

Chapter 5: The second leg of the admissibility analysis: Determining 'detriment to the administration of justice' in terms of section 35(5)

A Introduction	367
B Canada	373
1 Determining 'disrepute'; public opinion and the nature of the discretion.....	374
2 The seriousness of the Charter violation	379
2.1 Ascertaining the seriousness of the violation	380
2.2 The Good faith exception	392
3 The effect of exclusion	399
3.1 The seriousness of the charge	402
3.2 Importance of the evidence for the prosecution	408
C South Africa	417
1 Determining 'detriment'; public opinion and the nature of the discretion.....	419
2 The seriousness of the constitutional violation	432
2.1 Ascertaining the seriousness of the violation	433
2.2 The good faith exception	454
3 The effect of exclusion	464
3.1 The seriousness of the charge	467
3.2 The importance of the evidence for the prosecution	471
D Conclusion	478

A Introduction

Chapter five is divided into four parts. The first part consists of this introduction. The second part includes a discussion of Canadian section 24(2) jurisprudence in relation to the second and third groups of factors articulated in *R v Collins*,¹ namely the seriousness of the infringement and the effect of exclusion on the integrity of the justice system. The third part focuses on an analysis of this group of factors set out and to be assessed in terms of the *Collins* criteria, in the South African context. The fourth part consists of a conclusion.

A comparative analysis of section 24(2) of the Charter and section 35(5) of the South African Constitution is undertaken, more particularly in relation to the second and third group of *Collins* factors.² These factors are the seriousness of the violation,³ or the judicial condonation of unconstitutional conduct, on the one hand, and the effect of excluding or receiving the disputed evidence upon the repute of the administration of justice, on the other hand.⁴ The second group of *Collins* factors provides a ground for exclusion whenever a violation is adjudged to be of a serious nature. However, when the violation is categorised as a good faith violation, the evidence would not be susceptible to exclusion under this group of factors. It is argued, in respect of the second group of factors, that an objective test should be applied in order to determine whether police conduct could be classified as a good faith infringement. The negligent violation of

¹ (1987) 33 CCC (3d) 1, [1987] 1 SCR 265, 38 DLR (4th) 508, 1987 CarswellBC 94, 1987 CarswellBC 699 (SCC), (“*Collins*”).

² The majority opinion of the South African Supreme Court of Appeal has endorsed the *Collins* test (as amplified by reported cases thereafter) in *Pillay and Others v S* 2004 2 BCLR 158 (SCA), (“*Pillay*”).

³ Also referred to as the “second group of *Collins* factors”.

⁴ Also referred to as the “third group of *Collins* factors”.

constitutional rights has been condoned by South African courts,⁵ holding that it qualifies as a 'good faith' violation for the purposes of section 35(5). A subjective approach runs counter to the objectives that section 35(5) seeks to achieve. For this reason, it is suggested that such an approach should be discarded. One of the focal points of attention is how the seriousness of a violation should be determined. Should the nature of the evidence obtained after a violation, conscriptive or non-conscriptive, testimonial or real, be determinative of the classification of the infringement as either serious or trivial? In addition, what impact the *Stillman* analysis has on the good faith exception is explored.

Canadian precedent suggests that a violation of the right to legal representation should, based on a purposive interpretation of the right, in general, be regarded as a serious violation.⁶ The South African High Court has declined to categorise such a violation as serious.⁷ As a consequence, unwarranted police conduct was classified as good faith infringements in instances when the charges faced by the accused were of a serious nature and the disputed evidence (for the most part real evidence) was essential for a conviction.⁸ It is argued that such an approach defies a purposive interpretation of section 35(5) and should for that reason be

⁵ See for instance *S v Shongwe en Andere* 1998 2 SACR 321 (T), (hereinafter "*Shongwe*"); *S v Mkhize* 1999 2 SACR 632 (W), ("*Mkhize*").

⁶ See *R v Stillman* (1997) 113 CCC (3d) 321, 144 DLR (4th) 193, 5 CR (5th) 1, CarswellNB 108, ("*Stillman*"); *R v Feeney* (1997) 115 CCC (3d) 129, 7 CR (5th) 101, [1997] 2 SCR 13, ("*Feeney*").

⁷ See *Shongwe* (fn 5 above).

⁸ See, for example, *Shongwe* (ibid); see also the dissenting minority opinion of Scott JA in *Pillay* (fn 2 above). The right to privacy was violated in *Pillay* and real evidence discovered. The majority opinion held that the violation was serious, having regard to all the circumstances of the case, but the dissenting opinion categorised it as a *bona fide* violation. See also *Mkhize* (fn 5 above), where the admissibility of real evidence was in dispute, more particularly, see 637 of the judgment. See further the comments made by Van der Merwe in "Unconstitutionally Obtained Evidence" in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2 ed, 2002) at 243, with regard to the determination of good faith in *Mkhize*

rejected, because it primarily serves the values of an inclusionary rule and crime control, that unjustifiably weighs heavily in favour of the automatic reception of unconstitutionally obtained evidence.

The third group of *Collins* factors affirms the fact that the government has a vested interest in crime control. Interests considered under this group of factors are the seriousness of the charges formulated against the accused and the importance of the evidence to secure a conviction. In the event that the accused has been charged with a serious offence, the governmental concern in crime control dictates that evidence, essential for a successful prosecution should be admitted. In this regard, it is suggested that courts should consider these factors, having due regard to the presumption of innocence. Admission or exclusion should not be based upon a consideration of factual guilt, because the issue of admissibility should be separated from criminal liability. The regular disregard by South African courts of this fundamental rule of procedural fairness could inevitably impact negatively on the right to a fair trial, consequently offending the integrity of the criminal justice system.

In the light hereof, an important issue explored in this part of the work is whether the price paid by society as a result of the exclusion of reliable evidence that tends to prove the guilt of the accused in instances when the charges against him or her is of a serious nature and the violation was flagrant, could be justified. Furthermore, should the fact that the accused is factually guilty, as suggested by the minority judgment in the South African case of *Pillay*,⁹ be a determinative feature in the third group of *Collins* factors? A question related to this is should evidence, important for a successful prosecution, be regularly admitted when the accused is factually guilty? Put in a different manner: Should the minority judgment in *Pillay*, suggesting that admissibility should be closely

⁹ Fn 2 above at par 133.

connected to the criminal liability of the accused, have any room in the South African section 35(5) jurisprudence?¹⁰ Should factors that impact negatively on the presumption of innocence play a role in the admissibility assessment?

The Canadian Supreme Court has been reluctant to vigorously apply the third group of *Collins* factors, because such an approach would suggest that the ends of crime control justify the means of unconstitutional police conduct.¹¹ The high rate of serious crime in South Africa has resulted in public criticism of the criminal justice system.¹² This part of the work examines whether the high crime rate, in conjunction with public opinion, would tend to steer South African courts towards an approach that offers greater importance to the third group of *Collins* factors when determining admissibility.

Public opinion plays a role in determining whether exclusion or inclusion of the evidence would be detrimental to the administration of justice. To what extent should public opinion play a role when South African courts interpret section 35(5)? It is argued that by according inappropriate weight to 'current public mood' of society,¹³ the focus of attention of South African courts would unduly weigh in favour of the seriousness of the charges and the importance of the evidence to secure a conviction, to the detriment of the long-term goals of the Constitution.¹⁴ The disconcerting effect of such an approach is that factual guilt could potentially play a pivotal role in the admissibility assessment, thus leading courts to regularly admit unconstitutionally obtained real evidence even in cases where the infringements are serious. The disadvantage of such an approach would be that the police would be disinclined to respect the fundamental rights

¹⁰ Loc cit.

¹¹ Roach *Constitutional Remedies in Canada* (1994) at 10-83, par 10.1860.

¹² See chapter 1, fn 25.

¹³ See Van der Merwe (fn 8 above) at 234.

¹⁴ See Steytler *Constitutional Criminal Procedure* (1998) at 40.

of accused persons. Perhaps the weight to be attached to public opinion should be ascertained within a purposive context.

A purposive approach to the determination of the role of public opinion calls for an answer to the following question: What is the rationale of these groups of *Collins* factors? Can its function be traced to the avoidance of a stigma of partnership in unconstitutional police conduct or in the safeguarding of popular confidence in the criminal justice system? The answer to this question is inherently related to the primary role that public opinion should play in the section 24(2) and section 35(5) analyses. Put differently: It depends on what view the courts accept as their primary goal: either the notion that their role is primarily that of upholding constitutional values or the idea that the 'current public mood' of society should be regarded as a significant factor in the assessment. It is suggested that in the case of serious violations, South African courts should not be displeased to assert their unwillingness to be associated with such conduct.

South African presiding officers should frequently remind themselves that the Bill of Rights has been designed to protect the minority from the power of the majority and that section 35(5) should be interpreted in the same manner. South African courts should also be mindful of the fact that the regular admission of unconstitutionally obtained evidence, obtained after a serious infringement, would inevitably diminish the constitutional rights of the public at large, thus causing detriment to the administration of justice. This is the approach in Canada.¹⁵ The important issue that arises is: should South African courts consider the role of the 'current mood' of society in relation to the second and third groups of *Collins* factors in a like manner?¹⁶ This would depend on whether

¹⁵ See for example *Stillman* (fn 6 above); *Feeney* (fn 6 above).

¹⁶ See Steytler (fn 14 above) at 40.

the *Collins* test was adopted by the South Africa courts. If this is the case, it follows that – unless convincing reasons existst to deviate from the Canadian approach – the interpretation of these factors as applied by the Canadian Supreme Court, should be applied in a like manner by South African courts. The South African Supreme Court of Appeal adopted the *Collins*¹⁷ test in *Pillay*. It is submitted that such an approach denotes that the ‘current mood’ of society should not be over-emphasised when these groups of factors are considered.

In *Pillay*, the South African Supreme Court of Appeal emphasised the duty of the courts to protect the accused from unwarranted interference with her constitutionally entrenched rights, having due regard to the effect that the regular admission or exclusion of the disputed evidence would have on the repute of the criminal justice system.¹⁸ It is argued that this approach of the Supreme Court of Appeal enhances the approach proclaimed by the Constitutional Court in *S v Makwanyane*,¹⁹ and should be embraced in the interpretation of section 35(5): Courts, as the ultimate protectors of the constitutional rights of unpopular minorities, should not be seen as associating themselves with unlawful police conduct. The combined effect of the judgments in *Pillay* and *Makwanyane* is indicative of the fact that public opinion does play a role in the interpretation of section 35(5), but the final determination as to whether admission or exclusion would be detrimental to the administration of justice, falls to be decided be the courts. However, judges should constantly remind themselves when they apply section 35(5), especially when they regard an infringement as a serious violation, that their primary duty is to protect the repute of the criminal justice system. The classification of an infringement as

¹⁷ Fn 1 above.

¹⁸ *Pillay* (fn 2 above) at par 97.

¹⁹ 1995 2 SACR 1, 1995 6 BCLR 665, 1995 3 SA 391 (CC) at par 88, (“*Makwanyane*”).

serious should be at the heart of the issue as to whether exclusion or admission would be 'detrimental' to the administration of justice.

B Canada

This part of the work commences with a discussion of the concept 'disrepute': how should it be determined? Should a court consult public opinion polls to determine whether exclusion or admission of the disputed evidence would result in 'disrepute'? The next issue considered is the seriousness of the violation. How should this group of factors be considered and what is its impact on the admissibility assessment? The Canadian Supreme Court has proclaimed in *Collins* that section 24(2), unlike the exclusionary rule of the United States, has no place for the deterrence rationale. A question related to this line of reasoning is, if section 24(2) does not serve to punish unwarranted police conduct, should the good faith of the police nevertheless play a significant role in the assessment? If so, should an objective or subjective test be applied when this factor is considered? In other words, should negligent infringements of constitutional rights be condoned by courts? After the discussion of the seriousness of the infringement, this part of the work explores the effect of exclusion on the reputation of the criminal justice system. Under this group of factors the seriousness of the charges faced by the accused and the importance of the evidence for a successful prosecution are considered. An important issue considered in this regard, is whether the seriousness of the charges and the importance of the evidence for a successful prosecution unjustifiably encroaches upon the presumption of innocence. This leads to the significant question: Should a consideration of these factors be accommodated in the section 24(2)

assessment? The contributions made by several scholarly writers have enhanced the meaning and purpose of these groups of *Collins* factors.²⁰

1. Determining 'disrepute'; public opinion and the nature of the discretion

The concept 'disrepute' has flexible characteristics, especially when one considers it in conjunction with the purpose that the administration of justice serves to protect. For crime control protagonists the primary aim of the criminal justice system would be to include relevant, albeit unconstitutionally obtained evidence, because exclusion would be detrimental to the administration of justice.²¹ By

²⁰ See, for example, Stuart (1983) 37 *CR* (3d) 175, ("Stuart 1983"); Morissette (1984) 29 *McGill LJ* 522; Roach (1986) 44 *UT Fac L Rev* 209; Paciocco (1989) 32 *CLQ* 326, ("1989"); Gold (1990) *Supreme Court L R* 55; Bryant et al (1990) *Can Bar Rev* 1; Whyte & Lederman *Canadian Constitutional Law: Cases, Notes and Materials* (1992); Hogg *Constitutional Law of Canada* (3d ed, 1992); Mitchell (1993) 35 *CLQ* 35, ("Mitchell 1993"); Sopinka, Bryant & Lederman *The Law of Evidence in Canada* (1993), ("Sopinka et al"); Roach (fn 11 above); Godin (1995) 53 *UT Fac L Rev* 49; Young (1996) 29 *CLQ* 362, ("Young 1996"); Mitchell (1996) 38 *CLQ* 23; Fenton (1997) 39 *CLQ* 279; Young (1997) 39 *CLQ* 406; Wiseman (1997) 39 *CLQ* 435 Lamer (1998) 42 *St Louis ULJ* 345; Stuart (1998) 13 *CR* (5th) 197 (SCC), ("Stuart 1998"); Mitchell (1998) 30 *CLQ* 165; Mahoney (1999) 42 *CLQ* 443; Pringle (1999) 43 *CLQ* 86; Stuart (2000) 5 *Can Crim L Rev* 51; Paciocco (2001) 80 *Can Bar Rev* 433, ("Paciocco 2001"); Pottow (2001) 44 *CLQ* 34, ("Pottow 1"); Pottow (2001) 44 *CLQ* 223; Davies (2002) 46 *CLQ* 21; Stuart (2003) 10 *CR-ART* (6th) 112, ("Stuart 2003"); Stuart (2007) 49 *CR* (6th) 282, ("Stuart 2007"); Choo & Nash (2007) *E & P* 11 (2) 75 (publication page numbers not available).

²¹ See Paciocco 1989 (fn 20 above) at 364-365. He makes the following comments: "The acceptance of this philosophy [the interpretation of disrepute] by a majority of the Supreme Court of Canada is unquestionable, and it has provided the court with all the incentive it needed to push a compromise provision like s. 24(2) what is really a long way down the continuum towards the American exclusionary rule, this, despite that the language and the apparent underlying philosophy of the provision would suggest that our jurisprudence should be taking us towards the other end of the spectrum"; see also Paciocco 2001 (fn 20 above) at 435 where he

contrast, those in favour of the protection of due process interests would argue that the inclusion of unconstitutionally obtained evidence would be detrimental to the administration of justice, because the courts, as protectors of the Constitution, should not allow the government and its agents to prove its case against the accused by means of evidence obtained in violation of the Charter.²² Canadian courts have extensively dealt with the concept of 'disrepute'.²³ Before

argues in respect of the admissibility of evidence as follows: "Still it is my view that society should choose to sacrifice the truth by excluding information relevant to guilt only reluctantly, and even then, to no greater degree than is absolutely necessary"; Mahoney (fn 20 above) at 473, suggests that Charter violations should not intervene in cases of factual guilt. He makes the point as follows: "Criminals must be detected and punished. If this result was about to occur in a particular case, the mere fact of a Charter breach should not be treated as a sufficient reason to interfere with that inevitability".

²² See, for example, Davies (fn 20 above) at 39, who argues that Canadian courts should adopt a prima facie exclusionary approach, thus showing that they do take the protection of fundamental rights seriously. He argues as follows: "The *prima facie* exclusionary approach is merely a way of stating that **generally** to admit unconstitutionally obtained evidence would cause disrepute and that **generally** such evidence should be excluded. It's an approach entirely consistent with the rights-centred vision of the Charter" (emphasis in original); Pottow (fn 20 above); Pringle (fn 20 above); Fenton (fn 20 above) at 310 he makes the following point: "... exclusion must be mandated in all instances where the evidence is obtained as a result of a concriptive breach or a serious breach of the Charter and the evidence **would** not otherwise have been discovered" (emphasis in original); Young (fn 20 above); Wiseman (fn 20 above); Choo & Nash (fn 20 above), writing on exclusion within the context of the PACE, in comparison with section 24(2); Morissette (fn 20 above); Roach (fn 11 above); Stuart (fn 20 above).

²³ See for example the following Supreme Court cases: *R v Dymont* (1982) 12 CCC (3d) 532, ("Dymont"); *R v Therens* (1985) 18 CCC (3d) 481, [1985] 1 SCR 613, ("Therens"); *Collins* (fn 1 above); *R v Trask* (1984) 6 CCC (3d) 132, ("Trask"); *R v Turcotte* (1987) 39 CCC (3d) 193, ("Turcotte"); *R v Strachan* (1988) 46 CCC (3d) 479, ("Strachan"); *R v Wise* (1992) 70 CCC (3d) 193, ("Wise"); *R v Rahn* (1985) 18 CCC (3d) 514, ("Rahr"); *R v Clarkson* (1984) 9 CCC (3d) 263, ("Clarkson"); *R v Simmons* (1984) 11 CCC (3d) 193, ("Simmons"); *R v Manninen* (1984) 8 CCC (3d) 193, ("Manniner"); *R v Hamill* (1985) CCC (3d) 338, ("Hamill"); *R v Tremblay* (1985) 17 CCC (3d) 359, ("Tremblay"); *R v Sieben* (1987) 32 CCC (3d) 574, ("Sieber"); *R v Pohoretsky* (1987) 33 CCC (3d) 398, ("Pohoretsky"); *R v Genest* (1989) 45 CCC (3d) 385, ("Genest"); *R v*

the relevant factors under this group of *Collins* factors are discussed, it is appropriate to consider the role of public opinion in Canada when an assessment in terms of section 24(2) is undertaken.

The role of public opinion is especially important when the courts consider the effect of excluding the disputed evidence on the repute of the justice system. Section 24(2) enjoins Canadian courts to exclude evidence if its admission would

Debot (1989) 52 CCC (3d) 193, (“*Debot*”); *R v Duarte* ((1990) 53 CCC (3d) 1, (“*Duarte*”); *R v Brydges* (1990) 53 CCC (3d) 330, (“*Brydges*”); *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* (1990) 54 CCC (3d) 417, (“*Thomson Newspapers*”); *R v Wong* (1990) 60 CCC (3d) 460, (“*Wong*”); *R v Kokesch* (1990) 61 CCC (3d) 207, (“*Kokesch*”); *R v Hebert* (1990) 57 CCC (3d) 97, (“*Hebert*”); *R v Greffe* (1990) 1 SCR 755, (“*Greffe*”); *R v Smith* (1991) 63 CCC (3d) 313, (“*Smith*”); *R v Elshaw* (1991) 67 CCC (3d) 97, (“*Elshaw*”); *R v Broyles* (1991) 68 CCC (3d) 308, (“*Broyles*”); *R v Harper* (1994) 92 CCC (3d) 423, (“*Harper*”); *R v Mellenthin* (1993) 76 CCC (3d) 481, (“*Mellenthin*”); *R v Dersch* (1994) 85 CCC (3d) 1, (“*Dersch*”); *R v Pozniak* (1995) 92 CCC (3d) 473, (“*Pozniak*”); *R v Cobham* (1995) 92 CCC (3d) 333, (“*Cobham*”); *R v Wijesinha* (1995) 100 CCC (3d) 410, (“*Wijesinha*”); *R v Burlingham* (1995) 97 CCC (3d) 385, (“*Burlingham*”); *R v Evans* (1996) 104 CCC (3d) 23, (“*Evans*”); *R v Goldhart* (1996) DLR (4th) 502, (“*Goldhart*”); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *R v Law* (2002) 1 SCR 227, (“*Law*”); *R v Buhay* (2003) 174 CCC (3d) 97, (“*Buhay*”); *R v Mann* (2004) CarswellMan 303, (“*Mann*”); *R v Orbanski*; *R v Elias* (2005) 2 SCR 3, (“*Orbanski*”). The following are examples of courts, other than the Supreme Court, that dealt with these issues: *R v Charley* (1993) 16 CRR (2d) 338, (“*Charley*”); *R v Meddoui* (1992) 5 CRR (2d) 294 (Alta CA), (“*Meddoui*”); *R v Ferguson* (1991) CRR (2d) 227, (“*Ferguson*”); *R v Traverse* (2003) CarswellNfld 119, (“*Traverse*”); *R v Pippin* (1994) 20 CRR (2d) 62, (“*Pippin*”); *R v Mooring* (2003) 174 CCC (3d) 54, (“*Mooring*”); *R v Neilson* (1985) 36 CRR (2d) D-3, (“*Neilson*”); *R v Hosie* (1996) 107 CCC (3d) 385, (“*Hosie*”); *R v Baltrusaitis* (1996) 37 CRR (2d) D-5, (“*Baltrusaitis*”); *R v Belnavis* (1996) 36 CRR (2d) 32, (“*Belnavis*”); *R v Gordon* (1996) 36 CRR (2d) D-8, (“*Gordon*”); *R v Legere* (1988) 43 CCC (3d) 504, (“*Leger*”); *R v Buendia-Alas* (2004) 118 CRR (2d) 32, (“*Buendia-Alas*”); *R v Vu* (2004) 118 CRR (2d) 315, (“*Vu*”); *R v Manickavasagar* (2004) 119 CRR (2d) 1, (“*Manickavasagar*”); *R v Grant* (2006) 38 CR (6th) 58, CarswellOnt 3352, (“*Grant*”); *R v B (L)* (2007) 49 CR (6th) 245 (Ont CA), (“*B (L)*”); *R v Harris* (2007) 49 CR (6th) 276 (Ont CA), (“*Harris*”); *R v Williams* (2008) 52 CR (6th) 210 (Ont SC), (“*Williams*”).

cause 'disrepute to the administration of justice'.²⁴ Paciocco is of the opinion that 'disrepute' can only be determined by reference to the views of society at large.²⁵ The concept therefore suggests that the courts should attach some value to the opinion of society when the section 24(2) assessment is made,²⁶ only if the community's current mood is reasonable.²⁷ However, the Canadian Supreme Court has emphasised that, when interpreting section 24(2), the concept of 'disrepute' should not be equated with public opinion.²⁸ The reason for this approach becomes clear when one considers that the protection of constitutional

²⁴ This phrase is contained in section 24(2) of the Charter.

²⁵ Fn 20 above (Paciocco 1989) at 342; Morissette (fn 20 above) at 538 suggested that the following question should be asked to determine this issue: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case"? This suggestion was followed by Lamer J in *Collins* (fn 1 above).

²⁶ *Ibid* at 523, where Lamer J, in *Collins*, mentioned that "... the concept of disrepute necessarily involves some elements of community views ...", but that the admissibility of evidence under section 24(2) should be determined by a reasonable person who is an "average person in the community, but only when that community's current mood is reasonable". Furthermore, the decision as to whether evidence should be excluded or received, must be informed by the "long-term consequences of regular admission of this type of evidence on the repute of the administration of justice". However, before a ruling in terms of section 24(2) is made, presiding officers must constantly remind themselves that the Charter "was designed to protect the accused from the majority". Compare Paciocco 1989 (fn 20 above) at 342, contending that public opinion should play a significant role in the section 24(2) assessment, when he reasons as follows: "One cannot speak intelligently about disrepute without discussing through whose eyes the relevant reputation is to be judged. I have assumed ... that the relevant reputation is that which exists in the eyes of those to whom the legal system applies. ... the Supreme Court of Canada has accepted in substance that the repute of the administration of justice is to be judged through the eyes of the reasonable judge rather than in response to what the public might be thinking".

²⁷ *Loc cit*.

²⁸ *Loc cit*.

rights should not be left for protection by the majority.²⁹ Canadian courts and scholars alike have commended this approach³⁰ as the most appropriate standard to determine whether admission or exclusion of the disputed evidence would cause 'disrepute' to the administration of justice.

In summary: Public opinion polls are not considered when Canadian courts apply section 24(2), because the Charter serves the purpose of protecting the minority from the power of the majority. However, courts do attach some value to the current mood of society, provided it is reasonable.

The seriousness of the constitutional infringement under section 24(2) of the Charter is discussed next.

²⁹ *Collins* (fn 1 above) at par 32. Lamer J reasoned as follows: "The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion"; *Paciocco* 1989 (fn 20) at 344; see also Lamer (fn 20 above) at 354-355, where the Canadian Chief Justice explained as follows: "It is a trite observation that the repute of the administration of justice cannot be determined by simple reference to the barometer of current public opinion. One would expect public opinion regularly, if not always, to weigh in favour of admitting the evidence. There is a sense in which that opinion embodies the tyranny of the majority, a kind of tyranny against which Charter rights were designed to protect".

³⁰ Roach (fn 11 above); Roach (fn 20 above); Gold (fn 20 above); Bryant et al (fn 20 above); Whyte & Lederman (fn 20 above); Sopinka et al (fn 20 above); Godin (fn 20 above); Young (fn 20 above); Mitchell (fn 20 above); Stuart 2000 (fn 20 above).

2. The seriousness of the violation: exclusion to prevent judicial condonation of unconstitutional conduct

Under this group of *Collins* factors the courts must assess whether admission of the disputed evidence, obtained after a serious violation, would be tantamount to judicial condonation of unconstitutional conduct. Of paramount importance in this determination is the manner in which the right has been infringed. In this part of the work the following question is answered: How should the seriousness of the violation be determined? In terms of the *Stillman* fair trial framework, the nature of the evidence considered under the second and third groups of factors would, in general, be 'non-conscriptive, not discoverable' or derivative real evidence.³¹ An important issue that arises in this regard is whether the nature of the evidence is determinative of the classification of the infringement as a serious violation. In other words, do the Canadian courts apply the same criteria to determine the seriousness of the breach, regardless of the nature of the evidence? The Canadian courts determine the seriousness of the violation by scrutinising police conduct in the entire evidence gathering process. Added to this, the seriousness of the violation is determined by a consideration of the following factors: Whether the violation was committed in good faith, inadvertently, negligently, deliberately, or on the grounds of urgency. A discoverability analysis forms an essential part of this assessment.

³¹ However, see the unusual approach in *Grant* (fn 23 above) at paras 52-64, where it was held that the conscriptive evidence had a less invasive impact on trial fairness. For this reason it was not excluded on this ground. Based on this finding, its admissibility was considered under the second and third groups of *Collins* factors. An appeal was launched, which was argued in the Supreme Court on 23 April 2008. Judgment will be delivered in due course. Stuart of the Faculty of Law, Queen's University, Canada, acted on behalf of the intervenor in the appeal and has provided the writer with a copy of his Heads of Argument, ("Stuart's Heads of Argument"). The Heads of Argument is attached and marked Annexure D.

This part of the work is limited to the assessment of the seriousness of the violation and the good faith exception in Canada. The same method is followed when the seriousness of the infringement is discussed in the South African context. This method is followed because the other factors that may diminish the seriousness of the violation tend to have common characteristics with the 'good faith exception'.³²

2.1 Ascertaining the seriousness of the violation in Canada

It was pointed out in *Collins* that the attention of the court is directed, under this group of factors, not towards the nature of the right violated, but towards the seriousness of the constitutional violation.³³ This determination calls for an assessment of all the surrounding circumstances leading to the constitutional violation. The seriousness of the violation must be assessed by considering whether it was committed in 'good faith', or inadvertently or whether it was of a 'technical nature, deliberate, wilful or flagrant'.³⁴ The factors listed by Mitchell³⁵

³² For a discussion of these other factors, see Roach (fn 11 above) at 10-69-82.

³³ *Collins* (fn 1 above) at 527.

³⁴ Loc cit.

³⁵ Fn 20 above at 178-179. He mentions the following factors, adding that the list should not be regarded as exhaustive: "1. Did the police act in good faith? 2. Did the police act on reasonable and probable grounds? 3. Were the police acting on the authority of a law that had not been declared unconstitutional? 4. Did the police act contrary to the Criminal Code? 5. Was the violation inadvertent? 6. Could the violation be characterised as deliberate, overt, blatant, wilful or flagrant? 7. Was the violation serious or trivial? 8. Was the violation only technical? 9. Did the violation involve interference with the sanctity of a person's body? A violation of a person's body is much more serious than a violation of his office or even his home. A violation of a home is more serious than an office. 10. Did the police take advantage of a person's condition to obtain evidence they had no right to acquire without his consent? 11. Was the violation motivated by urgency or necessity to prevent the loss or destruction of evidence? 12. Were other investigatory techniques available to the police? 13. Could the evidence have been obtained without a violation

are indicative of the various features of police conduct a court may consider to determine the nature of the violation.

Hogg³⁶ is of the opinion that the rationale for exclusion under this group of factors is the fact that the courts do not want to condone unconstitutional conduct characterised as a serious violation, because by admitting evidence obtained in this manner they would be associating themselves with the unconstitutional conduct perpetrated by the police. Such association would by its very nature, impact negatively on the repute of the criminal justice system. By excluding the disputed evidence obtained in the shadow of a serious Charter violation, the court demonstrates that it distances itself from the unconstitutional conduct. The judicial integrity rationale evidently comes to prominence when courts exclude evidence on this ground.

In *R v Greffe*³⁷ the nature of the evidence in dispute was real evidence. The accused was charged with the crime of importing and the possession of heroin. Customs officers suspected that he was in possession of drugs and searched the accused without informing him about his right to legal representation. After the search, he was turned over to the drug squad, who requested a medical doctor to perform a rectal search on the accused. As a result of the latter search, heroin was discovered on the person of the accused. Lamer J, writing the majority opinion, held that the police had no reasonable and probable grounds to arrest the accused. This violation was aggravated by the nature of the subsequent searches, which progressed from the search of his bags and the frisking of his

of the Charter? 14. What type of person did the police believe they were dealing with? 15. Did the police act in an unreasonable manner? 16. Did the accused actively provoke the police into acting too hastily? 17. Were the duties of the police respecting the right to counsel suspended because the detainee failed to act with reasonable diligence in the exercise of his rights?"

³⁶ Fn 20 above at 411.

³⁷ Fn 23 above.

outer clothing, to a strip search and ultimately a rectal search. In addition to those violations, the accused was led to believe that the rectal search was necessary after he was formally arrested for traffic offences.³⁸

Lamer J reasoned as follows, and in this manner emphasised the seriousness of the violation:³⁹

Indeed, it is the intrusive nature of the rectal search and considerations of human dignity and bodily integrity that demands the high standard of justification before such a search will be reasonable. To paraphrase somewhat my statement in *Collins, supra*, at pp 22-3, we cannot accept that police officers subject persons to rectal examinations incident to arrests for traffic warrants when they do not have reasonable grounds to believe that those people are actually in possession of drugs. It is imperative that the court, having regard to the long-term consequences of admitting evidence obtained in these circumstances, dissociate itself from the conduct of the police in this case, which, always on the assumption that they merely had suspicions, was a flagrant and serious violation of the rights of the appellant. Indeed, in this case the absence of proof of reasonable and probable grounds, or even of 'objective articulate facts' to support the officers' suspicions, makes the unreasonable search a more serious Charter violation; see *Simmons, supra* at pp 325-6 and *Jacoy, supra*, at pp 54-5.

³⁸ Ibid at 191.

³⁹ Loc cit. In *Collins*, Lamer J was of the opinion that the violation was serious and that he would exclude the heroin on the said grounds, because the court could "not accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs".

It is submitted that the police conduct could not be characterised as a good faith infringement, because the search was not motivated by urgency, necessity or with the aim to prevent the destruction of evidence. Moreover, the bad faith of the police officers becomes evident when one considers that they suggested to the accused that the rectal search should be performed under the pretence that he was arrested for traffic offences. What is more, the violation involved an interference with the sanctity of the human body, made possible because the police took advantage of the accused's vulnerability (an unlawful arrest and detention) in order to perform the rectal search. No doubt, the rectal search constituted an affront to human dignity. The court also emphasised the fact that more than one Charter right had been violated and the breaches were not isolated errors of judgment.⁴⁰ Taken together, these factors added to the seriousness of the violation. The judgment in *Greffe* suggests that where there is a pattern of disregard for Charter rights, it only adds to the seriousness of the infringement.⁴¹

⁴⁰ Loc cit.

⁴¹ See also *Feeney* (fn 6 above) at par 80, where Sopinka J summarised the seriousness of the violation as follows: "... the violations in the instant case that were associated with the gathering of the shirt, shoes, cigarettes and money were serious. The police **flagrantly disregarded** the appellant's privacy rights and moreover showed little regard for his s. 10(b) rights. Indeed, while such misconduct was not directly responsible for the gathering of the shirt, shoes, cigarettes and money, the fact that the appellant did not speak with a lawyer for two days following his detention, yet the police did not cease in their efforts to gather evidence from him, indicates the lack of respect for appellant's rights displayed by the police. In light of this pattern of disregard for the rights of the appellant, in my view the obtention of the shirt, shoes, cigarettes and money was associated with very serious *Charter* violations". (Emphasis added). See further *Stillman* (fn 6 above) at par 124, where Cory J articulated his concern about the seriousness of the violation as follows: "Reprehensible as these actions were in themselves [the taking of the bodily samples and statement of the accused against his will before his attorney was present, and the fact that the police waited until the lawyer of the accused had left, thereafter proceeding to use force, threats and coercion to take bodily samples and to interrogate the accused; the police further pulled the scalp hair of the accused and made him provide his pubic hair and forced a plasticine

*Kokesch*⁴² demonstrates that when the police cannot obtain evidence against the accused in a constitutional manner, the procurement of the evidence as a result of a violation would be regarded as a serious breach.⁴³ In other words, a discoverability analysis is undertaken to determine whether the Charter violation could be categorised as serious. This view was confirmed by the majority judgment in *Stillman*.⁴⁴ In *Buhay*,⁴⁵ the evidence in dispute was real evidence. In this case, two accused rented a locker situated at a bus depot. They acted suspiciously and a security guard noticed the smell of marijuana when one of them opened the locker and removed a bag. The accused thereafter left the bag in the locker and both walked out of the bus depot. The security guards went to the locker and one of them sniffed through the vent of the locker door and detected the distinctive smell of marijuana. An operator of the lockers was contacted, who opened it with a master key. In the locker a quantity of marijuana was found, rolled up in the middle of a sleeping bag. The items were left in the locker and the police were contacted. The officers smelled the marijuana through the vent and the operator thereupon opened the locker for them. The marijuana was seized without a warrant for its search and seizure. The officers placed a note in the locker with the pager number of an undercover drug squad member.

mould into his mouth] they become intolerable when the police were aware that the appellant was a young offender at the time, and that he was entitled to special protection provided by the Young Offenders Act. ... All this was flagrantly disregarded”.

⁴² Fn 6 above.

⁴³ Compare the dissenting judgment of Dickson CJC in *Kokesch*, who reasoned that because other investigating techniques would have been fruitless, the breach should not be deemed a serious violation.

⁴⁴ Fn 6 above at par 125.

⁴⁵ Fn 23 above.

The next day the accused went to the locker, read the note and left. He was arrested soon thereafter. What is of paramount importance is the fact that one of the officers who was summoned by the security guards to inspect the locker, testified that he never thought about obtaining a warrant. His partner, in turn, testified that he never thought that the accused had an expectation of privacy in the locker and also conceded that he did not have sufficient grounds to obtain a warrant.

The Supreme Court held that the search and seizure without warrant constituted a violation of section 8 of the Charter.⁴⁶ Considering the seriousness of the violation, Arbour J held that the violation was serious and the officers could not successfully rely on the good faith exception, for the following reasons: Firstly, there was no situation of urgency, calling for immediate police action, because the evidence before court did not intimate that the dagga would be removed or destroyed. Furthermore, the dagga did not pose an immediate threat to public safety. Secondly, the testimony of one of the officers to the effect that he thought that he lacked sufficient grounds to obtain a warrant is suggestive of a blatant disregard of the Charter rights of the accused. Thirdly, the evidence could have been obtained in a lawful manner, while the officers failed to consider other investigatory techniques to obtain the evidence.⁴⁷ The court considered in favour of the prosecution, that the officers had reasonable and probable grounds to believe that a warrant could have been issued, because the information they received was obtained from the security guards, who are deemed reliable

⁴⁶ Ibid at par 38.

⁴⁷ Ibid at paras 60-63. The court relied heavily, in this regard, on the reasoning in *Dyment* (fn 23 above), where there was no indication in the evidence before court that the rights of the accused had been **deliberately** violated. However, at 440 it was held that the fact that other investigatory techniques were available and there was no urgency to obtain the evidence, the evidence was excluded because "such lax police procedures cannot be condoned". This is a discoverability analysis.

informants. Despite the fact that this consideration had been held on several occasions by the Supreme Court to diminish the seriousness of the violation,⁴⁸ the court after having regard to all the circumstances, classified the violation as serious.⁴⁹

The *Buhay* judgment serves as a convenient summary of the factors a court should consider when assessing the seriousness of the infringement. By this means, it upholds the importance of the function of the courts as protectors of fundamental rights. At the same time it acknowledges the fact that failure to do so would be synonymous with judicial disregard of unconstitutional conduct. It is further in conformity with sound constitutional policy, because it promotes the important principle that the government or its agents should not unduly interfere with the fundamental rights of citizens, unless a cogent reason for such interference can be demonstrated.⁵⁰ Before police conduct may be justified as

⁴⁸ The court referred to the following judgments: *Belnavis* (fn 23 above) at par 42; *Jacoy* (1988) 45 CCC (3d) 46 at 560, (“*Jacoy*”); *Duarte* (fn 23 above). See further *Silveira* (fn 23 above); see also *Traverse* (fn 23 above) at pars 21-22; *R v Krall* (2003) CarswellAlta 1336 at par 85, (“*Krall*”), where Allen Prov J held as follows: “The violation was serious and not merely of a technical nature. The police did not have reasonable grounds to believe that the applicant was in possession of marijuana. Had such grounds existed this would have gone a long way to mitigate their failure to obtain the appropriate warrant”. In *Buhay* (fn 23 above) at par 65, it was held that the existence of reasonable and probable grounds would, in general, render a violation less serious.

⁴⁹ Fn 23 above at par 66.

⁵⁰ See the comments by Sopinka J in *Kokesch* (fn 23 above) at 231, where he confirmed this view as follows: “Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally”; see also *R v Symbalisty* (2004) 119 CRR (2d) 311, where routine warrantless police searches of a pawn shop was held to violate section 8 of the Charter. Real evidence was in dispute. The violation was deemed serious, because the police conduct was tantamount to a **careless disregard** of fundamental rights. In *Pohoretsky* (fn 23 above), the accused was involved in a single-vehicle collision and taken to hospital. A police

inadvertent or as good faith infringements, their conduct should be objectively considered,⁵¹ taking into account whether alternative investigative procedures were available to them that would not have resulted in the infringement of fundamental rights. Failure by the police to consider alternatives available to them, so as to avoid a Charter breach, only serves as confirmation of a lack 'of a sincere effort to comply with the Charter'.⁵²

In *Hosie*,⁵³ the home of the accused was searched with an invalid warrant and the circumstances indicated that there was no urgency or the need for police intervention in order to prevent the loss of evidence. The Ontario Court of Appeal held that the warrant was invalid, because the police officer when applying for it, failed to disclose important facts to the issuing magistrate. The failure was

officer requested a doctor to obtain a blood sample of the accused while he was in an incoherent and delirious state. At 401, Lamer J analysed the seriousness of the violation as follows: "I consider this unreasonable search to be a very serious one. First, a violation of the sanctity of a person's body is much more serious than that of his office or even of his home. Secondly, it was **wilful and deliberate**, and there is no suggestion here that the police acted in good faith ...". (Emphasis added). Compare *Feeney* (fn 6), where the disputed evidence was real evidence in the form of a discarded tissue containing a mucous sample. This violation was classified as "not serious", because it did "not interfere with appellant's bodily integrity, nor cause him any loss of dignity", and the police **would have obtained it in any event** by sealing the "garbage container and obtained a search warrant". (Emphasis added).

⁵¹ The court in *Buhay* applied an objective test. This is evidenced by the fact that regardless of the testimony of the police officer that they subjectively thought that they did not have reasonable and probable cause, the court held, taking into account all the circumstances, that they in fact had reasonable and probable cause.

⁵² Per Arbour J in *Buhay* (fn 23 above) at par 63; see also *Wijesinha* (fn 23 above), where the fact that the police obtained legal advice from prosecuting counsel throughout the investigation, was considered as factors confirming the presence of good faith.

⁵³ Fn 23 above.

construed as having a misleading effect on the magistrate who authorised the warrant. Rosenberg JA held that:⁵⁴

[t]he obtaining of a search warrant in this fashion strikes at the core of the administration of justice.

Rosenberg JA excluded the evidence because the violation was regarded as serious, and in his considered opinion, the long-term consequences of the consistent admission of evidence obtained under those circumstances, would have a negative impact on the administration of justice.

It is evident when one considers the case law mentioned above, that the mental state and objective reasonableness of the police conduct in relation to the Charter breach, is at the heart of the assessment of this group of factors.⁵⁵ This assessment must be undertaken by scrutinising the police conduct in the entire evidence-gathering process.⁵⁶ However, Lamer J hastened to add⁵⁷ that the purpose of exclusion should not be aimed at disciplining the police,⁵⁸ but to

⁵⁴ Ibid at 110.

⁵⁵ See the cases cited at fn 48 above.

⁵⁶ Roach (fn 11 above) at 10-68, based on the approach of Dickson CJC in *Strachan*, is of the opinion that the courts, when assessing this group of factors, do not only narrowly focus on the actual police conduct in obtaining the evidence, (as in the USA), but they consider police conduct during the entire investigation process. He bases the distinguishing factors on the approach of the Supreme Court of the United States in *US v Sugeira* (1984) 468 US 796, ("*Sugeira*"). In this case, the illegal entry into the apartment of the accused was ignored, because the evidence was thereafter seized in terms of a legal warrant; see also *Oregon v Elstad* (1984) 470 US 298, ("*Elstad*"), where *Miranda* warnings were violated, but because the statement had been given voluntarily, it was admitted.

⁵⁷ *Collins* (fn 1 above) at par 31.

⁵⁸ It is submitted that in so doing, he highlighted the rationale of section 24(2), thus distinguishing it from the exclusionary rule applicable in the USA. Compare the dissenting judgment of Wells CJN in an appeal heard by the Newfoundland and Labrador Court of Appeal in

protect the integrity of the criminal justice system.⁵⁹ Therefore, by admitting the evidence thus obtained, courts should consider whether society at large would regard reception of the disputed evidence as judicial condonation of unconstitutional police conduct.⁶⁰

In *Feeney*⁶¹ and *Stillman*,⁶² the Supreme Court held that violations that impact negatively on trial fairness should by their nature be deemed as serious.⁶³ In this way these judgments suggest that admission of the disputed evidence would, by the same token, have a negative effect on the repute of the justice system.⁶⁴ *Stillman* further confirms the fact that Canadian courts regard infringements that significantly interfere with a person's body or bodily integrity as serious

Traverse (fn 23 above) at par 62, where the judge reasoned as follows: "If, as Lamer J decided in *Collins*, exclusion of evidence under section 24(2) of the Charter 'is not a remedy for police misconduct', then surely it should not be a remedy for police negligence or carelessness. If a remedy is required, it could be given by way of reduction of sentence".

⁵⁹ The rationale for exclusion in the USA is to discipline the police. See *Elkins v US* (1960) 364 US 206 at 217; see also *Miranda v Arizona* (1966) 384 US 436. Compare *Grant* (fn 23 above).

⁶⁰ See, for instance *Dyment* (fn 23 above) at 537-538; also *Pohoretsky* (fn 23 above) at 401-402.

⁶¹ Fn 6 above.

⁶² Fn 6 above.

⁶³ *Feeney* (fn 6 above) at par 170; *Kokesch* (fn 23 above); see also *Hebert* (fn 23 above). However, compare *Grant* (fn 23 above) at par 52, where Laskin JA defied the reasoning in the mentioned cases of the Supreme Court when he wrote for a unanimous Ontario Court of Appeal as follows: "... even though the admission of conscriptive evidence compromises trial fairness, its admission will not always bring the administration of justice into disrepute". The court further reasoned that the admissibility of conscriptive evidence depends on the degree of trial unfairness.

⁶⁴ See also *Hebert* (fn 23 above) at 20, where Sopinka J made the following comments: "For myself, I fail to see how the good faith or otherwise of the investigating officer can cure, so to speak, an unfair trial. This court's cases on section 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation)". Compare *Grant* loc cit.

violations.⁶⁵ *Stillman* and *Feeney* also suggest that when conscriptive evidence has been obtained after a violation, such infringement should be regarded as serious, based on the classification of the evidence.

An important issue that needs to be addressed here is whether the nature of the evidence in dispute has a decisive bearing on the assessment of the seriousness of the breach. Stuart⁶⁶ and Roach⁶⁷ are of the opinion that the nature of the evidence is determinative of whether the infringement should be regarded as serious. A review of the Canadian case law confirms the accuracy of their remarks. In *Mellenthin*, for example, the Supreme Court labelled a violation that produced conscriptive evidence as a serious breach, despite the fact that the court did not hold that the police acted in bad faith.⁶⁸ However, in *Grefe*, *Stillman*, *Feeney* and *Buhay*, where the disputed evidence was derivative real

⁶⁵ Fn 6 above at par 124; *Pohoretsky* (fn 23 above) at 401; *Grefe* (fn 23 above) at 191.

⁶⁶ *Charter Justice in Canadian Criminal Law* (1991) at 406, where he points out that real evidence "will only be excluded if the court is prepared to brand the police conduct in terms such as 'deliberate', 'flagrant' or 'blatant'."

⁶⁷ Fn 11 above at 10-78, where he expresses his concern in this regard as follows: "The conclusion that a particular Charter violation is wilful, deliberate or flagrant may appear to be result-oriented, because the court has applied different standards in different contexts. In cases where a Charter violation leads to incriminating evidence that will affect the fairness of the trial, the Supreme Court of Canada has been willing to characterize the Charter violations as deliberate, flagrant, and serious without any evidence that suggests the police acted in bad faith. Where Charter violations result in the discovery of real evidence ... they will generally only be classified as serious if there is some sign of abuse or disregard for other rights".

⁶⁸ See also *Herbert* (fn 23 above), where the infringement to the right to remain silent led to the discovery of conscriptive evidence, the infringement was classified as "wilful and deliberate"; *Therens* (fn 23 above), where a failure to inform the accused of the right to legal representation, and the evidence was conscriptive, the infringement was categorised as "flagrant", despite the fact that the court made no finding as to bad faith on the part of the police. Compare *Wise* (fn 23 above), where the evidence was real evidence and the police conduct was described as "careless". The evidence was admitted.

evidence, the infringements were regarded as serious only after the courts had classified the violations as either 'blatant', 'wilful' or 'flagrant'.⁶⁹ As a consequence, when non-conscriptive evidence is in dispute and the infringement is not categorised as 'flagrant', 'blatant' or 'wilful', the violation would, in general, not be deemed a serious infringement.⁷⁰

Factors that 'blunt' the seriousness of the infringement are the absence of evidence showing 'systemic or institutional failure or inadequate training'.⁷¹ Likewise, substantial compliance with the provisions of the Charter makes a violation less serious.⁷²

The seriousness of the violation must be weighed against the impact that exclusion of the disputed evidence would have on the repute of the administration of justice.⁷³ The third group of factors is discussed after the good faith exception.

⁶⁹ In *Feeney* (fn 6 above) at par 80, the violation of the right to privacy and legal representation (resulting in the discovery of the shoes, shirt, cigarettes and money) was typified as "flagrant" and a "pattern of disregard" and was accordingly considered a serious infringement. In *Stillman* the infringements that led to the discovery of real evidence was likewise characterised as "flagrant". In *Greffe*, the police conduct was classified as a "pattern of disregard"; see also *Buhay* (fn 23 above); *Mann* (fn 23 above) at par 57; *Williams* (fn 23 above) at par 26.

⁷⁰ See the dissenting judgment of Deschamps J in *Mann* (fn 23 above) at par 80; see also *Harris* (fn 23 above) at paras 59-61. Compare *Grant* (fn 23 above) at paras 60-63, where **conscriptive** evidence was adjudged not to have been obtained "deliberately", "flagrantly" or "wilfully" in defiance of Charter rights. The violation was accordingly categorised as non-serious, despite the court's finding, at par 60, that the right contained in "s 9 is an important Charter guarantee".

⁷¹ *Grant* (fn 23 above) at par 63.

⁷² *Strachan* (fn 23 above); *Grant* (fn 23 above) at par 62, suggesting that where the law on a particular issue is not unambiguous and the officers, in the execution of their duties, follow a procedure that impinges on a Charter right, such an infringement should not be regarded as a serious violation; compare *Kokesch* (fn 23 above) at 231.

⁷³ *Collins* (fn 1 above); see also Roach (fn 11 above) at 10-13.

Whether a violation should be classified as serious would depend on the absence or presence of good faith on the part of the police. It is therefore apposite to consider factors that could convince a court that a violation should not be classified as serious, but in good faith, and therefore non-serious.

2.2 The good faith exception in Canada

The Canadian courts have given frequent attention to the 'good faith' exception under this group of factors.⁷⁴ The conduct of the police must be objectively reasonable before it can be understood to qualify as 'good faith' for purposes of section 24(2).⁷⁵ Thus, in *Kokesch*,⁷⁶ Sopinka J wrote for the majority and reasoned that despite the honest belief of the police officers that they could proceed to search without a search warrant, one of two scenarios materialised, either they 'knew they were trespassing, or they ought to have known'.⁷⁷ In other words, the police acted either deliberately or negligently. The judge concluded that whatever their motive might have been, they could not be

⁷⁴ See the cases cited at fn 23 above.

⁷⁵ *Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Jacoy* (fn 23 above); *Duarte* (fn 23 above); see also *Wong* (fn 23 above). Compare *Grant* (fn 23 above) at par 63, where subjective factors were considered as diminishing the seriousness of the Charter violation. Prominent consideration was accorded to the conduct and particular perception of the officers when Laskin JA reasoned that the police "did not think that they had detained the appellant at all before he admitted to possession of marijuana". The important question is: was the belief of the police officers objectively reasonable? The court held, at par 62, that it was, having regard to the uncertainty of the legal position on the issue of when a person is deemed to be "detained". This uncertainty in the law was an important factor, indicative of a lack of bad faith on the part of the police, because it was held that the line "between police questioning that gives rise to a detention and questioning that does not is often not clear".

⁷⁶ Fn 23 above.

⁷⁷ *Ibid* at 231.

adjudged to have proceeded in 'good faith' as the term is understood under section 24(2). Judicial tolerance of the negligent violation of constitutional rights pays no heed to the protection of the integrity of the criminal justice system.⁷⁸

Sincere attempts by the police to keep their investigative powers within the ambit of the law are indicative of their good faith.⁷⁹ Conversely, where there was

⁷⁸ Loc cit; see also *Feeney* (fn 6 above) at 167, where the aforesaid dictum in *Kokesch* was quoted with approval; see further Roach (fn 11 above) at 10-76, where he points out that: "Acceptance of careless or negligent violations of Charter rights sits uneasily with protecting the reputation of the administration of justice. Courts should not be quick to accept careless or negligent Charter violations that should have been prevented. Stating that such violations are unacceptable will not necessarily lead to exclusion in all cases. Other factors such as compliance with other Charter rights and the harmful effects of excluding important evidence in serious cases can still be considered". However, compare the dissenting minority opinion of Wells CJN in *Traverse*, quoted at fn 58 above.

⁷⁹ See *Legere* (fn 23 above) where the accused was arrested and detained in a police cell. The police entered the cell and, initially without consent, took several strings of hair from the beard and head of the accused. The accused eventually pulled his hair and allowed other samples to be cut and gave it to the police. A few days thereafter the police again entered the police cell where the accused was detained, armed with a warrant, and took samples of his hair without consent. Despite the absence of statutory authority or a court order allowing the taking of hair samples, it was held that admission of the evidence would not impact negatively on the administration of justice, because a reported case condemning similar police conduct had not been published at the time of the breach. The police also consulted prosecuting counsel before acting as they did. There was, in a word, evidence to the effect that the police made genuine attempts not to violate the rights of the accused; compare *Stillman* (fn 6 above) at par 125, where Cory J rejected the prosecution argument that the police acted in good faith, because they obtained an opinion from the Crown Attorney as to whether they could seize the bodily samples of the accused, prior to its taking. Cory J held, based on *Kokesch*, that the unavailability of constitutional means to obtain evidence is no justification to obtain evidence by unconstitutional means.

a pattern of disregard for Charter rights, it would add to the seriousness of the violation.⁸⁰

Canadian courts are extremely careful to exclude evidence obtained as a result of a warrant which contains minor deficiencies that do not suggest improper police conduct.⁸¹ However, in *Genest*,⁸² where the police kicked down the door of a house without warning and used excessive force in conducting a search thereof, following a similar search a month before, the violation was classified as serious. This judgment is reconcilable with exclusion that is based on a pattern of disregard for Charter rights.⁸³ It additionally demonstrates that the infringements do not have to be closely linked in time to each other in order to constitute a 'pattern of disregard'. In *R v Gray*,⁸⁴ the evidence obtained as a result of a warrant was excluded because the magistrate who issued the warrant assisted the police in preparing the grounds for its authorisation. Roach⁸⁵ argues, correctly, that *Gray* was properly decided, because section 24(2) aims to protect the reputation of the entire criminal justice system. Therefore, not only

⁸⁰ *Grefe* (fn 23 above); see also *Grant* (fn 23 above) at par 63, where the absence of evidence showing that the infringement occurred as a result of "systemic or institutional failure, or inadequate training", was regarded as factors diminishing the seriousness of the breach.

⁸¹ See *Parent* (fn 23 above), where evidence obtained as a result of a warrant, defective in minor respects, were admitted; compare *Turcotte* (fn 23 above), where the evidence was excluded because the warrant was obtained in violation of the Criminal Code; see also *Hosie* (fn 23 above) where all the facts were not placed before the issuing magistrate when application was made for the warrant - the evidence thus obtained was excluded; see further *Mooring* (fn 23 above) where evidence of a transcript and audio tape of third-party intercepted communications was regarded as a breach of a "technical" nature, because the police had reasonable and probable grounds to conduct electronic surveillance of the accused and anyone else with whom he came into contact.

⁸² Fn 23 above.

⁸³ See the cases cited at fn 69 above.

⁸⁴ (1993) 81 CCC (3d) 174, ("*Gray*").

⁸⁵ Fn 11 above at 10-73.

unconstitutional police conduct should be subjected to judicial scrutiny, but also the conduct of court officials.

What is the impact of the *Stillman* fair trial framework on the assessment of this group of factors, and more specifically, the 'good faith' exception? It will be recalled that, in terms of the *Stillman* fair trial framework, the evidence must be typified as either 'conscriptive' or 'not conscriptive'. When categorised as 'conscriptive, not discoverable', that would put an end to the fair trial assessment and the section 24(2) analysis. This entails that such a classification of the evidence would insulate it from further analysis in respect of the second leg of the *Collins* admissibility analysis. By the same token, it confirms the notion that the good faith of the police cannot transform a trial that is unfair into a fair trial.⁸⁶ Sopinka J held as follows in a dissenting minority judgment in *Hebert*,⁸⁷ a matter decided prior to the introduction of the *Stillman* fair trial framework:⁸⁸

For myself, I fail to see how the good faith or otherwise of the investigating officer can cure, so to speak, an unfair trial. This court's cases on section 24(2) point clearly, in my opinion, to the conclusion that where impugned evidence falls afoul of the first set of factors set out by Lamer J in *Collins* (trial fairness), the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation).

⁸⁶ *Hebert* (fn 23 above) at 20. Compare *Grant* (fn 23 above), at par 59, suggesting that trial fairness can be achieved to a degree and that conscriptive evidence should be admitted if the infringement occurred in good faith. Admission of the evidence that impacts less seriously on trial fairness would, according to the court, not impact negatively on the repute of the justice system.

⁸⁷ Fn 23 above.

⁸⁸ *Ibid* at 20.

However, this dissenting opinion of Sopinka J was referred to with approval by Iacobucci J in *Elshaw*,⁸⁹ and embraced by majority opinions in *R v Bartle*⁹⁰ and *Broyles*.⁹¹ As a consequence, the *Stillman* fair trial framework did not change the effect of this approach proclaimed by Sopinka J in the overall section 24(2) analysis. Only evidence categorised as 'not conscriptive, not discoverable', would be subjected to further scrutiny under the second and third group of *Collins* factors. In a word, the scope of the good faith exception is limited to serve as a factor mitigating the seriousness of the infringement, solely when the evidence is characterised as 'not conscriptive, not discoverable'.⁹²

Canadian courts make use of concepts like 'flagrant', 'blatant', 'wilful' and 'careless' disregard or 'lax practices' to convey the fact that the infringements are serious. These notions may cause confusion. In *Wise*, for example, the infringement was categorised as 'careless', but the evidence was nevertheless admitted. Stuart, in his Heads of Argument in the appeal heard by the Supreme Court in *Grant*,⁹³ is of the view that the Supreme Court needs to clarify the meaning of these concepts. He suggests that Canadian courts should rather make use of familiar concepts like intention and negligence to describe the seriousness of the infringement. An infringement that occurred intentionally should be labeled ***especially serious***, whereas a breach that was performed negligently should be categorised as ***serious***. Conversely, police ignorance or misinterpretation of their powers should only be regarded as a factor diminishing

⁸⁹ Fn 23 above.

⁹⁰ (1994) 92 CCC (3d) 309, (1994) 11 DLR (4th) 83 (SCC), ("*Bartle*").

⁹¹ Fn 23 above. See also Mitchell 1993 (fn 20 above) at 443.

⁹² Compare *Grant* (fn 23 above), where conscriptive evidence was assessed under the second and third groups of factors. See also Pottow (fn 20 above) at 233, who suggests that the *Stillman* fair trial assumption that all conscriptive evidence would, by its very nature, render a trial unfair, is logically flawed.

⁹³ Fn 23 above. Judgment was reserved. See further the Heads of Argument at fn 31 above at 7.

the seriousness of the infringement when their conduct demonstrates a genuine attempt to comply with the Charter.⁹⁴

To summarise: The seriousness of a violation could be adjudged to have a negative impact on trial fairness and the disputed evidence may be excluded on this ground,⁹⁵ alternatively on the basis that its reception would cause disrepute to the administration of justice.⁹⁶ In general, an infringement should be regarded as serious when the privacy or freedom and security of the person interests of an accused have been infringed and:

- a) the infringement was not motivated by urgency, necessity or with the aim to prevent the loss or destruction of evidence;⁹⁷
- b) the infringement consists of a significant interference with the sanctity of the human body;⁹⁸
- c) the evidence could not have been obtained without lawful authority, but the police nevertheless proceeded to obtain it. Thus, the duty rests on government to enact laws of general application which justifies the reasonable and justifiable limitation of Charter rights. For that reason, when evidence could not have been obtained within the legal constraints established by a law of

⁹⁴ Ibid at 6-7.

⁹⁵ *Stillman* (fn 6 above) at par 31. This view was also held in *Grant* (fn 23 above) at paras 55 and 59. However, see Stuart (fn 31 above) at par 8, questioning the peculiarity of the approach suggested in *Grant* as follows: "It seems odd that a judge can acknowledge that a trial is even somewhat unfair and yet admit the evidence".

⁹⁶ See, for example, *Stillman* (fn 6 above). Stuart, in his Heads of Argument in the Supreme Court matter of *Grant* makes a similar suggestion. He argues (fn 37) at 5, that the focus of the court's attention should be on the seriousness of the violation, rather than the nature of the evidence and the seriousness of the charge.

⁹⁷ *Buhay* (fn 23 above); *Grefe* (fn 23 above); *Stillman* (fn 6 above).

⁹⁸ *Grefe* (ibid); *Feeney* (fn 6 above).

general application, the infringement is regarded as a blatant disregard of Charter rights;⁹⁹

d) where other investigatory techniques were available to obtain the evidence, but the police officer failed to consider it;¹⁰⁰ and

e) if reasonable and probable grounds existed, it would generally diminish the seriousness of the violation. However, if other investigatory techniques were available and no grounds of urgency existed, the infringement may be regarded as serious.¹⁰¹

When conscriptive evidence is obtained as a result of the infringement, thus impairing the right to a fair trial, the violation is regarded as a serious breach.¹⁰² Similarly, when more than one Charter right has been infringed, the breach is typified as a 'pattern of disregard' and the totality of the infringements are deemed a serious violation.¹⁰³ Conversely, substantial compliance with the law and the provisions of the Charter is indicative of the good faith of the officers.¹⁰⁴ However, the good faith of the police cannot change a trial that is unfair into a fair trial.¹⁰⁵

In terms of the *Stillman* fair trial directive, the good faith of the police is applicable only with regard to evidence that is categorised as 'non-conscriptive, not discoverable'. This view has recently been challenged by a judgment delivered by the Ontario Court of Appeal in *Grant*,¹⁰⁶ and the Supreme Court of

⁹⁹ *Kokesch* (fn 23 above); *Buhay* (fn 23 above); *Stillman* (fn 23 above).

¹⁰⁰ *Buhay* (fn 23 above); *Wijsinha* (fn 23 above).

¹⁰¹ *Buhay* (fn 23 above).

¹⁰² *Stillman* (fn 6 above); *Feeney* (fn 6 above). Compare *Grant* (fn 23 above).

¹⁰³ *Grefe* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above);

¹⁰⁴ *Strachan* (fn 23 above); *Legere* (fn 23 above).

¹⁰⁵ *Hebert* (fn 23 above); *Elshaw* (fn 23 above); *Bartle* (fn 90 above).

¹⁰⁶ Fn 23 above.

Canada will, in due course, pronounce its judgment on this and related issues. The good faith of the police is determined by means of an objective test.¹⁰⁷ For this reason, honest, but objectively assessed unlawful police conduct does not qualify as 'good faith' for purposes of section 24(2).¹⁰⁸ The presence of reasonable and probable grounds in the investigating process is, in general, an indicator of the fact that the police acted in good faith.¹⁰⁹ The overall conduct, including the mental state of the police in the entire investigation should be scrutinised to determine whether they acted in good faith.¹¹⁰

In general, when non-conscriptive evidence was obtained in the shadow of Charter infringements, such violations are categorised as serious, provided the courts typify the breaches as 'flagrant', 'willful' or 'blatant'. This prerequisite does not apply to conscriptive evidence.¹¹¹ The Supreme Court will, in due course, make a ruling on the approach to be followed in this regard and in respect of related issues raised in the matter of *Grant*.

3. Effect of exclusion on the administration of justice in Canada

The third group of *Collins* factors is concerned with the effect that exclusion of the evidence would have on the repute of the criminal justice system. This group of factors consists of the following factors: Firstly, the seriousness of the **charges**¹¹² against the accused; and secondly, the importance of the evidence

¹⁰⁷ *Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Wong* (fn 23 above).

¹⁰⁸ *Ibid.*

¹⁰⁹ *Harris* (fn 23 above); *Belnavis* (fn 23 above); *Jacoy* (fn 48 above); *Krall* (fn 48 above).

¹¹⁰ *Mann* (fn 23 above); *Williams* (fn 23 above);

¹¹¹ *Stuart* (fn 66 above) at 406; *Roach* (fn 11 above) at 10-78.

¹¹² As opposed to the **crime committed**. The seriousness of the crime can only be assessed after the court has considered all the admissible evidence.

for a successful prosecution. The governmental concern in crime control is of great prominence at this phase of the section 24(2) assessment. However, this does not mean that section 24(2) should become an automatic inclusionary tool.¹¹³ Canadian courts have been criticised for sacrificing the third group of *Collins* factors in favour of the first two groups of factors. The Canadian Supreme Court, according to its critics, has accorded greater prominence to these values in comparison to a consideration of the cost of excluding the evidence. *Paciocco*¹¹⁴ and *Sopinka, Bryant and Lederman*¹¹⁵ do not approve of this approach. *Sopinka, Bryant and Lederman* argue that Canadian courts are reluctant to balance the costs of excluding the impugned evidence against the seriousness of the violation and noticeably choose to place 'little weight on this [the cost of exclusion] factor'.¹¹⁶ The intensity of the criticism will likely be amplified in cases where the evidence is excluded when the accused is charged with a serious offence and the evidence is reliable and essential to ensure a successful prosecution. Would the price paid by society as a result of the exclusion of evidence under these circumstances be justified?

¹¹³ *Buhay* (fn 23 above) at par 71, where Arbour J noted the following: "Section 24(2) is not an automatic exclusionary rule ... neither should it become an automatic inclusionary rule when the evidence is non-conscripted and essential to the Crown"; see also par 73; see further *Feeney* (fn 6 above) at par 82; *Orbanski* (fn 23 above) at par 93, where Fish J pointed out that the Canadian Supreme Court did not establish an automatic exclusionary rule for conscriptive evidence, when the judge wrote as follows: "Our Court has remained mindful of the principle that the Charter did not establish establish a pure exclusionary rule. ... Nevertheless, while this part of the analysis [the fair trial analysis] is often determinative of the outcome, our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant".

¹¹⁴ Fn 20 above (1989) at 353.

¹¹⁵ Fn 20 above.

¹¹⁶ *Ibid* at 424.

According to Sopinka, Bryant and Lederman¹¹⁷ this group of factors is primarily a means used to conclude that a particular Charter violation was not 'sufficiently serious' to warrant exclusion.¹¹⁸ On this view, these factors favour admitting the disputed evidence when the Charter infringement is not serious. It was mentioned above that the most important elements constituting this group of factors are the seriousness of the charges against the accused and the importance of the evidence to secure a successful prosecution.¹¹⁹ In this part of the work the following issue is pertinent: Would the over-emphasis of the importance of these factors have a negative impact on the presumption of innocence? If so, should it feature at all under the section 24(2) assessment?

Canadian courts should, when called upon to evaluate this group of factors, endeavour to strike a balance between the interests of the truth seeking goals of the criminal justice system, on the one hand, and upholding the integrity of the judicial system, on the other.¹²⁰ More importantly, the courts of Canada are alive to the fact that the concerns served by the third group of factors (crime control) do not outweigh the longer-term effects that could be caused by the regular admission of evidence obtained after a serious infringement. In such instances, the Canadian courts make every effort to achieve this longer-term goal by constantly reminding them that the purpose of the *Collins* test is to compel the

¹¹⁷ Loc cit.

¹¹⁸ See also the majority opinion of Sopinka J in *Feeney* (fn 6 above) at par 83.

¹¹⁹ See the dictum of McLachlin J (now McLachlin CJ) in *Stillman* (fn 6 above) at par 256.

¹²⁰ Ibid at 127. In this regard, Mitchell J quotes with approval the eloquent comments made by Doherty JA in *R v Kitaitchik* (2002) 161 O A C 169, 166 CCC (3d) 14 at par 47, ("*Kitaitchik*"), where he described this stage of the assessment as follows: "The last stage of the *R v Collins*, *supra*, inquiry asks whether the vindication of the specific *Charter* violation through the exclusion of evidence extracts too great a toll on the truth seeking goal of the criminal trial"; see also *Buhay* (fn 23 above) at paras 71 and 73.

police to respect the guarantees contained in the Charter.¹²¹ By contrast, the Ontario Court of Appeal in *Grant*, suggests that the focus should be on the seriousness of the charges and the reliability of the evidence. *Grant* was argued in the Supreme Court on 23 April 2008 and judgment is awaited. What are the implications of the *Grant* approach, followed by the Ontario Court of Appeal, on the third group of *Collins* factors?

The first factor considered under this group of *Collins* factors is the seriousness of the charges.

3.1 The seriousness of the charge

How should the seriousness of the charges against the accused be determined, mindful of the fact that the admissibility assessment should be isolated from the culpability evaluation by means of a *voir dire*? All open and democratic societies have, over the years, adopted objective norms that serve the purpose of categorising crimes according to the severity of its impact on society.¹²² The seriousness of the charge is primarily determined by the punishment a court may impose.¹²³ Mahoney suggests that the seriousness of the charge should not only be considered based on objective norms, but that any aggravating circumstances

¹²¹ See *Buhay* (fn 23 above) at par 68, where the Supreme Court considered whether the trial judge took this reminder into account, and concluded as follows: "For the trial judge, however, they [the third group of factors] were outweighed by his concerns about the police officers' disregard for appellant's Charter rights and the longer-term effects of the attitude they displayed in this case: 'The court is concerned at the casual approach that the police took in infringing the accused's rights in these circumstances. It is this court's view and concern that if the evidence was to be admitted in this trial that it may encourage similar conduct by police in the future'."

¹²² *Morissette* (fn 20 above) at 528.

¹²³ *Ibid* at 529.

of a particular case, irrespective of the offence charged, should be relevant.¹²⁴ The seriousness of the charge, showing that the accused had a specific intent that has a bearing on the gravity of the offence charged, may be demonstrated by means of the testimony of an expert witness.¹²⁵

Roach is of the view that the Canadian Supreme Court has yet to develop a 'meaningful standard by which to separate serious offences from non-serious ones'.¹²⁶ He suggests, based on a purposive interpretation of the Charter, that offences involving violence should be regarded as serious offences because the protection of human dignity is central to the values protected by the Charter.¹²⁷ More importantly, courts should be alive to the fact that the accused is entitled to the protection of all Charter rights, even at this stage of the proceedings. One such guarantee is the presumption of innocence. Therefore, when the seriousness of the charges against the accused is assessed, courts should constantly remind themselves that the accused should be presumed innocent.

It was pointed out above that the Canadian Supreme Court has been criticised¹²⁸ for ignoring the third group of *Collins* factors in favour of their concern for the

¹²⁴ Fn 20 above at 461, next to fn 41 of his contribution.

¹²⁵ See *Buendia-Alas* (fn 23 above) at 37, where the judge implied that he would have preferred the testimony of an expert witness on this issue: "I proceed on the assumption in this case, although the Crown didn't call expert opinion evidence, for the purposes of s. 24(2) that you possessed this cocaine for the purpose of trafficking".

¹²⁶ Fn 11 above at 10-86.

¹²⁷ Loc cit.

¹²⁸ See, for example, the dissenting opinion of McLachlin J in *Stillman* (fn 6 above) at par 252, where she reasoned as follows: "The balancing process that the framers of the s. 24(2) intended is thus completely undermined, and the compromise between those who feared that exclusion of evidence would undercut the administration of justice by freeing guilty persons on technicalities and those who advocated judicial consequences for violations of the *Charter* is nullified"; see also Hogg (fn 20 above) at 943, where he expresses his opinion as follows: "In most of the cases

prevention of an unfair trial and judicial condonation of unconstitutional conduct. Roach is of the opinion that the Canadian Supreme Court has been reluctant to vigorously apply this group of factors because they would in so doing, endorse the message that the goals of crime control justifies unconstitutional conduct.¹²⁹

In *Collins*,¹³⁰ for example, it was held that the effects that exclusion might have upon the administration of justice when a serious offence has allegedly been committed, should not be considered as factors calling for the admission of the evidence when its admission would tend to have a negative impact on trial fairness. In conformity with the approach proclaimed in *Collins*, it was held in *Buhay*,¹³¹ that one of the purposes of section 24(2) is 'is to prevent having the administration brought into **further disrepute** by the admission of the evidence in the proceedings'.¹³² Arbour J continued his analysis of this stage of the inquiry by observing that 'further disrepute' can be caused by the reception of evidence that would 'deprive the accused of a fair hearing, **or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies**'.¹³³ The judge confirmed that the decision to exclude or admit invariably represents a weighing up of the truth-seeking concerns and the protection of the integrity of the criminal justice system. The approach by the court below in weighing up these two factors at this stage of the inquiry and its conclusion 'that the vindication of the Charter in this case, which was serious, did

where evidence has been excluded, the evidence appeared to be reliable, it appeared to be crucial to the prosecution's case, and the offence charged was a serious one. And yet the court typically did not discuss the cost of excluding the evidence and plainly placed little weight on this factor"; see further Paciocco 1989 (fn 20 above) at 326.

¹²⁹ Ibid at 10-83. He also suggests that a consideration of the seriousness of the offence would be offensive to the presumption of innocence.

¹³⁰ Fn 1 above at par 39.

¹³¹ Fn 23 above.

¹³² Ibid at par 70. (Emphasis in original).

¹³³ Loc cit. (Emphasis in original).

not detract too great a toll on the truth seeking goal' of the criminal justice system, was approved by the Supreme Court.¹³⁴ In this case, the seriousness of the violation and the long-term effect of the regular admission of the evidence in circumstances when it could have been obtained without a violation, weighed heavier than the truth-seeking goal of the criminal justice system.¹³⁵ Against this background, Arbour J held that admitting the evidence would be perceived by the public at large as judicial condonation of unacceptable police conduct.¹³⁶

After the majority judgment held in *Feeney* that admission of the evidence would render the trial unfair, the court nevertheless considered the third group of *Collins* factors.¹³⁷ Addressing the seriousness of the charges against the accused, the court reiterated that the violation was a very serious infringement of the rights of the accused.¹³⁸ These two factors,¹³⁹ together with a consideration of the importance of the evidence for the prosecution, had to be weighed up to determine whether admission or exclusion would bring greater harm to the integrity of the justice system. In its consideration of the seriousness of the charges, the court emphasised the fact that, at this stage of the proceedings, the accused should be presumed innocent.¹⁴⁰

¹³⁴ Ibid at par 73.

¹³⁵ Loc cit.

¹³⁶ Loc cit.

¹³⁷ Fn 6 above. This approach was probably followed as a result of its critics suggesting that the Supreme Court fails to consider "all the circumstances", and that the fair trial directive functions as an automatic exclusionary rule. See, for example, Mahoney (fn 20 above) at 455; Stuart 2003 (fn 20 above).

¹³⁸ *Feeney* (ibid) at par 81. The violation was labelled as "a pattern of disregard for the Charter". In *Stillman* the majority judgment at par 126 balanced the seriousness of the violation against the third group of factors.

¹³⁹ The seriousness of the charges and the seriousness of the infringement.

¹⁴⁰ Ibid at par 81, Sopinka J referred to the opinion of Iacobucci J in *Burlingham* with approval, where the latter is quoted as making this point as follows: "... we should never lose sight of the

An important issue that needs to be discussed is: Would a consideration of the seriousness of the charge potentially impact negatively on the presumption of innocence? Roach highlights the concern that, during a *voir dire*, the court would not have determined whether all the admissible evidence to be presented in court would provide proof, beyond reasonable doubt, that the accused has committed the offence contained in the charge sheet.¹⁴¹ The possibility exists that the evidence presented after the *voir dire* may reveal the culpability of the accused in relation to a less serious offence.¹⁴² Pottow concurs with the view held by Roach and raises the disconcerting likelihood that, in some cases, the evidence may reveal that the conduct of the accused was lawful, because it

fact that even a person accused of the most heinous crimes, and ***no matter the likelihood that he or she actually committed those crimes***, is entitled to the full protection of the Charter. Short-cutting or short-circuiting those rights affect not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s 24(2)". (Emphasis added). See also *Stillman* at par 126, where Cory J confirmed the sentiments held by Sopinka J in the following terms: "They [the police] were attempting to obtain evidence implicating the person they suspected had murdered a young girl. Yet Charter rights are the rights of all people in Canada. They cannot simply be suspended when the police are dealing with those suspected of committing serious crimes. Frustrating and aggravating as it may seem, the police as respected and admired agents of our country, must respect the Charter rights of all individuals, even those who appear to be the least worthy of respect. Anything less must be unacceptable to the courts".

¹⁴¹ Fn 11 above at at 10-86, he reasons as follows: "Even if the seriousness of the charge can be distinguished in a manner consistent with the Charter, giving this factor determinative weight in s. 24(2) applications remains problematic. What is judged is the offence charged, not the actual crime committed, and to give the offence charged too much weight is at odds with the presumption of innocence. Even if the accused is factually guilty, the judge at a *voir dire* may not be in a position to know, for example, whether the accused is guilty of manslaughter, even though charged with murder".

¹⁴² Loc cit. See also Pottow (fn 20 above) at 229-230.

complies with one of the grounds of justification.¹⁴³ For this reason, Roach¹⁴⁴ and Pottow¹⁴⁵ call for the removal of this factor from the section 24(2) assessment. In Canada, the admissibility issue is decided by means of a *voir dire*.¹⁴⁶ A ruling made in respect of the admissibility of evidence is final, since the jury should not include inadmissible evidence in their assessment of the culpability issue.¹⁴⁷ As a consequence, unlike the position in South Africa, it rarely happens that a court may be called upon during the trial to reconsider the admissibility issue based on new facts that arose during the trial. Viewed in this light, the concerns advanced by Roach and Pottow are valid. They highlight the fundamental concern that courts should not attach determinative weight to factual guilt during the admissibility assessment.¹⁴⁸ However, Canadian case law does not suggest that a consideration of this group of factors could potentially unjustifiably encroach upon the presumption of innocence.¹⁴⁹

A further argument against a consideration of the seriousness of the charges, is the contention that a consideration of this factor implies that the more serious the charge, the less protection is provided by the Charter.¹⁵⁰ In other words, an accused charged with murder would less likely be successful in relying on section

¹⁴³ Fn 20 above at 230.

¹⁴⁴ Fn 11 above at 10-86.

¹⁴⁵ Fn 20 above at 230.

¹⁴⁶ This is a pre-trial motion.

¹⁴⁷ According to Stuart of the Faculty of Law at Queens University, Canada, in an e-mail addressed to the writer, dated 5 May 2008. He wrote as follows: "Technically a motion to exclude under s. 24(2) could be brought again if the evidential picture changes. I do not know of such a case. It seems highly unlikely in jury cases although there could be a declaration of a mistrial if the jury has heard evidence the judge now thinks should be excluded".

¹⁴⁸ See the dissenting minority opinion in *Vu* (fn 23 above) at 338.

¹⁴⁹ See *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above) and the cases cited at fn 172 below.

¹⁵⁰ Stuart 1983 (fn 20 above) at 177.

24(2) than one charged with the offence of driving without a valid driver's licence. Stuart correctly argued in the Supreme Court, in the appeal of *R v Grant*,¹⁵¹ that there should be a 'real risk of exclusion for serious Charter breaches even in cases of serious crimes'.¹⁵² Morissette is of the opinion that it is sensibly impossible to 'remove from the discussion of this question any consideration of the seriousness of the offence'.¹⁵³ This view held by Morissette is correct, provided that this factor should not be accorded excessive weight during the admissibility assessment, in this manner causing damage to the long-term goals of the Charter.

3.2 The importance of the evidence for a successful prosecution

When considering this factor, should courts adopt an approach that suggests that unconstitutionally obtained evidence should in general be received especially when the accused is factually guilty?¹⁵⁴ Put differently: should courts, having regard to the end (factual guilt) reason rearward, thereby condoning the means employed to achieve the end? Would the presumption of innocence not be encroached upon by such reasoning? Conversely, would the price paid by society

¹⁵¹ This appeal was heard on 23 April 2008 and judgment will be delivered after about six months. Stuart acted on behalf of the Canadian Civil Liberties Association, as an intervenor in the matter. The writer has his heads of argument on file in this matter. This matter is the sequel to *R v Grant* (2006) 38 CR (6th) 201 58 (Ont CA), cited at fn 23 above. See further fn 31 above.

¹⁵² Stuart (fn 31 above) at 5.

¹⁵³ Fn 20 above at 529. He refers to the Australian and German approaches to exclusion where this factor is included in their admissibility assessment.

¹⁵⁴ The question was answered in the negative in *Genest* (fn 23 above) at 403, where Dickson CJ held as follows: "While the purpose of the rule is not to allow an accused to escape conviction, neither should it be interpreted as available only in those cases where it has no effect at all on the result of the trial. The consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case"; see also Roach (fn 11 above) at 10-86.

be justifiable when unconstitutionally obtained evidence is excluded despite clear evidence of factual guilt? The cost of exclusion would be high when the charge is serious and the evidence essential for a successful prosecution. By contrast, the cost of exclusion would not be that high when the accused can be convicted with other evidence, despite excluding the disputed evidence.

In *Dyment*,¹⁵⁵ the accused suffered a head laceration caused by a car accident. A doctor took a blood sample without the consent of the accused and handed it to a police officer. The officer lacked reasonable grounds to believe that the accused has committed an offence or that the blood sample constituted evidence of an offence. He also did not have a search warrant. The officer nevertheless had the blood sample analysed. The accused was charged, based on the results of the blood test. Mitchell J typified the breach as a 'gross violation of the sanctity, integrity and privacy of the appellant's bodily substances and medical records' and voiced the concern that society would be 'shocked and appalled',¹⁵⁶ should the evidence be admitted. The judge assessed whether exclusion or inclusion would bring the administration of justice into disrepute by considering the importance of the evidence to secure a conviction as follows:¹⁵⁷

¹⁵⁵ Fn 23 above; see also *Burlingham* (fn 23 above); *Feeney* (fn 6 above), where the Supreme Court excluded evidence, essential for a conviction on a serious charge. Exclusion followed because the infringement was deemed serious.

¹⁵⁶ *Ibid* at 537.

¹⁵⁷ *Loc cit.* (Emphasis added); see also *Feeney* (fn 6 above) at par 82, where Sopinka J was of the opinion that the following opinion of Iacobucci (also quoted with approval in *Stillman* by Cory J, confirming this view, at par 126, writing a majority opinion) was relevant to the case at bar: "... we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affect not only the accused, but also the entire reputation of the criminal justice system. It must be emphasised that the goals of preserving the integrity of the criminal justice system as well as promoting decency of investigatory techniques are of fundamental importance in applying s. 24(2)".

If the court received evidence obtained by taking a blood sample without consent, medical necessity or lawful authority, and without the police having any probable cause, it would bring the administration of justice into disrepute. ***It does not matter that the results of the blood tests confirm that, in fact, the appellant had committed an offence. The end does not justify the means.***

This judgment underlines the fact, despite an acceptance that the evidence was essential for a successful prosecution, the ends of crime control do not surpass the fundamental duty of courts to uphold Charter rights.¹⁵⁸ In *Feeney*, the court in delivering the majority opinion, considered the costs of excluding reliable evidence, essential for a successful prosecution of the accused, charged with serious offences. Sopinka J concluded that when unconstitutionally obtained evidence is excluded under these circumstances, the prosecuting authority is deprived of a conviction that does not meet Charter standards.¹⁵⁹ He concluded the section 24(2) inquiry with the following remarks, in response to a suggestion by L'Heureux-Dube J¹⁶⁰ to the effect that exclusion would likely result in an acquittal:¹⁶¹

... If the exclusion of this evidence is likely to result in an acquittal of the accused, as suggested by L'Heureux-Dube J in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of

¹⁵⁸ See also the majority opinion of Sopinka J in *Feeney* (fn 6 above) at par 83; see further the majority opinion written by Cory J in *Stillman* (fn 6 above) at par 126.

¹⁵⁹ *Ibid* at par 83.

¹⁶⁰ L'Heureux-Dube J wrote a dissenting minority opinion in *Feeney*.

¹⁶¹ Fn 6 above at par 83.

such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

The courts, as guardians of the Charter, have a constitutional duty to infuse public confidence in the 'willingness and ability' of the courts to uphold the rights guaranteed by the Constitution,¹⁶² regardless of the seriousness of the charges against the accused.¹⁶³

Would undue emphasis on the importance of the evidence for a successful prosecution have the potential to unjustifiably encroach upon the presumption of innocence? Pottow is of the view that it does.¹⁶⁴ Roach disagrees.¹⁶⁵ However, he acknowledges the fact that from a practical point of view, judges 'can hardly ignore that the exclusion of some evidence such as drugs will make a conviction impossible'.¹⁶⁶ Nevertheless, a review of Canadian case law has revealed that

¹⁶² Loc cit; see also *Burlingham* (fn 23 above) at par 25, where the Supreme Court was of the opinion that the *Collins* test serves the purpose to "oblige law enforcement authorities to respect the exigencies of the *Charter*".

¹⁶³ *Stillman* (fn 6 above) at par 126, where Cory J wrote that Charter rights cannot be suspended when the accused is suspected of having committed a serious offence.

¹⁶⁴ Fn 20 above at 231. He bases his criticism on an excerpt in *Broyles* (fn 23 above).

¹⁶⁵ Fn 11 above at 10-86-87.

¹⁶⁶ Loc cit; see, for example, the approach of the Ontario Court of Appeal in *Manikavasagar* (fn 23 above), where a police officer found the accused asleep behind the steering wheel of his car, while the engine was running. He opened the unlocked door and became aware of the smell of liquor. He asked the accused to get out of his vehicle and then saw 2 fire-arms. On a charge of possession of fire-arms, the breach was held not to be serious, because the appellant had a diminished expectation of privacy. The section 24(2) analysis was completed with the following sentence: "The charges were very serious and the evidence was necessary to substantiate the charges". See also *Vu* (fn 23 above), a decision of the British Columbia Court of Appeal. The police proceeded to the house of the appellant, armed with a search warrant. They also searched a car which was parked in the back yard. In the car they found evidence confirming the identity of the owner of the dwelling. A marijuana producing operation was found in the house. The

their approach to this factor does not pose any risk of encroaching upon the presumption of innocence.¹⁶⁷ The recently reported case of *Buendia-Alas*¹⁶⁸ reinforces this contention.

In *Buendia-Alas*, the accused was charged with dealing in cocaine. The police officer got suspicious because the occupants, while stopping at a red robot, stared forward and did not make any movements while in the car. He ran a check on the number plate of the vehicle and discovered that the vehicle was not insured. At a later stage it was established that this information was inaccurate. The officer stopped the car and noticed that the accused had a mobile phone in his possession.¹⁶⁹ A check on the driver revealed that he was on bail, subject to the condition that he does not possess a mobile phone and further that he should not be in a car with a person who possesses a mobile phone. The accused was searched for officer safety concerns, and as a result, cocaine was discovered in his pocket. Considering the seriousness of the offence, Tweedale Prov Ct J¹⁷⁰ assumed in favour of the prosecution that the charge was serious.¹⁷¹ The judge said the following with regard to this factor:

admissibility of the evidence found in the car was challenged. The majority opinion excluded the evidence after having typified the breach as serious. Braidwood JA dissented and held that the police acted in good faith. Considering the seriousness of the offence and the importance of the evidence for a conviction, the judge wrote as follows at 338: "While the cultivation of a narcotic is a very serious offence, the breach of the appellant's rights was not serious ... There is no need in this case to acquit the guilty in order to ensure that in future the public's right to privacy is protected; to do so in this case would bring the administration of justice into disrepute".

¹⁶⁷ See, for example, the approach of the courts in respect of these group of factors in *Collins* (fn 1 above); *Kokesch* (fn 23 above); *Dyment* (fn 23 above); *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); the majority judgment in *Vu* (fn 23 above); and *Buendia-Alas* (fn 23 above). Compare *Grant* (fn 23) above.

¹⁶⁸ *Ibid.*

¹⁶⁹ In his impromptu oral judgment, the judge referred to the accused as "the defendant".

¹⁷⁰ Fn 23 above at 37.

... I proceed on the assumption in this case, although the Crown didn't call expert opinion evidence, for the purposes of s. 24(2) that you possessed this cocaine for the purposes of trafficking. Of course the trial is not over ... being in possession of cocaine [is] a serious drug.

Turning to consider the seriousness of the Charter violation, the judge emphasised the fact that the officer failed to balance his 'discomfort, his concern about officer safety' that was not confirmed by evidence to be at risk, 'to in effect trump the rights that the defendant was entitled to under the Charter'.¹⁷² In so doing, the officer did not act in good faith when he failed to inform himself of the importance of the Charter rights of the accused. The violation was therefore serious. Thereafter, the judge balanced the various factors to be considered under these groups of factors and addressed the accused directly in the extemporised judgment as follows:¹⁷³

The fact is, you [the accused] live in a country where you ***are to be left alone*** by the police in the circumstances you found yourself in here. It's not right if you did possess cocaine, and ***it seems likely you did***, and it is certainly not right if you ***did that for the purpose of trafficking***. But there are more important rights that need to be protected in the circumstances of this particular case, and as a result I am excluding the evidence of the cocaine found on you, and that being the case, as I understand it, ***an acquittal should result***.

¹⁷¹ Loc cit.

¹⁷² Loc cit.

¹⁷³ Ibid at 38. (Emphasis added).

The italicised phrases demonstrate that the judge balanced the seriousness of the infringement, the importance of the evidence for a successful prosecution and the seriousness of the charges in a manner that does not unjustifiably impinge upon the presumption of innocence. The judge considered the factual guilt of the accused, when he made the remark that 'it seems likely you did'. However, a consideration of this factor did not, in this case, have a negative effect on the presumption of innocence, because the court emphasised the long-term effect of the regular admission of evidence obtained in this manner.

In *Grant*, Laskin JA re-oriented not only the fair trial assessment, but also the weight to be attached to the factors under the second and third groups of *Collins* factors. In terms of *Grant*, the focus should be on the reliability of the evidence and the seriousness of the offence.¹⁷⁴ Such an approach lays undue emphasis on the 'current mood' of society¹⁷⁵ and in this manner suggests that a consideration

¹⁷⁴ Fn 23 above at par 64, Laskin JA reasoned as follows: "Here, four considerations favoured admission of the evidence: possession of a loaded firearm in a public place is a very serious offence, as reflected in the mandatory minimum one-year sentence for a conviction under s. 95 or s. 100(1) of the *Criminal Code*; the appellant was carrying the gun in the vicinity of several schools, which aggravated the seriousness of the offence; the evidence was crucial to the Crown's case, and the evidence was entirely reliable. As Doherty JA said in *R v Belnavis* (1996) 29 OR(3d) 321 (Ont CA) at 349, and approved of in (1997) 118 CCC (3d) 405 (SCC) at para 45: 'The exclusion of reliable evidence essential to the prosecution of a significant criminal charge must, in the long-term, have some adverse effect on the administration of justice.'" See further par 65; see also *Harris* (fn 23 above) at par 76.

¹⁷⁵ *Ibid* at par 66 Laskin AJ dealt with the current public mood as follows: "Although the right to be free from arbitrary detention touches an individual's rights of autonomy and freedom, increasing levels of gun violence in our communities threaten everyone's personal freedom"; see also *B (L)* (fn 23 above) at par 80, where MJ Moldaver JA considered the current mood of society as one of the grounds for receiving the evidence, when made the following comments: "This case involves a loaded handgun in possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something ***Canadians will not tolerate***. It conjures up

of the long-term effects of the regular admission of evidence obtained after a serious infringement should be relegated to an insignificant concern when the disputed evidence is reliable and the charges are of a serious nature.¹⁷⁶ More importantly, such an approach defies the essence of the influential judgment delivered by Lamer J in *Collins*.¹⁷⁷ In this manner, the *Grant* judgment postulates that the reliability of the evidence determines that crime control interests should be elevated above the general purpose of the Charter, that is, the protection of fundamental rights.¹⁷⁸ In other words, Charter rights should be suspended when reliable evidence, crucial for the successful prosecution of a serious charge is in dispute. It is submitted that what should be regarded as important, is not the reliability of the evidence, but whether it was obtained in a manner that seriously infringed a Charter right.¹⁷⁹ The *Grant* judgment in effect calls upon courts to display judicial tolerance when reliable evidence is discovered as a result of serious Charter infringements in cases where the accused face serious charges.¹⁸⁰ In the absence of a real risk of exclusion when the Charter infringements are serious, even when the charges are serious, would indirectly encourage the police to deliberately or flagrantly infringe Charter rights when they are aware that the disputed evidence is reliable real evidence.¹⁸¹

images of horror and anguish the likes of which few could have imagined twenty-five years ago when the Charter first came into being". (Emphasis added).

¹⁷⁶ Compare *Collins* (fn 1 above); *Kokesch* (fn 23 above); *Dyment* (fn 23 above); *Burlingham* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); the majority judgment in *Vu* (fn 23 above); *Buendia-Alas* (fn 23 above); and the recently reported case of *Williams* (fn 23 above).

¹⁷⁷ Fn 1 above at 523; see also Lamer (fn 20 above) at 344.

¹⁷⁸ See *Grant* (fn 23 above) at par 52.

¹⁷⁹ See the cases cited at fn 155 above; see also Stuart (fn 31 above) at 5-6.

¹⁸⁰ Compare *Mann* (fn 23 above); *Buhay* (fn 23 above); *Williams* (fn 23 above).

¹⁸¹ Stuart (fn 31 above) at 6-7. The dangers of such an approach was by highlighted by Roach (1999) 33 *Israel LR* 607 at 623 and (1999) 42 *CLQ* 39 in relation to the first group of *Collins*

To summarise, when Canadian courts consider the third group of *Collins* factors, they weigh up and balance the seriousness of the charge (not the crime), against the seriousness of the Charter infringement and the importance of the evidence to secure a successful prosecution. This balancing exercise is undertaken while the courts frequently remind themselves that the *Collins* test serves the purpose to 'oblige law enforcement agencies to respect the exigencies of Charter'. In the light hereof, when a serious Charter infringement occurs in the evidence-gathering process and the evidence is essential for the prosecution of a serious charge, Canadian courts would, in general, exclude the disputed evidence.¹⁸²

A review of Canadian case law does not confirm the view held by commentators that a consideration of the importance of the evidence for the prosecution or the seriousness of the charges against the accused, pose any potential risk to the presumption of innocence. This may be ascribed to two important features: Firstly, when the courts of Canada consider these factors, they consciously remind themselves of their duty to respect and uphold the presumption of innocence; and secondly, they do not assign decisive significance to the 'current public mood'.¹⁸³ Nevertheless, a consideration of the seriousness of the charges may prejudice an accused, since the evidence that the prosecution leads during the trial may not establish proof of the crime contained in the charge sheet. However, this result follows the nature of a trial by jury.

factors. It is suggested that such criticism is applicable even with regard to the treatment of real evidence in the second and third groups of factors; see also *Ally* (2005) 1 *SACJ* 66 at 69.

¹⁸² See the cases cited at fn 155 and 176 above; compare *Grant* (fn 23 above); *Harris* (fn 23 above).

¹⁸³ Compare *Grant* (fn 23 above); *Harris* (fn 23 above).

C South Africa

This part of the thesis commences with a discussion of the concept 'detriment': Do the concepts of 'disrepute' and 'detriment' serve a similar purpose? The next issue considered is the seriousness of the violation. The seriousness of the constitutional infringement is considered while having due regard to the good faith of the police. This is followed by a discussion of the effect of exclusion on the integrity of the criminal justice system. Under these groups of factors, the seriousness of the charges faced by the accused and the importance of the evidence for a successful prosecution are explored.

South African courts have considered this group of factors in a number of cases.¹⁸⁴ The issues raised with regard to section 24(2) are revisited within the context of section 35(5).

The Canadian section 24(2) jurisprudence under the second and third groups of *Collins* factors are compared with the South African approach to the same groups

¹⁸⁴ See, for example, *S v Melani and Others* 1996 1 SACR 335 (E), ("Melani"); *S v Motloutsi* 1996 1 SACR 78 (C), ("Motloutsi"); *S v Madiba* 1998 1 BCLR 38 (D), ("Madiba"); *S v Mayekiso en Andere* 1996 2 SACR 298 (C), ("Mayekiso"); *S v Mark and Another* 2001 1 SACR 572 (C), ("Mark"); *S v Agnew* 1996 2 SACR 535 (C), ("Agnew"); *S v Marx and Another* 1996 2 SACR 140 (W), ("Marx"); *S v Desai* (1997) 1 SACR 38 (W), ("Desai"); *S v Mathebula* 1997 1 SACR 10 (W), ("Mathebula"); *Shongwe* (fn 5 above); *S v Mfene* 1998 9 BCLR 115 (N), ("Mfene"); *S v Malefo en Andere* 1998 1 SACR 127 (W), ("Malefo"); *S v Gasa and Others* 1998 1 SACR 446 (D), ("Gasa"); *S v Mphala and Another* 1998 1 SACR 338 (W), ("Mphala"); *S v Soci* 1998 2 SACR 275 (E), ("Soci"); *S v Nomwebu* 1996 2 SACR 396 (E), ("Nomwebu"); *S v Naidoo and Others* 1998 1 SACR 479 (N), ("Naidoo"); *S v Ngcobo* 1998 10 BCLR 1248 (W), ("Ngcobo"); *S v Mkhize* 1999 2 SACR 632 (W), ("Mkhize"); *S v Lottering* 1999 12 BCLR 1478 (N), ("Lottering"); *S v Seseane* 2000 2 SACR 225 (O), ("Seseane"); *S v R* 2000 1 SACR 33 (W), ("R"); *S v M* 2002 2 SACR 474 (N), ("M"); *S v Mansoor* 2002 1 SACR 629 (W), ("Mansoor"); *S v M* 2002 2 SACR 411 (SCA), ("M (SCA)"); *Pillay* (fn 2 above); *S v Hena and Another* 2006 2 SACR 33 (SE), ("Hena").

of factors in section 35(5) challenges. The phrase 'all the circumstances' appears in section 24(2) of the Charter, but has been omitted from section 35(5). One of the issues considered in this part of the work, is whether South African courts should, in a similar manner as their Canadian counterparts, consider all the circumstances leading to a constitutional violation in order to assess the seriousness of the violation, despite the absence of this phrase in section 35(5). This leads to an important question that should be asked by South African courts when the admissibility of evidence is considered under these groups of factors: Would the reception of evidence, essential for a conviction on a serious charge, but obtained after a serious infringement, be perceived by the public at large as synonymous with judicial condonation of unconstitutional police conduct? Put differently, should South African courts, in a similar manner as their Canadian counterparts, be reluctant to typify the infringement as serious in cases when the admissibility of reliable evidence, that does not impact negatively on trial fairness, is at issue? Should evidence of this nature only be excluded when it was obtained in a manner that is indicative of police abuse? What weight should be attached to the seriousness of the infringement, on the one hand, and the the reliability and importance of the evidence for a conviction, on the other hand, when the accused is charged with a serious offence and the infringement is of a serious nature?

The seriousness of a violation is determined while having regard to the absence or presence of good faith on the part of the police. For this reason, a comparative analysis is undertaken of the good faith exception, an excuse available to the prosecution that calls for the admission of unconstitutionally obtained evidence when guaranteed rights have been infringed. It is argued that the condonation of negligent police conduct offends the rationale of this group of *Collins* factors, as well as the spirit, purport and objectives of the Bill of Rights. Negligent violations of constitutional rights should not withstand section 35(5) scrutiny.

A theme explored in the overall assessment of these groups of factors is whether the over-emphasis of the seriousness of the charges and the importance of the evidence for a successful prosecution could possibly unreasonably impinge upon the presumption of innocence. This leads to the significant question: If it does, should a consideration of these factors be discarded in the section 35(5) assessment or should the weight attached to the 'current mood of society', when these groups of factors are considered, be re-aligned to achieve the goals sought to be achieved by the Bill of Rights?

These groups of factors were discussed by a number of scholarly writers.¹⁸⁵

1. Determining 'detriment'; public opinion and the nature of the discretion

Two issues are discussed under this heading: first, whether the concepts of 'disrepute' and 'detriment' serve a similar purpose; and second, the role of public opinion when section 35(5) is interpreted.

Do the concepts 'disrepute' and 'detriment' seek to achieve a comparable purpose? Cloete J mentioned obiter, in *S v Mphala*,¹⁸⁶ that the concept of 'disrepute', contained in section 24(2) of the Charter appears to be a test 'with a higher threshold for exclusion' than 'detriment', which appears in section 35(5) of

¹⁸⁵ See, for example, De Jager et al *Commentary on the Criminal Procedure Act* (2005) at 24-98H to 24-98N-1; Van der Merwe (fn 8 above) at 233; Schwikkard "Arrested, Detained and Accused Persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) 795-797; Schmidt & Rademeyer *Schmidt Bewysreg* (4th ed, 2006); Viljoen "The Law of Criminal Procedure and the Bill of Rights" in Mokgorro & Tlakula (eds) *The Bill of Rights Compendium* (2008); Steytler (fn 14 above) at 38-40; Skeen (1988) *SACJ* 389; Meintjies-Van der Walt (1996) 3 *SACJ* 389; Schutte (2001) 13 *SACJ* 57; Ally (fn 181 above).

¹⁸⁶ Fn 184 above at 659i-j.

the South African Constitution. Viljoen mentions that it is important to note that both concepts promote the application of an objective analysis.¹⁸⁷ Van der Merwe¹⁸⁸ accurately observes that once a court has concluded that admission of the evidence would cause 'disrepute' to the administration of justice, it would by necessary implication be indicative of the fact that such admission would be 'detrimental' to the administration of justice. In a word, the admission of evidence discovered as a result of a constitutional breach that could cause society to disrespect the criminal justice system would by the same token be harmful to it.¹⁸⁹ The Supreme Court of Appeal concurred with the line of reasoning suggested by Van der Merwe without referring to it, in the influential decision of *Pillay*,¹⁹⁰ when it resolved to employ the test of its Canadian counterpart in the seminal case of *Collins*.¹⁹¹ The *Collins* test was engaged as a means to determine whether exclusion or admission of the disputed evidence would be 'detrimental' to the administration of justice. In the light hereof, one cannot but conclude that the purpose sought to be achieved by the concepts of 'disrepute' and 'detriment' are analogous.

Should public opinion play a role in determining whether exclusion or admission of the disputed evidence could result in 'detriment' to the administration of justice? If so, what weight should be attached to it? The Constitutional Court was called upon in *Makwanyane*,¹⁹² to determine the relevance and weight to be

¹⁸⁷ Fn 185 above at 5B-50.

¹⁸⁸ Fn 8 above at 233.

¹⁸⁹ See Viljoen (fn 185 above) at 5B-50, who refers to the literal differences between the subjective concept "disrepute" and the objective concept "detriment", (meaning harm or damage). This view was confirmed by the Supreme Court of Appeal in *Pillay* (fn 2 above) at par 94, when the majority opinion reasoned that admission of the disputed evidence would "do more **harm** to the administration of justice than enhance it". (Emphasis added).

¹⁹⁰ Fn 2 above at par 88.

¹⁹¹ Fn 1 above.

¹⁹² Fn 19 above.

attached to public opinion when interpreting the Bill of Rights. Chaskalson P held that public opinion *does* play a role when interpreting the Constitution, but courts should not be a slave to it.¹⁹³ In his often-quoted statement on this issue, Chaskalson P was prepared to assume that the majority of South Africans are in favour of the retention of the death penalty, and continued by demarcating the impact of public opinion in a constitutional democracy as follows:¹⁹⁴

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.

It should be emphasised that Chaskalson P discussed the task of public opinion not only in relation to the constitutionality of the death penalty, but the judgment was intended to provide guidance with regard to the interpretation of the provisions of the Bill of Rights. To state the obvious, section 35(5) forms an integral part of the South African Bill of Rights. In the premises, it is suggested that the pronouncement of Chaskalson P should apply with equal force to the interpretation of section 35(5). Van der Merwe argues that the phrase 'would be detrimental to the administration of justice' is indicative of the fact that public opinion should be a prominent consideration in the second phase of the

¹⁹³ *Makwanyane* (ibid) at par 88.

¹⁹⁴ Loc cit.

admissibility assessment.¹⁹⁵ This argument of Van der Merwe is vulnerable to criticism on several grounds: Firstly, despite the fact that the concept of 'detriment' involves the making of a value judgment, determined by a presiding officer while taking into account the contemporary views of the public at large, this assessment should not be equated with a consideration of public opinion. Langa P in *S v Williams*¹⁹⁶ emphasised the importance of this distinction when he indicated that the South African Constitution is different when compared to that of the United States. The President of the Constitutional Court held that South African courts should interpret the Constitution in accordance with the 'values that underlie an open and democratic society based on [human dignity], freedom and equality', instead of 'contemporary standards of decency'.¹⁹⁷ In the premises, it is important to note that Langa P intended to impress on South African courts that the prevailing public mood should occupy a subsidiary role in relation to the long-term values sought to be achieved by the Constitution.

It is suggested that the approach to the interpretation of the provisions of the Bill of Rights should – depending on the rationale and the text of its constituent

¹⁹⁵ Fn 8 above at 234 he contends the following: "It is submitted that the courts are ... fully entitled to lean in favour of crime control. ... And whilst it is probably true that public opinion – including **public** acceptance of a verdict and **support for the system** – must go into the scale of as a **weighty factor**". (Emphasis added). This approach was followed by Scott JA in *Pillay* (fn 2 above) at par 126.

¹⁹⁶ 1995 (7) BCLR 861 (CC), ("*Williams CC*"). Langa P was the Deputy President of the Constitutional Court when this judgment was delivered.

¹⁹⁷ *Ibid* at par 36-37. The judge intimated that the relationship between "contemporary standards of decency" and public opinion is uncertain, but added that he is unconvinced that they are synonymous. It should be mentioned that the concept of "human dignity" was not included as a constitutional value in the Interim Constitution. This constitutional value is included in the 1996 Constitution. The matter of *Williams CC* was decided in terms of that Constitution.

provisions – as far as possible, be in accordance with its broader purposes.¹⁹⁸ Within this context, South African courts should, when determining whether to exclude or admit unconstitutionally obtained evidence, take note of the *aide memoire* provided by Chaskalson P in *Makwanyane*.¹⁹⁹ This is especially important when one takes into account that the *Makwanyane* court was called upon to provide a **remedy** for the vindication of constitutional guarantees – section 35(5) serves the equivalent purpose. It is therefore suggested that South African courts should take note of public opinion when applying section 35(5), without seeking public popularity. Erasmus J is in favour of such an approach to the consideration of the issue of public opinion under section 35(5), as expounded by him in the cases of *Nomwebu*²⁰⁰ and *Soci*.²⁰¹ He mentions that public opinion is influenced by the seriousness of the violation and the seriousness of the charges,²⁰² especially when one has regard to the state of ‘lawlessness’ prevailing in South Africa’.²⁰³ He also refers to Van der Merwe,

¹⁹⁸ See the approach of the European Court of Human Rights in *Klass v Germany*, (1961), Series A, No 28 at par 68, (“*Klass*”), where it was held that the interpretation of a provision of the European Convention must be “in harmony with the logic of the Convention”; see further the Canadian approach in *R v Big M Drug Mart Ltd* (1985) 50 CCC (3d) 1 (SCC), (“*Big M Drug Mart*”) which was adopted by Chaskalson P in *Makwanyane* (fn 19 above).

¹⁹⁹ Kentridge and Spitz “Interpretation” in Chaskalson et al (eds) *Constitutional law of South Africa*, (Rev Serv 1, 1996) at 11-16A, refers to this approach by the Constitutional Court as the “counter-majority dilemma”. This “dilemma” is encountered because a minority (the judges) are empowered to overrule unwarranted legislation or conduct of the majority (politicians representing the majority in Parliament); see also Currie and De Waal (eds) *The Bill of Rights Handbook* (5th ed, 2005) at 10, who describe this attribute of the Constitution in the following terms: “The new Constitution is a democratic pre-commitment to a government that is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of an individual”.

²⁰⁰ Fn 184 above.

²⁰¹ Fn 184 above.

²⁰² The third group of *Collins* factors.

²⁰³ *Nomwebu* (fn 184 above) at 648a-c; *Soci* (fn 184 above) at 295.

where the scholarly writer correctly argues that the public might have a negative perception of the criminal justice system in the event that it is perceived as acquitting a dangerous criminal because of an infringement that could be classified as an insignificant technicality.²⁰⁴ Erasmus J cautions that it is dangerous to ignore such public perceptions. Moreover, the judge reasoned, a consideration of the **prevailing** public mood²⁰⁵ provides a measure of flexibility to the application of the Bill of Rights and public acceptability of the values enshrined in the Constitution. The judge positioned the relevance of public opinion within its proper scope in section 35(5) challenges, when he wrote the following:²⁰⁶

Not that a court will allow public opinion to dictate its decision (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 431C-F). The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial, and *vice versa*. ... It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high-minded values designed to protect criminals from their just deserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish **their** constitutional rights. In other words, the courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man.

²⁰⁴ Loc cit. This was also of concern to the Full Bench in *Desai* (fn 189 above) at 42b-f; see also *Meintjies-Van der Walt* (fn 185 above).

²⁰⁵ *Nomwebu* (fn 184 above) at 648. Compare the Canadian approach, proclaimed in *Collins*, to the effect that the current mood of the public should be considered, only if it is **reasonable**.

²⁰⁶ *Ibid* at 648d-f; *Soci* (fn 184 above) at 295-296. (Emphasis in original).

The approach of Erasmus J complements the dictum of Chaskalson P in *Makwanyane*, while at the same time it is harmonious with the approach of our Canadian counterparts as reflected in the cases of *Collins*,²⁰⁷ *Jacoy*²⁰⁸ and *Feeney*.²⁰⁹ For these reasons, it is suggested that, the dictum of Erasmus J accurately sets out the scope and function of public opinion in terms of section 35(5). Of great value for South African section 35(5) jurisprudence, is the observation by Erasmus J that admissibility rulings should not be premised on public opinion.

Secondly, the contention by Van der Merwe that 'public support for the criminal justice system must be a weighty factor,' should be approached with caution, especially when the second and third groups of *Collins* factors are considered. The undue emphasis on the 'current public mood' may potentially unjustifiably compromise the presumption of innocence in cases where the accused is faced with a serious charge and the the evidence is important for a conviction. This argument is explored under C 3.2 below. Further, there appears to be no convincing reason why the prudent approach by Lamer J in *Collins* to the effect that the courts are customarily the only 'effective shelter for individuals and unpopular minorities',²¹⁰ should not be applicable to South African courts²¹¹ when 'detriment' has to be determined in terms of section 35(5).

²⁰⁷ Fn 1 above.

²⁰⁸ Fn 48 above.

²⁰⁹ Fn 6 above.

²¹⁰ Fn 1 above at par 34.

²¹¹ In this regard, see the approach of Chaskalson P in *Makwanyane* (fn 19 above) dealing with the constitutionality of the death penalty; see also *Melani* (fn 184 above) at 352, where Froneman J correctly concluded as follows: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity"; compare Van der Merwe (fn 8 above) at 324.

The provisions of section 35(5) have been introduced into the Bill of Rights in order to protect persons accused of having allegedly committed a crime, from the power of the majority. Against this background, the protection granted by section 35(5) should not be left to the majority.²¹² No doubt the accused, when faced with the might of the prosecuting authority - with all its expertise and resources, representing the people of South Africa – represents a vulnerable minority. By showing a preparedness to protect the constitutional rights of the accused, South African courts will instil public confidence in the criminal justice system. An unwillingness to do so will produce the opposite result, which would be detrimental to the administration of justice. This argument is further fortified by the supremacy clause,²¹³ which dictates that the Constitution shall be the supreme law in South Africa. In the event that public opinion is in conflict with it, the provisions of the Constitution must prevail.²¹⁴

Thirdly, the approach suggested by Van der Merwe fails to give adequate recognition to the purposes that section 35(5) seeks to protect, under the second and third groups of factors, which is: The protection of fundamental rights, the avoidance of what could be perceived as judicial condonation of unconstitutional police conduct by avoiding the long-term consequences of the regular admission

²¹² See, in this regard, the comments by Chaskalson P in *Makwanyane* (fn 19 above) at par 88, where he reasoned as follows: "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".

²¹³ Section 2 of the Constitution of the Republic of South Africa, 1996.

²¹⁴ Kentridge and Spitz (fn 199 above) at 11-16A, where they argue as follows: "The effect of the supremacy clause is to assign to the courts a role which extends beyond interpreting and enforcing the majority will, to the protection of the fundamental rights of individuals and minorities".

of evidence obtained through a serious constitutional infringement.²¹⁵ It is suggested that an over-emphasis of public opinion, especially during a consideration of the second and third group of factors, would necessarily imply that a consideration of the long-term effect that the regular admission of unconstitutionally obtained evidence would have on the justice system, would be relegated to an insignificant concern when the evidence is important to convict an accused on a serious charge, while the constitutional infringement consists of a deliberate breach.

Moreover, the contention of Van der Merwe was not followed by the majority opinion of the Supreme Court of Appeal in *Pillay*,²¹⁶ where the *Collins* test was adopted to determine whether admission or exclusion would cause 'detriment' to the administration of justice.²¹⁷ Against this background, it is suggested that South African courts should seek guidance from Canadian case law when they assess the task and weight to be attached to the different *Collins* factors.²¹⁸ Such

²¹⁵ See *Collins* (fn 1 above) at par 45; *Buhay* (fn 23 above) at par 90; *Feeney* (fn 6 above) at paras 81 and 83; *Stillman* (fn 6 above) at par 126; *Dyment* (fn 23 above) at 537.

²¹⁶ *Pillay* (fn 2 above) at paras 87 and 97; see also *Melani* (fn 184 above) at 352. Compare the minority opinion of Scott JA in *Pillay* (fn 2 above) at par 126, preferring the approach suggested by Van der Merwe.

²¹⁷ *Ibid* at paras 87 and 97. The cases of *Collins* and *Jacoy* were referred to with approval and followed in *Melani* (fn 184 above), and *M* (fn 184 above).

²¹⁸ *Pillay* (fn 2 above) at par 94, where the majority opinion adopted the Canadian approach of distancing itself from the unconstitutional conduct of the police when the violation is serious, the charges serious and the evidence important for a conviction, the Court declared as follows: "In our view, to allow the impugned evidence derived as a result of a serious breach of accused 10's constitutional right to privacy might create an incentive to law enforcement agents to disregard accused person's constitutional rights ..."; and at par 97 the majority judgment stated as follows: "Lamer J, in the *Collins* [sic] case (at 138), says the question under section 24(2) of the Charter is whether the system's repute will be better served by the admission or exclusion of the evidence. Our view is that the same applies under section 35(5) of the Constitution. Although it

an approach would give effect to the purposes that section 35(5) seeks to achieve. To be precise: Although section 35(5) does not serve as a deterrent for police misconduct,²¹⁹ it does serve a regulatory purpose, since one of its primary aims under the second and third groups of factors is to avoid the long-term effect of the regular admission of evidence procured as a result of serious constitutional infringements.²²⁰ By apportioning undue weight on the 'current public mood' when the constitutional infringement is serious, the evidence important for a successful prosecution and the accused is faced with a serious charge, would in effect convey the unbecoming message that the courts are affixing their stamps of approval to such constitutional infringements.²²¹ Moreover, if that were to be the case, the educational role of the courts would be downgraded so as to fade into obscurity.²²² To be sure, such a result would not be in conformity with one of the explicit purposes that section 35(5) seeks to achieve: the prevention of disrepute to the justice system.

may cause concern that a perpetrator such as accused 10 might go free as a result of exclusion of evidence which would have secured her conviction ...”.

²¹⁹ *Pillay* (fn 2 above) at par 92.

²²⁰ *Ibid* at par 94, where the majority opinion adopted the judicial integrity rationale (in respect of the second and third group of factors), in the following terms: “That result – of creating an incentive for the police to disregard accused person’s constitutional rights in cases like the present where a judicial officer is misled – is highly undesirable and would, in our view, do more harm to the administration of justice than enhance it”; and at par 97 they said the following after having considered the seriousness of the infringement and the costs of exclusion: “The police, in behaving as they did ... and the courts sanctioning such behaviour, the object referred to will in future be well nigh impossible to achieve”; see also *Collins* (fn 1 above) at par 31 and 45.

²²¹ *Pillay* (fn 2 above) at par 97; *Fenton* (fn 20 above) at 310-311.

²²² Per Erasmus J in *Nomwebu* (fn 184 above) at 422; see also *Soci* (fn 184 above); see also Schwikkard “Evidence” in Woolman et al (eds) *Constitutional Law of South Africa* (Vol 3, 2nd ed, 2007) at 52-62.

Fourthly, the undue emphasis on public opinion during the assessment of the second and third groups of factors may disturb the essential structure designed for the admissibility analysis as suggested in *Collins*²²³ and *Pillay*.²²⁴ Such a re-orientation of the character of the section 35(5) discretion could in turn provide judges with the latitude to determine the admissibility issue based on his or her subjective views of the 'current mood' of society. In such circumstances, the possibility remains that the purposes sought to be achieved by section 35(5) might be disturbed.²²⁵ Ostensibly with the aim to prevent the personal perspectives of judges to interfere with their section 35(5) assessments, the *Collins* judgment commands that judicial officers should refer to what they conceive to be the views of society at large, bearing in mind that they do not have an unfettered discretion: A presiding officer should constantly remind herself or himself that²²⁶

... his [or her] discretion is grounded in community values. He [or she] should not render a decision that would be unacceptable to the community when the community is not being wrought in passion or otherwise under passing stress due to current events.

This dictum of Lamer J in *Collins* clearly indicates that public attitudes towards exclusion or admission does matter²²⁷ when a court determines the second leg of

²²³ Fn 1 above.

²²⁴ Fn 2 above.

²²⁵ See, for example the approach in *Shongwe* (fn 5) above)

²²⁶ Fn 1 above at par 34; see *Melani* (fn 184 above) at 352, where this dictum was quoted with approval.

²²⁷ The South African High Court adopted this approach. See, for example, *Melani* (ibid) at 297, where the court dealt with the function of public opinion and its role in the admissibility assessment when the charges are of a serious nature as follows: "At the time of delivery of this judgment it is, I think, fair to say that there is a widespread public perception that crime is on the increase ... I venture to suggest that a public opinion poll would probably show that a majority of

the admissibility inquiry, provided that the 'current mood' of society could not be characterised as unreasonable.²²⁸ What could be categorised as unreasonable

our population would at this stage of the history of our country be quite content if the courts allow evidence at a criminal trial, even if it was unconstitutionally obtained". Furthermore, Froneman J, in *Melani* at 352, was mindful of the fact that the "current public mood" of the public towards unconstitutionally obtained evidence favoured the inclusion of evidence, but declined to be bound by such public attitudes, and observed as follows: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity"; compare *Ngcobo* (fn 184 above) at 1254, where Combrinck J emphasised the importance of the "current mood" of society towards the exclusion of relevant and reliable evidence when the violation was **not deemed to be of a serious nature**. He was of the view that the public at large should have confidence in the criminal justice system and that such confidence is "... eroded where courts on the first intimation that one of the accused's constitutional rights has been infringed excludes evidence which is otherwise admissible". See further *Malefo* (fn 184 above) at 151, where the court initially made the statement that courts must "enjoy public support", but at 155 the emphasis is adjusted to the view held in *Collins*. The court held that the "current mood of society" should be "reasonable", while having due regard to "long-term values" of society; see further *Nomwebu* (fn 184 above) at 1660-1661; *Soci* (fn 184 above) at 295; *Naidoo* (fn 184 above) at 531; *Mphala* (fn 189 above) at 400; *Pillay* (fn 2 above) at par 92, where Mpati DP and Motata AJA wrote as follows: "...the concept of disrepute necessarily involves some element of community views ..."; however, compare *S v Desai* 1997 (fn 189 above) at 42, where the Full Bench emphasised the importance of public attitudes towards the exclusion of evidence as follows: "Victims and those around them, and also society at large have an interest which is real and legitimate" in the outcome of a criminal trial; see also the view of the minority dissenting opinion of Scott JA, in *Pillay*, where the judge referred to *Makwanyane* (fn 19 above) and in particular the caveat issued by Chaskalson P regarding the dangers of relying on public opinion when interpreting the South African Constitution. Scott JA at par 126, confirming the view of Van der Merwe, distinguished the said approach from an interpretation of section 35(5) and concluded that: "It seems to me, however, that the very nature of the second leg of the inquiry postulated in section 35(5) of the Constitution contemplates a reference to **public opinion**. It must, **at least**, therefore constitute an **important** element of the inquiry". (Emphasis added).

²²⁸ See *Collins* (fn 1 above) at par 33-34.

should not be left to the all-encompassing discretion of the presiding officer.²²⁹ A presiding officer should always be mindful of the fact that he or she is interpreting a constitutional provision and his or her conclusion should therefore demonstrate that due regard has been given to the values that underpin the Constitution.²³⁰

To summarise, the concepts of 'disrepute' and 'detriment' aim to achieve a similar purpose. Public opinion does matter when South African courts have to determine whether admission or exclusion of evidence could be detrimental to the administration of justice. However, the decision to admit or exclude, should not be based on the 'current mood' of society. The public at large should be confident that the criminal justice system functions effectively by prosecuting and convicting those guilty of committing criminal offences. Yet this does not mean that the courts should sacrifice 'constitutional principle to the demands of expediency'.²³¹ The failure by South African courts to demonstrate a willingness to uphold constitutional rights, particularly when the infringement is regarded as serious, could have a detrimental effect on the criminal justice system. The discretion to admit or exclude evidence should, in the South African context, reflect due regard for the protection of the fundamental rights enshrined in the Constitution, recognise the values underpinning the Bill of Rights, and give effect

²²⁹ Loc cit.

²³⁰ Compare *Mkhize* (fn 184 above) at 637, where Willis J, writing a unanimous judgment for a Full Bench, made the following disturbing comments: "It seems to me that the provisions of the Act relating to the obtaining of search warrants are there not for the purposes of ensuring the fairness of the trial of an accused person but to protect the ordinary law-abiding citizens of our land from abuse of the formidable powers which the police necessarily have". This dictum begs the question: does the constitutional guarantee of the presumption of innocence serve any meaningful purpose in terms of the South African Bill of Rights? Compare the dictum of Erasmus J in *Nomwebu* (fn 184 above) at 422, to the effect that everyone is entitled to the protection provided by the rights in the Bill of Rights.

²³¹ Schwikkard (fn 185 above) at 795.

to the purposes that section 35(5) seeks to achieve. If South African courts take rights protection seriously, they will ensure that the significance of these factors is not undervalued.

2. The seriousness of the constitutional violation in South Africa

In this part of the work, the seriousness of the constitutional infringement is explored, followed by a discussion of the good faith exception. The following issues are the key focus areas: What factors should be taken into account when the seriousness of the constitutional infringement is determined? Is the nature of the evidence – real, reliable or testimonial compulsion – determinative of the classification of the infringement as either serious or trivial? Would South African courts, like their Canadian counterparts, be reluctant to classify the infringement as serious when the disputed evidence is real, reliable evidence that does not impact negatively on trial fairness and there is no indication that police abuse was the cause of its discovery? Put differently, would South African courts be more amenable to classify the infringement as serious when the disputed evidence constitutes testimonial compulsion? The phrase 'having regard to all the circumstances' which appears in section 24(2), does not appear in section 35(5). Do the South African courts have to consider all the circumstances surrounding the constitutional breach when making this assessment? What is the impact of this phrase on the admissibility assessment? An important issue considered here, is whether an honest belief by the police that they acted lawfully when the infringement occurred, should be regarded as a good faith violation.

2.1 Ascertaining the seriousness of the violation in South Africa

How should the seriousness of a violation be determined? The seriousness of a constitutional infringement depends on the facts of each case. A review of Canadian case law has shown that the absence or presence of good faith on the part of the police is a compelling indicator as to whether the infringement should be typified as serious, flagrant, deliberate or trivial, inadvertent, or of a technical nature. Exclusion of evidence obtained as a result of a trivial infringement, when the evidence is reliable and necessary to secure a conviction, would be detrimental to the administration of justice.²³² For this reason the classification of the infringement as either serious or trivial, is an important part of the assessment in the section 35(5) analysis. The classification of a violation as serious is a significant step in justifying its exclusion, because its admission would be regarded as judicial condonation of unconstitutional conduct.²³³ By

²³² See *Mark* (fn 184 above) at 578; see also Meintjies-Van der Walt (fn 185 above) at 87.

²³³ *Mphala* (fn 184 above) at 400, where Cloete J confirmed this position as follows: "I cannot accept that the conduct of the investigating officer was anything but intentional. In such a case the emphasis falls on the 'detrimental to the administration of justice' portion of s 35(5) and the disciplinary function of the Court, set out in the judgment of Tarnopolsky JA in *R v James; R v Dzagic* (1988) 33 CRR 107, (which has twice been approved by the Constitutional Court – in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) and *Keys's case supra* becomes important: 'The object of the Charter is not to make the obtaining of evidence or the getting of a conviction easier or more difficult, it is not intended to help people get acquittals or the Crown to succeed in its prosecutions, but rather to induce legislatures and government agents to respect the rights and freedoms set out therein, with notice as to the consequences of invalidity that follow any contrary action.'" See further *Malefo* (fn 184 above) at 148; *Pillay* (fn 2 above) at paras 94 and 97; *Hena* (fn 184 above) at 42. For an analogous approach in common law jurisdictions, see *The People v O' Brien* [1965] IR 142, ("*O' Brien*"), where Kingsmill Moore J reasoned as follows at 162: "... where evidence has been obtained ... as a result of deliberate and conscious violation of the constitutional (as opposed to the common law) rights of an accused person it should be excluded save where there are 'extraordinary excusing circumstances' ...". For

contrast, the categorisation of an infringement as non-serious is, in general, an important step to account for the reception of the disputed evidence, especially when the accused faces serious charges and the evidence is reliable and essential for a conviction.²³⁴

It is suggested that, having regard to the purpose that the right to legal representation seeks to achieve, a violation thereof should, in general, be regarded as a serious violation.²³⁵ The fact that the infringement is categorised

the position in England and Wales relating to exclusion when a serious infringement has occurred, see chapter 3.

²³⁴ See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

²³⁵ *Mphala* (fn 184 above) at 399-400. The manner in which the right to legal representation was violated in this case caused the court to categorise it as a deliberate and therefore, a serious infringement. Cloete J highlighted the seriousness of the violation as follows: "The State would not have been in possession of confessions which implicate the accused to the hilt and which, if admitted, would probably be decisive of their guilt, but for the fact that the Investigating Officer caused the confessions to be taken ... (a) at a time when he knew that the accused's attorney did not wish them to make any statement before consulting with him ... (b) without informing the accused of that fact and the fact that their attorney was on the way; and (c) after he had misled their attorney as to the time when the statements would be taken (obviously with the view to ensuring that the statements would be made before the attorney arrived) ...". The conduct of the police officer was categorised as a "**deliberate**" infringement, calling upon the court to exercise its "disciplinary function"; see also *Melani* (fn 184 above), where evidence of a pointing-out – the court emphasised the purpose of the right to legal representation – was excluded; *Soci* (fn 184 above), where evidence of a pointing-out, after a violation of the right to legal representation was not consciously violated, was nevertheless excluded; *Mfene* (fn 184 above), where the accused was not informed of his right to legal representation at governmental expense and the evidence of a pointing-out was excluded; *Gasa* (fn 184 above), the right to legal representation at state expense was infringed and the evidence obtained was excluded; *Seseane* (fn 184 above), where it was held that a ploy used by the police, practised over a long period, that was designed to obtain incriminating evidence from an accused without informing her of her fundamental rights which serve to protect her against self-incrimination, as sufficiently serious to warrant exclusion of the conscripted evidence. Compare *Malefo* (fn 184 above), where the

as serious, calls upon the prosecuting authority to present evidence showing that the police acted in good faith, or on the grounds of urgency or necessity.²³⁶ These factors have an extenuating effect on the seriousness of the infringement.

An assessment of the police conduct in the entire chain of events leading to the infringement and discovery of the evidence is central to this issue.²³⁷

In *Seseane*,²³⁸ Pretorius AJ appropriately held that a tactic used by the police, established over a prolonged period and which was designed to obtain incriminating evidence from an accused without informing her of her fundamental rights which serve to protect her against self-incrimination, as

offences were allegedly committed by the accused which had occurred before the Interim Constitution came into force, but the trial commenced thereafter. For the reason that the accused merely suggested hypothetically and in passing that their right to legal representation had been infringed, without mentioning what effect such infringement had on trial fairness, it was held that admission of the disputed evidence would not be detrimental to the administration of justice. It is suggested in chapter 4 C 4 that admission of the evidence would, on a sound legal basis, have been "detrimental" to the justice system, despite the fact that its admission would have tended to render the trial unfair; see further *Shongwe* (fn 5 above), where the accused was not advised of his right to legal representation at state expense and the consequences of making a statement was not conveyed to him before his statement was taken. Furthermore, before he was taken to make a pointing-out, he was not informed of the right to legal representation. The violations were held not to be sufficiently serious to warrant exclusion of evidence essential for a conviction.

²³⁶ For a discussion of these factors, see Roach (fn 11 above) at 10-69-82; Van der Merwe (fn 8 above) at 179-186, and 241-344.

²³⁷ *Mark* (fn 184 above); *Agnew* (fn 184 above); *Seseane* (fn 184 above); *Madiba* (fn 184 above); *Soci* (fn 184 above); *Mkhize* (fn 184 above); *Pillay* (fn 2 above); *Hena* (fn 184 above). See also Roach (fn 11 above) at 10-67, and 10-79.

²³⁸ Fn 184 above; see also *Agnew* (fn 184 above), where a tactic used by the police to avoid the attorney of the accused with the aim of obtaining a confession, Foxcroft J labeled the police conduct as a **flagrant** breach of the accused's right to silence; *Motloutsi* (fn 184 above); *Naidoo* (fn 184 above).

sufficiently serious to warrant exclusion of the conscripted evidence.²³⁹ The gist of this judgment suggests that admission of evidence obtained as a result of a conscious and deliberate infringement would be tantamount to judicial condonation of unconstitutional conduct. The police conduct could not be described as an infringement committed in good faith, inadvertently or negligently. The evidence was accordingly excluded so as to avoid giving the police an incentive to continue this mischief. However, when the violation is not adjudged to be of a serious nature and the evidence important for a successful prosecution, exclusion would be detrimental to the administration of justice.²⁴⁰

The nature of the disputed evidence, in *Pillay*, was reliable real evidence. The majority opinion of the Supreme Court of Appeal in *Pillay*,²⁴¹ embraced the *Collins*²⁴² approach by considering and balancing the different factors mentioned in *Collins* to determine whether the admission or exclusion of the challenged evidence would bring the administration of justice into 'disrepute'.²⁴³ Considering the seriousness of the violation, Mpati DP and Motata AJA, followed Canadian

²³⁹ *Seseane* (ibid) at 230*f-g* and 231*c-d*. It must be mentioned that the court endorsed the prejudice model advocated by Van der Merwe.

²⁴⁰ See the minority judgment in *Pillay* (fn 2 above) at par 127, where Scott JA correctly summarised the position as follows: "At the other end of the scale the refusal to admit derivative evidence on the grounds of some technical infringement of little consequence, would be no less detrimental to the administration of justice"; see also *Melani* (fn 184 above) at 191H-J, where Froneman J held that because the police could not, at the time of the violation, have foreseen what provisions would be contained in the Bill of Rights, it could not be said that the violation was serious; see also Meintjies-Van der Walt (fn 185 above) at 87; see further Skeen (1988) 3 *SACJ* 389 at 405.

²⁴¹ *Pillay* (fn 2 above); also *Soci* (fn 184 above) at 295.

²⁴² Fn 1 above.

²⁴³ Fn 2 above at par 93 to 95. The second and third group of *Collins* factors were considered and balanced to determine whether admission of the evidence would be detrimental to the justice system. Compare the recommendation contained in chapter 6 of this thesis that all the factors, that is, the first, second and third groups of factors, should be considered and balanced.

precedent²⁴⁴ by taking into consideration the police conduct during the *entire* investigation process²⁴⁵ – unlike the approach of the dissenting minority opinion²⁴⁶ – to assess this group of factors. This approach of the majority judgment is predicated upon its pronouncement that despite the fact that section 35(5) does not direct South African courts to consider ‘all the circumstances’,²⁴⁷ logic dictates ‘that all relevant circumstances should be considered’²⁴⁸ to determine whether admission or exclusion of the disputed evidence would be detrimental to the administration of justice. The majority opinion declined to accept any suggestion that the constitutional violation should be labeled as ‘merely technical’ in nature, because some of the information contained in the

²⁴⁴ See the approach adopted by the Supreme Court of Canada in *Strachan* (fn 23 above).

²⁴⁵ Fn 2 above at par 93, the majority opinion was the following: “In the present case the infringement of accused 10’s right to privacy through the illegal monitoring was quite serious when looked at from the point of view of *how* the direction to monitor was procured”. (Emphasis added). See also *Naidoo* (fn 184 above) at 530.

²⁴⁶ See the approach of Scott JA (dissenting) in *Pillay* (fn 2 above) at 133, preferring to focus on the conduct of the police after the warrant had been obtained - in accordance with the approach of the courts in the USA - therefore concluding that the violation had been serious, but that the police officers who monitored the conversation had not acted *mala fide*. The judge arrived at this conclusion by separating the conduct of police officers who applied for a monitoring court order, from that of the members who actually monitored the conversations. Scott JA reasoned at paras 129-130, that the police officers who monitored the conversations “neither had sight of the application [authorising the monitoring of conversations]” and “[a]t all times while listening to the tape recordings of the telephone conversations and acting on the information obtained, they were bona fide in their belief that a valid monitoring order had been granted authorising them to proceed as they did”.

²⁴⁷ This phrase is contained in section 24(2) of the Charter, but not in section 35(5) of the South African Constitution.

²⁴⁸ Fn 2 above at par 93.

application for a monitoring order was 'patently false' and some of which was 'downright misleading'.²⁴⁹

The majority judgment in *Pillay* added that the seriousness of the violation was aggravated by the fact that another investigating technique,²⁵⁰ for example, surveillance of the houses of the suspects, was available to procure the evidence in a constitutional manner.²⁵¹ The availability of constitutional means to procure the disputed evidence suggests that the police acted in an unacceptable manner by obtaining the evidence in a manner which they did. The fact that they could have achieved the same result in a lawful manner, only adds to the seriousness of the violation.²⁵² This approach of the Supreme Court of Appeal is comparable to that of the Supreme Court of Canada in *Collins*²⁵³ and *Kokesch*.²⁵⁴ By contrast,

²⁴⁹ Loc cit; see also *Melani* (fn 184 above) at 352, in a matter decided before the existence of s 35(5), where Froneman J underscored the seriousness of the violation as follows: "Infringements of fundamental rights resulting in an accused being conscripted against himself through some form of evidence emanating from himself would strike at one of the fundamental tenets of a fair trial, the right against self-incrimination".

²⁵⁰ See also *Motloutsi* (fn 184 above) at 87, where Farlam J, based on *The People v O'Brien*, held that where a police officer, acting beyond the bounds of the search warrant provisions of the Criminal Procedure Act when he searched the premises rented by the accused, without a warrant and without consent, constituted a **serious violation**, because he could have obtained a warrant from a senior officer. The availability of lawful means to obtain the evidence, but not employed by the police, only adds to the seriousness of the infringement.

²⁵¹ Fn 2 above at par 93; see also *Hena* (fn 184 above) at 40; compare *Mkhize* (fn 184 above) at 638e, the Full Bench reasoning that the fact that alternative means to procure the disputed evidence were available is not decisive. Police failure to follow lawful procedural rules was deemed a "technical and inadvertent" violation which does not call for exclusion of the disputed evidence.

²⁵² Loc cit. The majority judgment approved of this approach proclaimed in *Collins*, arguing that "the fact that the evidence could have been obtained without the infringement tend to render the violation of the right more serious".

²⁵³ Fn 1 above.

Scott JA, writing a minority dissenting opinion in *Pillay*, was of the view that the illegal monitoring was 'perhaps not the only possible course', but certainly 'the most expeditious course to solve one of the most successful and daring robberies in South Africa'.²⁵⁵ This view of the minority opinion could be read as suggesting that the urgency of the detection and apprehension of the suspects,²⁵⁶ against the background of the high level of the crime rate in South Africa and the

²⁵⁴ Fn 23 above; see also *Dyment* (fn 23 above).

²⁵⁵ *Pillay* (fn 2 above) at par 132.

²⁵⁶ Compare the approach to the evaluation of "exigent circumstances" by Sopinka J, writing the majority opinion in *Feeney* (fn 6 above) at 168 where he stated the following: "The respondent [prosecution] also argued that there were exigent circumstances in this case, which, according to *Silveira, supra*, may be a relevant consideration in a s. 24(2) analysis. As discussed above, in my view exigent circumstances did not exist in this case any more than they would exist in any situation following a serious crime. After any crime is committed, the possibility that evidence might be destroyed is inevitably present. To tend to admit evidence because of the mitigating effect of such allegedly exigent circumstances would invite the admission of all evidence obtained soon after the commission of a crime"; see, however, the comments by L'Heureux-Dube J, writing a dissenting minority opinion in *Feeney*, at par 156, where she formulated the grounds why she disagrees with Sopinka J as follows: "In my view, where there is a genuine fear that evidence of the crime will be lost, this can constitute the necessary exigent circumstances for a warrantless entry". The judge, at par 160, held that exigent circumstances did exist in this case, having regard to the fact that "... the police were pursuing the offender a short time after the occurrence of the crime. They had every reason to believe that the killer, if apprehended quickly, would still have blood stains on him, which would be important evidence". The judge cited with approval, case law of the USA which re-enforces her contention: *People v Johnson* 637 P2d 676 (Cal. 1981) and *People v Williams* 641 NE 2d 296 (1994). The passage quoted by L'Heureux-Dube J from this United States case illustrates the point made by her. She argued as follows at par 166: "The crime involved was of the most serious nature, involving unprovoked, deadly violence against the victim. From the time of the murder until defendant's arrest only 27 hours later, the police conducted an around-the-clock investigation, acting on every lead without delay ... Defendant's argument that, given the time lapse between Golden's statement and his arrest, the police could have obtained an arrest warrant is unpersuasive ... The officers clearly acted without delay in initiating efforts to apprehend defendant following receipt of information from Golden concerning defendant and his possible whereabouts".

prevalence of armed robberies,²⁵⁷ rendered the police conduct less blameworthy. The opinion of Roach,²⁵⁸ to the effect that a 'general concern and fear' should not justify any constitutional infringement is preferred above that suggested by Scott JA. Roach is correct in the view that urgency should not be an 'at-large excuse' for constitutional violations and suggests that there should be a rational connection between the violation and legitimate police concerns that explain why compliance with the Constitution was not possible.²⁵⁹ Based on the reasoning above,²⁶⁰ Scott JA concluded that the exclusion of the disputed evidence would, 'in the eyes of reasonable and dispassionate members of society' result in a 'loss of respect for not only the judicial process but the Bill of Rights itself'.²⁶¹

Proceeding with their evaluation of the seriousness of the violation, the majority opinion took into consideration the fact that the violation of the rights of the accused 'did not end with the unlawful monitoring' of her conversations. Added to this, the police officers, assumedly aware of the fact that they were not armed with a search warrant,²⁶² persuaded the accused to tell them where the money

²⁵⁷ Ibid at par 133.

²⁵⁸ Fn 11 above at 10-82.

²⁵⁹ Loc cit. Roach argues that the police should therefore provide evidence as to why compliance with a particular constitutional right in urgent circumstances would be inconsistent with legitimate police concerns. He bases his opinion on *Grefe* (fn 23 above), where the Supreme Court held that urgency did not justify a rectal search - the preferred course would have been to detain the suspect to "facilitate the recovery of the drugs through the normal course of nature", as well as the principle enunciated in *Strachan* (fn 23 above); see also the reasoning in *Stillman* (fn 6 above) at par 126. In the South African context, see *Madiba*, (fn 184 above), where the approach suggested by Roach was applied in relation to a violation of the right to privacy.

²⁶⁰ As well as a balancing exercise with the third group of *Collins* factors, ie the effect of exclusion on the administration of justice system. The third group of factors is discussed in this chapter under 3 below.

²⁶¹ Fn 2 above at par 133.

²⁶² Ibid at par 95. This is indicative of the fact that more than one infringement occurred.

was hidden, while 'giving her the undertaking that she would not be prosecuted'.²⁶³ This promise, the majority opinion concluded, was motivated by the aim to arrest the 'prime suspect', one Naidoo. Having regard to public policy, calling on citizens to report crime in order to prosecute and convict the prime suspects of serious crime, the majority opinion posed the following rhetorical question, while in this fashion underlining the seriousness of the infringement as tantamount to an abuse of governmental power designed to achieve unwarrantable self-incrimination:²⁶⁴

Can it ever be in the public interest, in a crime ridden society like ours, and where members of the public are urged to assist in combating crime by reporting it, to charge someone after having given him/her an undertaking that he or she would not be charged in the event of him or her disclosing a fact which, though prejudicial to him or her, will bring perpetrators of serious crime to book? We think not. In our view such conduct would be more harmful to the justice system than advance it.

This dictum is evidence of the fact that the judicial integrity rationale should in future be a prominent consideration in the interpretation of section 35(5) whenever unwarranted police conduct is labelled as a serious violation of constitutional rights. Highlighting the interests that section 24(2) serves to protect, and concluding that section 35(5) serves an indistinguishable purpose,²⁶⁵ the majority opinion arrived at the following conclusion:²⁶⁶

²⁶³ Loc cit; and (ibid) at par 96, where the seriousness of the violation was re-iterated as follows: "And what transpired in accused 10's house should not be considered in isolation, as if removed from the original violation of accused 10's right to privacy, ie the illegal monitoring of her telephone communications".

²⁶⁴ Ibid par 96.

²⁶⁵ Ibid par 97. Both sections call upon courts to determine whether admission or exclusion of the disputed evidence would better serve the repute of the administration of justice.

The police, in behaving as they did ... and ***the courts sanctioning such behaviour***, the objective referred to will in future be well nigh impossible to achieve. To use the words of section 35(5) of the Constitution it will be detrimental to the administration of justice.

Despite a clear rejection of the deterrence rationale,²⁶⁷ the majority opinion extensively scrutinised the police behaviour which led to the discovery of the evidence in concluding that the violation was serious.²⁶⁸ This approach is correct,²⁶⁹ because in order to determine whether the violation should be classified as serious, inadvertent, or committed in good faith, it would be essential to scrutinise the police conduct in the entire investigating process. For the reason that the infringement was typified as serious, the majority opinion was evidently concerned with future police compliance with the Constitution. This is borne out by the fact that when they assessed the 'detriment' requirement, they reasoned that, by admitting the evidence the court would be 'sanctioning such behaviour'²⁷⁰ which in turn, would provide an 'incentive for the police to disregard an accused person's constitutional rights'.²⁷¹ Mpati DP and Motata AJA thus conveyed the message that the courts should not associate themselves with police misconduct that could be characterised as a serious violation of

²⁶⁶ Ibid at par 97. (Emphasis added).

²⁶⁷ Ibid at par 92. The deterrence rationale was rejected and the court endorsed the *Collins* approach.

²⁶⁸ Ibid at paras 93, 95, and 96. Compare the conclusion of Scott JA in *Pillay*, at par 132, to the effect that the violation (the illegal monitoring), "though serious, cannot be said to be *mala fide*, because the police officers who monitored the conversations were not aware of the fact that the monitoring order had been illegally obtained and the monitoring police officers therefore acted "in the bona fide and reasonable belief that they were authorised to do what they did".

²⁶⁹ See also Roach (fn 11 above) at 10-79, who is of the same opinion.

²⁷⁰ Fn 2 above at par 97.

²⁷¹ Ibid at par 94.

constitutional rights - even when it means that a 'perpetrator of serious crime goes free as a result of exclusion of evidence which **would have secured her conviction**'.²⁷² The *Pillay* judgment clearly suggests that the long-term effect of the regular admission of evidence obtained after a serious constitutional infringement (as opposed to the 'current mood' of society) should be of primary concern to South African courts when they consider the second and third group of factors.²⁷³

It is important to note that the *Pillay* court excluded real, reliable evidence, essential for a conviction on serious charges, only after the court demonstrated that the infringement of the right to privacy (which, viewed independently, was considered a serious infringement) did not occur in isolation: additional unwarranted police conduct²⁷⁴ only aggravated the seriousness of the violation.

In *Naidoo*,²⁷⁵ the case that preceded *Pillay*, the evidence in dispute were illegally monitored telephone conversations. The evidence was excluded because its admission, it was held, would render the trial unfair.²⁷⁶ The court further held, obiter, that it would have excluded the evidence even on the ground that its reception would be detrimental to the administration of justice. McCall J held that the irregularities relating to the obtainment of the monitoring order was a serious infringement of the right to privacy, for the reason that a judge was misled in

²⁷² Ibid at par 97. (Emphasis added).

²⁷³ See – in Canadian context – cases confirming this view, *Buhay* (fn 23 above) at par 70; *Feeney* (fn 6 above) at par 80; *Stillman* (fn 6 above) at par 126.

²⁷⁴ The undertaking not to prosecute the accused was breached despite the fact that public policy encouraged suspects to co-operate with governmental agents in order to convict the kingpins of crime. Added to this, the evidence could have been obtained by lawful means, but the police failed to make use of such options. Moreover, more than 1 right was violated.

²⁷⁵ Fn 184 above.

²⁷⁶ Ibid at 532.

order to obtain the order.²⁷⁷ The court acknowledged that the evidence was important for a conviction on a serious charge.²⁷⁸

In *Hena*,²⁷⁹ the two accused were charged with two counts of rape, as well as robbery with aggravating circumstances. These charges were by their very nature, serious accusations leveled against the accused, especially when one considers that the culprits had unprotected sexual intercourse with the complainants. The following facts were not in dispute in this matter: The two female complainants were accosted at night by three men, armed with knives. The culprits stole two mobile phones, money and jewellery, using their knives as a threat to rid the complainants of their property. The complainants were ordered to enter a church. There, the three men raped them. The identity of the culprits was the principal issue during the trial. However, accused 2 was linked to the crime by means of DNA evidence. Accused 1 could not be connected to the crime by means of DNA evidence. The prosecution based their case against accused 1 on the 'doctrine of recent possession'.²⁸⁰ Based on this doctrine, it was argued that the fact that accused 1 was in possession of the stolen mobile phone shortly after the crimes were committed, the only inference that could be drawn was that he was one of the three culprits who committed the offences. The judgment essentially dealt with the admissibility of the evidence that linked accused 1 to the crimes.

²⁷⁷ Ibid at 530.

²⁷⁸ Ibid at 530-531.

²⁷⁹ Fn 184 above.

²⁸⁰ See, in this regard, *R v Chetty* 1943 AD 514, ("*Chetty*"); *S v Skweyiya* 1984 4 SA 712 (A), ("*Skweyiya*"). See further Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 373.

The court extensively analysed the circumstances that connected accused 1 to the crimes:²⁸¹ The circumstances are the following: Approximately a week after the incident, one of the complainants received information that a person had sold a mobile phone to certain Khayaletu Lucas (hereinafter referred to as "Lucas"), a person at that stage unknown to the complainant. The complainant conveyed this information to a member of a local anti-crime committee. The anti-crime committee member, together with other members, as well as the two complainants went to the house of accused 1. He was placed in the boot of a car and taken to the offices of the anti-crime committee, where members of the committee subjected him to continued interrogation and assaults. Eventually, accused 1 took the members of the committee to Lucas. Lucas produced the mobile phone, which was identified by the complainant as her property.

In court, Lucas testified that accused 1 and 2, together with a third person offered the mobile phone for sale. He took it, but refused to pay any sum of money, informing the three persons that he would keep and later return it to its owner. The admissibility of the *testimony* given by Lucas was attacked by accused 1 in terms of section 35(5) on the basis that it was derived from unconstitutionally obtained evidence. This type of evidence is classified as derivative evidence, because the testimony of Lucas existed regardless of the infringements suffered by the accused. It should therefore be treated the same as real evidence, derived from testimonial compulsion.²⁸²

The court held that the evidence had been obtained in an unconstitutional manner, because the anti-crime committee 'acted in a capacity similar to agents of the police conducting the investigation on their behalf'.²⁸³ Plasket J proceeded

²⁸¹ This approach is in conformity with *Pillay* and *Strachan*, although these cases were not referred to.

²⁸² Wiseman (fn 20 above) at 466-468.

²⁸³ Fn 184 above at 40.

to consider the second leg of the section 35(5) inquiry, without having considered whether admission of the evidence would render the trial unfair.²⁸⁴ In considering whether admission of the evidence would be detrimental to the administration of justice, the court took into account a number of factors,²⁸⁵

²⁸⁴ When the *Stillman* fair trial framework is applied, it is submitted that the fair trial assessment could conceivably not have resulted in the finalisation of the admissibility determination (even if the presumption in favour of exclusion was applied – see chapter 4 in 4.2, under the heading “The presumption in favour of exclusion”), for the reason that: Firstly, the **testimony** of Lucas was not a product of the accused’s mind or body. Secondly, the assaults may have been a ‘sufficient’ cause for the discovery of Lucas, but it was not the ‘**necessary**’ cause for his **testimony**. (See Wiseman fn 20 above at 466-468: “It is important to remember that not all live testimony is the result of something the accused has created. If someone witnesses an event and the Crown wishes to call that person, then that person’s testimony is, in effect, no different than real evidence – the witness existed regardless of the illegal behaviour of the state actor or actors, and the illegality merely helped the Crown locate the witness”). Furthermore, and unrelated to the fair trial assessment, it could be argued that the link between the infringement and his testimony was “too remote” – the reliance by the prosecution on the absence of a causative link between the infringement and the discovery of the live testimony of Lucas would in all probability have finalised the issue without the court having to consider the section 35(5) assessment, for lack of compliance with this threshold requirement. (See the discussion of *R v Goldhart* in chapter 3 par C – at 496 of the judgment – where the following argument from the judgment of Rehnquist J in *US v Ceccolini* (1978) 435 US 268 at 276-277 (“*Ceccolini*”), was quoted with approval by Sopinka J: “Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than any other kinds of evidence”. Compare *Mthembu v S* (64/2007) [2008] ZASCA 51 (10 April 2008), where a prosecution witness was tortured in order to obtain incriminating evidence against the accused; see further Fenton (fn 20 above) at 282-299).

²⁸⁵ Fn 184 above at 41, the judge considered the following factors, but emphasised that the exercise of the discretion is not limited to a consideration of these: (a) the absence or presence of good faith; (b) public safety and urgency; (c) the nature and seriousness of the violation; (d) the availability of lawful means of securing the evidence; (e) whether or not the impugned

frequently considered by Canadian courts under the second and third group of *Collins* factors.²⁸⁶

The court in *Hena* classified the violation as serious,²⁸⁷ because there was no evidence to the effect that the unconstitutional conduct was necessitated by public safety concerns or urgency.²⁸⁸ In light hereof, *Hena* can be read as postulating that, depending on the circumstances, the absence of public safety

evidence is real evidence; and (f) whether or not the evidence would have been discovered without a violation.

²⁸⁶ See, for example, *Jacoy* (fn 23 above) at 298, where the following was said: “The second set of factors concerns the seriousness of the violation. Relevant to this group is whether the violation was committed in good faith, whether it was inadvertent or of a merely technical nature, whether it was motivated by urgency or to prevent the loss of evidence, and whether the evidence could have been obtained without a Charter violation”.

²⁸⁷ Fn 184 above at 42; see also *S v M(N)* (fn 184 above): The investigating officer approached a defence witness with the sole aim of intimidating him to change his testimony in court, to the prejudice of the accused. The witness disclosed this to court. The court held that the police conduct could not be regarded as inadvertent or of a mere technical nature or in compliance with the requirements of urgency. It was further held that the accused’s right to challenge and adduce evidence had been violated. As a result, the court held, at 489, that the violation was serious and the conduct of the officer labelled as *mala fide*. Furthermore, the court quoted McQuoid-Mason at 488, and held that the evidence should be excluded, because courts should not be seen to “encourage or even condone the violation of the rights of suspects in the course of the investigative process”. However, this case was overruled by the Supreme Court of Appeal in *M* (SCA) fn 184 above); see also the comments made by McCall J in *Naidoo* (fn 184 above) at 94, dealing with the issue of judicial condonation of serious unconstitutional conduct. He said: “Both the interim Constitution and the new Constitution affirm the Legislature’s commitment to the concept of protection of private communications against violation or infringement. To countenance the violations in this case would leave the general public with the impression that the courts are prepared to condone **serious failures** by the police to observe the laid-down standards of investigation so long as a conviction results”. (Emphasis added).

²⁸⁸ *Hena* (ibid) at 42. A similar approach is followed in Canada. See, for example, *Kokesch* (fn 23 above); *Dyment* (fn 23 above); and *Buhay* (fn 23 above).

concerns or exigent circumstances when evidence is gathered, could be indicative of a lack of good faith. Moreover, the unwarranted conduct consisted of the deliberate infliction of physical violence, associated with the conscious interference with the liberty and human dignity of the accused. It is suggested that the seriousness of the violation was aggravated for the reason that the challenged conduct unjustifiably impinged upon rights that are intrinsically linked to the foundational values of the Bill of Rights, being human dignity and freedom.²⁸⁹ In the result, the the accused's right to bodily sanctity was impaired. Moreover, the seriousness of the infringement was amplified by the fact that the infringements were motivated by the unjustifiable aim of obtaining compelled self-incriminatory evidence against the accused.²⁹⁰ It cannot be disputed that the seriousness of the violation was aggravated by the fact that more than one constitutional right was violated: the right to freedom and security of the person, the right to human dignity, freedom from torture, the right to remain silent, and the privilege against self-incrimination. In other words, there was a pattern of disregard for fundamental rights protected by the Bill of Rights.

The judge furthermore highlighted the seriousness of the infringement by typifying it as 'systemic' unconstitutional conduct²⁹¹ perpetrated on persons accused of having committed a crime.²⁹² By excluding the disputed evidence, the court demonstrated: Firstly, that it does not want to be associated with unconstitutional conduct, from whatsoever source, especially when the constitutional infringement can be categorised as serious; and secondly, that

²⁸⁹ Such an interpretation is aligned to a purposive approach.

²⁹⁰ Roach (fn 11 above) at 10-78, par 10-1740.

²⁹¹ Fn 184 above at 41-42. With regard to the "systemic" abuse perpetrated by the anti-crime committee, see also *S v T* 2005 1 SACR 318 (E), ("T"), a judgment delivered by Plasket J; see further the comments made by McCall J in *Naidoo* (fn 184 above) at 94, with regard to the issue of judicial condonation of serious unconstitutional conduct; see also *S v M* (fn 184 above).

²⁹² *Hena* (loc cit).

once a violation is deemed serious, any evidence obtained as a result is susceptible to exclusion, because courts have to take account of the long-term effects that the regular admission of evidence obtained in this manner would have on the repute of the justice system. In this manner, section 35(5) also serves a regulatory purpose, because it serves to regulate future police conduct, with the aim to prevent 'systemic abuse' of fundamental rights. Thirdly, that, by excluding the evidence – which was essential for a successful prosecution – the court fulfilled its educational duty, illustrating that constitutional rights are meant for the protection of 'all of us'.²⁹³

Should South African courts, in view of the developments in Canadian section 24(2) jurisprudence, regard the absence of reasonable grounds when the police execute their investigative powers, as an indicator of the seriousness of the infringement?²⁹⁴ This issue was considered by the High Court in *Mkhize*,²⁹⁵ *Mayekiso*²⁹⁶ and *Motloutsi*.²⁹⁷ In *Mkhize*, the accused faced a number of serious charges, ranging from murder to the unlawful possession of firearms. The accused's locker was searched without a warrant or his consent. The officer – a Superintendent – testified that he did not consider it necessary, in terms of the law, to obtain a search warrant.²⁹⁸ In other words, he did not subjectively believe that his conduct violates the accused's right to privacy. The Superintendent had received information about the whereabouts of firearms that were not related to the charges faced by the accused. Section 22 of the Criminal Procedure Act

²⁹³ Ibid at 41.

²⁹⁴ See for example, *Kokesch* (fn 23 above); *Buhay* (fn 23 above); *Buendia-Alias* (fn 23 above); and *Symbalisty* (fn 50 above).

²⁹⁵ Fn 184 above.

²⁹⁶ Fn 184 above. This matter was decided in terms of the Interim Constitution.

²⁹⁷ Fn 184 above. It should be noted that this case was decided before the advent of section 35(5).

²⁹⁸ Fn 184 above at 635.

authorises a search when the person concerned gives his or her consent or when the officer **on reasonable grounds** believes that a warrant will be issued if he applies for one, but the delay in obtaining it would defeat the object of the search.²⁹⁹ The court therefore had to decide whether the belief of the officer was, objectively considered, reasonable. The court held that 'even if it be accepted that he failed to comply with the provisions of the Act relating to the search', such failure was committed in good faith.³⁰⁰ The court arrived at this conclusion despite the absence of any indication in the judgment that the officer made earnest attempts to keep the search within the ambit of the provisions of the Criminal Procedure Act.³⁰¹ Besides, other investigatory techniques, for example, consent from the accused or the obtainment of a search warrant was available, but an officer of his rank failed to consider any of these lawful alternatives. Canadian section 24(2) standards mandate that a failure by the police to consider lawful alternatives available to them, instead of committing Charter infringements, serves as an indicator of a lack of sincere effort to comply with the Charter as well as a pointer that the infringement should be regarded as a serious violation.³⁰²

²⁹⁹ Section 21(1)(a) of the Criminal Procedure Act permits the issue of a search warrant to conduct a search for an object which on reasonable grounds is suspected of having been used in an offence and which, on reasonable grounds, is believed to be in possession or under the control of any person or at any premises.

³⁰⁰ Fn 184 above at 638.

³⁰¹ Loc cit. It is clear that the officer was not acquainted with the scope of his powers or the rights of the accused. Perhaps the dictum of Sopinka J in *Kokesch*, at 231, should be paraphrased to summarise the position of the officer: Either he knew the search was unlawful or he ought to have known.

³⁰² See for example, *Buhay* (fn 23 above) at par 63. In *Buendia-Alas* (fn 23 above), the officer had two-and-half years experience at the time of the infringement. The officer's lack of understanding of Charter rights and his policing duties was recorded as follows by the court at par 19: "... [he] did not understand, and perhaps today does not understand sufficiently, the balancing of interests that require him to have more evidence ..." before he interferes with the

The *Mkhize* judgment is susceptible to the criticism that it suggests that the police may successfully rely on good faith even though their conduct consists of an 'unreasonable error or ignorance as to the scope of his or her authority'.³⁰³ It is suggested that the fact that the officer subjectively thought that his conduct was lawful, only adds to the seriousness of the infringement, because this factor is indicative of the fact that he did not even consider the scope of his authority and whether the execution of his powers impacted on the constitutional rights of the accused. Should such conduct not be considered as 'a blatant disregard' of constitutional rights?³⁰⁴

The matters of *Motloutsi* and *Mayekiso* were decided in terms of the Interim Constitution. Searches were conducted in both matters without consent and without warrants. Furthermore, the presence or not of 'reasonable grounds', contained in section 22 of the Criminal Procedure Act was at issue in both matters. In addition, in both matters, real evidence was discovered after the infringements. The judgment in *Mayekiso* was based on the reasoning in *Motloutsi*. In *Motloutsi*, the search was conducted at approximately 03h00 in the morning. It was held that the belief of the officer that the delay in obtaining a search warrant was not based on reasonable grounds.³⁰⁵ The prosecution argument that the officer misinterpreted the Criminal Procedure Act and therefore committed the infringement in good faith, prompted the court to rely

Charter rights of citizens. Evidence that cocaine was found in the possession of the accused was excluded.

³⁰³ Sopinka et al (fn 20 above) at 450.

³⁰⁴ *Buhay* (fn 23 above) at par 60. See, in this regard the recommendations made by Stuart (fn 31 above) at 7-8.

³⁰⁵ Fn 184 above at 87.

on the remark made by Walsh J in *People v Shaw*,³⁰⁶ where the following was said:³⁰⁷

A belief, a hope, on the part of the officers concerned that their acts would not bring them into conflict with the Courts is no answer, nor is an inadequate appreciation of the reality of the right of personal liberty guaranteed by the Constitution.

This view is comprehensively aligned to the approach applied by the Supreme Court of Canada in for example, *Kokesch*,³⁰⁸ *Buhay*³⁰⁹ and *Buendia-Alas*.³¹⁰ Such an approach accurately postulates the contention that courts should not readily condone the honest, but mistaken belief by police officials that make significant inroads into fundamental rights. In the result, Farlam J held, in *Motloutsi*, that the infringement constituted a 'conscious and deliberate' violation,³¹¹ sufficiently serious to justify exclusion. The *Motloutsi* judgment reaffirms the view held by McCall J in *Naidoo* to the effect that the tolerance by the courts of serious violations would leave 'the general public with the impression that the courts are prepared to condone **serious failures** by the police to observe the laid-down standards of investigation so long as a conviction results'.³¹²

³⁰⁶ [1928] IR 1 at 33-34, ("*Shaw*").

³⁰⁷ Fn 184 above at 87.

³⁰⁸ Fn 23 above.

³⁰⁹ Fn 23 above.

³¹⁰ Fn 23 above at par 19. See also *Krall* (fn 48 above) at par 84; *R v Rolls* 2001 CRR (2d) 151, 2001 CarswelAlta 922 at par 31, (*Rolls*): "In assessing the gravity of the Charter breach in this case, one starts from the proposition that it is a very serious interference with a person's right of privacy for the police to search the person's home".

³¹¹ Fn 184 above at 88.

³¹² *Ibid* at 94.

South African courts, like their Canadian counterparts,³¹³ are reluctant to classify an infringement as serious when the disputed evidence is real, reliable evidence that does not impact negatively on trial fairness. When in such cases, the police conduct cannot be described as 'flagrant', 'willful', 'deliberate' 'intentional', the cause of 'erroneous institutional training' or abusive, the infringement will not be classified as serious.³¹⁴ By contrast, South African courts are inclined to readily

³¹³ See Stuart (fn 66 above) at 406; Roach (fn 11 above) at 10-78.

³¹⁴ See, for example, *Pillay* (fn 2 above), *Mayekiso* (fn 184 above) and *Motloutsi* (fn 184 above), where real evidence were excluded after the right to privacy of the accused in each of these cases were infringed. The infringements in these matters were classified as serious only after the respective courts categorised the violations as "conscious", "deliberate", or "quite serious". In *Hena* (fn 184 above), the testimony of a third party, who was located as a result of the infringement of several fundamental rights of the accused, was excluded. It is submitted that this evidence should be treated as derivative evidence, because the testimony of the third party existed regardless of the infringement of the rights of the accused; it was also not a product of the accused's mind. The court held that the infringement was serious after describing the nature of the violation as "systemic abuse", committed in "bad faith", where there was "no public safety or urgency concerns". Compare *Lottering* (fn 184 above), where the evidence was a knife (reliable, real evidence) and testimonial compulsion. The court, at 1483, classified the violation as "not deliberate or flagrant", despite the fact that the police officer clearly had no clue of the informational duties contained in the Bill of Rights and its impact on his investigatory duties. Furthermore, the rights to legal representation and the privilege against self-incrimination were violated. In *Mkhize* (fn 184 above), the evidence in dispute was a gun (real evidence). The court, at 638, classified the infringement of the right to privacy as "inadvertent and technical in nature", again, despite the fact that the police officer had no idea of the scope of his powers; see also *Shongwe* (fn 5 above) at 345. These matters confirm the fact that the nature of the evidence obtained after a violation is determinative of the classification of the infringement as either serious or trivial. It is further suggested that the classification of the infringements in *Lottering*, *Shongwe* and *Mkhize* were result-constrained, which explains why the police conduct was erroneously considered to have been committed in good faith. See also the approach of Scott JA, writing a dissenting opinion in *Pillay* (fn 2 above), and categorised the police conduct as a bona fide violation, while the infringement was deemed serious. The judge would have received the real, reliable evidence which was essential for a conviction on a serious charge.

categorise the infringement as serious when the disputed evidence constitutes testimonial compulsion.³¹⁵

The good faith of the police, in the execution of their duties, is discussed below.

2.2 The good faith exception in South Africa

A review of Canadian case law is indicative of the fact that significant police compliance with the law and the Charter during their investigation could be considered as a factor demonstrating that the police acted in good faith.³¹⁶ Should this approach be accepted by South African courts? A question related to this is, should negligent or inadvertent infringements of the law by the police, be

³¹⁵ See, for example, *Agnew* (fn 184 above), where a tactic used by the police to avoid the attorney of the accused with the aim of obtaining a confession, Foxcroft J labelled the police conduct as a “flagrant” breach of the accused’s right to silence; see also *Soci* (fn 184 above), where the accused was not informed of the right to legal representation, available at governmental expense before he incriminated himself by means of a pointing-out. A pointing-out has been construed by South African courts (see for example *S v Sheehama* 1991 2 SA 860 (A)), as a statement of the accused made by his or her conduct. The evidence was excluded, despite a finding by the court, at 296, that it could not be said that the infringement was committed mala fide or even consciously. The infringement was, by necessary implication, regarded as serious. *Naidoo* (fn 184 above) at 527, where the court equated the monitored telephonic conversations with testimonial compulsion. Determining “detriment”, at 530, the irregularities were typified as “serious”, despite the absence of any indicators that the police conduct was mala fide. In *Mphala* (fn 184 above), the evidence in dispute constituted testimonial self-incrimination, obtained in violation of the right to legal representation. The infringement was adjudged to have been committed “deliberately and consciously” – in this case, there was clear evidence of mala fides on the part of the police. In *Seseane* (fn 184 above), the evidence in dispute was testimonial compulsion. The infringement was labelled “serious”. However, in this case, there was clear evidence of institutional abuse.

³¹⁶ *Jacoy* (fn 23 above); *Strachan* (fn 23 above); *Stillman* (fn 6 above), more particularly regarding the tissue containing mucous.

condoned by South African courts as good faith violations? In other words, should the test to determine whether the police acted in good faith be a subjective or an objective test?

In *Pillay*, Scott JA correctly held that, in order to comply with the 'good faith' exception, police conduct must not only be *bona fide*, but it should also be reasonable.³¹⁷ In this regard, the opinion of Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: in re Ex Parte President of the RSA and Others*,³¹⁸ confirms the rectitude of the approach adopted by Scott JA, when Chaskalson P declared as follows:³¹⁹

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in **good faith** believed it to be rational. Such a conclusion will place form above substance and undermine an important constitutional principle.

Van der Merwe³²⁰ echoes the view held by Scott JA. Based on this premise, the negligent violation of constitutional rights should not be tolerated by South African courts, especially in view of the fact that such an approach would be tantamount to the judiciary condoning unacceptable police conduct. In this

³¹⁷ *Pillay* (fn 2 above) at par 132, where Scott JA reasoned as follows: "Eva and Havenga acted in the *bona fide* and **reasonable belief** that they were authorised to do what they did". (Emphasis added).

³¹⁸ 2000 2 SA 674 (CC), ("*Pharmaceutical Manufacturers Association*").

³¹⁹ *Ibid* at par 86. (Emphasis added); see also *Manqalaza v MEC for Safety and Security, Eastern Cape* 2001 3 All SA 255 (Tk), ("*Manqalaza*"); see further *Mhaga v Minister of Safety & Security* 2001 2 All SA 534 (Tk), ("*Mhaga*").

³²⁰ (1998) 11 SACJ 462 at 473; see also Ally (fn 181 above) at 74.

regard, the approach adopted by Farlam J in *Motloutsi*³²¹ is to be preferred instead of that applied by Preller AJ in *Shongwe*.³²² In *Shongwe*, more than one constitutional right was violated. As a result, the accused was conscripted against himself;³²³ the accused was further detained and not advised of his right to legal representation and the consequences of any incriminating conduct on his part.³²⁴ All these violations occurred while the police sought his co-operation in their efforts to obtain incriminating evidence against him. Despite the fact that more than one constitutional right were violated, Preller AJ held that the constitutional infringements could not be labelled as serious, because it was ascribed to police ignorance of the law. The reasons for such a finding are not altogether clear from a reading of the judgment. However, the *Shongwe* approach to the

³²¹ Fn 184 above at 87-88, where the judge reasoned, based on *Shaw* (fn 306 above) that it would be absurd to condone police conduct as a bona fide error, due to his or her ignorance of constitutional law or ordinary law. However, it must be emphasised that *Motloutsi* preceded section 35(5), therefore the section was not applied. Despite this, it is suggested that *Motloutsi* should be followed, on this issue, when interpreting section 35(5).

³²² See *Shongwe* (fn 5 above) at 334, where it appears that the police failed to inform the accused of the consequences of not exercising the right to remain silent when he was arrested; in addition, he was not warned of his right to obtain legal representation at government expense before he co-operated with the police. The court held, at 334, that the violation was committed in good faith, because of the absence of mala fides on the part of the police or their ignorance of the law. Preller AJ reasoned at 344 as follows: "4. Vir sover daar 'n inbreuk op beskuldigde 1 se grondwetlike regte was, was dit van minder ernstige aard. 5. Daar is nie sprake dat die polisie anders as te goeder trou opgetree het nie. Enige moontlike inbreuk was nie die gevolg van kwaadwilligheid nie, maar hoogstens van onagsaamheid of onkunde". (Loosely translated, the above passage states the following. 4. Insofar as the rights of the accused 1 had been violated, such violations were trivial in nature. 5. One cannot but conclude that the conduct of the police was in good faith. Any possible breach was not caused as a result of mala fides, but at the most, it could be ascribed to ignorance or the inadequate appreciation of the constitutional rights of the accused) – my translation. Compare *Motloutsi* (fn 184 above) at 87; *Buendia-Alas* (fn 23 above).

³²³ Should this factor not have been considered as a factor having an adverse impact on fair trial concerns?

³²⁴ Fn 5 above at 334.

determination of 'good faith' suggests that, in effect, careless or negligent violations of the fundamental rights contained in the Constitution should be condoned by South African courts.³²⁵ Alternatively, it suggests that the absence of mala fides on the part of the police should be equated with good faith.³²⁶ Such an approach loses sight of the purpose that the seriousness of the violation criteria serves to protect: The protection of judicial integrity when unacceptable police conduct could have been prevented by applying the law.³²⁷

Farlam J, in *Motloutsi*, also referred to Canadian case law³²⁸ when he was of the view that the reliance by police officers on an Act of Parliament that had not been declared unconstitutional or a reported case of the highest court which had not been over-ruled, would qualify as a 'good faith' violation.³²⁹ In *S v R*,³³⁰ a

³²⁵ Loc cit.

³²⁶ Compare *Soci* (fn 184 above) at 296, where, despite the absence of mala fides, the infringement was not equated with good faith.

³²⁷ See the majority opinion in *Pillay* (fn 2 above); see also *Therens* (fn 23 above); *Kokesch* (fn 23 above); *Evans* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above).

³²⁸ Fn 184 above at 88. However, he distinguished the conduct of the police officers in the present case from that of the police officers in the Canadian cases of *Simmons* (fn 23 above); *Hammill* (fn 23 above), and *Sieben* (fn 23 above).

³²⁹ See also the approach of Erasmus J in *Soci* (fn 184 above) at 297, where this approach was applied to the interpretation of section 35(5). The accused was not informed about his right to legal representation before he made a pointing-out. Erasmus J held that the police conduct could not be classified as mala fide or a deliberate violation, because the police officer conscientiously complied with "departmental prescriptions, in a form apparently drafted by legal advisers of the SA Police Service", but nevertheless held that because the said form constituted the basis of the decision in *Marx* (fn 184 above), the violation could not be construed as a "good faith" infringement, within the meaning of section 35(5); see also *Mathebula* (184 above) at 142, where the matter was decided based on the limitations clause instead of a discretionary exclusionary rule or in terms of s 35(5). The importance of the decision is that, in that case, Claasen J applied an objective test to determine whether the accused had waived his rights and

police officer received instructions from the Director of Public Prosecutions to obtain blood samples from the accused, who were minors, for the purposes of DNA testing. The officer obtained 'imperfect' consent from one of the accused, because consent was obtained from his uncle, instead of his mother or guardian.³³¹ This failure was mitigated by two important features: firstly, the fact that the consent of the legal representative of the accused had been obtained and secondly, the fact that, at the time, no standard practice existed regarding the obtainment of consent in respect of the procurement of the relevant evidence.³³² Willis J held that the police officer acted in good faith. This is evidenced by the fact that the officer made sincere attempts to obtain the evidence within the parameters of the existing law.³³³ This approach is in

held that the *negligence* of the police in using an old form, not containing the constitutional warnings that an accused was entitled to, was a "bad slip" on their part, without any grounds of urgency, where there "clearly was no reason for the rights to have been breached".

³³⁰ Fn 184 above.

³³¹ Ibid at 42.

³³² Loc cit.

³³³ See, in this regard, the similarity in the approach to this issue by the Canadian Supreme Court in *Buhay* (fn 23 above) at par 63; *Strachan* (fn 23 above); see also *Legere* (fn 23 above), where there was no reported case condemning the police conduct and the officers consulted prosecuting counsel before acting as they did. It was held that the police made genuine attempts to comply with the provisions of the Charter; compare *Stillman*, where it was held that the unavailability of lawful means to obtain the evidence does not justify its unconstitutional obtainment. In South African context, see *Soci* (fn 184 above) at 296, where Erasmus J correctly approached the issue as follows: "The failure of the police, especially Superintendent ... to inform the accused properly of his right to consult there and then with a legal practitioner violated a fundamental right of the accused ... This violation was not, however, *mala fide* or even conscious. Superintendent ... in fact did his best to treat the accused fairly by complying with departmental prescriptions, in accordance with a form supplied for such purposes. The fault lies rather with the form apparently drafted by legal advisors of the South African Police Service". However, the police conduct did not qualify as a good faith infringement, because the judge continued as follows: "There can be little excuse for the oversight, as the *lacuna* in the form was the basis for the judgment in *S v Marx* ...". (Citation omitted).

conformity with the argument presented by Stuart³³⁴ in the Supreme Court of Canada, in the yet to be reported case of *Grant*.³³⁵

*Mkhize*³³⁶ is a decision where Willis J wrote the judgment on behalf of the Full Bench of the Witwatersrand Local Division of the High Court of South Africa. The police searched the locker of the accused without a search warrant, while investigating an unrelated crime. An unlicensed gun was discovered. The court held that the violation of the accused's right to privacy could not be classified as a serious infringement.³³⁷ A disturbing feature of this judgment is the fact that the judge suggested that the provisions of the Criminal Procedure Act relating to the obtainment of search warrants were intended to protect the rights of 'law-abiding citizens', as opposed to those persons suspected of having committed a criminal offence.³³⁸ Based on this premise, Willis J classified the violation as 'inadvertent and technical' and the police conduct was adjudged to have been committed in good faith.³³⁹ The court reasoned that if the police were armed with a search warrant, the evidence could have been discovered in any event.³⁴⁰ This conclusion, it is submitted, serves the purpose of aggravating the seriousness of the violation when the second group of *Collins* factors is considered. It is important to note that the discoverability inquiry in respect of the fair trial assessment differs from the causation requirement under the seriousness of the violation inquiry.

³³⁴ Fn 31 above at 7-8.

³³⁵ The Supreme Court will, in due course, deliver its judgment.

³³⁶ Fn 184 above.

³³⁷ *Ibid* at 638 the judge held that the infringement was "inadvertent and technical in nature".

³³⁸ *Ibid* at 637.

³³⁹ *Ibid* at 638. Van der Merwe (fn 8 above) at 243, correctly suggests that the judge "perhaps rather generously" arrived at such conclusion.

³⁴⁰ *Loc cit*.

The difference between the two approaches is not only of academic importance, but also of considerable practical significance to an accused person. Each inquiry serves a significantly different purpose and achieves remarkably divergent goals. For this reason, they should be distinguished and kept apart:³⁴¹ Under the seriousness of the violation group of factors, the fact that the police could have discovered the evidence by constitutional means only aggravates the seriousness of the violation.³⁴² By contrast, under the fair trial inquiry, the fact that the police could have discovered the evidence by constitutional means is a factor that could turn the outcome of the assessment in favour of the admission of the evidence.³⁴³ It appears that the Full Bench applied the discoverability analysis under the seriousness of the violation group of factors.³⁴⁴ However, after a discoverability analysis, the court held that the violation was not sufficiently serious to warrant exclusion of the evidence.³⁴⁵

In part B of this chapter, the good faith exception was considered in light of the *Stillman* fair trial framework. What is the position in South African section 35(5) jurisprudence? In *Melani*,³⁴⁶ Froneman J held that the good faith of the police relates mainly to the discovery of existing facts or objects, and not to self-incriminating evidence. In other words, this confirms the view that the good faith

³⁴¹ Roach (fn 11 above) at 10-79, is of the same opinion.

³⁴² See *Collins* (fn 1 above); also *Kokesch* (fn 23 above); also *Pillay* (fn 2 above) at par 93.

³⁴³ *Burlingham* (fn 23 above); *Feeney* (fn 6 above); see also *Stillman* (fn 6 above).

³⁴⁴ Van der Merwe (fn 8 above) at 243 indicates that the court decided the admissibility issue "with reference to the second leg of the test", in other words, the second and third groups of factors.

³⁴⁵ *Ibid* at 244. Van der Merwe suggests that the *Mkhize* court appears to have adopted the "inevitable discovery" doctrine applicable in the USA, and the *Stillman* and *Feeney* approach in Canada. However, in terms of the discoverability doctrine in Canada, this analysis is undertaken to assess trial fairness and the evidence must have been discoverable by lawful means. (*Burlingham* fn 23 above).

³⁴⁶ Fn 184 above at 352.

of the police cannot change a trial that is unfair into a fair trial. By the same token, an infringement that results in the accused being conscripted against herself should be regarded as a serious violation.³⁴⁷ This is one of the reasons why an infringement of the right to legal representation should be jealously protected by South African courts.

To summarise, South African courts should scrutinise the entire circumstances surrounding unwarranted police conduct to determine whether an infringement should be classified as serious. Members of the South African Police Service should, in order to prevent the unwarrantable violation of constitutional rights, be properly trained. This is especially important when one considers that institutional police ignorance or conduct that ‘arises from incorrect training’ of police officers that result in the violation of the fundamental rights of an accused is a factor that aggravates the seriousness of a violation.³⁴⁸ It is suggested that the costs involved in such training justifies the benefit of the respect for fundamental rights in a democratic society striving towards fairness and social justice. Against this background, South African courts should not have any qualms in classifying a violation as serious when the evidence is reliable and important to convict an accused facing serious charges. This approach would result in the conversion of the section 35(5) inquiry (and the entire Bill of Rights) into an empty promise. Such conversion would, in turn, inevitably have a detrimental effect on the criminal justice system.³⁴⁹

³⁴⁷ *Hena* (fn 184 above) at 40.

³⁴⁸ *Soci* (fn 184 above); see also Schwikkard (fn 222 above) at 52-63.

³⁴⁹ Morrissette (fn 20 above) at 551, makes the same point when he wrote as follows: “Conversely, the admission of the evidence translates into a denial of any adequate remedy, which amounts to obliterating a Charter right. Why have such a right, then, if it can be violated and the violation quickly forgotten? Why make the Charter lie if it is so easy to ensure that it speaks the truth?”

The classification of a violation as 'serious', 'inadvertent' or in 'good faith', would have significant consequences for an accused relying on the remedy contained in section 35(5). This is the case, because in the event that the violation has been typified as 'serious', this factor would weigh heavily in favour of the exclusion of the disputed evidence. In contrast, should the violation be regarded as an infringement committed in 'good faith', this factor would weigh heavily in favour of the admission of the disputed evidence.

Similar to the approach adopted by their Canadian counterparts, South African courts have held that in general, a violation of the right to legal representation should be deemed a serious violation.³⁵⁰ It is suggested that, having regard to the purposes the said right aims to protect, that a violation thereof should in general, be regarded as serious. This suggestion would not cause undue hardship on law enforcement agencies, especially when one considers government policy in providing legal aid and the provision of the services of the office of the public defender throughout South Africa.

Pillay and *Hena* demonstrate that the violation of more than one constitutional right adds to the seriousness of the violation. The majority opinion in *Pillay* further confirms that a violation committed to obtain evidence that could have been discovered in a constitutional manner, only adds to the seriousness of the violation.³⁵¹ This approach complies with the principles enunciated in *Collins*, *Stillman*, *Feeney*, and *Buhay*. The *Pillay* judgment has further highlighted the fact that the approach adopted in *Mkhize* and *Shongwe* is inconsistent with Canadian precedent³⁵² and for this reason are not in conformity with the rationale of

³⁵⁰ See *Feeney* (fn 6 above); *Stillman* (fn 6 above); see also *Seseane* (fn 184 above); *Melani* (fn 184 above); *Marx* (fn 184 above); *Naidoo* (fn 184 above) at 91C-D, where such an approach was referred to with approval; compare *Shongwe* (fn 5 above).

³⁵¹ Compare *Mkhize* (fn 184 above).

³⁵² See, for instance, *Therens* (fn 23 above); *Kokesch* (fn 23 above); *Evans* (fn 23 above).

section 35(5). *Mkhize* and *Shongwe* should accordingly not be followed. Subjectively honest, but objectively assessed unreasonable police conduct in the execution of their powers does not comply with the good faith exception within the meaning of section 35(5). However, sincere attempts made to substantially comply with the law could be regarded as a factor demonstrating police good faith.³⁵³

Van der Merwe is correct when he affirms that the test to determine whether police conduct complies with the 'good faith' exception should be an objective test. Guidance has also been given by the High Court in determining whether police conduct should be classified as a *bona fide* violation. The approach adopted in *Shongwe*, regarding the negligent infringement of fundamental rights, should be rejected and that applied in *Motloutsi*, *Soci*, and *S v R* should be embraced. The approach followed in *Motloutsi*, *Soci* and *S v R* unequivocally proclaims that the negligent violation of constitutional rights flies in the face of the judicial integrity rationale. For this reason the negligent violation of constitutional rights should not be tolerated by South African courts.

In the light of the following three factors, negligent infringements should be categorised as serious violations: firstly, the fact that the South African Constitution has been in force for more than a decade. This is one of the reasons why members of the South African Police must be presumed to be aware of the scope and ambit of their powers, as well as the duty imposed on them by the provisions of the Bill of Rights;³⁵⁴ secondly, the vast majority of South Africans

³⁵³ Stuart (fn 31 above) at 8.

³⁵⁴ Section 7 of the South African Constitution provides that the South African government must "protect, respect, promote and fulfil" the rights guaranteed in the Bill of Rights. Unlike socio-economic rights, the rights of accused, arrested and detained persons are couched in different terms. The rights of accused persons do not contain internal qualifiers like "progressive realisation" or "available resources". (See sections 26, 27 and 28 of the South African

are uneducated and unaware of the level of the protection they are entitled to in terms of the Bill of Rights;³⁵⁵ and, thirdly, South African courts should particularly be concerned about the long-term effect that the regular admission of evidence obtained by the negligent violations would have on the repute of the justice system. Anything less would be understood by the public at large that the courts are giving the police an incentive to infringe the fundamental rights of South African citizens.³⁵⁶ Moreover, the approach in *Motloutsi* and *Soci* is in conformity with an interpretation that gives effect to the spirit, purport and objects of the Bill of Rights and meet the terms of the approach adopted by the Constitutional Court in the *Pharmaceutical Manufacturers* case.³⁵⁷

3. The effect of exclusion in South Africa

Should reliable evidence, essential for a conviction on a serious charge, obtained after a serious infringement, be excluded? This question challenges South African presiding officers, schooled and experienced in the application of the common

Constitution). This entails that the governmental duties in respect of accused persons arose the moment the Bill of Rights became the supreme law. This, in turn, means that the government and its agents have an immediate constitutional duty to refrain from any unjustifiable interference with the fundamental rights of an accused. It further means that the government should take positive steps to fulfil the protection of the fundamental rights of arrested, detained and accused persons, by implementing measures and programmes designed to protect their fundamental rights. One such measure would be to properly train members of the police to prevent the **negligent** infringement of the rights of the accused while exercising their official duties. In order to effectively execute their constitutional and other duties, members of the police must be conversant with the duties imposed on them by the provisions of section 35 – but not limited thereto – of the Constitution.

³⁵⁵ See *Melani* (fn 184 above) at 347.

³⁵⁶ *Ibid* at 6-7.

³⁵⁷ Fn 318 above.

law inclusionary rule, to adapt their approach to the admissibility of evidence in order to give effect to the values sought to be protected by the provisions of section 35(5). A comparative study confirms that South African courts should apply Canadian precedent, while having proper regard for the high rate of serious crime. Exactly what is meant by 'proper'? Section 35(5) enjoins South African courts not to be swayed by the pressures of public opinion, but to assure all South Africans – irrespective of the fact that they are accused of having committed the most heinous crimes and no matter whether the likelihood is great that they probably committed such crimes – that the goals of crime control do not justify unconstitutional conduct.

Instead, the goal of preserving the integrity of the criminal justice system is of paramount importance when the second and third groups of *Collins* factors are applied in section 35(5) challenges. It is submitted that, while the 'current public mood' may be a relevant consideration under these groups of factors, it should not replace the fundamental duty of South African courts to 'uphold and protect the Constitution and the human rights entrenched in it', and to administer justice to 'all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.³⁵⁸

South African courts must in a similar manner as their Canadian counterparts, consider the seriousness of the charges against the accused and the importance of the disputed evidence for a successful prosecution, under this group of factors.³⁵⁹ Compared to their Canadian counterparts, a number of South African

³⁵⁸ The oath taken by judges when they take office, contained in item 6 of Schedule 2 of the South African Constitution.

³⁵⁹ *Pillay* (fn 2 above) the majority opinion, at par 93; see also the minority opinion of Scott JA in *Pillay*, at par 132, where he clearly demonstrated the application of the said factors as follows: "... her crime remains a serious one. The evidence in question was essential to substantiate the charge".

judgments have, perhaps as a result of the high rate of serious crime, over-emphasised the significance of the 'current mood' of society when they considered the third group of *Collins* factors.³⁶⁰ Two equally important issues are emphasised in this part of the work. The first is whether South African courts acknowledge the importance of the presumption of innocence when the seriousness of the charge against the accused is considered. The second issue is that of factual guilt. Should it be allowed to enter the equation when the importance of the evidence for a successful prosecution is determined? The disregard of these two issues might create the impression (and justifiable public concern) that the criminal culpability of the accused, facing a serious charge when the reliable evidence, essential for a successful prosecution, is not entitled to equal protection of the law when compared to an accused facing a minor offence under the same circumstances. Hahlo and Kahn pertinently describe the

³⁶⁰ See, for example, *S v Khan* 1997 2 SACR 611 (SCA), [1997] 4 All SA 435 (A) at 621, ("*Kharl*"), even though section 35(5) was not applied in this case, the seriousness of the offence and the interests of the public weighed heavily in favour of the admission of the evidence; see also the minority judgment in *Pillay* (fn 2 above); see further the comments made in *Soci* (fn 184 above) at 297; *Shongwe* (fn 5 above) at 344-345 Preller AJ dealt with the current public mood as follows: "Die land in die algemeen beleef 'n ongekende laag van wetteloosheid en in die betrokke omgewing het boonop tot onlangs 'n bloedige taxi-oorlog gewoed. Die publiek eis optrede teen misdaad. Die howe moet sigbaar 'n ferm standpunt inneem teen alle vorms van misdaad, onder andere om te verhoed dat die publiek in die versoeking kom om die reg in eie hande te neem". Loosely translated, it means the following: Lawlessness and crime is in general at the order of the day in this country, and the residents in this particular area recently had to endure a taxi war. The public demands that action be taken against crime. The courts must take a firm stand against all forms of crime to prevent the public from taking the law into their own hands – my translation; and *Ngcobo* (fn 184 above) at 1254, where the judge dealt with the reaction of society in instances when evidence is excluded as follows: "At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of evidence".

unjustifiable inequity caused by such unequal treatment in the following terms:³⁶¹

It is unjust to select arbitrarily different systems of value in considering one case and another. It is unjust to discriminate arbitrarily among equal cases.

However, when Hahlo and Kahn wrote on the differential treatment of similar cases, a provision in terms of section 35(5) was not contemplated in South African law. In spite of this, their comments have equal force, even today. The approach of the High Court of South Africa on the issue of the seriousness of the charges is considered against this background. The approaches adopted in the cases of *Melani*³⁶² and *Shongwe*³⁶³ are compared to demonstrate the unequal treatment of this factor in these two matters. These two matters are examples of the two divergent approaches applied by the courts of South Africa: The one favours due process concerns, while the other, crime control values. In other words, the *Melani* case focused on the long-term effect of the regular admission of evidence obtained after a serious infringement, and *Shongwe* opted to emphasise the 'current mood' of society, without demonstrating that such mood is reasonable.

3.1 The seriousness of the criminal charge

How should the seriousness of the charge against the accused be determined during the admissibility assessment? Unlike the position in Canada, in South

³⁶¹ *The South African Legal System and its Background* (1968) at 35.

³⁶² Fn 184 above; see also *Pillay* (fn 2 above); *Hena* (fn 184 above), where similar approaches were adopted in assessing the second and third groups of *Collins* factors.

³⁶³ Fn 5 above; see also *Mkhize* (fn 184 above).

Africa this factor is not determined in a pre-trial motion, with the result that the concerns raised by Roach³⁶⁴ and Pottow³⁶⁵ would not be applicable in the South African context. In South Africa the admissibility assessment takes place in a trial-within-a-trial.³⁶⁶ The admissibility assessment is further not limited to the facts contained in the trial-within-a-trial. A court may determine the seriousness of the charge against the accused by considering facts that are not in dispute in the main trial,³⁶⁷ facts in the trial-within-trial,³⁶⁸ and the charge sheet.³⁶⁹ If the evidence led at the end of the trial does not, for example, prove the charge of murder – but assault – the defence may request the presiding officer to reconsider the admissibility issue, based on this new development.³⁷⁰

It should be emphasised that, when considering this factor, due regard should be had to the presumption of innocence and the values sought to be protected by this constitutionally entrenched right. The Constitutional Court has typified the presumption of innocence as 'fundamental to our concepts of justice and forensic fairness'.³⁷¹ What should therefore be assessed under this group of factors should be the seriousness of the **offence** charged and not the seriousness of the **crime committed**.³⁷²

³⁶⁴ Fn 11 above at 10-86.

³⁶⁵ Fn 20 above at 229-230.

³⁶⁶ See chapter 3 par D 2.

³⁶⁷ See *Naidoo* (fn 184 above) at 507-522.

³⁶⁸ See *Malefo* (fn 184 above) at 133 and 138.

³⁶⁹ Loc cit.

³⁷⁰ Kriegler *Hiemstra: Suid-Afrikaanse Strafproses* (5th ed, 1993) at 553. Mindful hereof, and the importance of the presumption of innocence, should this factor – the seriousness of the charges – in actual fact have such a determinative impact on the admissibility issue?

³⁷¹ *S v Zuma* 1995 4 BCLR 401(CC) at par 36, ('*Zuma*').

³⁷² See *Soci* (fn 184 above) at 297, where the importance of the presumption of innocence was highlighted, having regard to this distinction.

In *Melani*,³⁷³ the charges against the accused were murder, robbery, and the unlawful possession of firearms and ammunition. These are indisputably serious charges. The three accused were conscripted against themselves. Froneman J observed that a public opinion poll would have suggested that the evidence should be admitted, despite the seriousness of the constitutional violations. However, after the judge gave due consideration to the presumption of innocence, the evidence was excluded.³⁷⁴ Froneman J based his decision on 'the longer term purpose of the Constitution, to establish a democratic order based on, amongst others, the recognition of basic human rights'.³⁷⁵ The court made its admissibility ruling while emphasizing that it is not bound by the 'current mood' of society.

The case of *Shongwe* was discussed previously, but the facts material to this discussion are repeated to illustrate the difference in the approach to the same groups of factors in the two cases. The three accused faced four charges of murder, four charges of kidnapping, the unlawful possession of two firearms, unlawful possession of ammunition, and armed robbery of a motor vehicle. The charges, arising from a local taxi-war, are by their nature serious. The admissibility dispute relates to accused 1.³⁷⁶ After he was arrested, the accused was not warned by a senior police officer of the consequences of not remaining silent and that he is entitled to legal representation at governmental expense. Furthermore, the accused was not warned of his right to legal representation before he co-operated with the police by making a pointing-out, once again, in the company of another senior officer. All of this happened approximately seven months after the advent of the Interim Constitution.³⁷⁷ It is clear that the

³⁷³ Fn 184 above.

³⁷⁴ Ibid at 353.

³⁷⁵ Loc cit.

³⁷⁶ Hereinafter "the accused".

³⁷⁷ Fn 5 above at 325. The accused was arrested on 14 December 1994.

accused was compelled to co-operate in the creation of evidence against him. Should the infringement not have been classified as serious, in the same manner that the obtainment of conscriptive evidence was classified in *Melani* and *Pillay*? Instead, Preller AJ emphasised the seriousness of the charges against the accused,³⁷⁸ the 'current mood' of the particular society where the crimes were committed,³⁷⁹ and factual guilt.³⁸⁰ The court admitted the disputed conscriptive evidence.³⁸¹

The difference in the outcomes of these cases resulted from the emphasis placed by the *Shongwe* court on the seriousness of the charges and the 'current mood' of society.³⁸² As a consequence, undue weight was accorded to the seriousness of the criminal charges and factual guilt, without proper regard for the seriousness of the infringement.³⁸³ Such an approach implies that the duty of

³⁷⁸ Ibid at 344, the seriousness of the charge was described as follows: "Die ten laste gelege misdaad is een van die heel ergste graad – vier hulpelose mense is koelbloedig, die een na die ander en ten aanskoue van mekaar, doodgeskiet". Loosely translated, this means the following: The charge faced by the accused is of the worst kind possible – four helpless people were cold-bloodedly shot dead, one after the other, and while the deceased witnessed how the others died. (My translation).

³⁷⁹ Loc cit.

³⁸⁰ Ibid at 345, Preller AJ reasoned as follows: "As 'n skuldige persoon in hierdie omstandighede vry uitgaan, sal dit teenproduktief wees vir die bevordering van 'n kultuur van menseregte ...". Loosely translated, this sentence has the following meaning: When a guilty person is acquitted under these circumstances, it would be counter-productive for the development of a culture of human rights ...". (My translation).

³⁸¹ Loc cit.

³⁸² It is suggested that the "current mood" of society was a weighty factor in the assessment, even though the judge mentioned, at 344, that he was not influenced by it. See, for example, at 344-345, the fact that it is mentioned at points 1, 2, 6, and 7 of the reasons for judgment.

³⁸³ In fact, Preller AJ held, at 344, that the infringement was not serious. Compare *Melani*, where a violation that caused self-incrimination was deemed serious. More importantly, there were more than one violation in *Shongwe*, which was tantamount to "institutional carelessness". The

courts to protect the fundamental rights of accused persons, who are guaranteed the right to be presumed innocent, should be of secondary importance while serious crime continues to remain at a high level. South African courts should guard against such an approach, because an over-emphasis of the fact that the accused is factually guilty of serious charges may perhaps unjustifiably encroach upon the presumption of innocence.

3.2 The importance of the disputed evidence for the prosecution

The question addressed here is whether a consideration of the importance of the evidence to obtain a conviction may possibly make unwarranted inroads into the presumption of innocence. It is in the interests of the prosecution to demonstrate that the disputed evidence is essential for a conviction and that it should for that reason, be received by the court. In other words, the prosecution must present evidence that suggest that the costs of exclusion would be high. However, the importance of an impugned confession, admission or pointing-out may, more often than not, be demonstrated exclusively by means of the contents of the disputed testimonial evidence.

It was held in the case of *S v January: Prokureur-Generaal, Natal v Khumalo*,³⁸⁴ that the disputed evidence may not be admitted until the court has made a ruling on its admissibility after a trial-within-a-trial. Furthermore, the case of *S v Lebone*³⁸⁵ effectively insulates the presumption of innocence from encroachment when the admissibility of testimonial evidence is the subject of the admissibility

fact that the officers were senior police officers should have been regarded as a factor which adds to the seriousness of the infringement.

³⁸⁴ 1994 2 SACR 801 (A), ("*January*").

³⁸⁵ 1965 2 SA 837 (A), ("*Lebone*"); see also *S v Khuzwayo* 1990 1 SACR 365 (SCA), ("*Khuzwayo*"); *S v Tsotsetsi and Others* (1) 2003 2 SACR 623 (W), ("*Tsotsetsi*").

dispute. The *Lebone* decision confirms the position in South African law that the prosecution may not lead evidence that discloses the contents of disputed incriminating testimonial evidence, unless the accused disputes its admissibility on the basis that information therein contained is false or originates from another source.³⁸⁶ The prosecution may therefore not introduce evidence relating to the contents of testimonial evidence obtained after a constitutional infringement, even in section 35(5) challenges, for the same reason that evidence of this nature was not allowed before the enactment of section 35(5).³⁸⁷ As a consequence, when the prosecution is called upon to demonstrate the importance of the disputed evidence to secure a conviction – while the contents of disputed testimonial evidence is the only source – they would be faced with the dilemma presented by the *Lebone* and *January* decisions.

Nevertheless, a court, when making the section 35(5) determination, should include this factor (the importance of the evidence for a conviction) in its assessment when it makes a value judgment³⁸⁸ as to whether admission or exclusion would be detrimental to the administration of justice.³⁸⁹ The fact that an onus should not be applied to determine whether admission or exclusion would be 'detrimental' to the administration of justice,³⁹⁰ ensures that the

³⁸⁶ Ibid at 841-842; see also *Tsotsetsi* (fn 385 above) at 627-628; see further De Jager et al (fn 185 above) at 24-66G; and Kriegler (fn 370 above) at 555.

³⁸⁷ See *Tsotsetsi* (fn 385 above) at 628.

³⁸⁸ *Lottering* (fn 184 above) at 1483; *Pillay* (fn 2 above) at par 92 and 97; see also Steytler (fn 14 above) at 36; Van der Merwe (fn 8 above) at 201.

³⁸⁹ See, for example, how McCall J assessed this factor in *Naidoo* (fn 184 above) at 394, where the disputed evidence consisted of monitored telephone conversations. (Could it be regarded as statements?). McCall J mentioned that it "was by no means apparent at this stage of the trial quite how material the evidence is", but nevertheless assumed its importance in view of the vigour with which the prosecution attempted to have it admitted and the defence sought to have it excluded.

³⁹⁰ See Van der Merwe (fn 8 above) at 201; Steytler (fn 14 above) at 36.

prosecution is not prejudiced when a court considers its ruling, especially in matters where testimonial evidence is in dispute. In this regard, the *Lebone* and *January* decisions prevent a court from considering the question of the factual guilt of an accused during a trial-within-a-trial.

In *Pillay*,³⁹¹ the Supreme Court of Appeal had to make a ruling on the admissibility of real evidence obtained after a constitutional infringement. Scott JA, writing a dissenting opinion, considered in his assessment of the 'detriment' requirement, whether an **acquittal** or **conviction** of the accused would be detrimental to the administration of justice.³⁹² It is fundamentally important to acknowledge that the admissibility issue should be separated from the determination of the criminal liability of the accused.³⁹³ It is for specifically this reason that the issue of the admissibility of evidence should be determined by means of a trial-within-trial. To add to the evaluation of the admissibility inquiry an assessment as to whether an accused is factually guilty, would inevitably impact negatively upon the presumption of innocence and such effect may possibly result in an unfair trial: One of the consequences that section 35(5)

³⁹¹ Fn 2 above.

³⁹² Ibid at par 133, the judge approached the issue of admissibility as follows: "Whether the admission of the evidence and the resultant **acquittal** of accused 10 would be detrimental to the administration of justice involves, I think, an inquiry whether an **acquittal** would be likely to bring the about a loss of respect for the judicial process in the eyes of reasonable and dispassionate members of society and, conversely, whether a **conviction** would be likely to result in a loss of respect for the Bill of Rights" (emphasis added); see also *Shongwe* (fn 5 above) at 345, where the judge stated as follows: "As 'n skuldige persoon in hierdie omstandighede vry uitgaan, sal dit teenproduktief wees vir die bevordering van 'n kultuur van menseregte ...". (Loosely translated, this phrase means the following: If a guilty person is set free under these circumstances, it would be counter-productive for the advancement of a culture of human rights ...". (My translation).

³⁹³ Kriegler (fn 370 above) at 553-554; Van der Merwe (fn 8 above) at 244.

evidently aims to prevent.³⁹⁴ An approach that evaluates admissibility with the emphasis on the factual guilt of the accused, flies in the face of the presumption of innocence and the long-term values the Constitution seeks to protect.³⁹⁵ Such an approach suggests that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty. Taken to its logical conclusion, evidence should regularly be excluded when the accused is likely to be acquitted.³⁹⁶ Surely, this could not have been the purpose of section 35(5)? If this were to be the case, the rationale for the existence of the constitutional provision would be defeated. Conversely, the majority opinion in *Pillay*,³⁹⁷ whilst acknowledging the concerns of Scott JA, placed great emphasis on the duty of the courts to protect the integrity of the criminal justice system. On this basis, the majority opinion concluded that the disputed should be excluded so as to prevent judicial contamination.³⁹⁸

The majority judgment in *Pillay* placed a high premium on their function as protectors of constitutional rights, even though the social costs of exclusion in the case at bar were great.³⁹⁹ Heeding the rationale of section 35(5), the

³⁹⁴ Roach (fn 11 above) at 10-86, arrives at the same conclusion. He illustrates the importance of such an approach by means of an example: when an accused is charged with murder, the judge may not, at the admissibility stage, know whether the accused is guilty of assault.

³⁹⁵ See, in this regard, the approach in *Melani* (fn 184 above) at 353.

³⁹⁶ Sopinka J adopted a similar approach in *R v Grant* (1994) 84 CCC (3d) 173 at 203a-b.

³⁹⁷ Per Mpati DP and Motata AJA in *Pillay*.

³⁹⁸ *Ibid* at par 97, where the judges reasoned as follows: "The police, in behaving as they did, ie charging accused 10 in spite of the undertaking, and the courts sanctioning such behaviour, the objective referred to will in future be well nigh impossible to achieve".

³⁹⁹ The accused was factually guilty of a serious offence, but acquitted. Were the social costs of exclusion an important factor that accounts for the different outcomes in the cases of *Melani* and *Shongwe*? In *Melani*, the accused was convicted on evidence other than the excluded evidence. Exclusion only weakened, but did not destroy, the case of the prosecution. In other words, the disputed evidence was not that important to secure a conviction, whereas the same could not be

majority opinion asserted their dissociation with the unwarranted police conduct as the ground for excluding reliable real evidence, essential to secure the conviction of the accused.

This approach by the majority opinion is in conformity with the Canadian section 24(2) jurisprudence and should be welcomed, especially in the light of the dissimilar approaches of the various divisions of the High Court with regard to this issue.⁴⁰⁰

The objection to an approach that attaches too much weight on factual guilt is pertinently demonstrated by the comments made by the Full Bench in *Mkhize*,⁴⁰¹ where Willis J wrote a unanimous judgment to the effect that the provisions of

said of the disputed evidence in the case of *Shongwe*. Likewise, in *Soci* (fn 184 above), the costs of exclusion were not very high, because the accused was convicted on the strength of other evidence. Compare *Naidoo* (fn 184 above), *Hena* (fn 184 above), and *Mphala* (fn 184 above), where the disputed evidence was essential for a conviction, but nevertheless excluded.

⁴⁰⁰ See, for instance, *Melani* (fn 184 above): following a violation of the right to legal representation, essential evidence was excluded, despite the fact that the case for the prosecution was weakened; see also *Motloutsi* (fn 184 above): evidence, essential to the prosecution, was excluded after a violation of the right to privacy. However, it should be noted that the judgments in the mentioned cases pre-dated s 35(5); *Soci* (fn 184 above): a confession was excluded because of a violation of the right to legal representation – however, the evidence was not essential for a successful prosecution. The accused was convicted on the strength of the remainder of the evidence; compare *Shongwe* (fn 184 above): after the violation of more than one constitutional right, including the right to legal representation, the conscriptive evidence, essential for a successful prosecution, was admitted; see further *Mkhize* (fn 184 above): the right to privacy was violated and real evidence, essential for a successful prosecution, was discovered and admitted at trial. The charges against the accused were serious. The evidence was admitted because the violation was deemed to have been committed in “good faith” and not regarded to be of a serious nature, calling for its exclusion.

⁴⁰¹ Fn 184 above; compare *Melani* (fn 184 above) at 353, where the presumption of innocence was duly considered.

the Criminal Procedure Act, regarding the obtainment of search warrants are **not** intended for:⁴⁰²

... the purpose of ensuring the fairness of a trial of an accused person but **to protect the ordinary law-abiding citizens** of our land from an abuse of the formidable powers which the police necessarily have.

The court in *Mkhize* conveyed an inapt message to law enforcement agencies to the effect that the goals of crime control justifies the unwarranted interference with constitutional rights: The end justifies the means, a sentiment reminiscent of the rationale of the common law inclusionary rule. In this regard, *Mkhize* challenges the comments made by South African scholarly writers to the effect that section 35(5) has evidently been designed to make 'a clear break with the common law' approach.⁴⁰³ The *Mkhize* judgment further implies that when the unconstitutional police conduct leads to the discovery of evidence that confirms the factual guilt of the accused, such evidence should, regardless of the manner of its obtainment, be admitted. By contrast, when it does not confirm factual guilt (and the person would be considered 'law abiding'), the disputed evidence would be inadmissible, and the police conduct classified as unconstitutional.

To summarise, under these groups of factors, the courts must consider whether exclusion or admission of the disputed evidence would have a negative impact on the integrity of the criminal justice system. The seriousness of the constitutional violation plays an important role in the assessment of this group of *Collins* factors. The reason why the seriousness of the constitutional violation should be balanced against other factors, is because the administration of justice may be brought into disrepute when evidence, essential for the prosecution, is

⁴⁰² Fn 184 above at 637. (Emphasis added).

⁴⁰³ Van der Merwe (fn 320 above) at 463.

excluded as a result of a trivial violation. Factors that weigh heavily in favour of admission of the evidence are, on the one hand, the fact that the violation cannot be regarded as sufficiently serious, and the fact that the evidence is important for a successful prosecution, on the other hand.⁴⁰⁴ Conversely, in the event that the violation could be regarded as serious, this would be a factor that weighs heavily in favour of exclusion of the evidence.⁴⁰⁵

However, when assessing the seriousness of the charges, courts should consciously remind themselves that the presumption of innocence operates in favour of the accused when the admissibility of evidence has to be assessed. The issue of factual guilt should be totally divorced from the admissibility inquiry. Such a clear separation is necessary to ensure that the fair trial concerns and the integrity of the justice system are not rendered irrelevant in cases where the accused faces serious charges and the evidence is essential for a successful prosecution. Further, when interpreting section 35(5), the provisions of section 9 of the Bill of Rights should be borne in mind. Those accused of allegedly having committed serious offences are, like those charged with minor offences, entitled to the full measure of protection guaranteed by the Bill of Rights. It is especially for this reason that the presumption of innocence, whether the charges are serious or not, should be a dominant consideration in the assessment of these group of factors.

When applying these groups of factors, courts should consciously be aware of the fact that the aims of crime control should not outweigh their constitutional duty to uphold, fulfil and promote the protection of constitutional rights. In giving effect to the judicial integrity rationale, South African courts should constantly – similar to approach of the *Pillay* court – pose the following question

⁴⁰⁴ See *Mooring* (fn 23 above).

⁴⁰⁵ In this regard, see the discussion under B 2 and C 2 above.

when called upon to apply the factors under this group of *Collins* factors: what effect would the regular admission of evidence, obtained after a serious infringement, have on the integrity of the criminal justice system? The majority opinion in *Pillay* has evidently aligned the South African jurisprudence on the admissibility of unconstitutionally obtained evidence with that of the Supreme Court of Canada.⁴⁰⁶ In the light hereof, one can safely assume that South African courts will not over-emphasise the 'current mood' of society, when they apply the second and third groups of *Collins* factors.

D. Conclusion

This chapter contains a discussion of the approaches to the interpretation of the second and third groups of *Collins* factors in admissibility disputes in terms of sections 24(2) of the Charter and 35(5) of the South African Constitution. A comparative review of the case law of the two jurisdictions suggests that South African jurisprudence on the admissibility of unconstitutionally obtained evidence has made sufficient progress towards the interpretation of these groups of factors under section 35(5).

In both jurisdictions, the classification of a violation as serious is at the heart of the assessment of the second and third groups of factors. The classification of a violation as serious is a significant step in justifying its exclusion, because admission of evidence obtained in such a manner would be regarded as judicial condonation of unconstitutional conduct.⁴⁰⁷ By contrast, the categorisation of a

⁴⁰⁶ *Ally* (fn 181 above) at 74.

⁴⁰⁷ *Mphala* (fn 184 above) at 400; *Malefo* (fn 184 above) at 148; *Pillay* (fn 2 above) at paras 94 and 97; *Hena* (fn 184 above) at 42. For an analogous approach in common law jurisdictions, see

constitutional breach as non-serious would, in general, be an important step to account for the reception of the disputed evidence, especially when the accused faces serious charges and the evidence is reliable and essential for a conviction.⁴⁰⁸ A number of South African courts paid heed to the judicial integrity rationale by classifying violations as serious, even in cases where the evidence were reliable and essential for a conviction on serious charges.⁴⁰⁹ Such an approach mirrors the approach followed by Canadian courts to these groups of factors.⁴¹⁰

However, notably after the bench of the Supreme Court of Canada is comprised of newly appointed judges, there has been a remarkable predisposition by especially the Ontario Court of Appeal, to attach much weight to the third group of factors (the reliability and importance of the evidence to secure a conviction and the seriousness of the charges).⁴¹¹ The Supreme Court heard argument relating to this recent modification of the assessment of these groups of factors, in the matter of *Grant*, on 23 April 2008. Judgment will be delivered in due course. Stuart, acting on behalf of an intervener in this appeal, correctly argued that the focus of the *Grant* approach on the reliability of the evidence and the seriousness of the charges bears the inherent danger that 'far less exclusion' would result after Charter infringements.⁴¹² As a consequence, he submits, this would lead to 'patterns of inclusion despite police breaches', resulting in less

O' Brien (fn 233 above) at 162. For the position in England and Wales in relating to exclusion when a serious infringement has occurred, see chapter 3.

⁴⁰⁸ See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

⁴⁰⁹ See the cases cited at fn 407 above.

⁴¹⁰ See, for example, *Mellenthin* (fn 23 above); *Kokesch* (fn 23 above); *Jacoy* (fn 23 above); *Duarte* (fn 23 above); *Wong* (fn 23 above); *Stillman* (fn 6 above); *Feeney* (fn 6 above); *Buhay* (fn 23 above).

⁴¹¹ See, for example, *Manikavasagar* (fn 23 above); *Vu* (fn 23 above); *Harris* (fn 23 above); *B (L)* (fn 23 above); *Grant* (fn 23 above).

⁴¹² Fn 31 above at 5.

police incentive to 'take the Charter seriously'.⁴¹³ Such a result would, no doubt, have an adverse effect on the repute of the criminal justice system.

A comparative analysis has revealed that, in both jurisdictions, the seriousness of the infringement pivots on the nature of the evidence discovered after a violation. In cases where conscriptive evidence has been discovered, courts are more amenable to categorise the infringement as serious.⁴¹⁴ By contrast, when reliable, real evidence has been discovered after infringements, courts are prepared to classify the breaches as serious only when the manner in which the evidence has been obtained could be described as 'flagrant', 'willful' or 'blatant'.⁴¹⁵

Factors that are indicative of the seriousness of infringements are essentially the same in both jurisdictions. Likewise, factors that are indicative of the good faith of the police are comparable. However, South African courts should guard against condoning negligent police conduct as good faith infringements for purposes of section 35(5), because such an approach is inimical to the judicial integrity rationale.

Public opinion does matter in the section 35(5) assessment. This is common cause between both due process protagonists and those in favour of crime control. The differences emerge when one has to determine the weight to be

⁴¹³ Ibid at 6-7.

⁴¹⁴ In Canada, see for example, *Mellenthin* (fn 23 above); *Hebert* (fn 23 above); *Therens* (fn 23 above). For the position in South Africa, see for example, *Melani* (fn 184 above); *Seseane* (fn 184 above); *Naidoo* (fn 184 above); *Mphala* (fn 184 above).

⁴¹⁵ In Canada, see for example, *Grefe* (fn 23 above); *Symbalisti* (fn 50 above); *Pohoretsky* (fn 23 above); *Feeney* (fn 6 above); *Stillman* (fn 6 above); *Buhay* (fn 23 above). South African cases where this approach was followed are for example, *Motloutsi* (fn 184 above); *Soci* (fn 184 above); *Hena* (fn 184 above); *Pillay* (fn 2 above).

attached to the 'current mood' of society. Those in favour of crime control would suggest that the 'current mood' of society should feature prominently during the second phase of the admissibility inquiry. South African scholarly writers, like their Canadian counterparts,⁴¹⁶ are divided on this issue.⁴¹⁷ Likewise, South African decisions were, until the *Pillay* judgment, incompatible with regard to the weight that should be attached to public opinion.⁴¹⁸

The high rate of serious crime in South Africa has, wittingly or unwittingly, been considered as a factor unduly weighing in favour of the admission of evidence, even when the constitutional violation should have been regarded as serious.⁴¹⁹ However, South African courts should be wary not to convey the message to society that the ends of crime control justifies unconstitutional means. This would be tantamount to informing society at large that **their** rights guaranteed in the Bill of Rights are not of any value while the high rate of serious crime in South Africa does not show any signs of a decline.⁴²⁰ Is such an approach reasonable? This implies that South Africans should accept that whatever the Constitution guarantees, should not be taken seriously. Would this state of affairs not be detrimental to the administration of justice?

The presumption of innocence deserves particular protection in a constitutional democracy based on human dignity, freedom and equality, even when the

⁴¹⁶ Paciocco 1989 (fn 20 above) argues that the courts should seek public popularity; compare Roach (fn 11 above) who is opposed to this view.

⁴¹⁷ Van der Merwe (fn 8 above) argues that the 'current mood' of society should be a "weighty factor" when courts consider the second and third groups of factors; compare Steytler (fn 14 above) at 40, who is of the opinion that the long-term values of the Constitution should be a dominant feature.

⁴¹⁸ See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above); *Ncgobo* (fn 184 above); compare *Melani* (fn 184 above); *Nomwebu* (fn 184 above); *Soci* (fn 184 above).

⁴¹⁹ See *Shongwe* (fn 5 above); *Mkhize* (fn 184 above).

⁴²⁰ See the approach of the minority opinion in *Pillay* and *Shongwe* (fn 5 above).

evidence is essential to convict an accused facing serious charges. For this reason, the admissibility inquiry should be isolated from the assessment of factual guilt. In the light hereof, too much weight should not be attached to the seriousness of the charges against the accused and the importance of the evidence for a conviction, especially when the evidence was obtained as a result of a serious infringement. Furthermore, the fact that the accused is factually guilty should not be determinative of the admissibility assessment. Contrary to the approach suggested by Scott JA in *Pillay*,⁴²¹ it is suggested that the admissibility issue should not, in order to protect the presumption of innocence, be closely linked to criminal culpability. Moreover, the regular admission of reliable, real evidence, even when the infringement is serious and the accused is factually guilty on serious charges, would serve as an incentive for police abuse.

Those in favour of due process concerns will argue that it would be a considerable mistake to attach too much weight to the 'current mood' of society when South African courts determine whether exclusion or admission would be detrimental to the administration of justice. The approach suggested by Erasmus J in *Nomwebu*,⁴²² approved in *Naidoo*,⁴²³ and applied in *Pillay*,⁴²⁴ is based on a sound policy basis. As such, it is consistent with the dictum of Chaskalson P in *Makwanyane*.⁴²⁵ Disrepute to the administration of justice would result if, despite a serious constitutional infringement, the courts were to enforce what they perceive to be the will of the majority, on a minority the Constitution expect it to protect.

⁴²¹ Ibid at par 133.

⁴²² Fn 184 above.

⁴²³ Fn 184 above.

⁴²⁴ Fn 2 above.

⁴²⁵ Fn 19 above.