

## Chapter 6: Conclusions and recommendations

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This part of the thesis consists, firstly, of conclusions comprising responses to the research questions posed in chapter one; secondly, recommendations to guide the future interpretation of section 35(5); and thirdly, concluding remarks.

## **A Conclusions**

Given the aim of this work, the research questions are focussed on the issue of exclusion of evidence in terms of section 35(5). It follows that matters related to constitutional exclusion in South Africa form the greater part of the conclusions in this chapter. In this thesis, as in South African case law, the Canadian section 24(2) jurisprudence has been employed as a guide for the interpretation of section 35(5). Reference is also made here to section 24(2) in order to highlight the similarities and differences in the approach to the interpretation of the two provisions, while it also serves as a guide for the future development of section 35(5).

- 1 The appropriateness of Canadian section 24(2) jurisprudence as a guide for the interpretation of section 35(5)

Is Canadian section 24(2) jurisprudence an appropriate guide for the interpretation of section 35(5) of the South African Constitution? Canada and South Africa share fundamental similarities relating to the historic legal developments in the respective countries. For example, during the pre-constitutional era in both countries, judgments in Canadian and South African cases dealing with the admissibility of evidence were based on the English

decision in *R v Leatham*.<sup>1</sup> These similarities stem from the fact that both countries were at some stage under British rule, and that their procedural and evidentiary law were principally based on the English common law.

Both countries emerged from systems of parliamentary sovereignty to become constitutional democracies, in which substantive fairness defines trial fairness.<sup>2</sup> A number of fundamental principles that enhance procedural fairness, which originate from the English law of evidence and criminal procedure, were incorporated into the Bills of Rights of both countries.<sup>3</sup> For example, the Constitutions of both countries include provisions containing comprehensive procedural rights aimed at protecting an accused during the pre-trial, trial and post-trial phases. Furthermore, the Constitutions of both countries contain a general limitations clause,<sup>4</sup> and a provision that establishes the constitutional foundation for the exclusion of unconstitutionally obtained evidence.<sup>5</sup>

Of particular importance for purposes of this work, is the fact that the exclusionary provisions contained in the Constitutions of both jurisdictions are couched in strikingly similar terms.<sup>6</sup> The differences between the provisions were pointed out by commentators such as Van der Merwe.<sup>7</sup> The significance of two

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<sup>1</sup> 1861 Cox CC 498, (“*Leathart*”).

<sup>2</sup> *R v Collins* (1987) 33 CCC (3d) 1 (SCC), 38 DLR (4<sup>th</sup>) 508, 1 SCR 265, (1987) Can LII 84 (SCC), (“*Collins*”) at 20; see also *S v Dzukuzi* 2000 4 SA 1078 (CC), (“*Dzukuzi*”).

<sup>3</sup> De Villiers unpublished LLD thesis at the Faculty of Law, UP, entitled *Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and Proposals for Reform* (2000) at 522-523; see also Hamman unpublished LLM dissertation at the Faculty of Law, UWC, entitled *The Right to Privacy and the Challenge of Modern Cell Phone Technology* (2004).

<sup>4</sup> Section 1 of the Canadian Charter and section 36 of the South African Constitution.

<sup>5</sup> Section 24(2) of the Charter and section 35(5) of the South African Constitution.

<sup>6</sup> See the introductory chapter par 1.

<sup>7</sup> “Unconstitutionally Obtained Evidence” in Schwikkard & Van der Merwe (eds) *Principles of Evidence* (2<sup>nd</sup> ed, 2002) at 200.

important aspects, namely (a) omission of the phrases 'if it is established' and 'all the circumstances'<sup>8</sup> from section 35(5), and (b) the explicit *inclusion* of the phrase 'or otherwise'<sup>9</sup> in this section, is discussed below.

However, it has to be kept in mind that there are socio-political differences between the two countries: For example, Canada has been a liberal democracy for more than two decades with the focus of the courts centred on sustaining fundamental rights. The socio-economic state of affairs in the two countries is markedly different. The general level of education in Canada is, for example, notably higher when compared to that of South Africa. In addition, the extent of serious crime in Canada is not as high as that of South Africa.<sup>10</sup> Furthermore, civil society organisations in Canada have developed a strong commitment to the protection of fundamental rights, including the Charter rights of persons accused of having allegedly committed crimes. One such non-governmental organisation is the Canadian Civil Liberties Association, which was established during 1964. Perhaps the perceived high rate of serious crime in South Africa accounts for the absence of an effective fundamental rights movement aimed at the protection of the constitutional rights of the accused.

It is submitted that the differences in the levels of crime and education place a heavier duty on the courts of South Africa – and other appropriate role players in

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<sup>8</sup> These phrases appear in section 24(2). The Supreme Court of Appeal held in *Pillay and Others v S* 2004 2 BCLR 158 (SCA), ("*Pillay*"), that the phrase "all the circumstances" should be read into section 35(5). This view is supported; see par A 3.3 below. For a discussion of the phrase "if it is established", see A 2.4 below.

<sup>9</sup> This phrase is not contained in section 24(2), but it is included in section 35(5).

<sup>10</sup> See for example the article by Steenkamp in the *Rapport* newspaper dated 10 August 2008, and entitled "Minister erken: ANC het groot foute gemaak (misdaad wen, erken die regering)". The author mentions that the Minister acknowledged that the rate of serious crime in SA is amongst the highest in the world.

government, the media and civil society – to mould public opinion, in furtherance of the achievement of the important constitutional goal of creating and further fostering a culture of fundamental rights. The appropriateness of the Canadian section 24(2) jurisprudence, for purposes of a comparative analysis with section 35(5), should be understood while bearing in mind these differences.<sup>11</sup>

In the light hereof, the importance of a comparative law analysis for the interpretation and application of section 35(5) has highlighted that the courts of South Africa could – as argued below – benefit with regard to the interpretation of a number of aspects, from Canadian section 24(2) jurisprudence. Conversely, this comparative analysis has furthermore revealed that the approach followed by the Canadian courts relating to numerous other aspects of the interpretation of section 24(2) should be avoided by the courts of South Africa.

## 2 Threshold requirements

### 2.1 The beneficiaries of section 35(5)

Who are the beneficiaries of section 35(5)? Would section 35(5) be applicable when the fundamental rights of South African citizens, contained in section 35 of the South African Constitution, have been infringed in foreign jurisdictions by foreign governmental officials? Would evidence obtained in this manner, be admissible in a South African court? The second question posed under this

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<sup>11</sup> Ackermann argues in (2006) 123 *SALJ* 497 at 505 that cultural (legal or otherwise) and political differences should not be used to generally prevent the use of foreign law as a comparative tool for the benefit of the South African legal system. These differences were not highlighted in *S v Melani* 1996 1 SACR 335 (E), (“*Melani*”); see also *Pillay* (fn 8 above). However, the minority opinion in *Pillay* emphasised the high rate of serious crime in South Africa; see also *S v Shongwe* 1998 9 BCLR 1170 (T), (“*Shongwe*”).

heading is whether a person, who has been regarded a 'suspect' when the violation occurred, may have access to the relief guaranteed by section 35(5), given that section 35 does not explicitly mention that suspects may rely on the protections guaranteed in the rights contained in the Bill of Rights.

The South African Constitutional Court correctly held that the Constitution does not, as a general rule, apply extra-territorially.<sup>12</sup> It follows that section 35(5) does not have direct or indirect application in instances when South African citizens face criminal charges allegedly committed in a foreign jurisdiction.<sup>13</sup> To state the obvious, a South Africa citizen facing criminal charges in a foreign court cannot, at least in respect of the exclusion of unconstitutionally obtained evidence, demand that the criminal justice system of that jurisdiction complies with the provisions of the South African Constitution in this respect.

However, the position would be entirely different if the evidence were obtained by South African governmental officials in a foreign jurisdiction in violation of the provisions of the Constitution, with the aim of using the disputed evidence in a South African court. The Bill of Rights, including section 35(5), would not be directly applicable, since the infringement occurred outside the borders of South Africa, and the evidence accordingly would not have been '**obtained**' in a manner that violates a right contained in the Bill of Rights. However, it is submitted that the Bill of Rights would be indirectly applicable, since **admission** of the evidence could render the trial unfair or otherwise be detrimental to the administration of justice. It follows that at her trial, the accused should be a

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<sup>12</sup> *Kaunda and Others v President of the RSA* 2005 1 SACR 111 (CC). It was similarly held in Canada, in the decision of *R v Harrer* (1995) 101 CCC (3d) 193; and in England and Wales, in *R (Al-Skeini and Others) v Secretary of State for the Defence* 14 June 2007, *The TimesOnline*, <http://business.timesonline.co.uk/tol/business/law/reports/article1929124.ece?>, accessed on 25/06/2007.

<sup>13</sup> Chapter 3 par 2.

beneficiary of the right to a fair trial. In any event, even if section 35(5) does not find application, the court may in terms of section 38 of the Constitution exercise its common law discretion to exclude the disputed evidence.<sup>14</sup> The common law exclusionary rule should accordingly be developed, having regard to the spirit, purport and objectives of the Bill of Rights.<sup>15</sup>

Should a 'suspect' be a beneficiary of the rights contained in section 35? It is submitted that the literal and legalistic interpretation of the concepts 'arrested' and 'detained', followed by MacArthur J in *S v Langa*,<sup>16</sup> should not be adopted by other courts in South Africa. Such a restrictive interpretation has the undesired effect of unduly limiting the scope of the protection guaranteed by the conspectus of fundamental rights. Instead, the generous and purposive interpretations suggested obiter in *S v Sebejan*,<sup>17</sup> and *S v Zuma*,<sup>18</sup> are supported.<sup>19</sup> Moreover, these obiter observations were unequivocally applied in *S v Orrie*.<sup>20</sup> Such an approach is compellingly aligned with the primary rationale of section 35(5), which is the protection of judicial integrity, while it also serves a

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<sup>14</sup> See the judgment of MT Steyn JA, delivered during the pre-constitutional era, in *S v Ebrahim* 1991 2 SA 553 (A) at 582; see also Schwikkard "Arrested, Detained and Accused Persons" in Currie & De Waal (eds) *The Bill of Rights Handbook* (5<sup>th</sup> ed, 2005) at 792 is of the opinion that admissibility may, under these circumstances, be challenged in terms of the common law. She suggests that admissibility should be considered on the same basis as in *S v Mthethwa* 2004 1 SACR 449 (E), ie whether admission would render the trial unfair or bring the administration of justice into disrepute. By contrast, it is submitted in this work (chapter 4 par B 1.2.2), that the test for trial fairness suggested by Schwikkard would be best suited to determine trial fairness when the common law should be developed in terms of s 39(2).

<sup>15</sup> See *Thebus v S* 2003 10 BCLR 1100 (CC) at par 28, ("*Thebus*").

<sup>16</sup> 1998 1 SACR 21 (T), ("*Langa*").

<sup>17</sup> 1997 8 BCLR 1086 (T), ("*Sebejan*").

<sup>18</sup> 2006 3 All SA 8 (W), ("*Zuma 2*").

<sup>19</sup> Schwikkard (fn 14 above) at 791 supports this point of view; see also Schwikkard (1997) 3 *SAJHR* 446.

<sup>20</sup> 2005 1 SACR 63 (C), ("*Orrie*").

regulatory and deterrent purpose by influencing future police conduct. It follows that in order to achieve these purposes, a court should be empowered to exclude evidence if the rights of a suspect had been infringed. It is the effect of the admission of the evidence, rather than the status of the accused when the inculpatory conduct was performed, that should determine the issue.

Schwikkard is of the view that the *Sebejan* judgment demonstrates that the concept of 'detention' could nevertheless be relevant in the South African context.<sup>21</sup> She argues that a person could technically be regarded as a 'suspect' and might incriminate herself because she feels obliged to respond to police questioning. In other words, the use of the concept 'suspect' could in such cases not be sufficiently broad to protect a suspect when compared to the scope of protection guaranteed by the concept 'detained', as interpreted in Canada. In Canada, the concept includes the 'psychological' detention of a person, which consists of three elements: A police direction or demand to a person; such person's voluntary compliance with the police demand and which results in a deprivation of liberty or other serious legal consequences; and the person's reasonable belief that she has no choice but to comply with the police demand. Stuart is of the opinion that the Canadian approach to 'detention' is vulnerable to abuse and suggests that it should be broadened to include any steps the police take to establish, denounce or reveal the existence of inculpatory evidence against a person being interviewed.<sup>22</sup> A comparable approach is applied by the ICTY, ICTR, ICC, and the majority of the domestic legal systems of the members of the European Union.<sup>23</sup>

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<sup>21</sup> Fn 19 above at 455.

<sup>22</sup> See Annexure "D", being the Heads of Argument of Stuart in the appeal of the decision of *R v Grant* (2006) 209 CCC (3d) 250, 143 CRR (2d) 223, 38 CR (6<sup>th</sup>) 58, (2006) CarswellOnt 3352, 81 CR (3d) 1, 213 OAC 127 (Ont CA), ("*Grant*"). He acted on behalf of the intervenor in this case, argued before the Supreme Court of Canada on 23 April 2008. Judgment has been reserved.

<sup>23</sup> See Chapter 3 par 2.2.



## 2.2 The 'connection' requirement

The following question was posed in the introductory chapter: Should an accused show that the disputed evidence would not have been obtained 'but for' the infringement, or would the 'connection' requirement be satisfied when the court is convinced that the evidence had been obtained after the violation? Put differently: Should the phrase 'obtained in a manner' be interpreted as requiring from an accused to satisfy a strict causal link between the infringement and the discovery or creation of the evidence?

Both sections 24(2) and 35(5) contain the phrase 'obtained in a manner' that violates any right guaranteed in terms of the Constitution. A comparative review of case law in both jurisdictions reveals that the phrases have been accorded a comparable meaning. However, unlike the position in Canada, an accused in South Africa does not bear the *onus* of showing that a link exists between the infringement and the discovery of the evidence.<sup>24</sup> In spite of this procedural difference, the courts in both jurisdictions have held that this requirement has been satisfied when one of either a temporal sequence test or a causal connection requirement is present. If one of the two 'connections' is weak, the stronger connection should be regarded as sufficient to satisfy this threshold requirement.<sup>25</sup> In both jurisdictions, the breach must not be 'too remote' from the discovery of the evidence.<sup>26</sup> In other words, the courts must consider the

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<sup>24</sup> *S v Ntantsi* 2007 4 All SA 941 (C) at par 16, ('*Ntantsi*'). In South Africa, the presiding judge must make a value judgment, based upon "all the circumstances". The different approaches adopted by the courts in the two countries in relation to the "threshold onus" in showing that the evidence has been obtained in violation of the constitutional rights of an accused is dealt with in par A 2.4 below.

<sup>25</sup> Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) at 35; see also chapter 3 par C.

<sup>26</sup> *R v Goldhart* (1996) DLR (4<sup>th</sup>) 502, ('*Goldhart*'); Steytler (loc cit).

presence and strength of both the temporal and causal connections to determine whether the infringement is closely linked to the discovery of the evidence. This exercise should be undertaken on a case-by-case basis.

The South African decision in *Mthembu v S*<sup>27</sup> demonstrates that when the infringement forms part of a chain of events that leads to the discovery of the disputed evidence, an important issue in the assessment of this threshold question should be whether there is a sufficient link between the violation and its discovery.

### 2.3 The standing threshold requirement

May an accused rely on section 35(5) when the rights of an innocent third party (and not that of the accused) had been infringed, and the prosecution seeks to rely on this evidence at the trial to secure a conviction of the accused? The legal position in the two jurisdictions differs on this issue. Before an accused in Canada may rely on section 24(2), she must show that *her* Charter rights have been infringed during the evidence-gathering process. If the rights of a third party have therefore been infringed, the accused may not challenge the admissibility of the evidence obtained at her trial.<sup>28</sup>

By contrast, under South African section 35(5) jurisprudence, an accused may challenge the admissibility of the unconstitutionally obtained evidence procured in this manner. In *Mthembu*, for example, the rights of a third party were infringed by the police. The court nevertheless allowed the accused to challenge

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<sup>27</sup> [2008] 2 ZASCA 51 (10 April 2008), ("*Mthembu*").

<sup>28</sup> See Godin (1995) 53 *UT Faculty LR* 49. He is of the view that the Supreme Court of Canada has incorrectly followed decisions of the USA on this issue, instead of a purposive approach. See chapter 3 par E.

the admissibility of the evidence. Such an approach is, in my view, in line with a purposive interpretation of section 35(5). Furthermore, the text of section 35(5) dictates that the disputed evidence must be excluded if its **admission** – regardless of the fact that the rights of a third party or that of an accused has been infringed – could cause the results forbidden in terms of the section. Such an interpretation sustains the important virtue of preventing the deliberate infringement of the rights of third parties in order to convict those guilty of committing criminal offences at all costs. The rationale of the prevention of judicial contamination is also advanced by such an approach.<sup>29</sup> The judgment in the recently reported decision of *Mthembu*,<sup>30</sup> which confirms the writer’s point of view on this issue, should be followed.<sup>31</sup> This decision furthermore confirms the views held by Steytler<sup>32</sup> and Van der Merwe.<sup>33</sup>

#### 2.4 The ‘threshold onus’ of showing a rights violation

Should the accused bear the onus of proving that her constitutional right has been violated or should the prosecution bear the burden of showing that the evidence has been obtained in a constitutional manner?

The phrase ‘if it is established’ contained in section 24(2) of the Charter led to the remark made by Lamer J in *Collins*<sup>34</sup> that an accused should bear the onus of

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<sup>29</sup> See also Van der Merwe (fn 7 above) at 207.

<sup>30</sup> Fn 27 above.

<sup>31</sup> See chapter 3 par E.

<sup>32</sup> Fn 25 above at 35. Steytler approaches this issue by means of a contextual interpretation of section 35(5). He gives meaning to section 35(5) by reading it together with section 38 of the South African Constitution. His interpretation of this threshold requirement leads to a comparable result when compared with the outcome of *Mthembu*.

<sup>33</sup> Fn 7 above at 207-208.

<sup>34</sup> Fn 2 above at 21.

showing, on a balance of probabilities, that her Charter rights have been infringed. However, the drafters of section 35(5) have, seemingly by design, omitted this phrase from this provision. The decision by the Supreme Court of Appeal in *Director of Public Prosecutions v Viljoen*,<sup>35</sup> suggesting that section 35(5) should, on this issue, be interpreted in a similar manner as section 24(2), should in my view not be followed. Rather, it is submitted that the Full Bench decision of the Transvaal Provincial Division in *S v Mgcina*,<sup>36</sup> where it was held that the onus of showing that the disputed evidence had not been procured in an unconstitutional manner rests on the prosecution, should be welcomed. The judgment in *Mgcina* is based on sound constitutional policy, established in the seminal case of *S v Zuma*.<sup>37</sup> As such, the *Mgcina* approach serves to protect the right to remain silent and the privilege against self-incrimination, and furthermore re-affirms that the onus to prove criminal culpability should be satisfied by means of constitutionally obtained evidence. Those whose unwarranted conduct impinges on constitutional guarantees should be required to show that their conduct was not unconstitutional. An accused that relies on section 217 of the Criminal Procedure Act as a ground for exclusion should not

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<sup>35</sup> [2005] 2 All SA 355 (SCA), (“*Viljoen*”).

<sup>36</sup> 2007 1 SACR 82 (T), (“*Mgcina*”). Schmidt & Rademeyer *Schmidt Bewysreg* (4<sup>th</sup> ed, 2006) at 383, refers to *Fedics Group (Pty) Ltd v Matus* 1997 9 BCLR 1199 (C), (“*Fedics*”) and express the opinion that, in civil matters, the party who obtained the evidence in an unconstitutional manner bears the onus of providing reasons why it was obtained in this manner.

<sup>37</sup> 1995 BCLR 401 (CC), (“*Zuma*”). In *Zuma*, Kentridge AJ dealt with the issue of whether the onus of proving that a confession has been obtained voluntarily in terms of the common law as follows at par 33: “... [T]he common law rule in regard to the burden of proving that a confession was voluntary ... has been an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s ‘golden thread’ – that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. Reverse the burden of proof and all these rights are seriously compromised and undermined”.

be better off than an accused that relies on section 35(5) for exclusion arising from a breach of a constitutional guarantee.

Furthermore, in my view, a contextual reading of section 35(5) with sections 35(2)(b) and 39(3) confirms the soundness of the *Mgcina* approach: Section 39(3) preserves the common law position insofar as it is not incompatible with the Constitution. For the reason that section 35(5) is silent on the issue as to who should bear the burden of proving a violation of rights, it is submitted that it cannot plausibly be argued that the common law, on this issue, is in conflict with the provisions of section 35(5). The Constitutional Court has confirmed the common law position relating to the question of the incidence of the onus in the *Zuma* decision. It was held in *Zuma* that the prosecution bore the burden of showing that a confession or admission was obtained voluntarily. Based on this premise, the *Mgcina* court properly held that the prosecution should bear the burden of showing that the evidence had been obtained in a constitutional manner. Moreover, one of the purposes of section 35(5) is to ensure that an accused has a fair trial. The right to legal representation during the pre-trial phase, guaranteed by section 35(2)(b), is essential to ensure that an accused effectively exercises the right to remain silent and the right not to make a confession. These rights, in turn, seek to achieve the goal of preventing an unfair trial – one of the purposes of section 35(5). In the same vein, the ‘golden thread’, that it is for the prosecution to prove the guilt of the accused – relied upon by Kentridge AJ in *Zuma* – is preserved.

Additional support for the *Mgcina* approach can be found in the practice followed in England and Wales. In England, an accused that relies on section 78(1) to challenge the admissibility of evidence does not bear the onus of showing that it

had been obtained in a manner prohibited by the provisions of the Police and Criminal Evidence Act<sup>38</sup> or the Code.<sup>39</sup>

It is therefore submitted that in South Africa, unlike the position in Canada, an accused should not bear the onus of showing that her rights have been infringed. The point of view held by Van der Merwe, that the accused should allege that – but does not have to prove – the evidence had been obtained in violation of a right guaranteed by the Bill of Rights, is supported.<sup>40</sup>

A comparative overview of the threshold requirements contained in sections 24(2) and 35(5) has revealed that, by and large, and considered from the perspective of an accused person, the threshold requirements contained in section 24(2) are more onerous to satisfy than those contained in section 35(5). The lenient threshold requirements of section 35(5) accords with a purposive and generous interpretation and promotes the virtue of broadening access to courts. The strict threshold requirements applicable in Canada may be attributed to two factors: firstly, the adoption by the Supreme Court of Canada of the United States approach to threshold requirements, instead of a purposive interpretation; and, secondly, the drastic impact of the rule of ‘near automatic’ exclusion whenever trial fairness has been impaired. It is submitted that the regular exclusion of evidence based on the Canadian approach to trial fairness<sup>41</sup> could be

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<sup>38</sup> Hereinafter “the PACE”.

<sup>39</sup> See chapter 2 par D 2(a).

<sup>40</sup> Fn 7 above at 245, where he makes the following submission: “It is submitted that an alternative approach is possible. **First**, the defence must allege – but need not prove – that there has been an infringement of a constitutional right of the accused ...”. Emphasis in original.

<sup>41</sup> See paragraph A 3.3 below.

considered as one of the factors that contributed to the strict interpretation of the threshold requirements in Canada.<sup>42</sup>

### 3 The fairness of the trial requirement

The discussion under this heading starts off with an examination of the rationales for the exclusionary provisions in different jurisdictions, aimed at preserving trial fairness. A review of the different rationales is important in order to determine the scope and purpose of the different exclusionary provisions. This is followed by a discussion of two issues that are intrinsically linked to each other: Whether the courts of South Africa should adopt the Canadian practice of a presumption in favour of exclusion whenever trial fairness has been impaired; and, whether conscriptive evidence should be admitted despite the fact that its admission would tend to render the trial unfair.

The purposes sought to be protected by the applicable exclusionary rule determines the scope of the concept 'trial fairness'. Four different notions of the concept 'fair trial' have been identified by focusing on the rationales of the different exclusionary rules. For example, the common law exclusionary rule was designed to achieve a notion of trial fairness that does not necessarily coincide with the purpose sought to be achieved by an exclusionary rule which is constitution-centred. The exclusionary remedy in the two systems serves to protect different interests. The notion 'fair trial' may be defined as verdict-centred, process-centred, balance-centred, or constitution-centred. The differences among the different approaches are discussed above.<sup>43</sup> The

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<sup>42</sup> Steytler (fn 25 above) at 35, raises a similar argument with regard to the Canadian standing threshold requirement.

<sup>43</sup> The differences have been identified in chapter 1 par B.

rationales of the exclusionary rules applicable in England and Wales, Canada and South Africa are summarised against this background.

### 3.1 The rationales for the exclusionary remedies in England, Canada and South Africa

What values are sought to be protected by the fair trial requirement under section 35(5)? In order to answer this question, it is important to consider the rationales for exclusion. This issue is especially essential to determine whether the purposes sought to be protected by the fair trial tests suggested by the Canadian decision in *Grant*, and the South African case of *Tandwa*, adequately seek to protect the procedural rights contained in the Bill of Rights. Furthermore, are the fair trial rationales applicable in England, Canada and South Africa comparable?

#### *England and Wales*

The underlying purpose of the common law exclusionary rule applicable in England is the prevention of police impropriety that has a negative effect on the **reliability** of the evidence and the **privilege against self-incrimination**.<sup>44</sup> Before the introduction of justiciable constitutional rights in Canada and South Africa, the scope and purpose of the common law exclusionary remedy applicable in both countries were indistinguishable from that applied in England. The exclusionary remedy contained in section 78(1) of the PACE serves to safeguard identical values as that protected by its common law precursor.<sup>45</sup> The

<sup>44</sup> *Leatham* (fn 1 above) at 239; *R v Sang* [1980] AC 402, (“*Sang*”).

<sup>45</sup> See for example, *R v Samuel* [1998] 87 Cr App R 237, (“*Samuel*”); *R v Mason* [1998] 1 WLR 144, (“*Mason*”); and *R v Canale* [1990] 2 All ER 187, (“*Canale*”). In *Samuel* and *Mason* evidence was excluded because it was obtained in a manner that encroached upon the privilege against



importance of reliability concerns in terms of both the common law exclusionary rule and exclusion in terms of section 78(1) emphasises the fact that both remedies serve the purpose of enhancing the truth-seeking goal of the courts. It is also important to note that neither the common law exclusionary rule,<sup>46</sup> nor the remedy contained in section 78(1), is based on the deterrence rationale.<sup>47</sup>

The Human Rights Act incorporated the provisions of the European Convention into the national law of England. This Act provides that its provisions should be interpreted while having due regard to the case law of the European Court of Human Rights.<sup>48</sup> In *Funke v France*,<sup>49</sup> the European Court of Human Rights held that the privilege against self-incrimination and the right to remain silent serve to protect the right to a fair trial. It is noteworthy that the *Funke* court excluded real evidence on the basis that its admission would render the trial unfair. This implies that the exclusionary rule contained in section 78(1) could be interpreted to protect an accused against compelled conscription. However, Lord Hobhouse, in *R v Chesterfield Justices, ex parte Bradley*,<sup>50</sup> was of the view that the Human Rights Act did not have any effect on the interpretation of section 78(1). The decision in *Samuel*,<sup>51</sup> read with *Bradley*, confirm the notion that criminal trials in England, both before and after the advent of the Human Rights Act, are verdict-centred. In other words, the truth-seeking goal of the courts is of paramount importance to the criminal justice system.

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self-incrimination; whereas in *Canale, R v Keenan* [1990] 2 QB 54, ("*Keenan*") and *R v Delaney* [1989] 2 Cr App R 565, ("*Delaney*"), exclusion was based on the effect the police conduct had on the reliability of the evidence.

<sup>46</sup> Per Lord Goddard in *Kuruma v R* [1955] 1 All ER 236 at 239, ("*Kuruma*").

<sup>47</sup> *Mason* (fn 45 above). However, compare *Keenan* (fn 45 above) at 61, which could be read as suggesting the opposite.

<sup>48</sup> Section 2 of the Act.

<sup>49</sup> Application No 31827/96, decided on 3 May 2001, ("*Funke*").

<sup>50</sup> [2001] 1 All ER 411, ("*Bradley*").

<sup>51</sup> Fn 45 above. See also the other cases cited at fn 45 above.

### *Canada and South Africa*

The exclusionary rules contained in sections 24(2) of the Canadian Charter and 35(5) of the South African Constitution serve to protect an accused from compelled conscription.<sup>52</sup> Exclusion is founded on the fundamental unfairness caused by self-conscription: An accused would have to face evidence at her trial she would not otherwise have had to face had her rights been respected by the police.<sup>53</sup> In other words, the police should not gain unfairly by admitting the disputed evidence if they could not have obtained the evidence in a constitutional manner.<sup>54</sup> In this manner the trial fairness requirement serves the purpose of encouraging police officials to respect the fundamental rights of the accused during the evidence-gathering process. In the light hereof, the trial fairness rationale serves a regulatory purpose. Compared to the fair trial concerns protected by section 78(1) of the PACE, the fair trial prong contained in sections 24(2) and 35(5) can be defined as constitution-centred. This classification is based on the fact that it serves to enhance the constitutionally entrenched right to remain silent and the privilege against self-incrimination. By the same token, it enhances the view that the onus of proof, which rests on the prosecution, should not be satisfied by means of unconstitutionally obtained evidence.

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<sup>52</sup> For the position in Canada, see *Collins* (fn 2 above); *Mellenthin* (1993) 76 CCC (3d) 481, (“*Mellenthin*”); *R v Ross* (1989) 46 CCC (3d) 129, (“*Ross*”); *Stillman* (1993) 113 CCC (3d) 321, (“*Stillman*”). For case law on the South African position, see *Melani* (fn 11 above); *Pillay* (fn 8 above); *S v Tandwa* [2007] SCA 34 (RSA), at paras 124-125, (“*Tandwa*”).

<sup>53</sup> Davies (2000) 29 CR (5<sup>th</sup>) 225 (publication pages not available) at 8-9 of the printed pages.

<sup>54</sup> See chapter 4 par B 2; see also *Stillman* (fn 52 above). However, compare Mahoney (1999) 42 CLQ 443. In the South African context, see *Pillay* (fn 8 above) at par 89-90.

The concept of a 'fair trial' was recently adapted in Canadian section 24(2) as well as South African section 35(5) jurisprudence. In *Grant*,<sup>55</sup> the Ontario Court of Appeal proposed the re-alignment of the fair trial requirement by supplementing a **second phase** to the *Stillman* fair trial analysis.<sup>56</sup> During the second phase, the societal interest in truth-seeking and the extent of the infringement were added to the analysis. The overall effect of the *Grant* fair trial test is that a trial that has been rendered unfair may be transformed into a fair trial based on the reliability of the evidence and the extent of the infringement. In other words, truth-seeking values may be accorded more weight than fundamental rights aimed at protecting trial fairness.

In *Tandwa*,<sup>57</sup> the South African Supreme Court of Appeal seemingly sought guidance for its interpretation of the concept 'trial fairness' from a combination of the article written by Skeen during 1988,<sup>58</sup> and the work by Schwikkard and Van der Merwe.<sup>59</sup> In terms of *Tandwa*, the trial fairness prong should be determined by means of the exercise of a discretion by balancing the interests of the accused against the interests of society.<sup>60</sup> It could be argued that the phase during which the balancing exercise is undertaken in *Tandwa*, entails that the approach it advocates is analogous to that applicable in the common law jurisdictions of Australia and Scotland.<sup>61</sup> In terms of *Tandwa*, the following

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<sup>55</sup> Fn 22 above.

<sup>56</sup> The *Stillman* fair trial framework basically "refined" the *Collins* fair trial prong, by introducing a precise, almost mathematical, method for the determination of trial fairness. (See chapter 4 par B 4.2). It also dictated that when the admission of the disputed evidence would tend to render the trial unfair, it is not necessary to consider the factors contained in the second leg of the assessment.

<sup>57</sup> Fn 52 above.

<sup>58</sup> (1988) 3 *SACJ* 389.

<sup>59</sup> Fn 7 above at 213-214.

<sup>60</sup> Fn 52 above at par 117.

<sup>61</sup> See chapter 4 par C 1.2.2; see also par A 3.3 and A 3.4 below.

factors should amongst others, be considered in the exercise of the discretion: Firstly, the nature and degree of the prejudice suffered by the accused as a result of the infringement must be taken into account.<sup>62</sup> The degree of prejudice suffered hinges on the proximity of the causal connection between the infringement and the conscriptive conduct. Conscriptive refers to testimonial compulsion and includes the compelled discovery of real evidence. Secondly, the extent of the infringement must be considered. If the police conduct can be labelled as a 'good faith' infringement, as opposed to deliberate or flagrant, the violation would not be regarded as serious and the trial would not be unfair.<sup>63</sup> Thirdly, the 'current mood' of society should have a significant impact on the overall assessment.<sup>64</sup> It was held in *Tandwa* that the admission of real evidence obtained through torture would render the trial unfair, because the infringement was regarded as serious and the accused suffered a high degree of prejudice.<sup>65</sup> The expression of concern about the lack of clarity as to what weight should be attached to the fact that the evidence had been obtained in a conscriptive manner would be justified.

The following question might arise: Does it really matter whether the *Tandwa* or *Pillay* fair trial framework is followed, as neither of the tests follows the extremities of the verdict-centred or process-centred approaches? It is submitted that it does matter. For some, the approach in *Tandwa* might be appealing because it appears to strike a balance between rights protection and crime control values. However, it is submitted that the *Tandwa* approach achieves this purpose at the cost of potentially weakening the fundamental rights aimed at enhancing the essential content of the right to a fair trial.

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<sup>62</sup> Fn 52 above at par 117.

<sup>63</sup> Ibid at paras 124-126.

<sup>64</sup> Ibid at par 121.

<sup>65</sup> Ibid at par 128.

One of the dangers of the *Tandwa* fair trial framework is that the balancing exercise that is performed during the **first leg** of the analysis, in actual fact dilutes the normative value of those procedural rights aimed at protecting trial fairness. This weakening of the meaning of fundamental rights is brought about because, in terms of *Tandwa*, those fundamental rights are to be weighed against societal interests that serve to ensure that those who are factually guilty are convicted. In this manner, the approach advocated in *Tandwa* suggests that **trial fairness** should be determined by means of a proportionality test between the nature of the infringement and factors that explain why the police acted as they did. The innate risk attached to such an approach is that judges show different degrees of latitude towards unwarranted police conduct. Such an approach may lead to unwarranted police conduct being readily categorised as 'good faith' infringements even when the evidence had been obtained in a conscriptive manner, thus providing adequate justification for a ruling that trial fairness had not been impaired.

By contrast, a purposive interpretation of such an infringement could have determined that the constitutional infringement should be regarded as serious, despite a tenuous causal nexus. Furthermore, in terms of the *Tandwa* approach the possibility exists that evidence may be admitted despite the fact that the accused suffered a high degree of prejudice, if this factor is outweighed by the competing requirements of public policy that those guilty of perpetrating criminal offences should be convicted. More importantly, one of the detrimental implications of the *Tandwa* fair trial assessment is that it may in the long-term lead to the weakening of the normative value of those fundamental rights aimed at achieving substantive fairness. In a word, the long-term decline of the importance of the fundamental rights that serve to protect 'forensic fairness' would be detrimental to the administration of justice – one of the consequences section 35(5) seeks to prevent. Furthermore, when section 35(5) is read

contextually with section 36 of the South African Constitution, a fundamental vulnerability of the *Tandwa* fair trial framework is exposed.

In terms of the *Tandwa* fair trial analysis, the infringement of a fundamental right should be weighed against factors that validate or justify such an infringement (such as the good faith of the police).<sup>66</sup> In performing such a balancing exercise, a court is by implication authorised to 'limit' the scope of protection guaranteed by the procedural rights aimed at enhancing the right to a fair trial, based on policy considerations – as opposed to a law of *general* application.<sup>67</sup> By contrast, such police conduct cannot be justifiable in terms of section 36 of the Constitution. For example, when a police officer fails to inform an accused about her right to legal representation as a result of which she incriminates herself, the police conduct cannot be justified in terms of the limitations clause: section 36 would not be applicable because the infringement would not have been authorised by a law of general application. However, the *Tandwa* fair trial framework allows a court to consider factors that justify the 'limitation' or constriction of the normative value of rights, firstly, that are not subjected to any limitation in terms of section 36, and, secondly, on a basis not authorised by section 36. The *Tandwa* approach raises the following fundamental question: If the limitations clause has not been designed for the purpose of sanctioning unwarranted executive conduct, 'however reasonable, to limit rights where this is not done in terms of a law':<sup>68</sup> why should the right to a fair trial be interpreted in such a manner?

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<sup>66</sup> Fn 52 above at par 117.

<sup>67</sup> Section 36 of the South African Constitution provides that all rights contained in the Bill of Rights may be limited "*only* in terms of a law of general application"; see Steytler (fn 25 above) at 18.

<sup>68</sup> Steytler (ibid) at 19 confirms this view, citing *President of the RSA v Hugo* 1997 6 BCLR 708 (CC), ("*Hugo*") where the Constitutional Court reasoned as follows: "The limitations clause, Krieglger J observed, 'is not there for the preservation of executive acts of government but to

Against this background, it is forcefully contended that the *Tandwa* and *Grant* fair trial frameworks do not adequately protect the rights aimed at advancing trial fairness concerns when compared to the *Collins* and *Pillay* approaches. Quite the opposite, the tests suggested in both *Grant* and *Tandwa* create the likelihood that the fair trial values guaranteed in terms of the Charter and the Bill of Rights may in the long-term be eroded.

The second phase of the fair trial analysis in *Grant* leans towards a verdict-centred approach, because it emphasises reliability and truth-seeking concerns, while effectively underrating the fact that the accused had been conscripted against herself in the process of the discovery of the evidence.<sup>69</sup> By comparison, the *Tandwa* fair trial assessment can be described as balance-centred, because it weighs the severity of the infringed right against the public interest in convicting those who are factually guilty. This approach begs the question: Why should factors relevant to the second leg of the assessment have to be considered during the first leg of the assessment? The inappropriateness of the *Tandwa* fair trial assessment within the context of section 35(5) is discussed above. The significant impact such an approach could have on the admissibility assessment and the likely explanation for the adoption of the *Tandwa* fair trial framework is dealt with under A 3.3 and A 3.4 below.

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allow certain rules of law to be saved'... As the primary function of the Bill of Rights is to limit state powers, it does not provide authorisation for conduct, however reasonable, to limit rights where this is not done in terms of a law".

<sup>69</sup> Compare the following dictum in *R v Burlingham* (1995) 97CCC (3d) 385 at 408, ("*Burlingham*"): "In any event, even if the improperly obtained evidence is reliable, considerations of reliability are no longer determinative, given that the Charter has made the rights of the individual and the fairness and integrity of the judicial system paramount".

To review the main points, the rationales applicable to trial fairness concerns in England, Canada and South Africa are not comparable. The trial fairness assessment in England is focused on the reliability of the evidence and the soundness of the outcome. Real evidence is readily admitted, despite infringements. By contrast, the fair trial requirement under sections 24(2) and 35(5), before *Grant* and *Tandwa*, was focused on the prevention of conscription. Furthermore, in terms of the fair trial requirement contained in these provisions, real and testimonial evidence obtained as a result of compulsion could be excluded.

### 3.2 The fair trial tests: real evidence and the common law privilege against self-incrimination

The following research question was posed in chapter one: Does the common law privilege against self-incrimination, applied within the context of section 35(5), adequately protect the procedural rights contained in the Bill of Rights? An issue related to this question is whether the common law privilege against self-incrimination should or has been adapted within the limited context of section 35(5).

In answering these questions, it is apposite to first consider the position in England and Wales, and to thereafter explore the position in Canada and South Africa.

#### *England and Wales*

The courts of England and Wales exercise a very broad discretion in section 78(1) challenges. This broad discretion, compared to the exclusionary remedy in Canada before *Grant*, is unstructured and has the potential to lead to



unpredictable outcomes in admissibility disputes. True to the common law exclusionary rule, testimonial self-incriminatory evidence obtained after a violation is readily excluded. This broad discretion and its emphasis on reliability concerns has caused scholarly writers to conclude that it primarily serves to enhance the truth-seeking function of the courts, given that reliable evidence obtained after unwarranted police conduct is generally admitted.<sup>70</sup> Real evidence could be excluded on the exceptional ground that it shocks the moral integrity of the justice system, for example, when the evidence was obtained through torture.<sup>71</sup> It is submitted that this notably high threshold for the exclusion of real evidence is comparable to the 'shock the community' test, applied by the Supreme Court of Canada in *R v Wray*,<sup>72</sup> during the pre-Charter-era.<sup>73</sup>

### *Canada and South Africa*

The Supreme Court of Canada, in *Collins*, identified the following factors to determine trial fairness under section 24(2):

a) The first factor is the nature of the evidence.<sup>74</sup> The manner in which Lamer J formulated this requirement created the impression that testimonial evidence obtained after an infringement would ordinarily render a trial unfair, but real evidence obtained in the same manner would not ordinarily have the same effect.<sup>75</sup> In subsequent decisions, Canadian section 24(2) jurisprudence has substituted this factor and in its stead focused on the manner in which the

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<sup>70</sup> Tapper *Cross and Tapper on Evidence* (2004) at 543.

<sup>71</sup> *A and Others v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 (HL), ("*A and Others*").

<sup>72</sup> (1970) 4 CCC (3d) 1, ("*Wray*").

<sup>73</sup> For a discussion of the admissibility of evidence in Canada during this era, see chapter 4 par B 1.1.

<sup>74</sup> See chapter 4 par B 1.2.1.

<sup>75</sup> *Collins* (fn 2 above) at par 37.

evidence had been obtained.<sup>76</sup> This development, in South African context, is discussed below.

b) The second factor relates to the 'but for' requirement or causation analysis, and may be posed as a question: Could the evidence have been discovered in any event in the absence of a constitutional violation?<sup>77</sup> This factor has not eluded criticism from scholarly writers.<sup>78</sup> This factor serves the purpose of determining whether the participation of the accused led to the discovery of the evidence intended to be used against her. In other words, it primarily serves the purpose of the prevention of conscription. This factor additionally serves to assess whether the police have gained an unfair advantage from their unconstitutional conduct which they would not otherwise have achieved had the rights of the accused been respected. Put differently, this factor seeks to achieve fundamental fairness during the pre-trial phase. In *Tandwa*, a causation analysis is likewise applied, with the emphasis on determining the degree of prejudice suffered by the accused.

c) The third factor is the nature of the right infringed. This factor functions under the assumption that certain rights are inherently designed to protect an accused from compelled conscription. As such, the task of this factor is to identify those rights, seemingly with the aim of notifying the police in advance that an infringement thereof would impair trial fairness. It is submitted that the *Stillman* fair trial framework has rendered a consideration of this factor superfluous as an independently existing factor.<sup>79</sup> To determine whether evidence had been obtained in a conscriptive manner, the right infringed must

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<sup>76</sup> *Ross* (fn 52 above); *Burlingham* (fn 69 above); *Mellenthin* (fn 52 above); *Stillman* (fn 52 above); *Feeney* (1997) 115 CCC (3d) 129, 7 CR (5<sup>th</sup>) 101, [1997] 2 SCR 13, ("*Feeney*"); *Grant* (fn 22 above).

<sup>77</sup> See chapter 4 paras B 2 and C 2. Mahoney (fn 54 above) at 466, makes the point that the doctrine of discoverability is actually an "extrapoliation" from the "independent source" doctrine.

<sup>78</sup> Chapter 4 par B 4.4.

<sup>79</sup> See chapter 4 par B 4.4

necessarily also be considered. Such an approach implies that the admissibility test should apply equally to the infringement of any constitutional right. However, the *Stillman* fair trial framework failed to achieve the goal of protecting all fundamental rights. The courts of Canada applied the *Stillman* fair trial assessment in a pigeon-hole manner. Conscriptive evidence was limited to the following categories of evidence: statements, bodily samples, the use of the body of the accused in creating the evidence or a significant interference with human dignity. If the evidence did not fall under any of these categories, the courts automatically held that trial unfairness had not been compromised.<sup>80</sup>

In the case of *Pillay*,<sup>81</sup> the South African Supreme Court of Appeal adopted the *Collins* fair trial test, as amplified by cases reported thereafter.<sup>82</sup> The Court was alive to the fact that the distinction between real evidence and testimonial compulsion, which originates from the common law privilege against self-incrimination,<sup>83</sup> had been adapted in subsequent Canadian decisions.<sup>84</sup> In *Pillay*, the majority and the minority opinions concurred that admission of the real evidence (money) would not render the trial unfair.<sup>85</sup> These separate but concurring judgments, on the issue of trial fairness, were not based on the reliability of the evidence. Rather, the judgments concurred by holding that the evidence could have been discovered in any event without a violation.<sup>86</sup> This

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<sup>80</sup> Maric (1999) 25 *Queen's LJ* 95 at par 119-120.

<sup>81</sup> Fn 8 above at par 87-88.

<sup>82</sup> See also *Melani* (fn 11 above); *S v M* 2002 2 SACR 411 (SCA) at par 31, ("*M*").

<sup>83</sup> See chapter 4 par B 1.1 and C 1.1 for a discussion of the privilege against self-incrimination and the values sought to be protected by this concept.

<sup>84</sup> *Pillay* (fn 8 above) at par 88 and 89; see also *Tandwa* (fn 52 above) at par 125, where Cameron JA dealt with this issue as follows: " ... focusing as the Court [below] did on the classification of the evidence (distinguishing between testimonial or real) is misleading, since the question should be whether the accused was compelled to provide the evidence".

<sup>85</sup> *Ibid* at par 90 and 125.

<sup>86</sup> *Loc cit*.

approach is aligned to the principle of the 'absence of pre-trial obligation', also known as the principle of the 'case to meet'. It is submitted that a number of South African courts have adopted the principle of the 'absence of pre-trial obligation'<sup>87</sup> into section 35(5) jurisprudence, with the result that the distinction between real evidence and testimonial compulsion had been discarded. In terms of this principle, the focus of attention should be directed towards the manner in which the evidence had been obtained instead of its nature.

It is further submitted, based on the criteria identified in *Thebus*,<sup>88</sup> that the common law privilege against self-incrimination had been adapted, within the limited context of section 35(5), in order to give effect to the spirit, purport or objects of the Bill of Rights.<sup>89</sup> This adaptation was necessitated by reason of the fact that the common law privilege against self-incrimination is limited in its scope to the protection of testimonial evidence obtained in an unconstitutional manner, and not real evidence obtained in a similar manner. Against this background, nowadays in South Africa, any evidence, testimonial or real evidence obtained in an unconstitutional manner, may be excluded if its admission would render the trial unfair.<sup>90</sup>

The common law privilege against self-incrimination was not designed to protect the procedural rights of an accused person in instances when real evidence had been discovered after a constitutional infringement. The courts of South Africa were alive to this shortcoming and consequently adapted the common law privilege, at least within the context of the fair trial prong of section 35(5), to

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<sup>87</sup> Chapter 4 par C 1.2.3.

<sup>88</sup> Fn 15 above at par 28.

<sup>89</sup> See chapter 4 par C 1.2.2(a) and (b).

<sup>90</sup> The future position in Canada depends on the outcome of the appeal argued before the Supreme Court in the appeal of *Grant* (fn 22 above). In South Africa, in terms of both the *Pillay* and *Tandwa* fair trial assessments, the real evidence distinction has been discarded.

protect both testimonial and real evidence discovered in an unconstitutional manner.<sup>91</sup>

### 3.3 The presumption in favour of exclusion

The issue considered here is whether the presumption in favour of exclusion once trial fairness had been impaired, should be adopted by the courts of South Africa. The presumption in favour of exclusion when trial fairness has been compromised can be traced to the dissenting opinion delivered by Sopinka J in *R v Hebert*.<sup>92</sup> This dissenting opinion was subsequently adopted by majority opinions in *R v Bartle*,<sup>93</sup> *R v Elshaw*<sup>94</sup> and *R v Broyles*.<sup>95</sup> Cory J, in *Stillman*, added force to these judgments when he incorporated a 'near automatic' exclusionary rule whenever trial fairness has been impaired. Cory J included as part of the 'refined' fair trial framework, the directive that the courts of Canada do not have to consider the second leg of the admissibility assessment (dealing with the second and third groups of *Collins* factors) whenever admission of the disputed evidence would render the trial unfair. It will be recalled that the trial fairness requirement is considered during the first leg of the admissibility assessment. Cory J reasoned that an unfair trial would necessarily be detrimental

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<sup>91</sup> See chapter 4 par C 1.2.3 (a) and (b).

<sup>92</sup> (1990) 57 CCC (3d) 97 at 20, ("*Hebert*"). Sopinka J reasoned as follows: "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)". Perhaps this approach of Sopinka J explains why the good faith of the police was included as a factor in the *Grant* and *Tandwa* fair trial assessments.

<sup>93</sup> (1994) 92 CCC (3d) 309, ("*Bartle*").

<sup>94</sup> (1991) 67 CCC (3d) 97, ("*Elshaw*").

<sup>95</sup> (1991) 68 CCC (3d) 38, ("*Broyles*").

to the administration of justice.<sup>96</sup> Such an application of the fair trial framework led to Canadian scholars typifying section 24(2) as a 'near automatic' or an 'automatic' exclusionary provision.<sup>97</sup> In this manner section 24(2) became a mechanism that focused almost exclusively on the rights of the accused (assessed during the first leg) while ignoring the interests of society, which should be assessed under the second leg of the admissibility assessment. In other words, when trial fairness concerns were adversely affected during the first leg of the analysis, the public interest in convicting those guilty of committing criminal offences (determined during the second leg), absolutely disappeared from the radar of section 24(2). Put in a different way: The directive of section 24(2) that the courts of Canada should consider 'all the circumstances' before evidence is excluded or admitted, was ignored. However, this approach has since been overturned.

Apparently because of the following two reasons, a new trend has developed in the interpretation of section 24(2). Firstly, the fervent opposition by Canadian judges and scholars to the rule of 'near automatic' exclusion when trial fairness has been impaired.<sup>98</sup> Secondly, the new appointments made to the bench of the Supreme Court of Canada after the retirement of Lamer CJ, Sopinka, and Cory JJ.<sup>99</sup> This new development is evidenced by the reasoning of Arbour J in *R v*

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<sup>96</sup> *Stillman* (fn 52 above) at par 119.

<sup>97</sup> See chapter 4 par B 4.4. See also Stuart (2003) 10 CR (6<sup>th</sup>) 233 (publication page references not available) at printed page 2, where he summarises the position as follows: "There may be another shoe to fall from the Supreme Court in its new unified approach to s 24(2) ... Many judges and commentators see the Court's exclusion of conscripted evidence as going to the fairness of the trial as a rule of automatic exclusion especially as factors of seriousness of the violation and effect on the administration of justice are normally not to be considered".

<sup>98</sup> See for example, Delaney (1997) 76 CBR 521; Brewer (1997) 2 *Can Crim LR* 239; Mahoney (fn 54 above) at 445; Paciocco (1997) 2 *Can Crim LR* 163; Stuart (fn 22 above) at par 10.

<sup>99</sup> The retirement from the Supreme Court bench of Lamer CJ, Sopinka, and Cory JJ, who supported the argument of the presumption in favour of exclusion once trial unfairness has been

*Buhay*,<sup>100</sup> when she explained the function of section 24(2) on behalf of a unanimous court, as follows:<sup>101</sup>

Section 24(2) is not an automatic exclusionary rule (see *inter alia*, *Dyment, supra*); in my view neither should it become an automatic inclusionary rule when the evidence is non-conscriptive and essential to the the Crown's case.

The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence ...

On this view, evidence should not be excluded in a mechanical manner because its admission would tend to render the trial unfair. The admissibility test is essentially an assessment of what impact admission or exclusion would have on the reputation of the administration of justice.

This new approach was confirmed by Fish J in *R v Orbanski*,<sup>102</sup> where the judge re-affirmed that section 24(2) is not a 'pure exclusionary rule',<sup>103</sup> which dictates that exclusion should follow whenever trial fairness has been compromised. The

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compromised, has left room for the reconsideration of this approach by a Canadian Supreme Court Bench consisting of new members. For example, the approach followed by the Ontario Court of Appeal in *Grant* defies the approach adopted by the retired Supreme Court judges mentioned above. The current members sitting on the Bench of the Supreme Court of Canada are Rothstein, Charrion, Abella, Fish, Deschamps, LeBel, Binnie, Bastarache JJ, and McLachlin CJ. (<http://www.scc-csc.ac.ca/AboutCourt/judges>, accessed on 20 May 2008).

<sup>100</sup> [2003] 1 SCR 63 at par 71, ("*Buhay*").

<sup>101</sup> *Ibid* at paras 71 and 72.

<sup>102</sup> (2005) 196 CCC (3d) 481, ("*Orbanski*").

<sup>103</sup> *Ibid* at par 93. LeBel J, writing a separate concurring opinion confirmed this point of view.

judge in effect reversed the impact of *Bartle*, *Elshaw* and *Broyles*, in relation to the presumption in favour of exclusion, when he emphasised that the Supreme Court of Canada did not suggest 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'.<sup>104</sup> Therefore, despite trial unfairness, the second leg of the admissibility assessment should not altogether be ignored. The courts of Canada should, in addition, consider the factors resorting under the second leg of the inquiry and perform a balancing exercise by considering all the different factors to determine whether exclusion or admission of the disputed evidence would offend the integrity of the criminal justice system. Such an interpretation of section 24(2) is firmly aligned to the dictum of Lamer CJ in *Collins*, where he said the following:<sup>105</sup>

In determining whether the admission of the evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be **considered** and **balanced** have been listed by many courts in the country ...

Lamer CJ proceeded by listing the various factors frequently considered by the courts of Canada, under both the first and second legs of the analysis, before a ruling on the admissibility of the evidence is made. It is important to note that he mentioned that all the factors, resorting under the first, second and third groups of *Collins* factors had to be considered and balanced in order for a court to make the admissibility assesment.

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<sup>104</sup> Loc cit.

<sup>105</sup> Fn 2 above at par 35. (Emphasis added).



The view held by Van der Merwe, when he makes the following remark constitutes an endorsement of the approach of 'near automatic' or 'automatic' exclusion whenever trial fairness has been compromised:<sup>106</sup>

Obviously, if the court concludes that admission would render the trial unfair the evidence **must** be excluded.

However, this statement of Van der Merwe must be considered within its proper context. It must be emphasised that he does not base his opinion on an approach that is similar to that advocated in *Bartle*. He supports an approach analogous to the *Tandwa* approach, where factors relevant to the second leg of the *Collins* admissibility assessment is weighed against factors normally considered under the first, in order to determine trial fairness. In other words, only after a balancing exercise of the various factors, followed by a ruling that admission would impair trial fairness, must it be excluded. This should be the case, according to Van der Merwe, because its admission would, per se, be detrimental to the integrity of the justice system.<sup>107</sup> Put differently, 'automatic' exclusion should only follow after factors relevant to the public interest in the protection of the rights of the accused and the public interest in convicting the factually guilty have been considered, and it is held that admission could have a negative impact on trial fairness. He bases his opinion, cited above, on the presence of the phrase 'or otherwise' contained in section 35(5), as interpreted in *S v Naidoo*.<sup>108</sup> However, it should be mentioned that the *Naidoo* court followed the two-phased interpretation of the substantive phase, established in *Collins*, and followed in *Pillay*.

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<sup>106</sup> Fn 7 above at 209. Emphasis added.

<sup>107</sup> Ibid at 202.

<sup>108</sup> 1998 1 SACR 479, ("*Naidoo*").

In my view, once the court has found that admission of evidence would tend to render the trial unfair, this factor should (depending on factors relevant to the second leg of the admissibility assessment) weigh heavily in favour of exclusion. This should be position, since an infringement of the right to a fair trial should always be regarded as a serious infringement: Judicial condonation of serious infringements would always be detrimental to the integrity of the justice system. It is submitted that under these circumstances the constitutional imperative that the impugned evidence 'must be excluded' is set in motion. The reasons why such an approach should be followed is discussed below. Conversely, the point of view that the disputed evidence must always be excluded **at this stage** of the admissibility assessment when a two-phased approach is applied during the substantive phase – as in the *Naidoo* decision – thus rendering the second leg of the analysis redundant, is not supported.

It is submitted that a plain reading of the phrase 'or otherwise' should have the following effect on the remainder of the section, and should accordingly be read to mean: 'for reasons other than trial fairness may be admitted', if its **exclusion** could be detrimental to the administration of justice.<sup>109</sup> Zeffertt<sup>110</sup> is of the opinion that the phrase could be interpreted to have such meaning. Nevertheless, he is of the view that such an interpretation is implausible. By contrast, the core of the reasoning of Steytler<sup>111</sup> could be read as confirming – to

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<sup>109</sup> See chapter 4 par C 4.2. Allen (ed) *The Concise Oxford Dictionary of Current English* (8<sup>th</sup> ed, 1991) at 841, explains the meaning of the phrase as follows: "the negation or opposite (of a specified thing)"; see also Brown (ed) *The New Shorter Oxford English Dictionary on Historic Principles* (Vol 2, 1991) at 2032; Bullon (ed) *Longman Dictionary of Contemporary English* (4<sup>th</sup> ed, 2003) at 1164; Black, Nolan & Connolly *Black's Law Dictionary* (4<sup>th</sup> ed, 1993) at 1101; Soanes & Stevenson (eds) *Concise Oxford English Dictionary* (11<sup>th</sup> ed, 2004) at 1013; *South African Oxford School Dictionary* (2<sup>nd</sup> ed, 2004) at 313-314.

<sup>110</sup> 1996 *ASSAL* 803 at 804-805.

<sup>111</sup> Fn 25 above at 36.

an extent – the plausibility of the interpretation suggested in this thesis. The viewpoint of Steytler that the purpose of section 35(5) is to achieve primarily one goal, that is, to determine whether exclusion or admission of the disputed evidence would be detrimental to the administration of justice, is supported. He argues that an unfair trial should be regarded as a specific manifestation of the broader inquiry into what would be ‘detrimental’ to the justice system. Taken to its logical conclusion, it is submitted that the peremptory instruction that the evidence ‘must be excluded’, should be based on a value judgment that should be made after ‘all the circumstances’ have been considered. The majority opinion in *Pillay* held that, despite the absence of this phrase in section 35(5), it should be incorporated into the section.<sup>112</sup> Canadian precedent dictates that this phrase refers to all the *Collins* factors listed under the first and second legs of the admissibility analysis.<sup>113</sup> Read in this manner, the soundness of the interpretation suggested in this thesis is further re-inforced. In other words, the factors relevant to the second leg of the analysis (the second and third groups of *Collins* factors) should be considered to determine whether, despite the fact that admission would tend to render the trial unfair, the evidence should on different grounds be **admitted**. In the final analysis, it is submitted that the three groups of factors (trial fairness, the seriousness of the infringement, and the effect of exclusion) should be considered to determine the issue of admissibility.<sup>114</sup>

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<sup>112</sup> Fn 8 above at par 93.

<sup>113</sup> See, for example, *Grant* (fn 22 above); see further the cases cited at fn 114 below.

<sup>114</sup> See the overall approach in *Grant* (fn 22 above) at par 67. In terms of *Grant*, the three groups of factors are to be balanced to determine the admissibility of the disputed evidence; see also *R v Krall* (2003) CarswellAlta 1336 at par 99, (“*Krall*”); *R v Harris* (2007) 49 CR (6<sup>th</sup>) 276 (Ont CA) at par 77, (“*Harris*”); see further *Collins* (fn 2 above) at par 35, where Lamer J introduced this approach. In South African context, it could be argued that the approach advocated in *Tandwa*, and preferred by Van der Merwe, gives effect to the phrase “all the circumstances”, since those factors are considered during the fair trial assessment.

The courts of South Africa should, therefore (always on the understanding that this thesis supports an approach based on a two-phased analysis to determine the substantive phase of the admissibility assessment),<sup>115</sup> despite a finding that admission of the evidence would tend to render the trial unfair, nevertheless also consider whether exclusion would not be detrimental to the administration of justice.<sup>116</sup> The advantage of such an interpretation is that it permits a court to hold that despite trial unfairness (the first leg of the analysis), exclusion would – on unrelated grounds – be detrimental to the administration of justice. Bearing in mind the contention by Steytler that the admissibility assessment should be undertaken while considering the two legs of the analysis as identified in *Collins*, and the endorsement of his argument in this thesis that those two phases should be separated:<sup>117</sup> When admission would tend to render the trial unfair, why should the good faith of the police or the fact that the evidence had been obtained on grounds of urgency, for example, be totally ignored?<sup>118</sup> Even if the courts of South Africa should accept that the *Hebert* rule is based on sound constitutional policy, it is submitted that the phrase ‘or otherwise’ permits of an approach which determines the admissibility issue based on trial fairness, but also on grounds other than trial fairness. In instances when trial unfairness was caused by the police acting in objective ‘good faith’, for example, should the courts not consider whether exclusion, having regard to this and other factors, could be ‘detrimental to the administration of justice’? In this manner the ‘good faith’ of the police officers does not transform an unfair trial into a fair trial, but the fact that they acted in good faith may be considered as a factor determining what effect exclusion might have on the integrity of the justice system.

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<sup>115</sup> See par B 2.1 below.

<sup>116</sup> It is submitted that such an approach is not inconceivable. See the Canadian decision of *R v Tremblay* (1987) 37 CCC (3d) 481, (“*Tremblay*”). See further chapter 4 par C 4.2.

<sup>117</sup> Steytler (fn 25 above) at 36.

<sup>118</sup> This is the upshot of the judgments in *Hebert*, *Bartle*, *Broyles* and *Stillman*.

Compared to the *Hebert* and *Stillman* approaches, the interpretation suggested in this thesis allows for a broader application of the good faith exception and other excusing factors. For example, in terms of the *Stillman* approach, the good faith of the police would only be relevant in respect of 'non-conscriptive, not discoverable' evidence. In this way the interests of society in crime control is completely ignored whenever the evidence had been classified as conscriptive. By contrast, the approach suggested in this work has the advantage that the societal interests in crime control are not altogether disregarded whenever trial fairness had been compromised because conscriptive evidence had been unconstitutionally obtained. In the light hereof, it is submitted that the good faith of the police, including the factors relevant to the second leg of the analysis, should be considered regardless of whether admission would tend to render the trial unfair. Such an approach would ensure that the interests of the accused are as a rule weighed against the interests of society.

It is therefore suggested that, instead of the presumption in favour of exclusion, the courts of South Africa should follow the following approach: If admission would tend to render the trial unfair, the phrase 'or otherwise' permits the courts to consider factors other than trial unfairness that could – if ignored – in the long-term, be 'detrimental' to the integrity of the justice system. In other words, an unfair trial reflects negatively on the integrity of the justice system. It follows that a violation that has brought about such an effect on the trial fairness requirement should, for this reason, be considered as a serious infringement. However, a court may consider different factors that may, if disregarded, be equally detrimental to the justice system. For example, the failure to consider factors like the 'good faith' of the police which contextualises the nature and extent of the infringement (both relevant during the second leg) may indisputably be detrimental to the justice system, since such an approach may

create the impression among reasonable members of society that the courts are showing unwarranted 'sympathy for crime and its perpetrators'.<sup>119</sup>

Against this background, it is submitted that the courts of South Africa should not adopt the presumption in favour of exclusion, as it is applied in Canada, into our section 35(5) jurisprudence.

### 3.4 Admission of conscriptive evidence despite trial unfairness

Should the courts of South Africa adopt the approach suggested in *Grant*, which supports the view that even though the admission of the disputed evidence would tend to render the trial unfair, it should nevertheless be received – depending on the extent of the infringement?

*Grant* suggests, despite a finding that admission of the evidence would tend to render a trial unfair in terms of the *Stillman* and *Pillay* fair trial frameworks, that the disputed evidence should – having regard to factors associated with the second leg of the *Collins* assessment – nevertheless be admitted. Van der Merwe, in the South African context, observes that the courts have adopted a similar line of reasoning.<sup>120</sup> It was argued above that the innate danger of such an approach is that it could likely erode the normative value of the constitutional rights which collectively serve to protect the right to a fair trial. It follows that if the fundamental rights guaranteed to protect an accused against governmental abuse during the pre-trial phase could be interpreted in this restrictive manner, it could create the likelihood that other fundamental rights established to protect

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<sup>119</sup> Per Kriegler J in *Key v Attorney-General, Cape Provincial Division* 1996 4 SA 187 (CC), at par 13, ("Key"), a judgment delivered before the advent of section 35(5).

<sup>120</sup> Fn 7 above at 215; see also chapter 4 par C 4.1.

individuals from governmental intrusion or neglect may be interpreted in a like manner.

Some might understandably argue that the approach followed in *Grant* (and the argument raised by Van der Merwe, if applied to a two-phased analysis) relating to trial fairness, have been developed to achieve the worthy aim of attenuating the impact that the presumption in favour of exclusion, as applied in *Hebert*, would have on the overall admissibility assessment. It is submitted that no rational connection exists between the achievement of this procedural goal and the negative effect it could have on the normative value of fundamental rights, designed with the aim of protecting the right to a fair trial. The avoidance of the effect that the rule of 'near automatic' exclusion has on the overall analysis does not justify the erosion of fundamental rights. This consequence should especially be avoided when an alternative, less obtrusive approach, can be followed to achieve the purposes of section 35(5).

It follows that if the approach suggested in this thesis under A 3.3 above is adopted in South Africa, the call for the admission of the disputed evidence despite trial unfairness, as suggested by the *Grant* court, cannot be justified.

#### 4 Determining 'detriment'

##### 4.1 The role of public opinion

The important question asked here is whether the concepts of 'disrepute' and 'detriment' have an equivalent meaning. If so, having regard to the high rate of serious crime in South Africa, should public opinion or the 'current mood' of society be considered as a weighty factor in the assessment of the 'detriment'

requirement? Does the judicial integrity rationale not direct that courts should mould public opinion rather than abide by it?

The concepts 'disrepute' contained in section 24(2) and 'detriment', which appears in section 35(5), have a comparable meaning.<sup>121</sup> Neither concept should be equated with public opinion. At the same time, this also does not mean that the view held by the public at large about the integrity of the criminal justice system should be totally ignored.<sup>122</sup> The 'current mood' of society should be considered, but only if such mood is reasonable.<sup>123</sup> This qualification is necessary, because the protection of the minority (in this the accused) should not depend on the utterly impulsive will of the majority (here, the public at large or the people, as represented by the might of the prosecuting authority) against which the minority has to be protected.<sup>124</sup>

Van der Merwe is of the view that the 'current mood' of society should be considered as a 'weighty' factor and argues that the courts of South Africa should lean in favour of crime control concerns during the second leg of the admissibility assessment.<sup>125</sup> He asserts that the high rate of serious crime justifies such an approach. Langa DP<sup>126</sup> did not share this view in *S v Williams*,<sup>127</sup> when he maintained that the Constitution should be interpreted while having proper

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<sup>121</sup> See chapter 5 C 1.

<sup>122</sup> Loc cit.

<sup>123</sup> *Collins* (fn 2 above).

<sup>124</sup> Ibid at par 34.

<sup>125</sup> Fn 7 above at 234.

<sup>126</sup> Now Langa CJ.

<sup>127</sup> 1995 (7) BCLR 861 (CC) at par 36-37, (*Williams*). In *Williams*, Langa CJ had to decide on the constitutionality of corporeal punishment as a competent sentencing option. See also *S v Makwanyane and Another* 1995 2 SACR 1 (CC), (*Makwanyane*).



regard to constitutional values, as opposed to 'contemporary standards of decency'.

Furthermore, the Constitutional Court was called upon in *Makwanyane* to provide a **remedy** for the infringement of constitutional rights. As section 35(5) serves a similar purpose, the role of public opinion in this provision should be interpreted in a like manner. In other words, judges should relate their decision, whether to exclude or admit the disputed evidence, to the broader purposes of the Bill of Rights.<sup>128</sup> An important purpose of the Bill of Rights is to instil a culture of fundamental rights protection. The approach followed in *S v Soci*,<sup>129</sup> and *S v Nomwebu*,<sup>130</sup> which were decided within the context of section 35(5), appropriately gives effect to the achievement of such a purpose. These cases are furthermore aligned to the approach adopted by the Constitutional Court in *Williams* and *Makwanyane*.<sup>131</sup> In a word, the approach adopted in *Soci* and *Nomwebu* is analogous to the *Collins* approach to public opinion.

In my view, Schwikkard is correct when she remarks that the high rate of serious crime has influenced the courts of South Africa to steer away from the approach

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<sup>128</sup> Roach *Constitutional Remedies in Canada* (2004) at 10-18, confirms this point of view as follows: "*Collins* has the important virtue of assimilating s. 24(2) decisions to the rest of constitutional interpretation. This forces judges to relate their decisions to the larger purposes of the Charter." See further Davies (2002) 46 *CLQ* 21 at 29, where he endorses this point of view as follows: "It [s 24(2)] must also be interpreted remembering that the Charter is the 'supreme law of Canada'. In other words, s 24(2) must be interpreted in a way that ensures for Canadians the full benefit of their rights and in a way that gives effect to the Charter's overall purpose of constraining governmental action".

<sup>129</sup> 1998 2 SACR 275 (E), ("*Soci*").

<sup>130</sup> 1996 2 SACR 396 (E), ("*Nomwebu*").

<sup>131</sup> See also *Melani* (fn 11 above); the majority opinion in *Pillay* (fn 8 above). Schmidt & Rademeyer (fn 36 above) at 180-181 confirm the aptness of the *Soci* and *Nomwebu* approach. However, compare *S v Ngcobo* 1998 (10) BCLR 1248 (W), ("*Ngcobo*").

advocated in *Soci* and *Nomwebu*.<sup>132</sup> She maintains that the courts of South Africa are inclined to underscore the 'current mood' of society during section 35(5) challenges. The danger attached to the over-emphasis of the 'current mood' of society, is that the costs of exclusion could be determinative of the outcome of the admissibility assessment. If such an approach is adopted, reliable real evidence would regularly be admitted, especially when the evidence is essential to convict an accused facing serious charges. Moreover, as illustrated under A 4.3.1 and A 4.3.2 below, it is submitted that the effect of an over-emphasis of the 'current mood' of society may potentially result in the encroachment upon the presumption of innocence. The final objection to such an approach is that it may render a consideration of the factor of the long-term effect of the regular admission of the evidence on the integrity of the justice system, as well as the educational role of the courts, redundant.<sup>133</sup> It is submitted that what really matters is that the public should have faith in the judicial process.

The integrity of the ***judicial process*** has an effect on public attitudes towards the justice system.<sup>134</sup> The public should be satisfied that the judiciary is impartial and independent of any improper influence.<sup>135</sup> In the same vein, the public should have faith that the decision of a judge, whether to exclude or admit evidence, is grounded in the Constitution. If the Constitution directs that evidence that was obtained in a manner not sanctioned by it should be excluded, it cannot plausibly be argued that the consequences brought about by the

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<sup>132</sup> Schwikkard (fn 14 above) at 795-796.

<sup>133</sup> Schwikkard (loc cit) confirms this point of view.

<sup>134</sup> Speech delivered by McLachlin CJ on 5 May 2001 entitled "The Role of Judges in Modern Society", accessed on 22 May 2008, available at [www.scc-csc.gc.ca/aboutcourt/judges/speeches/role-of-judges\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/role-of-judges_e.asp).

<sup>135</sup> Speech delivered by McLachlin CJ on 11 May 2001, entitled "Judicial Independence", accessed on 22 May 2008, available at [www.scc-csc.gc.ca/aboutcourt/judges/speeches/independence\\_easp](http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/independence_easp).

faithful application of the Constitution could be detrimental to the justice system. Any argument along these lines would render section 35(5) redundant. Empirical research undertaken in Canada with specific reference to the outcome in *Feeney*,<sup>136</sup> revealed that the exclusion of reliable evidence essential to convict the accused on a charge of murder did not detrimentally affect the integrity of the criminal justice system, because the Canadian public at large – even after this case – still have faith in the criminal justice system.<sup>137</sup> The public at large should be able to count on the independence of the judiciary. They should have faith in the fact that the courts would only convict an accused based on evidence which has been procured in a constitutionally fair manner, and which does not tarnish the integrity of the justice system. The educational role of the courts should for this reason not be underrated.

A purposive interpretation of section 35(5) dictates that the rationale of section 35(5) should determine the role and weight to be attached to public opinion. As a consequence, the view held by the South African courts in *Makwanyane*, *Williams*, and *Soci* should be followed when section 35(5) is interpreted. Put differently, section 35(5) should be interpreted in conformity with other provisions of the Constitution. When a violation is typified as serious, the courts of South Africa should see their role as educators and guardians of the Constitution, thereby serving the purpose of moulding public opinion and upholding fundamental rights. Moreover, by adopting the role of moulders of public opinion and guardians of constitutional rights, the courts would enhance the normative value of the infringed rights. In this manner the courts would implement their fundamental duty, which is to serve as protectors of the integrity of the criminal justice system. Section 35(5) should function as a mechanism to protect these interests, rather than becoming an instrument in the enthusiastic

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<sup>136</sup> Fn 76 above.

<sup>137</sup> Fn 134 above.

quest to seek public popularity by upholding the truth-seeking function of the courts. The supremacy clause dictates that the Constitution is the supreme law of South Africa. It follows that it would be a contradiction in terms to argue that a faithful application of the supreme law could be detrimental to the justice system. Against this background, public opinion should not be allowed to 'limit' the scope of fundamental rights, by permitting it to usurp the fundamental function of the courts to uphold the protection of fundamental rights. Should this be the case, the courts may be perceived by the public at large as having abdicated their fundamental duty as guardians of the Constitution. In the light hereof, it is submitted that the attachment of too much weight to the 'current mood' of society would be incompatible with the purposes of section 35(5).

The effective enforcement of the fundamental rights of the accused in South Africa should not be dependent on a decrease in the high rate of serious crime. Crime must be detected and effectively prosecuted within the parameters permitted by the Constitution. The procedural rights contained in section 35 are not couched in terms analogous to those of socio-economic rights. The duties imposed by the provisions of the Constitution on officials involved in the criminal justice system (including the courts) are enforceable with immediate effect. The over-emphasis of the role of the 'current mood' of society would serve a similar purpose as that of internal qualifiers, characteristically designed for the progressive enforcement of socio-economic rights: The enforceability of socio-economic rights is generally dependent on the future realisation of governmental obligations, in anticipation of the availability of resources.<sup>138</sup> The enforcement of

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<sup>138</sup> See *Soobramoney v Minister of Health* 1998 1 SA 765 (CC), ("*Soobramoney*"); *Government of the RSA and Others v Grootboom and Others* 2001 1 SA 46 (CC), ("*Grootboom*"); Brand "Introduction to Socio-economic Rights in the South African Constitution" in Brand & Heyns (eds) *Socio-economic Rights in South Africa* (2005) at 1-56; Liebenberg & Pillay (eds) *Socio-economic rights in South Africa* (2000) 9-105.

the procedural guarantees contained in the Bill of Rights should not be subjected to such an interpretation.

In view hereof, the rights contained in section 35 and the remedy contained in section 35(5) should not be interpreted in a manner that their scope is narrowed whenever the rate of serious crime is high. For these reasons, the *Soci* approach should be followed and the *Ngcobo* and *Grant* approaches, which emphasise the 'current mood' of society, should be rejected.

#### 4.2 Determining the seriousness of the infringement by considering the nature of the infringement and police 'good faith'

How should the seriousness of the violation be determined? Should the nature of the evidence (real or testimonial) be determinative of the classification of the infringement as either serious or non-serious? Would the 'good faith' of the police be considered as a factor that diminishes the seriousness of the infringement? What purpose should the 'good faith' of the police fulfil in the overall admissibility analysis?

The seriousness of the infringement is considered under the second group of *Collins* factors, (during the second leg of the admissibility analysis). The rationale for exclusion based on the second group of *Collins* factors is that the courts do not want to be associated with unwarranted police conduct when the infringement is regarded as serious. It is submitted that the seriousness of the infringement should be at the heart of the overall admissibility assessment. The exclusion of evidence essential for a conviction on a serious offence, obtained after a trivial infringement, would in general be detrimental to the administration of justice. It is submitted that a similar consequence could follow if trial fairness had been compromised in circumstances when the police acted in objective

'good faith'. This consideration was consistently neglected in the overall admissibility assessment in terms of *Stillman*, especially with regard to 'conscriptive, not discoverable' evidence. It is submitted that the absence or presence of 'good faith' on the part of the police should be a compelling indicator of whether the infringement should be categorised as serious, 'flagrant', deliberate' or 'trivial', 'inadvertent' or of a 'technical' nature.

When the infringement is labelled as serious, it should be regarded as a significant step in justifying the exclusion of the disputed evidence. This criterion is employed in a number of open and democratic societies, as well as the ad hoc International Criminal Tribunals, where exclusionary remedies are utilised for the protection of fundamental fairness and the integrity of the criminal justice systems.<sup>139</sup> The classification of the violation as non-serious is an important step to explain why the evidence should be received, especially when it is essential for a conviction on a serious charge. It is furthermore a common norm in open and democratic societies that evidence obtained as a result of a violation of the right to legal representation necessarily impacts negatively on trial fairness and the infringement of both rights, even when considered independently, are deemed serious infringements.<sup>140</sup>

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<sup>139</sup> See chapter 2 for examples of the application of this method in England and Wales; see also the position in Australia and Scotland in, for example, the decisions of *The People v O' Brien* [1965] IR 142, ('*O' Brien*'), and *Bunning v Cross* (1978) 141 CLR 54, ('*Bunning*'). For the position in Canada, see *Buhay* (fn 100 above); *Stillman* (fn 52 above). For the position in respect of the ad hoc International Criminal Tribunals, see chapter 2 par E 3. The cases of *Melani* (fn 11 above) and *Pillay* (fn 8 above) confirm the fact that section 35(5) is comparable to section 24(2) of the Charter.

<sup>140</sup> For the position in England and Wales, see chapter 2 par D 3. For the Canadian position, see chapter 4 par B 2.1. For the position in South Africa, see chapter 4 par C 2.1.

Should the nature of the evidence be determinative of the classification of the infringement as serious? Stuart<sup>141</sup> and Roach<sup>142</sup> are correct when they conclude that the classification of a violation in Canada is in general 'result-oriented'. They argue that when the disputed evidence had been obtained in a manner that impairs trial fairness the infringement is typified as serious despite a lack of evidence of police abuse or bad faith. By contrast, when the disputed evidence is real evidence, the manner of its procurement is only categorised as serious when the police conduct can be described as 'wilful', 'flagrant', 'deliberate' or obtained as a result of police abuse or in a pattern of disregard. A review of South African case law has revealed that some of the courts of South Africa have followed this tendency.<sup>143</sup> However, this is not a common trend.<sup>144</sup>

Canadian and South African jurisprudence dealing with the determination of the seriousness of the infringement have in general considered the factors listed below as indicators of the seriousness of the violation. Those factors are whether:<sup>145</sup>

- a) the evidence was obtained in a manner that constitutes an affront, not minimal in nature, to human dignity;<sup>146</sup>
- b) the evidence was obtained in a pattern of disregard for constitutional rights;<sup>147</sup>

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<sup>141</sup> *Charter Justice in Canadian Criminal Law* (2001) at 406.

<sup>142</sup> Fn 128 above at 10-76, par 10.1710.

<sup>143</sup> See chapter 5 par C 2.1.

<sup>144</sup> *Loc cit.*

<sup>145</sup> See the discussion of these factors in chapter 5 par B 2.1 and C 2.1.

<sup>146</sup> *Buhay* (fn 100 above); *Stillman* (fn 52 above); *Feeney* (fn 76 above); *S v Hena* 2006 2 SACR 33 (SE), ("Hend"); *Tandwa* (fn 52 above); *Mthembu* (fn 27 above).

<sup>147</sup> See the Canadian cases referred to in fn 146 above. In the South African context, see *Pillay* (fn 8 above); *Mthembu* (fn 27 above); and *Hena* (fn 146 above).

- c) the evidence could not have been obtained in a constitutional manner;<sup>148</sup>
- d) the evidence had been obtained without reasonable grounds to obtain a warrant when a warrant could have been obtained;<sup>149</sup>
- e) the evidence could have been obtained in a constitutional manner if other investigatory techniques were followed;<sup>150</sup>
- f) the evidence was not obtained on the grounds of urgency, calling for immediate police action or it was not obtained on the grounds that it might otherwise have been destroyed or removed;<sup>151</sup>
- g) the evidence had been obtained in a conscriptive manner, which has a negative impact on trial fairness;<sup>152</sup>
- h) the violation was caused as a result of systemic unconstitutional conduct or institutional failure or inadequate training;<sup>153</sup>

<sup>148</sup> *R v Kokesch* (1990) 61 CCC (3d) 207, ("Kokesch"); *Mthembu* (fn 27 above).

<sup>149</sup> *Kokesch* (fn 148 above); *Buhay* (fn 100 above); *R v Buendia-Alas* (2004) 118 CRR (2d) 32, ("Buendia-Alas"); *S v Motloutsi* 1996 1 SACR 78 (C), ("Motloutsi"); *S v Mayekiso* 1996 2 SACR 396 (E), ("Mayekiso"). These South African cases were decided before the advent of section 35(5), but it is submitted that the principles considered to determine this factor are relevant in section 35(5) disputes.

<sup>150</sup> *R v Greffe* (1990) 55 CCC (3d) 161, ("Greffe"); *Buhay* (fn 100 above); *Motloutsi* (fn 149 above); *Pillay* (fn 8 above); *Hena* (fn 146 above).

<sup>151</sup> *R v Hosie* (1996) 107 CCC (3d) 385, ("Hosie"); *Buhay* (fn 100 above); *S v Madiba* 1998 1 BCLR 38 (D), ("Madiba"); *Motloutsi* (fn 149 above); *Mayekiso* (fn 149 above); *Hena* (fn 141 above); see also the minority opinion of Scott JA in *Pillay* (fn 8 above) at par 132.

<sup>152</sup> *Hebert* (fn 92 above); *Kokesch* (fn 148 above); *Stillman* (fn 52 above); *Feeney* (fn 76 above); however, compare *Grant*, suggesting that despite trial unfairness, the infringement could be regarded as less serious. In the South African context, see *S v Mphala* 1998 1 SACR 388 (W), ("Mphala"); *Melani* (fn 11 above); *Soci* (fn 129 above); *S v Mfene* 1998 9 BCLR 115 (W), ("Mfene"); *S v Gasa* 1998 1 SACR 446 (D), ("Gasa"); *S v Malefo* 1998 1 SACR 127 (W), ("Malefo"); *Tandwa* (fn 57 above); however, compare *Shongwe* (fn 11 above), where, it is submitted, the court should have held that the infringements were serious, given that it impaired trial fairness.



- i) the accused was, because of his youthful age, regarded as especially vulnerable and legislation was introduced with the aim of protecting such individuals during the evidence-gathering process, which legal provisions were flouted by the police in the procurement of the evidence;<sup>154</sup>
- j) the evidence, typified as conscriptive, was obtained through torture;<sup>155</sup>
- k) the evidence had been obtained in circumstances where the police could easily have complied with their constitutional duties which would have enabled the accused to exercise her rights aimed at protecting her against self-conscription, but they deliberately failed to discharge such duties.<sup>156</sup>

In terms of Canadian and South African exclusionary jurisprudence the mental state and objective reasonableness of the police conduct is key to the assessment.<sup>157</sup> Hence the courts of both jurisdictions determine the 'good faith' of the police by means of an objective test. It follows that the courts of South Africa should not regard the negligent infringement of fundamental rights as

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<sup>153</sup> *Buhay* (fn 100 above); *Orrie* (fn 20 above); *S v Seseane* 2000 2 SACR 225 (O), ("*Seseane*"); *Hena* (fn 146 above). However, compare *S v Mkhize* 1999 2 SACR 632 (W), ("*Mkhize*").

<sup>154</sup> In *Stillman* the provisions of the Young Offender's Act were violated, which added to the seriousness of the infringement. On 25 June 2008 the Child Justice Bill was approved by the South African National Assembly during its second reading. This Bill aims to protect a juvenile offender in a manner comparable to the Young Offender's Act. The violation of the rights of a juvenile accused, protected by the provisions of this Bill could, once enacted, be regarded as a factor that adds to the seriousness of the infringement.

<sup>155</sup> See *Tandwa* (fn 52 above); *Mthembu* (fn 27 above).

<sup>156</sup> *Ross* (fn 52 above); *Stillman* (fn 52 above); *Mphala* (fn 152 above).

<sup>157</sup> Roach (fn 128 above) at 10-75; Steytler (fn 25 above) at 39; Van der Merwe (fn 7 above) at 240-241.

'good faith' infringements within the meaning of section 35(5).<sup>158</sup> Despite the absence of the phrase 'all the circumstances' in section 35(5), the majority opinion in *Pillay* held that this phrase should be read into section 35(5). *Pillay* demonstrates that a consideration of 'all the circumstances' may have a significant impact on the outcome of the admissibility assessment. In *Pillay*, the majority opinion considered the police conduct in the entire evidence-gathering process. Based on such an interpretation of the phrase 'all the circumstances', it was held that the infringement was serious and the police conduct was accordingly held not to meet the criteria of 'good faith' for purposes of section 35(5). By contrast, the dissenting minority opinion of Scott JA regarded the violation as less serious and the infringement was consequently adjudged to meet the standards of a 'good faith' violation. It is submitted that the minority opinion did not consider 'all the circumstances' that led to the discovery of the evidence, given that the judge narrowly focused on the unwarranted police conduct that was closely connected to the discovery of the evidence, instead of the entire police conduct that led to its discovery. It is further submitted that the approach of the majority opinion in *Pillay* was followed in *Mthembu*, without explicitly referring to it. In the light hereof, 'all the circumstances' that led to the discovery of the evidence should be considered when a court determines the seriousness of the infringement and the 'good faith' of the police.

The following factors have been considered as indicative of the fact that a police officer acted in 'good faith':

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<sup>158</sup> See chapter 5 par C 2.1; see also Van der Merwe (loc cit). Compare *Shongwe* (fn 11 above); *Mkhize* (fn 153 above).

- a) he made sincere attempts to exercise his duties within the ambit of the law;<sup>159</sup>
- b) the evidence was obtained on grounds of urgency that explains why it was objectively impossible to obtain the evidence by constitutional means;<sup>160</sup>
- c) the police conduct was based on 'reasonable and probable grounds';<sup>161</sup>
- d) the violation was unintentional or of a technical nature;<sup>162</sup>
- e) the police in reasonable good faith relied on the validity of a law or procedure that was, when the infringement occurred, not declared unconstitutional;<sup>163</sup>
- f) the police had reasonable grounds to believe that the force they used was necessary in order to prevent harm to themselves, the accused or members of the public;<sup>164</sup>

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<sup>159</sup> *R v Strachan* (1998) 46 CCC (3d) 479 (SCC) at 694, ("*Strachan*"); *S v R* 2000 1 SACR 33 (W), ("*R*"); the dissenting judgment of Scott JA in *Pillay*. However, see the comments above relating to the approach of the minority judgment in *Pillay*.

<sup>160</sup> *Elshaw* (fn 94 above); see also the dissenting opinions in *Feeney* (fn 76 above). Van der Merwe (fn 7 above) at 215-217, argues that urgency should have been considered as a mitigating factor which diminished the seriousness of the infringement of the trial fairness prong in *S v Lottering* 1999 12 BCLR 1478 (N), ("*Lottering*") – see chapter 4 par C 4. In this thesis, the two phased admissibility analysis is supported, instead of the approach preferred by Van der Merwe. In the light hereof, it is submitted that urgency should be considered under the second leg of the analysis, which serves to determine the 'disrepute' requirement.

<sup>161</sup> However, see how this factor was applied in *Buhay* (fn 100 above).

<sup>162</sup> *Strachan* (fn 159 above); *Grant* (fn 22 above). See also *R* (fn 159 above).

<sup>163</sup> *R v Sieben* (1987) 32 CCC (3d) 574, ("*Siebert*"); *R* (fn 159 above). The decision in *R* suggests that a violation may be construed as having been committed in 'good faith', even though the police conduct was not authorised by an Act of Parliament. This approach broadens the scope of the concept 'good faith', and should be welcomed.

<sup>164</sup> *R v Genest* (1989) 45 CCC (3d) 385, ("*Genest*"); *Madiba* (fn 151 above).

- g) the infringement could not be branded as a case of flagrant police abuse, given that the police did not 'grossly overstep' their authority;<sup>165</sup>

Stuart draws attention to the present trend followed by the Canadian Provincial Courts of Appeal by rating the seriousness of the infringement in relation to the 'good faith' of the police according to a scale of seriousness.<sup>166</sup> He argued in the Supreme Court of Canada that the applicable terminology should be clarified in order to prevent the uncertainty caused by this an approach of the courts of appeal. There is no evidence that the South African courts have followed this Canadian trend. Nevertheless, this problem can be averted if the courts of South Africa follow a purposive interpretation, based on the case law of the Supreme Court of Canada prior to *Grant*.

- 4.3 Determining the effect of exclusion on the integrity of the justice system by considering the seriousness of the charges and the importance of the evidence for the prosecution

The relevant factors considered under the third group of factors are the seriousness of the charges and the importance of the evidence to secure a conviction. Whether the reliability of the evidence and its significance in proving factual guilt should feature prominently under this leg of the assessment is of paramount importance. The research question posed in chapter one in respect of these factors is whether the over-emphasis of the seriousness of the charges and

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<sup>165</sup> *Grant* (fn 22 above) at par 66; *Harris* (fn 114 above) at par 72; *Madiba* (fn 151 above). This factor and factor (d) could be regarded as essentially similar. The validity of factor (g) is one of the issues in the appeal of *Grant*, argued in the Supreme Court on 23 April 2008. As mentioned previously, judgment has been reserved and will be delivered in due course.

<sup>166</sup> Fn 22 above at par 25.

the importance of the evidence for a conviction might unjustifiably make inroads on the presumption of innocence. An issue related to this question is whether a consideration of factual guilt should form part of the admissibility assessment. If this were the case, it would entail that the fact that the evidence is reliable and essential for a conviction when an accused faces serious charges, should be determinative of the overall admissibility assessment. Put differently: Should crime control interests be a dominant factor in the admissibility assessment?

#### *4.3.1 The seriousness of the charge*

In Canada, admissibility disputes are determined by means of a *voir dire* (pre-trial motion). The danger exists that the charges formulated against an accused at this stage may not be proved by the prosecution at the end of the trial. For example, on a charge of murder the evidence may prove culpability in respect of assault. For this reason the charge formulated against the accused should not be over-emphasised in Canada. This problem is not applicable to South Africa, because the admissibility assessment takes place, as part of the trial process, during a trial-within-a-trial. The defence may, based on new evidence, invite the court to reconsider the admissibility assessment at any stage of the trial proceedings. However, the practice has recently developed in South Africa that an accused may challenge the admissibility of evidence by means of a pre-trial motion on the grounds that a warrant authorising the search and seizure of evidence be declared invalid<sup>167</sup> or that a provision contained in an Act of Parliament, authorising the issue and execution of a search warrant be declared

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<sup>167</sup> See for example *Bennett and Others v Minister of Safety and Security and Others* 2006 1 SACR 523 (T), ("*Bennett*"); *Mahomed v National Director of Safety and Security and Others* 2006 1 SACR 495 (W), ("*Mahomed*"); *Zuma and Another v National Director of Public Prosecutions and Others* 2006 1 SACR 468 (D), ("*Zuma 3*").

unconstitutional.<sup>168</sup> In the recently reported case of *Thint (Pty) Ltd v National Director of Public Prosecutions and Another; Zuma v National Director of Public Prosecutions and Others*,<sup>169</sup> the Constitutional Court discouraged the exercise of this pre-trial remedy when it is aimed exclusively at circumventing the application of section 35(5) or at delaying the finalisation of criminal proceedings.

The courts of South Africa do acknowledge the presumption of innocence when they consider the factor of the 'seriousness of the charge faced by the accused' during admissibility assessments.<sup>170</sup> However, the perception should not be created that the more serious the charges, the lesser protection should be accorded to an accused. Correspondingly, the courts should not be more amenable to exclude evidence when the charges are regarded as less serious. The potential harmful effect of such an approach on the integrity of the criminal justice system is discussed below.

In chapter five, the cases of *Melani* and *Shongwe* were compared to illustrate that the issues in these cases were more or less similar, but the outcomes were different, partly because the seriousness of the charges were over-emphasised in the admissibility assessment in *Shongwe*. It was pointed out earlier that *Melani* was decided in terms of the Interim Constitution. It is nonetheless submitted that the *Melani* court applied the rationale of section 35(5) when the admissibility challenge was considered. This explains the relevance of *Melani*, despite the fact that judgment was delivered in terms of the Interim Constitution. In these cases the courts assessed the different factors to be considered under the second leg of the analysis differently. In each case the court considered the seriousness of the charges and the seriousness of the infringements. In *Melani*, the court

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<sup>168</sup> *Maghjane v Chairperson, North-West Gambling Board and Others* 2006 2 SACR 447 (CC), ("Maghjane").

<sup>169</sup> [2008] ZACC 13 at par 65, ("Thint").

<sup>170</sup> See the discussion of *Melani* (fn 11 above) in chapter 5 par C 3.1.

focused on the seriousness of the infringement and long-term constitutional values. The *Melani* approach is supported by the approach followed by the Canadian Supreme Court in, for example, *Burlingham*<sup>171</sup> and *Grefe*.<sup>172</sup> Differently put, the decision whether to admit or exclude the disputed evidence should hinge on the seriousness of the infringement. When the seriousness of the infringement outweighs the public interest in securing a conviction, exclusion should in general follow. In terms of this view, admission or exclusion turns on a balance between the truth-seeking function of the courts and the preservation of the constitutional directive contained in section 35(5) that courts have a constitutional duty to safeguard the integrity of the justice system. By contrast, in *Shongwe*, where the infringements were more or less the same in nature and extent as in *Melani*, the court emphasised the seriousness of the charges, factual guilt, the effective prosecution of crime, and the perceived response of the local residents to the exclusion of the evidence and the acquittal of the accused. In other words, the 'current mood' of society was a weighty factor in the assessment. Authority for the *Shongwe* approach can be found in *Grant* and the Australian approach to this group of factors.<sup>173</sup>

The *Grant* court reasoned that the more serious the offence charged, the greater the probability that the administration of justice will be brought into disrepute by the exclusion of the evidence crucial to secure a conviction. This reasoning was applied in the Australian case of *R v Dalley*,<sup>174</sup> where Spigelman CJ expressed the opinion of the court as follows:

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<sup>171</sup> Fn 69 above at 408.

<sup>172</sup> Fn 150 above at 193.

<sup>173</sup> See also the approach suggested by Van der Merwe (fn 7 above) at 234, where he argues that courts should be entitled to lean towards crime control. He further asserts that public acceptance of a verdict and **public support for the criminal justice system** should be a "weighty factor" in the second leg of the assessment.

<sup>174</sup> [2002] NSWCCA 284 at par 3, ("*Dalley*").

... the public interest in admitting evidence varies directly with the gravity of the offence. The more serious the offence, the more likely it is that the public interest requires the admission of the evidence.

These approaches suggest that the seriousness of the charges, the 'current mood' of society, and considerations of factual guilt should be weighty factors in the admissibility assessment. This implies that the less serious the charge, the greater constitutional protection is accorded to an accused. Equally, the more serious the charge, the evidence would less likely be excluded. A proportionality test applied in this manner should not be determinative of the admissibility assessment. Such an approach implies that an accused, who is guaranteed the right to be presumed innocent, may in actual fact not rely on this constitutional guarantee if the prosecution *alleges* that she has committed a serious offence: The remedy contained in section 35(5) would be rendered superfluous unless the accused faces a less serious offence. Stuart highlighted the danger of this approach in the appeal of *Grant*.<sup>175</sup> Such an approach flies in the face of the constitutional value of equal protection before the law and equal benefit of the law. Moreover, it would offend the integrity of the justice system, and should

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<sup>175</sup> Fn 22 above at par 15, he argued as follows: "There are dangers in adopting a test of 'proportionality' between the seriousness of the violation and the seriousness of the offence. A criminal trial under a system of entrenched *Charter* rights for accused has to concern itself with the truth of police abuse and disregard of *Charter* standards, not just truth of the accused's guilt. Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection"; see also Davies (fn 128 above) at 27, where he remarks that a proportionality test applied in this manner creates a "rights paradise" for those charged with trivial offences, but alleged rapists and murderers will find themselves in "a due process desert". He highlights, (ibid) at 29, the fact that a proportionality test runs counter to the presumption of innocence.



primarily for this reason not be followed by the courts of South Africa when this group of factors is considered.

To return to the comparison between the two approaches: In *Melani* the evidence was excluded, while the evidence was received by the *Shongwe* court. This comparison illustrated that the accordance of too much weight to the 'current mood' of society (which translates to the seriousness of the charge and the importance of the evidence for a conviction), may disturb the fine balance created by the *Collins* admissibility assessment. More importantly, such an approach may lead to the erosion of the significance of a consideration of the seriousness of the infringement in the overall admissibility assessment, as well as the educational role of the courts.

#### *4.3.2 The importance of the evidence for a conviction*

The South African decisions of *S v January; Prokureur-Generaal, Natal v Khumalo*<sup>176</sup> and *S v Lebone*<sup>177</sup> effectively insulate the presumption of innocence from encroachment during a trial-within-a-trial where testimonial evidence is in dispute. In terms of these decisions the prosecution may not lead evidence disclosing the contents of disputed testimonial evidence obtained after a violation. In many instances the importance of a confession or statement made by the accused may only be determined after its contents had been disclosed. Against this background, it would be difficult for the prosecution to show how important the disputed evidence would be to secure a conviction. However, this difficulty does not prejudice the prosecution, given that a court should make a value judgment to determine whether admission or exclusion would render the

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<sup>176</sup> 1994 2 SACR 801 (A), ("*January*").

<sup>177</sup> 1965 2 SA 837 (A), ("*Lebone*").

trial unfair or otherwise be detrimental to the repute of the justice system.<sup>178</sup> Moreover, the *Januarie* and *Lebone* decisions ensure that a consideration of factual guilt cannot be added to the admissibility assessment when the prosecution relies on testimonial evidence.

However, when Scott JA in his dissenting judgment in *Pillay*, assessed the admissibility of real evidence he considered whether an **acquittal** or **conviction** of the accused would be 'detrimental' to the administration of justice.<sup>179</sup> In other words, admissibility was determined by connecting the assessment with criminal culpability. Factual guilt determined the outcome of the admissibility analysis. Such an approach may make inroads into the presumption of innocence. It is submitted that criminal culpability should be totally separated from the admissibility assessment.

An issue that is intrinsically linked to this submission is whether the costs of exclusion should determine the outcome of the admissibility assessment. Such an approach would imply that reliable real evidence, essential for a conviction on serious charges, would be more readily admitted. Admission under these circumstances would evidently find public support, especially when South Africans are enduring high levels of serious crime. A review of sections 24(2) and 35(5) jurisprudence has revealed that, by and large, the courts in the relevant jurisdictions have demonstrated firm resistance against the contention that the costs of exclusion should influence their admissibility rulings.<sup>180</sup> This stance is laudable. However, it would be disturbing for due process protagonists to note that such factors could convince a court to admit evidence in the face of the purposes sought to be protected by the relevant provisions.

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<sup>178</sup> Steytler (fn 25 above) at 36; Van der Merwe (fn 7 above) at 201.

<sup>179</sup> Fn 8 above at par 133. See further chapter 5 par C 3.2 for a discussion of *Mkhize* (fn 153 above), where an analogous approach was followed.

<sup>180</sup> See chapter 5 par B 3.1 and C 3.1.

## **B Recommendations**

In this part of the thesis, recommendations are made, firstly, with regard to the threshold requirements, and secondly, with regard to the substantive phase of the section 35(5) analysis.

### **1 Threshold requirements**

Under this heading, recommendations are made with regard to the different threshold requirements discussed in this thesis.

#### **1.1 Beneficiaries of section 35(5)**

The decision by the Constitutional Court in *Kaunda*,<sup>181</sup> to the effect that the South African Constitution does not, as a general rule, have extra-territorial application is based on sound international law principles. It follows that section 35(5) would not have direct application when a right of a South African accused guaranteed by the Bill of Rights has been violated in a foreign jurisdiction. However, when evidence obtained in this manner is sought to be admitted in a South African court, the Bill of Rights should have indirect application. This would be the case because the Bill of Rights guarantees to everyone who faces a criminal charge within the territorial borders of South Africa, that her trial must comply with the concept of 'substantive fairness' as expounded by the Constitutional Court in the seminal case of *Zuma*.<sup>182</sup> The spirit, purport and objectives of the Bill of Rights should, in such circumstances, be infused into the

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<sup>181</sup> Fn 12 above.

<sup>182</sup> Fn 37 above at par 16; *Dzukuda* (fn 2 above) at par 9-11 confirms the correctness of the *Zuma* approach.

common law exclusionary rule in order to ensure that it adequately achieves the notion of 'substantive fairness'.<sup>183</sup>

Section 35(5) should be interpreted generously and purposively, while having due regard to the goals sought to be achieved by the Bill of Rights.<sup>184</sup> In the light hereof, an accused should be entitled to challenge the admissibility of unconstitutionally obtained evidence against her while she was a 'suspect'. It was argued above<sup>185</sup> that it is not the status of the accused when a fundamental right is infringed that is at the heart of the matter. Rather, it is the manner in which the evidence had been obtained and the effect that its admission would have on the fairness of the trial and the integrity of the justice system that should be central to the assessment. In Canada, a generous and purposive interpretation was likewise employed to give meaning to the concept 'detained'. The virtue of such an interpretation is that it is firmly aligned to the goal of the prevention of judicial contamination that could likely be caused by unwarranted police pre-trial conduct. In the light hereof, the approach suggested in *Sebejan*,<sup>186</sup> which was followed in *Orrie*,<sup>187</sup> should be embraced.

Despite the broad interpretation of the concept 'detained' in Canada, the fact that its practical application has given rise to confusion that may leave room for the unwarranted interference with fundamental rights, was recently highlighted

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<sup>183</sup> It is suggested in fn 14 above that the test suggested by Schwikkard (fn 14 above) at 794, and Skeen (fn 58 above) at 405, which was applied in *Tandwa* (fn 56 above), would be apposite for the development of the common law exclusionary rule.

<sup>184</sup> See *R v Big M Drug Mart Ltd* (1985) 18 DLR (4<sup>th</sup>) 385 at 237, ("*Big M Drug Mart*"); *R v Mills* (1986) 29 DLR (4<sup>th</sup>) 161, ("*Mills*"); *Makwanyane* (fn 127 above) at par 9; *Melani* (fn 11 above) at 347-348.

<sup>185</sup> Chapter 3 par B 3.2.

<sup>186</sup> Fn 17 above.

<sup>187</sup> Fn 20 above.

in the appeal of *Grant*.<sup>188</sup> The reasons for this difficulty are twofold: firstly, the line between police questioning that triggers the informational warnings and questioning that does not is often blurred,<sup>189</sup> and secondly, the police may deliberately delay an arrest to avoid issuing the informational warnings required by sections 9 and 10 of the Charter. Under these circumstances, the police strategy would be to inform the person that she is free to leave when she is in fact regarded as a suspect.<sup>190</sup> Stuart argued in the appeal of *Grant* that this concern can be overcome by adding an alternative test which broadens the concept 'detention' to include any steps taken by the police to establish, denounce or reveal the existence of inculpatory evidence.<sup>191</sup>

A comparative analysis undertaken in this thesis has shown that the ICTY, ICTR, ICC and the legal systems of the majority of the members of the European Union apply a comparable approach.<sup>192</sup> The application of this assessment is supported. The advantages of such an approach are: firstly, that it enhances the *Sebejan* and *Orrie* approaches, given that it serves the purpose of highlighting the dividing line between legitimate police questioning in terms of, for example, section 41 of the Criminal Procedure Act, and interrogation aimed at obtaining incriminating evidence while the suspect is not informed that she is regarded as such. Secondly, it serves as a pointer to the police as to when the duty to issue the informational warnings arises. For example, the practical efficacy of such an approach would have been of considerable advantage to a police officer investigating a complaint based on the facts of *Lottering*.<sup>193</sup> Thirdly, the

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<sup>188</sup> *Grant* (fn 22 above).

<sup>189</sup> *Ibid* at par 62.

<sup>190</sup> Stuart (fn 22 above) at par 28.

<sup>191</sup> *Loc cit*.

<sup>192</sup> See chapter 3 par B 2.

<sup>193</sup> Fn 160 above. This case is discussed in chapter 4 par C 4.

establishment of a clear dividing line has the added advantage of precluding the unintended infringement of fundamental rights.

## 1.2 The 'connection' requirement; standing; and the threshold onus of showing a rights violation

The Canadian and the South African interpretation of the 'connection' requirement are comparable. The phrase 'obtained in a manner' appears in both section 24(2) of the Charter and section 35(5) of the Constitution. The standard endorsed in both jurisdictions in order to satisfy this requirement can be summarised as follows: A causal or temporal connection between the infringement and the discovery of the evidence is required. However, the link between the discovery of the evidence and the infringement should not be too remote. In *Mthembu*, for example, the temporal link between the infringement and the actual testimony of the prosecution witness was weak, given that he had been tortured (about four years before he testified in court), which prompted him to make a statement that implicated the accused in the commission of the crimes. In contrast, the causal link between the violation and his testimony in court was strong, because 'the fact that his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement ... was extracted through torture'.<sup>194</sup> Approached in this manner, the Supreme Court of Appeal was correctly satisfied that the manner in which the evidence had been obtained met the terms of the 'connection' requirement under section 35(5).<sup>195</sup>

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<sup>194</sup> *Mthembu* (fn 27 above) at par 34.

<sup>195</sup> *Loc cit.*

However, the courts of South Africa correctly, it is submitted, did not follow the Canadian approach relating to the standing threshold requirement.<sup>196</sup> The Canadian approach to this threshold requirement does not enhance the judicial integrity rationale: it indirectly encourages the infringement of the rights of innocent third parties. On this view, it advances sentiments closely associated with the common law inclusionary rule, given that the evidence is admitted, regardless of the effect that such admission could have on the integrity of the justice system. By contrast, the approach adopted in *Mthembu* serves to prevent detriment befalling the criminal justice system. The *Mthembu* interpretation of this threshold requirement should accordingly be followed.

It was argued above<sup>197</sup> that *Viljoen*<sup>198</sup> could be read as suggesting that a 'threshold onus' of showing that evidence had been obtained as a result of a violation of a fundamental right should rest on the accused. Such an approach favours crime control concerns and should not be followed. In terms of the *Viljoen* approach, a potential beneficiary of fundamental rights should be saddled with the duty of showing that the police conduct did not comply with the provisions of the Constitution. Failure to satisfy this onus would render the police conduct immune from the rigours of scrutiny provided by section 35(5). In other words, if the accused cannot satisfy this threshold requirement the court may receive the evidence without investigating the manner in which it had been obtained. The danger of such an approach is that it may create the public perception that the courts are prepared to condone or indirectly encourage unconstitutional police conduct. Such an approach evidently runs counter to the judicial integrity rationale.

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<sup>196</sup> See chapter 3 par E.

<sup>197</sup> See par A 2.4 above.

<sup>198</sup> Fn 35 above.

By comparison, the approach followed by the Full Bench of the Transvaal Provincial Division in *Mgcina*,<sup>199</sup> to the effect that the prosecution bears the burden of showing that the evidence had been obtained in a constitutional manner, serves to protect constitutional values generally allied to the advancement of substantive fairness. For this reason, and the argument set out in A 2.4 above, the standard established by the *Mgcina* court should be adhered to.

## 2 The substantive phase

The Supreme Court of Appeal has adopted two different approaches to determine whether admission of the disputed evidence would render the trial unfair or would otherwise be harmful to the integrity of the justice system. One approach favours the Canadian approach of a two-phased analysis during the substantive phase, while the other prefers a balancing exercise in order to determine trial fairness: If admission would impair trial fairness, admission would, by itself, be detrimental to the justice system. My purpose in this part of the thesis is to consider an alternative approach that is, in my view, aligned to the purposes sought to be achieved by section 35(5).

The recommended overall structure of the admissibility analysis is discussed in light of the developments in Canada, which suggests the reason why the drafters of section 35(5) modified the section by means of the inclusion of the phrase 'or otherwise'. In addition, the reason why the importance of the 'seriousness of the infringement' factor should be at the heart of the admissibility assessment is discussed. While explaining the reasons why a balancing exercise should be undertaken in the end of the analysis, the pitfalls experienced by the Canadian

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<sup>199</sup> Fn 36 above.



courts in the interpretation of section 24(2) that should be prevented in the interpretation of section 35(5), are highlighted.

## 2.1 The recommended overall structure of the admissibility assessment

The suggested overall structure of section 35(5) preferred in this thesis is derived primarily from a combination of the approaches followed in *Pillay*, *Tandwa*, Canadian precedent and the opinions of scholars.

The overall structure followed by the Supreme Court of Appeal in *Pillay* should be embraced by the courts of South Africa.<sup>200</sup> In other words, a court that determines the admissibility of evidence should consider the three groups of *Collins* factors: firstly, what effect the admission of the evidence would have on the fairness of the trial (also referred to as the first leg of the analysis or the first group of *Collins* factors); secondly, whether admission of the evidence obtained after a serious infringement would be tantamount to judicial condonation of unconstitutional conduct (also known as the second group of *Collins* factors); and, thirdly, what effect admission or exclusion of the evidence would have on the integrity of the justice system (referred to as the third group of *Collins* factors). The second and third groups of *Collins* factors are to be considered during the second leg of the admissibility assessment. In addition, a balancing exercise, analogous to that applied in *Tandwa*, should be undertaken – however, not as suggested in *Tandwa* during the first leg of the analysis – but at the end. The purpose of such a balancing exercise at the end of the analysis is to consider and weigh rights protection concerns against crime control values in order to

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<sup>200</sup> Stuart (2000) 5 *Can Crim L Rev* 51 at par 6 makes a similar recommendation in relation to section 24(2), suggesting that the *Collins* approach should be followed. See further *Melani* (fn 11 above). Although *Melani* was decided before section 35(5) came into effect, the court applied the rationale of the provision.

establish whether either admission or exclusion would ultimately be detrimental to the justice system.

Based on Canadian precedent, the trial fairness assessment, representing the public interest in the protection of the interests of the accused, should be assessed during the first leg of the assessment. The public interest in convicting perpetrators of crime should be determined during the second leg of the analysis. The difficulties experienced by our Canadian counterparts should be considered as useful guidelines when the courts of South Africa interpret section 35(5). One such pitfall was the over-emphasis by the Supreme Court of Canada, during the Lamer CJ era, of the task of the trial fairness requirement in the overall admissibility assessment. It was held that whenever trial fairness concerns were impaired, exclusion should automatically follow.<sup>201</sup> Cory J reinforced this line of reasoning in *Stillman*,<sup>202</sup> by asserting that the second leg of the analysis need not be considered whenever the admission of conscriptive evidence would impact negatively on trial fairness.

It cannot be denied that Lamer CJ made profound contributions towards the development of the Canadian section 24(2) jurisprudence.<sup>203</sup> Most of the majority judgments written by him have shaped the present-day Canadian criminal justice system, and the principles contained in those judgments will continue to be quoted with approval by both Canadian and South African courts. However, the approach of 'near automatic' or 'automatic' exclusion whenever trial fairness has been compromised, elicited passionate criticism by Canadian courts and scholars.<sup>204</sup>

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<sup>201</sup> See Stuart (loc cit); Mahoney (fn 54 above) at 444.

<sup>202</sup> Fn 52 above.

<sup>203</sup> See for example the introductory remarks of Stuart (fn 200 above).

<sup>204</sup> See Stuart (fn 22 above) at par 7.

The gist of the criticism leveled against the rule of 'automatic' exclusion is that the public interest in the protection of the rights of the accused has been elevated and equated with 'detriment to the justice system', regardless of the effects that exclusion may have on the integrity of the justice system. This approach has the inherent disadvantage of undermining the public interest in convicting perpetrators of crime. After the early retirement of Lamer CJ, the only member on the bench of the Supreme Court of Canada with comparable experience in criminal law was Arbour J.<sup>205</sup> Although assessing the second leg of the admissibility assessment in *Buhay*,<sup>206</sup> the unanimous judgment written by Arbour J can be read as suggesting a new trend in the interpretation of section 24(2), given that the judge emphasised the fact that section 24(2) should not function as an automatic exclusionary or inclusionary rule.<sup>207</sup>

The approach of the 'automatic' exclusion of evidence once trial fairness has been impaired was applied in Canada before section 35(5) was incorporated into the 1996 Constitution of South Africa.<sup>208</sup> Paciocco, the principal opponent to the rule of 'automatic' exclusion, conveyed his concern with regard to this rule prior to such incorporation.<sup>209</sup> Against this background, it is assumed that the drafters of section 35(5) must have been aware of the weakness of the rule of 'automatic' exclusion. However, they nevertheless deemed it appropriate to follow the structure and essential content of the Canadian exclusionary provision,<sup>210</sup> subject

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<sup>205</sup> Fn 200 above, more particularly the introductory paragraph.

<sup>206</sup> Fn 100 above. She retired on 30 June 2004. See [http://www.scc-csc.ac.co/AboutCourt/judges/arbour/index\\_e.asp](http://www.scc-csc.ac.co/AboutCourt/judges/arbour/index_e.asp). (Accessed on 20 May 2008).

<sup>207</sup> Ibid at par 71-72; see also *Orbanski* (fn 102 above) at par 93; Stuart (fn 200 above).

<sup>208</sup> See, for example, *Hebert* (fn 92 above); *Bartle* (fn 93 above); *Broyles* (fn 95 above).

<sup>209</sup> See (1989) 32 *CLQ* 326; Paciocco (1996) 38 *CLQ* 26; see also Hogg *Constitutional Law of Canada* (3<sup>rd</sup> ed, 1992) at 943.

<sup>210</sup> The courts of South Africa noted these striking similarities in, for example, *Naidoo* (fn 108 above); *Ntlantsi* (fn 24 above); *Pillay* (fn 8 above).

to an important modification: the phrase 'or otherwise' was included in section 35(5). The meaning of this phrase within the context of section 35(5) was discussed above.<sup>211</sup> To be precise, it means 'the negation or opposite' of something specifically mentioned earlier.<sup>212</sup> Differently put, in ordinary terms, the relevant phrase suggests that, despite trial unfairness, factors that may make an allowance for the reception of the evidence on different grounds, should be considered in order to determine whether either exclusion or admission would be detrimental to the justice system. In the light hereof, it is submitted that the significance of the drafters' inclusion of the phrase 'or otherwise' becomes clear in the overall interpretation of section 35(5). In other words, section 35(5) should not be applied as a rule of automatic exclusion whenever trial fairness has been compromised. The courts of South Africa should, additionally, proceed to consider the second leg of the admissibility assessment to determine whether exclusion would for reasons other than trial unfairness – and on different grounds – be detrimental to the administration of justice. Put differently, if admission of the disputed evidence would tend to render the trial unfair, the phrase 'or otherwise' authorises the courts of South Africa to consider different factors to determine whether **exclusion** may, after having considered the latter factors, be more harmful to the integrity of the justice system than **admission**. Given that an unfair trial should be a compelling factor that could tilt the balancing exercise in favour of exclusion, a court should nevertheless consider other factors (under the second leg of the analysis) to determine whether exclusion would (because the police acted in objective 'good faith', for example) be detrimental to the justice system.

All three groups of *Collins* factors must therefore be considered to determine whether either admission or exclusion of the disputed evidence would be

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<sup>211</sup> Chapter 4 par C 4; see also par A 3.3 above.

<sup>212</sup> Allen (fn 109 above) at 841; see further the dictionaries mentioned in fn 109 above.

detrimental to the criminal justice system. In my view, such an approach can be reconciled with the purposes of both sections 24(2) of the Charter and 35(5) of the South African Constitution. The suggested approach was pioneered by Lamer CJ in *Collins*, where the judge introduced the following important procedural standard:<sup>213</sup>

In determining whether the admission of evidence would bring the administration of justice into disrepute, the judge is directed by s 24(2) to consider 'all the circumstances'. The factors which are to be **considered** and **balanced** have been listed by many courts in the country ...

Lamer CJ then proceeded to list the factors to be considered under the first and second leg of the admissibility assessment. It was held in *Pillay*, that the phrase 'all the circumstances' should be read into section 35(5).<sup>214</sup> It was mentioned earlier that this view is supported. In the light hereof, a court making an admissibility assessment should, in each and every admissibility dispute, consider the public interest in protecting the interest of the accused (which is considered under the first leg), and the public interest in convicting perpetrators of crime (which is scrutinised under the second leg), before a ruling in terms of section 35(5) is made.<sup>215</sup> It is accordingly submitted that factors relevant to trial fairness

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<sup>213</sup> Fn 2 above at par 35. Emphasis added.

<sup>214</sup> See paragraph A 3.4 above.

<sup>215</sup> Compare Van der Merwe (fn 7 above) at 211, fn 289, who explains that a set sequence is not a requirement under s 35(5), without providing any reason for such contention. He contends that if a court is "satisfied that admission of the evidence would be detrimental to the administration of justice" (referred to as the 'second leg' in his work and in this thesis), the court is "strictly speaking, not even required to consider trial fairness as required in the 'first leg'." Nonetheless, he hastens to add that the *Naidoo* court followed the sequence recommended in this thesis. The procedure advocated in this thesis was also followed in *Pillay* and in Canadian section 24(2) jurisprudence since *Collins*. The method preferred by Van der Merwe was followed in *Mthembu*

should be considered first, and thereafter, factors that may have a negative impact on the integrity of the justice system.

The fact that trial fairness concerns have been compromised does not mean that the evidence should 'automatically' be excluded.<sup>216</sup> However, the fact that the violation had a negative impact on the trial fairness directive should, at the end of the analysis, be accorded much weight when the 'seriousness of the infringement' is considered and balanced against the effects of exclusion.<sup>217</sup> If, after having considered the second group of factors, the seriousness of the infringement has not been diminished by for example, police good faith, urgency or necessity, this should be a compelling factor that should prompt the courts to give effect to the constitutional command that the impugned evidence 'must be excluded'. Exclusion on the grounds that admission would render the trial unfair, would, under these circumstances, not be detrimental to the integrity of the justice system. This should be the case because the admission of evidence obtained after a serious infringement (since the infringement impacted negatively on trial unfairness) would always be 'detrimental to the administration of justice'. Such an approach is forcefully allied to the primary rationale of section 35(5) that prescribes that judicial exoneration of serious constitutional violations would be harmful to the integrity of the justice system.

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and *Hena*, once more, without disclosing any cogent reason why the South African approach should be any different from the Canadian approach.

<sup>216</sup> See chapter 4 par C 3; see also par A 3.3 above.

<sup>217</sup> In other words, all three groups of *Collins* factors should be considered to determine the admissibility issue. The majority judgment in *Stillman* (fn 52 above) at par 122-123 followed a similar approach in delivering an obiter dictum to demonstrate that the infringements were of a serious nature; see also the approach adopted by Sopinka J in *R v Grant* (1994) 84 CCC (3d) 173 at 200-203, (*"Grant 1"*). However, the judge erroneously applied the "real" evidence distinction to determine trial fairness. See further Mahoney (fn 54 above) at 460. For a discussion of the determination of the seriousness of the infringement and the effects of exclusion in terms of the recommended application of section 35(5), see the discussion under 2.1.3.1 and 2.1.3.2 below.

Against this background, it is recommended that all of the factors mentioned by Lamer CJ in *Collins* should be considered by the courts of South Africa to determine whether the disputed evidence should either be received or excluded. It is important to note that, among those factors, the 'seriousness of the infringement' should be a weighty factor.<sup>218</sup> Such an approach is closely aligned to the judicial integrity rationale: The more serious the constitutional infringement, the more likely admission of the evidence obtained as a result thereof would be detrimental to the integrity of the justice system.

For some, the approach suggested in this thesis begs the question: Why the need to distinguish between the two legs or phases during the substantive phase, if all the factors have to be weighed and balanced in the final analysis? Differently put, why not perform a balancing exercise during the first leg of the analysis by weighing and balancing the two countervailing public interests of rights protection and crime control? South African scholars concur that the two tests, representing the two legs of the admissibility assessment, should be kept apart, as each test aims to achieve a different purpose.<sup>219</sup> This thesis supports this point of view. It is accordingly submitted that the test applicable to the first leg should not be loaded with factors that should in actual fact be considered under the second leg. Put differently, one test should not be allowed to cast a shadow over the other. A balancing exercise performed at end of the analysis has the important virtue of avoiding this difficulty.

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<sup>218</sup> Stuart (fn 141 above) at 466-469; see also Penney (2004) *McGill LJ* 105 at 133.

<sup>219</sup> Steytler (fn 25 above) at 36 expresses his opinion as follows: "... it should be emphasized that section 35(5) has created two tests which should be kept separate: rules applicable to one are not necessarily applicable to the other"; see also Van der Merwe (fn 7 above) at 202. However, compare Van der Merwe (ibid) at 215, suggesting that a court may, while assessing the trial fairness prong, consider factors like, for example, the seriousness of the infringement, the interests of society, and public policy.

To come to the point, the courts of South Africa should be wary of the pitfalls experienced in the Canadian section 24(2) jurisprudence of the over-emphasis of, for example, the first leg of the admissibility analysis to the disadvantage of the second leg. The danger of such an approach is that it entails that the public interest in the protection of the rights of the accused outweighs the public interest in convicting the guilty, whenever trial fairness has been compromised. This Achilles' heel in the interpretation of section 24(2) led to the *Grant* court introducing factors, normally considered under the second leg, into the first leg of the admissibility assessment. In other words, the strictness of the rule of 'automatic' exclusion was alleviated by creating an 'exception' that dictates that despite trial unfairness, the disputed evidence should nevertheless be received. This approach gives rise to two fundamental issues: Did the 'good faith' of the police 'transform' a trial that was initially unfair, into a fair trial? How does one reconcile this approach with the notion that an unfair trial is, as such, detrimental to the justice system?<sup>220</sup>

The *Grant* decision (while applying a two-phased analysis) diluted the normative value of concerns aimed at protecting trial fairness by supplementing it with factors meant to be considered when assessing the public interest in convicting the guilty. The danger of such an approach is that the normative value of the procedural rights, designed to protect an accused from, for example, self-incrimination, may be weakened. In the vein of the *Grant* approach, it was submitted earlier that the balancing exercise performed during the **first leg** of

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<sup>220</sup> Compare *Hebert* (fn 92 above); *Stillman* (fn 52 above); *Tandwa* (fn 52 above) at par 118, where Cameron JA challenges the rectitude of the approach followed in *Grant*, without referring to it, as follows: "As we have pointed out, though admitting evidence that renders the trial unfair will **always** be detrimental to the administration of justice ...". Emphasis added. See also Van der Merwe (fn 7 above) at 211.



the analysis in *Tandwa*, bears a similar attribute.<sup>221</sup> Surely, section 35(5) was not designed to achieve such purposes? On the contrary, its aim is to prevent the erosion or at worst, the negation of fundamental rights.

A balancing exercise should be undertaken at the end, since it demonstrates that the section 35(5) analysis strives to achieve a compromise between the two countervailing public interests of rights protection and crime control. In the same vein, the view held by Cloete J, eloquently articulated as follows in *Mphala*,<sup>222</sup> may indeed be achieved when the balancing exercise is undertaken in the end of the analysis:

So far as the administration of justice is concerned, there must be a **balance** between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Over-emphasis of the former would lead to acquittals on what would be perceived by the public as technicalities whilst over-emphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.

In my view, one of the primary purposes of section 35(5) is to achieve this goal: A balance between crime control interests and the enhancement of fundamental rights. A balancing exercise at the end of the admissibility analysis is best suited to achieve this goal, without possibly eroding the normative value of fundamental rights. Ackermann J in *Ferreira v Levin NO and Others v Powell NO*

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<sup>221</sup> See the discussion under A 3.1 and A 3.4 above.

<sup>222</sup> Fn 152 above at 657g-h (emphasis added); see also *Hena* (fn 184 above above) at 39, citing *Key v A-G, Cape Provincial Division* 1996 6 BCLR 788 (CC).

*and Others*<sup>223</sup> appealed for a generous and purposive interpretation during the rights analysis phase of interpretation, as opposed to the performance of a balancing exercise in order to determine ***whether a violation occurred***. He argued that such an approach is tantamount to inviting a court to apply a limitations exercise 'at the first stage of the enquiry', and that it 'requires at best, an uncertain, somewhat subjective and generally constitutionally unguided normative judicial judgment to be made'. The judge warned that when applying such an approach '[t]he temptation to, and danger of, judicial subjectivity is great'.<sup>224</sup> It is submitted that, although mentioned in a different context, this objection is relevant to the balancing exercise followed in *Tandwa*, since such an approach in effect 'limits' the normative value of the trial fairness requirement by balancing the interests it was designed to protect against the public interest in convicting the factually guilty, with the aim of determining whether trial fairness has been impaired.

The approach presented in this thesis has the significant virtue of achieving the aim mentioned in *Mphala*: that is, determining admissibility challenges without over-emphasising one public interest to the disadvantage of the other.

It must be emphasised that the balancing exercise suggested here differs from that applied in the common law jurisdictions of Australia and Scotland, since the balancing exercise proposed in this thesis should be focused on the purposes of section 35(5) and the values espoused by the Bill of Rights. For example, one such purpose is the furtherance of an ethos of fundamental rights; another is the constriction of governmental authority. In the light hereof, courts should

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<sup>223</sup> 1996 1 BCLR 1 (CC), (*"Ferreira"*), at par 82. It must be mentioned that this was a dissenting opinion. The judge distinguished between the Constitutions of South Africa and that of the USA (the one having a limitations clause while a similar provision is absent in the other) and raised the relevant argument within this context.

<sup>224</sup> *Loc cit.*

consciously remind themselves that their decision, whether to receive or exclude unconstitutionally obtained evidence, should be related to the purposes sought to be achieved by section 35(5), in particular, and the Bill of Rights in general.

Finally, it is suggested that the approach advocated in this thesis provides legal clarity as to the interpretation of section 35(5), since it gives effect to the text of the provision, its purposes, and furthermore seeks to achieve the general purposes of the Bill of Rights.

### *2.1.2 Trial fairness: the first leg of the assesment*

For the reasons mentioned in the discussion under A 3.1 above, this thesis does not endorse the *Tandwa* fair trial analysis.<sup>225</sup> Rather, the fair trial prong of section 35(5) should be interpreted in a purposive manner, while having due regard to its rationale. In other words, the interpretation should advance the constitutional values sought to be protected by the trial fairness requirement. In my view, the trial fairness requirement was designed to prevent an accused from being conscripted against herself. The majority judgment of the Supreme Court of Appeal in *Pillay* has endorsed such an approach.<sup>226</sup> A comparative analysis of the right to a fair trial in comparable open and democratic societies has confirmed that this right primarily serves to protect the right to remain silent and the privilege against self-incrimination.<sup>227</sup> In this way the standard is promoted that criminal culpability should be satisfied by the prosecution based, on the one hand, on evidence procured in a lawful manner; and evidence obtained in a

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<sup>225</sup> See also par A 3.4 above and B 2.1.1 above, more particularly in the text above fn 223 above.

<sup>226</sup> Fn 8 above at par 88-90. See also Steytler (fn 25 above) at 36-37.

<sup>227</sup> For the position in England and Wales, and the European Court of Human Rights, see par A 3.1 above (see further chapter 2 par D 3); for the Canadian position, see chapter 4 par B 1.

manner that is fair towards the accused, on the other hand. In other words, the unlawful conscription of an accused should be prevented. These values are incorporated into the South African Constitution. In a word, the trial fairness requirement contained in section 35(5) should be constitution-centred.

Factors having an adverse impact on trial fairness should be regarded as serious infringements, given that an unfair trial reflects negatively on the integrity of the justice system.<sup>228</sup> The seriousness of the violation of interests aimed at protecting an accused against trial unfairness could be aggravated or diminished, having regard to factors regularly considered under the second leg of the analysis. It is against this backdrop that it is suggested that the admissibility assessment, at the end of the analysis, should be determined by weighing and balancing all three groups of *Collins* factors to determine the impact that either exclusion or admission would have on the integrity of the justice system.

Evidence that would not have been obtained 'but for' the infringement is an important indicator (among other factors to be considered under the trial fairness requirement) that admission would tend to render the trial unfair.<sup>229</sup> An accused should not have to defend her liberty interests by having to confront evidence she would not have had to challenge if her fundamental rights had not been infringed. In such circumstances the prosecution gains unfairly from the manner in which the evidence had been obtained. For this reason, the nature of the evidence that would tend to render the trial unfair should not be limited to testimonial compulsion, but it should encompass any type of evidence that would not have been discovered without the compelled participation of the accused.<sup>230</sup>

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<sup>228</sup> Mitchell (1993) *CLQ* 433 at 434.

<sup>229</sup> See chapter 4 par B 2 and C 2. Compare Stuart (fn 22 above) at para 3 and 9, who advocates that the discoverability analysis should be abandoned.

<sup>230</sup> *Ross* (fn 52 above); *Mellenthin* (fn 52 above); *Brydges* (1990) 53 CCC (3d) 330, ("*Brydges*"); *R v Black* (1989) 50 CCC (3d) 20, ("*Black*"). Mahoney (fn 54 above) at 454 eloquently sums up

However, evidence that could have been discovered without the accused having been unlawfully conscripted against herself and that would inevitably have been discovered by lawful means or that could inevitably have been discovered by means of an independent, lawful source does not impact negatively on trial fairness, because the accused did not create the inculpatory evidence against herself.<sup>231</sup> The seriousness of the infringement is accordingly blunted by the manner in which the evidence had been obtained. The fact that the manner of its obtainment did not jeopardise trial fairness concerns could have an effect on the extent of the infringement, which should be considered under the second leg of the analysis.<sup>232</sup>

The reason why the 'seriousness of the infringement' is mentioned here is to demonstrate the inter-relationship among the different groups of factors (when the balancing exercise is undertaken at the end) and to illustrate that the seriousness of the infringement should be a weighty factor in the overall admissibility assessment.<sup>233</sup> It was pointed out above that the extent of the

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the sense of unfairness caused by unconstitutional governmental pre-trial conduct as follows: "The trial is the metaphorical battle in the adversarial system, and Canadians may rightly view as unfair any contest where one contestant has been severely handicapped by earlier, disgraceful conduct by his or her opponent".

<sup>231</sup> Mahoney (fn 54 above) at 466; see also Naude (2008) 2 *SACJ* 168 at 185. Some might argue that the *Tandwa* prejudice model generally serves a similar purpose as the discoverability/"independent source" doctrine.

<sup>232</sup> Whether the infringement remains non-serious depends on an assessment of the factors usually considered under the 'seriousness of the infringement' group of factors, during the second leg of the analysis.

<sup>233</sup> Compare *Grant* (fn 22 above), highlighting reliability concerns during the trial fairness analysis; see also *Tandwa*, where the good faith of the police is included as a factor for consideration in relation to the fairness of the trial. Van der Merwe (fn 7 above) at 217-221 confirms that the seriousness of the infringement should be an important factor during the first leg of the admissibility assessment. Compare Stuart (fn 22 above) at par 12, confirming that the seriousness of the infringement should be of paramount importance in the section 24(2) analysis;

infringement should be considered during the assessment of the second and third groups of *Collins* factors (during the second leg of the admissibility inquiry) to determine what effect exclusion or admission would have on the integrity of the justice system. The intensified importance of the 'seriousness of the infringement' factor is justifiable, given that section 35(5) was designed to advance the protection of fundamental rights, while by the same token it serves to safeguard the integrity of the justice system: Admission of evidence obtained as a result of a ***serious infringement*** would invariably tarnish the integrity of the criminal justice system. Likewise, the exclusion of evidence essential for a conviction obtained after a trivial infringement while the accused faces serious charges, would be detrimental to the justice system.

As mentioned above, the trial fairness assessment should be focused on the prevention of conscription. In addition, the 'independent source' exception<sup>234</sup> and the doctrine of 'discoverability'<sup>235</sup> should, where applicable, be considered to determine whether admission of the disputed evidence would tend to render the trial unfair.<sup>236</sup> The prosecution may rely on these exceptions to demonstrate that

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see further Mahoney (fn 54 above) at 460, asserting that the fact that the accused had been conscripted against herself should be considered as a factor that is indicative of the seriousness of the infringement. Mahoney (ibid) at 476, confirms that the seriousness of the infringement should be considered as one of the "most important" factors in the s 24(2) analysis.

<sup>234</sup> Van der Merwe (fn 7 above) at 182 confirms that Langenhoven, in an unpublished LLD thesis, makes a similar recommendation. For a discussion of the "independent source" doctrine, see Van der Merwe (loc cit); and Naude (fn 230 above), and the authorities cited at 173-175.

<sup>235</sup> For a discussion of this doctrine, see chapter 4 par B 2 and C 2.

<sup>236</sup> Van der Merwe (fn 7 above), like Mahoney (fn 54 above) do not call for the total discardence of the doctrine of discoverability. Van der Merwe (ibid) at 244, argues that the doctrine of "discoverability" and the "independent source" exception should be applied during the second leg of the admissibility assessment, as factors justifying the reception of the evidence. The point of view that all the circumstances that led to the discovery of the evidence should be considered in order to determine the admissibility issue is supported.

admission of the disputed evidence would not render the trial unfair. The doctrine of discoverability has been subjected to rigorous scrutiny by both Canadian and South African scholars.<sup>237</sup> It must be emphasised that the discoverability analysis does not serve the purpose of determining whether an unfair trial could be transformed into a fair trial.<sup>238</sup> Rather, its purpose is to assess whether the evidence has been discovered through a process of compelled conscription. In point of fact, trial fairness should be determined with the focus centred on whether the evidence would inevitably have been discovered by ***constitutional*** means, in the absence of conscription. It follows that evidence that has been obtained in a constitutional manner would not render the trial unfair.<sup>239</sup>

The seriousness of the charge faced by the accused, the 'good faith' of the police, factual guilt, and the 'current mood' of society should not be considered at this stage of the analysis.<sup>240</sup> These factors cannot transform a trial that has been rendered unfair into a fair trial.<sup>241</sup> Quite the opposite, those factors, in conjunction with other relevant factors, collectively determine whether the effects of exclusion or admission of the disputed evidence would be injurious to the integrity of the justice system.

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<sup>237</sup> The following commentators do not approve of the manner in which the doctrine is applied: Mahoney (fn 54 above) at 464; Stuart (1996) 48 CR (4<sup>th</sup>) 251; Delaney (fn 98 above) at 527. In the South African context, see Naude (fn 230 above). However, compare, for instance, Brewer (1997) *Can Crim LR* 329; Moreau (1997) 40*CLQ* 148; Roach (fn 128 above) at 10-6, par 10.1310.

<sup>238</sup> Mahoney (fn 54 above) at 449.

<sup>239</sup> Van der Merwe (fn 7 above) at 189, fn 144.

<sup>240</sup> Steytler (fn 25 above) at 37. It is submitted that a consideration of factual guilt should not be considered at all during the admissibility assessment, given that it may likely encroach upon the presumption of innocence.

<sup>241</sup> *Hebert* (fn 92 above); *Collins* (fn 2 above).

*2.1.3 'Detriment' caused to the justice system because of admission or exclusion: the second leg of the analysis*

This part of the recommendations relate to the second leg of the admissibility analysis. Recommendations are made with regard to the impact that the nature of the evidence has on the classification of the infringement, the effect of the successful reliance on the 'good faith' exception, the role of the 'current mood' of society, and the significance of factual guilt during this leg of the analysis.

*2.1.3.1 The seriousness of the infringement and the good faith of the police*

The seriousness of the infringement and the good faith of the police should be determined while having due regard to 'all the circumstances'.<sup>242</sup> The mental state of the police when the infringement occurred should be an important factor during the assessment.<sup>243</sup> The purpose of the assessment of the seriousness of the infringement is to determine whether exclusion or admission of the disputed evidence would be 'detrimental' to the justice system. The judiciary should not be perceived by the public at large as associating itself with serious constitutional violations. It is submitted that this is one of the primary rationales of section 35(5). Therefore, when an infringement has been classified as serious, it should be a significant step in explaining why the disputed evidence should be excluded.

A number of particular factors taken into account by the courts of Canada and South Africa to determine whether the infringement should be labelled as

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<sup>242</sup> *Pillay* (fn 8 above).

<sup>243</sup> *Steytler* (fn 25 above) at 39.



serious or a good faith violation have been outlined under A 4.3 above. It must be emphasised that the lists of factors mentioned in A 4.3 are not exhaustive. In general, if an infringement can be categorised as 'blatant', 'deliberate' 'wilful' or 'flagrant', the evidence obtained as a result thereof could be susceptible to exclusion, given that its admission would be tantamount to judicial condonation of unconstitutional conduct. Evidence obtained as a result of the police acting in objective good faith can be saved from exclusion. However, negligent infringements should not be equated with 'good faith' violations.<sup>244</sup>

The nature of the evidence obtained after a violation could be determinative of the classification of the infringement as serious.<sup>245</sup> Some might argue that such an approach only serves to perpetuate the common law distinction between the admissibility of 'real' and testimonial evidence. Perhaps this linkage between the nature of the evidence and the classification of the extent of the infringement can be explained in light of the fact that the nature of the evidence is a significant factor in determining the effect of exclusion on the repute of the justice system. However, the courts of South Africa have, in a number of judgments, steered away from such an approach.<sup>246</sup> This approach should be embraced.

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<sup>244</sup> Loc cit; Van der Merwe 1988 11 *SACJ* 462 at 473; see also chapter 5 par C 2.2.

<sup>245</sup> See chapter 5 par B 2.1 and C 2.1.

<sup>246</sup> Ibid.

### 2.1.3.2 *The effect of exclusion on the integrity of the justice system*

The 'current mood' of society should be considered under this group of factors, provided such mood is adjudged to be reasonable.<sup>247</sup> When a violation is non-serious, the exclusion of evidence essential to secure a conviction on a serious charge might be detrimental to the justice system. However, the seriousness of the charge faced by the accused should not be determinative of the admissibility assessment: the exclusionary remedy should not be reserved for instances when the accused faces less serious charges.

Finally, the inherent danger of two approaches, which could unavoidably be 'detrimental' to the justice system, should be particularly guarded against by the courts of South Africa: the first of these approaches is that the admissibility assessment should not be closely linked to criminal culpability.<sup>248</sup> The fact that the accused is factually guilty should not be determinative of the admissibility assessment. Such an approach is not justifiable in a democratic society based on human dignity, freedom and equality – factual guilt should not be allowed to encroach upon the presumption of innocence.

The second potentially dangerous approach is that the costs of exclusion should not influence the outcome of the admissibility assessment.<sup>249</sup> Evidence should

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<sup>247</sup> *Collins* (fn 2 above); *Steytler* (fn 25 above) at 40. Compare *Van der Merwe* (fn 7 above) at 234.

<sup>248</sup> See the approach of the minority judgment in *Pillay*, and the judgment in *Mkhize*, discussed in chapter 5 at paragraph C 3.2.

<sup>249</sup> See chapter 5 par C 3.2. In *Melani*, for example, the social costs of exclusion were not very high, because the accused was convicted on the strength of other admissible evidence. Exclusion weakened, but did not destroy the case of the prosecution. The same can be said of *Soci*: the accused was convicted on evidence other than the excluded evidence. In *Naidoo*, *Hena*, *Mphala*, and *Pillay*, the excluded evidence was essential to convict the accused on serious charges. However, in *Shongwe*, exclusion would have resulted in an acquittal.

not only be excluded when criminal culpability can be satisfied by means of other admissible evidence. Such an approach would be results-oriented, thus defeating the purpose of section 35(5).

## C Concluding remarks

In a speech delivered by McLachlin CJ, the current Canadian Chief Justice, she correctly remarked that public support for the courts is not determined by the popularity of a judgment.<sup>250</sup> Rather, she contended, public approval of the Supreme Court of Canada is 'tied to the perceived integrity of the judicial process'.<sup>251</sup> The perceived integrity of the justice system, in turn, hinges on the apparent impartiality and independence of the courts.<sup>252</sup> She elaborated by citing the report of the Canadian Institute for Research on Public Policy, compiled after the judgments of the Supreme Court had been delivered in *Feeney* and *Vriend v Alberta*.<sup>253</sup> In *Vriend*, the government of Alberta was directed to extend fundamental rights to everyone regardless of their sexual orientation. In *Feeney*, reliable real evidence, essential to convict the accused on a charge of murder was excluded, because he had been conscripted against himself. The study

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<sup>250</sup> Roach (fn 128 above) at 3-7, par 3.160, confirms the argument that it is unlikely that the reputation of the administration of justice would be adversely affected by a decision to exclude or receive unconstitutionally obtained evidence. He argues that the reputation of the administration of justice could depend on community standards or a lack of control over police misconduct. However, compare Packer *The limits of the Criminal Sanction* (1968) Part II who makes the point that some might argue that the repute of the criminal justice system is closely linked to its ability to control crime. The argument of Van der Merwe, that the "current mood" of society should be emphasised during the second leg of the admissibility assessment, appears to be based on this contention.

<sup>251</sup> Fn 134 above.

<sup>252</sup> Fn 135 above.

<sup>253</sup> 1998 1 SCR 493, ("*Vriend*").

examined Canadian public attitudes towards the courts against this background. The research revealed that a majority of Canadians opposed the outcome in *Feeney*, while most Canadians were in favour of the outcome in *Vriend*. The study arrived at the following insightful conclusion:<sup>254</sup>

Notably, where Canadians are generally opposed to [a] ruling, as in *Feeney*, these attitudes have little leverage on overall assessments of judicial institutions. In contrast, where public sentiment is consonant with the Court's decision, [as in] *Vriend*, ... opinion on the case is more tightly linked to general attitudes that citizens' faith in the courts is not principally the result of agreement with the court's decisions, but a result in faith in the judicial process.

In the light hereof, McLachlin CJ expressed the view that it should be a common belief in *all* open and democratic societies that when all other governmental institutions fail, its citizens should be able to 'count on the fairness of the courts'.<sup>255</sup> In order for a court to achieve this goal, its role in the admissibility assessment should not be aimed at the appeasement of public attitudes. Moreover, the study undertaken by the Canadian Institute for Research on Public Policy, including research undertaken by Canadian commentators,<sup>256</sup> have

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<sup>254</sup> Cited by McLachlin CJ. See fn 124 above.

<sup>255</sup> *Loc cit.* In the South African context, compare the front page news report by Boyle in the *Sunday Times* dated 7 December 2008, entitled "We are gatvol!" The correspondent reports on the outcome of the annual Reconciliation Barometer compiled by the Institute for Justice and Reconciliation, which concludes as follows: "Public confidence in churches and the media has remained stable over the past two years, but trust in political and governmental institutions – from the presidency, parliament and provincial government to the Human Rights Commission and the Constitutional Court – is down by around 20%". It must be emphasised that the exclusion of unconstitutionally obtained evidence is not cited as a reason for the decline of public confidence in the Constitutional Court.

<sup>256</sup> See Bryant et al (1990) 2 *CBR* 1; Gold et al (1990) 1 *Supreme Court LR* 555.

indicated that no evidence exists that the exclusion of unconstitutionally obtained evidence in circumstances when the public at large would be opposed to such exclusion, necessarily leads to negative public perceptions of the justice system. It is submitted that no such evidence exists in the South African context either.

What really matters is whether the public perceives the judiciary as an independent institution which enforces the law without fear, favour or prejudice. In a word, South Africans should have faith in the impartiality of the judiciary. The current dilemma faced by the South African judiciary where a senior judge of the High Court allegedly attempted to influence the outcome of a case pending before the Constitutional Court does not enhance this perception.<sup>257</sup>

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<sup>257</sup> See *Thint* (fn 164 above) at par 4-6, more particularly par 4, where Langa CJ refers to this alleged disreputable occurrence in the following terms: "After judgment was reserved in these cases on 13 March 2008, certain events occurred that resulted in a complaint being lodged with the Judicial Services Commission (JSC) by judges of this Court. The complaint was against the alleged conduct of a Judge from one of the High Courts, the basis of which was that he had allegedly tried improperly to influence two Judges of this Court to decide these cases in favour of one of the parties in these cases. It is now common cause that the High Court Judge did visit the Judges of this Court. There is a dispute about the content of the discussions that took place during the visits. The High Court Judge has in turn lodged a counter-complaint against Judges of the Constitutional Court alleging improper conduct on their part which amounted to a violation of his constitutional rights. The basis of his complaint is the issuing by the Judges of this Court to the media of a statement about their complaint to the JSC, which is also common cause". The Witwatersrand Local Division of the High Court has subsequently held that the Constitutional Court judges have infringed the rights of the relevant senior judge by disclosing details of the alleged attempt to influence them before reporting the matter to the JSC. The complaint against the senior judge is pending before the JSC. Mkhabela reports in the *Sunday Times* newspaper, dated 7 December 2008, at 4, and entitled "Special deal could end judges' fight", that this dispute may soon be settled out of court. See also the newspaper article by Mkhabela in the *Sunday Times*, 24 October 2008 at 4, entitled "We won't mess with Constitution". The journalist reports on a meeting recently addressed by the Deputy President of the ANC (and current President of South Africa), held near Stellenbosch. Attendees raised their concern regarding the independence of the judiciary during the post-Mbeki period.

However, it may be argued that the fact that the alleged unwarranted conduct was exposed instead of covered up constitutes sufficient evidence that South African courts do exercise their duties without fear, favour or prejudice.<sup>258</sup> Then again, calls that the charges against the President of the African National Congress be abandoned, in the absence of any legal foundation, may have a negative impact on the rule of law and consequently, the integrity of the justice system.<sup>259</sup> Plato cautioned against the setting of such precedents when he reasoned as follows:<sup>260</sup>

Where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing Heaven sends on a society.

The perception should not be created among members of the public that the 'authorities' are entitled to special treatment by the criminal justice system. The

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<sup>258</sup> This concern was highlighted in *Thint* (fn 169 above) at par 6, where Langa CJ deemed it necessary to mention that the Constitutional Court judgment in that case was not influenced by the events that preceded the judgment, as follows: "It is however important to emphasise that the cases have been considered and decided in the normal way, in accordance with the dictates of our Oath of Office and in terms of the Constitution and the law, without any fear, favour or prejudice"; see also *Langa v Hlope* (697/08) [2009] ZASCA 36 (31 March 2009) at par 50, ("*Hlope*").

<sup>259</sup> See the article by Malefane, Mafela & Mkhabela in the *Sunday Times*, dated 7/9/2008 at 4, entitled "Cosatu warns of strike if Zuma charges are not dropped". The acting National Director of Public Prosecutions (NDPP) has, on 7 April 2009, withdrawn the charges against Mr Zuma. The reason given for the withdrawal of the charges is that the criminal proceedings had been tainted by the conduct of a member of staff, previously employed by the NDPP. ( *e-News Channel* Special broadcast at 11h30, on 7 April 2009).

<sup>260</sup> Quoted by Mahomed DP in a speech reported in [1989] 5 *Lesotho LJ* 1 at 2. Mahomed DP was the first Deputy Chief Justice in South Africa after 1994.

law, as dictated by the Constitution and the rule of law, must be general in its application.<sup>261</sup>

The public should accept that even members of the judiciary are servants of and subject to the Constitution: They should be content that any decision made by a judge on the admissibility of unconstitutionally obtained evidence does not reflect his or her personal views on the issue, but rather, the long-term values sought to be protected by the Constitution. Research has revealed that the police do change their practices to avoid the risk of exclusion.<sup>262</sup> Hence, the reasons for exclusion or admission should be conveyed to the police by means of, for example, continued education. In other words, the educational role of, not only the courts, but also government and civil society organisations, should be harnessed.

Significant steps have already been taken by the courts to explain to the general public the reasons why an accused has been convicted or acquitted: The Constitutional Court and the Supreme Court of Appeal have, for example, established websites that include media summaries of their judgments, which explain in layman's terms the reasons for their judgments,<sup>263</sup> and a number of significant criminal court judgments have been televised on national television. The success achieved by the educational role, undertaken by the South African government in relation to discrimination based on sexual orientation, confirms

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<sup>261</sup> Ibid at 3.

<sup>262</sup> Uchida & Bynam (1991) 81 *J Crim L & Criminology* 1034; Moore (1992) *Osgoode Hall LJ* 547; Stuart 1998 11 *SACJ* 325; compare Mahoney (fn 54 above) at 448, who argues that in terms of the current approach to s 24(2), "tainted evidence must be excluded if its admission into evidence will bring the administration into disrepute", regardless of the effect that exclusion may have on future police misconduct.

<sup>263</sup> See the websites of the Constitutional Court at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za); and the Supreme Court of Appeal at [www.supremecourtofappeal.gov.za](http://www.supremecourtofappeal.gov.za).

the validity of this submission: gay and lesbian rights were initially perceived by the public at large as unthinkable – nowadays, the application of fundamental rights to gays and lesbians are not generally frowned upon by the South African public at large.<sup>264</sup>

We, as South Africans, must be concerned about the perceived high rate of serious crime. Would it, for this reason be justifiable to ordinarily admit evidence, essential for a conviction on a serious charge, despite the fact that it had been obtained in deliberate violation of the constitutional rights of the accused? It is assumed that right-thinking South Africans would not approve of it. If evidence should readily be admitted under these circumstances, then none of us would be ensured that the rights contained in the Bill of Rights are meant to protect all of us from unwarranted governmental conduct. It is submitted that the rational solution to the problem of the high rate of serious crime should be found in the effective policing and prosecution of crime, rather than the condonation (and implied encouragement) of unconstitutional police conduct.<sup>265</sup> Yet the courts of South Africa have, on a number of occasions, related their decisions on the admissibility of unconstitutionally obtained evidence to the high rate of serious

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<sup>264</sup> See, for example, the television broadcast by SABC TV1 on 24 November 2008 at 23h00, entitled "Counting the booty – it's okay to be gay". The program probed public attitudes towards gay marriages or unions, as well as the right of gay persons to adopt minor children. The title is self-explanatory as to the outcomes of the evaluation.

<sup>265</sup> See Plasket (1998) 11 *SACJ* 173 at 195; see further the *Rapport* newspaper dated 22 September 2007, entitled "Kry nuwe minister vir beter strafregstelsel", by Mapiloko, Lubisi and Sefara, at [www.news24.com/Rapport/Nuus/0,,752-795\\_2188914,00.html](http://www.news24.com/Rapport/Nuus/0,,752-795_2188914,00.html). (Accessed on 25 May 2008). Mr DeLange, the current Deputy Minister of Safety and Security, has recommended a crime-fighting plan to effectively curb the problem of the high crime rate by, among others, co-ordinating the functions of the justice cluster; see also the article by Mkwanzazi in Independent Online, entitled "Skilled staff key to new crime initiative", at [www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn2007111208544567](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn2007111208544567), accessed on 2007/11/26.



crime.<sup>266</sup> Supporters of this line of reasoning will be relieved – provided these promises are faithfully implemented – that the South African government has identified the reasons for the high rate of serious crime and has designed a crime-fighting plan, aimed at reducing the level of crime.

The Deputy Minister of Safety and Security ascribes the high rate of serious crime in South Africa to incorrect governmental policy decisions, unprofessionalism in the law enforcement agencies, as well as a lack of essential resources and accountability.<sup>267</sup> The solutions to these problems should preferably be implemented sooner rather than later. A local television news channel commented that a lack of political will to reduce the high rate of serious crime, rather than the introduction of the Constitution, is the cause of this evil.<sup>268</sup>

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<sup>266</sup> See, for example, *Ngcobo* (fn 131 above); *Shongwe* (fn 11 above).

<sup>267</sup> See the newspaper article by Steenkamp in the *Rapport* (fn 10 above), where the Deputy Minister of Safety and Security acknowledged that the government erred by not employing its resources effectively in the fight against crime. He recommended that the police, correctional services and the courts should implement a seven point plan to rectify the current dilemma in the criminal justice system. The flaws in the justice system are, among others, the following: the police should gather evidence relating to the commission of offences – a great number of crime scenes are not inspected by the police; a shortage in resources which prevents police experts to effectively execute their duties; the policing services do not employ a sufficient number of forensic experts to assist in the investigation of crime; only 15% of the members of the police services are tasked with the investigation of crime; the backlog in criminal matters in the magistrates courts are extremely high; the average session of regional courts is three and-a-half hours per day. He concludes by recommending that the government should develop a professional attitude in its law enforcement agencies in order to effectively fight crime. Compare Van Dijkhorst *Consultus* (1998) Vol II, 136.

<sup>268</sup> 'The Big Debate' *e-News Channel* 17/04/09 at 11h00; see also the report by Human Rights Watch, issued during the third week of January 2009, and cited by Fabricius, the foreign news editor of the *Pretoria News* newspaper, dated 16 January 2009 at 7, entitled 'Rights group criticises SA government'. He quotes as follows from the report: "Poverty, unemployment, gender-based and xenophobic violence, and **crime** remain significant barriers to the enjoyment

The government has recently, as part of a longer-term solution, called upon the public at large to make recommendations for the review of the criminal justice system.<sup>269</sup>

The regular excuse of unconstitutional police conduct merely because the evidence is essential for a conviction on serious charges should be avoided for another important reason: Such an approach would only enhance the public perception (which existed before 1994),<sup>270</sup> that the police are above the law.<sup>271</sup> To be sure, such a state of affairs runs counter to the 'never again' principle, which was endorsed by the Constitutional Court as one of the fundamental tools that should be employed to interpret the provisions of the Bill of Rights.<sup>272</sup>

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of human rights; the government's commitment to address them is inadequate". (Emphasis added).

<sup>269</sup> See the special feature in the *Sowetan* newspaper, 29 August 2008; see also the website of the Department of Justice at [www.doj.gov.za](http://www.doj.gov.za), calling on the public to make such recommendations.

<sup>270</sup> Complaints against members of the SAPS investigated by the investigative journalist, Patta, and televised on '3<sup>rd</sup> degree Plus', *e-News Channel TV* on 21 August 2008 at 23h00, led to her concluding that the pattern of police misconduct creates the perception that the police are above the law.

<sup>271</sup> See De Villiers (ed) *The Truth and Reconciliation Commission of SA Report* (Vol 6, 2003).

<sup>272</sup> *Ferreira* (fn 221 above) at par 257, fn 22 of the separate but concurring judgment delivered by Sachs J.