

**THE ADMISSIBILITY OF UNCONSTITUTIONALLY OBTAINED
EVIDENCE: ISSUES CONCERNING IMPEACHMENT**

GYSBERT NIESING

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SUPERVISOR: PROF SE VAN DER MERWE

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature:

Date:

is however no longer considered as a confession of guilt.¹ Unconstitutionally obtained evidence is therefore admissible for impeachment purposes.² The rationale is to prevent the accused from exploiting the prosecution's inability to impeach the accused if the fruits of the American approach in South Africa had been applied in *Makhatini*.³

The second possibility is for South Africa to refer to the Court of Canada in *R v Collins*.⁴ The admission of evidence with evidence in chief – is based on the effect of the administration of justice. However, evidence excluded from chief evidence circumstances be admitted in cross-examination of the accused.⁵

Finally, the option suggested by this thesis, is to amend the South Africa's Constitution, which has already been signed, where the admissibility of unconstitutionally obtained evidence is Section 35(5), like the Canadian s 24(2) it leaves some discretion to exclude unconstitutionally obtained evidence on the basis of the accused or the effect admission will have on the administration of justice. This thesis thus, because of the interlocutory nature of a ruling on admissibility, adapts easily to the admission of limited purpose evidence such as cross-examination the admission of the unconstitutionally obtained evidence, regardless of whether

¹ D 1997 (1) 21 Case no CC73/97.
² (1998) 46 CR (6th) 133 (SCC).

Summary

The law regarding the admissibility of unconstitutionally obtained evidence for impeaching the accused's testimony is still undeveloped. This work discusses three of the options available to South African courts and the difficulties inherent in each. The first is to follow the approach of the Supreme Court of the United States. The American approach regarding the exclusion of evidence from the case in chief is strict. Courts are not bestowed with a discretion to admit unconstitutionally obtained evidence: Unless one of the accepted exceptions exist, a court must exclude unconstitutionally obtained evidence in order to deter unconstitutional behaviour by the authorities. Deterrence of unconstitutional police behaviour is however no longer considered controlling when cross-examining the accused. Unconstitutionally obtained evidence – both real and testimonial communications – is therefore admissible for impeachment purposes despite being excluded from the case in chief. The rationale is to prevent the accused giving perjurious testimony in the face of the prosecution's inability to impeach the accused's veracity in the usual manner. The application of the American approach in South Africa has however already been rejected in *S v Makhathini*.¹

The second possibility is for South African courts to follow the position of the Supreme Court of Canada in *R v Calder*.² The admissibility of impeachment evidence in Canada – as with evidence in chief – is based on the effect of its admission of the repute of the administration of justice. However, evidence excluded from the case in chief will only in very rare circumstances be admitted in cross-examination of the accused.

Finally, the option suggested by this thesis, is to continue the trend started by s 35(5) of the South African Constitution, which has already been applied with great success in cases where the admissibility of unconstitutionally obtained evidence in the case in chief is in issue. Section 35(5), like the Canadian s 24(2) it bears some resemblance to, gives courts a discretion to exclude unconstitutionally obtained evidence on the basis of unfairness to the accused or the effect admission will have on the administration of justice. It is submitted in this thesis that, because of the interlocutory nature of a ruling on admissibility, this approach adapts easily to the admission of limited purpose evidence such as impeachment evidence: If the admission of the unconstitutionally obtained evidence, regardless of whether it was

¹ D 1997-11-21 Case no CC73/97.

² (1996) 46 CR (4th) 133 (SCC).

previously excluded from the case in chief, renders the trial unfair or would otherwise be detrimental to the administration of justice it must be excluded.

Opsomming

Die reg in verband met die toelaatbaarheid van ongrondwetlik verkreë getuienis vir 'n geloofwaardigheidsaanval op die beskuldigde is nog in 'n vroeë stadium van ontwikkeling. Hierdie tesis bespreek drie moontlikhede beskikbaar aan Suid-Afrikaanse howe en die probleme inherent aan elkeen. Die eerste is om die posisie van die Amerikaanse Hooggeregshof te volg. Die Amerikaanse posisie betreffende die toelaatbaarheid van getuienis tydens die staat se saak is streng. Howe het geen diskresie om ongrondwetlik verkreë getuienis toe te laat nie: Behalwe in gevalle waar aanvaarde uitsonderings bestaan, moet 'n hof dus ongrondwetlik verkreë getuienis uitsluit om ongrondwetlike optrede deur die owerhede te voorkom. Voorkoming van ongrondwetlike optrede aan die kant van die polisie is egter nie meer die beherende oorweging wanneer die beskuldigde in kruis-ondervraging geneem word nie. Ongrondwetlik verkreë getuienis – beide reël en verklarend van aard – is gevolglik toelaatbaar vir doeleindes van 'n geloofwaardigheidsaanval, ten spyte daarvan dat dit moontlik ontoelaatbaar was tydens die staat se saak. Die rede is om te voorkom dat die beskuldigde meinedige getuienis lewer terwyl die staat verhoed word om the bekuldigde se geloofwaardigheid op die gewone manier te toets. Hierdie posisie is egter al verwerp in *S v Makhathini*.³

Die tweede moontlikheid is om die posisie soos uitgelê deur die Hooggeregshof van Kanada, in *R v Calder*⁴ te volg. In Kanada word die toelaatbaarheid van getuienis rakende geloofwaardigheid – sowel as getuienis rakende skuld – bepaal deur die invloed wat die toelating daarvan op die reputasie van die regspleging het. Getuienis wat ontoelaatbaar is tydens die staat se saak sal egter slegs in baie beperkte omstandighede toegelaat word tydens kruisondervraging van die beskuldigde.

Laastens, die opsie wat voorgestel word deur hierdie tesis, is om voort te gaan met die patroon wat ontwikkel is deur art. 35(5) van die Grondwet van Suid-Afrika, wat alreeds met groot sukses toegepas is in sake waar die toelaatbaarheid van ongrondwetlik verkreë getuienis in die staat se saak ter sprake was. Artikel 35(5), soos Kanada se art 24(2) waarmee dit tot 'n

³ D 1997-11-21 Case no CC73/97.

⁴ (1996) 46 CR (4th) 133 (SCC).

mate ooreenstem, gee howe 'n diskresie om ongrondwetlik verkreë getuienis uit te sluit op grond van onregverdigheid teenoor die beskuldigde of indien die toelating daarvan 'n negatiewe invloed op die regspleging sal hê. Omdat 'n beslissing oor die toelaatbaarheid van getuienis tussenstyds van aard is, pas dit goed aan by die verdere ondersoek na die toelaatbaarheid van getuienis wat slegs vir 'n beperkte doel aangebied word: Indien die toelating van ongrondwetlik verkreë getuienis, ongeag of dit voorheen uitgesluit was uit die staat se saak, die verhoor onregverdig maak of die regspleging negatief beïnvloed, moet sulke getuienis uitgesluit word.

[Penal law] is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community and the individual

– Wechsler “The Challenge of a Model Penal Code” 1952 *Harvard LR* 1097, 1098

FOR LIEZEL

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CHAPTER ONE

INTRODUCTION

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1 1 INTRODUCTION

“Murder trial five freed as judge condemns police bugging abuse”.⁵

Newspaper headlines like these will always evoke a wide variety of responses. On the one hand, there is exasperation when an (factually guilty) accused escapes punishment because of a “technicality”.⁶ On the other hand, such headlines demonstrate that the same “technicalities”⁷ guarantee that intrusions on the basic rights and freedoms of the community will not be tolerated, especially when committed by the authorities. These two viewpoints illustrate the divergent considerations that need to be balanced in a criminal prosecution. It is important to protect accused persons against violations of their basic rights, regardless of who the violators are. At the same time, community interest demands that factually guilty persons be brought to justice. However, it is in the community’s long-term interest not to have criminals brought to justice at all costs, as this would endanger the community’s interest in protecting the basic rights of all its members, whether innocent or *accused*.⁸

A number of remedies are available to accused persons who were the victims of such violations, the most extreme of which is the exclusion of the evidence so obtained. This remedy may render all evidence resulting from a violation of basic rights inadmissible at a criminal trial. In many cases, the evidence at issue had either been obtained during an illegal search and/or seizure,⁹ or compelled from the suspect’s own mouth.¹⁰ Often, the last-mentioned kind of evidence is the most damaging to the accused’s case, if not downright

⁵ The Times (UK) (2002-01-30) 1.

⁶ As an ordinary member of the public understands it. See *S v Mphala* 1998 (1) SACR 654 (W) 657G.

⁷ See n 6 *supra*.

⁸ Once a person’s guilt is established, certain rights may be infringed upon. For instance, the right to freedom of movement may be infringed by putting such a person in jail. However, any person – especially an accused person – must be presumed innocent until proven guilty.

⁹ A violation of the right to privacy.

¹⁰ A violation of the privilege against self-incrimination.

damning. This thesis will focus on violations of both the right to privacy and the privilege against (compelled) self-incrimination, as well as the nature of the resulting evidence.

The exclusion of evidence obtained in an illegal manner has two direct consequences. First, it serves as a trial-remedy for the accused whose rights have been infringed by illegal police conduct. It is often acknowledged that the primary rationale for exclusion is the equalising effect it has upon the balance of power between a government-funded prosecution that has a police force at its disposal, and accused persons, who have limited means and little knowledge of the law.

The second consequence of excluding evidence is the disciplining effect it has on police behaviour. By breaking the rules, they run the risk of having the fruit of their unconstitutional behaviour excluded in court.¹¹ Disciplining police for misbehaviour also serves to deter future misconduct.¹² The disciplining, or deterrence, effect is especially popular in the United States, where it is often held that the deterrence of official misconduct is the primary rationale for the strict exclusionary rule applied by the Supreme Court.¹³ Consequently, the effect that exclusion of improperly obtained evidence has on the repute of the judicial system is only considered after the deterrence requirement has been satisfied. The Supreme Court clearly demonstrated this way of thinking in *Harris v New York*¹⁴ and the subsequent cases dealing with impeachment by means of improperly obtained evidence.¹⁵

In Canada, matters are somewhat different. The Canadian Supreme Court has held that deterrence or disciplining of official misbehaviour is not a motivation for the exclusion of evidence.¹⁶ However, the Supreme Court has implied the existence of a disciplinary function by holding that admission of unconstitutionally obtained evidence could create the impression that the judiciary condones official misconduct.¹⁷

In the United States, the exclusion of evidence has been controversial since 1914, when the Supreme Court first started using it in all federal trials as a constitutionally required

¹¹ Van Rooyen "Lead-in Paper: The Investigation and Prosecution of Crime" 1975 *Acta Juridica* 70 refers to the rules governing police behaviour as the "primary rules" and the exclusionary sanction, which merely enforces these rules, as the "secondary rule".

¹² See *S v Makhathini* D 1997-11-21 Case no CC73/97. This case is discussed in § 4.2.2 *infra*.

¹³ Dressler *Understanding Criminal Procedure* 3 ed (2002) 381; *United States v Janis* 428 US 433 (1976).

¹⁴ 401 US 222 (1971).

¹⁵ *Riddell v Rhay* 404 US 974 (1971); *Oregon v Hass* 420 US 714 (1975); *United States v Havens* 446 US 620 (1980). See § 1.2 & ch 3 *infra*.

¹⁶ *R v Collins* (1987) 56 CR (3d) 193 (SCC).

¹⁷ *R v Burlingham* (1995) 38 CR (4th) 265 (SCC), also cited as (1995) 97 CCC (3d) 385 (SCC); Stuart *Charter Justice in Canadian Criminal Law* 2 ed (1996) 488.

remedy to protect the accused's right to privacy.¹⁸ In 1961, the Supreme Court applied the exclusionary rule to state prosecutions.¹⁹ Notwithstanding the numerous compelling grounds for the exclusion of evidence, the exclusionary rule is not free from criticism. It is criticised mainly for detracting from the real purpose of the trial, namely the determination of the guilt or innocence of the accused.²⁰ Opponents of exclusion suggest that other (non-trial) remedies, such as a civil claim for compensation, should be sufficient to remedy any rights violation. A claim for compensation is after all the main remedy available to innocent persons whose rights have been violated, but never end up in the dock.

The law in South Africa regarding the admissibility of unconstitutionally obtained evidence is still in comparative infancy.²¹ The enactment of the interim²² and present²³ Constitutions has created the opportunity, and the need, for development in this important field of procedural law. To date, the courts have only had a few opportunities to interpret s 35 of the Constitution, which deals with the rights of "arrested, detained and accused" persons. Prior to constitutionalisation, South African courts generally adhered to the common law tradition in terms of which the admissibility of evidence depended on relevance rather than the lawfulness of its procurement.²⁴

Since the enactment of the Constitution, courts are no longer allowed to distance themselves from the actions of other law enforcement agencies. Section 35(5) requires the exclusion of unconstitutionally obtained evidence "if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice". It follows that relevance or "trustworthiness"²⁵ of evidence alone will not be sufficient to ensure its admission. Section 35(5) requires more, even something altogether different: When deciding the admissibility of evidence, courts may no longer ignore illegal methods of evidence gathering employed by police officers. The "disciplinary function of the Court" has already

¹⁸ *Weeks v United States* 232 US 383 (1914).

¹⁹ *Mapp v Ohio* 367 US 643 (1961). However, the first attempt to enforce the exclusionary rule on state prosecutions had already been made in *Wolf v Colorado* 338 US 25 (1949).

²⁰ This is one way of looking at it. Another view, more tolerant of exclusion, is that the main purpose of the trial is to ensure that justice is done, to the accused as well as society. See § 4 2 2 2 6 *infra*.

²¹ *S v Makhathini supra*.

²² Act 200 of 1993.

²³ Act 108 of 1996. Hereafter the "Constitution".

²⁴ See § 1 4 *infra*. Relevance is still the requirement for admission of evidence. Section 35(5) of the Constitution only added to the relevance requirement. See also § 4 2 2 2 2 *infra*.

²⁵ "Trustworthiness" was the requirement used by the US Supreme Court in *Harris v New York* 401 US 222 (1971) to justify the admission of previously excluded evidence to impeach the credibility of the accused. This term was also used in *Oregon v Hass supra*. Ironically, this creates the impression that the prosecution is trying to prove that the accused is dishonest in court by proving that he was honest, or trustworthy, when making the statement at issue! See however § 3 3 1 3 *infra*.

been recognised as a valid consideration when applying s 35(5) of the Constitution.²⁶ As in the United States, the aim is not to discipline individual law enforcement officers; rather the intention is to prevent violations of basic rights on an institutional level. This also means that regardless of the individual police officer's efforts to act reasonably, in good faith and in accordance with departmental guidelines, evidence must still be excluded when the departmental guidelines are in violation of the accused's rights.²⁷ Another consideration is that due process can never be ignored "in the light of a bill of rights ... which places important constitutional limitations upon official power".²⁸ Due process in a constitutional system is the ever-present, ever vigilant and over-arching value against which the whole criminal prosecution must be measured.

Ultimately, the thesis aims to analyse the issues surrounding the impeachment of an accused's credibility by means of previously excluded evidence. To put this into context, the general principles governing the exclusion of evidence in the United States and Canada are discussed in Chapter Two.

Chapter Two comprises a comparative study of United States and Canadian jurisprudence. The features of the respective exclusionary regimes are compared and comments made upon the differences. Throughout, references and comparisons are made to the South African position. However, one must bear in mind differences between the three legal systems under discussion. These include the lack of a jury, consisting of laypersons, as sole trier of fact in South Africa, which instead employs (lay or expert) assessors who decide on the facts together with the presiding judicial officer. This difference, which has far-reaching consequences for the effective adjudication of limited purpose evidence, such as impeachment, is discussed in Chapters Four and Five.

The development of the exclusionary rule in the United States will be the starting point. It is important to note that the exclusion of unconstitutionally obtained evidence is "constitutionally required"²⁹ in the United States, hence the exclusionary *rule*. The US Supreme Court consequently interprets alleged violations of the United States Constitution narrowly in order to escape the strict requirements of the rule. For this reason, the Supreme Court has created numerous exceptions to the exclusionary rule. Notwithstanding the

²⁶ *S v Mphala* 1998 1 SACR 388 (W) 400b.

²⁷ A good example is *S v Soci* 1998 2 SACR 275 (E), where a standard form, drafted by the legal advisers of the SAPS, contained a material oversight regarding the accused's right to consult counsel before a pointing out.

²⁸ Schwikkard & Van der Merwe *Principles of Evidence* 2ed (2002) 176.

²⁹ *Mapp v Ohio* *supra* 648, citing *Silverthorne Lumber Co v United States* 251 US 385 (1920) 392. Even though it is only "judicially implied".

differences in approach, much can be learned from the considerable experience of the US Supreme Court in dealing with unconstitutionally obtained evidence and its use for impeachment. The exceptions developed by the Supreme Court are useful when considering which factors ought to be relevant when the discretion to exclude is exercised by South African courts.

Landmark decisions of the US Supreme Court are examined. The development of the Fourth Amendment exclusionary rule as a constitutionally required remedy is studied with reference to some decisions of the Supreme Court, notably *Mapp v Ohio*.³⁰ In this case, the court made the exclusionary rule mandatory in state prosecutions. The intention of the court was to complete the “halting but seemingly inexorable”³¹ process started in *Weeks v United States*.³² Instead, the *Mapp* judgment sparked a debate that rages to this day about the constitutionality of the Fourth Amendment exclusionary rule.³³

Shortly after its judgment in *Mapp*, the US Supreme Court held that exclusion is also a constitutionally required remedy for violations of the Fifth Amendment privilege against self-incrimination. The first cases in which the Supreme Court dealt with exclusion as a remedy for Fifth Amendment violations were *Massiah v United States*³⁴ and *Escobedo v Illinois*.³⁵ These two cases were followed by the Supreme Court’s landmark decision in *Miranda v Arizona*.³⁶ In *Miranda*, the Supreme Court combined four appeals from various states in an attempt to clarify its findings in *Massiah* and *Escobedo*. The Supreme Court held that exclusion is constitutionally required where certain procedural safeguards protecting the privilege against self-incrimination were not in place. As part of the procedural safeguards put into place to secure the privilege against compelled self-incrimination, the Supreme Court extended the right to counsel to the pre-trial phase.³⁷

Because of the mandatory nature of the (*Mapp*) exclusionary rule, the US Supreme Court has since the creation of the rule, carved out exceptions to it. For example, an exception has been found in cases when officers acted upon a warrant that they believed to be valid, but

³⁰ 367 US 643 (1961).

³¹ *Elkins v United States* 364 US 218 (1960) 219.

³² 232 US 383 (1914).

³³ See for example *United States v Calandra* 414 US 338 (1974); *Pennsylvania Board of Probation and Parole v Scott* 524 US 357 (1998).

³⁴ 377 US 201 (1964).

³⁵ 378 US 478 (1964).

³⁶ 384 US 436 (1966).

³⁷ This is a separate right from the 6th Amendment right to trial counsel. See n 154 *infra*.

which later appeared to be invalid through someone else's mistake.³⁸ Another exception is the "inevitable discovery" exception.³⁹ It means that, but for the illegal manner in which evidence was discovered, it would inevitably have been discovered through legal means.⁴⁰ Because s 35(5) of the Constitution (of South Africa) gives courts a discretion to exclude unconstitutionally obtained evidence, there is no need to create exceptions. However, these exceptions are useful as guidelines when the admissibility of evidence in a South African context is considered.

As far as the so-called "*Miranda*-rights" are concerned, s 35(1) of the Constitution creates similar rights for "arrested" persons. However, one may rightfully ask what is to be done with statements made by a person prior to arrest, but at a stage when he is already the subject of a police investigation.⁴¹ As in Fourth Amendment cases, the US Supreme Court has created exceptions to the *Miranda* requirements, when warnings are not necessary.⁴²

Canadian case law, with its discretionary approach to exclusion of evidence, is useful to put into context the particular way in which the US Supreme Court deals with unconstitutionally obtained evidence. Furthermore, s 35(5) of the South African Constitution was to some extent modelled on s 24(2) of the Canadian Charter of Rights and Freedoms.⁴³ Therefore, case law dealing with *discretionary* exclusion of unconstitutionally obtained evidence is a useful indicator of how s 35(5) of our Constitution should be applied. It is particularly useful to see which considerations are of importance to the Supreme Court of Canada when exercising its discretion. A comparison between Canadian and American law, especially with a view to the differences between the principles regarding exclusion, should be useful in identifying the possibilities for development in South Africa.

³⁸ *United States v Leon* 468 US 897 (1984); *Arizona v Evans* 514 US 1 (1995).

³⁹ *Nix v Williams* 467 US 431 (1984). This exception forms part of the "fruit-of-the-poisonous-tree" doctrine. See § 2 2 2 4 3 *infra*.

⁴⁰ See Scott JA for the minority in *Pillay v S* 2004 (2) BCLR 158 (SCA) 196.

⁴¹ *Escobedo Illinois* 378 US 478 (1964); *S v Makhathini supra*; *S v Orrie* CPD 14-10-2004 Case no SS 32/2003; *S v Sebejan* 1997 (8) BCLR 1086 (W) 10961-J; *S v Ndlovu* 1997 (12) BCLR 1785 (N); *S v Van der Merwe* 1998 (1) SACR 194 (O); Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 631. But see *S v Langa* 1998 (1) SACR 21 (T); *S v Mthethwa* 2004 (1) SACR 449 (E). In *Mthethwa* the court declined to follow *Sebejan*, but nonetheless held that a suspect was entitled to be cautioned before being questioned by the police. In this regard, see also nn 443 & 501 *infra*.

⁴² See § 2 2 3 3 *infra*.

⁴³ Part I of the Constitution Act, 1982. Hereinafter "Canadian Charter" or "Charter".

1 2 STANDING

In the United States it is important that any person claiming exclusion must show that his *own* Fourth Amendment rights were violated by government action. This is known as “standing”. In South Africa, s 38 of the Constitution lists the circumstances in which a claim under the Bill of Rights may be made.

However, the Supreme Court of Appeal in *S v M*,⁴⁴ when ruling on the admissibility of a letter that was obtained from a defence witness, noted: “The constitutional rights of the *appellant* [accused] could not conceivably have been infringed no matter how it came into possession of the authorities”.⁴⁵ This might indicate that the Supreme Court of Appeals takes the view that admission of evidence “would [only] render the trial unfair or otherwise be detrimental to the administration of justice” if that evidence had been “obtained in a manner that violates any right in the Bill of Rights” of the *accused*. Similarly, in *S v Naidoo*⁴⁶ the court asked the question: “Was the evidence obtained ... in a manner that violates any right, *of the accused*, in the bill of rights?”⁴⁷ This approach bears a striking resemblance to the standing requirement in the United States.

1 3 IMPEACHMENT

The loss of important evidence because of official misconduct can be severely detrimental to the prosecution’s case. Moreover, conventional wisdom and indeed some earlier decisions of the US Supreme Court suggest that once evidence is excluded, it “shall not be used at all”.⁴⁸ However, in *Harris v New York*⁴⁹ the US Supreme Court held that under certain conditions, evidence excluded from the case-in-chief might still be used for collateral purposes, such as impeaching the accused’s credibility.⁵⁰ In contrast, the Supreme Court of Canada held in *R v Calder*⁵¹ that once evidence is excluded, it is indeed excluded for all

⁴⁴ 2003 (1) SA 341 (SCA).

⁴⁵ *S v M* 2003 (1) SA 341 (SCA) 362E.

⁴⁶ (1998) 1 All SA 189 (D).

⁴⁷ *S v Naidoo* (1998) 1 All SA 189 (D) 229. Emphasis added.

⁴⁸ *Silverthorne Lumber Co v United States supra* 392, as cited in *Mapp v Ohio supra* 648. The judgment in *Miranda v Arizona* 384 US 436 (1966) can also be understood in this way, but this was specifically denied in *Harris v New York supra*.

⁴⁹ *Supra*.

⁵⁰ An example of the US Supreme Court not only interpreting the violation of the basic rights narrowly, but also the application of the exclusionary rule. See text following n 29 *supra*.

⁵¹ (1996) 46 CR (4th) 133 (SCC).

purposes. Previously excluded evidence will only in “very special circumstances”⁵² be admitted to impeach the accused.

The term “impeachment” for purposes of the thesis has a very specific meaning, which should be clearly defined. The *Oxford Dictionary*⁵³ provides three possible definitions for “impeach[ment]”:

“1 *Brit.* charge with a crime against the State, especially treason. 2 *US* charge (the holder of a public office) with misconduct. 3 call in question, disparage (a person’s integrity etc.) ... impeachment *n*”.

In the United States, the term “impeachment” may have a further meaning. In federal prosecutions and certain state prosecutions, the prosecution may require suspects, witnesses or any other persons whose testimony is believed to be useful, to appear before a so-called “grand jury”. In this context, requiring a person to testify before a grand jury is sometimes referred to as “impeaching” a person to appear before a grand jury. Grand jury proceedings form part of the pre-trial phase of a prosecution and therefore most trial rights do not apply. This is not the meaning given to “impeachment” in this thesis. As grand jury proceedings fall outside the scope of the thesis, further discussion of these proceedings are not necessary.

The meaning of the term “impeachment”, as used in the thesis is closely related to the third definition put forward in the *Oxford Dictionary*: Calling into question or disparaging, for example, a person’s integrity. In the thesis, however, “impeach”, or “impeachment” specifically refers to calling into question the credibility of, or discrediting the accused. The thesis is concerned only with the credibility of the *accused* and not with that of witnesses.⁵⁴

In *Harris v New York*,⁵⁵ the US Supreme Court held by a majority of 5-4 that “[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances”.⁵⁶ Writing for the majority, Burger CJ held that the only requirement for the admission of previously excluded evidence was that its “trustworthiness”⁵⁷ satisfies the legal standard. This holding was

⁵² *R v Calder* (1996) 46 CR (4th) 133 (SCC) § 35. La Forest J, in a separate opinion, agreed with the majority (per Sopinka J) in general, but could not imagine any such “special circumstances”.

⁵³ Allen (Ed) *Concise Oxford Dictionary of Current English* 8 ed (1990).

⁵⁴ The impeachment exception does not apply to defence witnesses. See *James v Illinois* 493 US 307 (1990).

⁵⁵ *Supra*.

⁵⁶ *Harris v New York supra* 226.

⁵⁷ *Harris v New York supra* 224. See n 25 *supra*.

confirmed some months later in *Riddell v Rhay*,⁵⁸ when the Supreme Court denied an application for a writ of *certiorari*,⁵⁹ again amid strong criticism from the minority.

According to Douglas J, writing for the minority in *Riddell*, this case illustrated the benefits reaped by the prosecution when police interrogators “deliberately or otherwise”⁶⁰ ignored the restrictions placed upon them by *Miranda*. When testifying in his own defence, the accused stated that his finger was *not* on the trigger of the rifle he was carrying. However, in an inadmissible statement to the police, properly excluded from the prosecution’s case-in-chief, he had admitted that he “cocked the hammer and pulled the trigger”. By admitting the statement, even for the limited purpose of attacking the accused’s credibility, the prosecution was able to prove that the accused was lying about his finger not being on the trigger.⁶¹ It follows that even if the contents of the statement were not made available to the jury, proof that the accused lied is often also proof of the truth – and the accused’s guilt.

The Canadian Supreme Court, on the other hand, held in *R v Calder*⁶² that once unconstitutionally obtained evidence is excluded, it should remain so for the full duration of the trial and for all purposes. Writing for the majority, Sopinka J held that the focus should not be on the purpose for which admission of the evidence is sought, but rather on the effect that admission of evidence will have on the repute of the administration of justice. Citing *R v Adams*,⁶³ he held that in order to reverse an earlier exclusion, there has to be a material change of circumstances to justify such a decision. The change of the purpose for which the admission of the evidence was sought was not a sufficiently material change.⁶⁴

On the face of it, the position in Canada, as laid out in *Calder*, is the opposite of the US Supreme Court’s judgment in *Harris*. A comparative study between these conflicting positions is useful to suggest possibilities regarding impeachment in South African courts. Impeachment of the accused’s credibility by means of earlier excluded evidence is investigated in detail. It is suggested that the South African position should favour that of the Canadian Supreme Court, but not blindly follow it, keeping in mind the differences between the two jurisdictions.

⁵⁸ 404 US 974 (1971).

⁵⁹ Without going into a detailed definition, this means that the Supreme Court declined an application to review the records of the case.

⁶⁰ *Riddell v Rhay supra* 974.

⁶¹ After all, there were only two possibilities: Either his finger was *on* the trigger or it was *not*.

⁶² *Supra*.

⁶³ (1995) 4 SCR 707 (SCC).

⁶⁴ But see § 4 1 2 & ch 5 *infra*.

The study gives an account of the development, to date, of the exclusionary *rule* in the United States and *discretionary* exclusion in Canada. Furthermore, the different approaches to the use of inadmissible evidence to impeach the credibility of the accused are identified. Lastly, an attempt is made to identify guidelines that can assist in solving present⁶⁵ and future⁶⁶ problems concerning the interpretation of s 35(5), with the focus on impeachment.

1 4 HISTORY

In order to put into context the discussion of the discretionary approach adopted by the courts since constitutionalisation, some matters should be mentioned about the way things were before the Constitution. Even in the years leading up to the Constitution, it was obvious that a change was taking place in the courts' thinking.

Since the nineties, but especially since the enactment of the interim Constitution,⁶⁷ the focus started to shift towards protection of fundamental rights such as privacy of a person. In *S v Hammer*⁶⁸ this was alluded to by the Cape High Court. A letter, written by a minor in police custody to his mother and legal guardian, was intercepted and read by the police. The letter was then forwarded to the Attorney-General and never given to the mother. An application for exclusion was made, based on two grounds, the second of which was that the admission of the evidence of the letter would be a violation of the accused's fundamental right to privacy, as entrenched in the interim Constitution. The court excluded the letter on the first ground of the application, namely that "otherwise admissible evidence" should be excluded "where the rules of admissibility would operate unfairly against the accused and thereby conflict with public policy".⁶⁹

In excluding the evidence on the first ground, Farlam J felt it unnecessary to deal with the second ground of the application. He did however have the following to say in reaction to the prosecution's contention that the accused gave up his right to privacy:

"Waiver is never presumed. A party relying on waiver must show that the party who is alleged to have waived decided with full knowledge of his or her right, to abandon it,

⁶⁵ See ch 4.

⁶⁶ See ch 5.

⁶⁷ The Interim Constitution does not contain a section equivalent to s 35(5) of the Constitution.

⁶⁸ 1994 (2) SACR 496 (C).

⁶⁹ *S v Hammer* 1994 (2) SACR 496 (C) 497b.

either expressly (which did not happen here) or by conduct plainly inconsistent with an intention to enforce it".⁷⁰

The judge was satisfied that the accused's conduct did not constitute a waiver. Additionally, he emphasised "that I have a *discretion* to exclude evidence which has been illegally or improperly obtained".⁷¹ The position that courts had a discretion to exclude evidence under the interim Constitution was confirmed after enactment of the Constitution in *S v Shongwe*.⁷²

A few years earlier, this had not yet been the case. In *S v Nel*,⁷³ the private communications of the accused were also intercepted in an unlawful manner. Van der Walt J held that the two grounds for exclusion of unlawfully obtained evidence were:

"[D]at 'n beskuldigde nie verplig kan word om getuienis teen homself te verskaf nie en die keersy daarvan, dat getuienis wat onder dwang bekom is van 'n beskuldigde nie teen hom gebruik kan word nie. Dit is die algemene benadering".⁷⁴

According to the Judge, the only remedy available to the accused for the alleged breach of his privacy was a private law action for damages. The (alleged) violation of the accused's privacy had no bearing on the admissibility of the evidence that resulted from the violation.⁷⁵

However, in some earlier judgments, courts have considered various possibilities of dealing with unlawfully obtained evidence, including discretionary exclusion. In *S v Mushimba*,⁷⁶ the then Appellate Division courted with this idea. Rumpff CJ stated:

"Daar is verskillende uitsprake in ons eie reg en in die Engelse reg wat nie op 'n vasomskrewe beginsel wys nie, en die moontlikheid van 'n diskresionêre bevoegdheid van die Hof is waarskynlik nie uitgesluit nie".⁷⁷

It is clear that the opinions of our courts regarding the admissibility of unlawfully obtained evidence did not suddenly change with the enactment of s 35(5) of the Constitution. Nor did the change only occur once the Constitution came into force. The change in position is a gradual process that has started some years before constitutionalisation. This trend is by no

⁷⁰ *S v Hammer supra* 498a-b.

⁷¹ *S v Hammer supra* 498e-f. Emphasis added. See *S v Forbes* 1970 (2) 594 (C).

⁷² 1998 (2) SASV 321 (TPA).

⁷³ 1987 (4) SA 950 (WPA).

⁷⁴ *S v Nel* 1987 (4) SA 950 (WPA) 953I-J.

⁷⁵ *S v Nel supra* 954D-E.

⁷⁶ 1977 (2) SA 829 (A).

⁷⁷ *S v Mushimba* 1977 (2) SA 829 (A) 840F.

means complete, and with a justiciable Constitution to support it, it should lead to a body of law that strikes a balance between the various conflicting values involved in a criminal trial.

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21 INTRODUCTION

The aim of this chapter is to give an overview of the development of the exclusionary rule as a trial remedy. The general principles, as applied in the United States and Canada, are evaluated and the similarities pointed out. Additionally, the exceptions created by the

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2 1 INTRODUCTION

The aim of this chapter is to give an overview of the development of the exclusionary sanction as a trial remedy. The general principles, as applied in the United States and Canada are evaluated and the similarities pointed out. Additionally, the exceptions created by the US

Supreme Court are compared with the various considerations taken into account by the Canadian Supreme Court when exercising its discretion to exclude.

At the end of this chapter it should be clear that the considerations taken into account by courts in the United States when carving out exceptions to the exclusionary rule are not that different from those taken into account by Canadian courts when exercising the discretion to exclude. These general principles and considerations are reflected upon in Chapter Three, where impeachment by means of unconstitutionally obtained evidence is examined.

2 2 THE UNITED STATES: THE EXCLUSIONARY RULE

“The movement towards the rule of exclusion has been halting but seemingly inexorable”.⁷⁸

2 2 1 INTRODUCTION

Exclusion as a remedy for violations of constitutional rights is not explicitly mandated in the United States Constitution as it is in s 24(2) of the Canadian Charter and s 35(5) of the South African Constitution. Furthermore, implementation of exclusion as a “constitutionally required” remedy was done in a rather piecemeal fashion. Violations of the Fourth Amendment right to privacy were the first to be remedied by exclusion. After many attempts, the first being as early as in 1914,⁷⁹ the Supreme Court, in *Mapp v Ohio*,⁸⁰ finally held that exclusion of evidence obtained in violation of the right to privacy was mandated by the Fourth Amendment.

A few years later, the Fifth Amendment privilege against compelled self-incrimination was protected in the same manner. This happened after a series of cases that concluded with the Supreme Court’s judgment in *Miranda v Arizona*.⁸¹ In *Miranda*, exclusion was held to be a constitutional remedy for violations of the privilege against self-incrimination, specifically in cases of custodial interrogation.

There are many similarities between the two exclusionary rules. Most evident is their common rationale – to prevent infringements of the basic rights of the community. In other

⁷⁸ *Elkins v United States* 364 US 218 (1960) 219.

⁷⁹ *Weeks v United States* 232 US 383 (1914).

⁸⁰ 367 US 643 (1961).

⁸¹ 384 US 436 (1966). As with exclusion under the 4th Amendment, the Supreme Court sparked a debate that rages to this day, instead of bringing closure to the matter. See § 3 2 3 8 *infra*.

words, to deter official misconduct.⁸² The Supreme Court has also drawn numerous analogies between the two rules during their development⁸³ and subsequent application. Despite this, it is important to bear in mind that they are inherently two different remedies that are applicable to two different basic rights under different circumstances. Moreover, subsequent rulings regarding their constitutional origin have had different outcomes.⁸⁴

2 2 2 EXCLUSION AND THE FOURTH AMENDMENT

2 2 2 1 The text

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”.

The Fourth Amendment is very clear on what is included in the right to privacy. It also indicates that violation of the community’s right to their “persons, houses, papers, and effects” can occur through either a “search” or a “seizure”. It further foresees the possibility that searches and seizures can occur either with or without warrants and makes provision for their lawful execution.⁸⁵ And infringements upon the right to privacy may be justified by showing reasonableness.⁸⁶ However, the text makes no mention of an appropriate remedy in the event of a violation of the Fourth Amendment.

⁸² Exclusion in South Africa is similarly part of the courts’ disciplinary function, aimed at inducing legislatures and government agents to respect the rights and freedoms set out in the Bill of Rights. See *S v Mphala* 1998 (1) SACR 388 (WLD).

⁸³ Most notably, Black J (concurring) in *Mapp v Ohio* 367 US 643 (1961) 662: “[W]hen the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule”.

⁸⁴ *United States v Calandra* 414 US 338 (1974) seems to have de-constitutionalised exclusion as a remedy for 4th Amendment violations. See also *Pennsylvania Board of Probation and Parole v Scott* 524 US 357 (1998). In turn, after almost following 4th Amendment exclusion in losing its constitutional pedigree, the 5th Amendment (*Miranda*) exclusionary rule had its constitutional origin reaffirmed in *Dickerson v United States* 530 US 428 (2000).

⁸⁵ The Supreme Court considers the reasonableness requirement of warrantless searches and seizures to be at least as strict as, if not the equivalent to, the probable cause requirement of warrant searches. Consider the following by Black J (concurring) in *Mapp v Ohio supra*: “In [*Rochin v California* 342 US 165 (1952)], three police officers, acting with neither a judicial warrant nor probable cause, entered Rochin’s home for the purpose of conducting a search...” Emphasis added.

⁸⁶ The 5th Amendment makes no provision for reasonableness. The right to privacy as it is formulated in s 14 of the SA Constitution also does not contain a reasonableness provision, which means that any infringements thereupon must be justified in terms of s 36, or dealt with in terms of s 35(5).

2 2 2 2 *Mapp v Ohio*

In 1961, the Supreme Court finally recognised that exclusion of evidence is “an essential ingredient”⁸⁷ of the Fourth Amendment right to privacy. Although not replacing any of the other possible (civil) remedies, it became the primary (trial) remedy for violations of the Fourth Amendment.

In *Mapp v Ohio*⁸⁸ police officers investigating a recent bombing, sought to enter the accused’s house in order to find and question a suspect whom they believed to be hiding there. In addition, they believed that a large amount of policy paraphernalia was hidden in the home. When the officers demanded entrance, the accused telephoned her attorney and on his advice refused to admit them without a search warrant.

Later, the police returned to the house, still without a warrant. This time, they forcibly entered. Meanwhile, the accused’s attorney arrived, but the police denied him access into the house and refused to let him see his client.

The accused was forcibly taken to her bedroom, where the officers searched her belongings. Later, the rest of the house was thoroughly searched. Nobody, nor any evidence regarding the bombing, was found. However, “obscene materials” were found and seized. The trial court convicted the accused for possession of these materials.

2 2 2 2 1 *The trend*

*Wolf v Colorado*⁸⁹ recognised the enforceability of the right to privacy against states, but not yet with the remedy of exclusion.⁹⁰ Since then, many states have adopted the exclusionary rule as the remedy for violations of Fourth Amendment rights; “because the other remedies have completely failed to secure compliance with the constitutional provisions...”⁹¹ The failure of other remedies to protect the Fourth Amendment has been recognised by the Supreme Court since *Wolf*.⁹²

⁸⁷ *Mapp v Ohio supra* 657.

⁸⁸ *Supra*.

⁸⁹ 338 US 25 (1949).

⁹⁰ Partly on the facts and partly because the court felt that other remedies were available to enforce this right.

⁹¹ *People v Cahan* 44 Cal 2d 434 (1955) 445.

⁹² *Irvine v California* 347 US 128 (1954) 137.

The trend at the time of *Mapp v Ohio*⁹³ was definitely towards reading exclusion into the Fourth Amendment. A year earlier, in 1960, the Supreme Court widened the strict standing requirements for challenging unconstitutional searches and seizures.⁹⁴ Later in the same year, the court added momentum to the trend by finally rejecting the so-called “silver platter” doctrine.⁹⁵ This meant that the prosecution in a federal trial could no longer rely on evidence obtained illegally by state officials. The Supreme Court arrived at this conclusion because the purpose of the exclusionary rule “is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it”.⁹⁶ The implication of this holding was that unconstitutionally obtained evidence became inadmissible in a federal court, regardless of its source.

*Mapp v Ohio*⁹⁷ finally ended the double standards whereby evidence constitutionally inadmissible in federal courts, was still admissible in state courts. The Supreme Court held that not only should the right to privacy be applicable to the states through the Due Process clause of the Fourteenth Amendment,⁹⁸ but it should be enforceable by the same sanction of exclusion as against the Federal Government.⁹⁹ To do otherwise, it held, would be to recognise the right to privacy without securing its effective enjoyment.¹⁰⁰ Part of the court’s reasoning was that it had not hesitated in earlier decisions to enforce equally against federal and state courts other rights, like the right to a fair trial which includes the right not to be convicted by use of a coerced confession (without regard to its reliability). The same should apply to what is “tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc”.¹⁰¹ Moreover, the court held:

“The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence – the very least

⁹³ *Supra*.

⁹⁴ *Jones v United States* 362 US 257 (1960). The court held that anyone who was “legitimately on the premises” at the time of the search or seizure could challenge the use of such evidence. However, the standing requirement has since been narrowed. See *Rakas v Illinois* 439 US 128 (1978).

⁹⁵ *Elkins v United States supra*. The reverse of the “silver platter” doctrine, where state prosecutors used evidence illegally obtained by federal agents, had earlier been rejected in *Rhea v United States* 350 US 214 (1956).

⁹⁶ *Elkins v United States supra* 217. See also *Mapp v Ohio supra* 656.

⁹⁷ *Supra*.

⁹⁸ This was as far as the Supreme Court was willing to go in *Wolf v Colorado* 338 US 25 (1949).

⁹⁹ Any remedy that is constitutionally required is binding on the states through the due process clause of the 14th Amendment. For more on how the 14th Amendment incorporates the Bill of Rights see Dressler *Understanding Criminal Procedure* 3ed (2002) ch 3.

¹⁰⁰ *Mapp v Ohio supra* 656.

¹⁰¹ *Mapp v Ohio supra* 656. However, see § 2 2 1 *supra*. This argument seems to imply that, like in Canada, the distinction should rather be between conscripted and non-conscripted evidence. See §§ 2 3 2 1 1 & 2 3 2 1 2 *infra*.

that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence".¹⁰²

2 2 2 2 Judicial integrity¹⁰³

Finally, the court in *Mapp* considered what was referred to in *Elkins v United States*¹⁰⁴ as the "imperative of judicial integrity".¹⁰⁵ This rationale had already been acknowledged by the Supreme Court in *Weeks v United States*,¹⁰⁶ although not explicitly in "integrity" terms.¹⁰⁷ According to Clark J, for the majority in *Mapp*:

"However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness".¹⁰⁸

He continued that "[o]ur decision, founded in reason and truth, gives ... to the courts, that judicial integrity so necessary in the true administration of justice".¹⁰⁹ In reaction to criticism that "[t]he criminal is to go free because the constable has blundered", he stated that in some cases "this will undoubtedly be the result".¹¹⁰ He continued however: "The criminal goes free, if he must, but it is the law that sets him free".¹¹¹

Although the "judicial integrity" argument featured prominently in *Mapp*, it has since lost ground to the deterrence rationale to the point of irrelevance. Only five years later, the Supreme Court held:

"This rationale [judicial integrity], however, is really an assimilation of the more specific rationales [deterrence and trustworthiness], and does not in their absence provide an independent basis for excluding challenged evidence".¹¹²

The Supreme Court has since *Mapp* also held that "while it is quite true that courts are not to be participants in 'dirty business', neither are they to be ethereal vestal virgins of another

¹⁰² *Mapp v Ohio supra* 657. However, in §§ 3 2 3 & 3 2 4 *infra* it is illustrated why analogies between the 4th & 5th Amendments should, at the most, be used sparingly.

¹⁰³ See also § 4 2 2 2 6 *infra*.

¹⁰⁴ 364 US 218 (1960).

¹⁰⁵ *Elkins v United States supra* 222, as quoted in *Mapp v Ohio supra* 659.

¹⁰⁶ 232 US 383 (1914).

¹⁰⁷ Dressler *Criminal Procedure* 381.

¹⁰⁸ *Mapp v Ohio supra* 658, citing *Miller v United States* 357 US 301 (1958) 313.

¹⁰⁹ *Mapp v Ohio supra* 660.

¹¹⁰ *Mapp v Ohio supra* 659, quoting Cardozo J in *People v Defore* 242 NY 21 (1926) 587.

¹¹¹ *Mapp v Ohio supra* 659.

¹¹² *Michigan v Tucker* 417 US 433 (1974) 451.

world”.¹¹³ If there were any doubt left, the Supreme Court held in *United States v Janis*¹¹⁴ that deterrence is the “‘prime purpose’ of the rule, if not the sole one”.¹¹⁵

2 2 2 3 Is exclusion *really* constitutionally mandated?

Much has been said in criticism of the ruling in *Mapp v Ohio*¹¹⁶ – possibly, none as fierce as that of its own minority. The minority based their criticism on the argument that when deciding whether any right or remedy is required by the Constitution, its desirability, costs and even its effectiveness in achieving secondary goals should be irrelevant. The only relevant factor should be whether it is *required* by the Constitution. In other words, if the Constitution requires exclusion of unlawfully obtained evidence, it must be excluded regardless of the consequences. The minority did not believe that the Constitution requires such a remedy. Consequently, the minority did not believe that the Fourteenth Amendment empowered the Supreme Court to require enforcement of the right to privacy by the states in the same way it would in a federal prosecution – by excluding the impugned evidence.

Although not overruling the holding of the majority in *Mapp v Ohio*, the Supreme Court has since overruled the constitutional reasoning of *Mapp*. Speaking for a majority of six members in *United States v Calandra*,¹¹⁷ Powell J described the exclusionary rule as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved”.¹¹⁸ This suggested that exclusion was no longer regarded as constitutionally required, but merely a judicially implied remedy aimed at deterring official misconduct. Although the Supreme Court has not gone so far as to acknowledge explicitly what was implied in *Calandra*, it has since ventured that “the rule is prudential rather than constitutionally mandated...”¹¹⁹

¹¹³ Rehnquist J (as he then was), for the minority in *California v Minjares* 443 US 916 (1979) 924.

¹¹⁴ 428 US 433 (1976).

¹¹⁵ *United States v Janis* 428 US 433 (1976) 446.

¹¹⁶ *Supra*.

¹¹⁷ 414 US 338 (1974). This case concerned the admissibility of unconstitutionally seized evidence in grand jury proceedings, which, strictly speaking, falls outside the ambit of the current work. See § 1 3 *supra*. Nonetheless, the judgment had important consequences for the exclusionary rule “designed” by the Supreme Court in *Mapp v Ohio supra*.

¹¹⁸ *United States v Calandra supra* 348.

¹¹⁹ *Pennsylvania Board of Probation and Parole v Scott supra* 363. This has implications for the application of the exclusionary rule in the states. If it is not constitutionally required, but merely judicially implied as part of the Supreme Court’s supervisory function over federal proceedings, the states, and indeed Congress, would be free to create their own remedies. See, however, the Supreme Court’s arguments to the contrary in *Dickerson v United States supra*.

2 2 2 4 Exceptions: When unconstitutionally obtained real evidence will not be excluded

2 2 2 4 1 *General*¹²⁰

It is clear that the strict exclusionary rule adopted by the Supreme Court in *Mapp v Ohio*¹²¹ leaves a court no choice but to exclude evidence once it finds that a violation of a right has occurred. In order to avoid the effects of such a strict rule, the Supreme Court can do one of two things: Either employ a narrow interpretation of basic rights whenever the admissibility of evidence is at issue,¹²² or restrict the application of the exclusionary rule when the deterrence rationale will not be served or has adequately been served.¹²³ In any event, the exclusionary rule has little or no application in ordinary civil suits¹²⁴ or hearings of an administrative kind.¹²⁵ In criminal proceedings of a non-trial nature, the exclusionary rule is similarly not applicable.¹²⁶

In criminal *trials*, when the exclusionary rule does apply, the Supreme Court has allowed some exceptions. This means that although factually a violation occurred, the evidence resulting from that violation is admissible. Although impeachment is often referred to as another exception to the exclusionary rule, it should be noted that it does not prevent exclusion of evidence like other exceptions. Impeachment in the sense that it is understood in this work only becomes relevant once the evidence in question had already been excluded, or should have been.

2 2 2 4 2 *Good faith*

In *United States v Leon*¹²⁷ and *Massachusetts v Sheppard*,¹²⁸ the Supreme Court held that if the warrant (which should at least be facially valid) authorising the search were later found

¹²⁰ See generally Dressler *Criminal Procedure* § 21 5.

¹²¹ *Supra*.

¹²² This is almost as dangerous as condoning police infringements upon constitutional rights, since the effect is that basic rights are effectively restricted in their application. In *Mapp v Ohio supra* 647, the court, citing *Boyd v United States* 116 US 616 (1886) 635 held that “constitutional provisions for the security of person and property should be liberally construed”.

¹²³ *United States v Calandra supra*.

¹²⁴ *United States v Janis supra*.

¹²⁵ *INS v Lopez-Mendoza* 468 US 1032 (1976).

¹²⁶ *United States v Calandra supra*; *Giordenello v United States* 357 US 480 (1958); *United States v McCroy* 930 F 2d 63 DC Dir (1991); *Pennsylvania Board of Probation and Parole v Scott supra*; 18 USCA § 3142 f (2000).

¹²⁷ 468 US 897 (1984).

¹²⁸ 468 US 981 (1984). A companion case of *Leon*.

to be invalid, evidence resulting from the search would not be excluded if the executing officers had acted in good faith.¹²⁹ The Supreme Court applied an *objective* test to determine if the warrant was executed in good faith – “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization”.¹³⁰ All relevant considerations are to be taken into account when deciding what the knowledge of a “reasonably well trained” officer would have been in the circumstances, including the subjective knowledge of the executing officer.

The judgment is based on the distinction between so-called “good faith” law enforcement and “bad faith” law enforcement. The court argued that the results of “bad faith” law enforcement should be excluded, and rightfully so.¹³¹ However, it serves no purpose to exclude evidence obtained through police activities that can objectively be seen as reasonable law enforcement.¹³² In other words, it is counter-productive to deter certain behaviour if any reasonable police officer would have acted in the same way under the circumstances.

2 2 2 4 3 *Fruit of the poisonous tree*

It is clear that evidence obtained during illegal police activities is inadmissible at a criminal trial, unless an exception applies. Evidence that is causally linked to the illegal conduct is tainted¹³³ – the so-called “fruit of the poisonous tree” – and must also be excluded. However, the causal connection between the poisonous tree and its fruit can “become so attenuated as to dissipate the taint”.¹³⁴ How far must the fruit fall from the tree to remove the taint? In this regard, there is a distinction between direct evidence, which is inadmissible, and derivative evidence, which may be admissible.

As a threshold matter, the “independent source doctrine” determines whether the impugned evidence fall within the scope of the fruit-of-the-poisonous-tree doctrine. Evidence

¹²⁹ Ironically, despite the exclusionary rule being mandatory in state prosecutions, the “good faith” exception is not. In fact, it has been rejected in many states. See *Dorsey v State* 761 A 2d 807 (Del 2000); *Gary v State* 422 SE 2d 426 (Ga 1992).

¹³⁰ *United States v Leon* 468 US 897 (1984) 923.

¹³¹ If looked at from a deterrence perspective.

¹³² See also *Mkhize v S* (2000) JOL 6155 (W).

¹³³ In Canada, the focus is on the temporal link between the Charter violation and the evidence in question. See § 2 3 3 *infra*.

¹³⁴ *Nardone v United States* 308 US 338 (1939) 341.

derived from an independent source is not causally linked to the illegal conduct and normally admissible in court.¹³⁵

Evidence not obtained from an independent source, but that would inevitably have been discovered through legal means, had it not been for the illegal conduct, is also admissible.¹³⁶ The ratio being that community interest requires that the prosecution should not be put in a worse position than it would have been in had the police acted lawfully.¹³⁷ Simply put, exclusion in a situation like this would not serve the deterrence rationale.

Finally, the causal connection can become so attenuated that exclusion would serve no (deterrent) purpose.¹³⁸ In determining whether the connection has become too attenuated, a court should determine each case on its facts and take into account all relevant circumstances.¹³⁹ Moreover, the nature of the secondary evidence does make a difference to the gravity of the taint.¹⁴⁰ This means that courts have a discretion to exclude derivative evidence – and the factors relevant to the discretion bear a striking resemblance to those relevant to the discretion in Canada.¹⁴¹

2 2 3 *MIRANDA V ARIZONA* AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture”.¹⁴²

2 2 3 1 General

The Fifth Amendment of the United States Constitution contains numerous, seemingly unrelated commands, “probably [the US Constitution’s] most schizophrenic amendment”.¹⁴³

¹³⁵ *Silverthorne Lumber Co v United States* 251 US 385 (1920); *Nix v Williams* 467 US 431 (1984).

¹³⁶ *Nix v Williams supra*. This case dealt with a violation of the 6th Amendment, but the fruit-of-the-poisonous-tree analysis applies in the same manner to the 4th Amendment and the privilege against compelled self-incrimination. See however, § 2 2 3 3 3 *infra* for a discussion of the fruit of the poisonous tree in cases of *Miranda* violations.

¹³⁷ In contrast, see the text accompanying n 211 *infra*.

¹³⁸ *Wong Sun v United States* 371 US 471 (1963).

¹³⁹ Including temporal proximity, intervening events and whether the police acted deliberately rather than unintentionally. See §§ 2 3 2 2 & 2 3 3 *infra*. See also *Murray v United States* 487 US 533 (1988).

¹⁴⁰ In *United States v Ceccolini* 435 US 268 (1978) the Supreme Court held that a witness’ testimony is more likely to be free of taint than real evidence. The majority probably had in mind that the independent conduct of a witness could break the chain of causality or cause the dissipation of the taint in another way. According to the minority, this amounts to no more than “judicial double counting” of the free will factor.

¹⁴¹ See generally § 2 3 *infra*.

¹⁴² Rehnquist CJ in *Dickerson v United States supra* 443.

¹⁴³ Schulhofer “Some Kind Words for the Privilege Against Self-Incrimination” 1991 *Val ULR* 311.

Among other things, it holds that “[n]o person shall be ... compelled in any criminal case to be a witness against himself...” Like the Fourth Amendment, the Fifth Amendment is silent about the appropriate remedy for violations of any of its commands. The privilege against self-incrimination, however, specifically forbids the use of any compelled self-incriminatory evidence in a criminal trial. In other words, the *use* of such evidence in itself constitutes a violation of the Constitution. And, unlike the Fourth Amendment, infringements cannot be justified by showing reasonableness.

2 2 3 2 *Miranda v Arizona*

In *Massiah v United States*¹⁴⁴ and *Escobedo v Illinois*,¹⁴⁵ the Supreme Court extended the Sixth Amendment right to counsel to the pre-trial and pre-indictment phases, respectively. This led to the decision in *Miranda v Arizona*.¹⁴⁶ However, instead of settling the Sixth Amendment right-to-counsel issue, the Supreme Court created a different right to counsel as a means of protecting the privilege against compelled self-incrimination.¹⁴⁷ After *Miranda*, the Supreme Court held that the motivation for the *Escobedo* decision was “not to vindicate the constitutional right to counsel as such, but, like *Miranda*, ‘to guarantee full effectuation of the privilege against self-incrimination...’”¹⁴⁸ Hereby the court seemed to approve the *Miranda* court’s shift in focus from the right-to-counsel to the privilege against self-incrimination.

Traditionally, the confessions obtained in the four cases before the *Miranda* court would have been deemed voluntary,¹⁴⁹ but the Supreme Court was concerned about the protection of the accused’s Fifth Amendment right not to be witnesses against themselves. They all found themselves in unfamiliar, police dominated surroundings, confronted with menacing interrogation methods, the sole purpose of which was to enforce the will of the interrogator on his subject. This might not have been through physical intimidation, but the court was of

¹⁴⁴ 377 US 201 (1964).

¹⁴⁵ 378 US 478 (1964).

¹⁴⁶ *Supra*.

¹⁴⁷ Throughout this work, it is illustrated that there is considerable disagreement within the US Supreme Court whether the rights identified in *Miranda* are in fact constitutional rights. In South Africa, rights essentially similar to those identified in *Miranda* are included in s 35 of the Constitution, effectively preventing any dispute as to their constitutionality and consequently simplifying the inquiry whether constitutional rights had in fact been violated. See ch 4 *infra*.

¹⁴⁸ *Kirby v Illinois* 406 US 682 (1972) 689, citing *Johnson v New Jersey* 384 US 719 (1966) 733, in which the *Escobedo* judgement was restricted to its facts.

¹⁴⁹ See §§ 2 2 3 2 & 3 2 3 8 2 *infra*. The Supreme Court applies the new (bright-line) standard only to *Miranda* violations and reverts to the traditional voluntariness standard for impeachment purposes. See *Harris v New York* 401 US 222 (1971); *Dickerson v United States supra*.

the opinion that the psychological pressures exerted on the suspects were nonetheless equally coercive. The Supreme Court was concerned about the lack of procedural safeguards to ensure that the statements were indeed the product of free choice.

The essence of the *Miranda* judgment is as follows: No statement by the accused, whether inculpatory or exculpatory, may be used against him in court if such a statement resulted from a custodial interrogation, unless the prosecution can show the use of effective procedural safeguards to secure the accused's privilege against compelled self-incrimination as guaranteed by the Fifth Amendment.

In *Escobedo*, the Supreme Court held that the right to counsel¹⁵⁰ attaches when the adversarial process begins. According to the Supreme Court's holding in that case, the adversarial process begins as soon as the "focus" of an investigation is on a suspect and the purpose of the interrogation is to get a confession. The *Miranda* court equated "focus" to custodial interrogation.¹⁵¹

Although not constitutionally required as such, the procedural safeguards, as minimum requirements ensure the protection of the privilege against compelled self-incrimination, which *is* constitutionally required. The *Miranda* judgment left the possibility for the states and Congress to devise their own means of ensuring the protection of the privilege against self-incrimination. The Supreme Court however made it clear that without procedural safeguards that are at least equally effective as the measures they proposed, any interrogation is inherently coercive.¹⁵²

The procedural safeguards laid down by the Supreme Court focus on two issues. First, it requires that before any interrogation, the police inform the accused of the privilege against compelled self-incrimination, and the consequences of waiving it.¹⁵³ The second aim of the procedural safeguards laid down by the Supreme Court, is to ensure that the accused is continually and effectively able to exercise his privilege throughout the potentially extended and coercive interrogation process. This was achieved by creating a right for the accused to

¹⁵⁰ At the time, the court seemed to refer to the 6th Amendment right, but in *Kirby v Illinois supra*, the court held that the focus was on the protection of the privilege against self-incrimination instead.

¹⁵¹ In South Africa the position is similar. See n 41 *supra*. In *S v Makhathini* D 1997-11-21 Case no CC73/97, Hurt J held that even before as suspect is formally arrested, he must be informed of his rights before he is questioned.

¹⁵² *Miranda v Arizona* 384 US 436 (1966) 458, 467, 468, 524. In *United States v Patane* 159 L Ed 2d 667 (2004) § 2, the court went so far as to say that *Miranda* created a generally rebuttable presumption of coercion.

¹⁵³ These rights are deemed so important, that no *ex post facto* assessment of the accused's actual knowledge will be made; no amount of circumstantial evidence of the accused's knowledge at the relevant time will relieve the police of this simple duty.

consult with counsel before and *during* the interrogation process.¹⁵⁴ As with the Sixth Amendment right to counsel, the accused has a right to appointed counsel if he is indigent.¹⁵⁵ Therefore, interrogators have a duty to inform the accused of both the right to confer with, and have counsel appointed if necessary.

The decision in *Miranda* was intended to affect only in-custody interrogations, and not to frustrate traditional crime investigation methods. Custody is a situation where “there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest”.¹⁵⁶ And, “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation”.¹⁵⁷ It follows that *Miranda* does not cover on-the-scene questioning of bystanders or “stop-and-frisk” seizures of persons.¹⁵⁸ The impact of the restriction of movement on the person subjected thereto is so brief that a reasonable person would not believe that he is in custody.¹⁵⁹

Furthermore, *Miranda* is only aimed at interrogations. In *Rhode Island v Innis*¹⁶⁰ and *Brewer v Williams*¹⁶¹ the Supreme Court held that interrogation could be something other than the express questioning of a suspect. It can be “any words or actions on the part of the police ... that the police *should* know are reasonably likely to elicit an incriminating response from the suspect”.¹⁶² The test is objective: Should the officer have known that the suspect might perceive his actions or comments as an interrogation, or not?

Nevertheless, any subjective knowledge that the interrogating officer had of the suspect’s particular vulnerabilities also play a role. In *Brewer*, police officers were transporting the accused from one town to another. They agreed with accused’s counsel that they would not interrogate the accused during the journey. However, during the journey one of the officers had a lengthy conversation with the accused about various topics, including the crime. He played on certain “weaknesses” in the accused’s personality when he referred to the crime

¹⁵⁴ Since this “right” to counsel is essentially a separate right from the 6th Amendment right to counsel, it follows that if an accused asserts his 6th Amendment right to counsel, he does not by implication assert his *Miranda* right to counsel or *vice versa*.

¹⁵⁵ The 6th Amendment right to appointed counsel for indigents was confirmed in *Gideon v Wainwright* 372 US 335 (1963). The same reasons for supplying indigents with trial-counsel at government expense should apply when the right to counsel is extended to the pre-trial phase.

¹⁵⁶ *California v Beheler* 463 US 1121 (1983) 1125, citing *Oregon v Mathiason* 429 US 492 (1977) 495.

¹⁵⁷ *Berkemer v McCarty* 468 US 420 (1984) 442.

¹⁵⁸ *Terry v Ohio* 392 US 1 (1968). The Supreme Court allowed the police to conduct a “stop-and-frisk” of a person on a lesser ground than probable cause. For a stop-and-frisk, the police need only a reasonable suspicion that criminal activity is afoot.

¹⁵⁹ *United States v Mendenhall* 446 US 544 (1980).

¹⁶⁰ 446 US 291 (1980).

¹⁶¹ 430 US 387 (1977). The so-called “christian-burial-speech” case.

¹⁶² *Rhode Island v Innis* 446 US 291 (1980) 301. Emphasis added.

and the possibility that the victim's body might not be found in time for a "Christian" burial.¹⁶³ The accused responded with incriminating statements and led the officers to the body. The Supreme Court regarded this as an interrogation. Consequently, the evidence was inadmissible.

Lastly, *Miranda* is not applicable if the accused spontaneously confesses. In *Colorado v Connelly*,¹⁶⁴ the accused, suffering from chronic schizophrenia, responded to "the voice of God" ordering him to confess or commit suicide. He subsequently approached a police officer and confessed to a murder. The Supreme Court held that there was no external compulsion on him to confess and therefore no *Miranda* warnings were necessary.¹⁶⁵ It follows that if the accused is unaware that he is talking to a government agent he can not be under any compulsion to speak either.¹⁶⁶

2 2 3 3 Exceptions: When *Miranda* warnings are not required

2 2 3 3 1 *Public safety*

In *New York v Quarles*,¹⁶⁷ the accused, a rape suspect, was arrested in a grocery store. Noticing that the suspect had an empty shoulder holster and without issuing *Miranda* warnings, one of the officers asked the suspect where he had hidden the gun. The suspect replied, "the gun is over there",¹⁶⁸ and pointed to some empty cartons in the store. The police subsequently retrieved the weapon where the accused had said it would be.

The Supreme Court admitted the statement about the gun and the gun itself, because the police "were confronted with the immediate necessity"¹⁶⁹ of finding the weapon. As long as its whereabouts were unknown, it posed a threat to the safety of the public and the officers involved.¹⁷⁰ The exigency must require "immediate action by the officers beyond the normal need expeditiously to solve a serious crime".¹⁷¹ The subjective motivations of the

¹⁶³ The officer knew the accused to be a deeply religious man and a recent escapee from a mental hospital.

¹⁶⁴ 479 US 157 (1986).

¹⁶⁵ But see *R v Harper* (1994) 92 CCC (3d) 423 (SCC).

¹⁶⁶ *Illinois v Perkins* 496 US 292 (1990). See § 2 2 3 3 2 *infra*.

¹⁶⁷ 467 US 649 (1984).

¹⁶⁸ *New York v Quarles* 467 US 649 (1984) 652.

¹⁶⁹ *New York v Quarles supra* 657.

¹⁷⁰ *New York v Quarles supra* 657 stated: "[A]n accomplice might make use of it, a customer or employee might later come upon it".

¹⁷¹ *New York v Quarles supra* 659, distinguishing on the facts from *Orozco v Texas* 394 US 324 (1969); *Rhode Island v Innis supra*.

interrogating officer are not relevant – the questions must objectively be prompted by a concern for public safety.

Although the exception reduces the necessary clarity of the *Miranda* requirements,¹⁷² the Supreme Court believed that police “can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect”.¹⁷³

2 2 3 3 2 *Covert custodial interrogation*

It was explained above that the existence of an interrogation or its “functional equivalent” depends on the perceptions of the suspect. Therefore, if the suspect is unaware that he is speaking to a police officer, there can be no perception on the part of the suspect that an interrogation is taking place. This is the essence of the Supreme Court’s ruling in *Illinois v Perkins*.¹⁷⁴

The accused, who was in jail for another crime, admitted committing a murder and gave details of the crime to another “inmate”, who was in fact an undercover police officer instructed to gather information from the accused. The Supreme Court held that “*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement”.¹⁷⁵ It follows that if the suspect believes that he is talking to a cellmate, there is no “interrogation” and therefore no danger of coercion, even though he is in custody.¹⁷⁶

2 2 3 3 3 *Fruit of the poisonous tree*

Even though the fruit-of-the-poisonous-tree doctrine applies to violations of the privilege against self-incrimination¹⁷⁷ – in other words, when statements were not *voluntary* – there is no such doctrine applicable to violations of *Miranda*.¹⁷⁸ Therefore, as long as the traditional

¹⁷² See Scalia J for the minority in *Dickerson v United States* *supra* 463-464.

¹⁷³ *New York v Quarles* *supra* 658-659. Even if the police do not, or cannot make the distinction, the necessity of the particular questions in the relevant situation would still be judged *objectively* afterwards.

¹⁷⁴ 496 US 292 (1990). See also *Rothman v R* (1981) 1 SCR 640 (SCC).

¹⁷⁵ *Illinois v Perkins* *supra* 294.

¹⁷⁶ In other words, a “covert” interrogation is not the functional equivalent of an interrogation. See § 2 2 3 2 *supra*.

¹⁷⁷ In much the same way as with violations of the 4th Amendment.

¹⁷⁸ Dressler *Criminal Procedure* 503; Mirfield *Silence, Confessions and Improperly Obtained Evidence* (1997) 336.

voluntariness requirement is adhered to, the prosecution may call a witness whose identity is the direct result of an unwarned statement,¹⁷⁹ tender the physical fruits of suspect's unwarned statements¹⁸⁰ and even introduce an accused's own post-*Miranda* admission that resulted from an earlier violation of *Miranda*.¹⁸¹

This is apparently the result of the Supreme Court's subsequent reluctance to treat the *Miranda* judgment as a constitutional judgment.¹⁸² Considering the (partial) confirmation of the constitutional status of *Miranda v Arizona*¹⁸³ in *Dickerson v United States*¹⁸⁴ the Supreme Court should reconsider its no-fruit stance. However, the Supreme Court has thus far shied away from any such notion.¹⁸⁵

2 2 4 WAIVER OF CONSTITUTIONAL RIGHTS

In *Johnson v Zerbst*,¹⁸⁶ the Supreme Court held that a constitutional right is waived only when there is "an intentional relinquishment or abandonment of a known right or privilege".¹⁸⁷ This ruling is divisible into three elements. First, it must be shown that actual relinquishment or abandonment of the relevant constitutional right has taken place.¹⁸⁸ A court will not make assumptions. Second, the relinquishment must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception".¹⁸⁹ Third, the holder of the right must be aware of the nature of the right, and the primary consequences of giving it up.

However, the Supreme Court held in *New York v Hill*¹⁹⁰ that "[w]hat suffices for a waiver depends on the nature of the right at issue".¹⁹¹ The distinction seems to be drawn between ordinary constitutional rights and constitutional rights that enhance the reliability of the

¹⁷⁹ *Michigan v Tucker supra*.

¹⁸⁰ *United States v Patane supra*.

¹⁸¹ *Oregon v Elstad* 470 US 298 (1985). See also *S v Manuel* 1997 (2) SACR 505 (C).

¹⁸² The judgment in *New York v Quarles supra* was similarly based on the premise that the *Miranda* judgment was of a non-constitutional nature.

¹⁸³ *Supra*.

¹⁸⁴ 530 US 428 (2000). See § 3 2 3 8 *infra*.

¹⁸⁵ Dressler *Criminal Procedure* 503.

¹⁸⁶ 304 US 458 (1938).

¹⁸⁷ *Johnson v Zerbst supra* 464. The position in SA is the same. In *S v Mphala supra* 399e, the court held that informed waiver cannot take place when the accused is not informed of obviously relevant facts – in this case that counsel had already been retained for the accused by a family member. But see *Moran v Burbine* 475 US 412 (1986).

¹⁸⁸ See *Brewer v Williams* 430 US 387 (1977) 404.

¹⁸⁹ *Moran v Burbine supra* 421. See *S v Mphala supra*.

¹⁹⁰ 528 US 110 (2000).

¹⁹¹ *New York v Hill* 528 US 110 (2000) 114.

outcome of the trial.¹⁹² The Supreme Court “ha[s] been unyielding in [its] insistence that a defendant’s waiver of his *trial rights* cannot be given effect unless it is ‘knowing’ and ‘intelligent’”.¹⁹³ In other words, before the Supreme Court will accept as valid an alleged waiver of a trial right, all the requirements of *Johnson v Zerbst*¹⁹⁴ must be satisfied. Mere consent will not do. For other constitutional rights, such as the right to privacy, consent will, in fact, do – consent is a valid exception to the warrant requirement of the Fourth Amendment.

It follows that despite *Johnson v Zerbst*, the Supreme Court applies different requirements for waiver of trial rights as opposed to other constitutional rights. Therefore, any analogies drawn between trial rights and non-trial rights should be done with the utmost circumspection.¹⁹⁵

2 3 CANADA: SECTION 24(2) OF THE CHARTER

“Section 24(2) of the Charter has rejected extreme answers. No longer is all evidence admissible, regardless of the means by which it was obtained. Nor, on the other hand, is all improperly obtained evidence inadmissible”.¹⁹⁶

2 3 1 INTRODUCTION

Prior to enactment of the Canadian Charter of Rights and Freedoms, the admissibility of evidence was governed by the common law. This meant, generally, that if evidence was relevant, it was admissible. The Charter did not wholly change this position – admissibility of evidence is still determined by its relevance, except when “evidence was obtained in a manner that infringed or denied any rights or freedoms” guaranteed by the Charter. The admissibility of evidence obtained in such a manner must be decided in accordance with s 24(2) of the Charter. Unconstitutionally obtained evidence must, however, still be relevant to be admissible.¹⁹⁷

¹⁹² See §§ 3 2 2 2 & 4 2 2 2 2 *infra*.

¹⁹³ *Illinois v Rodriguez* 497 US 177 (1990) 183. Emphasis added.

¹⁹⁴ *Supra*.

¹⁹⁵ It is submitted that the US Supreme Court draws such analogies too easily. See n 192 *supra* & § 3 2 *infra*.

¹⁹⁶ *R v Collins* (1987) 56 CR (3d) 193 (SCC) § 16, quoting Seaton JA in *R v Collins* (1983) 5 CCC (3d) 141 (BC CA) 149.

¹⁹⁷ In South Africa the position is the same. See §§ 4 1 1; 4 2 1 & 5 5 2 *infra*.

In comparison to the United States, the application of the discretionary approach in Canada takes into account, as considerations, many of the exceptions created by the US Supreme Court. For instance, a Canadian court may consider exigent circumstances such as the eminent destruction of evidence when determining whether a warrantless police entry into a home should render the resulting evidence inadmissible. Similarly, although the focus differs somewhat, the fruit-of-the-poisonous-tree doctrine determines whether evidence is tainted by illegal police conduct.

It was mentioned above that the text of s 24(2) served as a model for the wording of s 35(5) of the Constitution of South Africa. It is suggested that the application of s 24(2) by the Canadian Supreme Court could be helpful to South African courts in the interpretation of s 35(5). One should however be watchful not to blindly follow the Canadian interpretation. Rather, learn from the difficulties encountered by the Canadian courts and apply s 35(5) in a South African context – the discretion is flexible enough.

2 3 1 1 **The text**

“Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings *would* bring the administration of justice into disrepute”.¹⁹⁸

In their interpretation, courts generally substitute “would” in the English text with the less onerous “could”. This interpretation is more in accordance with the French version of s 24(2), which is the preferred of the two versions, because it better protects the right to a fair trial.¹⁹⁹

2 3 1 2 **The theory**

Generally, it is understood that courts have a discretion to exclude unlawfully obtained evidence. However, once a court concludes that admission of the impugned evidence could bring the administration of justice into disrepute,²⁰⁰ it has no choice but to exclude it.²⁰¹ The

¹⁹⁸ Emphasis added.

¹⁹⁹ *R v Collins supra* § 43.

²⁰⁰ See § 2 3 1 1 *supra*.

²⁰¹ Similarly in South Africa.

discretion lies therefore only in the determination of whether, “having regard to all circumstances”, the administration of justice could be brought into disrepute.

If one compares the above to the exclusionary *rule* of the United States, this much is evident – in principle at least: The starting point of the approach followed by each of these countries is the direct opposite of the other. Courts in the United States exclude unlawfully obtained evidence regardless of its effect on the administration of justice. Generally, the US Supreme Court would only consider exceptions to the rule once its primary purpose (deterrence) has been accomplished and the effect of exclusion on the administration of justice could be negative.

2 3 2 THE PRACTICE: *R v COLLINS*

In *R v Collins*,²⁰² the Supreme Court reduced the discretion to three questions, the answers to which determine the admissibility of evidence.

2 3 2 1 Trial fairness

If the admission of unconstitutionally obtained evidence results in an unfair trial it is excluded. In these cases, the seriousness of the violation and the possible negative effect of exclusion on the administration of justice are rarely taken into account.²⁰³ The question whether unlawfully obtained evidence detract from the fairness of the trial is usually concerned with the distinction between conscriptive and non-conscriptive evidence. This distinction is not based on the distinction between testimonial communications and real evidence, as is the case in the United States²⁰⁴ and South Africa. Rather, Canadian courts distinguish between situations where the accused was conscripted to provide the evidence against himself, whether real or a testimonial, and situations where evidence was obtained without cajoling the accused into providing it.

The nature of the right infringed upon is also important in this inquiry, since violations of certain rights would most certainly detract from the fairness of the trial, whereas other rights very rarely have anything to do with ensuring a fair trial. It is submitted however, that this

²⁰² (1987) 56 CR (3d) 193 (SCC).

²⁰³ *R v Stillman* (1997) 1 SCR 607 (SCC) § 72.

²⁰⁴ See n 101 *supra* and the text accompanying it.

distinction is neglected in favour of the distinction between conscriptive and non-conscriptive evidence – a trend that South African courts must not follow.

2 3 2 1 1 *Conscriptive evidence*

Any evidence that could not have been obtained without the unconstitutional participation of the accused is conscriptive evidence.²⁰⁵ Subject to rare exceptions, conscriptive evidence is considered to have an adverse effect on the fairness of the trial and must be excluded.²⁰⁶ Any kind of evidence can be conscripted from the accused – testimonial communications, derivative (real) evidence²⁰⁷ and even bodily samples.²⁰⁸ All that has to be shown for evidence to be deemed conscriptive is that it was obtained without the necessary legal authority and the involuntary participation of the accused.²⁰⁹

In *R v Burlingham*²¹⁰ the accused was unconstitutionally compelled to reveal the whereabouts of the murder weapon (a gun) at the bottom of a frozen lake. Supreme Court applied the distinction between conscriptive and non-conscriptive evidence to the derivative (real) evidence that resulted from this compelled pointing out by the accused. The court came to the conclusion that the accused was unconstitutionally conscripted to incriminate himself by revealing the whereabouts of the gun. Consequently, not only the evidence of the pointing out, but also the gun itself, was ruled inadmissible for being in violation of the *principle* against self-incrimination. The rationale behind this ruling was that the prosecution should not be put in a better position than it would have been had the government shouldered the entire load of proving the accused's guilt.²¹¹

In *R v Stillman*²¹² the Supreme Court went further and applied the distinction to bodily samples taken from a murder suspect. The bodily samples in question were obtained from the accused with neither his consent nor any legal authority²¹³ and while he was in police custody. The court emphasised that what is known as real evidence does not automatically

²⁰⁵ Bradley (Ed) *Criminal Procedure: A Worldwide Study* (1999) 64.

²⁰⁶ *R v Cook* (1998) 2 SCR 597 (SCC).

²⁰⁷ *R v Burlingham* (1995) 38 CR (4th) 265 (SCC). Testimonial communications, which include pointings out, often leads to real evidence, such as the gun in *Burlingham*.

²⁰⁸ *R v Stillman supra*; *R v Legere* (1988) 89 NBR (2d) 361 (CA).

²⁰⁹ *R v Stillman supra* § 76.

²¹⁰ (1995) 38 CR (4th) 265 (SCC).

²¹¹ See, in contrast, the text accompanying n 137 *supra*.

²¹² (1997) 1 SCR 607 (SCC).

²¹³ The court ruled that the common law did not authorise the seizures of the bodily samples as an “incident” of the arrest, which would have made it lawful. And at the time of the seizures no statutory authority existed for the police's actions.

fall into the “non-conscriptive” category. The following passage clearly illustrates the court’s reasoning:

“There is on occasion a misconception that ‘real’ evidence, referring to anything which is tangible and exists as an independent entity, is always admissible. It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as ‘real evidence existing independently of the Charter breach’. It is true that all of these examples ‘exist’ quite independently of a Charter breach. *Yet, it is key to their classification that they do not necessarily exist in a useable form.* For example, in the absence of a valid statutory authority or the accused’s consent to take bodily samples, the independent existence of the bodily evidence is of no use to the prosecution since there is no lawful means of obtaining it.”²¹⁴

Cory J, for the majority, continued:

“*Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples...* It is the compelled statements or the conscripted use of bodily substances obtained in violation of Charter rights which may render a trial unfair... When the rule against self-incrimination first emerged, there was a very real concern that a confession sometimes obtained by torture or threats could well be unreliable... It is only in recent times that the compelled use of the body of the accused has been considered. Yet, it cannot be forgotten that in *Collins*, supra, Lamer J. astutely observed that ‘the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him’.”²¹⁵

It is evident that the Canadian Supreme Court adheres to a wider notion of self-incrimination than in the United States, or South Africa.²¹⁶ But, as indicated in § 3 2 2 below, the US Supreme Court has applied the idea of self-incrimination to the Fourth Amendment through various analogies with the Fifth Amendment. This should be avoided in South Africa.

Occasionally, the behaviour of the accused also has an influence upon the admissibility of conscriptive evidence. On rare occasions, conscriptive evidence has been admitted when the

²¹⁴ *R v Stillman supra* § 76. Emphasis added.

²¹⁵ *R v Stillman supra* §§ 80-82, citing *R v Collins supra* § 37. Emphasis added.

²¹⁶ Hence the Supreme Court’s use of the term “*principle* against self-incrimination” rather than “*privilege* against self-incrimination”.

accused was abusive,²¹⁷ too intoxicated to exercise the right to counsel²¹⁸ or would inevitably have confessed even if provided with warnings as to the right to counsel.²¹⁹

2 3 2 1 2 *Non-conscriptive evidence*

It follows that non-conscriptive evidence is evidence, testimonial or real, that is obtainable without the unconstitutional assistance of the accused. Moreover, according to *R v Stillman*,²²⁰ the evidence in question has to exist

“independently of the Charter breach *in a form useable by the state*... Therefore, it may be more accurate to describe evidence found without any participation of the accused ... simply as non-conscriptive evidence; its status as ‘real’ evidence, simpliciter, is irrelevant to the s. 24(2) inquiry”.²²¹

Non-conscriptive evidence is generally considered to have no negative effect on the fairness of the trial.²²² Therefore, when the challenged evidence is classified as non-conscriptive, the inquiry turns to the seriousness of the Charter violation and possible adverse effects that the exclusion of the evidence could have on the repute of the administration of justice.

*R v Evans*²²³ is a good example of a case where, despite a Charter violation, evidence was classified as “non-conscriptive”. Police officers arbitrarily knocked on the door of the accused’s home. When the accused opened the door, the police smelled dagga and proceeded to search the home. The police seized 41 plants and other drug paraphernalia. Clearly the evidence seized was real in nature and existed independently of the violation, in a form useable by the prosecution, despite the illegal search. When it was established that the discovery of the evidence happened without the participation of the accused, the evidence was classified as “non-conscriptive”. As a result, its admission would not have resulted in an unfair trial. The court then proceeded to consider the seriousness of the violation and the effect of exclusion on the repute of the administration of justice.

²¹⁷ *R v Tremblay* (1987) 60 CR (3d) 59 (SCC).

²¹⁸ *R v Mohl* (1989) 69 CR (3d) 399 (SCC).

²¹⁹ *R v Harper supra*. The accused spontaneously declared “I’m the guy you want”. See also *Colorado v Connelly* 479 US 157 (1986).

²²⁰ *Supra*.

²²¹ *R v Stillman supra* § 77.

²²² Similarly, in South Africa real evidence is seldom considered to have a negative effect on the fairness of the trial. See § 4 2 1 2 *infra*.

²²³ (1996) 1 SCR 8 (SCC).

However, the problem with this approach is that the analysis focuses too much on the fact that evidence must be in a form useable by the state, and too little on whether it is capable of being *discovered* without the assistance of the accused. A statement, or pointing out, is the only kind of evidence that truly cannot be obtained without the accused's cooperation. Even in his ruling for the majority in *Stillman*, Cory J indicated that the Canadian Supreme Court still heavily relies on the "independent existence" requirement to support the distinction between conscriptive and non-conscriptive evidence, with no mention that it must exist in a usable form:

"[T]he situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for *it did not exist prior to the violation*".²²⁴

Evidence that exist independent of the violation, like bodily samples, can be *made* into a form useable by the state. Especially with the changes in the Canadian criminal code effected since *Stillman* that now allow for the taking of DNA samples under certain circumstances. Like with searches or seizures of any other place or kind of evidence, DNA samples may be taken after a judicial officer has been satisfied that reasonable and probable grounds exist and that the procedure is not excessively intrusive. There is an even greater likeness between the seizure of bodily samples and other searches and seizures. In the words of the Canadian Supreme Court:

"The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's [the accused] s. 7 Charter right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. *It was the ultimate invasion of the appellant's privacy*".²²⁵

Therefore, like with all other cases involving invasions of privacy, the admissibility of unconstitutionally seized bodily samples should not turn on the question of self-incrimination or even fairness.²²⁶ Rather, the focus should be on the seriousness of the violation and the effect that exclusion would have on the repute of the administration of justice.²²⁷

²²⁴ *R v Stillman supra* § 82, quoting *R v Collins supra* § 37.

²²⁵ *R v Stillman supra* § 51.

²²⁶ Assuming that the Supreme Court only excludes evidence on the basis of fairness if it determines that the evidence in question was conscripted from the accused.

²²⁷ But surely, a particularly serious violation could also render the trial unfair?

2 3 2 2 Seriousness of the Charter violation

When a court is satisfied that admission of the impugned evidence would not render the trial unfair, the approach towards the question of admissibility changes dramatically. Compared to the *virtually* automatic exclusion of conscriptive evidence,²²⁸ exclusion of non-conscriptive evidence is far from automatic. The enquiry then proceeds to determining the seriousness of the Charter violation.

In determining the seriousness of the violation, courts will take into account whether police violated the Charter intentionally or by mistake. A contention that police could have obtained the evidence without violating the Charter is mostly considered an aggravation of the violation. It follows that the inevitable discovery rule and the independent source doctrine as applied in the United States is not applicable to the same extent when the seriousness of the violation is considered in Canadian courts.²²⁹ Serious violations of the Charter, warranting exclusion, have been found in cases when drugs were seized by a chokehold to prevent them from being swallowed²³⁰ and when drugs were seized after an unconstitutional and intrusive rectal search.²³¹

2 3 2 2 1 *Good faith*

The good faith of an officer is taken into account when the seriousness of the violation is determined. Good faith is more widely defined than in the United States and includes reliance upon legislation, warrants, policy directives, prior cases, legal advice and accepted practices later found to be unconstitutional or defective.²³² Moreover, violations of Charter rights occurring due to exigent circumstances are not considered serious enough to warrant exclusion, much like in the US. For instance, the Supreme Court has admitted drugs seized

²²⁸ Bradley *Criminal Procedure* 65; Gorham "Eight Plus Twenty-Four Two Equals Zero-Point-Five" 2003 *CR* (Canada) 258.

²²⁹ See § 2 2 2 4 3 *supra*.

²³⁰ *R v Collins supra*.

²³¹ *R v Greffe* (1990) 55 CCC (3d) 161 (SCC). A rectal search was performed on the accused after he was arrested for an outstanding traffic violation.

²³² *R v Sieben* (1987) 32 CCC (3d) 574 (SCC); *R v Hamill* (1987) 33 CCC (3d) 110 (SCC); *R v Duarte* (1990) 53 CCC (3d) 1 (SCC); *R v Wong* (1990) 60 CCC (3d) 460 (SCC); *R v Thomson* (1990) 59 CCC (3d) 225 (SCC); *R v Generoux* (1992) 70 CCC (3d) 1 (SCC); *R v Grant* (1993) 84 CCC (3d) 173 (SCC). In other words, systemic deterrence of Charter violations is not such a priority as in the US and South Africa.

after a warrantless entry by police officers into a house in order to prevent the drugs from being destroyed.²³³

2 3 2 3 **The effect of exclusion**

Although this is not done when fairness of the trial is at stake, courts take into account the effect that excluding the evidence could have on the repute of the administration of justice. Considerations such as the seriousness of the criminal charge, the importance of the challenged evidence to the prosecution's case and the reactions of reasonable people are taken into account.

Drug offences, for example, are considered especially serious and the drugs important to the prosecution's case.²³⁴ These considerations are weighed up against the alleged illegal methods employed by police in securing evidence against the accused. The influence that these considerations have on the admissibility of evidence is illustrated by two cases dealing with serious traffic accidents. In *R v Dersch*,²³⁵ an illegally seized blood sample was excluded because other evidence remained to charge the accused. In *R v Colarusso*²³⁶ however, an illegally seized blood sample was admitted because it was essential to the prosecution's case. The distinction seems artificial.

The fact that the community has a higher interest in punishing crimes of a serious nature as opposed to minor offences is indeed a valid consideration. However, the coin has two sides. Equally important and often overlooked is the fact that the seriousness of the criminal charges also raises the stakes for the accused, who upon conviction faces serious consequences. For the accused it is equally important not to be convicted upon illegally obtained evidence if the crime charged is serious. To contend that serious Charter violations are downplayed by the seriousness of the crime is a lopsided portrayal of the considerations at stake. Violations of the accused's rights should not be diluted by the contention that serious crimes need to be punished without at least some consideration for the consequences faced by the accused.

²³³ *R v Silveria* (1995) 97 CCC (3d) 450 (SCC). The police did however apply for a search warrant once the exigency had passed.

²³⁴ *Bradley Criminal Procedure* 65.

²³⁵ (1993) 85 CCC (3d) 1 (SCC).

²³⁶ (1994) 87 CCC (3d) 193 (SCC).

However, more must be said. While it is true that the consequences for the accused are more serious upon conviction of a serious crime, the Supreme Court in *R v Collins*²³⁷ was more concerned with repute on a long-term basis:

“[E]ven though the inquiry under s 24(2) will necessarily focus on the specific prosecution, *it is the long-term consequences* of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered”.²³⁸

This implies that the consequences for the accused are only as a matter of necessity considered, the real issue being the long-term consequences for the administration of justice. In the event of contrasting interests, the Supreme Court would favour the latter, unless an unfair trial would result.²³⁹ However, one can be sure that an accused’s motivation for applying for exclusion is based squarely on their interest in the former.

2 3 3 FRUIT OF THE POISONOUS TREE

The Supreme Court favours a wider definition of tainted fruit than in the US, with the focus on the temporal connection rather than the causal one.²⁴⁰ If, for instance, drugs were found during a legal search, but while the accused was denied access to counsel, the drugs would be tainted evidence. Whether it would be excluded depends on the discretion of the court.

The focus on a temporal instead of causal link, when defining fruit of a poisonous tree, provides for exclusion of evidence that is not causally linked to a particular violation, but obtained in an investigation that was marred by a serious violation.²⁴¹ Therefore, when deciding whether specific evidence is tainted by illegality, courts look at the totality of the circumstances surrounding the investigation and no serious misconduct by the police will be

²³⁷ *Supra*.

²³⁸ *R v Collins supra* § 32.

²³⁹ *R v Collins supra* § 39. See also *S v Madiba* 1998 (1) BCLR 38 (D). The court overlooked the seriousness of the consequences for the accused when it upheld an illegal search because the importance of achieving the object of the search (the criminal charge was serious) outweighed the violation of their rights. However, in view of all the considerations favouring admission of the impugned evidence, it is not contended that the court’s judgment would have been different had the consequences of conviction been taken into account. The judgment merely indicates that the consequences of conviction for the accused are not always taken into account.

²⁴⁰ See § 2 2 2 4 3 *supra*.

²⁴¹ *R v Brydges* (1990) 46 CRR 236 (SCC); *R v Voisine* (1994) 20 CRR 258 (NB CA).

disregarded. For example, fingerprints taken after an unlawful arrest will be excluded as being unconstitutionally conscripted from the accused.²⁴²

2 3 4 THE RESULT

The Canadian Supreme Court has reduced its discretion to a limited set of rules that leave little room for any other considerations, severely limiting the scope of the discretion. Especially when evidence was conscripted from the accused, has the discretion been turned into a virtually absolute exclusionary rule, when a balancing of interests would otherwise occur. Self-incrimination has a wider meaning than in the United States or South Africa and includes not just testimonial communications, but all evidence compelled from the accused.²⁴³ Non-conscripted evidence would only be excluded as a result of a violation that is particularly serious compared to the criminal charge.

2 4 SUMMARY

In the United States, unconstitutionally obtained evidence is excluded in criminal cases, unless an accepted exception exists. This is done in order to satisfy the primary rationale of the strict exclusionary sanction, namely deterrence of official misconduct. Only when deterrence has been achieved to a satisfactory level does the Supreme Court entertain other considerations; or when the specific unconstitutional behaviour is not worth deterring, such as good faith behaviour on the part of police officers.

The Canadian position is common law oriented: Exclusion of unconstitutionally obtained evidence is not automatic. Only when a court determines that admission of the impugned evidence could (or would) bring the administration of justice into disrepute must the evidence be excluded. The discretion to exclude is not applied uniformly, depending on whether or not evidence has been conscripted from the accused. However, in exercising its discretion a court may take into account certain considerations similar to the exceptions of the US Supreme Court, such as good faith or the seriousness of the offence.

²⁴² *R v Feeney* (1997) 115 CCC (3d) 129 (SCC). See § 2 3 2 1 1 *supra*.

²⁴³ *R v Stillman supra*. See §§ 2 3 2 1 1 & 2 3 2 1 2 *supra*.

CHAPTER THREE

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3 1 INTRODUCTION

Chapter Two illustrates the different views taken by the Supreme Courts of the United States and Canada regarding the admission of improperly obtained evidence. Yet, despite the seemingly opposing viewpoints, both countries achieve satisfactory and rather similar results. This is the result of both Supreme Courts' tempering of the harshness of the exclusionary and the inclusionary systems in their unadulterated forms. Be it as exceptions to the rule, or as a discretionary exercise, both systems attempt to achieve a golden mean.

However, it is when the admission of previously excluded evidence for the limited purpose of impeaching the accused is at issue that the different principles underlying the two systems assert themselves the strongest. The result is two contrary positions – one in favour of and the other against impeachment by means of unconstitutionally obtained evidence. The US's primary concern is the deterrence of official misconduct, moderated by the need for crime control. But the primary concern in Canada is trial fairness, in other words protecting the rights of the accused and especially the accused's right not to incriminate himself.²⁴⁴

In this chapter, these differences are explored. At first glance, the deterrence rationale, toned down by crime control, seems to be just another way of ensuring trial fairness; hence the similar results where exclusion is concerned. Evidently, this similarity disappears when the issue is no longer admission of unconstitutionally obtained evidence in the case in chief, but the use of that evidence for the limited purpose of impeachment.

This raises the question whether it would make a difference if the (unconstitutional) evidence had previously been excluded from the prosecution's case in chief. It becomes clear that even in situations where unconstitutionally obtained evidence had not previously been excluded, but only tendered for impeachment, the difference in position still exists.²⁴⁵

3 2 THE UNITED STATES

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely *evidence so acquired shall not be used before the court but that it shall not be used at all*”.²⁴⁶

3 2 1 WHAT LIES BENEATH?

3 2 1 1 Deterrence first... but only if the price is right

As pointed out above, the underlying principle of the exclusionary rules²⁴⁷ in the United States is the deterrence of official misconduct.²⁴⁸ This is particularly clear in cases where the

²⁴⁴ See §§ 2 3 2 1 1 *supra*; 4 2 2 2 3 & 4 2 2 2 4 *infra*.

²⁴⁵ *R v Cook* (1998) 2 SCR 597 (SCC). See § 3 3 2 3 *infra*.

²⁴⁶ *Silverthorne Lumber Co v United States* 251 US 385 (1920) 392. Emphasis added. See also *Mapp v Ohio* 367 US 643 (1961) 648.

²⁴⁷ Although reference is often made to the exclusionary *rule*, the reality is that for each constitutional right concerned a separate *rule* was developed, hence the use of the plural. See generally ch 2 *supra*.

²⁴⁸ See generally §§ 2 2 & 3 1 *supra*.

Supreme Court has to consider exceptions to the “constitutionally required”²⁴⁹ exclusionary rules. In these cases, the court’s approach focuses almost entirely on the deterrent function of the exclusionary sanction and the lengths to which the court would go towards preventing official misconduct.

When, in the opinion of the Supreme Court, the exclusionary rule has sufficiently served its preventative purpose, the cost of its use becomes too high. This explains the Supreme Court’s willingness to allow the use of unconstitutionally obtained evidence for impeachment of the accused, even when it would be, or has been, excluded from the case in chief. The Supreme Court justifies this position with a cost-benefit analysis: The “cost” of allowing factually guilty persons to remain in society being higher than the benefit of the additional deterrence resulting from excluding evidence that is tendered for a limited purpose only, and not as part of the case in chief.²⁵⁰

However, when constitutional rights are at odds with other considerations important to a particular community, the solution should *not* be a simple balancing of interests, or cost-benefit analysis. Constitutional rights should be upheld above all else.²⁵¹ Only in circumstances where constitutional rights are in conflict with other *constitutional* rights may a balance of some sort be attempted.²⁵² Being costly to society in a specific instance should not be an acceptable reason to discard a constitutional right. Not even when one is of the opinion that a constitutional right had adequately served its purpose, should there be any interference.

The tendency to weigh constitutional dictates against community benefit leaves the accused in an unenviable position. As the Oregon Supreme Court in *State v Hass*²⁵³ pointed out, the police and therefore the prosecution “had nothing to lose and something to gain”²⁵⁴ from infringing the rights of the accused. This is especially true in confession cases, as illustrated by *Harris v New York*²⁵⁵ and *Hass*. In most cases, if the accused were properly informed of his privilege and had proper access to counsel, no confession or statement would result and be available to discredit the accused during cross-examination. But infringing these rights gives the prosecution the opportunity to cross-examine and discredit the accused with

²⁴⁹ *Mapp v Ohio supra* 648.

²⁵⁰ See § 2 2 2 3 *supra*.

²⁵¹ See generally the minority opinion in *Mapp v Ohio supra*.

²⁵² See, for example, *S v Aimes* 1998 (1) SACR 343 (C). This case is discussed in § 4 2 3 *supra*.

²⁵³ 267 Or 489 (1973).

²⁵⁴ *State v Hass* 267 Or 489 (1973) 493. This ruling was overturned by the US Supreme Court in *Oregon v Hass* 420 US 714 (1975). However, the minority in *Oregon v Hass supra* still adhered to this reasoning.

²⁵⁵ 401 US 222 (1971).

evidence that would otherwise not have existed. It may not be incrimination of the accused, but it is something. And in a system where the case of the accused often depends on his version of the facts being as believable as that of the prosecution, the prosecution might secure a conviction by proving the accused is a liar without ever proving that the accused is in fact guilty. Moreover, even the most carefully instructed jury would find it difficult to distinguish and effectively apply the difference between proof of guilt and proof of dishonesty.²⁵⁶ There is a difference, is there not?

3 2 2 THE FOURTH AMENDMENT OR FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION: SHOULD IT MAKE A DIFFERENCE WHICH RIGHTS WERE VIOLATED?

3 2 2 1 Introduction: Real evidence compared to testimonial communications

It is clear that despite the US Supreme Court drawing analogies between the two Amendments when excluding evidence, the right to privacy and the privilege against compelled self-incrimination are inherently different in nature.²⁵⁷ Moreover, they are two separate constitutional rights. And each has their own particular exclusionary sanction. One must bear in mind these differences when attempting to deviate from either exclusionary rule for purposes of impeachment.

An important difference between the Fourth Amendment and the Fifth Amendment²⁵⁸ is in the nature of evidence that a violation of either would normally produce. Although the Fourth Amendment itself does not only protect corporeal things, but all aspects of the right to privacy, a violation of the Fourth Amendment often results in the discovery of real evidence. In contradistinction, a violation of the Fifth Amendment leads to the discovery of information, which in turn may or may not lead to the discovery of real evidence.

The important difference between real evidence and testimonial communications relates to the manner in which they do, or can, become available to the prosecution. Even more important is their connection to the accused.

By its nature, real evidence is some object used during the commission of a crime or resulting from the crime. The existence of real evidence as evidence therefore relates directly to the commission of the crime. The existence of the *object* before the crime is not relevant

²⁵⁶ See § 3 3 1 3 & n 282 *infra*.

²⁵⁷ *Dickerson v United States* 530 US 428 (2000) 441.

²⁵⁸ Throughout this work, reference to the 5th Amendment is a reference to *only* the privilege against compelled self-incrimination, unless otherwise indicated or obvious from the context that something else is meant.

here, only its existence as *evidence* after the crime. Real evidence exists independently of its creator. It is therefore, objectively speaking at least, possible for a third party to discover the already existing evidence and make a connection to the guilty party. Importantly, this can be done without the cooperation of the guilty party and even without his knowledge.²⁵⁹ The existence of real evidence is not the result of a violation of the accused's rights, but of the crime being committed. This has implications for its "trustworthiness" and reliability.²⁶⁰ The "objective reliability" of real evidence is also accepted in South Africa, which means that unconstitutionally obtained real evidence is more readily admitted than similarly obtained testimonial communications.²⁶¹

However, the Fourth Amendment restricts the means employed in the discovery of the evidence and its association to the accused. When a violation of the Fourth Amendment occurs, the resulting evidence would most likely be excluded from the prosecution's case, unless an acceptable exception comes to the prosecution's rescue. It is important to bear in mind that a violation of the accused's Fourth Amendment rights does not create the real evidence, but only causes its discovery and the prosecution's knowledge of its existence. And only once the prosecution knows of its existence can they attempt to connect it to the accused.

When the privilege against compelled self-incrimination is violated, the accused creates the evidence as a direct result of the violation, not the commission of the crime. Although the information resulting from the violation existed prior to the violation, it was not separate from the accused – hence neither subject to discovery by third parties nor useable as evidence. Therefore, the information only becomes evidence once the violation takes place.

Once the accused makes a statement, whether the result of undue pressure or not, the connection between the evidence and the accused is evident. There is no need to prove a link between the evidence and the accused, as is often necessary with real evidence. By making a statement, the accused not only provides the prosecution with the evidence, but also connects himself to whatever evidence he provides.

A comparison between the relevant sections of the Fourth and Fifth Amendments reveals that while the Fourth Amendment provides for reasonable restrictions upon the right to privacy, the Fifth Amendment does not provide for similar restrictions upon the privilege. In

²⁵⁹ See § 2 3 2 1 1 *supra*.

²⁶⁰ See §§ 1 2 *supra* & 4 2 2 2 2 *infra*.

²⁶¹ *S v M* 2003 (1) SA 341 (SCA) 362A. See also *Pillay v S* 2004 (2) BCLR 158 (SCA); *S v Naidoo* 1998 (1) All SA 189 (D).

addition, the Fourth protects the right to privacy, but does not refer to the legality of its use during criminal proceedings against the accused. As explained earlier,²⁶² this necessitated the Supreme Court's interpretation that the use of evidence obtained in violation of the Fourth Amendment is not permitted either.²⁶³ The Fifth Amendment on the other hand is unambiguous: "No person ... shall be compelled in any criminal case to be a witness against himself". Consequently, there can be no doubt that the use of evidence obtained from the accused in violation of his privilege is in *itself* a violation of the Constitution. This relates to the fact that the privilege against compelled self-incrimination is a trial right that "enhance[s] the reliability of the truth-determining process",²⁶⁴ while the right to privacy is not.²⁶⁵

3 2 2 2 Trial rights and non-trial rights

There is another important difference. The Fourth Amendment's protection of privacy rights concern government overreaching in general and is not specifically aimed at regulating the criminal trial. Instead,

"evidence seized in violation of the Fourth Amendment is excluded from a criminal trial not as a personal right of the criminal defendant but rather as a remedy for a wrong that is fully accomplished at the time the evidence is obtained".²⁶⁶

As held in *United States v Havens*,²⁶⁷ evidence secured in violation of the Fourth Amendment can be introduced for impeachment purposes, since its introduction brings about no independent constitutional harm, subject to the condition that its introduction does not prejudice the efficacy of the exclusionary rule in deterring future violations of the Fourth Amendment.²⁶⁸

The Fifth Amendment privilege against compelled self-incrimination on the other hand, is concerned expressly with criminal procedure; it is a *trial right* of the accused and non-adherence to it directly affects the fairness of the trial. Moreover, exclusion of evidence obtained contrary to the dictates of the privilege is not intended as a remedy for a wrong that

²⁶² See ch 2 *supra*.

²⁶³ *Weeks v United States* 232 US 383 (1914); *Agnello v United States* 269 US 20 (1925); *Mapp v Ohio supra*.

²⁶⁴ Dressler *Understanding Criminal Procedure* 3ed (2002) 63.

²⁶⁵ *Tehan v United States ex rel Shott* 382 US 406 (1966).

²⁶⁶ Stevens J for the minority in *Michigan v Harvey* 494 US 344 (1990) 361, referring to *Stone v Powell* 428 US 465 (1976) 486; *United States v Calandra* 414 US 338 (1974) 348.

²⁶⁷ 446 US 620 (1980). See § 3 2 3 7 *infra*.

²⁶⁸ *United States v Havens* 446 US 620 (1980) 627-628.

is “fully accomplished at the time the evidence is obtained”.²⁶⁹ Rather, exclusion is integral to the privilege in that it *prevents* the accused from being made a witness against himself in violation of the Fifth Amendment. It is not the method employed in procuring the evidence, but the use of the evidence at trial that constitutes the violation of the Fifth Amendment.

The aim of the privilege against compelled self-incrimination is to protect the accused from being “compelled in any criminal case to be a witness against himself”. Unquestionably, the “criminal case” referred to by the Fifth Amendment includes both the prosecution’s case in chief and any attempts by the prosecution to impeach the accused. Therefore, the Fifth Amendment’s ban on compelling the accused to be a “witness against himself” applies no less to impeachment than incrimination.

3 2 3 IT SHOULD BUT IT DOES NOT

3 2 3 1 Introduction

Many significant differences exist between Fourth Amendment and Fifth Amendment cases. Therefore, no attempt to draw an analogy between Fourth and Fifth Amendment cases should be made without due consideration of the purpose of each Amendment. In any event, no analogy should be attempted if the facts of a case do not specifically lend themselves to such an analogy being drawn.

3 2 3 2 *Agnello v United States*

It is evident from *Agnello v United States*²⁷⁰ that the Supreme Court considered evidence of illegal searches and seizures (in other words, violations of the Fourth Amendment) as *synonymous* to compelling the accused to be a witness against himself, in other words, a violation of the Fifth Amendment’s privilege against compelled self-incrimination. It seems that at that stage in the development of the exclusionary rule(s) there was no need for a “judicially implied”²⁷¹ exclusionary rule – the Supreme Court simply applied the prohibition in the Fifth Amendment. While in later rulings²⁷² when the Supreme Court forged the (Fourth Amendment) exclusionary rule as a separate sanction to enforce the Fourth Amendment the

²⁶⁹ See n 266 *supra* and the text accompanying it.

²⁷⁰ 269 US 20 (1925).

²⁷¹ *Mapp v Ohio supra* 648.

²⁷² *Mapp v Ohio supra*. See § 2 2 2 2 *supra*.

Supreme Court made numerous analogies to the Fifth Amendment's prohibition, this was not the *Agnello* court's intention. In *Agnello*, the Fifth Amendment was not the basis for an analogy with which to achieve the desired result. It was the "exclusionary rule" protecting the Fourth Amendment interests of the accused. According to Butler J,

"it [was] well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment".²⁷³

Compared to the Supreme Court's later position that what is "tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc"²⁷⁴ should be protected by a sanction similar to the prohibition in the Fifth Amendment, it is clear that analogies were not what the *Agnello* court had in mind. However, the *Agnello* court accepted the notion that once evidence had been excluded from the case in chief, it may still be admitted for another (limited) purpose such as impeachment.

3 2 3 3 *Walder v United States*

In *Walder v United States*²⁷⁵ the accused's attempts at proving his good name over and above merely denying his guilt on the charges against him ultimately proved very counterproductive. In *Walder*, the accused was indicted for the purchase and possession of heroin. However, when his motion to suppress the use of the illegally seized narcotics succeeded, the government dismissed the prosecution. Two years later, he was again indicted for a narcotics violation completely unrelated to the first one. During cross-examination, he denied that law enforcement officers had seized narcotics from his home two years earlier. He also claimed that he had *never* dealt in or possessed any narcotics.²⁷⁶

By not just denying his guilt, but by making the sweeping claim that he had never dealt in or possessed narcotics, he opened the door to the prosecution to introduce evidence excluded in the prior narcotics charge against him.²⁷⁷ The court held that any general denial or

²⁷³ *Agnello v United States supra* 33-34, citing the following cases: *Boyd v United States* 116 US 616 (1886) 630; *Weeks v United States supra* 398; *Silverthorne Lumber Co v United States supra* 391, 392; *Gouled v United States* 255 US 298 (1921) 306; *Amos v United States* 255 US 313 (1921) 316.

²⁷⁴ *Mapp v Ohio supra* 656.

²⁷⁵ 347 US 62 (1954).

²⁷⁶ *Walder v United States* 347 US 62 (1954) 65.

²⁷⁷ It is submitted that South African courts should take into consideration such sweeping denials when exercising their discretion whether or not to allow impeachment of the accused's credibility. See ch 5 *infra*. See also *R v Solomons* 1959 (2) 352 (A).

statement that goes beyond a denial of the elements of the crime charged would not be protected by the exclusionary rule of *Weeks v United States*.²⁷⁸ Statements relating to *collateral* matters could therefore be impeached. The Supreme Court however carefully distinguished the situation where the accused's testimony was a denial of matters directly related to the offence. In such cases, the accused had to be able to meet the accusations against him without any outside influences on his decision to do so or not, including confrontation with previously excluded evidence:

“[T]he constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief”.²⁷⁹

Ironically, this pre-*Miranda* case became the basis for the majority decision *Harris v New York*,²⁸⁰ which securely embedded the practice of impeachment by means of previously excluded evidence in the American criminal justice system.

3 2 3 4 *Harris v New York*

In *Harris* the accused was on trial for dealing in heroin. After his arrest, the police questioned him, but neglected to inform him of his (*Miranda*) right to appointed counsel. This omission rendered the statements made by the accused during this interrogation inadmissible at trial.²⁸¹

However, the accused took the stand and testified to his innocence. The prosecution then introduced the prior inconsistent (and inadmissible) statements in order to impeach the credibility of the accused. The prosecution conceded that these statements were inadmissible as proof of guilt. However, the prosecution's aim was not to prove the guilt of the accused,

²⁷⁸ 232 US 383 (1914).

²⁷⁹ *Walder v United States supra* 65

²⁸⁰ *Supra*.

²⁸¹ The discussion that follows is based on the assumption that the *Miranda* ruling is a constitutional ruling and intends to show the contradiction in maintaining this notion while at the same time maintaining the holding in *Harris* that a different (but also constitutional) standard applies to the impeachment process. One must not forget that the impeachment process during cross-examination is just as much part of a criminal trial as the case in chief. So, presumably the privilege against self-incrimination is just as applicable to this part of the criminal trial when it states that “[n]o person shall be compelled in any criminal case to be a *witness* against himself”. See also § 3 2 3 8 *infra*.

but rather to attack his credibility. The trial judge instructed the jury to consider these prior inconsistent statements only on the question of credibility and not as evidence of guilt.²⁸²

The Supreme Court made short work of the comments in *Miranda v Arizona*²⁸³ where the Supreme Court held that uncounseled statements were inadmissible for *any* purpose.²⁸⁴ Burger CJ, writing for a 5-4 majority, explained that even though the statements were rendered inadmissible under *Miranda*, the shield provided by *Miranda* could not be “perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent statements”.²⁸⁵ The Supreme Court held that those comments were not controlling since discussion of the impeachment issue was not necessary in *Miranda*. According to Burger CJ, the only requirement for the admissibility of uncounseled prior statements for impeachment purposes is that its trustworthiness satisfies the legal standard.²⁸⁶ This is ironic in light of the rationale behind the *Miranda* court’s decision to require the presence of counsel, which was to protect the accused against the *inherent* coerciveness of the interrogation process. Furthermore, the presence of counsel, it was held in *Miranda*, assures the accuracy of the statements. Therefore, unless the right to counsel was validly waived, any statement made in the absence of counsel is made under inherently coercive circumstances.²⁸⁷ Coerced statements would generally not satisfy the legal standard of trustworthiness.²⁸⁸

Despite the *Miranda* majority’s concerns to the contrary, statements made without the warnings required by *Miranda* can still be voluntary.²⁸⁹ The traditional voluntariness test²⁹⁰ was not replaced by the ruling in *Miranda*, only added to. For admission into the case in chief, statements therefore need to be both voluntary and in compliance with the requirements laid down in *Miranda*.²⁹¹ In contradistinction, statements obtained in violation of *Miranda*

²⁸² It is doubtful that, even with the proper instructions, the jury would be left uninfluenced by these statements when the issue of guilt is considered. Cleary (Ed) *McCormick on Evidence* 3 ed (1984) 513. See also Davies “Exclusion of Evidence Illegally or Improperly Obtained” 2002 *The Australian LJ* 170 183.

²⁸³ 384 US 436 (1966).

²⁸⁴ *Miranda v Arizona* 384 US 436 (1966) 479.

²⁸⁵ *Harris v New York* 401 US 222 (1971) 224. See the discussion of *Harris* and *Miranda* in a South African context in *S v Makhathini* D 1997-11-21 Case no CC73/97; *Wesso v Director of Public Prosecutions, Western Cape* 2001 (1) SACR 674 (CPD).

²⁸⁶ *Harris v New York supra* 224.

²⁸⁷ *Miranda v Arizona supra* 439.

²⁸⁸ This is implied in *Dickerson v United States supra* 433, 435.

²⁸⁹ *Dickerson v United States supra* 444.

²⁹⁰ *Bram v United States* 168 US 532 (1897); *Brown v Mississippi* 297 US 278 (1936). See also *Davis v United States* 512 US 452 (1994) 464.

²⁹¹ In practice the *Miranda* enquiry is supposed to ensure the voluntariness of the statements, therefore a separate voluntariness enquiry would be unnecessary. See *Miranda v Arizona supra*.

would still be admissible for impeachment purposes, provided that they are *at least* voluntary under the traditional standard.²⁹²

The Supreme Court relied on *Walder v United States*²⁹³ as authority for their judgment in *Harris*. However, the *Walder* decision differed from *Harris* in three important aspects. First, the *Walder* case concerned the use of real evidence for impeachment. Therefore, *Walder* could only really be authority for *Harris* by analogy.²⁹⁴ Second, the accused in *Walder* was impeached on collateral matters. Third, the *Walder* decision predates both *Miranda v Arizona*²⁹⁵ and *Mapp v Ohio*,²⁹⁶ which might explain the Supreme Court's reverting to pre-*Miranda* voluntariness criteria.²⁹⁷

The Supreme Court in *Harris* laid down two requirements for inadmissible testimonial communications to be used for impeaching the accused's credibility, neither of which safeguards against the admission of untrustworthy evidence. First, the excluded statements must be inconsistent with the accused's testimony bearing *directly* on the crimes charged. Secondly, even though the *Miranda* requirements were not met, the accused must make no claim that his prior statements were coerced or involuntary. This signalled a return to the traditional voluntariness standard, confirming the *Miranda* bright-line rules as prophylactic, despite the Supreme Court's insistence that they apply to the states and therefore *must* be of a constitutional nature.²⁹⁸

Requiring that the accused's testimony must be inconsistent with the inadmissible statements implies that the accused must testify himself. Moreover, the testimony must be on matters bearing *directly* on the crimes charged. This is the direct opposite of the requirement in *Walder* that the accused may *not* be impeached on matters directly related to the charge, only on collateral matters.²⁹⁹ The minority in *Harris* shared this opinion.

The second requirement laid down in *Harris* for admitting prior inconsistent statements to impeach credibility is that the accused must make no claim that the prior statements were

²⁹² *Mincey v Arizona* 437 US 385 (1978).

²⁹³ *Supra*.

²⁹⁴ In the light of the US Supreme Court's liberal use of analogies, this is not surprising.

²⁹⁵ *Supra*.

²⁹⁶ 367 US 643 (1961).

²⁹⁷ This makes the ruling in *Miranda* stand out like a bright line across the whole notion of determining voluntariness by considering the totality-of-the-circumstances.

²⁹⁸ *Dickerson v United States supra* 438 begs the question: "[F]irst and foremost of the factors ... that *Miranda* is a constitutional decision is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts".

²⁹⁹ The court in *Walder* had already noted the negative impact on an accused's unfettered right to be a witness in his own defence that results from impeachment of testimony directly related to the crimes charged. See § 3 2 3 3 *supra*.

coerced or involuntary. It is strange that the court should only require that an accused make no such claim. The *Miranda* judgment should be understood to mean that any statement made during custodial interrogation without proper warnings is inherently coercive.³⁰⁰ To require of the accused to make a claim of involuntariness or coerciveness is to deny exactly what was recognised in *Miranda* – the warnings serve to protect the ignorant. Furthermore, no *ex post facto* inquiry is to be made of the accused's actual knowledge of his rights.³⁰¹ Moreover, this aspect of the *Miranda* judgment could not be so easily dismissed, had the court tried. The reason being that the issue was whether or not such a statement is coerced – a matter that the *Miranda* court was required to discuss and therefore binding on all its subsequent rulings.

When deciding whether the excluded evidence is indeed trustworthy enough to be used for impeaching the testimony of the accused, one must be aware of the inherent differences between testimonial communications and real evidence.³⁰² Real evidence, as used for impeaching the testimony of the accused in *Walder*, would typically have resulted from a violation of the Fourth Amendment. However, the real evidence existed prior to the violation and the violation only affects the government's knowledge of the existence thereof. Consequently, the prosecution is able to demonstrate the link between the impugned evidence and the accused in court. The trustworthiness of the real evidence is not affected by the violation of the Fourth Amendment. It follows that generally, real evidence will relatively easily satisfy the trustworthiness requirement of Burger CJ.³⁰³

The situation concerning statements elicited without following the procedures laid down in *Miranda*, is different. In contradistinction to real evidence, (involuntary) statements – whether obtained in actual violation of the privilege against compelled self-incrimination, or in violation of *Miranda* – often exposes evidence that did not exist before the violation.³⁰⁴ Therefore, the existence of the evidence for use by the prosecution is a direct result of the violation of the accused's rights. And, since the court in *Miranda* found the lack of procedural safeguards to be inherently coercive, it follows that the trustworthiness of the evidence is jeopardised.

³⁰⁰ *Miranda v Arizona supra* 458, 467.

³⁰¹ *Miranda v Arizona supra* 473. See § 2 2 3 2 *supra*.

³⁰² See § 3 2 2 1 *supra*.

³⁰³ *Harris v New York supra* 224. See also §§ 3 2 2 1 *supra* & 4 2 2 2 *infra*. In South Africa, real evidence is similarly considered more trustworthy, or reliable, than testimonial communications. See *S v M supra*; *Mkhize v S* (2000) JOL 6155 (W); *Pillay v S supra*.

³⁰⁴ See § 3 2 2 1 *supra*.

Alternatively, it can be argued that the accused in fact waived his *Miranda* right to counsel with regards the impeachment process. By not attempting to show that his statement was coerced or involuntary, the accused can be understood to waive the rights that he had regarding the evidence to be led during impeachment. The Supreme Court has since observed that what will constitute a waiver will depend on the right at issue.³⁰⁵ Therefore, what seems to be a waiver of rights may be treated as something else or, depending on the right at stake, the requirements for a valid waiver may be applied less strictly.³⁰⁶

However, the Supreme Court has been “unyielding” in its insistence that an accused’s waiver of his *trial rights* cannot be given effect unless it is done “knowing[ly]” and “intelligent[ly]”.³⁰⁷ The so-called “trial rights” refer to those rights that enhance the reliability of the truth-determining process, such as the Sixth Amendment right to counsel³⁰⁸ and the right not to “be compelled in any criminal *case* to be a witness against himself”.³⁰⁹ From this, it is clear that what may be an acceptable waiver in Fourth Amendment cases, such as *Walder*, would not necessarily constitute a valid waiver where the privilege against compelled self-incrimination is concerned. Therefore, It is dangerous to use non-trial right cases as precedent for cases concerning the privilege against compelled self-incrimination.

Interestingly, the minority in *Harris* also cited *Walder* as authority for its decision. In *Harris*, the accused flatly denied material aspects of the crimes charged. Pivotal to the minority’s finding was that in the *Walder* case, the accused was impeached on testimony of a general nature and unrelated to his guilt.³¹⁰

In *Malloy v Hogan*,³¹¹ the court held that the accused is guaranteed the right “to remain silent unless he chooses to speak in the *unfettered* exercise of his own will”.³¹² In this case, it meant that no negative inference could be drawn because of the accused’s choice to remain silent. Likewise, no negative inference should be drawn when the accused does decide to take

³⁰⁵ *New York v Hill* 528 US 110 (2000) 114.

³⁰⁶ In *Johnson v Zerbst* 304 US 458 (1938), which was applied in *Miranda v Arizona supra*, the Supreme Court required a valid waiver of a constitutional right to be “an intentional relinquishment or abandonment of a known right or privilege”.

³⁰⁷ *Illinois v Rodriguez* 497 US 177 (1990) 183.

³⁰⁸ *Dressler Criminal Procedure* 63.

³⁰⁹ The 5th Amendment. Emphasis added.

³¹⁰ Although the Supreme Court in *Walder* did not identify the constitutional basis of the accused’s freedom to meet the accusations against him without prejudice, the minority in *Harris* was of the opinion that the *Miranda* court had identified such a basis in the 5th Amendment privilege against self-incrimination.

³¹¹ 378 US 1 (1964).

³¹² *Malloy v Hogan* 378 US 1 (1964) 8. Emphasis added.

the stand. When the accused runs the risk that an illegally obtained statement will be introduced to impeach his direct testimony, the exercise of his will becomes fettered.

The minority in *Harris*, however, felt that the matter had already been settled in *Miranda*:

“The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner... [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial... These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement*”.³¹³

The only requirement that could reasonably justify admitting unconstitutionally obtained evidence would be its trustworthiness. But even then, “[t]he objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of [the] adversary system”,³¹⁴ the “essential mainstay”³¹⁵ of that system being the privilege against self-incrimination.

Another matter was overlooked by the Supreme Court when they applied *Walder v United States*³¹⁶ as precedent in *Harris v New York*.³¹⁷ Not only was *Walder* decided before the decision in *Miranda* was handed down, it was also decided before the issue of exclusion in Fourth Amendment cases was authoritatively dealt with in *Mapp v Ohio*.³¹⁸ This puts the *Harris* decision, and subsequent Fifth Amendment impeachment cases, in the dubious position of having to depend on an analogy drawn to Fourth Amendment jurisprudence for support. More importantly, the analogy to the Fourth Amendment jurisprudence was drawn far back in time to a case that was decided before the issue of exclusion of evidence in Fourth Amendment cases was conclusively dealt with. One can hardly expect a case like *Walder*, which deals with impeachment by means of previously excluded real evidence, to survive unscathed the decision that changed the law regarding exclusion of unlawful search-and-seizure evidence. But apparently, it did.

³¹³ *Harris v New York supra* 230-231; *Miranda v Arizona supra* 476-477. Emphasis in *Harris*.

³¹⁴ *Harris v New York supra* 231.

³¹⁵ *Miranda v Arizona supra* 460; *Michigan v Tucker* 417 US 433 (1974) 439, citing *Johnson v New Jersey* 384 US 719 (1966) 729.

³¹⁶ *Supra*.

³¹⁷ *Supra*.

³¹⁸ *Supra*. Although, exclusion in federal prosecutions had already been accepted in *Weeks v United States supra*, but on the basis of the reasoning in *Dickerson v United States supra*, exclusion was not yet considered a constitutional remedy.

3 2 3 5 *Riddell v Rhay*

Within a year of its decision in *Harris v New York*,³¹⁹ the Supreme Court had the opportunity to reconsider its position regarding impeachment by means of a prior inconsistent statement in *Riddell v Rhay*.³²⁰ The majority however, stuck to their guns. The minority based their criticism of the majority's ruling on the following argument: The contested facts of some cases, like the one at hand, often lend themselves to no more than two possibilities. In *Riddell*, the accused initially told the police that his finger was on the trigger of his gun and in court he denied having his finger on the trigger. It follows that by discrediting the accused's testimony in court, only one possibility remains: His finger *was* on the trigger. Hereby the content of the prior inconsistent statement, excluded from the case in chief, became known even when the prosecution was barred from leading evidence about its contents. It would indeed be tempting for a jury to take into consideration the remaining version – which became part of the evidence in a way that can only be described as through the “back door” – as the truth and proof of guilt.³²¹ However, this was the version that had previously been excluded for being obtained in circumstances described by the majority in *Miranda* as “inherently compelling”.³²² And according to the Supreme Court in *Dickerson v United States*,³²³ “coerced confessions are inherently untrustworthy”.³²⁴ A judge would really have his work cut out explaining this to the jury.³²⁵

3 2 3 6 *Oregon v Hass*

Four years after holding that impeachment by means of previously excluded evidence was not barred by the deterrence rationale of the exclusionary rule,³²⁶ the Supreme Court had another opportunity to consider the matter in *Oregon v Hass*.³²⁷ However, as the minority pointed out,³²⁸ the facts in *Hass* presented a different situation from *Harris*. In *Harris*, the

³¹⁹ *Supra*.

³²⁰ 404 US 974 (1971).

³²¹ Cleary *McCormick on Evidence* 513. See also Davies “Exclusion of Evidence” *The Australian LJ* 183.

³²² *Miranda v Arizona supra* 467.

³²³ 530 US 428 (2000).

³²⁴ *Dickerson v United States supra* 433. See the *Miranda* minority's use of the term “inherently coercive” in describing the majority's finding.

³²⁵ See n 282 *supra*.

³²⁶ *Harris v New York supra*.

³²⁷ 420 US 714 (1975).

³²⁸ So did the Supreme Court of Oregon. Of course, had the majority shared this opinion, the Supreme Court would not have assumed jurisdiction to review the case in the first place.

warnings required by *Miranda v Arizona*³²⁹ were only partially given, leaving out information about the right to appointed counsel. In *Hass*, the warnings were given to the full extent required by *Miranda*. However, despite the accused's request to phone an attorney, police continued their interrogation, ignoring the request. This resulted in the accused giving inculpatory information. The evidence was properly excluded from the prosecution's case in chief.

The difference between the two cases lies in the police's compliance with their own warnings. In *Harris*, the police issued incomplete warnings, but at least complied with their own version of the warnings. In *Hass*, police issued the complete *Miranda* warnings and then completely disregarded the warnings by continuing their interrogation of the accused after he had requested to phone his attorney. It follows that if the police understood the *Miranda* warnings *at least* as well as the accused, which is not such a far-fetched assumption, they acted in blatant disregard of the rules they had just recited to the accused.

Blackmun J, for the majority, also found this "possible factual distinction" between *Harris* and *Hass*, in that the "*Miranda* warnings given *Hass* were proper, whereas those given *Harris* were defective".³³⁰ He continued:

"The deterrence of the exclusionary rule, of course, lies in the necessity to give warnings. That these warnings, in a given case, may prove to be incomplete, and therefore defective, as in *Harris*, does not mean that they have not served as a deterrent to the officer who is not then aware of their defect; and to the officer who is aware of the defect the full deterrence remains".

What did this distinction mean to the majority?³³¹ In terms of proving guilt it meant nothing – evidence resulting from defective warnings are inadmissible regardless of the issuing officer's knowledge of the defect. *Miranda* was quite clear on this point. And in terms of determining credibility? Again nothing. Because "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth".³³² The question remains: Why would a police officer who *is* aware of the defect in the warnings not act to correct the defect? Perhaps he has something to gain?³³³

³²⁹ *Supra*.

³³⁰ *Oregon v Hass supra* 723.

³³¹ Or, what did it mean in practice?

³³² *Oregon v Hass supra* 723.

³³³ *State v Hass supra* 493.

The Supreme Court did not satisfactorily explain why the distinction between the facts of *Harris* and *Hass* made no difference when impeachment of the accused's testimony was concerned. Nonetheless, the Supreme Court highlighted the difference. It is submitted that the distinction should not only be between effective and defective warnings. On top of this, one should distinguish on the basis of the police's compliance with the warnings that were given, to the extent that they were given. Contrary to the majority's opinion, it seems that by admitting unconstitutionally obtained evidence for impeachment, police and the prosecution *do* have "nothing to lose and something to gain".³³⁴

It is the cases where police knowingly disregarded the warnings, either by paying them mere lip service, or not correcting known defects that should be a cause for concern. As the minority in *Hass* pointed out:

"[I]f the requirement [of having an attorney present] is followed there will almost surely be no statement since the attorney will advise the accused to remain silent. If, however, the requirement is disobeyed, the police may obtain a statement which can [at least] be used for impeachment if the accused has the temerity to testify in his own defense".³³⁵

Consequently, one might tolerate defective warnings given without knowledge of the defect and complied with to the extent given where impeachment is at issue. At least the police acted in good faith.³³⁶ However, when the defect is known to police and they do not correct it, or when they simply disregard the warnings they had just given, anything that they might gain in terms of impeachment evidence would be unfair towards the accused. Even if this does not have negative implications for the accused's right not to be a witness against himself, which is doubtful, it seriously detracts from the accused's right to a fair trial.

In one regard the decision in *Hass* does appear to narrow, or at least clarify, the first requirement for impeachment stipulated in *Harris*. In *Harris*, the Supreme Court required that the excluded statements must be inconsistent with the accused's testimony bearing directly on the crimes charged. After *Hass*, the accused must testify to his innocence *knowing* that the "opposing testimony had been ruled inadmissible for the prosecution's case in chief".³³⁷ In *Harris*, the accused also knew that the evidence would not be admitted as proof of guilt, because the prosecution conceded that it was inadmissible under *Miranda*. This is of course

³³⁴ *State v Hass supra* 493.

³³⁵ *Oregon v Hass supra* 725.

³³⁶ The principle of systemic deterrence would probably still require exclusion, because "the courts must be slow to indulge ignorance of the law of criminal procedure on the part of the police". *Mkhize v S supra* 7.

³³⁷ *Oregon v Hass supra* 722.

purely academic. No prosecutor worth his salt would risk falling outside this ruling by not attempting to use all evidence as proof of guilt, which is in any event more damaging to the accused's case than mere impeachment according to the majorities in both *Harris* and *Hass*. Moreover, the accused would know which evidence has been excluded, since it is the defence who would apply for such exclusion.

3 2 3 7 *United States v Havens*

In *United States v Havens*³³⁸ the Supreme Court dealt with impeachment by means of unconstitutionally obtained real evidence. Nonetheless, the court held that its rulings in *Harris v New York*³³⁹ and *Oregon v Hass*,³⁴⁰ dealing with testimonial communications, were controlling in the matter. The court added only one new but significant aspect to the "rule in *Harris*":³⁴¹ The accused may not only be impeached upon his testimony in chief, but also on testimony given in cross-examination – if this testimony relates to a matter "that [is] plainly within the scope of the defendant's direct examination".³⁴²

3 2 3 8 *Dickerson v United States: An ill-considered confirmation of Miranda v Arizona*

3 2 3 8 1 *Introduction*

From the preceding paragraphs it should be clear that a major contradiction exists in American jurisprudence regarding the constitutional requirements that regulate the admissibility of testimonial communications. On the one hand is the supposedly³⁴³ constitutional ruling in *Miranda v Arizona*³⁴⁴ in which the Supreme Court devised the bright-line test known colloquially as the "*Miranda* rights". Moreover, the Supreme Court went one step further by insisting – and this was reiterated in *Dickerson v United States*³⁴⁵ – that these rules were the (new) constitutional standard for admissibility of statements made by the accused while in custody.

³³⁸ *Supra*.

³³⁹ *Supra*.

³⁴⁰ *Supra*.

³⁴¹ Schwikkard & Van der Merwe *Principles of Evidence* 2 ed (2002) 432.

³⁴² *United States v Havens supra* 627.

³⁴³ The majority in *Dickerson* was adamant that *Miranda*'s "core ruling" is constitutional.

³⁴⁴ *Supra*.

³⁴⁵ *Supra*.

On the other hand, *Harris v New York*³⁴⁶ very clearly held that the standard for the admissibility of impeachment evidence was *still* the traditional standard of voluntariness, to be determined with consideration of the totality of all the circumstances surrounding the interrogation. And, along with other cases, the *Harris* court was adamant that the *Miranda* rules were “not themselves rights protected by the Constitution”,³⁴⁷ but merely prophylactic in nature.³⁴⁸

3 2 3 8 2 *The traditional test*

It was clear from as early as *Bram v United States*³⁴⁹ and *Brown v Mississippi*³⁵⁰ that when determining the admissibility of a statement, its voluntariness “is controlled by that portion of the Fifth Amendment ... commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”.³⁵¹ In other words, the Fifth Amendment’s privilege against compelled self-incrimination holds that no person may be forced against his will to give evidence against himself in any criminal case. This means two things. First, the test for the admissibility of any statement made by the accused is voluntariness as explained by the Supreme Court in *Bram v United States*, and subsequently developed into the traditional determination of whether the statement was the result of an overborne will.

Second, the privilege against compelled self-incrimination applies to “any criminal case”. This means that involuntary statements would be inadmissible in all pending criminal cases as well as any future cases against the person who made the statement. What’s more, the Fifth Amendment uses only the term “criminal case” without distinguishing between the different stages of a trial. This is an important omission, since *Miranda* dealt with admissibility of evidence into the case in chief when evidence is mostly used to indicate guilt, while *Harris* was concerned with the admissibility of evidence during cross-examination when evidence would typically be used for the limited purpose of discrediting the accused’s testimony. There is no dispute that the privilege against compelled self-incrimination must be applicable to both situations.

³⁴⁶ *Supra*.

³⁴⁷ *Michigan v Tucker supra* 444.

³⁴⁸ *New York v Quarles* 467 US 649 (1984). See also *Harris v New York supra*.

³⁴⁹ 168 US 532 (1897).

³⁵⁰ 297 US 278 (1936).

³⁵¹ *Bram v United States supra* 542.

In other words, the impeachment process is still very much part of the criminal trial. It follows that there exists a double standard for application of the privilege against compelled self-incrimination. Being a constitutional right – at least there is no dispute about this – it should control in the *same* manner the admissibility of a statement offered in evidence as part of the case in chief and a statement offered for impeachment. The Fifth Amendment makes no mention that it should be otherwise. However, *Harris v New York*³⁵² and its progeny³⁵³ show that this is not the case.

3 2 4 WRAPPING UP: NO MORE ANALOGIES

It has been shown throughout this chapter that analogies between the Fourth and Fifth Amendments for the purpose of excluding unconstitutionally obtained evidence is reckless. A useful distinction could be made based on the nature of the evidence, as an indication of its trustworthiness. Additionally, the fact that the privilege against compelled self-incrimination is a trial right of the accused and therefore substantive in nature as opposed to the mere remedial nature of the exclusionary rule for violations of the Fourth Amendment requires that they be applied differently.

3 3 CANADA

“I conclude that the Crown’s strategic choice at trial to use the evidence only for impeachment purposes does not lessen the standard for admissibility. Acceptance of a lesser standard would encourage Charter breach in order to achieve tactical advantage at trial. A statement obtained in breach of the Charter for impeachment purposes, it would be thought, is better than no statement at all”.³⁵⁴

3 3 1 IMPEACHMENT BY MEANS OF PREVIOUSLY EXCLUDED EVIDENCE: *R v CALDER*

3 3 1 1 General

*R v Calder*³⁵⁵ was the first case in which the Canadian Supreme Court specifically had to decide the issue of the admissibility of unconstitutionally obtained evidence to impeach the

³⁵² *Supra*.

³⁵³ *Riddell v Rhay* 404 US 974 (1971); *Oregon v Hass supra*; *United States v Havens supra*.

³⁵⁴ Berger JA in *R v Whitford* (1997) 115 CCC (3d) 52 (Alta CA) 62, as quoted in *R v Cook supra* § 77.

³⁵⁵ (1996) 46 CR (4th) 133 (SCC).

accused. The accused, a police officer,³⁵⁶ had been convicted in a lower court of attempting to purchase the sexual services of a person under eighteen, extortion and breach of trust. He was never informed of his right to counsel. In fact, the accused was under the impression that he was subject to an internal investigation and thus obliged to answer questions.³⁵⁷ He consequently made a statement, denying that he had been at the street corner where and when the alleged transaction took place. This statement was false. The courtroom testimony of an independent witness, the complainant and, significantly, that of the accused himself proved this. The prosecution wanted to tender the statement as evidence of consciousness of guilt. And, as his trial testimony contradicted his earlier statement to the police, the prosecution wanted to cross-examine him on his earlier statement in an attempt to impeach his credibility.

The trial judge held that he was in fact detained, and should have been properly advised of his Charter rights. The statement was consequently excluded, because its admission would have brought the administration of justice into disrepute. Furthermore, the trial judge held that once it had been excluded under s 24(2), admission of the statement even for a limited purpose, would be unfair to the accused.

The parties agreed that the evidence had been properly excluded from the prosecution's case. The appeal dealt only with the question of admission for the (limited) purpose of impeaching the credibility of the accused.

The crown relied heavily on the Supreme Court's decision in *R v Kuldip*,³⁵⁸ which held that the accused might be cross-examined on statements made by him during a previous trial, in spite of the protection against self-incrimination in s 13 of the Charter. The Supreme Court distinguished the two cases, holding that *Kuldip* did not concern a statement that had previously been held inadmissible. In *Kuldip*, the Supreme Court only had to decide whether the admission³⁵⁹ of impeaching evidence violated the self-incrimination clause³⁶⁰ and not whether it would bring the administration of justice into disrepute,³⁶¹ as was the case in *Calder*.

³⁵⁶ See *S v Makhathini supra*; *Wesso v Director of Public Prosecutions, Western Cape supra*. As a rule, even police officers must be properly informed of their rights. See n 153 *supra*.

³⁵⁷ Internal investigations of the police force are conducted under different procedural rules than a criminal prosecution.

³⁵⁸ (1990) 3 SCR 618 (SCC).

³⁵⁹ The crown conceded that the use of evidence for impeachment is an "admission". The Supreme Court agreed.

³⁶⁰ Section 13 of the Charter.

³⁶¹ Section 24(2) of the Charter.

The trial judge in *Calder* had already ruled the statement inadmissible as proof of guilt. Consequently, as was held in *R v Adams*,³⁶² the only way that an order made by a court may be revoked or altered was if the circumstances surrounding the initial order changed materially. For a change in circumstances to be material, “the change must relate to a matter that justified the making of the order in the first place”.³⁶³ It follows that a change in the purpose for which evidence is meant to be used does not constitute such a material change.

3 3 1 2 Inadmissible in general also means inadmissible for a limited purpose

Since the submission of evidence generally constitutes submission for all purposes, unless specifically limited, the subsequent limiting of its intended use does not bring about a material change in circumstances that would justify varying the exclusion order. Nothing indicated that the prosecution’s initial attempt to use the accused’s statement as evidence of guilt was limited to that one use only. In fact, the Supreme Court concluded that had the accused’s statement been admitted earlier, the prosecution would have been free to use the statement for any purpose, including impeachment. It follows that the limited purpose for which the evidence was later tendered, formed part of the general purpose for which the statement had already been offered and excluded.

The distinction between admitting evidence generally, as opposed to admission for the limited purpose of impeachment, was at that time already well known in Canadian law. Sopinka J referred to cases involving prior inconsistent statements, as early as 1947³⁶⁴ and more recently *R v Kuldip*³⁶⁵ and *R v Crawford*,³⁶⁶ where the distinction had been useful.³⁶⁷ He continued:

“The distinction draws a fine line. When a statement is admitted, generally it is available as positive evidence of innocence or guilt. The statement is evidence of the truth of its contents which may be incriminating. Moreover, the mere fact that a false exculpatory statement was made may be evidence of consciousness of guilt. On the other hand, a statement whose use is limited to a challenge of credibility can serve only to impeach the

³⁶² (1995) 4 SCR 707 (SCC).

³⁶³ *R v Adams* (1995) 4 SCR 707 (SCC) 722, as quoted in *R v Calder* (1996) 46 CR (4th) 133 (SCC) § 21.

³⁶⁴ *R v Calder supra* 198, referring to *R v Deacon* (1947) SCR 531 (SCC).

³⁶⁵ *Supra*.

³⁶⁶ (1995) 1 SCR 858 (SCC).

³⁶⁷ The distinction has been eroded in some circumstances. See *R v B (K G)* (1993) 1 SCR 740 (SCC).

testimony of the [accused]. The most that can be achieved is the nullification of the [accused's] evidence".³⁶⁸

One question comes to mind: How does the prosecution justify the use of a prior inconsistent statement, *proven* to be false, to impeach the accused's testimony at trial? The prior inconsistent statement was not merely proven false by the prosecution, but the accused himself admitted as much. Moreover, other attempts to impeach the accused were unsuccessful, indicating that his trial testimony at least resembled the truth.³⁶⁹ Should a distinction be made between situations where seemingly truthful testimony at trial contradicts an earlier (inadmissible) lie, and cases where perjurious trial testimony contradicts an earlier (possibly) truthful statement? Is such a distinction at all possible?

3 3 1 3 The testimony at trial: Truth vs perjury

The prosecution in *R v Calder*³⁷⁰ relied on the fact that the accused's testimony at trial contradicted his earlier statement. The court rejected this, saying that "it would not have escaped the Crown that the accused would likely testify and that his testimony *could* contradict the statement".³⁷¹ The situation in *Calder* is distinguishable from the American impeachment cases already discussed, making direct comparison difficult.

In *Calder*, the accused initially made a false exculpatory statement to the police, which he contradicted with testimony in which he explained his presence at the scene of the crime. In *Harris*, while this is not clear from the facts, it is clear from the reasoning of the US Supreme Court that the court dealt with the opposite situation, where the accused initially made a true, if only partially so, inculpatory statement to the police and then resorted to perjury during the trial in an attempt to deny guilt.

Speaking for the majority in *Harris*, Burger CJ clearly indicated that perjury would not be tolerated: "[T]here is hardly justification for letting the defendant affirmatively resort to *perjurious* testimony in reliance on the Government's disability to challenge his credibility".³⁷² In conclusion, he held that "[t]he shield provided by *Miranda* cannot be

³⁶⁸ *R v Calder supra* § 25.

³⁶⁹ Even if it was only his version thereof!

³⁷⁰ *Supra*.

³⁷¹ *R v Calder supra* § 25. Emphasis added.

³⁷² *Harris v New York supra* 224, citing *Walder v United States supra* 65. Emphasis added.

perverted into a license to use *perjury* by way of a defense, free from the risk of confrontation with prior inconsistent utterances”.³⁷³

The prevention of perjury is a worthwhile goal. Indeed, it is essential that perjury be prevented in order to successfully determine the guilt or innocence of the accused. However, this motivation is of no use when impeachment of truthful testimony is attempted by means of previously excluded inconsistent statements that are *known* to be false. A situation could easily develop as foreseen in *R v Wellers*³⁷⁴ – a case dealing with cross-examination of one’s *own witness*, but not altogether irrelevant – that “[i]f ... counsel were allowed to cross-examine ... the court might be led to doubt evidence which is really true”.³⁷⁵

In *Calder*, the defence attempted to draw an analogy to the law regarding involuntary confessions as laid out by the Supreme Court in *Monette v R*.³⁷⁶ A statement made by the accused while in detention is either admissible, or it is not. If it is inadmissible, it cannot be made admissible by putting it to the accused in cross-examination, because of the statement’s inherent unreliability. Although of some help, the analogy was not absolute. According to Sopinka J, there were two reasons. First, the law regarding involuntary confessions has evolved considerably since *Monette*.³⁷⁷ *R v Whittle*³⁷⁸ held that although the rule against involuntary confessions was initially motivated by the inherent unreliability of such confessions, “a strong undercurrent developed which also supported the rule in part on fairness in the criminal process”.³⁷⁹ Therefore, even reliable confessions would be subject to exclusion if the fairness of the trial were jeopardised.

Second, while both the law regarding involuntary confessions and s 24(2) take fairness into account, s 24(2) focuses on the effect of admission on the repute of the administration of justice as a whole. In other words, s 24(2) requires that a balance be struck between the fairness of admission to the accused and fairness of exclusion to the community interest.³⁸⁰

³⁷³ *Harris v New York supra* 225. Emphasis added. See also *Wesso v Director of Public Prosecutions, Western Cape supra*.

³⁷⁴ 1918 TPD 234.

³⁷⁵ *R v Wellers* 1918 TPD 234 237.

³⁷⁶ (1959) SCR 400 (SCC).

³⁷⁷ *R v Calder supra* §§ 26-27.

³⁷⁸ (1994) 2 SCR 914 (SCC).

³⁷⁹ *R v Whittle* (1994) 2 SCR 914 (SCC) 932.

³⁸⁰ In South Africa, the position differs somewhat. The fairness leg of the inquiry in s 35(5) of the Constitution is ultimately concerned with fairness to the accused: If on a balance of all stakeholders’ interests admission will result in unfairness to the *accused*, evidence must be excluded regardless of the unfairness of exclusion to the prosecution or other interested parties.

Although no longer the only reason, the inherent unreliability is still an important reason for excluding involuntary statements. Similarly, the concern for unreliability should overwhelmingly demand exclusion of a statement that is not merely inherently unreliable, but *known* to be false and therefore even more detrimental to the accused.

Where trial fairness is concerned, the situation is a little more complicated: The little, if any, unfairness to the accused of admitting a previously excluded truthful statement, to prevent perjury, could be exceeded by the unfairness to the community if it were excluded. Especially if it was done for the limited purpose of impeachment, the argument that such statements are inherently unreliable even if they resemble the truth, should be balanced against the consideration that the “inherently unreliable” statement would not be used to prove guilt, but its use limited to testing the truthfulness of the accused’s trial testimony.

When a statement that is known to be false is admitted, even for the limited purpose of impeachment, the unfairness to the accused is much more serious and outweighs the unfairness towards the community that would result from the complete exclusion of such a statement. Added to this, admitting a statement that is known to be false to test the reliability of the accused’s trial testimony serves no rational purpose. It would undermine the credibility of the accused, regardless of whether his trial testimony is indeed false or not. Therefore, admission of a previously excluded false statement would not only undermine the determination of the accused’s guilt or innocence, but also would be unfair to the accused. And, in the long run, it would bring the administration of justice into disrepute.

3 3 1 4 Not the carefully instructed jury but the well-informed citizen

The court in *Calder* highlighted two important factors regarding the use of evidence for a limited purpose in a trial where a jury is the trier of fact. First, the court

“acknowledge[d] the concern that a jury would have difficulty in applying the distinction [between incrimination and impeachment] but concluded that, with the benefit of a very careful instruction from the trial judge, this difficulty could be overcome”.³⁸¹

However, the court continued:

³⁸¹ *R v Calder supra* § 32.

“The fact that a jury carefully instructed can apply the distinction *does not mean that use for the purpose of impeachment will, in the eyes of the jury, have a less detrimental effect on the case of the accused*”.³⁸²

Second, in strict adherence to *R v Collins*,³⁸³ the court distinguished the admissibility of evidence, including evidence intended for a limited purpose, from its eventual weighing by the jury at trial. The admissibility of evidence obtained in violation of the Charter depends not on the detrimental effect it may have for the accused, in the eyes of the jury, but on the effect its admission has on the repute of the administration of justice. And the determination of the effect on the repute of the administration of justice is not for the jury to make:

“[I]n determining admissibility under s. 24(2), it is not the carefully instructed juror who is the arbiter of the effect on the administration of justice but rather the well-informed member of the community. This mythical person does not have the benefit of a careful instruction from the trial judge on the distinction. Not only will that person not tend to understand the distinction in theory, but, in any event, will regard the distinction as immaterial in assessing the effect on the repute of the administration of justice. If use of the statement is seen to be unfair by reason of having been obtained in breach of an accused’s Charter rights, it is not likely to be seen to be less unfair because it was only used to destroy credibility”.³⁸⁴

The court conceded that while it would be difficult, even impossible, for a jury with proper instructions to make the distinction between incrimination and impeachment, it would be more so for the reasonable, well-informed member of the community who does not have the benefit of an instruction from the trial judge. While it is proper to leave the jury to weigh the facts before them as they see fit, the question of admissibility is concerned with the determination of which facts should be made available to the jury without damaging the repute of the administration of justice. It follows that involving the jury in this inquiry would cause immeasurable prejudice to the fairness of the process, and would most probably bring the administration of justice into disrepute.

³⁸² *R v Calder supra* § 34. Emphasis added. See also Cleary *McCormick on Evidence* 513; Davies “Exclusion of Evidence” *The Australian LJ* 183.

³⁸³ (1987) 56 CR (3d) 193 (SCC).

³⁸⁴ *R v Calder supra* § 34, as quoted by Cory & Iacobucci JJ in *R v Cook supra* § 76. See also Morissette “The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do” 1984 *McGill LJ* 521 538, as cited in *R v Collins* (1987) 56 CR (3d) 193 (SCC) § 33.

3 3 2 EVIDENCE TENDERED ONLY FOR IMPEACHMENT: *R v COOK***3 3 2 1 Introduction**

In *R v Calder*³⁸⁵ the Supreme Court was confronted with a situation where evidence was initially submitted generally, as part of the prosecution's case against the accused, and excluded. Later, when the accused testified, the prosecution again submitted the excluded statement in cross-examination of the accused, but for the limited purpose of impeaching his credibility. The court refused to admit it, holding that the evidence had been excluded for all purposes, including impeachment, when it was previously excluded.³⁸⁶

Does this mean that evidence not tendered as part of the prosecution's case-in-chief may be used in cross-examination to impeach the credibility of the accused? In *R v Cook*,³⁸⁷ the Supreme Court was faced with such a situation. The prosecution never tendered the evidence obtained in violation of the Charter as part of its case-in-chief, but tried to do so during cross-examination of the accused in an attempt to impeach his credibility.

3 3 2 2 *R v Cook: Collins revisited*³⁸⁸

The accused in *R v Cook*³⁸⁹ was arrested in the United States for a murder committed in Canada. The arresting officer, a United States Marshall, read him his rights as required by *Miranda v Arizona*.³⁹⁰ Later, two Canadian detectives interrogated the accused while he was still in the United States awaiting extradition to Canada. They failed to inform him of any rights that he had under the Canadian Charter. As in *R v Calder*,³⁹¹ the accused gave an exculpatory statement.

First, the Supreme Court had to decide whether the Charter applied extraterritorially to the interrogation in the United States.³⁹² Since this topic falls outside the scope of this thesis, it would suffice to say that the Charter was applicable to the interrogation in the US.³⁹³

³⁸⁵ *Supra.*

³⁸⁶ See § 3 3 1 2 *supra*.

³⁸⁷ (1998) 2 SCR 597 (SCC).

³⁸⁸ See § 2 3 2 *supra*.

³⁸⁹ *Supra.*

³⁹⁰ *Supra.*

³⁹¹ *Supra.*

³⁹² In any event, the requirements of the US Bill of Rights were not complied with either.

³⁹³ Cory & Iacobucci JJ, for the majority in *R v Cook supra* thoroughly discussed the reasons for their conclusion that the Charter applied extraterritorially in §§ 23-54.

Having concluded that the Charter did apply to the interrogation in the United States, the Supreme Court had no difficulty in concluding that the Charter had been violated.³⁹⁴ Moreover, the Supreme Court regarded the trial judge's findings as significant:

“[T]he information given to the appellant regarding his right to counsel was misleading to the extent that ... the appellant was prevented from making a considered choice regarding legal assistance and that this was the very effect the police officer intended”.³⁹⁵

Consequently, the Supreme Court found the violation to be “very serious if not flagrant”.³⁹⁶

3 3 2 3 Evidence not previously excluded

The prosecution did not tender the statement in an attempt to incriminate the accused as was done in *R v Calder*.³⁹⁷ However, before closing its case, the prosecution made an application that the statement be admitted in cross-examination for the limited purpose of impeaching the accused's credibility. The trial judge greatly relied on the distinction between using evidence for incrimination and the use of impeachment, where the statement was not tendered as proof of its contents, but merely to impeach the accused. The trial judge allowed the statement to be used for impeachment, finding that when used for this purpose it was not self-incriminating.

The holding of the trial judge resembled the holding in *R v Kuldip*,³⁹⁸ where the Supreme Court held that the accused might be cross-examined on a statement made during a previous trial, despite the prohibition against self-incrimination in s 13 of the Charter. This was not surprising, since at the time of the trial court's ruling, the Supreme Court had not yet delivered its judgment in *Calder*.

However, the Supreme Court in *Calder* held that the inquiry regarding the admission of evidence obtained in violation of the Charter should not be determined based on self-incrimination. Rather, under s 24(2) the inquiry must be whether the admission of such evidence would bring the administration of justice into disrepute. This is the case regardless of the intended use of the evidence.

³⁹⁴ In fact, the parties agreed that if the Charter was applicable it had indeed been violated.

³⁹⁵ *R v Cook supra* § 56. The court referred to § 27 of the trial court's ruling.

³⁹⁶ *R v Cook supra* § 57.

³⁹⁷ *Supra*.

³⁹⁸ *Supra*.

The judgment in *R v Calder* differs from *R v Cook* in the sense that the evidence tendered for impeachment, had previously been excluded. In *Cook*, the Supreme Court had to consider the “admission of evidence for a limited purpose where the Crown [was] not ‘fettered’ by a prior ruling under s 24(2)”.³⁹⁹ However, the Supreme Court felt that *Calder* also considered the broader issue and was therefore applicable to the appeal in *Cook*. And, referring to the “very limited” circumstances where the *Calder* majority thought that a change in the intended use of the evidence might result in admission where it would not otherwise be admissible,⁴⁰⁰ the Supreme Court held that there must be no distinction based on intended use at all.⁴⁰¹ As motivation for this conclusion, the court, citing *R v Calder*,⁴⁰² held that while a carefully instructed juror might be able to distinguish between the different purposes for which evidence may be admitted, it is the “reasonable, well-informed citizen who represents community values” who decides the effect of admission on the repute of the administration of justice. Not benefiting from “a careful instruction from the trial judge on the distinction”, this “mythical person” would not understand the distinction, or in any event regard the distinction as immaterial in assessing the effect on the repute of the administration of justice.⁴⁰³ Consequently, when admission of unconstitutionally obtained evidence is in question, the only consideration should be the effect that its admission would have on the repute of the administration of justice.

3 3 3 IN CONCLUSION

The position in Canada seems to be clear regarding the use of unconstitutionally obtained testimonial communications, or, in the Supreme Court’s definition, conscriptive evidence: Subject to very rare circumstances, which have not yet materialised, prior inconsistent statements are not admissible for impeachment. However, the Supreme Court has not had the opportunity to decide whether real evidence (or, non-conscriptive evidence)⁴⁰⁴ will be admissible for impeaching the accused.

³⁹⁹ *R v Cook supra* § 74.

⁴⁰⁰ *R v Calder supra* § 35.

⁴⁰¹ *R v Cook supra* § 76. La Forest J, concurring in *Calder*, also found it difficult to imagine any special circumstances that would justify a departure from the approach set forth by the majority.

⁴⁰² *R v Calder supra* § 34.

⁴⁰³ See § 3 3 1 4 *supra*.

⁴⁰⁴ Keeping in mind that the distinction between testimonial communications and real evidence is not based on exactly the same definitions as the distinction between conscriptive and non-conscriptive evidence.

CHAPTER FOUR

IMPEACHMENT IN SOUTH AFRICA

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“[A] juror who asked not to be identified was quoted. ‘I had very grave doubts as to her innocence, yes. Unfortunately, I had very reasonable doubts as to her guilt...’⁴⁰⁵

4 1 INTRODUCTION

4 1 1 IMPEACHMENT UNDER THE COMMON LAW

In Chapter One, a short summary was made of South African courts’ approach to the admissibility of evidence in the pre-constitutional era. It was pointed out that there was a gradual shift to a discretionary approach even before the interim Constitution was enacted. It is now necessary to summarise the position regarding impeachment under the common law. In short, the position seemed to be as follows: Once evidence was found to be inadmissible, it was as a general rule inadmissible for all purposes. This meant that the prosecution was not allowed to cross-examine an accused on inadmissible evidence in order to discredit the accused.

⁴⁰⁵ Stephen King *The Shining & Misery: Two novels in one volume* (2000) 218.

In *R v Gibixegu*⁴⁰⁶ the court was concerned with the use of a confession⁴⁰⁷ inadmissible under s 244(1) of Act 56 of 1955. O'Hagan J, in a minority opinion, held that “[a]n accused, like any other witness, may be cross-examined upon any matter relevant to his credibility provided that the matter is not one which a rule of law excludes from admission in evidence”.⁴⁰⁸ He continued that South African authority revealed that inadmissible evidence remained inadmissible at all stages and for all purposes of the criminal proceedings concerned, subject only to rare exceptions.⁴⁰⁹ This position was confirmed by the Bophuthatswana Supreme Court in *S v Molautsi*,⁴¹⁰ when, with reference to *Gibixegu*, the court held that the prosecutor “was not entitled to elicit inadmissible evidence in his favour”.⁴¹¹

The use of previous convictions for impeachment purposes seems to create some difficulties in practice. In *S v Mavuso*,⁴¹² the accused appealed against a conviction for the possession of dagga. At issue in the trial court was whether the accused knew that there was dagga in the vehicle driven by him.⁴¹³ His knowledge of dagga was therefore potentially relevant. A previous conviction for possession of dagga was admitted in cross-examination. On the facts, however, Hefer JA held that the accused’s previous conviction did not necessarily lead to the conclusion that the appellant knew what dagga smelt like. The facts of the previous conviction (for possession of dagga) were unknown and based upon the extended definition of “possession”. Therefore, it could not be concluded that he had physically handled dagga before, or had any other contact with it that would indicate that he knew what it smelt like.

Hefer JA cited *R v Solomons*,⁴¹⁴ which he regarded as a good explanation of the common law concerning the admissibility of previous convictions:

“It is clear that evidence of criminal actions other than those laid in the indictment is inadmissible against an accused merely to show a criminal propensity. But it is, I think, equally well established ... that evidence *which is relevant to an issue before the Court* is

⁴⁰⁶ 1959 (4) SA 266 (E).

⁴⁰⁷ *R v Gibixegu* 1959 (4) SA 266 (E) 270B. The court specifically left open the question “whether facts, contradictory to the evidence of an accused person at his trial, short of a confession, may be used to impeach his testimony”.

⁴⁰⁸ *R v Gibixegu supra* 270H. Emphasis added.

⁴⁰⁹ For instance, when the inadmissible evidence is adduced by the accused in support of an aspect of his case. See *R v Bosch* 1949 (1) SA 548 (AD).

⁴¹⁰ 1980 (3) SA 1041(BSC).

⁴¹¹ *S v Molautsi* 1980 (3) SA 1041(BSC) 1042E.

⁴¹² 1987 (3) SA 499 (A).

⁴¹³ About 620 kg was found in the vehicle he was driving!

⁴¹⁴ 1959 (2) SA 352 (A).

not rendered inadmissible merely because it tends to show the commission by the accused of other crimes”.⁴¹⁵

The Criminal Procedure Act,⁴¹⁶ in s 197(d) – cited in Afrikaans by the court in *Mavuso*⁴¹⁷ – states as follows:

“An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted of or has been charged with any offence other than the offence with which he is charged, or that he is of bad character, unless –

(a)...

(b)...

(c)...

(d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged”.

It is submitted that, had the previous conviction for possession of dagga been relevant to the facts in *Mavuso*, it might well have been admissible as evidence for the limited purpose of discrediting the accused’s testimony, but not as proof of guilt or as proof of a criminal propensity.

A change of circumstances could justify reversing a ruling on the admissibility of evidence. It was submitted above that once evidence is ruled inadmissible, it generally remains inadmissible for all purposes. But in *R v Solomons*,⁴¹⁸ the court was confronted with an unexpected change in the accused’s testimony, allowing the admissibility of certain evidence to be reconsidered. The accused was on trial for murder. The prosecution had, during its case in chief, led evidence from an eyewitness who testified that the accused was in possession of a knife on the evening in question.⁴¹⁹ Over and above this testimony, the crown also sought to lead evidence from the same witness that the accused had earlier in the same evening committed two other knife-assaults in the presence of the witness. The defence objected. The court excluded the testimony of the knife-assaults, because of its “extremely

⁴¹⁵ *S v Mavuso* 1987 (3) SA 499 (A) 504E-F; *R v Solomons* 1959 (2) 352 (AD) 361. Emphasis in *Mavuso*.

⁴¹⁶ Act 51 of 1977.

⁴¹⁷ *S v Mavuso supra* 504G-H.

⁴¹⁸ *Supra*.

⁴¹⁹ The deceased was killed with a knife.

great prejudice to the accused”⁴²⁰ and because the court had already received the testimony that the accused was in possession of a knife on the evening in question.

However, during cross-examination by the crown, the accused denied possessing a knife on the evening in question. This denial changed the circumstances of the case, making the evidence previously excluded directly relevant to the accused’s possession of the knife, his alleged alibi and his contention that he was not in the presence of the witness. The trial judge intervened and held that “the unanticipated denial by the accused of being in possession of a knife on the evening in question caused one of the grounds whereupon the previously tendered evidence had been excluded to fall away”.⁴²¹ Consequently, “[c]rown counsel was now entitled to put questions to the accused to show that he was *not speaking the truth* in regard to a knife”.⁴²² The trial judge had specifically put to the crown that it might lead evidence to attack the credibility of the accused’s testimony, but not to controvert it.⁴²³ In other words, the inconsistency could be shown, but the contents of the contradicting evidence could not be proved. This case illustrates another important matter: At common law, a ruling on the admissibility of evidence is of an interlocutory nature and therefore subject to review during the trial. There is no reason why a ruling on admissibility under the Constitution would not similarly be susceptible to alteration during the trial.⁴²⁴

When comparing the *Solomons* case to the minority opinion in *Riddell v Rhay*,⁴²⁵ another question is raised: Once the inconsistency is proved, which version is really the truth?⁴²⁶ The aim of cross-examination is to test, or discredit the opposing party’s testimony – often by showing inconsistencies either with their own previous statements or with that of other witnesses. And if a party is shown to be inconsistent in his testimony, it makes the other party’s version that much more believable and the court would normally accept that version as the truth. Consider the following statement by the trial judge:

⁴²⁰ Ogilvie Thompson JA, citing from the record, in *R v Solomons supra* 357A-B.

⁴²¹ *R v Solomons supra* 357G.

⁴²² *R v Solomons supra* 357H. Emphasis added.

⁴²³ *R v Solomons supra* 358A-B: “Ek het gesê jy is toegelaat om te kruisverhoor in verband met die geloofwaardigheid van die mes. Hy sê hy het nie [‘n] mes gehad nie. Ek weet van die getuienis wat voor my lê wat die teoorgestelde sal bewys. U moet geregtig wees om dit aan hom te stel om te wys dat hy nie die waarheid daaromtrent praat nie. Dit is ‘n ander vraag of jy daarna sal toegelaat word om dan getuienis te lei om te weerlê wat hy gesê het. Dit is heeltemal iets anders”. Emphasis added.

⁴²⁴ *S v M* 2003 (1) SA 341 (SCA) 361C.

⁴²⁵ 404 US 974 (1971). See § 3 2 3 5 *supra*.

⁴²⁶ At this stage of the trial, this question is no longer central to the issue and therefore need not be answered. In fact, the prosecution is precluded from leading evidence about the contents of any previously excluded statements. But see § 3 3 1 3 *supra*.

“I am ruling now definitely that the Crown can put these questions in order to show that the witness [accused] is not telling the truth about the possession of the knife... It will be another matter whether it can be controverted”.⁴²⁷

This simply means that by showing someone is lying, one’s own version becomes more probable. But this is still a far cry from *proving* someone’s guilt.⁴²⁸

4 1 2 SECTION 39(1)(C) OF THE CONSTITUTION: RELIANCE ON FOREIGN PRECEDENT

In *Park-Ross and Another v The Director, Office for Serious Economic Offences*⁴²⁹ Tebbutt J made the following observations regarding the usefulness of relying upon the experiences of other jurisdictions when applying the Bill of Rights:

“While it is indeed so that section 35(1) of the [interim] Constitution provides that in interpreting the provisions of Chapter 3 thereof, the Court may ‘have regard to comparable foreign case law’,⁴³⁰ this should be done with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being... [O]ne must be wary of the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting. The South African constitution must be interpreted within the context and historical background of the South African setting”.⁴³¹

It is submitted that this assertion is as applicable under the present Constitution as it was under the interim Constitution.

Although a lot can be learned from decisions of the Supreme Courts of the United States of America and Canada, the lesson – especially in the case of the United States – is often one of what *not* to do. It is evident from discussions in Chapters Two and Three that one should wade through the quagmire of contradictory judgments in the United States with the utmost caution.

⁴²⁷ *R v Solomons supra* 358C-D. See n 423 *supra*.

⁴²⁸ However, see §§ 3 2 3 5 & 3 3 1 3 *supra*.

⁴²⁹ 1995 (2) BCLR 198 (C) 208.

⁴³⁰ The present Constitution contains essentially the same provision in s 39(1)(c).

⁴³¹ *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) 208, citing Froneman J in *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) 633F-G. Emphasis added. See also *S v Minnies* 1991 (1) SACR 335 (Nm) 370g-h.

Underlying the notion to not simply take foreign rulings at face value, are the numerous procedural and societal differences that exist between the South African and two North American jurisdictions. Chief amongst these is the fact that the South African criminal justice system does not employ juries.⁴³² In a jury trial, a judge has no control over the factual deliberations – apart from providing limiting instructions when necessary during the trial and a summary of the facts at the end. The jury alone deliberates on the verdict.⁴³³ In South Africa, judges and magistrates either consider the verdict themselves, or together with one or two assessors.⁴³⁴ Either way, the presiding judicial officer is always involved in determining the guilt of the accused. This way, assessors are continually guided by the presiding judicial officer, who ensures that they are aware of the rules applicable to the evaluation of evidence and apply them correctly. Moreover, the presence of the judicial officer reliably ensures that the assessors consider evidence only for the purpose for which it had been admitted.⁴³⁵

It is submitted that in the light of the above, the South African system can afford to be more tolerant towards admitting limited purpose evidence. The risk of evidence being interpreted incorrectly is less than in systems that rely solely on laypersons to interpret the evidence.

In *Pillay v S*⁴³⁶ another difference came to light. Scott JA, in a minority opinion, pointed out that while decisions of the Canadian Supreme Court can be useful in interpreting s 35(5) of the Constitution, the range of orders available to each court differed. According to Scott JA, for the minority, “[i]t should also be borne in mind that by reason of the wide powers of the Canadian Supreme Court to order a retrial, a decision by that court to exclude evidence is less likely to result in the acquittal of a guilty person than a similar exclusion in South Africa”.⁴³⁷ Again, this seems to favour South African courts adopting a lenient approach towards the use of unconstitutionally obtained evidence for impeachment purposes. Either this, or courts should generally apply a less strict regime of exclusion than the Canadian courts.

⁴³² Although we have retained the essential structure designed for a trial by jury. See Schwikkard & Van der Merwe *Principles of Evidence* 2 ed (2002) 13.

⁴³³ § 3 2 3 5 *supra* illustrates the risk involved in letting a jury decide the facts on its own when limited purpose evidence is involved. See also Cleary (Ed) *McCormick on Evidence* 3 ed (1984) 513 & § 3 3 1 3 *supra*.

⁴³⁴ The Magistrates court Act 32 of 1944 s 34. Although knowledge of the law is not a requirement, it often happens that advocates or academics serve as assessors, especially in the High Courts.

⁴³⁵ Nonetheless, when two assessors are involved, they can overrule a judge. They must however furnish reasons for their decision, which juries do not have to do.

⁴³⁶ 2004 (2) BCLR 158 (SCA).

⁴³⁷ *Pillay v S* 2004 (2) BCLR 158 (SCA) 197. The US Supreme Court similarly has a wide range of powers to order a retrial. See *S v Makhathini* D 1997-11-21 Case no CC73/97 3.

Another important matter that must be taken into account is the fact that both the United States and Canada, as first-world countries, have much more experience adjudicating in a constitutional setting. South Africa, as a developing country, has had a workable Constitution for only ten years. Moreover, South Africa suffers from a rampant crime rate,⁴³⁸ fuelled by unemployment and other symptoms of “social structures” that are to a large extent not as well-developed as those of the USA and Canada.⁴³⁹ This leaves South African courts with the unenviable task of ensuring that the Constitution has the respect of the people by ensuring due process while at the same time trying to curb the crime wave.

In time, both seemingly contradictory objectives can be obtained.⁴⁴⁰ As long as the police strictly adhere to the dictates of the Constitution,⁴⁴¹ effective crime control is possible while ensuring due process for each accused. In this regard, the US Supreme Court’s analysis of the successes of the Federal Bureau of Investigations is informative:

*“Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay. A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states: ... ‘We can have the Constitution, the best laws in the land, and the most honest reviews by courts – but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually – and without end be violated... The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative’”.*⁴⁴²

⁴³⁸ The Constitutional court took judicial notice of the high crime rate in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) [152]. See also *Pillay v S supra* 159, 187, 198, 203.

⁴³⁹ *Park-Ross and Another v The Director, Office for Serious Economic Offences supra* 208.

⁴⁴⁰ Van der Merwe “Unconstitutionally Obtained Evidence: Towards a Compromise Between the Common Law and the Exclusionary Rule” 1992 *Stell LR* 173 184 argues that “the crime control model and the due process model are not necessarily rival models. Both models seek to vindicate the goals of substantive criminal law. But they endeavour to do so along different routes”.

⁴⁴¹ See *S v Makhathini supra*.

⁴⁴² *Miranda v Arizona* 384 US 436 (1966) 483-484. Emphasis added.

Additionally, the US Supreme Court analysed the experiences of other countries that “also [suggest] that the danger to law enforcement in curbs on interrogation is overplayed”.⁴⁴³ Significantly, the Judges’ Rules of England, as cited by the US Supreme Court, provide that:

“II. *As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence*”.⁴⁴⁴

It is up to the courts to watch over the activities of the police and ensure that due process prevails.⁴⁴⁵ But at the moment, courts would probably gain the respect of the people by letting as few criminals as possible go free because of “technicalities”.⁴⁴⁶ These considerations have all been taken into account by both the majority and the minority in *Pillay v S*,⁴⁴⁷ and rightly so.

Lastly, with s 35(5) of the Constitution modelled on s 24(2) of the Canadian Charter, extensive importing of Canadian principles into South African judgments is very tempting. However, there is a world of difference in the Canadian interpretation of the word “would”, which Canadian courts generally substitute for “could”. This interpretation is more in line with the French text of s 24(2) and is more lenient to the accused, by requiring exclusion when disrepute is only a possibility instead of a certainty. It is submitted that South African courts should continue to interpret “would” as “would” – in other words, evidence must be excluded only when unfairness or detriment is a certainty. Had the intention of the framers of the Constitution been different, they certainly would have followed the interpretation of the Canadian courts. This means that, *ceterus paribus*, exclusion will less often be required in a South African court than in a Canadian court. Consequently, evidence would more often be admitted into the case in chief, reducing the probability that admission of evidence for impeachment alone will be required.

Although helpful – often as an indication of which difficulties to avoid – one should not overly rely on foreign jurisdictions to provide answers to the specific issues in South Africa.

⁴⁴³ *Miranda v Arizona supra* 486. The countries mentioned by the Supreme Court are: England, Scotland, India, Ceylon and the USA’s own Uniform Code of Military Justice.

⁴⁴⁴ *Miranda v Arizona supra* 487n57.

⁴⁴⁵ See §§ 4 2 2 2 5 & 4 2 2 2 6 *infra*. See also n 585 *infra*.

⁴⁴⁶ *S v Mphala* 1998 (1) SACR 654 (W) 657G. See n 6 *supra*.

⁴⁴⁷ *Supra* 187, 198.

4 2 SECTION 35(5): IMPEACHMENT

4 2 1 INTRODUCTION: EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE

The enactment of the Constitution and specifically the introduction of s 35(5) did not render obsolete the common and statutory law regarding the admissibility of evidence in South Africa. Therefore, in principle, relevance remains the basic test for admissibility.⁴⁴⁸ All that s 35(5) does is to add additional requirements for the admissibility of evidence that resulted from violations of the Bill of Rights.

4 2 1 1 The threshold

Section 35(5) is only concerned with “[e]vidence obtained in a manner that violates any right in the Bill of Rights”. Therefore, it is only activated once a court determines that a violation took place. This is sometimes referred to as the threshold test.⁴⁴⁹ Therefore, the admissibility of all evidence obtained illegally or improperly,⁴⁵⁰ but not in violation of the Bill of Rights,⁴⁵¹ must be determined according to the common and statutory law. However, Schwikkard and Van der Merwe warn:

“[I]n the exercise of its common law discretion, the court should ensure that the constitutional right to a fair trial is not jeopardized by the admission of improperly or illegally obtained evidence. It has rightly been pointed out that s 35(5) ‘was intended to add to and not to detract [detract] from the constitutional right to a fair trial’.”⁴⁵²

Likewise, De Waal *et al* “disagree with the cases in which it is suggested that s 35(5) both defines and circumscribes the accused’s right to a fair trial when the admissibility of evidence is in issue”.⁴⁵³

⁴⁴⁸ See § 2 3 1 *supra*.

⁴⁴⁹ Schwikkard & Van der Merwe *Principles* 202.

⁴⁵⁰ Until now the phrases “improperly obtained evidence”, “illegally obtained evidence” and “unconstitutionally obtained evidence” have been used interchangeably in this work, all referring to evidence obtained in violation of rights in a Bill of Rights. In this paragraph, however, “improperly obtained” and “illegally obtained” refer specifically to evidence obtained in violation of the common law or statutory law – but not in violation of any right in the Bill of Rights. However, it is argued that the “spirit” of the Bill of Rights requires the rights therein to be liberally construed, effectively assimilating many, if not all, of the common law and statutory rights that could be violated in such a way as to render the resulting evidence “improperly” or “illegally” obtained.

⁴⁵¹ Courts must however not merely interpret the Bill of Rights to the letter when determining whether it had been violated, but should have regard for the “spirit” of the Bill of Rights. See *S v Mphala* 1998 (1) SACR 388 (W) 399e.

⁴⁵² Schwikkard & Van der Merwe *Principles* 202-203, citing Trengrove in Chaskalson (Ed) *et al Constitutional Law of South Africa* (1996 revision service 2 of 1998).

⁴⁵³ De Waal, Currie & Erasmus *The Bill of Rights Handbook* 4 ed (2001) 658, referring to *S v Mphala supra* 398i-399a; *S v Naidoo* (1998) 1 All SA 189 (D).

The relevant paragraph of the judgment by Cloete J in *S v Mphala*,⁴⁵⁴ referred to by De Waal *et al*,⁴⁵⁵ reads as follows:

“Section 35(5) envisages the exclusion only of evidence obtained in an unconstitutional manner. That is a prerequisite for its operation. If evidence could be excluded even although it has been obtained without an infringement of the accused’s constitutional rights, on the basis that the admission of such evidence would unfairly infringe an accused’s right to a fair trial, s 35(5) would have been unnecessary. That section in my view both defines and circumscribes an accused’s right to a fair trial when the admissibility of evidence is in issue...”⁴⁵⁶

Cloete J however, continued:

“I find that *the failure by the investigating officer to inform the accused, before they waived their constitutional rights:*

- (a) that an attorney had been retained to represent them;
- (b) that the attorney was on his way to consult with them, and
- (c) that the attorney did not wish them to make any statement before such consultation had taken place,

has the effect that the evidence contained in the confessions was obtained in a manner which violated the rights conferred on the accused by those provisions of s 35(1) and (2) of the Constitution... I do not suggest that a police officer is obliged to give advice to an accused; but I do find that a police officer is not entitled to prevent such advice being given. That is effectively what happened in this matter. In addition it seems plain to me that when the accused were for practical purposes asked to waive their constitutional rights, their consent to do so had to be an informed consent. *They were as entitled to be informed of facts obviously relevant to the exercise of their election, as they were of the express provisions of the Constitution itself. There had to be compliance not only with the letter, but the spirit, of the Constitution”.*⁴⁵⁷

Schwikkard and Van der Merwe formulate the threshold test for activation of s 35(5) in the following terms:

“[I]s the objection to the admission of the evidence based upon the violation of a constitutional right (‘any right in the Bill of Rights’) *or the violation of a non-*

⁴⁵⁴ 1998 (1) SACR 388 (W).

⁴⁵⁵ De Waal *et al* *Bill of Rights Handbook* 658. See n 453 *supra*.

⁴⁵⁶ *S v Mphala supra* 398i-399a.

⁴⁵⁷ *S v Mphala supra* 399b-399e. Emphasis added. See § 2 2 4 *supra*. But see *Moran v Burbine* 475 US 412 (1986).

constitutional right (for example, where a statute has conferred ‘more extensive rights’⁴⁵⁸ on the accused than those which are explicitly or impliedly found in the Bill of Rights)?⁴⁵⁹

It is submitted that Cloete J’s reading of the threshold test of s 35(5), coupled with that of Schwikkard and Van der Merwe,⁴⁶⁰ leave the threshold low enough to effectively eliminate the theoretical possibility that the constitutional right to a fair trial might be jeopardised by the admission of “improperly or illegally” obtained evidence. In *S v Soci*,⁴⁶¹ the court similarly gave the threshold test a very wide – if not *low* – application although based upon the notion that a causal connection between the violation and the evidence need not exist. In this way, the threshold test is interpreted purposefully to give effect to the spirit of the Bill of Rights.

Moreover, the remaining common law and statutory rights, not assimilated into the “spirit” of the Bill of Rights, cannot be as important as the rights found in, or associated with, the Bill of Rights. Consequently, admission of any evidence obtained in violation of these remaining rights will hardly jeopardise the right to a fair trial, or be detrimental to the administration of justice, effectively rendering the issue of common law exclusion based on fairness moot.⁴⁶²

4 2 1 2 Trial fairness

“At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted”.⁴⁶³

Once s 35(5) has been activated – the evidence in issue had been obtained in violation of a right in the Bill of Rights – a court must determine whether admission of that evidence would result in unfairness to the accused, or would otherwise be detrimental to the administration of justice.

⁴⁵⁸ De Waal et al *Bill of Rights Handbook* 658. One should be careful not to end up in the same quagmire as the US Supreme Court did with its *Miranda* prophylactic.

⁴⁵⁹ Schwikkard & Van der Merwe *Principles* 202. Emphasis added.

⁴⁶⁰ Schwikkard & Van der Merwe *Principles* 202.

⁴⁶¹ 1998 (2) SACR 275 (E) 293c-293i.

⁴⁶² It is submitted that this reading of the threshold test would produce essentially the same result as that suggested in *S v Kidson* 1999 (1) SACR 338 (W) 349c-e and is more in line with the intention of s 35(5).

⁴⁶³ *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC) 196A-B. But see the qualification at the end of this §.

It must be noted that the words “or otherwise” in s 35(5) indicate that the so-called first leg of the inquiry in s 35(5) – “would render the trial unfair” – is actually just a specific manifestation of the (so-called) second leg of the admissibility test – “be detrimental to the administration of justice”. In other words, if a court determines during the “fairness” phase of the inquiry that the admission of unconstitutionally obtained evidence “would render the trial unfair”, it means that admission of that evidence would also “be detrimental to the administration of justice”, because an unfair trial *is* detrimental to the administration of justice.⁴⁶⁴ Even if this is not so, exclusion in terms of s 35(5) can stand on only one leg.⁴⁶⁵

Quoting from *S v Zuma*,⁴⁶⁶ the Constitutional Court in *S v Dzukuda*,⁴⁶⁷ defined the right to a fair trial as follows:

“[A]n accused’s right to a fair trial under section 35(3) of the Constitution is a comprehensive right and ‘embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force’ It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the sub-section and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on section 35(3) develops”.⁴⁶⁸

It follows that the right to a fair trial is concerned with more than just the admissibility of evidence. But as submitted in § 4.2.1.1 above, when admissibility of evidence is in issue, the right to a fair trial can only be jeopardised by the admission of evidence that was *unconstitutionally* obtained. This does not mean that the right to a fair trial is only at risk when the admissibility of evidence is at issue. For instance, being tried *in absentia*⁴⁶⁹ violates the right to a fair trial and so does being tried for an offence for which the accused had previously been acquitted or convicted.⁴⁷⁰ However, these rights in themselves, rarely, if ever, have anything to do with the admissibility of evidence.

⁴⁶⁴ *S v Naidoo supra* 233-234.

⁴⁶⁵ Section 35(5) requires exclusion even if only one of the two legs of the test is implicated.

⁴⁶⁶ 1995 (2) SA 642 (CC).

⁴⁶⁷ 2000 (11) BCLR 1252 (CC).

⁴⁶⁸ *S v Dzukuda* 2000 (11) BCLR 1252 (CC) [9], citing *S v Zuma* 1995 (2) SA 642 (CC) [16]. See also *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 [22]; *S v Ntuli* 1996 (1) SACR 94 (CC) 95i-96e.

⁴⁶⁹ Section 35(3)(e).

⁴⁷⁰ Section 35(3)(m).

When would admission of unconstitutionally obtained evidence render the trial unfair? In *S v Soci*,⁴⁷¹ a case that dealt with the admissibility of “self-incriminatory acts”, the court held that the distinction is based upon prejudice.⁴⁷² Erasmus J stated:

“[T]he presence or absence of prejudice to the accused *as well as the nature and degree thereof*, impacted on the question of whether to exclude the evidence in the interests of ensuring a fair trial. The question of prejudice is in my view inseparable from the question of fairness, in that a trial cannot be completely fair where the accused is in any way prejudiced; but, on the other hand, the trial can hardly be unfair where there is no prejudice. I find therefore that the presence or absence of prejudice is relevant to the question of a fair trial”.⁴⁷³

What causes prejudice? In this regard, the admission of evidence resulting from violations of the accused’s trial rights would be more prejudicial to the accused than a violation of other rights in the Bill of Rights. Rights like the right to legal representation,⁴⁷⁴ the right to silence⁴⁷⁵ and the privilege against compelled self-incrimination,⁴⁷⁶ are all primarily aimed at protecting the right to a fair trial. Therefore, admission of evidence obtained in violation of any of these rights – or any other right in the collection of rights that comprise the right to a fair trial – would seriously prejudice the accused in his defence. Depending on the nature and degree of the prejudice, an unfair trial will be the result.

Closely linked to the nature of the right is the nature of the evidence that resulted from the violation.⁴⁷⁷ The Canadian Supreme Court has come to the conclusion that admission of real evidence (non-constitutive evidence), which exists “irrespective of Charter violations”, will “rarely render the trial unfair”.⁴⁷⁸ In South Africa, the courts have – correctly, it is submitted – adopted this approach: Real evidence, which normally exists independently of the violation, “usually possesses an objective reliability ... [that] does not ‘conscript the accused against

⁴⁷¹ *Supra*.

⁴⁷² See also *S v Nombewu* 1996 (2) SACR 396 (E).

⁴⁷³ *S v Soci* 1998 (2) SACR 275 (E) 294a-b, citing *S v Nombewu supra* 420i-422f. Emphasis added.

⁴⁷⁴ Section 35(3)(f). In America, the 6th Amendment. In Canada, s 10(b) of the Charter (Even though there is no explicit mention of *trial counsel* – s10 contains the rights of arrested and detained persons – this is surely implied in s 10(b)).

⁴⁷⁵ Section 35(3)(h). In America the *Miranda* rules afford arrested persons this right with their subsequent trial in mind. In Canada, s 11(c) does the same.

⁴⁷⁶ Section 35(3)(j). In America, the 5th Amendment. In Canada, s 11(c).

⁴⁷⁷ See §§ 2 3 2 1 & 3 2 2 *supra*.

⁴⁷⁸ *R v Jacoy* (1988) 38 CRR 290 (SCC) 298; *R v Collins* (1987) 56 CR (3d) 193 (SCC) § 37. See also *R v Stillman* (1997) 1 SCR 607 (SCC) §§ 72-80.

himself” in the manner of a confessional statement”.⁴⁷⁹ Therefore, admission of unconstitutionally obtained real evidence rarely violates an accused’s (fair) trial rights. Consequently, its admission “may operate unfortunately for the accused, but not unfairly”.⁴⁸⁰ In the terms of *S v Soci*,⁴⁸¹ real evidence does not prejudice the accused’s right to a fair trial like testimonial communications, which were come by as a direct result of the violation.

Finally, a court must consider the effects of exclusion. Determining the fairness of the trial is not a one sided inquiry. The fairness towards the prosecution and the effect of exclusion on the administration of justice should also be taken into account. These considerations are particularly important when the charge against the accused is serious and the violation of little significance. However, “if the admission of the evidence would result in an unfair trial [to the accused], the seriousness of the offence [or any other factor] would not render the evidence admissible”.⁴⁸²

At this point, it becomes clear that the oft-cited phrase from *Key v Attorney-General, Cape Provincial Division*⁴⁸³ that introduced this discussion of trial fairness needs to be qualified: If, after taking into account the relevant considerations, including possible unfairness to the prosecution, a court concludes that admission of the evidence would result in an unfair trial to the accused, that evidence *must* be excluded. Any subsequent unfairness that the prosecution suffers from exclusion would *never* be enough to tip the balance back towards admitting the evidence.

4 2 1 3 Detriment to the administration of justice

If a court has already determined that admission of evidence obtained in violation of the Bill of Rights would result in an unfair trial, the evidence must be excluded. There would consequently be no reason to continue the inquiry into the effect on the administration of

⁴⁷⁹ *S v M supra* 362A, citing *R v Holford* (2001) 1 NZLR 385 (CA) 390. See also *S v Naidoo supra*; *Mkhize v S* (2000) JOL 6155 (W).

⁴⁸⁰ Chaskalson (Ed) et al *Constitutional Law of South Africa* 2 ed (2002-) 26–19, citing *R v Wray* (1970) 11 DLR (3d) 673.

⁴⁸¹ *Supra*.

⁴⁸² *S v Naidoo supra* 232, citing *R v Jacoy supra* 298. See also *R v Stillman supra* § 72.

⁴⁸³ 1996 (4) SA 187 (CC) 196A-B. See n 463 *supra*. Reference to this part of the ruling in *Key* was made in, among others, the following cases: *S v Orrie* CPD 14-10-2004 Case no SS 32/2003 18; *Mkhize v S supra* 6; *Pillay v S supra* 199; *S v Dube* 2000 (2) SA 583 (N) 608E; *S v Khan* 1997 (2) SACR 611 (SCA) 618b-c; *S v Kidson supra* 352i; *S v M supra* 361H; *S v Mphala supra* 399f; *S v Mphala supra* 657b-c; *S v Soci supra* 295a; *S v Thapedi* (2002) JOL 9372 (T) 17.

justice, because an unfair trial *is* detrimental to the administration of justice.⁴⁸⁴ In practice, this would lead to essentially the same result as in Canada where, once it is determined that admission of unconstitutionally obtained evidence would render the trial unfair, the enquiry is not taken any further.⁴⁸⁵

It is however not necessary for a court to determine the admissibility of evidence first in terms of fairness and then, if necessary, in terms of the effect of admission on the administration of justice. A court may start its inquiry by determining the effect of admission on the administration of justice.⁴⁸⁶ And a court need not answer both questions in the affirmative before exclusion of evidence is mandated: Either requirement on its own mandates the exclusion of evidence.

In *S v Soci*⁴⁸⁷ the court defined the (so-called) second leg of the s 35(5)-discretion and distinguished it from the trial fairness leg as follows:

“The court has the power (indeed duty) to exclude evidence if the admission thereof would bring the administration of justice into disrepute, even where there is no causal connection between the constitutional infringement and the subsequent self-incriminatory acts by the accused. It seems to me that the question of prejudice lies at the very basis of the distinction between the two requirements in ss (5)”.⁴⁸⁸

Therefore, admission of evidence that would not in any way be unfair, could still be detrimental to the administration of justice. This is because the detriment test is much wider than the fairness test: Trial fairness is determined only upon the facts of the case and concentrates on the short-term effects of admission of evidence with prejudice to the accused the central issue;⁴⁸⁹ other factors are only considered in relation to the accused’s right to a fair trial. In contrast, the effect of admission on the administration of justice requires both short-term and long-term factors to be considered, which include more than just the facts of the case. And the accused’s position is only one of many valid considerations taken into account alongside each other.

⁴⁸⁴ *S v Naidoo supra* 233-234. Even if this were not so, s 35(5) can stand on only one leg. See n 465 *supra*.

⁴⁸⁵ See § 2 3 2 1 *supra*.

⁴⁸⁶ But see *S v Orrie supra* 20: “The initial enquiry ... must, however be, whether the admission of the evidence obtained in violation of an accused’s constitutional rights, would render the trial unfair”. And, “the first issue in the present matter must be whether the shortcomings in the warning or communication to the accused rendered his trial unfair”.

⁴⁸⁷ *Supra*.

⁴⁸⁸ *S v Soci supra* 294c-d.

⁴⁸⁹ *S v Soci supra* 293i-294a; *S v Orrie supra* 20.

The administration of justice is divisible into the seemingly opposing considerations of crime control⁴⁹⁰ and due process. Due process, as a subdivision of the administration of justice, has at least two facets: First, the concerns at play in a specific trial, or the short-term facet. Second, the cumulative effect that the outcome of each additional case has upon the administration of justice in the long term.⁴⁹¹ This implies that these two facets are interwoven – the manner in which a court balances the different considerations in a specific case, adds to a trend that also has an effect on due process in the long term.

Nonetheless, the short-term considerations can be in conflict with the long-term considerations. This is because short-term due process takes into account only those considerations that are important to a specific case. Of these, fairness to the accused is very important, as well as the consequences that the accused is faced with upon conviction. The consequence faced by the accused is of course the motivation for the defence to attack the admissibility of any evidence. However, once the inquiry focuses on the effect of admission on the administration of justice, determination of the fairness to the accused is no longer the ultimate goal of the enquiry and the fairness consideration takes on a reciprocal nature.

In the short term, the importance of the interest of the community and victims to have a guilty person convicted would vary according to the nature of the crime committed.⁴⁹² But in the long term, the importance of bringing criminals to book must be influenced by the state of criminal activity in society and the need to effectively prosecute and prevent it. In the short term, the conduct of the police during their investigation is also of some importance, but mostly only in cases of serious violations on their part, which in turn affect the fairness of the trial.

In the long term, systemic deterrence of unconstitutional police conduct becomes more important. The disciplining function of the courts was emphasised in *S v Mphala*.⁴⁹³ Cloete J excluded the accused's confessions, because they resulted from the deliberate violations of the accused's rights in terms of s 35(1) and (2) of the Constitution.⁴⁹⁴ It follows that the short-term and long-term elements of the administration of justice are particularly intertwined where the focus is on deliberate violations of fundamental rights. Exclusion on account of

⁴⁹⁰ See § 4 2 2 2 7 *infra*. See n 440 *supra*.

⁴⁹¹ In *R v Collins supra*, the Canadian Supreme Court favoured an approach based upon the long-term effect on the administration of justice. See § 2 3 2 3 *supra*.

⁴⁹² *S v Dube supra* 608F. But some crimes, like not stopping at a red traffic light, do not have victims.

⁴⁹³ *Supra* 400b. See § 4 2 2 2 5 *infra*.

⁴⁹⁴ The court found that even though the investigating officer complied with the "letter" of the Constitution by informing the accused of all their rights, he still violated the "spirit" of the Bill of Rights by not furnishing them with all relevant information to make an informed decision about waiving their rights.

deliberate violations is done on a case-by-case basis, not so much as a remedy, but as a means of ensuring future compliance with the Constitution.⁴⁹⁵ Nonetheless, deliberate violations of fundamental rights often render the trial unfair, which would adequately justify exclusion in the short term.

4 2 2 *S v MAKHATHINI*

4 2 2 1 Introduction: The case

At the trial-within-the-trial of *S v Makhathini*,⁴⁹⁶ South African jurisprudence regarding unconstitutionally obtained evidence reached a crossroad: The question arose whether unconstitutionally obtained evidence previously excluded may nonetheless be used to impeach the credibility of the accused.⁴⁹⁷ One option – to follow the lead of the United States⁴⁹⁸ – was offered the court, but the court (perhaps wisely) declined to go down that road.

In disallowing the impeachment of the accused's testimony, a matter that is at least partially procedural, Hurt J pointed out that "one must bear in mind that the procedure in our courts is somewhat different from that in the United States".⁴⁹⁹

It is not clear from this judgment exactly how the court exercised its discretion to exclude the impugned evidence from the state case in the first place, but this much is clear: The rights of an accused person as enshrined in s 35 of the Constitution are just as applicable to an accused-to-be. In other words, the police may not "circumvent the rights enshrined in the Constitution simply by deferring the decision to arrest or detain".⁵⁰⁰ Therefore, even a suspect must be informed of his rights before any information is elicited from him.⁵⁰¹

By refusing to follow the rationale of *Harris*, the court in essence adopted the rationale, in its strict form, of the majority in *Miranda v Arizona*⁵⁰² that evidence excluded for being obtained in violation of the Bill of Rights, shall not be used at all. This is not surprising,

⁴⁹⁵ *S v Makhathini supra* 4.

⁴⁹⁶ D 1997-11-21 Case no CC73/97.

⁴⁹⁷ However, cross-examining of an accused by a co-accused using inadmissible statements had already been allowed a month earlier in *S v Aimes* 1998 (1) SACR 343 (C).

⁴⁹⁸ The prosecution relied on *Harris v New York* 401 US 222 (1971).

⁴⁹⁹ *S v Makhathini supra* 3. See also n 437 *supra*.

⁵⁰⁰ *S v Makhathini supra* 2; *S v Orrie supra*; *S v Sebejan* 1997 (8) BCLR 1086 (W) 1096I-J; *S v Ndlovu* 1997 (12) BCLR 1785 (N); *S v Van der Merwe* 1998 (1) SACR 194 (O); Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* (2002) 631. See n 41 *supra* & § 4 2 1 1 *supra*.

⁵⁰¹ This is also the position in England. See n 444 *supra*, and the text it accompanies.

⁵⁰² 384 US 436 (1966).

given that s 35 of the Constitution includes essentially all the rights created by *Miranda*. However, even today the US Supreme Court is divided on the question whether these rights themselves are constitutional or merely prophylactic in nature. By including these rights in the Bill of Rights, the framers of the SA Constitution have avoided the nearly forty-year-old debate in the United States from spilling over into our courts. Hurt J reinforced the apparent parallel to *Miranda* in the following statement, which also emphasises the need to deter official misconduct:

“It seems to me that the solution to the avoidance of contradictory statements being made by the accused and not being admissible before the Court is in the hands of the police themselves, and once the police get into the habit of observing the requirements of the Constitution meticulously, the type of problem which perhaps has arisen in this case may disappear altogether”.⁵⁰³

This means that, regardless of South Africa being plagued by serious crime, the police should not expect the courts to do their work for them, or turn a blind eye to unconstitutional conduct. At least not yet, considering that our constitutional law and the application of the Constitution are still in relative infancy, and the “fundamental importance that must be attributed to the requirement that accused persons [and accused-to-be] be fully apprised of their rights”.⁵⁰⁴ For the time being, when the effect upon the administration of justice is determined, crime control takes a second place to due process.⁵⁰⁵

From his comments in *Makhathini*, Hurt J seemed to consider due process towards the accused (short-term) both as an end in itself and as a means to ensure that police toe the line in the long run.⁵⁰⁶

In determining the importance of the various considerations at play when applying s 35(5), South African courts should not overly rely on the judgments of the Canadian Supreme Court. Section 24(2) is concerned with the effect that admission of the impugned evidence would have on the “repute” of the administration of justice in the eyes of “the well-informed member of the community”.⁵⁰⁷ It seems that the test of s 35(5) of the SA Constitution is less

⁵⁰³ *S v Makhathini supra* 4. See also *S v Soci supra*.

⁵⁰⁴ *S v Makhathini supra* 4.

⁵⁰⁵ See § 4 2 2 2 7 *infra*.

⁵⁰⁶ *S v Makhathini supra* 4.

⁵⁰⁷ *R v Calder* (1996) 46 CR (4th) 133 (SCC) § 34, as quoted by Cory & Iacobucci JJ in *R v Cook* (1998) 2 SCR 597 (SCC) § 76.

strict, or wider:⁵⁰⁸ Admissibility of evidence is dependant on its admission not being “detrimental to the administration of justice”.⁵⁰⁹ Anything that may cause detriment to the administration of justice, *including* disrepute, should be taken into account. It is submitted that the burden of the high crime rate upon society and the need to combat it effectively *must* be taken into account.

The court in *Makhathini* declined to “start tampering with, or restricting, the limits of admissibility of evidence given by accused persons to police by making adjustments to the procedures in the course of trial”.⁵¹⁰ This is perhaps in line with the Canadian position as laid down in *R v Calder*.⁵¹¹ The Canadian Supreme Court refused to admit for the limited purpose of impeachment, evidence that had previously been excluded. The court held that reopening the issue of admissibility would require a material change of the circumstances relating to the making of the order in the first place, and only in very limited circumstances would a change in the intended use of evidence, for that reason alone, “qualify as a material change of circumstances that would warrant reopening the issue”.⁵¹²

In *R v Solomons*⁵¹³ the court held as follows:

“Under cross-examination by counsel for the Crown, appellant denied that he had had any knife in his possession at any stage of the evening in question... [T]his unanticipated denial by the accused of being in possession of a knife on the evening in question caused one of the grounds whereupon the previously tendered evidence had been excluded to fall away, and that Crown counsel was now entitled to put questions to the accused to show that he was not speaking the truth in regard to a knife”.⁵¹⁴

This principle, not unknown to our courts under the common law, adapts easily to the constitutional environment we find ourselves in: If the circumstances of the case change materially, removing the reason⁵¹⁵ for excluding the evidence, the admissibility of the impugned evidence must be reconsidered. In determining what may constitute such a material change in circumstances, the common law is again useful. For instance, if the accused leads

⁵⁰⁸ See § 4 2 1 3 *supra*. See also the comments of Cloete J in *S v Mphala supra* 659h-j. He unfortunately chose to use the word “threshold”, confusing the requirements for exclusion with the real threshold test which activates s 35(5), namely whether a constitutional right had been violated in the first place.

⁵⁰⁹ Trial fairness is not mentioned, because it is just a specific manifestation of detriment to the administration of justice.

⁵¹⁰ *S v Makhathini supra* 4.

⁵¹¹ (1996) 46 CR (4th) 133 (SCC).

⁵¹² *R v Calder supra* § 35. It is perhaps worth noting that these circumstances have, to date, never materialised in Canadian jurisprudence.

⁵¹³ *Supra*.

⁵¹⁴ *R v Solomons supra* 357G-H. Emphasis added.

⁵¹⁵ Unfairness to the accused or detriment to the administration of justice.

character evidence inconsistent with the excluded evidence or attempts to discredit a state witness, the shield that the accused has against attack on his own credibility falls away. In constitutional terms, this means that the administration of justice or trial fairness might require admission of previously excluded evidence – or at least not prevent its admission – during cross-examination.

4 2 2 2 Principles of exclusion: The rationales behind *Makhathini*⁵¹⁶

“The exclusion of evidence illegally or improperly obtained has come to be seen as a means of disciplining law enforcement officers, maintaining integrity and public confidence in the courts, and protecting rights as well as to give effect to its original purpose, to avoid the risk of unreliability of evidence”.⁵¹⁷

4 2 2 2 1 Introduction

It is illustrated throughout this work that various reasons exist for a court to exclude, or include, unconstitutionally obtained evidence.⁵¹⁸ However, this does not mean that every rationale will always be applicable – it is clear that the Supreme Courts of both the United States and Canada favour some rationales to others. In the United States, the deterrence of official misconduct is the rationale of choice, with others only applicable when a court deems deterrence to have served its purpose. In Canada, courts are more concerned with the fairness of the trial and general repute of the administration of justice. This seems to indicate that every rationale can be relevant, but none on its own should be decisive. On which rationale(s) did the *Makhathini* court base its decision that once evidence has been excluded, its admission may not be reconsidered for impeachment purposes?

4 2 2 2 2 Reliability

In this regard, it is extremely important to bear in mind the difference between testimonial communications and real evidence:⁵¹⁹ On the one hand, “[c]onfessions forced from the

⁵¹⁶ The discussion is based in part on Mirfield *Silence, Confessions and Improperly Obtained Evidence* (1997) ch 2. See also Davies “Exclusion of Evidence Illegally or Improperly Obtained” 2002 *The Australian LJ* 170; Van der Merwe “Unconstitutionally Obtained Evidence” 1992 *Stell LR*.

⁵¹⁷ Davies “Exclusion of Evidence” *The Australian LJ* 170.

⁵¹⁸ See especially ch 1 & 2 *supra*.

⁵¹⁹ See § 3 2 2 1 *supra*.

suspect by the flattery of hope or the torture of fear ... [come] in a questionable shape and [are] undeserving of credit". On the other hand, real evidence speaks for itself and its probative value remains unaffected by the manner of its acquisition.⁵²⁰ The Supreme Court of Appeal in *S v M*⁵²¹ commented on the "objective reliability" of real evidence as follows:

"Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see, for example, *R v Jacoy*⁵²²) the reason being that it usually possesses an *objective reliability*. It does not 'conscript the accused against himself' in the manner of a confessional statement (*R v Holford*⁵²³)".⁵²⁴

The evidence at issue in *Makhathini* was of a testimonial nature; therefore, its reliability is closely connected to the manner in which it was elicited from the accused. However, the court never directly referred to the risk of unreliability of the statements as a basis for their exclusion. The only suggestion that reliability might play a role is found in *Harris v New York*⁵²⁵ and *Miranda v Arizona*,⁵²⁶ to which the court in *Makhathini* refers. Both cases held that unreliable, or untrustworthy, evidence may not be used, although both were only concerned with reliability as a factor in deterring (disciplining) official overreaching and the extent to which misconduct should be deterred.⁵²⁷ In any event, the court in *Makhathini* did not refer to these cases in such a way as to suggest that it considered reliability as the basis for exclusion in this case.

However, reliability as a requirement for admissibility of confessions at common law⁵²⁸ was specifically discussed in *S v Mphala*.⁵²⁹ Moreover, the court held that, even under the Constitution, the admissibility of evidence is still determined according to the common law. In other words, for the confessions at issue in *S v Mphala* to be admissible they still had to satisfy the requirements of s 217 of the Criminal Procedure Act.⁵³⁰ But, the Constitution

⁵²⁰ *Mirfield Improperly Obtained Evidence* 7.

⁵²¹ 2003 (1) SA 341 (SCA).

⁵²² (1988) 38 CRR 290 (SCC) 298.

⁵²³ (2001) 1 NZLR 385 (CA) 390.

⁵²⁴ *S v M supra* 362A-B. Emphasis added.

⁵²⁵ 401 US 222 (1971).

⁵²⁶ *Supra*.

⁵²⁷ See §§ 4 2 2 2 & 4 2 2 5 *supra*.

⁵²⁸ As regulated by s 217 of the Criminal Procedure Act 51 of 1977.

⁵²⁹ *Supra* 396g.

⁵³⁰ Act 51 of 1977.

added to the common law admissibility requirements when evidence is “obtained in a manner that violates any right in the Bill of Rights”.⁵³¹

This means that evidence that may be admissible under common law can still be excluded if its admission “would render the trial unfair or otherwise be detrimental to the administration of justice”.⁵³² For instance, in *S v Soci*⁵³³ the court found that the pointing out and the statement had been made freely and voluntarily by the accused,⁵³⁴ and that they were therefore technically admissible in terms of s 217 of the Criminal Procedure Act 51 of 1977. However, the admissibility of the pointing out and the statement was still open to a challenge based on the Constitution. And in *S v Mphala* the court was satisfied “that the State [had] discharged the onus of proving the requirements laid down in s 217 of the Criminal Procedure Act for the admission [of the impugned evidence]... But that [did] not conclude the matter”.⁵³⁵ The admissibility of the evidence still had to be tested against the provisions of the Constitution.

The admissibility of derivative evidence is similarly governed by s 218 of the Criminal Procedure Act⁵³⁶ and s 35(5) of the Constitution. Section 218 determines that otherwise admissible derivative evidence is admissible notwithstanding the fact that this evidence resulted from an inadmissible confession or pointing out.⁵³⁷ In other words, derivative evidence is admissible despite any violation of the accused’s rights unless its admission would have one of the consequences that would require its exclusion in terms of s 35(5). It follows that all s 218 does is to eliminate the possibility of a fruit-of-the-poisonous-tree doctrine in South Africa and give courts a discretion to admit the evidence, subject to the Constitution.⁵³⁸

4 2 2 2 3 *Self-incrimination*

“The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is ... now to be found in the

⁵³¹ See § 4 2 1 1 *supra*.

⁵³² Section 35(5). Emphasis added.

⁵³³ *Supra* 286c, 288e.

⁵³⁴ See also *S v Marx* 1996 (2) SACR 140 (W) 144a.

⁵³⁵ *S v Mphala supra* 396g.

⁵³⁶ Act 51 of 1977. See also Scott JA for the minority in *Pillay v S supra*.

⁵³⁷ See also *US v Patane* 159 L Ed 2d 667 (2004); Scott JA for the minority in *Pillay v S supra*.

⁵³⁸ *Pillay v S supra* 195.

maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer or in its popular English mistranslation ‘the right to silence’.⁵³⁹

The self-incrimination principle is closely connected to the principle of reliability. Moreover, as with reliability of evidence, the nature of the evidence determines to a large extent whether the accused had been compelled to incriminate himself.⁵⁴⁰ However, in this regard the different jurisdictions take different views of the privilege against compelled self-incrimination. In the United States, as in South Africa, the privilege protects the accused from being compelled to make a statement or a pointing out, while real evidence found as a result of a violation of the privilege would in most cases not be protected by the privilege. However, the US Supreme Court has muddled this distinction to some extent through numerous analogies between the Fourth and Fifth Amendments.⁵⁴¹

In contrast, the Supreme Court of Canada takes a wider approach to the question of self-incrimination. Canadian courts do not distinguish between different kinds of evidence on the basis of their nature (testimonial or real).⁵⁴² Rather, the focus is on the question whether the accused had been unconstitutionally conscripted to provide the evidence at issue. Therefore, real evidence that could not have been found without forcing the accused to reveal its whereabouts violates the privilege against compelled self-incrimination⁵⁴³ in the same manner that an improperly obtained statement would. An oft-cited example is *R v Burlingham*.⁵⁴⁴ The accused was unconstitutionally conscripted to reveal the location of the murder weapon at the bottom of a frozen lake. The police would never have found it without the accused’s unconstitutional participation. Consequently, both the statement revealing the location of the gun *and the gun itself* were excluded for being in violation of the principle against self-incrimination.

In South Africa, a pointing out by the accused is regarded as a testimonial communication, which is protected by the privilege against compelled self-incrimination. However, real evidence that was obtained as a result of a pointing out would normally not be treated as self-incriminatory. Consequently, even if the prosecution is not allowed to lead evidence of the pointing out, the evidence obtained as a result may still be linked to the accused in other

⁵³⁹ Lord Diplock in *R v Sang* 1980 AC 402 436, as cited in Mirfield *Improperly Obtained Evidence* 14.

⁵⁴⁰ See *S v M supra* 362A.

⁵⁴¹ *Agnello v United States* 269 US 20 (1925); *Mapp v Ohio* 367 US 643 (1961); *Walder v United States* 347 US 62 (1954). See generally §§ 3 2 2 & 3 2 3 *supra*.

⁵⁴² *R v Stillman supra*.

⁵⁴³ Often referred to as the “principle against self-incrimination”, because of its wider application. See *R v Stillman supra*.

⁵⁴⁴ (1995) 38 CR (4th) 265 (SCC).

ways. For example, on the facts of *Burlingham*, the gun may still be available to the prosecution in a South African court. While not being allowed to connect the gun to the accused by way of the pointing out, the prosecution would not be precluded from attempting to establish a connection by way of other non-self-incriminatory evidence, such as forensic evidence.

In *Makhathini*, the court specifically mentioned the right to remain silent⁵⁴⁵ and the right to legal representation⁵⁴⁶ as crucial to any inquiry regarding the admissibility of evidence used in cross-examination of the accused. In fact, the court regarded the rights enshrined in s 35 as “the starting point in relation to any inquiry as to what can and what cannot properly and fairly be put to a witness in cross-examination”.⁵⁴⁷

4 2 2 2 4 *Protection of constitutional rights*

The privilege against compelled self-incrimination is substantive in nature in the sense that it demands that no person may be forced to incriminate himself. Therefore compelling a person to make a statement does not violate the privilege against self-incrimination, but admission of that statement in criminal proceeding does.⁵⁴⁸ One can almost say it is a remedy in itself,⁵⁴⁹ considering that the privilege against compelled self-incrimination is a trial right that “enhance[s] the reliability of the truth-determining process”.⁵⁵⁰

In contrast, other fundamental rights, like the right to privacy, does not in themselves prevent the use of evidence obtained contrary to their mandates. Rather:

“Evidence seized in violation of the Fourth Amendment is excluded from a criminal trial not as a personal right of the criminal defendant but rather as a remedy for a wrong that is fully accomplished at the time the evidence is obtained”.⁵⁵¹

The so-called “protective principle” is purely remedial (and procedural) in nature. It aims to provide an effective remedy for violations of the accused’s rights by removing the prejudice that would result from admission of the resulting evidence. Prejudice must not be

⁵⁴⁵ Section 35(1)(a).

⁵⁴⁶ Sections 35(2)(b) & 35(3)(f).

⁵⁴⁷ *S v Makhathini supra* 3.

⁵⁴⁸ *Mirfield Improperly Obtained Evidence* 18. For this reason, a person may be compelled to make certain information known to the authorities in certain proceedings of a non-criminal nature. The privilege only requires that this information not be used to prosecute that person.

⁵⁴⁹ Having characteristics of both “primary” rules and the “secondary” rule. See n 553 *infra*.

⁵⁵⁰ *Dressler Understanding Criminal Procedure* 3 ed (2002) 63.

⁵⁵¹ *Stevens J for the minority in Michigan v Harvey* 494 US 344 (1990) 361, referring to *Stone v Powell* 428 US 465 (1976) 486; *United States v Calandra* 414 US 338 (1974) 348. See § 3 2 2 2 *supra*.

understood in the sense that the evidence tend to incriminate the accused, as state evidence normally does. Rather, the prejudice that must be remedied exists when admission of the evidence would impact negatively on the fairness of the trial or the administration of justice in general, given the manner in which it was acquired.⁵⁵²

At this point, it is useful to mention the distinction between “primary rules” and the “secondary rule”.⁵⁵³ The rules regulating pre-trial police powers (primary rules), like the right to privacy or silence, restricts the behaviour of police officials in their contact with persons suspected of committing crime. This means that evidence – even if reliable and highly probative – may not be sought at all costs and might consequently never be found because of the restrictions placed on the police’s pre-trial behaviour. It follows that none of these restrictions are newly imposed by the exclusionary rule (the secondary rule). The exclusionary rule merely enforces these restrictions. Therefore:

“A society whose officials obey the [primary rules] in the first place ... pays the same price as the society whose officials cannot use the evidence they acquired because they obtained it in violation of the [primary rules]. *Both* societies convict fewer criminals”.⁵⁵⁴

However, the protective principle only requires a remedy when a violation results in prejudice to the accused, or would be detrimental to the administration of justice. In *S v Mphala*⁵⁵⁵ the court held that even though the accused were required to take part in an identification parade without the presence of their lawyer, his presence would not have made any difference to their being identified as the perpetrators. Therefore, admission of the evidence of their identification did not detract from the fairness of the trial or the administration of justice. In *Mkhize v S*⁵⁵⁶ the court specifically referred to and applied the “no difference” principle of *Mphala*. The court held that the police’s non-compliance with the search warrant requirement made no difference, because even if they had applied for the warrant, nothing that the accused could legally have done would have prevented the discovery of the evidence in issue.

⁵⁵² See § 4 2 1 2 *supra* and the references therein to *S v Soci* *supra* for another look at prejudice.

⁵⁵³ Van Rooyen “Lead-in Paper: The Investigation and Prosecution of Crime” 1975 *Acta Juridica* 70 79.

⁵⁵⁴ Kamisar “‘Comparative Reprehensibility’ and the Fourth Amendment Exclusionary Rule” (1987) 86 *Michigan LR* 1 47-48, as cited in Van der Merwe “Unconstitutionally Obtained Evidence” 1992 *Stell LR* 194. Emphasis in the original.

⁵⁵⁵ *Supra* 660c.

⁵⁵⁶ *Supra* 8.

In *S v Makhathini*,⁵⁵⁷ Hurt J implied that the “spirit”⁵⁵⁸ of the Constitution extended the rights of arrested, detained and accused persons to “*protect a person who had not yet been formally arrested, detained or charged, but who is being questioned by the police with the intention of arresting, detaining or charging him*”.⁵⁵⁹ It becomes clear that, in the opinion of the court, *effective protection* against infringement of the rights in the Constitution is crucial. For this reason, remedies as extreme as the exclusion of the “fruits” of conduct that prejudice the accused is called for.

By siding with the minority in *Harris v New York*,⁵⁶⁰ Hurt J galvanised the rationale that individuals must be protected against violations of their rights. The *Harris* minority placed great value on safeguarding the rights entrenched in the (American) Constitution and those highlighted by cases such as *Miranda v Arizona*.⁵⁶¹ Hurt J continued:

“[T]he minority judges [in *Harris*] taking the view that to allow previous contradictory statements, otherwise inadmissible, to be put to an accused in cross-examination, would simply be allowing inadmissible evidence ‘through the back door’”.⁵⁶²

The majority in *Miranda* shared this sentiment. However, the majority in *Miranda* opted instead to base their decision on the deterrence (disciplining) rationale,⁵⁶³ which, it is submitted, is closely linked to the protective principle. Similarly, the minority in *Harris* felt that allowing evidence “through the back door” would undo much of the deterrence brought about by cases such as *Miranda*.

The court in *Makhathini* emphasised the importance of protecting accused persons against violations of the rights incorporated in s 35 of the Constitution, which consists of the rights of “arrested, detained and accused persons”.⁵⁶⁴ Of these, the privilege against compelled self-incrimination is paramount. In *S v Mphala*,⁵⁶⁵ the court held that compliance with the “spirit”, rather than the “letter” of the Constitution prevents situations that would still render a trial unfair.⁵⁶⁶ It is submitted that the “spirit” of the Constitution likewise works to protect against

⁵⁵⁷ *Supra*.

⁵⁵⁸ *S v Mphala supra* 399f.

⁵⁵⁹ *S v Makhathini supra* 3-4. Emphasis added.

⁵⁶⁰ *Supra*.

⁵⁶¹ *Supra*. These rights are in essence the same as those found in s 35 of the SA Constitution.

⁵⁶² *S v Makhathini supra* 3.

⁵⁶³ See §§ 2 2 1 *supra* & 4 2 2 5 *infra*.

⁵⁶⁴ These rights are primarily aimed at protecting the accused’s privilege against compelled self-incrimination.

See § 4 2 2 3 *supra*.

⁵⁶⁵ *Supra*.

⁵⁶⁶ *S v Mphala supra* 399f.

violations of all the other rights contained in the Bill of Rights, and to provide a remedy at trial if necessary.

4 2 2 2 5 *Police discipline*

It was submitted above that the protection rationale is closely linked to the disciplining rationale; the former being a remedy for prejudice against the particular accused and the latter a preventative measure against any future overreaching by the police. This leads to two conclusions. First, the disciplining rationale serves a wider purpose, aiming to prevent future police conduct that *might* bring about prejudice to accused persons. Second, the protection of the accused in a particular case also serves as a preventative measure against similar abuses in future cases.

The disciplining rationale has a wider application than both the reliability principle and the protective principle. Moreover, the disciplining rationale in its pure form is not concerned with the reliability of evidence or protection of the accused in a particular case. Therefore, even if evidence is reliable and the accused suffered no significant prejudice, the disciplining rationale may still require exclusion of unconstitutionally obtained evidence. The reason is simple: The disciplining rationale is aimed at *preventing* future unconstitutional behaviour by police that could lead to unreliable evidence or prejudice to the accused, even if it did not in the particular case.

Furthermore, the unlawful conduct that is sought to be prevented need not be causally connected to the evidence in question. Rather, the question is whether the unlawful conduct *could* lead to the discovery of the evidence in question. If the answer is affirmative, all that remains to be determined is whether exclusion of the particular evidence will result in the deterrence of unconstitutional conduct in future cases. The aim of this rationale is to prevent future violations of constitutional rights and focuses on the unlawful behaviour of the police.

Therefore, the nature of the evidence uncovered does not play such a big role in determining when evidence should be excluded. This being the primary rationale for exclusion in the United States, it might explain why the Supreme Court determines the admissibility of real evidence along much the same lines as the admissibility of testimonial communications. However, it is submitted that because the nature of the evidence is often determinative of the degree of prejudice its admission will have to the accused, the nature of

the evidence *should* be taken into account when determining what police activities could lead to future prejudice.

The question whether police intentionally violated a basic right in order to obtain the evidence in question is important. In *S v Mphala*, Cloete J held:

“In such a case [an intentional violation of the Constitution] the emphasis falls on the ‘detrimental to the administration of justice’ portion of s 35(5) and the disciplinary function of the Court ... becomes important: ‘The object of the [Canadian] Charter is not to make the obtaining of evidence or the getting of a conviction easier or more difficult, it is not intended to help people get acquittals or the Crown to succeed in its prosecutions, but rather to induce legislatures and government agents to respect the rights and freedoms set out therein, with notice as to the consequences of invalidity that follow any contrary action’”.⁵⁶⁷

It follows that good faith violations of the Constitution are not considered in such a serious light. Moreover, exclusion of evidence obtained in good faith does not satisfactorily serve the deterrence rationale, hence the US Supreme Court’s “good faith” exception to both the Fourth Amendment and the *Miranda* exclusionary rules.

However, the aim is not to discipline individual law enforcement officers. Rather, the aim is to deter violations on an institutional level. Therefore, regardless of the individual police officer’s efforts to act reasonably, in good faith and even following departmental guidelines, evidence must still be excluded when the departmental guidelines are in violation of the accused’s rights. A good example is *S v Soci*,⁵⁶⁸ where a form, drafted by the legal advisers of the South African Police Service, contained a material oversight regarding the accused’s right to consult counsel before a pointing out. Also, in *Mkhize v S*⁵⁶⁹ Willis J held that “the courts must be slow to indulge ignorance of the law of criminal procedure on the part of the police”.⁵⁷⁰ Therefore, good faith behaviour is only tolerated where the institution as a whole acted in the way expected of a reasonable police force.

In *Makhathini*, the court made it abundantly clear that prevention is better than cure: “[O]nce the police get into the habit of observing the requirements of the Constitution meticulously, the type of problem which perhaps has arisen in this case may disappear

⁵⁶⁷ *S v Mphala supra* 400b-d, quoting Tarnopolsky JA in *R v James; R v Dzagic* (1998) 33 CRR 107 (Ont CA), which has twice been approved by the Constitutional court – in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); *Key v Attorney-General, Cape Provincial Division supra*.

⁵⁶⁸ *Supra*.

⁵⁶⁹ (2000) JOL 6155 (W).

⁵⁷⁰ *Mkhize v S supra* 7.

altogether”.⁵⁷¹ It seems clear that the court intended to discipline the police for not adhering to the dictates of the Constitution. On top of that, the ultimate goal of the court was to *prevent* future violations. By deterring future unconstitutional conduct, the need to apply a remedy as drastic as exclusion of evidence may not arise in future cases.

4 2 2 2 6 *Judicial integrity*⁵⁷²

Judicial integrity is to some extent connected to the repute of the administration of justice. This means that courts should uphold the Constitution at least as strictly as a reasonable member of society would – a court is not only bound by its own beliefs, but also those of the community it serves. That public perception⁵⁷³ is important is illustrated by the following argument in favour of an inclusionary approach (or against an exclusionary rule) as formulated by Van der Merwe:

“The most important of these [arguments in favour of an inclusionary approach] is probably the danger of creating a situation where society perceives the relevant criminal justice system as a system which “frees” a murderer or rapist on account of a constable’s blunder”.⁵⁷⁴

And the opposite, illustrated by *S v Naidoo*:⁵⁷⁵

“To countenance the violations in this case would leave the general public with the impression that the courts are prepared to condone serious failures by the police to observe the laid down standards of investigation so long as a conviction results”.⁵⁷⁶

The conflicting interests within the community are central to the issue of judicial integrity. More important than acting according to its own conscience, a court must strike a balance between two extremes, often referred to as social justice and individual justice. Social justice itself consists of two contradictory requirements: Guilty persons must be brought to justice, but not at all costs. Individual justice means that every person (criminal) must get his just deserts. If courts exclude unlawful evidence too easily, resulting in the acquittal of factually

⁵⁷¹ *S v Makhathini supra* 4. See also *S v Naidoo supra* 237.

⁵⁷² See § 2 2 2 2 2 *supra*.

⁵⁷³ The perceptions of the public can be defined in many forms. Mirfield *Improperly Obtained Evidence* 23-24 gives at least three variations on the theme. *R v Cook supra* § 66, citing *R v Collins supra* 282, 288, explains public perception as follows: “[I]n the eyes of a reasonable person, dispassionate and fully apprised of the circumstances”.

⁵⁷⁴ Van der Merwe “Unconstitutionally Obtained Evidence” 1992 *Stell LR* 183, referring to the example mentioned by Cardozo J in *People v Defore* 242 NY 21 (1926) 587. See n 110 *supra*.

⁵⁷⁵ 1998 (1) All SA 189 (D).

⁵⁷⁶ *S v Naidoo supra* 236.

guilty persons, the public will lose faith in the integrity of the legal system. Conversely, if courts admit evidence resulting from illegal investigative methods, they might create the perception that they condone police infringements upon fundamental rights of members of the community in order to secure evidence against accused persons.⁵⁷⁷

With this in mind, the principle of legal guilt fits neatly into the judicial integrity principle:

*“[A] person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect”.*⁵⁷⁸

The US Supreme Court has on numerous occasions emphasised the importance of judicial integrity in the run-up to *Mapp v Ohio*⁵⁷⁹ and *Miranda v Arizona*⁵⁸⁰ and shortly thereafter. However, this principle has since lost much of its appeal in American courts.⁵⁸¹

In *Makhathini* Hurt J probably had judicial integrity in mind when he stated:

*“Our constitutional law and the application of the [present] Constitution are, as yet, in comparative infancy, and the Constitutional Court has emphasised, on a number of occasions already, the fundamental importance that must be attributed to the requirement that accused persons be fully apprised of their rights”.*⁵⁸²

This seems to indicate that, for the time being, courts must accept no compromise when giving effect to the rights of accused persons. Therefore, the first priority of the courts is to embed the Constitution as part of our national culture.⁵⁸³ Furthermore, courts must make certain that they are not perceived by the public to apply double standards by condoning police practices that do not conform to the requirements of the Constitution. Hurt J continued:

⁵⁷⁷ See also §§ 1 1 & 2 3 2 3 *supra*.

⁵⁷⁸ Packer *The Limits of the Criminal Sanction* (1968) 166, as quoted in Van der Merwe “Unconstitutionally Obtained Evidence” 1992 *Stell LR* 190.

⁵⁷⁹ 367 US 643 (1961).

⁵⁸⁰ *Supra*.

⁵⁸¹ See § 2 2 2 2 *supra*.

⁵⁸² *S v Makhathini supra* 4.

⁵⁸³ Both in the minds of the public and in the practices of the police.

“[I]t is [not] correct for this Court to start tampering with, or restricting, the limits of admissibility of evidence given by accused persons to police *by making adjustments to the procedures* in the course of trial”.⁵⁸⁴

According to the court, the balance for the time being must be heavily weighted in favour of due process.

Pursued to its logical conclusion, judicial integrity coupled with the principles of legal guilt and social justice, requires that the criminal justice system must be able to correct its own abuses. The criminal trial is also uniquely placed to be able to correct abuses within the administration of justice, almost immediately.⁵⁸⁵ Critics would say that the principle of self-correction – which as an integral part includes the exclusionary rule – detracts from the primary function of the criminal trial, namely to determine the truth, by creating a proliferation of secondary questions. But in a system where the administration of justice is based on constitutional due process, the principle of social justice must replace the narrow truth-at-all-costs rationale as the primary purpose of a criminal trial. And this, it is submitted, was the essence of Hurt J’s decision in *Makhathini*.

4 2 2 2 7 *Crime control*

While all the principles discussed above have some relation to the requirement of due process, the South African experience requires that something be said about the realities in South Africa. The Constitutional Court⁵⁸⁶ has taken judicial notice of the crime wave plaguing South Africa. Violent crimes are particularly rife.⁵⁸⁷

It is imperative that courts are not *perceived* to detract from the dictates of the Constitution, especially so soon after its enactment. However, if ever there was a balancing factor in the South African context, the requirement that crime be prevented and criminals brought to justice would be it. This does not imply that police may with impunity disregard the Constitution. On the contrary, the police themselves have the duty, and the power, to prevent many of the problems of inadmissible evidence by strictly adhering to the Constitution.⁵⁸⁸ However, s 35(5) gives courts a discretion to decide whether evidence is

⁵⁸⁴ *S v Makhathini supra* 4. Emphasis added.

⁵⁸⁵ Van der Merwe “Unconstitutionally Obtained Evidence” 1992 *Stell LR* 193. It also fits in with the courts’ supervisory function over the administration of justice.

⁵⁸⁶ *Ferreira v Levin NO; Vryenhoek v Powell NO supra* [152]. See n 438 *supra*.

⁵⁸⁷ *Pillay v S supra* 187.

⁵⁸⁸ *S v Makhathini supra* 4.

admissible on the facts of the case – and probably to take into account wider principles like the reality of serious crime in South Africa. Like the Constitution, the constitutionally entrenched discretion is *also* “in comparative infancy”⁵⁸⁹ and must be interpreted and applied according to the needs of the South African people.

In *S v Mphala*⁵⁹⁰ the court held that

“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. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities...”⁵⁹¹

The perceptions of the public were explained as follows by Flemming DJP in *Desai v S*:⁵⁹²

“I am not suggesting that the procedural unfairness of proceeding against an accused is unimportant. Only that it is important to remember that in considering all sorts of reasons why a man should be found not guilty despite evidence or admissions which establish the commission of the crime beyond all doubt, it is necessary to strive towards balance... [I]t is incomprehensible that a man who clearly committed an offence should be acquitted... Victims and those around them and also society at large have an interest which is real and legitimate”.⁵⁹³

Erasmus J, in *S v Nombewu*,⁵⁹⁴ explained the necessity to take into account the needs of society:

“The concept of a fair trial not only encompasses the abstract universal values of an open and democratic society, but also – I should think – *has regard to the subjective needs, feelings and views of society at the particular time*... Public opinion will no doubt be affected by the nature and seriousness of the infringement, as well as by the nature and seriousness of the crime involved (*S v Hammer*⁵⁹⁵) seen in the light of the state of lawlessness prevailing in the country (*Melani*⁵⁹⁶). The Constitution operates in a particular society with *immediate needs*”.⁵⁹⁷

⁵⁸⁹ *S v Makhathini supra* 4

⁵⁹⁰ 1998 (1) SACR 654 (W).

⁵⁹¹ *S v Mphala supra* 657f-h. In *R v Cohen* (1983) 5 CCC 39 (BC CA), Anderson J wrote in a minority opinion: “A balance must be struck between the need for firm and effective law enforcement and the right of the citizen to be as free as reasonably possible from illegal and unreasonable conduct on the part of the police”.

⁵⁹² 1997 (2) All SA 298 (W). See also *S v Nombewu supra*.

⁵⁹³ *Desai v S* 1997 (2) All SA 298 (W) DJP 302b-e. Emphasis added.

⁵⁹⁴ 1996 (2) SACR 396 (E).

⁵⁹⁵ 1994 (2) SACR 496 (C).

⁵⁹⁶ *S v Melani* 1995 (2) SACR 141 (E) 191h.

⁵⁹⁷ *S v Nombewu supra* 422f-423b. Emphasis added.

In *S v Makhathini*⁵⁹⁸ the court emphasised “the fundamental importance that must be attributed to the requirement that accused persons be fully apprised of their rights”.⁵⁹⁹ Nonetheless, it is imperative that courts not lose sight of the realities of crime and the difficulties faced by the authorities in effectively bringing the guilty to book.⁶⁰⁰

However, it is clear that courts, even when faced with serious crimes and the need to bring the perpetrators to justice, will not tolerate violations of constitutional rights:

“There may be those members of the public who will regard the exclusion of the evidence as being evidence of undue leniency towards criminals [in this case the perpetrators of what has been referred to as the biggest robbery in the history of South Africa]. The answer to that is that crime in this country cannot be brought under control unless we have an efficient, honest, responsible and respected police force, capable of enforcing the law. One of the mistakes which must be learnt from the past is that illegal methods of investigation are unacceptable and can only bring the administration of justice into disrepute, particularly when they impinge upon the basic human rights which the Constitution seeks to protect”.⁶⁰¹

It is submitted that the seriousness of the crime should not be summarily dismissed in the face of a violation of the Constitution. The seriousness of the charge should be balanced against the seriousness of the violation of the Constitution. In this way a proportional result, taking into account the pressing need to convict serious criminals, is possible. In *S v Madiba*⁶⁰² this was done – the seriousness of the offence was considered along with the fact that the accused’s rights were only violated to the extent necessitated by circumstances. Hurt J⁶⁰³ concluded that “the extent of the infringement of the right to privacy was such as to pale into insignificance compared with the importance of achievement of the object which the police had in the course of their duties”.⁶⁰⁴

⁵⁹⁸ *Supra*.

⁵⁹⁹ *S v Makhathini supra* 4.

⁶⁰⁰ See *S v Lottering* 1999 (12) BCLR 1478 (N). See also *New York v Quarles* 467 US 649 (1984).

⁶⁰¹ *S v Naidoo supra* 237.

⁶⁰² 1998 (1) BCLR 38 (D).

⁶⁰³ Hurt J also delivered the judgment in *S v Makhathini supra*.

⁶⁰⁴ *S v Madiba* 1998 (1) BCLR 38 (D) 45.

423 *S v AIMES*

In *S v Aimes*,⁶⁰⁵ the court was presented with a novel situation in terms of exclusion under s 35(5) of the Constitution. Counsel for accused no 2 wanted to introduce, and cross-examine accused no 1 on, evidence given by the latter during his bail application. The bail testimony of accused no 1 contained statements that were self-incriminating but also exculpated accused no 2. Accused no 1's testimony in court was inconsistent with his testimony during the bail proceedings, which was inadmissible for being given in violation of accused no 1's right to silence under the interim Constitution.⁶⁰⁶

The novelty was in the fact that it was not the state but a co-accused who, in order to effectively conduct his own defence, wanted to tender the unwarned bail evidence to impeach the credibility of accused no 1. Counsel for accused no 2 relied on his client's right to a fair trial which included the right "to adduce and challenge evidence".⁶⁰⁷ To give effect to this right meant that accused no 2 had to be allowed to tender the statements made by accused no 1 in which he exculpated accused no 2. Furthermore, accused no 2 had to be allowed to challenge the in-court testimony of accused no 1 insofar as it was inconsistent with his statements at the bail hearing. Both these rights were elements of the right to a fair trial under the interim Constitution and still are under the present Constitution.⁶⁰⁸ This meant that in order for accused no 1 to have a fair trial the evidence had to be excluded. And for the trial against accused no 2 to be fair, he had to be able to introduce the same evidence in his defence and cross-examine accused no 1 on it. It follows that accused no 2's right to a fair trial, was in conflict with accused no 1's right to a fair trial.

The court, although faced with the question of admissibility for a limited purpose, still did not face the same situation as the court in *S v Makhathini*.⁶⁰⁹ In *S v Aimes*⁶¹⁰ the question was not whether the prosecution could impeach accused no 1, whose right to silence was violated, with the inadmissible evidence, but whether another accused could present that evidence in his own favour, *although it would inevitably have discredited accused no 1*.

⁶⁰⁵ 1998 (1) SACR 343 (C). Judgment in this case was delivered about a month before the judgment in *S v Makhathini supra* was delivered.

⁶⁰⁶ Which is essentially the same as under the present Constitution. By the time that the hearing of the trial commenced, the present Constitution had already come into force.

⁶⁰⁷ Section 25(3)(d) of the interim Constitution; s 35(3)(i) of the present Constitution.

⁶⁰⁸ Sections 25(3)(c) & 25(3)(d) of the interim Constitution; s 35(3)(h) & 35(3)(i) of the present Constitution.

⁶⁰⁹ *Supra*.

⁶¹⁰ *Supra*.

The judgment in *Aimes* indicates that evidence inadmissible as proof of guilt might still be admitted to impeach one accused, if fairness to a co-accused requires it. Desai J did however specifically rule that admission of the inculpatory statements in accused no 1's bail testimony "would still render the trial unfair as far as it concerns the position of Accused No 1 unless a formula is found by the court to prevent such prejudice". Desai J continued that a formula similar to that adopted in *S v Jeniker*⁶¹¹

"would achieve the purpose of preventing such prejudice, namely that the bail evidence of Accused No 1 may be introduced as evidence for the specific purpose of assisting Accused No 2 in his defence, subject to the rider that it is not admissible as evidence against Accused No 1 and that *it may be used for the purpose of cross-examining Accused No 1* or for such other purpose as Counsel for Accused No 2 may deem fit *insofar as this does not seek to introduce the transcript as being a statement of the truth or its contents to be used against Accused No 1*".⁶¹²

The result of the court's finding in *S v Aimes*⁶¹³ was that admission of the evidence for purposes of cross-examination against accused no 1 would (probably) jeopardise the fairness of his trial. But since violations of rights occur in degrees, the degree of unfairness to accused no 1 brought about by impeachment – not incrimination – was outweighed by the degree of unfairness to accused no 2 that would have resulted had he not been able to effectively meet the charges against him. However, fairness to accused no 2 did not require the contents of accused no 1's bail evidence to be admitted against accused no 1, and therefore it remained inadmissible for the purpose of proving his guilt.

The ruling opened the door ever so slightly for the accused's right to silence and not to incriminate himself, to be balanced against other equally fundamental rights. However, the fairness test in s 35(5) still rigidly protects any accused from being confronted with unconstitutionally obtained evidence that would render his trial unfair.

The judgment in *Aimes* illustrates another important matter, accepted by the US Supreme Court since *Harris v New York*:⁶¹⁴ There is a difference in the prejudice suffered by the accused when unconstitutionally obtained evidence is used as proof of the accused's guilt and the prejudice when only the inconsistency between his trial testimony and previous inadmissible testimony is used to discredit him.

⁶¹¹ 1993 (2) SACR 464 (C) 467-468.

⁶¹² *S v Aimes supra* 350e-g. Emphasis added.

⁶¹³ *Supra*.

⁶¹⁴ *Supra*.

4 2 4 *WESSO v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE*

For nearly four years after *S v Makhathini*,⁶¹⁵ nothing happened to confirm or overthrow the no-impeachment stance taken by Hurt J in that judgment. Then, in *Wesso v Director of Public Prosecutions, Western Cape*,⁶¹⁶ the issue was brought up, discussed and eventually not decided. The court held, correctly, that the application to prevent the use of the evidence in question was premature and that the trial court would be in a better position to decide the admissibility of the evidence in question.⁶¹⁷

The evidence that gave rise to the application resulted from an “interview or consultation” in the offices of the director of public prosecutions where the accused (applicant) made statements. He also pointed out certain things at the crime-scene. On the applicant’s version of the facts,⁶¹⁸ he was invited to attend the interview as a state witness and consequently not warned that he was a suspect. The respondent claimed that the decision to prosecute the applicant had not been taken at that stage. Nor does it appear, from the respondent’s version of the facts, that the decision to prosecute had been deferred in order to sidestep the warning requirements of s 35 of the Constitution as was done in *Makhathini*. Therefore, at worst the applicant made unwarned statements, which the respondent in any event assured both the applicant and the court would not be used at the trial of the applicant.

However, the respondent specifically reserved the right to use the evidence against the applicant

“where parts of the statement were to be elicited by the defence or Wesso [second accused] were to give evidence in his own defence and adduce a version contrary to the said statement. *The State will then seek leave to put the said statement into evidence in order to impeach the credit of Wesso*”.⁶¹⁹

The indication that the respondent intended to impeach the applicant’s testimony in court with the unwarned and therefore unconstitutionally obtained evidence led to the court’s discussion of the issue in *Makhathini*. Moreover, since the respondent had assured the applicant that the evidence would not be used against him, a trial court would probably have

⁶¹⁵ *Supra*.

⁶¹⁶ 2001 (1) SACR 674 (CPD).

⁶¹⁷ *Wesso v Director of Public Prosecutions, Western Cape* 2001 (1) SACR 674 (CPD) 683d-g, 685e, citing *Key v Attorney-General, Cape Provincial Division supra* [14]; *Sapat v The Director: Directorate of Organised Crime and Public Safety* 1999 (2) SACR 435 (C) 443c.

⁶¹⁸ There were factual disputes that the court could not resolve on papers.

⁶¹⁹ Erasmus AJ in *Wesso v Director of Public Prosecutions, Western Cape supra* 678g-h, quoting from the answering affidavit. Emphasis added.

no difficulty in ruling the statements inadmissible under s 35(5) if the prosecution (respondent) acted in breach of its promise. Would such inadmissible statements nonetheless be admissible to impeach the testimony of the accused if his testimony conflicted with these statements?

In discussing the question Erasmus AJ stated: “Whether or not the prosecution would in our law be allowed to cross-examine the second accused on the statement he made to [respondent] *is not clear*”.⁶²⁰ And immediately thereafter:

“In *S v Sibusiso Makhathini [sic] and Others* (unreported, Durban and Coast Local Division, Case number CC73/97, 21 November 1997)⁶²¹ questions aimed at discrediting an accused by putting to him statements made to the investigating officer were not allowed on the ground that there had not been the customary warning in terms of the Judges’ Rules and the accused had not been informed of his rights in terms of s 35 of the Constitution”.⁶²²

Does this mean that Erasmus AJ did not consider the judgment in *Makhathini* as conclusive? It is not clear from Hurt J’s judgment in *Makhathini* exactly how he exercised his discretion – assuming that he did⁶²³ – to exclude the statement from the prosecution case in the first place. Nonetheless, once the evidence had been ruled inadmissible, the general rule is that it would have been inadmissible for all purposes, including discrediting the accused.

After a discussion of the *Makhathini* case and the American authority it declined to follow, Erasmus AJ continued with a discussion of the Canadian Supreme Court’s ruling in *R v Calder*.⁶²⁴ The *Calder* case was based on a factual situation similar to *Wesso*: Both cases concerned a police officer who made statements without having been warned about their respective rights. It may be significant that Erasmus AJ highlighted the factual similarities before emphasising the Canadian Supreme Court’s position on the matter:

“The Supreme Court of Canada, however, kept the door open by holding that in some future case a trial Judge might decide that there were ‘special circumstances’ warranting reception of such a statement for the limited purpose of impeaching credibility”.⁶²⁵

⁶²⁰ *Wesso v Director of Public Prosecutions, Western Cape supra* 684c. Emphasis added.

⁶²¹ Cited in this work as *S v Makhathini* D 1997-11-21 Case no CC73/97.

⁶²² *Wesso v Director of Public Prosecutions, Western Cape supra* 684d.

⁶²³ The judgment merely states that because the accused had not received any of the warnings in terms of the Judges’ Rules or the Constitution, any information elicited from his “conversations” with the police was inadmissible.

⁶²⁴ *Supra*.

⁶²⁵ *Wesso v Director of Public Prosecutions, Western Cape supra* 684i.

The significance of this remark is strengthened by the tendency of South African courts to be influenced by the judgments of the Canadian Supreme Court in cases where interpretation and application of s 35(5) is required. It is submitted that *S v Makhathini*⁶²⁶ will not be the final case on the matter.

⁶²⁶ *Supra.* (1996) 16 SCA 473 (1996) 5 SA

CHAPTER FIVE

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“The most that can be achieved is the nullification of the [accused’s] evidence”.⁶²⁷

5 1 INTRODUCTION

The previous chapter focused on the development to date of local precedent regarding the use of inadmissible evidence for the limited purpose of impeaching the accused. The current chapter is aimed at the future: To suggest possible guidelines or considerations to be taken

⁶²⁷ *R v Calder* (1996) 46 CR (4th) 133 (SCC) § 25.

into account by courts when deciding whether to admit inadmissible evidence to impeach the testimony of the accused.

Despite the general principle that evidence ruled inadmissible remains inadmissible for the duration of the trial and for all purposes,⁶²⁸ a ruling on the admissibility of evidence is only interlocutory.⁶²⁹ Therefore, under certain “circumstances” a judge may be called upon to reconsider or revise his earlier ruling on admissibility.⁶³⁰

Certain factors have been discussed throughout this work that might be useful in the decision whether inadmissible evidence may after all be admitted to impeach the accused. First, the nature of the right that was violated to obtain the evidence in issue could determine whether or not the accused is prejudiced.⁶³¹ Second, the nature of the evidence that resulted from the violation and its potential probative value may affect the decision whether to impeach or not.⁶³² Third, the distinction between the two legs of s 35(5) is important. Fourth, the intentions of the police play a role in determining the degree of prejudice to the accused. Fifth, the strategy employed by the accused during the trial can have a mitigating effect on the potential prejudice resulting from admission of impeachment evidence.⁶³³ Sixth, the absence of juries in South African trials, frees the courts to hear otherwise inadmissible evidence without the risk that the evidence would be misinterpreted.⁶³⁴ These factors are not mutually exclusive and, when relevant to a specific case, should all be put in the balance to determine the admissibility of unconstitutionally obtained evidence for the purpose of impeachment.

Another matter that is crucial to the debate whether or not evidence should be admissible for impeachment is the fact that it is tendered only for a limited purpose. Admission of evidence for impeachment is not intended to prove the guilt of the accused, but only to test

⁶²⁸ See §§ 1 1 & 4 1 1 *supra*. See also § 3 3 1 2 *supra*, which explains the position in Canada.

⁶²⁹ See § 4 1 1 *supra*.

⁶³⁰ *R v Calder supra* § 35; *R v Solomons* 1959 (2) 352 (A). See also §§ 1 3; 4 1 1 & 4 2 4 *supra*.

⁶³¹ See §§ 2 2 4; 3 2 2; 3 2 3 4 & 4 2 2 2 4 *supra*.

⁶³² See §§ 2 2 2 4 3; 2 3 2 1; 3 2 2 1 & 3 2 3 *supra*.

⁶³³ *R v Solomons supra*. This principle, not unknown to our courts under the common law, adapts easily to the constitutional environment we find ourselves in: If the circumstances of the case change materially, removing the reason for excluding the evidence, the admissibility of the impugned evidence must be reconsidered. In determining what may constitute such a material change in circumstances, the common law is again useful. For instance, if the accused leads character evidence inconsistent with the excluded evidence or attempts to discredit a state witness, the shield that the accused has against attack on his own credibility falls away. In constitutional terms, this could mean that the administration of justice or trial fairness might require admission of previously excluded evidence.

⁶³⁴ The justified lack of faith in a jury’s ability to assess limited purpose evidence for what it is worth has been illustrated throughout this thesis. See §§ 1 1; 3 2 1 1; 3 2 3 5; 3 3 1 4; 4 1 2 & n 282 *supra*.

the veracity of his testimony – a distinction that a judicial officer, but not necessarily a layperson, would normally be able to make and properly apply to the facts.

In other words, by discrediting the accused's testimony, the prosecution neutralises it leaving the accused with nothing. It is important to note that neutralising the accused's testimony alone does not lead to a conviction. More is needed. The conviction will not follow merely because the accused put up a poor, or even a perjurious defence. Only substantive evidence, proving the accused's guilt beyond a reasonable doubt, will secure a conviction.

Impeachment merely serves to illustrate that at the very worst the accused is guilty of perjury, which on its own will never be enough for a conviction of the crime charged. Therefore admitting the unconstitutionally obtained evidence for a limited purpose has a limited impact on the trial: Where admission of unconstitutionally obtained evidence as proof of guilt would prejudice the accused, admission for a limited purpose would prejudice the accused to a lesser degree, or not at all. And since the "nature and degree" of prejudice determines whether the right to a fair trial has sufficiently been infringed to exclude evidence,⁶³⁵ it is possible that admission of evidence to impeach might not infringe the right to a fair trial even when admission in general would. Similarly, admission for the limited purpose of impeachment might not be detrimental to the administration of justice while admission to prove guilt might be.

5.2 THE IMPORTANCE OF STAYING WITHIN THE FRAMEWORK OF SECTION 35(5) OF THE CONSTITUTION⁶³⁶

The most important reason why courts must not stray from the framework of s 35(5) is the risk of creating precedent that would be unsuitable to the local needs. The easiest way to stray would be to blindly follow the Canadian lead. The obvious, but sometimes superficial, similarity between s 24(2) of the Canadian Charter and our own s 35(5) of the Constitution makes it tempting to rely on Canadian jurisprudence, especially at a time when there is a shortage of local precedent.

However, the underlying differences between these sections, together with the numerous procedural and societal differences, demand a cautious and independent interpretation of s 35(5). First, the Canadian Supreme Court's replacement of the word "would" with the less

⁶³⁵ *S v Soci* 1998 (2) SACR 275 (E) 294a.

⁶³⁶ See generally § 4.1.2 *supra*.

onerous “could”⁶³⁷ must not be followed. The reason is obvious: If the framers of our Constitution had intended such an interpretation they would have chosen to insert the word “could” into s 35(5). This means that, in the context of s 35(5) exclusion of unconstitutionally obtained evidence is mandated only when it is a certainty (“would”) – and not merely a possibility (“could”)⁶³⁸ – that admission will lead to one of the results mentioned.⁶³⁹

Second, s 24(2) of the Charter focuses on the “repute” of the administration of justice, which is determined by “the well-informed member of the community”.⁶⁴⁰ In other words s 24(2) is moved by public perceptions. It is submitted that s 35(5) takes into account a wider range of factors, *including public perceptions*, to determine whether admission of the impugned evidence would be detrimental to the administration of justice, effectively lowering the level for activation of s 35(5). South African courts should therefore not limit themselves in their interpretation of s 35(5) by blindly following the Canadian interpretation.

Third, it is submitted that the Canadian distinction between “conscriptive” and “non-conscriptive” evidence, discussed in § 2 3 2 1 above, and further discussed in §§ 5 3 and 5 6 below, takes the reliance on self-incrimination as a reason for exclusion too far. Local courts should not follow this trend.

Fourth, the Canadian Supreme Court interprets s 24(2) within the Canadian procedural framework, which differs from that of South Africa in two important aspects:⁶⁴¹ Canadian courts have a wide range of powers to order a retrial once evidence has been excluded. And Canadian trials employ juries, which heightens the risk of evidence being misinterpreted and potentially causing unfairness to the accused. South African courts do not employ juries. Consequently, South African courts can afford to be less strict in their admissibility requirements, because a judicial officer will be less likely to attach a greater value to limited purpose evidence than it is worth. In any event, any misinterpretation of such evidence would be evident from the reasons that a judicial officer is required to give. Juries do not give reasons for their decisions.

Fifth, South African courts must bear in mind that Canadian courts are required to interpret the Charter in a way that satisfies the needs of society as they exist in Canada.

⁶³⁷ See § 2 3 1 1 *supra*.

⁶³⁸ The Canadian interpretation.

⁶³⁹ See § 4 1 2 *supra*.

⁶⁴⁰ *R v Calder supra* § 34. See § 3 3 1 4 & n 384 *supra*.

⁶⁴¹ The procedural framework in the US differs from that of SA in essentially the same two ways. See *S v Makhathini* D 1997-11-21 Case no CC73/97 3 & n 437 *supra*

Likewise, the South African Constitution “operates in a particular society with *immediate needs*”.⁶⁴² It follows that, for example, the Canadian experience with, and need for, effective law enforcement does not necessarily have the same priority in a South African context.

5.3 CONSCRIPTIVE EVIDENCE (SELF-INCRIMINATING STATEMENTS) AS OPPOSED TO REAL EVIDENCE

Canadian courts distinguish two kinds of evidence: Conscriptive and non-conscriptive. This distinction differs from the distinction used in the United States and South Africa. While the latter two countries distinguish evidence on the basis of its physical characteristics – real or testimonial – Canadian courts focus on which rights were implicated in the discovery of the evidence: Conscriptive evidence is evidence, testimonial or real, that was obtained in violation, or resulted from a violation, of the so-called principle against self-incrimination.⁶⁴³ If the accused was not compelled to participate in the discovery or creation of the evidence, the evidence is classified as non-conscriptive. In other words, non-conscriptive evidence exists independent of the violation.

In § 4.2.2.2 above it was contended that the risk of unreliability is considered a rationale for excluding unconstitutionally evidence.⁶⁴⁴ However, the risk of evidence being unreliable depends to a great extent on the physical nature of the evidence that resulted from the unconstitutional behaviour. According to Davies: “[T]he essential difference between confessional evidence and ‘real evidence’ is that in the former case but not the latter the manner in which it is obtained may well affect its reliability”.⁶⁴⁵

It is submitted that the Canadian Supreme Court places too great an emphasis on the privilege against self-incrimination when classifying evidence. The tendency to extend the scope of self-incrimination is evident from cases like *R v Burlingham*,⁶⁴⁶ *R v Stillman*⁶⁴⁷ and *R v Feeney*.⁶⁴⁸

⁶⁴² *S v Nombewu* 1996 (2) SACR 396 (E) 422f-423b. Emphasis added.

⁶⁴³ *R v Stillman* (1997) 1 SCR 607 (SCC) §§ 75-82. See n 543 *supra*.

⁶⁴⁴ See also §§ 2.3.2.1; 3.2.2.1 & 3.2.3 *supra*.

⁶⁴⁵ Davies “Exclusion of Evidence Illegally or Improperly Obtained” 2002 *The Australian LJ* 170 177, referring to *R v Swaffield*; *Pavic v The Queen* (1997) 192 CLR 159 75.

⁶⁴⁶ (1995) 38 CR (4th) 265 (SCC). Evidence of an unconstitutional pointing out, *as well as* real evidence found as a result, was excluded.

⁶⁴⁷ (1997) 1 SCR 607 (SCC). Bodily samples taken while in police custody, in violation of the right to privacy was excluded on the basis of being conscriptive.

⁶⁴⁸ (1997) 115 CCC (3d) 129 (SCC). Fingerprints taken after an unlawful arrest were excluded.

To some extent, the US Supreme Court has, through its numerous analogies between the Fourth and Fifth Amendments, also implied violations of the privilege against self-incrimination in cases where there actually only occurred violations of the right to privacy.⁶⁴⁹

It is submitted that South Africa should not follow this extended version of self-incrimination and the resulting blurring of the distinction between testimonial communications and real evidence. The Canadian Supreme Court – while its notion that in such situations the accused was indeed compelled to incriminate himself may not be completely unfounded – loses sight of the traditional reason for excluding compelled statements: The risk of unreliability.⁶⁵⁰ Testimonial communications emanate from the mind of the accused and are therefore susceptible to all the imperfections of human nature such as the tendency to lie in difficult situations. In contrast, real evidence, even when conscripted from the accused, “possesses an objective reliability. [Therefore,] [i]t does not ‘conscript the accused against himself’ in the manner of a confessional statement”.⁶⁵¹ Nonetheless, the Canadian Supreme Court cited the historical rule against self-incrimination, based upon the risk of unreliability, as the reason for holding that *all* “conscriptive” evidence would render the trial unfair.⁶⁵²

Keeping in mind that South African courts can afford to be less strict in excluding evidence because the risk of misinterpretation is smaller⁶⁵³ and the specific need to effectively combat crime greater, it is submitted that it would most probably be detrimental to the administration of justice to follow the lead of the Canadian courts.

5 3 1 TRIAL FAIRNESS

It is clear that South African courts should not follow the Canadian definitions of conscriptive and non-conscriptive evidence. Therefore, South African courts *must not* follow the Canadian interpretation of trial fairness, which is almost exclusively based on their interpretation of conscriptive evidence and the “principle” against self-incrimination.

It is submitted that local courts must, in their interpretation of the trial fairness leg of s 35(5), focus on two considerations: First, violations of the collection of rights that comprise

⁶⁴⁹ *Mapp v Ohio* 367 US 643 (1961) 656; *United States v Havens* 446 US 620 (1980). And see n 101 *supra*.

⁶⁵⁰ The Canadian Supreme Court in *R v Stillman* *supra* §§ 80-82 acknowledged this. But see the passage quoted in § 2 3 2 1 1 *supra*.

⁶⁵¹ *S v M* 2003 (1) SA 341 (SCA) 343E.

⁶⁵² *R v Stillman* *supra* §§ 81-82.

⁶⁵³ South African courts do not employ juries as the sole finders of fact. See §§ 5 1 & 5 2 *supra*.

the rights of “arrested, detained and accused persons”⁶⁵⁴ and specifically those rights that aim to ensure the right to a fair trial.⁶⁵⁵ Second, the behaviour and chosen strategy of the accused, during both the pre-trial and trial phases of the proceedings.

It was submitted in § 4 2 1 2 above that the enquiry must ultimately be concerned with the question whether admission of the evidence would lead to the accused having an unfair trial. It is now submitted that, because of the interlocutory nature of an exclusion order and the importance of the matter to all parties, a change in – rather, a limiting of – the purpose⁶⁵⁶ for which admission is sought is a valid reason for the court to *re-evaluate* an earlier ruling on admissibility. This is justified because the purpose for which evidence is admitted greatly determines its impact on the fairness of the trial. If the limited use that the prosecution can derive from the evidence sufficiently diminishes its impact on the fairness of the trial, it follows that the reason for its initial exclusion (unfairness to the accused) can no longer be upheld. And if admission of the evidence, in its diminished form, does not render the trial unfair, the only other reason that could prevent its admission is that its admission might still be detrimental to the administration of justice.

Because of the nature of the rights involved, the most likely kind of evidence to be implicated under the fairness leg of s 35(5) is testimonial communications.⁶⁵⁷ The nature of the evidence also determines whether evidence can safely be used to impeach the accused. Testimonial communications result from the mind of the accused and are therefore susceptible to the same weaknesses as the mind from which it flowed, of which the risk of unreliability is paramount. This means that even if the resulting unfairness is sufficiently diminished to have an unconstitutionally obtained statement or pointing out admitted for impeachment, it will be of little value. Unless the reliability of the impeachment evidence can be confirmed by other evidence, there will always be the risk that the court is “led to doubt evidence which is really true”.⁶⁵⁸

The behaviour of the accused during the pre-trial phase can influence the degree of unfairness to the accused. In this regard, local courts may take a leaf from the Canadian book. Abusive, aggressive or generally obstructive behaviour towards the police,⁶⁵⁹ should be taken into account when a court determines whether admission of the resulting evidence would

⁶⁵⁴ Section 35 of the Constitution.

⁶⁵⁵ Section 35(3) of the Constitution.

⁶⁵⁶ In theory, tendering evidence in general means that it is tendered for all purposes, including impeachment.

⁶⁵⁷ See §§ 5 7 1 2 & 5 7 2 6 *infra*.

⁶⁵⁸ *R v Wellers* 1918 TPD 234 237. See § 3 3 1 3 *supra*.

⁶⁵⁹ *R v Tremblay* (1987) 60 CR (3d) 59 (SCC).

render the trial unfair. Similarly, a court should take into account if, for example, the accused was too intoxicated to exercise the right to counsel⁶⁶⁰ or would inevitably have confessed even if provided with warnings.⁶⁶¹

The accused's chosen strategy in court can remove, or diminish, the unfairness resulting from admission of the evidence sufficiently to justify admission of that evidence to impeach. *R v Solomons*⁶⁶² serves as an example: The accused unexpectedly changed his testimony, causing evidence previously excluded because of its "extremely great prejudice to the accused",⁶⁶³ to become directly relevant to his credibility. It follows that the prejudice referred to by the court must have been negated by the accused's chosen strategy for it to become admissible in *rebuttal*.⁶⁶⁴ Another strategy that the accused may follow is to testify, knowing that "opposing testimony had been ruled inadmissible for the prosecution's case in chief".⁶⁶⁵ This possibility is discussed further in § 5 4 below.

In conclusion, the remarks of Erasmus J in *S v Nombewu*⁶⁶⁶ are enlightening:

"The concept of a fair trial not only encompasses the abstract universal values of an open and democratic society, but also – I should think – *has regard to the subjective needs, feelings and views of society at the particular time...* Public opinion will no doubt be affected by the nature and seriousness of the infringement, as well as by the nature and seriousness of the crime involved (*S v Hammer*⁶⁶⁷) seen in the light of the state of lawlessness prevailing in the country (*Melani*⁶⁶⁸). The Constitution operates in a particular society with *immediate needs*".⁶⁶⁹

It is clear from the above passage that no specific rules have as yet crystallised. This is good – local courts must leave themselves room to apply the discretion as the facts of each case dictate and avoid reducing the discretion to a limited set of rules, as is the case in Canada. However, some guidelines have emerged: Evidence excluded under the fairness leg of s 35(5) would in the majority of cases have resulted from violations of the accused's trial rights, especially the privilege against self-incrimination. The resulting evidence would

⁶⁶⁰ *R v Mohl* (1989) 69 CR (3d) 399 (SCC).

⁶⁶¹ *R v Harper* (1994) 92 CCC (3d) 423 (SCC). The accused spontaneously declared "I'm the guy you want". See also *Colorado v Connelly* 479 US 157 (1986).

⁶⁶² 1959 (2) 352 (A). See § 4 1 1 *supra*.

⁶⁶³ Ogilvie Thompson JA, citing from the record, in *R v Solomons supra* 357A-B.

⁶⁶⁴ One must always bear in mind that impeachment evidence is used only in rebuttal, never as proof of guilt.

⁶⁶⁵ *Oregon v Hass* 420 US 714 (1975) 722.

⁶⁶⁶ 1996 (2) SACR 396 (E).

⁶⁶⁷ 1994 (2) SACR 496 (C).

⁶⁶⁸ *S v Melani* 1995 (2) SACR 141 (E) 191h.

⁶⁶⁹ *S v Nombewu supra* 422f-423b. Emphasis added.

mostly be in the form of testimonial communications – its creation a direct result of the constitutional violation. Testimonial communications run the risk of being unreliable. Consequently, even when the impact on the fairness of the trial can be sufficiently diminished, the use of testimonial communications for impeachment has little value, unless its reliability can be confirmed by other evidence.

Therefore, local courts should admit testimonial communications for impeachment only when it is satisfied of two things: First, the unfairness to the accused of its admission for the limited purpose, is sufficiently reduced. Second, the risk of unreliability has been sufficiently countered.

5 3 2 DETRIMENTAL TO THE ADMINISTRATION OF JUSTICE

The second leg of s 35(5) focuses on both the long and the short term effects of admission on the administration of justice. To determine the effects of admission, a court must take into account a wider range of factors than with the fairness enquiry. There is no exhaustive list of factors, but the following are the most common: The kind of evidence obtained, the nature of the constitutional right infringed, the seriousness of the breach and whether the evidence would have been obtained by other means.⁶⁷⁰ Again, the behaviour of the accused and the nature of the crime charged also play a role.

While it is true that the consequences for the accused are more serious upon conviction of a serious crime, the Supreme Court of Canada is more concerned with repute on a long-term basis.⁶⁷¹ This implies that the consequences for the accused are only as a matter of necessity considered, the real issue being the long-term consequences for the administration of justice. In the event of contrasting interests, the Canadian Supreme Court would favour the latter, unless an unfair trial would result.⁶⁷² However, one can be sure that the accused's motivation for applying for exclusion is based squarely on their interest in the former. It is submitted that the specific needs in South Africa, especially curbing the crime rate, dictate that a similar approach is followed locally.

Real evidence, which is normally the result of a violation of a non-trial right have an "objective reliability ... [that] does not 'conscript the accused against himself' in the manner

⁶⁷⁰ *S v Orrie* CPD 14-10-2004 Case no SS 32/2003 20.

⁶⁷¹ *R v Collins* (1987) 56 CR (3d) 193 (SCC) § 32.

⁶⁷² *R v Collins supra* § 39.

of a confessional statement”.⁶⁷³ Consequently it is more readily admitted than testimonial communications. It is submitted however that even in cases where real evidence had been excluded because its admission would be detrimental to the administration of justice, the fact that it is subsequently tendered for only a limited purpose should weigh in favour of admitting it for impeachment. When real evidence is excluded, it would rarely be because of the risk of unreliability. More often it would be excluded because courts are unwilling to condone the particular kind of behaviour that led to discovery of the evidence.⁶⁷⁴ In these cases the court should not deny itself the use of otherwise reliable evidence with which to test the reliability of the accused’s testimony.⁶⁷⁵ The administration of justice would be poorer for losing a useful tool enabling it to not only determine the truth, but also to ensure that justice is done to all interested parties.

5.4 THE “NO LICENCE TO PERMIT PERJURY” ARGUMENT

“[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility”.⁶⁷⁶

In *Oregon v Hass*⁶⁷⁷ the US Supreme Court held that the accused may be impeached by previously excluded testimonial communications if the accused testifies to his innocence *knowing* that the “opposing testimony had been ruled inadmissible for the prosecution’s case in chief”.⁶⁷⁸ Of course the accused will know that the opposing testimony had been excluded – it is, after all, the accused who had to object to its admission and request its exclusion!

It is submitted that the risk of perjurious testimony is a valid concern. But locally, it must not be imparted with the same overriding significance it has been given by the US Supreme Court. More is required for the “no licence” argument to justify admission of impeachment evidence.

In this regard, the nature of the evidence in question, and its proven reliability, must be controlling. It is illustrated in § 5.3.2 above that real evidence, because of its objective

⁶⁷³ *S v M supra* 362A, citing *R v Holford* (2001) 1 NZLR 385 (CA) 390; *S v Naidoo* 1998 (1) All SA 189 (D); *Mkhize v S* (2000) JOL 6155 (W).

⁶⁷⁴ Mostly in cases of *mala fide* or other especially gross violations when less intrusive means were available.

⁶⁷⁵ See the US position, especially *Walder v United States* 347 US 62 (1954). This would of course be as applicable in a South African court when faced with a similar factual situation.

⁶⁷⁶ *Walder v United States supra* 65, as quoted in *Harris v New York* 401 US 222 (1971) 224.

⁶⁷⁷ 420 US 714 (1975).

⁶⁷⁸ *Oregon v Hass supra* 722.

reliability, is an excellent means of determining the veracity of the accused's testimony. It is the use of testimonial communications for impeachment that causes problems.

Testimonial evidence, especially the kind obtained by unconstitutional means, comes in many shades of the truth, with the distinct possibility that it is devoid of truth altogether. This is of course true of the accused's trial testimony as well. Therefore, although impeachment is not concerned with proving the truth directly, it serves no rational purpose attempting to prove that the accused's trial testimony is perjurious by proving an inconsistent prior statement that is itself proven to be false and consequently of no value.⁶⁷⁹

It is a different matter if the reliability of the testimonial communication, intended to be used for impeachment, is corroborated by other evidence. In this way, the risk that the trial judge may be led to doubt evidence that is really true can be avoided.⁶⁸⁰ And in such a case, the same pressing reasons that demand admission of real evidence for impeachment, can justify admission the testimonial communication in question.

5.5 LOCAL RELEVANCE OF THE MINORITY'S ARGUMENT IN *HARRIS V NEW YORK*

Any reference to the US Supreme Court's decisions (majority and minority) in *Harris v New York*⁶⁸¹ and its progeny⁶⁸² must be seen in the proper perspective. It is therefore necessary to bear in mind the most important procedural difference between the American and South African criminal trials: The lack of juries. Much of the minority's argument relates to the risk that a jury will not fully understand the difference between using evidence as proof of the accused's guilt and using the same evidence merely to prove that the accused is giving false testimony.

Moreover, the minority's argument must be seen in the light of the majority's ruling. It is submitted that the majority went too far by unconditionally allowing the use of unconstitutionally obtained evidence for impeachment in all but one situation.⁶⁸³

⁶⁷⁹ See § 3.3.1.3 *supra*.

⁶⁸⁰ See *R v Wellers* *supra* 237.

⁶⁸¹ 401 US 222 (1971).

⁶⁸² *Riddell v Rhay* 404 US 974 (1971); *Oregon v Hass* *supra*; *United States v Havens* *supra*.

⁶⁸³ *Mincey v Arizona* 437 US 385 (1978). The majority in *Harris* recognises that involuntary statements may not be used for impeachment. See § 5.4 where certain restrictions upon the majority's argument is suggested.

551 INTERFERENCE WITH AN ACCUSED'S UNFETTERED RIGHT TO ELECT WHETHER TO TESTIFY ON HIS OWN BEHALF

The accused will have to make many difficult choices during the course of his trial, but this does not mean that every time his choice results in an unfortunate outcome his choice had been “fettered”.

The minority in *Harris* was concerned that the risk of impeachment by means of statements obtained in violation of *Miranda v Arizona*⁶⁸⁴ would “fetter” the accused in his decision whether or not to testify in his own defence, because:

“The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner... [S]tatements merely intended to be exculpatory by the defendant are often *used to impeach his testimony at trial... These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement*”.⁶⁸⁵

It is submitted that the only time when evidence, real or testimonial, used for impeachment will be incriminating is when its purpose is misunderstood by the finder of fact. This is not to say that a judge, or magistrate, may fail to understand that discrediting the accused is not equal to incriminating the accused, but it is clear that the use of evidence for impeachment will not be regarded as incriminating the accused in a South African court.⁶⁸⁶

In *S v Aimes*⁶⁸⁷ the court held that the right of accused no 2 to testify in his own defence required that accused no 1 must be cross-examined on unwarned statements that accused no 1 had made during their bail application. If the argument of the *Harris* minority applied, accused no 1's choice to testify in his own defence would have been fettered, because he would effectively have been impeached with his own, inadmissible previous statements. In reality the only choice that had been “fettered” was accused no 1's *choice to put up a lying defence*. At common law, the choice that every accused has to put up a lying defence, is exactly the kind of choice that impeachment is meant to prevent. It is submitted that in a constitutional context impeachment similarly serves to prevent an accused from exercising certain choices.

⁶⁸⁴ 384 US 436 (1966).

⁶⁸⁵ *Harris v New York supra* 230-231; *Miranda v Arizona* 384 US 436 (1966) 476-477. Emphasis in *Harris*.

⁶⁸⁶ See § 5.5 *supra*.

⁶⁸⁷ 1998 (1) SACR 343 (C). See also *S v Sebejan* 1997 (8) BCLR 1086 (W).

5 5 2 BLURRING THE LINE BETWEEN CONSTITUTIONAL REQUIREMENTS AND THE COMMON LAW EVIDENTIARY RULE OF RELEVANCE

Section 210 of the CPA holds that no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings. Section 210 is statutory confirmation of the common law, stating the rule in its negative form: Irrelevant evidence is inadmissible. However, courts prefer to state the rule in its positive form: “[A]ll facts relevant to the issue in legal proceedings may be proved”.⁶⁸⁸

Relevance is the basis of the law of evidence: “The law of evidence is foundationally based on the principle that evidence is admissible if it is relevant to an issue in the case”.⁶⁸⁹ Therefore, relevance is the starting point of any enquiry when the admissibility of evidence is in issue: “The ... rule ... is that any evidence which is relevant is admissible *unless there is some other rule of evidence which excludes it*”.⁶⁹⁰ One such rule of evidence is s 35(5) of the Constitution. Consequently, an enquiry in terms of s 35(5) will only ever be concerned with evidence that is *relevant* to the enquiry – irrelevant evidence is by its very nature inadmissible for as long as it remains irrelevant to the matter at hand. It therefore follows that even highly relevant evidence *must* be excluded if found inadmissible under s 35(5).

5 5 3 SAFEGUARDING THE INTEGRITY OF THE ADVERSARIAL SYSTEM

“Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. *He cannot be forced to do that either before the trial, or during the trial...* What the rule forbids is compelling a man to give evidence which incriminates himself”.⁶⁹¹

What the above passage illustrates is that it is essential to afford accused persons the same protection against violations of their rights before the trial as during the trial. Otherwise, it would be little comfort for the accused to know that during the trial he has all the protection of the law – the assistance of legal counsel, the right to silence and so on – but before the trial, the police have already gathered all the evidence they need from the accused in a way that would be contrary to the accused’s trial rights.

⁶⁸⁸ *R v Trupedo* 1920 AC 58 62; Schwikkard & Van der Merwe *Principles of Evidence* 2 ed (2002) 45.

⁶⁸⁹ *S v Gokool* 1965 3 SA 461 (N) 475G.

⁶⁹⁰ *R v Schaube-Kuffler* 1969 2 SA 40 (RA) 50B.

⁶⁹¹ *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) 1030F-H, citing *S v Zuma* 1995 (2) SA 642 (CC) [31], which in turn cited *R v Camane* 1925 AD 570 575. Emphasis added.

The minorities in *Harris v New York*⁶⁹² and *Oregon v Hass*⁶⁹³ were both similarly concerned with the possibility⁶⁹⁴ that police will be encouraged to infringe the accused's rights during the pre-trial phase. They felt that, especially in cases where no statements would otherwise result, police would have "little to lose and perhaps something to gain by way of possibly uncovering impeachment material"⁶⁹⁵ by infringing on the accused's rights under *Miranda v Arizona*.⁶⁹⁶

There is local authority suggesting that these rights, or at least an appropriate form thereof, should be accorded a person merely suspected of committing a crime.⁶⁹⁷ In *S v Sebejan*⁶⁹⁸ the court held:

There is a deception in treating a suspect as no more than a witness, obtaining information from her under false pretences in the hope and belief that this can be used to further an investigation of and against that person. To then rely on that individual's ignorance and use whatever has been extracted during this time of deceptive safety in order to initiate or found or develop a prosecution of such person is inimical to a fair pre-trial procedure... If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who was operating within a quicksand of deception while making a statement. *That pre-trial procedure is a determinant of trial fairness is implicit in the Constitution and in our common law. How can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception?*... The constitutional right of an accused person does not only relate to fundamental justice and fairness in the procedure and the proceedings at his trial. *It also includes the right to be treated fairly, constitutionally and lawfully by policing authorities and state organs prior to the trial.*⁶⁹⁹

In conclusion, it is clear that the minority in *Harris*'s concern is legitimate, but not absolute. It is clear that local courts must practice restraint before admitting impeachment evidence obtained during the pre-trial phase under circumstances that did not ensure the accused (or, whatever the legal definition of his status was at the time) the appropriate and effective protection of the Constitution.

⁶⁹² *Supra*.

⁶⁹³ *Supra*.

⁶⁹⁴ The majorities in both *Harris* and *Hass* called it a "speculative possibility".

⁶⁹⁵ *Oregon v Hass supra* 723.

⁶⁹⁶ *Supra*.

⁶⁹⁷ *S v Sebejan supra*; *S v Orrie supra*.

⁶⁹⁸ 1997 (8) BCLR 1086 (W)

⁶⁹⁹ *S v Sebejan supra* [46]-[51]. Emphasis added. See also *United States v Toscanino* 500 F 2d 267; *S v Ebrahim* 1991 (2) 553 (A) at 583G; *S v Mushimba* 1977 (2) 829A; *S v Lwane* 1966 (2) 433 (A); *S v Botha* (1) 1995 (2) SACR 598 (W); *S v Orrie supra* 8-11.

554 UNDERMINING THE DETERRENCE OBJECTIVE

The final objection of the minority in *Harris* was closely connected to their contention that the police will have nothing to lose by infringing the accused's pre-trial rights: They argued that the admission of unconstitutionally obtained evidence for impeachment destroys the deterrent effect of the exclusionary rule. In a system that has deterrence of unconstitutional police conduct as the basis of its exclusionary rule(s), this *is* a scary thought.

Regarding the deterrence rationale, certain factors are important. The US Supreme Court recognises that the distinction between "good faith" and "bad faith" police behaviour is pivotal to the effective deterrence of misconduct.⁷⁰⁰

In South Africa, deterrence of official misconduct is only one of many possible considerations when the admissibility of unconstitutionally obtained evidence is at issue.⁷⁰¹ It is furthermore important to bear in mind that the enquiry does not stop at the question whether the individual police officer acted in a manner consistent with a reasonable police officer. Rather, the enquiry must further determine good faith on an institutional level. The basic facts of *S v Soci*⁷⁰² serve as an example: If the investigating officer relies on a *pro forma* document normally used by the police to notify the accused of his rights, he acts in good faith if he believes that the document in question states the complete set of rights. Therefore, if this document omits some of the accused's rights, it is not through the bad faith of the issuing officer, but through the "bad faith" of the police force as an institution. And the consequences to the accused are the same: He is not properly informed of his rights. Therefore, bad faith on an institutional level, whether intentional or negligent, must meet with at least the same consequences as bad faith on the part of the individual officer. Nonetheless, it is submitted that although the accused suffers the same amount of prejudice, such an omission on an institutional level is potentially more detrimental to the administration of justice than the same omission by the individual officer, because future reliance on the same incomplete document by other officers is virtually inevitable.

⁷⁰⁰ *United States v Leon* 468 US 897 (1984) 919. See also *Mkhize v S supra*.

⁷⁰¹ See § 4 2 2 2 *supra*. See *S v Mphala* 1998 (1) SACR 388 (W).

⁷⁰² 1998 (2) SACR 275 (E). On the specific facts of the case, the court held that the accused was properly informed of his rights.

5.6 LOCAL RELEVANCE OF THE CANADIAN APPROACH

In the light of the numerous differences between real evidence and testimonial communications for use in impeachment, it is imperative to note from the beginning that the Canadian approach, set out in *R v Calder*⁷⁰³ and *R v Cook*,⁷⁰⁴ only addresses the use of testimonial communications for impeachment.

Regarding usefulness of the Canadian approach locally, *S v Makhathini*,⁷⁰⁵ the only case in South Africa to deal directly with the use of an unwarned statement for impeachment, is of little use – it makes no mention of Canadian authority at all. It does however reject the approach of the US Supreme Court in *Harris v New York*.⁷⁰⁶

In *Wesso v Director of Public Prosecutions, Western Cape*⁷⁰⁷ the court, although not required to decide the impeachment matter, discussed the Canadian approach as set out in *Calder*, as well as the American approach already rejected in *Makhathini*. The only conclusion the court in *Wesso* arrived at was:

“[T]he admissibility of such a statement, *and the issues of principle and policy which arise*, are to be determine [*sic*] by the trial judge when appraised of the full factual context within which the evidence is sought to be admitted”.⁷⁰⁸

Wesso's case does however provide a clue to the relevance of the Canadian approach. Erasmus AJ emphasises the holding in *Calder* that in some circumstance unconstitutionally obtained statements may be used for impeachment, despite citing an article by Rose,⁷⁰⁹ which contends that in Canada the door has effectively been closed to impeachment.⁷¹⁰

Despite there being no precedent in Canada regarding the use of unconstitutionally obtained real evidence for impeachment, Scott JA's minority opinion in *Pillay v S*⁷¹¹ is informative on whether any future developments in Canada can be useful locally. In refusing

⁷⁰³ (1996) 46 CR (4th) 133 (SCC).

⁷⁰⁴ (1998) 2 SCR 597 (SCC).

⁷⁰⁵ D 1997-11-21 Case no CC73/97.

⁷⁰⁶ *Supra*.

⁷⁰⁷ 2001 (1) SACR 674 (CPD).

⁷⁰⁸ *Wesso v Director of Public Prosecutions, Western Cape* 2001 (1) SACR 674 (CPD) 685a-b. Emphasis added. For this reason – not being the trial court – the court did not decide the matter. See also Rose “*Calder* Successes will be Rare and the Procedure Uncertain” 46 CR (Canada) 151; Scott “*Calder* – The Charter Trumps the Truth-Seeking Tool of Impeaching the Accused with a Prior Inconsistent Statement” 46 CR (Canada) 161.

⁷⁰⁹ Rose “*Calder* Successes will be Rare and the Procedure Uncertain” CR 151.

⁷¹⁰ See also La Forest J's separate opinion in *Calder*, agreeing with the result but holding that no special circumstances exist.

⁷¹¹ 2004 (2) BCLR 158 (SCA).

to apply the definition of conscriptive evidence set out in *R v Burlingham*,⁷¹² preferring the position in *S v M*,⁷¹³ Scott JA highlighted an important difference between the approaches followed in Canada and South Africa regarding exclusion of real evidence.

It is submitted that the Canadian approach is only of little use, given the different circumstances under which South African courts must operate. The most important differences are: First, South African courts do not employ juries, who have little or no understanding of the difference between incrimination and impeachment. It is submitted that this difference is especially important in cases where testimonial communications are at issue. Second, South African courts distinguish between the kinds of evidence along lines different from Canada, as set out by Scott JA in *Pillay v S*.⁷¹⁴ Lastly, the South African reality of a high crime rate, especially armed robberies, many of which result in no arrests, dictates a different approach to maintaining respect for the Bill of Rights.

5.7 SECTION 35(5): THE RELEVANCE OF LOCAL DEVELOPMENTS REGARDING THE DISCRETION⁷¹⁵

Since enactment of the Constitution, courts have gained considerable experience in interpreting and applying the s 35(5)-discretion to situations where exclusion of evidence from the prosecution's case in chief is required. It is submitted that the local experience will be most useful in applying the discretion to determine the admissibility of unconstitutionally obtained evidence for impeachment. It is submitted above that a change in purpose of the evidence,⁷¹⁶ from incrimination to impeachment, at least warrants the matter of admissibility to be reconsidered, taking into account all factors that are relevant at the time of the new enquiry.

Although not all problems have been solved – either because such a situation has not arisen locally or courts are in disagreement – some matters relevant to an impeachment enquiry have been clarified.

⁷¹² *Supra*. See §§ 2.3.2.1.1; 4.2.2.2.3 & 5.3 *supra*.

⁷¹³ 2003 (1) SA 341 (SCA). See §§ 4.2.2.2.2; 4.2.2.2.3; 5.3.1 & 5.3.2 *supra*.

⁷¹⁴ *Supra*, for the minority.

⁷¹⁵ The discussion is largely based on Schwikkard & Van der Merwe *Principles* 222-243.

⁷¹⁶ See § 5.3.1 *supra*.

5 7 1 TRIAL FAIRNESS

5 7 1 1 Waiver of constitutional rights

Despite there being a dispute whether individuals can actually *wave* their constitutional rights,⁷¹⁷ it is common cause that accused persons may “waive the right to exercise a fundamental right”.⁷¹⁸ Furthermore, an accused may at any time re-assert any right that he has previously waived, but any consequence that flows from an earlier waiver cannot be undone. If, for example, the accused opted to make a statement or consented to a search of his house,⁷¹⁹ that statement or any evidence obtained from the search, will be admissible.

On waiver of pre-trial constitutional rights, *S v Mphala*⁷²⁰ clarifies the matter. Both accused were properly informed of their rights under the Constitution. In the meantime, a third party had arranged for an attorney to represent them. The accused were not informed of this obviously relevant fact and consequently gave up the right to legal counsel and opted to make statements to the police. Cloete J emphasised that a police officer must not just comply with the “letter” of the Constitution; the “spirit” of the Constitution demands that an accused must also be given all obviously relevant information for a waiver to be informed.⁷²¹

It is submitted that, like in the US, “[w]hat suffices for a waiver depends on the nature of the right at issue”.⁷²² In the same way, the right to privacy can be more easily waived, by mere consent, which need not be as informed as in the case of pre-trial rights.

5 7 1 2 Real evidence conscripted from the accused

Real evidence conscripted from the accused includes real evidence “emanating from the accused”⁷²³ and derivative real evidence.⁷²⁴ It has been submitted repeatedly in this thesis that South African courts, correctly, do not extend the privilege against self-incrimination to real evidence conscripted from the accused, as the Canadian Supreme Court does.⁷²⁵ Local courts

⁷¹⁷ See Schwikkard & Van der Merwe *Principles* 222. It is submitted that the dispute has more to do with semantics and terminology than what actually happens in practice.

⁷¹⁸ De Waal, Currie & Erasmus *The Bill of Rights Handbook* 4 ed (2001) 43.

⁷¹⁹ In the USA, consent is a valid exception to the warrant requirement. See § 2 2 4 *supra*

⁷²⁰ *Supra*.

⁷²¹ *S v Mphala supra* 391a-b. Compare to *Moran v Burbine* 475 US 412 (1986), where on similar facts, the US Supreme Court held otherwise.

⁷²² *New York v Hill* 528 US 110 (2000) 114.

⁷²³ *R v Stillman supra* § 95.

⁷²⁴ *R v Burlingham* (1995) 38 CR (4th) 265 (SCC); *R v Feeney* (1997) 115 CCC (3d) 129 (SCC); *R v Stillman supra*.

⁷²⁵ See §§ 2 3 2 1 1; 4 2 1 2; 5 2; 5 3 1 & 5 6 *supra*.

have consistently held that the privilege against self-incrimination protects only testimonial communications and not real evidence “conscripted” from the accused.⁷²⁶

Regarding derivative evidence, South African courts similarly do not follow the trend in Canada. Even when real evidence results from an unconstitutionally obtained statement or pointing out, it is as a rule not excluded merely because the violation of the accused’s rights led to its discovery.⁷²⁷ In this regard, s 218 of the CPA is informative. In short, it holds that evidence may be admitted notwithstanding the fact that discovery of that evidence resulted from an inadmissible confession or pointing out of the accused and notwithstanding that discovery of that evidence took place against the will of the accused.⁷²⁸ It was submitted above that s 218 prevents to a large extent the so-called fruit-of-the-poisonous-tree doctrine from applying in South Africa. In any event, derivative evidence is not deserving of exclusion merely because the evidence it was derived from is inadmissible.⁷²⁹ The admissibility of derivative evidence must be decided in a separate s 35(5)-enquiry.

The following factors are useful in determining the admissibility of all real evidence “conscripted” from the accused: Real evidence pre-exists any violation that can lead to its discovery; it is not created by the violation as in the case of testimonial communications. Real evidence is not protected by the privilege against self-incrimination. Real evidence can consequently be incriminating – as all prosecution evidence relevant to the issue of guilt tend to be – but never self-incriminating.⁷³⁰ Real evidence is objectively reliable.

All these factors tend to favour admission of the evidence. However, the seriousness of the violation that led to the discovery of the real evidence, especially violations involving police violence, must weigh against admission.⁷³¹ In cases of serious violations, the court should rely heavily on its disciplinary function⁷³² and its duty to protect judicial integrity and the integrity of the system as a whole.⁷³³ In instances of non-violent infringements, courts should

⁷²⁶ *S v Binta* 1993 (2) SACR 553 (C); *S v Huma* (2) 1995 (2) SACR 411 (W); *S v Maphumalo* 1996 (2) SACR 84 (N); *Msoni v Attorney-General of Natal* 1996 (8) BCLR 1109 (W); *S v R* 2000 (1) SACR 33 (W). Although the US Supreme Court has blurred the line somewhat with its analogies between the 4th & 5th Amendments, the position in the US is essentially the same. See *Schmerber v California* 384 US 757 (1966).

⁷²⁷ See *R v Burlingham supra*.

⁷²⁸ See the reference to s 218 of the CPA by both the majority and minority in *Pillay v S* 2004 (2) BCLR 158 (SCA).

⁷²⁹ See both the majority and minority opinions in *Pillay v S supra* 182, 195.

⁷³⁰ Schwikkard & Van der Merwe *Principles* 230.

⁷³¹ See generally Scott JA, for the minority, in *Pillay v S supra*; *Mkhize v S supra*.

⁷³² *S v Mphala supra* 400b.

⁷³³ Schwikkard & Van der Merwe *Principles* 229.

be able to rely on the independent source doctrine, the inevitable discovery principle⁷³⁴ and the attenuation-of-the-taint principle.⁷³⁵

5 7 1 3 Identification evidence

Evidence of a positive identification of the accused, resulting from an identification parade held without the presence of their legal counsel, will not be excluded if the presence of the legal counsel would have made no difference to the outcome of the parade.⁷³⁶ However, police may not deliberately infringe upon the accused's right to have his attorney present. The accused should be given reasonable opportunity to arrange for legal representation. And, where necessary, police must inform the accused's counsel of the proposed identification parade.⁷³⁷ Nonetheless, identification evidence would only really be excluded where such extreme circumstances existed that the court needs to discipline the police.⁷³⁸

5 7 2 DETRIMENT TO THE ADMINISTRATION OF JUSTICE

5 7 2 1 The crime wave

Much has been said, in this work and elsewhere,⁷³⁹ about the extremely high level of especially violent crimes prevalent in South Africa and the "immediate need"⁷⁴⁰ of society to be protected from crime. Schwikkard and Van der Merwe contend, correctly it is submitted, that "courts are – in their interpretation of the second (or over-arching) test in s 35(5) – fully entitled to lean in favour of crime control".⁷⁴¹

5 7 2 2 Good faith

It has been pointed out that the "good faith" exception creates the risk of encouraging police to remain ignorant of their duties and the rights of suspects, arrested, detained and

⁷³⁴ Schwikkard & Van der Merwe *Principles* 229.

⁷³⁵ *Wong Sun v United States* 371 US 471 (1963). See also § 2 2 2 4 3; 2 2 3 3 3 & 2 3 3 *supra*.

⁷³⁶ *S v Mphala* 1998 (1) SACR 654 (W).

⁷³⁷ *S v Thapedi* 2002 (1) SACR 598 (T) 604b-c.

⁷³⁸ Schwikkard & Van der Merwe *Principles* 232.

⁷³⁹ See §§ 4 1 2; 4 2 2 1; 4 2 2 2 7; 5 3 2 & 5 6 *supra*. See also *Ferreira v Levin NO*; *Vryenhoek v Powell NO supra* [152]; *Pillay v S supra*; *S v Naidoo supra*; *S v Cloete* 1999 (2) SACR 137 (C); *S v Melani supra* 191h; *S v Nombewu supra*; Schwikkard & Van der Merwe *Principles* 233-236.

⁷⁴⁰ *S v Nombewu supra* 422f-423b.

⁷⁴¹ Schwikkard & Van der Merwe *Principles* 234.

accused persons.⁷⁴² But it is submitted that no reasonable police officer will remain ignorant of the law regarding his duties and therefore any police officer who does choose to remain ignorant is acting in bad faith for that reason alone.

It is submitted that there is sufficient local authority that “good faith”, both on an individual and institutional level, is a valid consideration when admissibility of evidence under the second leg of s 35(5) is determined.⁷⁴³

5 7 2 3 Exigent circumstances: Public (police) safety and imminent destruction of evidence

Exigent circumstances, requiring police to act without having the luxury of first observing the “niceties” of the law, or fully considering other options,⁷⁴⁴ is closely connected to the good faith consideration. Situations where police have to act speedily must occur together with the reasonable belief that the infringement is necessary under the circumstances. Therefore, much of the authority in “good faith” cases are based on circumstances where the police had to act speedily⁷⁴⁵ or ignore the rights of an arrested person⁷⁴⁶ in order to protect themselves and the public from harm. Similarly, it submitted, is the imminent destruction of evidence also reason for police to act without a warrant in order to secure the evidence. It is submitted that these considerations must be as relevant when determining the admissibility of impeachment evidence, and would generally favour admission thereof.

5 7 2 4 Lawful or less intrusive means of securing the evidence

In Canada, this factor on its own, tend to make the violation more serious and is even indicative of a blatant disregard for the Charter⁷⁴⁷ and bad faith on the part of the police.⁷⁴⁸ Therefore, it is submitted that this factor must be taken into consideration together with the previous two mentioned. Especially when police in good faith commit a violation of an

⁷⁴² *S v Motloutsi* 1996 (1) SACR 78 (C).

⁷⁴³ *Mkhize v S supra*; *Pillay v S supra*; *S v Naidoo supra*; *S v Mphala supra*; *S v Madiba* 1998 (1) BCLR 38 (D); *S v Soci supra*. *S v Soci* is a good example where the police’s failure to properly inform the accused of his rights was based on an unreasonable mistake on an institutional level.

⁷⁴⁴ See § 5 7 2 4 *infra*.

⁷⁴⁵ *S v Madiba supra*.

⁷⁴⁶ See *S v Lottering* 1999 (12) BCLR 1478 (N).

⁷⁴⁷ *R v Collins supra*.

⁷⁴⁸ *R v Feeney supra*.

“inadvertent or of a merely technical nature”,⁷⁴⁹ it is by no means conclusive that admission of the evidence will be detrimental to the administration of justice.

5 7 2 5 Seriousness of the violation

When a violation is, however, not inadvertent or of a mere technical nature, the balance tend to lean in favour of exclusion. Depending on where on the scale – with technical and inadvertent violations on one extreme and gross, violent, deliberate and cruel violations on the other⁷⁵⁰ – the violation belongs, together with the abovementioned three factors, especially institutional good faith,⁷⁵¹ a court must determine whether admission of the evidence will be detrimental to the administration of justice.

5 7 2 6 Real evidence

In *Mkhize v S*⁷⁵² the court held, in reliance on Canadian authority,⁷⁵³ that the admission of real evidence will rarely render the trial unfair. This notion was confirmed by Scott JA in his minority opinion in *Pillay v S*.⁷⁵⁴ It is therefore submitted that the admissibility of real evidence in South Africa, despite Canadian authority to the contrary, is decided under the second leg of s 35(5) with due consideration to the factors listed in §§ 5 7 2 1 – 5 7 2 5 above.⁷⁵⁵

5 8 REMARKS IN CONCLUSION

It is submitted that unconstitutionally obtained evidence, even if previously excluded under s 35(5), remain potentially available to impeach the accused. However, such evidence must not be admitted as readily as in the United States. Nor must it be admitted in only the “very limited circumstances”⁷⁵⁶ foreseen by the Canadian Supreme Court.⁷⁵⁷

⁷⁴⁹ *Mkhize v S supra* 7.

⁷⁵⁰ See Schwikkard & Van der Merwe *Principles* 242.

⁷⁵¹ See *S v Seseane* 2000 (2) SACR 225 (O); *S v Mark* 2001 (1) SACR 572 (C).

⁷⁵² (2000) JOL 6155 (W).

⁷⁵³ *R v Collins supra*; *R v Jacoy* (1988) 38 CRR 290 (SCC).

⁷⁵⁴ *Supra* 200, citing *S v M supra*.

⁷⁵⁵ See however, also § 5 7 1 2 *supra*.

⁷⁵⁶ *R v Calder supra* § 35.

⁷⁵⁷ La Forest J in a separate concurring opinion in *R v Calder supra* could not imagine any such circumstances. See also Rose “*Calder* Successes will be Rare and the Procedure Uncertain” CR 151.

Guidelines for a balanced enquiry into the admissibility of impeachment evidence are best found in South Africa's own developments to date regarding exclusion in general under s 35(5) of the Constitution. In developing the s 35(5)-discretion, courts have already assimilated or rejected some important foreign precedents. Only in cases where the matter has not yet been decided may foreign precedent be more useful, subject to the restrictions pointed out in §§ 4 1 2 and 5 2 above.

It is submitted that the conclusion in this thesis is essentially based on two notions: First, a ruling on the admissibility of evidence is interlocutory in nature. Consequently, the question of admissibility of evidence for impeachment may be determined in a separate enquiry from the original s 35(5)-enquiry when admissibility had to be determined. It follows that with a separate enquiry the results are independent of the initial enquiry, and should therefore vary as the relevant considerations and circumstances change.

The second basis for the argument in favour of admitting this kind of evidence in South African courts, is based on the fact that South African courts do not employ juries as the finders of fact. This means that the accused is not at risk of being unduly prejudiced, because the presiding judicial officer, as the finder of fact, will understand the difference between use of evidence to incriminate and to impeach. Juries, generally, do not understand the difference.⁷⁵⁸ In South Africa magistrates can ensure that their lay assessors understand the difference.

The nature of the evidence plays a large role in its suitability for impeachment purposes. In this regard, the distinction as currently employed in South Africa⁷⁵⁹ is to be preferred over the distinction of the Canadian Supreme Court.⁷⁶⁰ Because of the objective reliability of real evidence, it is more suitable for impeachment purposes. However, if the reliability of testimonial communications can be confirmed, its value as impeachment evidence increases.⁷⁶¹

Because of the distinction employed in South African courts, the nature of the evidence involved is mostly indicative of the nature of the right that had been violated to secure it.⁷⁶² The nature of the right, together with the nature of the evidence, largely determines under

⁷⁵⁸ *R v Calder supra* § 32. See §§ 1 1; 3 2 1 1; 3 2 3 5; 3 3 1 4 & 4 1 2 *supra*. See also nn 282; 433; 634 *supra*.

⁷⁵⁹ *Mkhize v S supra*; *Pillay v S supra*; *S v M supra*.

⁷⁶⁰ *R v Burlingham supra*; *R v Feeney supra*; *R v Stillman supra*.

⁷⁶¹ See §§ 3 3 1 3; 5 3 1 & 5 4 *supra*.

⁷⁶² Regarding derivative real evidence this may not be entirely accurate. See §§ 4 2 2 2 2; 5 7 1 2 & 5 2 4 6 *supra*. See also s 218 of the CPA.

which leg of the s 35(5)-discretion the matter of impeachment must be decided. In determining whether evidence must be admitted for impeachment, a court must consequently be guided by either the factors enumerated under § 5.7.1 above, or those under § 5.7.2 above.

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