Chapter 52
Evidence

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52.1 Function and constitutionality

The law of evidence serves many functions. The rationalist tradition recognises the promotion of accuracy in decision-making as its primary function. [1] Evidence rules are also shaped by 'non-rationalist values such as the acceptability of verdicts and

1 See ML Siegel 'A Pragmatic Critique of Modern Evidence Scholarship' (1994) 88 *Northwestern University LR* 995, 996. On the rationalist tradition generally, see W Twining *Rethinking Evidence, Exploratory Essays* (1990). See also CR Nesson 'The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98 *Harvard Law Review* 1357.

the need for efficient resolution of disputes'. [2] Legitimacy constitutes a third important function. [3] It requires rules that are not only directed at maximising factual accuracy but also at giving 'moral and expressive authority' [4] to verdicts. [5] Evidence rules accomplish this end by both excluding inherently unreliable evidence and excluding reliable evidence 'if it carries significant risks of impairing the moral authority of the verdict'. [6] Ashworth and Redmayne suggest that 'legitimacy' amounts to no more than 'accuracy and respect for rights'. [7] In our legal order, the moral authority or the legitimacy of evidentiary rules require that they be consistent with an express set of constitutional rights and values. The rights component of 'legitimacy' forms the focus of this chapter. [8]

The appropriate contextual reference points for determining the legitimacy of legal verdicts will inevitably vary between procedural regimes. For example, the requirement of proof beyond reasonable doubt in a criminal trial is a direct product of the presumption of innocence; the absence of the presumption of innocence from civil procedure legitimates a standard of proof expressed as a balance of probabilities. Because the criminal trial is a concrete expression of state power, constitutional issues are far more prominent in criminal proceedings than they are in civil proceedings.

The principle of constitutional supremacy has affected South Africa's law of evidence in a number of ways. A host of common law rights have now been

accorded constitutional recognition: the right to adduce and challenge evidence, the right not to incriminate oneself, and the rights to remain silent and to be presumed

2 JD Jackson 'Modern Trends in Evidence Scholarship: Is All Rosy in the Garden? 2003 (21) *QLR* 893, 899.

3 IH Dennis 'Rectitude Rights and Legitimacy: Reassessing and Reforming the Privilege Against Self-incrimination in English Law' (1997) 31 *Israel Law Review* 24, 36.

4 Ibid.

5 Ashworth and Redmayne are sceptical of 'the legitimacy-based account of the criminal trial' and prefer to ground their own theory in retributive justice. A Ashworth & M Redmayne *The Criminal Process* (3rd Edition, 2005) 25. Despite these plausible reservations, I find Dennis' functional account, which emphasises legitimacy, extremely useful in so far as it is restricted to the law of evidence.

6 Dennis 'Rectitude' (supra). Both inquisitorial and adversarial procedural models exclude reliable evidence on grounds of public policy. See C Bradley 'The Emerging International Consensus as to Criminal Procedure Rules' (1993) 14 *Michigan Journal of International Law* 171 (Gives examples of the exclusion of evidence in German courts on the basis of privacy and personality rights.) See also M Damaska 'Evidentiary Barriers to Conviction and Two Modes of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania LR* 500.

7 Ashworth & Redmayne (supra) at 25.

8 Although not appropriate for consideration in this chapter, it should be noted that it is not entirely clear whether the promotion of legitimacy can also explain those evidence rules based on the utilitarian function of avoiding undue delay and expense. In order to bring these utilitarian considerations under the legitimacy umbrella it might be necessary to extend the components of legitimacy to include the broader, redistributive demands of social justice.

innocent. Consequently, any departure from these rights requires justification; the absence of sufficient justification may have a direct impact on admissibility. These fair trial rights, located in FC s 35(3), have altered the shape of rules regulating state privilege, various presumptions and the admissibility of admissions and confessions. The rights to equality, dignity and privacy have also changed the contours of a diverse range of evidence rules. However, FC s 35(5) — which provides for the exclusion of evidence obtained in violation of any right in the Bill of Rights where admission would render the trial unfair or be detrimental to the administration of justice — is the most significant.

52.2 The right to a fair trial

(a) Criminal proceedings

The right to a fair trial was a rather sterile concept prior to 1994. Its character is probably best captured by the following, oft quoted, extract from *S v Rudman; S v Mthwana*:

> [A court of appeal] does not enquire whether the trial was fair in accordance with 'notions of fairness and justice', or with 'the ideas underlying ... the concept of justice which are the basis of all civilised systems of criminal administration'. The enquiry is whether there has been an irregularity or illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated and conducted... . What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice. [9]

In its very first judgment, *S v Zuma*, the Constitutional Court resoundingly rejected this formalistic approach. It held that the constitutional right to a fair trial embraced 'a concept of substantive fairness' that 'required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. [10] The *Zuma* Court also held that the right to a fair trial was not restricted to those rights now found in FC s 35(3). [11] That the content of the right to a fair trial extends beyond those rights enumerated in FC s 35(3) and embraces procedural and substantive concerns located elsewhere in the Bill of Rights was first articulated by Justice Ackermann in *S v Dzukuda; S v Tshilo*:

> [A]n accused's right to a fair trial under s 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'. Elements of this comprehensive right are specified in paras *(a)* to *(o)* of ss (3). The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to

9 1992 (1) SACR 70, 100 and 109 (A).

10 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1 ('*Zuma*') at para 16.

11 See, for example, *S v Msithing* 2006 (1) SACR 266 (N); *S v Khumalo* 2006 (1) SACR 447 (N); *S v Muller* 2005 (2) SACR 451 (C).

a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection 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 s 35(3) develops. It is preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified elements of the right to a fair trial, the specified elements being those detailed in ss (3)... It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand. At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality. [12]

(b) Other proceedings

The right to a fair trial applies only to accused persons. [13] The FC s 35(3) right does not extend to civil trials, nor does it apply to interrogation procedures outside of the criminal process. [14]

Several statutory enactments provide for interrogation procedures that are not directed at a finding of guilt. Many of these schemes authorise designated officials to compel persons to appear before them and to answer questions, whether

12 *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16 at paras 9 and 11. See also *Zuma* (supra) at para 16; *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC), [1995] ZACC 14; *Key v Attorney-General Cape Provincial Division* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC), [1996] ZACC 25; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC), 1998 (1) SACR 227 (CC), [1997] ZACC 18 at para 22; *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC), 2005 (1) SACR 215 (CC).

13 *Omar v Government Republic of South Africa* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC), 2006 (1) SACR 359 (CC), [2005] ZACC 17, at para 51; *Sibiya v Director of Public Prosecutions, Johannesburg* 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC), 2006 (1) SACR 220 (CC), [2005] ZACC 6 at para 31.

14 See *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), [1996] ZACC 6 at para 11 (Court held that the application of s 25(3) of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') was restricted to criminal proceedings.) See also *Ferreira v Levin and Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1993] ZACC 13 ('*Ferreira v Levin*') at para 41; *Bernstein v Bester* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC), [1996] ZACC 2 ('*Bernstein*'); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC), [1997] ZACC 5; *Key* (supra); *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA), 2002 (1) SACR 128 (SCA); *Parbhoo v Getz* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC); *De Lange v Smuts NO* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC), [1998] ZACC 6; *Mitchell and Another v Hodes & Others NNO* 2003 (1) SACR 524 (C) ('*Mitchell v Hodes*'); *Thatcher v Minister of Justice and Constitutional Development* 2005 (1) SACR 238 (C).

incriminating or not. [15] As the subject of the examination is not an accused person, she cannot claim fair trial rights. However, if an examinee is subsequently charged, and the prosecution seeks to use evidence obtained at such an interrogation in a subsequent trial, then the protections afforded by FC s 35(3) will apply. Even where an examinee has been arrested and charged prior to an examination which occurs independently of the criminal trial, they can only claim FC s 35(3) rights if evidence from the examination is sought to be introduced at the trial. [16] However, where the purpose of the examination relates specifically to the offence charged, the accused may not be summoned for interrogation. [17] If the evidence elicited at an examination is found to have been obtained in contravention of the privilege against self-incrimination, then it may be excluded in terms of FC s 35(5) at a subsequent trial. [18] Thus, the right to a fair trial is protected by use of immunity in respect of evidence arising out of the 'non-trial' interrogation. However, the subsequent use of derivative evidence is less clear cut and its admissibility falls to be determined in terms of a competent court's FC s 35(5) discretion to exclude evidence. [19] This discretion does not mean that an examinee is deprived of the right to procedural fairness prior to becoming an accused. [20] An examinee will still be subject to the residual procedural safeguards to be found in the FC s 12(1) right to freedom and security of person. [21] In addition, a person detained for non-trial purposes — say, for deportation — may

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15 For example, s 65 of the Insolvency Act 24 of 1936; ss 415 and 417 of the Companies Act 61 of 1973; s 66(1) of the Close Corporations Act 69 of 1984, ss 3, 4, 6, 8 and 9 of the Inspection of Financial Institutions Act 38 of 1984; ss 7, 9 and 17 of the Maintenance and Promotion of Competition Act 96 of 197; ss 5(7) and 14 of the Harmful Business Practices Act 71 of 1988; s 6 of the Banks Act 94 of 1990; s 51 of the National Ports Act 12 of 2005.

16 *Mitchell and Another v Hodes and Others NNO* 2003 (1) SACR 524 (C). See also *Equisec (Pty) Ltd v Rodrigues and Another* 1999 (3) SA 113 (W).

17 See *Shaik v Minister of Justice and Constitutional Development* 2004 (1) SACR 105 (CC), [2003] ZACC 24 at para 19. (The Constitutional Court held that the reference to 'any person' in s 28*(b)* of the National Prosecuting Authorities Act, which permits the Investigating Director to summons any person who is believed to be able to furnish any information in respect of the commission of a specified offence, did not include an accused who is being tried on charges covered by the s 28 summons.) Cf *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C), 2005 (4) BCLR 388 (C).

18 See *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2003 (1) SACR 286 (W). For a fuller discussion of investigative inquiries, see DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 527; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) §10.2.4. and PJ Schwikkard *Presumption of Innocence* (1999) 65–75.

19 See *Key* (supra); *Bernstein* (supra); *Ferreira v Levin* (supra); *National Director of Public Prosecution v Mohamed* 2003 (2) SACR 258 (C); *S v Basson* 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10.

20 *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), [1996] ZACC 6 ('*Nel*') at para 11. See also *Bernstein* (supra); *Geuking v President of the Republic of South Africa & Others* 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC), 2003 (1) SACR 404 (CC), [2002] ZACC 29.

21 See, generally, M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40. See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), [1995] ZACC 7 at para 43.

nevertheless rely on the FC s 35(2) rights of detainees. [22]

The Constitutional Court in *Nel v Le Roux* [23] considered the extent to which the right to a fair trial applies only to accused persons when it engaged with the constitutionality of s 205 of the Criminal Procedure Act ('CPA'). [24] In terms of this section, a judge or magistrate, upon receiving a request from a Director of Public Prosecutions ('DPP') or public prosecutor, may request a person, who is likely to give material or relevant information about an alleged offence, to appear before them for examination by the DPP or public prosecutor. Such an examination may be conducted in private. [25] The applicants challenged CPA s 205 in terms of the following provisions of the Interim Constitution: IC s 8(1) (equality); IC s 11(1) (freedom and security of person); IC s 11(2) (cruel, inhuman or degrading treatment or punishment); IC s 13 (privacy); IC s 15(1) (freedom of speech and expression); IC s 23 (access to information); IC s 24 (administrative justice); IC s 25(3) (fair trial); IC s 25(3)*(a)* (public trial); IC s 25(3)*(c)* (the right to be presumed innocent and to remain silent) and IC s 25(3)*(d)* (the privilege against self-incrimination).

The *Nel* Court found that CPA s 205 was not inconsistent with any of the above provisions. Arguments pertaining to the infringement of IC s 11(2) and IC s 23 were not pursued before the court and were dismissed by Ackermann J as not being worthy of serious consideration. [26] The *Nel* Court was also not convinced that IC s 24 was applicable to CPA s 205 proceedings and held that, even if it was, its provisions were not infringed by CPA s 205. [27] In relation to the privilege against self-incrimination the *Nel* court held that '[i]n view of the transactional indemnity and use of immunity provisions in s 204(2) and (4) respectively of the Criminal Procedure Act, the applicant could not validly object to answering self-incrimination questions'. [28] As to the general strength of the applicant's Bill of Rights challenge, the *Nel* Court wrote:

> If the answer to any question put to an examinee at an examination under s 205 of the Criminal Procedure Act would infringe or threaten to infringe any of the examinee's Chapter 3 rights, this would constitute a 'just excuse' for purposes of s 189(1) for refusing to answer the question unless the s 189(1) compulsion to answer the particular

22 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T).

23 *Nel* (supra).

24 Act 51 of 1977.

25 Sections 162–5, 179–81, 187–9, 191 and 204 are applicable to proceedings held in terms of s 205. Section 205(4) provides that a person who refuses or fails to give information shall not be sentenced to imprisonment as contemplated in s 189 unless the presiding officer is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

26 *Nel* (supra) at para 24.

27 Ibid at para 24.

28 Ibid at para 4.

> question, would in the circumstances, constitute a limitation on such right which is justified under s 33(1) of the Constitution. In determining the applicability of s 33(1), regard must be had not only to the right asserted but also the State's interest in securing information necessary for the prosecution of crimes. ... There is nothing in the provisions of s 205 read with s 189 of the Criminal Procedure Act which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights. [29]

The applicant contended that CPA s 205 infringed the IC s 11(1) right not to be detained without trial: the CPA s 205(3) procedure (incorporating the summary incarceration procedure of s 189) did not, he alleged, constitute a 'trial'. This argument was rejected on the grounds that a 'trial' in the context of IC s 11(1) merely required 'the interposition of an impartial entity, independent of the Executive and the Legislature to act as arbiter between the individual and the State'. [30] The Court found a s 205 enquiry met these requirements. The *Nel* Court also noted that CPA s 205(4) specifies that presiding officers can only sentence a recalcitrant examinee to imprisonment where they are 'of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order'. This limitation on the presiding officer's discretion to jail a recalcitrant witness, Ackermann J held, demonstrated that 'the s 205 provisions are as narrowly tailored as possible to meet the legitimate State interest of investigating and prosecuting crime'. [31]

The *Nel* Court held that the IC s 25(3) right to a fair trial applied only to accused persons and, as a reluctant CPA s 205 examinee could not be said to be an 'accused', it was not necessary to consider IC s 25(3) in determining the constitutionality of CPA s 205. [32] The Court also dismissed the arguments that s 189 summary imprisonment proceedings denied the applicant his right to a public trial and his right 'to be informed with sufficient particularity of the charge'. Noting that there are several recognised exceptions to the rule that criminal proceedings should be held in public, the *Nel* Court found that there might well be 'important and justified policy grounds for holding the CPA s 205 enquiry in private.' [33] Furthermore, as a presiding officer had a discretion whether to hold such an enquiry in public or private, until such a discretion has been exercised the question of whether a constitutional right had been infringed did not arise. Similarly, the question whether the examinee's right 'to be informed with sufficient particularity of the charge' had been infringed could not be decided in the abstract as there was no provision prohibiting a presiding officer from properly informing the examinee of the possible consequences of refusingto answer a question. [34] These two observations suggest

29 Ibid at para 7.

30 *Nel* (supra) at para 14. See also para 20.

31 Ibid at para 20.

32 Ibid at para 11. See also *S v Mahlangu* 2000 (1) SACR 565 (W).

33 Ibid at paras 17–19.

34 Ibid at para 19.

that while CPA s 205 itself is not unconstitutional, there may well be circumstances in which its application infringes an examinee's Chapter 2 rights.

The application of FC s 35(3) is not only dependent on the claimant of the relevant rights being an accused; the claimant must also be an accused in criminal trial proceedings. Consequently, an accused in bail proceedings is entitled to claim the rights of an arrested and detained person but not fair trial rights. [35] In

S v Dlamini, S v Dladla, S v Joubert, S v Schietekat, Kriegler J drew the following distinction between bail and trial proceedings:

> [T]here is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The focus at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial, and that entails in the main protecting the investigation and prosecution of the case against hindrance. [36]

(c) Arrested, detained and accused persons [37]

FC s 35 specifies particular sets of rights in respect of three categories of people. FC s 35(1) applies to arrested persons, FC s 35(2) to detained persons and FC s 35(3) to accused persons. FC s 35(4) applies to arrested, detained and accused persons. However, FC s 35(5) may not be similarly restricted. [38] In order to determine the scope of FC s 35, it is necessary to understand what constitutes an arrested, detained or accused person. Unfortunately, there are no convenient statutory definitions.

In terms of s 39(1) of the Criminal Procedure Act '[a]n arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by forcibly confining his body'. In terms of s 39(3) of the Criminal Procedure Act '[t]he effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.' FC s 35(1) specifically refers to accused persons arrested for *allegedly committing an offence*. Given that the language of FC s 35(1) squares with the underlying requirement for a lawful arrest in terms of the Criminal Procedure Act, FC s 35(1)

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35 See *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 ('*Dlamini*') at para 78 (Kriegler J held that the imposition of an onus on an applicant for bail was not constitutionally objectionable as the question of erroneous conviction did not arise.) Bail is discussed more fully below at § 52.6.

36 *Dlamini* (supra) at para 11. See also *Geuking v President of the Republic of South Africa* 2003 (1) SACR 404 (CC), 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC), [2002] ZACC 29 at para 47 (Court held that '[a] person facing extradition is not an accused person for the purposes of the protection afforded by s 35(3) of the Constitution'.)

37 See, generally, F Snyckers & J le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51.

38 For more on FC s 35(5), see § 52.10 infra.

rights will accrue to a person arrested in terms of CPA s 39. [39] An arrested person will also be a detained person: thus the rights specified in FC s 35(2) will also accrue to an arrested person. But a detained person will not always be an arrested person. Since FC s 35(1) only applies to persons 'arrested for allegedly committing an offence' a person who is detained for other purposes will not be an 'arrested person' for the purposes of FC s 35(1). If the definition of arrest or detention is restricted to those who are in some way physically confined, then the suspect who has not been arrested is potentially in a very vulnerable position. As Satchwell J noted in *S v Sebejan*:

> The crux of the distinction between the arrested person and the suspect is that the latter does not know without equivocation or ambiguity or at all that she is at risk of being charged. The suspect may herself have an inkling that she is mistrusted by the investigating officer; she may even have been told that she is at some risk of being arrested; but the suspect has not been placed on terms. Indeed the suspect may have no qualms or concerns whatsoever and may therefore continue to operate in a state of ignorance — ignorance that she is mistrusted, may be under surveillance, that the investigator is enquiring into her actions and behaviour, that there may be an attempt to develop sufficient evidence against her. In this situation there is no bliss in ignorance. The suspect is in jeopardy of committing some careless or unwise act or uttering some incautious and potentially incriminating words which would subsequently be used against her in a trial. [40]

Sebejan acknowledges that the right to a fair trial does not begin in court but at the inception of the criminal process. [41] In order to protect the accused's fair trial right not to incriminate herself, Satchwell J held (albeit obiter [42]) that a suspect was entitled to the same warning as an arrested person. [43]

However, the High Courts have diverged on this point. In *S v Langa,* the court held that IC s 25 did not apply to suspects. [44] Pickering J in *S v Mthethwa* similarly held that the rights of arrested, detained and accused persons set out in FC ss 35(1), (2) and (3) were irrelevant in respect of a suspect. [45] However, the *Mthethwa* court

39 See, generally, E Du Toit et al *Commentary on the Criminal Procedure Act* (2011) 5-1 — 5-2.

40 *S v Sebejan* 1997 (1) SACR 626, 636 (W)('*Sebejan*').

41 Ibid at 635d. See also *S v Mpetha (2)* 1983 (1) SA 576 (C); *S v Lwane* 1966 (2) SA 433 (A); *R v Kuzwayo* 1949 (3) SA 761 (A); *S v Dlamini* 1973 (1) SA 144 (A); *S v Agnew* 1996 (2) SACR 535 (C); *S v Mathebula* 1997 (1) SACR 10 (W). Cf *S v Ngwenya* 1998 (2) SACR 503 (W)(Leveson J, referring to the Interim Constitution, held that the IC s 25(3) right to a fair trial did not include pre-trial procedures.)

42 This line of reasoning did not assist the accused in *Sebejan*. The court found that she had not been a suspect at the time of making the statement in question.

43 *Sebejan* (supra) at 636b. See also *S v Van der Merwe* 1998 (1) SACR 194 (O); *S v Orrie* 2005 (1) SACR 63 (C)(The court held that a suspect must be made aware of their status as a suspect.)

44 *S v Langa* 1998 (1) SACR 21 (T). See also *S v Ndhlovu* 1997 (12) BCLR 1785 (N). IC s 25 contained substantially similar provisions to those found is FC s 35 and similarly made a distinction between arrested, detained and accused persons.

45 *S v Mthethwa* 2004 (1) SACR 449, 453e–f (E).

found that as the statement had been obtained in breach of the Judges Rules [46] and that the admission of the evidence would render the trial unfair and bring the administration of justice into disrepute, the evidence fell to be excluded in terms of the court's common law discretion.

This vexed question of when fair trial rights kick-in might also be answered in terms of the meaning of 'detention'. The concept of 'detention' extends beyond physical incarceration. [47] For example, the Supreme Court of Canada has held that detention occurs not only when persons are deprived of their liberty by physical constraint, but also 'when a police officer or other agent of the state assumes control over the movement of a person by demand or direction which may have

significant legal consequence and which prevents or impedes access to counsel'. [48] The Canadian Supreme Court has held that 'the necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply'. [49] Were the Canadian gloss on detention to be placed on FC s 35, it would appear that suspects who are questioned by the police in their homes will not be 'detained' and will not be entitled to be advised of their right to legal representation — as the police have no power to compel suspects to answer questions. [50] However, if a suspect reasonably believes that she must answer the question then she will be 'detained' and must be advised of her right to legal representation. On this definition of 'detention' the test for reasonable belief would be subjective. (That fact would hardly make the definition of detention unique: the test for undue influence in relation to confessions also contains an element of subjectivity. [51]) The test then would run as follows: a person who is questioned by the police, and who does not know that she is not obliged to answer the questions, and feels compelled to speak, will be detained for purposes of FC s 35.

52.3 A fair public hearing [52]

46 See also *S v Khan* 2010 (2) SACR 476 (KZP). Judges Rule 2 provides: 'Questions may be put to a person whom the police have decided to arrest or who is under suspicion where it is possible that the person by his answers may afford information which may tend to establish his innocence. ... In such a case a caution should first be administered. Questions, the sole purpose of which is that the answers may afford evidence against the person suspected, should not be put.'

47 On the meaning of 'detention' in FC s 12, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS,July 2006) Chapter 40.

48 *R v Therens* [1985] 1 SCR 613, 642-645; *R v Rahn* [1985] 1 SCR 659; *R v Trask* [1985] 1 SCR 655;*R v Thomsen* [1988] 1 SCR 640. Cf *R v Goodwin* [1993] 2 NZLR 153.

49 *Thomsen* (supra).

50 *R v Esposito* (1985) 53 CR (2d) 356.

51 See PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) at 339.

FC s 34 is viewed by some as the civil proceedings equivalent of FC s 35. Section 34 provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. The impact of FC s 34 on the admissibility of evidence has been relatively limited. However, it may play a role in restricting the exclusion of evidence when state privilege [53] is claimed and it may assist the court in determining the admissibility of improperly obtained evidence in civil trials. [54]

52.4 The presumption of innocence and related rights

The presumption of innocence in FC s 35(3)*(h)* traditionally provides the ballast for fairness in criminal justice proceedings. Although the presumption of innocence as a constitutional right has a narrowly defined content, its operational efficacy is dependent on a number of associated rights: The right to remain silent at both trial (FC s 35(3)*(h)*) and pre-trial stages (FC s 35(1)*(a)*), and the privilege against self-incrimination at trial (FC s 35(3)*(j)*) and the right not to make a confession or admission at the pre-trial stage (FC s 35(1)*(c)*). These rights in turn would be, in many instances, illusory if arrested, accused and detained persons did not have

the right to be advised of the existence of such rights (FC s 35(1)*(b)*, FC s 35(2)*(b)*, FC s 35(3)*(f)*) and did not have access to legal representation (FC s 35(2)*(b)*and *(c)*, FC s 35(3)*(f)* and *(g)*) to enable them to effectively exercise those rights.

(a) The presumption of innocence

(i) Content and rationale

The presumption of innocence, as a consequence of poetic licence in *Woolmington v DPP*, [55] is frequently viewed as an ancient principle of English law. It has, as a consequence of our historical relationship with England, been absorbed into South African law as a fundamental legal principle. [56] However, it seems that the presumption of innocence is neither particularly ancient nor English. [57] That said, it has secured a place in a number of modern constitutions. The rationale for its prominence of place is varied. Rationales range from a concern that individual rights need to be protected from the potentially coercive authority of the state to policy concerns directed at maintaining the legitimacy of the criminal-justice system and

52 See, generally, J Brickhill & A Friedman 'Access to Courts' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59.

53 See § 52.6 infra.

54 Ibid.

55 *Woolmington v DPP* [1935] AC 462 (HL) 481.

56 See PJ Schwikkard *Presumption of Innocence* (1999) 2–7 (Offers a general discussion of the origins and rationale of the presumption of innocence.)

57 Ibid.

the normative force of the criminal law. The most persuasive rationale turns on the recognition that the presumption of innocence is necessary to reduce the possibility of erroneous convictions. [58]

The presumption of innocence is most powerfully expressed in terms of the reasonable doubt standard. The reasonable doubt standard demands that the burden of proof rests on the prosecution to prove guilt beyond a reasonable doubt. The correlation between the rationale for the presumption of innocence and the reasonable doubt standard is succinctly expressed by Wilson in the following passage:

> Although the reasonable doubt standard is less a precise formula than it is a symbol it satisfies certain imperatives. It offers society assurance that people innocent of crime shall not be convicted; and although it creates an inevitable margin of error, 'our society [has determined] that it is far worse to convict an innocent man than to let a guilty man go free'. Second, the reasonable doubt standard protects the individual against the state's considerable resources and its potentially oppressive power to secure the conviction of the essentially powerless defendant. Perhaps most important, the reasonable doubt standard has captured society's belief in the security of its own standards of criminal justice. '[I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt, whether innocent men are being condemned.' It is also important in our free society that 'every individual going about his ordinary affairs have confidence

> that his government cannot adjudge him guilty of a criminal offence without convincing a proper fact finder of his guilt with utmost certainty. [59]

The South African case law shows that the presumption of innocence is used to describe two different phenomena: (1) a rule regulating the standard of proof; and (2) a policy directive that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial. [60]

Potential definitional difficulties arise if we do not distinguish between those rights that cohere with the presumption of innocence and the presumption of innocence itself. Whilst the rationale of rights such as the right to remain silent and the privilege against self-incrimination may be partially attributable to the presumption of innocence, their existence can also be attributed to policy considerations separate from those applicable to the presumption of innocence. Accordingly their application will give rise to considerations which may not arise when considering the extension of the presumption of innocence. The danger of conflating the presumption of innocence and other separately enumerated rights is that those rights become vulnerable to the argument that in situations where the presumption of innocence is not applicable, or where the burden imposed by the

58 See *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8 at para 78. See C Collier 'The Improper use of Presumptions in Recent Criminal Law Adjudication' (1986) 38 *Stanford LR* 423, 457.

59 V Wilson 'Shifting Burden in Criminal Law: A Burden on Due Process' (1981) 8 *Hastings Constitutional Law Quarterly* 731, 732-3. See also LJ Harris 'Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness' (1986) 7 *Journal of Criminal Law and Criminology* 308, 310; D Dripps 'The Constitutional Status of the Reasonable Doubt Rule' (1987) 75 *California LR* 1665, 1670.

60 See Schwikkard *Presumption of Innocence* (supra) at 35–36.

presumption of innocence has been discharged, then those rights no longer apply. For example, the Constitutional Court, in *S v Manamela,* drew a distinction between an infringement of the right to remain silent and the presumption of innocence. [61] The *Manamela* Court was required to consider whether the reverse onus in s 37 of the General Law Amendment Act infringed the constitutional right to a fair trial, and, in particular, the right to be presumed innocent, the right to remain silent, and the right not to testify during proceedings. [62]

The *Manamela* Court held that s 37(1) required the prosecution to prove the following beyond a reasonable doubt: (1) that the accused was found in possession of goods, other than stock or produce; (2) that the goods were acquired otherwise than at a public sale; and (3) that the goods had been stolen. Once the prosecution had discharged this burden the accused must establish on a balance of probabilities that: (1) he or she believed, at the time of acquiring the goods, that the person from whom he or she received them was the owner of the goods or was duly authorised by the owner to dispose of them; and (2) his or her belief was reasonable. Section 37(1) effectively creates statutory liability for the negligent acquisition or receipt of stolen goods. The *Manamela* Court held that s 37(1) was a justifiable infringement of the right to remain silent but an unjustifiable infringement of the presumption of innocence. It held that the reverse onus justifiably infringed the right to silence because the accused had to establish that they had reasonable

grounds for believing that the seller of the goods was authorised to sell the goods or was the owner of the goods, even where the prosecution had led no evidence regarding the reasonableness of that belief. A failure to adduce evidence of the reasonableness of that belief leads to a reasonable inference that the accused knew of the purloined nature of the goods. However, the presumption of innocence was unjustifiably infringed because s 37 'imposed a full legal burden of proof on the accused'. [63] Similarly, in *S v Singo*, the Constitutional Court indicated that the presumption of innocence as a constitutional right is restricted to the requirement that guilt be proved beyond a reasonable doubt. [64] Although this burden is a partial product of the right to remain silent, the right to remain silent appears to be a far more malleable right.

(ii) The scope of the presumption of innocence

The Constitutional Court has had ample opportunity to reiterate that the right to be presumed innocent requires the prosecution to prove the guilt of an accused person

61 *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC), 2000 (1) SACR 414 (CC), [2000] ZACC 5.

62 Act 62 of 1955.

63 *S v Manamela* (supra) at para 25. For a critical discussion of this case, see P Schwikkard 'Evidence' (2000) 13 *SACJ* 237, 239. Cf *Osman v Attorney-General Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC), [1998] ZACC 14. See also PJ Schwikkard 'A Dilution of the Presumption of Innocence and the Right to Remain Silent' (1999) 116 *SALJ* 462. However, s 37(1) has since been amended to omit the offending phrase. See DT Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 555.

64 *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC), [2002] ZACC 10.

beyond reasonable doubt. [65] The presumption of innocence applies to those elements of the state's case that must be established in order to justify punishment. [66] The presumption of innocence will be infringed whenever there is the possibility of a conviction despite the existence of reasonable doubt. The arena in which the presumption of innocence has found greatest application is in that of reverse onus provisions. Reverse onus provisions in civil cases merit some attention. [67] However, because the constitutional right to a presumption of innocence arises only in the context of an accused's right to a fair trial, reverse onus provisions attract far greater attention in the context of criminal trials. [68]

Likewise, because the presumption of innocence arises only in the context of an accused's right to a fair trial, the presumption of innocence has been held not to apply to interrogation procedures outside of the criminal process, nor to

proceedings that take place after conviction. [69] Quasi-exceptions to this rule are the civil imprisonment of debtors and the contempt of court proceedings instituted by means of civil proceedings. [70]

(iii) Reverse onus provisions

Reverse onus provisions were considered for the first time by the Constitutional Court in *S v Zuma*. [71] CPA s 217(1)(*b*)(ii) placed a burden on the accused to prove, in specified circumstances, the inadmissibility of a confession on a balance of

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65 See, for example, *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC); *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC); *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC)('*Bhulwana*'); *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC) at para 16.

66 Schwikkard *Presumption of Innocence* (supra) at 40-42.

67 See, for example, the Constitutional Court's consideration of the allocation of the burden of proof in defamation cases in relation to FC s 16 in *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). See also *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC), [1995] ZACC 7 ('*Coetzee v Government*')(Court held the civil imprisonment of debtors unconstitutional.); *Laubscher v Laubscher* 2004 (4) SA 350 (T).

68 See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 752 (CC), [1997] ZACC 5. See also *NDPP v Phillips* 2002 (4) SA 60 (W).

69 In *S v Dzukuda; S v Tshilo* 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16 at para 53 (Court held that while the accused's liberty and security interests were not extinguished during the sentencing phase of the trial, they were reduced in that the presumption of innocence was no longer applicable. However, Ackermann J held that the accused's rights to remain silent and not to testify during proceedings were still applicable at the sentencing stage. Ibid at para 40.) See also *NDPP v Phillips* 2001 (2) SACR 542 (W)(The court held that proceedings in terms of chapter 5 of the Prevention of Organised Crime Act 121 of 1998, relating to confiscation orders commencing after conviction, could not be affected by the presumption of innocence as guilt or innocence was not in issue.)

70 *Uncedo Taxi Service Association v Maninjwa* 1998 (2) SACR 166 (E). The presumption of innocence has clear application in contempt of court proceedings. See, generally, *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SACR 81 (CC); *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC); *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC). Cf *S v Chinamasa* 2001 (1) SACR 278 (ZS).

probabilities. Kentridge AJ held that the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt. Furthermore, where a statutory presumption requires the accused to prove or disprove an element of an offence or excuse on a balance of probabilities, such a presumption would create the possibility of conviction despite the existence of a reasonable doubt. [72] Finding that the effect of the presumption contained in CPA s 217(1)*(b)*(ii) was to place a burden on the accused to prove a fact on a balance of probabilities, Kentridge AJ concluded that the section breached the constitutional right to be presumed innocent.

In *S v Coetzee*, [73] the Constitutional Court had the opportunity to deal with the effect of the presumption of innocence on statutory provisions requiring

the accused to prove an exemption, exception or defence. [74] The *Coetzee* Court was required to determine the constitutionality of CPA s 332(5):

> When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore.

Langa J (as he then was) held that CPA s 332(5) imposed an onus on the accused to prove an element relevant to the verdict. Whether this element pertained to the offence or to an exemption was not relevant; the issue was the substance of the offence: 'If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.' [75] The *Coetzee* Court, by implication, rejected the 'greater includes the

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71 *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC).

72 See *Bhulwana* (supra)(The Constitutional Court similarly found that the presumption contained in s 21(1)(*a*)(i) of the Drugs and Drug Trafficking Act 140 of 1992 unconstitutional.) See also *S v Ntsele* 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC)(Section 21(1)(*b*) of the Drugs and Drug Trafficking Act held unconstitutional); *S v Mello* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC), 1999 (2) SACR 255 (CC)(Section 20 of the Drugs and Drug Trafficking Act was struck down); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC)(The Court held s 40(1) of the Arms and Ammunition Act 75 of 1960 unconstitutional); *Lodi v MEC for Nature Conservation and Tourism, Gauteng* 2005 (1) 556 SACR (T)(The court found s 37(1)*(c)* and s 110(1)*(b)* and *(c)* of the Nature Conservation Ordinance 12 of 1983 unconstitutional, but favouring the approach taken in *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC) held that s 37(1)*(b)* which required a person to give a satisfactory account of possession of dead game, did not constitute a reverse onus provision.)

73 *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC), 1997 (1) SACR 379 (CC), [1997] ZACC 2. For a further discussion of *Coetzee*, see G Kemp 'Die Grontwetlikheid van Statutere Vermoedens' (1998) 9 *Stellenbosch LR* 106.

74 See also *S v Nduku* 2000 (2) SACR 382 (TkHC). See, generally, A Paizes 'A Closer Look at the Presumption of Innocence in Our Constitution: What is an Accused Presumed to be Innocent of?' (1998) 11 *SACJ* 409.

lesser test'. [76] Consequently, a reverse onus provision cannot be saved by the argument that the legislature, by creating a special defence in respect of which the accused bears the onus, has ameliorated the hardship the accused would otherwise have suffered if it had chosen to create an absolute liability offence. [77]

The Constitutional Court in *Scagell v Attorney-General of the Western Cape*, without distinguishing between permissive and mandatory evidentiary presumptions, held that an evidentiary burden does not create the possibility of conviction despite the existence of a reasonable doubt. [78] One of the provisions considered in *Scagell* was s 6(3) of the Gambling Act: [79]

> When any playing-cards, dice, balls, counters, tables, equipment, gambling devices or other instruments or requisites used or capable of being used for playing any gambling game are found at any place or on the person of anyone found at any place it shall be prima facie

> evidence in any prosecution for a contravention of subsection (1) that the person in control or in charge of such place was playing such game at such place and was visiting such place with the object of playing such game.

O'Regan J noted that the words 'shall be prima facie evidence' used in s 6(3) were generally believed to impose no more than an evidentiary burden on the accused. Such an evidentiary burden merely requires 'evidence sufficient to give rise to a reasonable doubt to prevent conviction'. [80] She held that unlike the imposition of a legal burden, an evidentiary burden did not create the possibility of conviction despite the existence of a reasonable doubt. The Court found it unnecessary to consider whether s 6(3) nevertheless infringed the presumption of innocence by relieving the prosecution of its duty to prove all the elements of the offence charged. It did not have to give the presumption of innocence further consideration because s

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75 *S v Coetzee* (supra) at para 38.

76 This American phraseology is used to reflect the argument that since the legislature in formulating offences is not obliged to provide any defence, it is free to determine the rules of proof in relation to any defences it gratuitously creates, ie the greater power to eliminate the defence is seen as including the lesser power of shifting the burden of proof. See D Dripps 'The Constitutional Status of the Reasonable Doubt Rule' (1987) 75 *California LR* 1665.

77 While it might not be possible to challenge absolute liability offences on the basis that they infringe the presumption of innocence, they remain vulnerable to challenge on the basis of the constitutional right to freedom and security of person. See *S v Coetzee* (supra) at paras 93 and 159. O'Regan J held that it was necessary to distinguish between two separate constitutional inquires that may arise where a statutory provision creates a strict liability offence and places a burden on the accused. The first inquiry is whether it is constitutionally legitimate for Parliament to impose the form of criminal liability. The second inquiry focuses on the legitimacy of imposing a burden on the accused. For more on FC s 12, see M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 40.

78 *Scagell v Attorney-General of the Western Cape* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC), 1996 (2) SACR 579 (CC), [1996] ZACC 18 ('*Scagell*').

79 Act 51 of 1965.

80 *Scagell* (supra) at para 12.

6(3) contained sweeping provisions that permitted innocent persons to be brought to trial 'merely upon proof of a fact which itself is not suggestive of any criminal behaviour'. [81]

One of the weaknesses of *Scagell* is the Court's failure to draw a distinction between permissive and mandatory evidentiary burdens. It is clear that s 6(3) created a mandatory presumption. The presumption requires the court to presume, once certain items had been found, that the person in control of or in charge of such place permitted the playing of a gambling game. There can be no doubt that proof of the basic fact in s 6(3) has a very tenuous relationship with the presumed fact and could in no way be considered to lead inexorably to the conclusion presumed. Consequently, if the accused exercised his constitutional right to remain silent and led no defence evidence, then he would, in the absence of other evidence capable of raising a reasonable doubt, be liable to conviction despite the existence of a reasonable doubt. [82] In the absence of a mandatory presumption, the prosecution would be forced to lead additional evidence of the presumed fact in order to secure conviction or avoid discharge. The application of such a presumption could lead to conviction despite the existence of reasonable doubt. Ironically, this line of reasoning is implicit in O'Regan J's reasons for holding that s 6(3) infringed the right to a fair trial. O'Regan J held that the effect of s 6(3) was that 'innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence'. [83]

The issue of determining the application of the presumption of innocence to regulatory offences has yet to be properly considered by the courts. However, the Constitutional Court has indicated that the regulatory nature of an offence is better considered as a factor in establishing whether a provision constitutes a justifiable limitation on the right to be presumed innocent rather than in establishing breach. This approach is to be preferred. It allows the court to concentrate on 'the values

at stake in the particular context' [84] rather than focusing on the unruly distinction between regulatory and criminal offences. [85]

Although the Constitutional Court has made it clear that there may well be instances where a reverse onus provision is justified, [86] it has been remarkably consistent in refusing to find justification for an infringement of the presumption of innocence. The normative value accorded to the presumption as a fundamental right

81 Ibid para 16.

82 See *R v Wholesale Travel Inc* 1992 8 CR (4th) 145.

83 *Scagell* (supra) at para 16.

84 See *S v Coetzee* (supra) at para 43.

85 See D Stuart *Canadian Criminal Law — A Treatise* (3rd Edition, 1995) 160. See also PJ Schwikkard *Presumption of Innocence* (1999) 97–109. Cf *S v Fransman* 2000 (1) SACR 99 (W).

86 *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 41.

has been underlined by the Court's insistence that any justification for infringing the presumption of innocence would have to be clear, convincing and compelling. [87]

(b) Right to remain silent; right not testify during proceedings and right not to give self-incriminating evidence

(i) Content and rationale

The right to remain silent can be described as the absence of a legal obligation to speak. [88] Its underlying rationale is three-fold: (1) concern for reliability (by deterring improper investigation) which relates directly to the truth-seeking function of the court; (2) a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (3) the right to remain silent is necessary to give effect to the privilege against self-incrimination and the presumption of innocence. [89] The Final Constitution offers its protection with respect to both pre-trial procedures (FC s35(1)*(a)*) [90] and trial procedures (FC s 35(3)*(h)*). An arrested person must be promptly informed of the right to remain silent and of the consequences of not remaining silent (FC s 35(1)*(b)*). The advice must be conveyed in a language that is understood by the accused (FC s 35(4)). The failure to properly advise the accused of his or her right to remain silent will constitute a constitutional breach, it may infringe the right to a fair trial [91] and it might lead to subsequent statements made by the accused being deemed inadmissible in terms of FC s 35(5). However, if an accused is aware of his right to remain silent, then the failure to advise him of this right will not necessarily render the trial unfair. [92]

(ii) Negative inferences from silence

87 See *S v Mbatha*; *S v Prinsloo* 1996 (1) SACR 371 (CC) at para 10. *S v Ntsele* 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC) at para 4. For a fuller discussion of limitation's analysis in relation to reverse onus provisions, see Schwikkard *Presumption of Innocence* (supra) at 133–165; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 517.

88 *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC)('*Thebus*') at para 55; *R v Esposito* (1985) 49 CR (3d) 193 (Ont CA).

89 *Thebus* (supra) at para 55. See also *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC); *Osman v Attorney-General Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC).

90 See *S v Mcasa* 2005 (1) SACR 388 (SCA) at para 15.

91 *Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 (SCA) at para 18.

92 *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) at para 43. Cf *S v McKenna* 1998 (1) SACR 106 (C); *S v Solomons* 2004 (1) SACR 137 (C).

In the constitutional context, an issue that has been the subject of both national [93] and international [94] debate is whether a negative inference can be drawn from an accused's election to exercise her right to remain silent. Although the issue of a negative inference will only arise at the trial stage, there are significant policy issues differentiating silence prior to trial and silence at trial.

At common law, the right to remain silent prohibited a court from drawing adverse inferences from silence at the investigative stage of the proceedings. However, at common law, if an alibi defence is raised for the first time at trial, then the court, in determining whether the alibi is reasonably possibly true, may take into account that there has been no opportunity for the state to investigate the alibi properly. [95]

The constitutionality of the common-law approach to the late disclosure of an alibi was considered by the Constitutional Court in *S v Thebus.* The *Thebus* Court also applied its mind to the permissibility of drawing an adverse inference of *guilt* from pre-trial silence and the constitutionality of drawing an adverse inference as to the *credibility* of the accused from pre-trial silence.

These issues were raised on appeal by one of two co-accused whose conviction on a charge of murder and two counts of attempted murder had been confirmed by the Supreme Court of Appeal. On arrest, the accused was warned of his right to remain silent but nevertheless elected to make an oral statement in which he described the whereabouts of his family at the time of the shooting. At trial, he testified that this statement was not intended to include himself. (If it did, then it would have contradicted the details of his alibi defence.) After making this initial oral statement, the accused refused to make a written statement and only disclosed his alibi defence two years later when the matter came to trial. The alibi defence was rejected by the trial court and the accused was convicted. The accused's appeal to the Supreme Court of Appeal failed and the matter then proceeded to the Constitutional Court. The accused contended that the Supreme Court of Appeal had erred in drawing a negative inference from the accused's failure to disclose his alibi defence timeously. Although the Justices concurred on the ultimate fate of the appeal on this point, it attracted four separate judgments.

Moseneke J (Chaskalson CJ and Madala J concurring) emphasised the distinction between pre-trial silence and trial silence. In terms of this distinction, the objective of the right to silence during trial is to secure a fair trial, whereas '[t]he protection of the right to pre-trial silence seeks to oust any compulsion to speak'. [96]

93 See South African Law Commission, Project 73 *Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure — Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials* (2002); K Van Dijkhorst 'The Right to Silence: Is the Game Worth the Candle?' (2001) 118 *SALJ* 26; RW Nugent 'Self-incrimination in Perspective' (1999) 116 *SALJ* 501;P Schwikkard 'Silence and Common Sense' (2003) *Acta Juridica* 92.

94 See, for example, S Easton *The Case for the Right to Silence* (2nd Edition, 1998); I Dennis 'Silence in the Police Station: The Marginalisation of Section 34' [2002] *Criminal Law Review* 25; J Jackson, M Wolfe & K Quinn *Legislating Against Silence: The Northern Ireland Experience* (2000).

95 *R v Mashele* 1944 AD 571; *S v Zwayi* 1997 (2) SACR 772 (Ck).

96 *Thebus* (supra) at para 55.

Moseneke J then categorically stated that '[i]n our constitutional setting, pre-trial silence of an accused can never warrant the drawing of an inference of guilt' [97] as this would undermine both the rights to remain silent and to be presumed innocent. [98] It is the ambiguity of pre-trial silence that prohibits an inference from silence being drawn. On Moseneke J's account, the drawing of an inference would render the mandatory warning of the right to remain silent 'a trap instead of a means for finding out the truth in the interests of justice'. [99]

Moseneke J drew a distinction between an inference as to guilt and an inference pertaining to credibility on the basis of a person's pre-trial silence. The latter would not necessarily infringe the presumption of innocence. [100] This distinction is somewhat tendentious. For example, with respect to the late disclosure of an alibi defence, a negative inference as to credibility will inevitably be a factor taken into consideration in the ultimate determination of guilt or innocence. Moseneke J's judgment also supports a distinction being drawn between an inference as to guilt and the effect of late disclosure on the evaluation of the weight to be accorded the alibi evidence. The latter is simply treated as an unavoidable consequence of adversarial proceedings: late disclosure precludes the prosecution from properly investigating the alibi defence. As a result, the alibi evidence will not be fully tested and less weight must be attached to it. The effect on weight is not a result of a negative inference as to credibility or guilt. It is simply a product of the evaluation of evidence in the context of an adversarial system. Nevertheless, Moseneke J appears to equate this procedural consequence with an inference as to credibility and argues that drawing an inference as to credibility amounts to a compulsion to speak and consequently limits the accused's right to silence. Moseneke J further noted that it is constitutionally mandatory to warn accused of their right to remain silent but that it is not mandatory that they be warned that their silence may possibly be used against them and that their silence will be taken into account in determining the weight to be accorded an alibi. Taking into account the limited use of an inference based on the late disclosure of an alibi, he concluded that the common-law rule is a justifiable limitation of the right to remain silent and that late disclosure of an alibi may have consequences which 'can legitimately be taken into account in evaluating the evidence as a whole'. [101] Moseneke J acknowledged that 'an election to disclose one's defence only when one appears on trial is not only legitimate but also protected by the Constitution'. [102] However, he then held that this protection would not preclude cross-examination on the accused's election to remain silent as such cross-examination would go to credit. Such cross-examination 'would not unjustifiably limit the right to remain silent' [103] provided it was conducted with due regard to the dictates of trial fairness. [104]

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97 *Thebus* (supra) at para 57. See also *S v Maasdorp* 2008 (2) SACR 296 (NC).

98 *Thebus* (supra) at para 58.

99 Ibid at para 58.

100 Ibid at para 59.

101 Ibid at para 68.

102 Ibid at para 69

Goldstone and O'Regan JJ (Ackermann and Mokgoro JJ concurring) concurred in the result but dissented insofar as they reached the conclusion that drawing an adverse inference from the first appellant's failure to timeously disclose his alibi was an unjustifiable infringement of the right to remain silent. In considering the rationale for prohibiting inferences from silence, they rejected the argument that it is unfair to place the accused in a position where he will suffer adverse consequences whatever his election: hard choices are unavoidable in the adversarial process. [105] But they went no further than suggesting that it is inevitable that there may be adverse consequences from exercising the right to remain silent and avoided concluding that silence itself is an item of evidence.

Goldstone and O'Regan JJ also rejected the argument that drawing an adverse inference infringes the presumption of innocence because it relieves the state of part of its burden of proving guilt beyond a reasonable doubt. They argued that the Final Constitution 'does not stipulate that only the state's evidence may be used in determining whether the accused person has been proved guilty'. [106] However, taking the historical record of policing into account, they found that the prohibition on adverse inferences was justified insofar as it protected accused persons from improper police questioning and procedures. [107] They held that this rationale does not extend to silence in court. They also endorsed the view that it is unfair to warn accused persons of their right to remain silent in a formulation that implies that there will be no penalty for silence, and then to permit a court to draw a negative inference from that silence. [108] Although it is legitimate for an accused to be compelled to make a choice, that choice must be an informed choice and 'an accused person needs to understand the consequences of remaining silent'. [109] The warning also constitutes a barrier to drawing an adverse inference in that in many cases it 'will render the silence by the accused ambiguous'. [110] Goldstone and O'Regan JJ rejected the distinction between adverse inferences going to guilt and those going to credit. Although they might be conceptually different, the two Justices wrote, 'the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty'. [111] They also rejected Moseneke J's conclusion that it is constitutionally permissible to

103 Ibid at para 69.

104 Ibid at para 70.

105 *Thebus* (supra) at para 83.

106 Ibid at para 83.

107 Ibid at para 85.

108 Ibid at para 86.

109 Ibid at para 87.

110 Ibid at para 88.

cross-examine accused on their election to remain silent. First, an accused should not be required to explain why she chose to exercise a constitutional right; [112] and, second, it would be unfair in the light of the constitutionally mandated warning in respect of silence. [113] However, the two Justices concluded that, if the warning was revised, an adverse inference from the

late disclosure of an alibi would constitute a justifiable limitation of the right to remain silent. [114]

Yacoob J, although concurring in the result, took a somewhat different approach. He rejected the distinction between trial and pre-trial silence and held that FC s 35(1)*(a)* and FC s 35(3)*(h)* 'represent a continuum'. [115] He identified the purpose of the right to silence as being to 'ensure that people are protected from self-incrimination in the process of police interrogation'. [116] However, the ultimate objective of the right to remain silent, Yacoob J held, is to ensure a fair trial. Furthermore, he wrote that

> [the right to a fair trial] is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice. [117]

Because this broad concept of trial fairness cannot, presumably, be found in FC s 35(3), Yacoob J locates it in FC s 35(5). FC s 35(5) confers a discretion on the courts to admit evidence even if it was unconstitutionally obtained provided that it is fair to do so and its admission is not detrimental to the interests of justice. Consequently, Yacoob J wrote that provided that the drawing of inferences from the exercise of the right to remain silent — or the interrogation of such exercise on cross-examination — does not ultimately render the trial unfair, there is no basis on which to forbid the drawing of such inferences. He reasoned as follows:

> In the exercise of the duty to ensure a fair trial, it would become necessary to balance the rights of the accused, the rights of the victim and society at large. The right to silence of the accused could well become implicated in this balancing exercise when the judicial officer makes decisions concerning the admissibility of evidence, the allowing of cross-examination, as well as the drawing of inferences. Indeed inferences arising out of silence cannot ordinarily be drawn unless there is evidence of the silence of the accused and evidence of the circumstances surrounding the silence. Any investigation

111 Ibid at para 90.

112 Ibid at para 91.

113 Ibid.

114 *Thebus* (supra) at para 34.

115 Ibid at para 104.

116 Ibid at para 105.

117 Ibid at para 107.

> around the accused's silence cannot be said to infringe his right to silence unless the trial is thereby rendered unfair. The same goes for all decisions concerning admissibility of evidence as well as the use of silence in the drawing of inferences. The fairness of the trial as an objective is fundamental and key. The right to silence can only be infringed if it is implicated in a way that renders the trial unfair. It is a contradiction in terms to suggest that the right to silence has been infringed if it is implicated in a way that does not compromise the fairness of the trial but enhances it. [118]

The reasoning in this passage ought not to be endorsed. First, FC s 35(5) only becomes applicable once it has been established that evidence has been unconstitutionally obtained. In respect of the right to remain silent, it first needs to be established whether the right to remain silent in FC s 35(1)*(a)* or FC s 35(3)*(h)* has been infringed. The right to remain silent attaches only to arrested and to accused persons and does not embrace the rights of the victim and society at

large. The broader notion of trial fairness may possibly be read into FC s 35(5) — but is precluded at any earlier stage of the inquiry. Secondly, by conflating the right to silence and the right to a fair trial at all stages, Yacoob J implies that the only remedy for infringing the right to remain silent is the exclusion of evidence. An arrested person who is subjected to improper police questioning that infringes her right to remain silent must surely (at least theoretically) be able to seek relief for the infringement of this pre-trial right prior to going to trial. Undue emphasis on trial fairness may result in insufficient attention being given to the underlying relationship between the right to remain silent and the right to dignity.

However, there is much to say for the contextual approach taken by Yacoob J in respect of the appropriate warning to be given to arrested persons. He suggests that a more complex warning as to the consequences of remaining silent may well 'tilt the balance in favour of getting [a] person to speak' [119] and that such a consequence may not necessarily be fairer than the constitutionally prescribed warning that 'encourages silence on the part of an arrested person'. [120] As a result, Yacoob J concluded that the more limited warning did not result in any unfairness to the appellant. [121] Contextualising these particular constitutional rights might also lead to the conclusion that a more complex warning will make little difference to the fairness of the trial: it is very likely that neither warning will be properly understood. Therefore adverse inferences should not be permitted in these circumstances as silence in response to an incomprehensible warning would inevitably be too ambiguous to sustain an inference. [122]

Given the divergent judgments, it is difficult to state, with any clarity, what the law now is. Ten judges heard the case: surprisingly, only two of the 10 justices found that it was unnecessary to determine whether the failure to disclose an alibi defence

118 Ibid at para 109.

119 *Thebus* (supra) at para 111.

120 Ibid.

121 Ibid.

122 Yacoob J, like Goldstone and O'Regan JJ, rejects the distinction between inferences that go to credibility and those that go to guilt.

to the police could attract an adverse inference — on the facts of the case, the appellant had not exercised his right to silence and after being duly warned had responded to a question concerning his whereabouts. [123] In effect, the Court treated the matter as a previous inconsistent statement. Seven of the 10 judges held that it was constitutionally impermissible to draw an adverse inference as to guilt from the accused's pre-trial silence. However, four of the seven judges indicated that if the constitutionally mandated warning was rephrased so as to apprise arrested persons of the consequences of remaining silent, an adverse inference for pre-trial silence might be constitutionally justifiable. Three other judges held that although an adverse inference as to guilt was not justifiable, an adverse inference as to credibility was a justifiable limitation on the right to remain silent and that it was permissible to cross-examine the accused on his failure to disclose an alibi timeously. Four justices expressly rejected this conclusion. All eight of the judges dealing with the question of adverse inferences would appear to concur with the view that there may well be acceptable negative consequences

that attach to remaining silent. It would seem, therefore, that the common law position remains largely intact and that it is constitutionally permissible to take the late disclosure of an alibi into account in determining what weight should be attached to the alibi defence.

As to the drawing of inferences from pre-trial silence, Moseneke J makes it categorically clear that negative inferences are constitutionally impermissible. On the other hand, the concurring judgment of Goldstone and O'Regan JJ suggests that such inferences might be constitutional if arrested persons are warned of the consequences of their silence. One conclusion that would be consistent with both judgments is that the ambiguity of silence (and the impermissibility of drawing any inference) would remain if an arrested person did not understand the revised warning. Such a restatement of the law would make it highly unlikely that a negative inference could ever be drawn from silence at any stage where an arrested person or accused person is not represented by counsel.

The position as regards inferences from trial silence likewise remains unclear. At common law, the prosecution could refer to the accused's silence once a *prima facie* case had been established. Clear authority exists for the proposition that, in certain circumstances, an accused's refusal to testify, when the prosecution had established a prima facie case, could be a factor in assessing guilt. [124]

The High Court in *S v Brown* held that whilst the right to remain silent was recognised at common law, its constitutional status required a change in emphasis as regards its application. [125] (The most obvious change is that any infringement of the right to remain silent is required to be justified with reference to the limitations clause.) Buys J, finding that the use of silence as an item of evidence amounted to an indirect compulsion to testify and that the drawing of an adverse inference from silence diminished and possibly nullified the right to remain silent, held that it would be unconstitutional for the court to draw an adverse inference where accused

123 Ngcobo J, with Langa DCJ concurring.

124 *S v Mthetwa* 1972 (3) SA 766 (A); *S v Snyman* 1968 (2) SA 582 (A); *S v Letsoko* 1964 (4) SA 768 (A); *R v Ismail* 1952 (1) SA 204 (A).

125 *S v Brown* 1996 (2) SACR 49 (NC).

persons elect to exercise their constitutional right to remain silent. [126] However, the court held that this conclusion does not mean that no adverse consequences could arise should an accused exercise the right to remain silent. [127] Where the state has established a *prima facie* case against the accused, and the accused fails to testify or to adduce any other evidence to rebut the *prima facie* case, the court is required to base its decision on the uncontradicted evidence of the state. In this situation, it is possible, indeed common, that the *prima facie* case will be sufficient to sustain a conviction. In other words, although the accused's silence may not be treated as an item of evidence, he or she will have to accept the risk of conviction on the basis of the state's uncontradicted *prima facie* case. However, let

us be clear: any inference drawn by the court is drawn from the uncontroverted evidence and not from the silence of the accused. [128]

Reaching the opposite conclusion (and without reference to *Brown*), the court in *S v Lavhengwa* fully endorsed the view that an adverse inference could be permitted in appropriate circumstances:

> It accords, first, with common sense. The inference is permissible only when the accused fails to give evidence despite the fact that the prosecution evidence strongly indicates guilt, an innocent accused would have refuted evidence against him, and there is no other explanation of his failure to do so. In these circumstances common sense demands that an inference be drawn and human nature is such that one would be all but inevitable. It has indeed been suggested that 'no rule of law can effectively legislate against the drawing of an inference from a failure to testify'. Secondly, it is not mere sophistry to reason ... that an accused's right to remain silent is not denied or eroded by an inference drawn from his choice to exercise that right in circumstances where an innocent person would have chosen to do so. It is suggested thirdly that, even if the rule permitting an adverse inference impinged upon the right of the accused to remain silent, it is in any event probably a justifiable limitation. [129]

The Constitutional Court has not expressly ruled on whether drawing an adverse inference from silence at trial would pass constitutional muster. However, it has on more than one occasion pronounced that trial silence may have such untoward consequences. In *Thebus*, the Court wrote that 'if there is evidence that requires a response and if no response is forthcoming ... [then] the Court may be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused'. [130]

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126 Ibid at 62.

127 Ibid at 63.

128 See also *S v Hlongwa* 2002 (2) SACR 37 (T); *S v Scholtz* 1996 (2) SACR 40 (NC). See also SE Van der Merwe 'The Constitutional Passive Defence Right to an Accused versus Prosecutorial and Judicial Comment on Silence: Must We Follow *Griffin v California*' (1994) *Obiter* 1. See, further, *R v Noble* (1997) 1 SCR 874, 6 CR (5th) 1 (The Canadian Supreme Court held that using silence as an item of evidence infringed both the presumption of innocence and the right to remain silent.)

129 *S v Lavhengwa* 1996 (2) SACR 453, 487 (W) ('*Lavhengwa*'). Cf *S v Mseleku* 2006 (2) SACR 574 (D).

130 *S v Thebus* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) at para 58. See also *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC); *S v Mokoena* 2006 (1) SACR 29 (W); *S v Hena* 2006 (2) SACR 33 (SE). Cf *S v Sithole* 2005 (2) SACR 504 (SCA).

The Supreme Court of Appeal, after *S v Monyane*, also appears prepared to expand the ambit of negative consequences to drawn from silence of an accused. [131] As Ponnan JA writes:

> Secondly, somewhat surprisingly, the fourth appellant did not testify. The presence of his vehicle and the evidence of the second appellant linked him to the crime scene. In those circumstances, a reasonable expectation existed that, if there were an explanation consistent with his innocence, it would have been proffered. He, however, refused to rise to the challenge. For him to have remained silent in the face of the evidence was nothing short of damning. [132]

The Supreme Court of Appeal did not have to reach such a conclusion because the state had produced sufficient evidence to establish guilt beyond reasonable doubt. An inference from silence would not have altered the outcome. [133]

Another difficulty arises with drawing inferences from trial silence: what inference should be drawn if the accused remains silent on the advice of counsel? Under such circumstances, it would be seem unjust for any court to conclude that an inference to credibility or to guilt was the only reasonable inference. The Supreme Court of Appeal skirted this vexed issue in *S v Tandwa*. [134] The accused alleged that his right to a fair trial had been compromised, as a result of incompetent legal representation, because counsel had advised him not to testify. The court, recognising that the constitutional right to legal representation encompassed a right to competent representation, held:

> When an accused ... complains about the quality of legal representation, the focus is no longer, as before the Constitution, only on the nature of the mandate the accused conferred on his legal representative, or only on whether an irregularity occurred that vitiated the proceedings — the inquiry is into the quality of the representation afforded. [135]

Two obvious evidential questions arise when the accused lodges a complaint of poor legal representation. First, would admitting an affidavit by the impugned counsel constitute a breach of legal professional privilege? The *Tandwa* court drew a distinction between implied and imputed waiver of legal professional privilege:

> Implied waiver occurs ... when the holder of the privilege with the full knowledge of it so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where — regardless of the holder's intention — fairness requires that the court conclude that the privilege was abandoned. Implied waiver entails an objective inference that the privilege was actually abandoned; imputed waiver proceeds from fairness, regardless of actual abandonment. [136]

131 2008 (1) SACR 543 (SCA) at para 19.

132 Ibid at para 19. Cf *S v Mavinini* 2009 (1) SACR 523 (SCA); *S v Mdlongwa* 2010 (2) SACR 419 (SCA) at para 25.

133 Cf *S v Lotter* 2008 (2) SACR 595 (C).

134 2008 (1) SACR 613 (SCA).

135 Ibid at para 7 (footnotes omitted).

The *Tandwa* court, following Wigmore, [137] held that waiver must be imputed where a client alleges incompetence on the part of his or her legal representative. [138]

The second evidential difficulty is whether an appeal court will be confronted by conflicting affidavits, one from the accused alleging incompetence and one from the legal representative denying incompetence. The *Tandwa* court held that such a conflict would not prove an insurmountable difficulty. The court possesses the inherent power to cut the Gordian knot 'in an appropriate case by a commission or [some] other suitable proceeding'. [139] In the instant matter, the *Tandwa* court found it unnecessary to embark upon such measures because it had readily concluded that the accused's version was improbable at best:

> [W]hen an accused raises a fair-trial complaint involving allegedly incompetent legal representation that raises a dispute about what occurred between him and his lawyer, *(a)*

> the lawyer's response to the allegations is admissible in assessing the veracity of the complaint; *(b)* if the allegations raise a real possibility that there was incompetence or that bad advice was given or that misconduct occurred, it may be necessary for appropriate mechanisms to be developed to establish the facts; *(c)* in this case, the accused's complaint is inherently contradictory and implausible and must be rejected without further inquiry. [140]

However, no party disputed the claim that the accused did not testify because of the advice of his counsel. The *Tandwa* court — adopting a similar approach to the *Monyane* Court — held that this *troublesome* silence could still give rise to an inference of guilt and assist the court in establishing guilt beyond reasonable doubt. Indeed, this inference led to the accused's conviction.

The troublesome silence, refracted through the Supreme Court of Appeal's views on inference and inadequate legal counsel, raises another troubling conclusion. Given the undisputed fact that the accused remained silent on counsel's uninterrogated advice, the *Tandwa* court failed to explain why an inference of guilt was the only reasonable inference under such contested facts. A reader is left with the impression that, as a general matter, the possibility of incompetent legal counsel is an inconvenient truth barring the way to a conviction based, in part, on the silence of the accused.

(iii) Discharge at the close of the state case

136 Ibid at para 18.

137 *Wigmore on Evidence in Trials at Common Law* (JT McNaughton rev. 1961) Vol VIII at para 2328.

138 *Tandwa* (supra) at paras 19 & 20.

139 Ibid at para 22.

140 *Tandwa* (supra) at para 29.

The rights to remain silent, [141] not to testify during the proceedings [142] and not to be compelled to give self-incriminating evidence [143] also fall to be considered when dealing with discharge at the close of the state case. Two relatively recent decisions of the Supreme Court of Appeal go some way towards clarifying the limits of judicial discretion in granting a discharge at the close of the state case in terms of CPA s 174. Section 174 reads as follows:

> If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may convicted on the charge, it may return a verdict of not guilty.

Prior to the new constitutional dispensation, a significant body of case authority supported the proposition that the use of the word 'may' in CPA s 174 conferred a discretion on the court to refuse discharge in the absence of evidence supporting a conviction — provided there was a 'reasonable possibility that the defence evidence might supplement the state case'. [144] The correctness of this approach was challenged soon after the Interim Constitution came into force. Claassen J in *S v Mathebula* held that an accused's right to freedom and security of person as well as his rights to be presumed innocent and remain silent severely curtailed the discretion conferred by s 174 and held that a court did not have a discretion

to refuse discharge when there was no evidence tendered against the accused. [145] However, the court expressly acknowledged that its judgment did not lay down a general rule in those cases where there was some evidence against the accused. This approach was not uniformly adopted by the High Court. [146]

The Supreme Court of Appeal in *S v Legote* [147] and *S v Lubaxa* [148] extends the line of reasoning proffered in *Mathebula*. [149] In *Legote*, Harms JA held that it was clear that a court had a duty to ensure that an unrepresented accused against whom the state had not made out a *prima facie* case was discharged and the principle of

141 FC s 35(3)*(h)*.

142 Ibid.

143 FC s 35(3)*(j)*.

144 See *S v Shuping* 1983 (2) SA 119 (B) 120; *R v Kritzinger* 1952 (2) SA 401 (W); *S v Zimmerie* 1989 (3) SA 484 (C); *S v Campbell* 1991 (1) SACR 435 (Nm).

145 *S v Mathebula* 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W).

146 See, for example, *S v Makofane* 1998 (1) SACR 603 (T).

147 *S v Legote* 2001 (2) SACR 179 (SCA).

148 *S v Lubaxa* 2001 (2) SACR 703 (SCA)('*Lubaxa*'). See also *S v Zwezwe* 2006 (2) SACR 599 (N).

149 *Mathebula* (supra).

equality required that this duty be extended to the represented accused. In *Lubaxa,* Nugent AJA (as he was then) held:

> I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence. [150]

However, the *dictum* of Nugent AJA, albeit obiter, casts some doubt as to whether the relevant threshold to be passed in order to avoid discharge is that of a *prima facie* nature. It also clearly advocates a different approach in respect of co-accused. The *Lubaxa* court found that the right to be discharged did not necessarily arise from the rights to be presumed innocent, to remain silent or not to testify but from the constitutional rights to dignity and personal freedom which require the existence of a 'reasonable and probable' cause to believe that the accused is guilty'. [151] However, the court appeared to have difficulty in drawing a clear line between the constitutional rights to dignity, personal freedom and a fair trial. It concluded that the protection afforded by the rights to dignity and personal freedom will be 'pre-eminently' eroded 'where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination'. Presumably, the privilege against self-incrimination underlies the *Lubaxa* court's finding that'[t]he same considerations do not necessarily arise, ... where the prosecution's case against one accused might be supplemented by the evidence of a co-accused'. [152] The express reason given by the *Lubaxa* court for this distinction is that as '[t]he prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has chosen to prosecute more than one person jointly'. [153] However, it is not self-evident as to why the rights to privacy and to freedom of the person

cease to be infringed merely because the prosecution has chosen to prosecute more than one person jointly. One argument that might support this view is that the refusal of discharge is premised, not on the possibility that the accused will incriminate himself, but rather on the likelihood that the co-accused will complete the prosecution's task. [154]

The uncertainties raised by *Lubaxa* [155] were partially addressed by the Supreme Court of Appeal in *S v Nkosi*. [156] It was common cause that in the court *a quo* the state had failed to establish 'any evidence against the first appellant on which a reasonable man could convict him at the end of the case'. [157] (This wording suggests that the state must establish a *prima facie* case to avoid discharge.) The court *a quo* refused to recognize that in matters with multiple accused it ought to assess whether conflicting interests and conflicting accounts — or their absence — might

150 *Lubaxa* (supra) at para 18. See also *S v Zwezwe* 2006 (2) SACR 599 (N).

151 *Lubaxa* (supra) at para 19.

152 Ibid at para 20. See also *S v Tusani* 2002 (2) SACR 468 (TD); *S v Tsotetsi and Others (2)* 2003 (2) SACR 638 (W).

153 *Lubaxa* (supra) at para 20.

constitute adequate grounds for discharge. The *Nkosi* court held that *Lubaxa* foresaw the possibility that the failure to discharge a co-accused might amount to an infringement of the right to a fair trial. [158] In the instant matter, the first appellant's right to a fair trial had been compromised by the court *a quo*'s refusal to even hear an application for discharge given that no 'reasonable basis ... for an expectation that his co-accused might incriminate him' obtained. [159] Despite this gloss on the holding in *Lubaxa*, *Lubaxa* cannot, logically, be invoked as binding precedent for the proposition that refusing to discharge an accused party in a case involving multiple co-accused constitutes a violation of the right to a free trial.

In *S v Agliotti,* the court reviewed the post-constitutional development of s 174 jurisprudence. [160] It discharged the accused because the sole state witness incriminating Agliotti lacked any semblance of credibility. However, the court, relying in part on *S v Mpetha*, [161] noted that in s 174 proceedings credibility plays only a limited role and will generally only be taken into consideration where 'it was of such poor quality that no reasonable person could possibly accept it'. [162]

(c) The right not to be compelled to make any confession or admission that could be used in evidence; the right not to be compelled to give self-incriminating evidence; and the right to legal representation.

154 In *Zuma*, Van der Merwe JA refers to *Lubaxa* and then stands the right to be presumed innocent and the constitutional requirement that an accused's guilt be established beyond a reasonable doubt on their respective heads. The learned judge apparently refused discharge on the basis that he was *not* convinced of the accused's *innocence beyond a reasonable doubt*. *S v Zuma* 2006 (2) SACR 191 (W)(The court held that it 'could therefore not find beyond reasonable doubt that the accused did not have the required *mens rea*'. This finding appears to be contrary to the presumption of innocence that requires the State to prove guilt beyond a reasonable doubt.) See also *S v Masondo: In Re S v Mthembu* 2011 (2) SACR 286 (GSJ)(High Court judgment clearly deviates from SCA precedent). 'Innocence beyond a reasonable doubt' is not a principle of evidence or criminal procedure in any known legal jurisdiction.

155 For more on the uncertainties that arise from this judgment, see Schwikkard & Van der Merwe *Principles of Evidence* (supra) at 567–568.

156 *S v Nkosi* 2011 (2) SACR 482 (SCA).

157 Ibid at para 24.

158 Ibid at paras 25 and 26.

159 Ibid at para 26.

160 2011 (2) SACR 437 (GSJ)('*Agliotti*').

161 1983 (4) SA 262 (C).

162 *Agliotti* (supra) at para 262.

(i) The right to legal representation and the privilege against self-incrimination [163]

Arrested persons have the right not to be compelled to make any confession or admission that could be used in evidence against them (FC s 35(1)*(c)*). Accused persons have the right not to be compelled to give self-incriminating evidence (FC s 35(3)*(j)*). Detainees and accused (and inevitably arrested persons as at the moment of arrest they will also be detained) have the right to 'to choose, and to consult with, a legal practitioner, and to be informed of this right promptly'(FC s 35(2)*(b)* and FC s 35(3)*(f)*). [164] They must also all be informed of the right 'to have a legal practitioner assigned to ... [them] by the state and at state expense, if substantial injustice would otherwise result' (FC s 35(2)*(c)* and s 35(3)*(g)*). [165]

In the United States, the Fifth Amendment — which gives constitutional protection to the privilege against self-incrimination — was extended in *Miranda v Arizona* to incriminating statements made by persons in police custody. [166] In *Miranda,* the US Supreme Court, relying upon *Escobedo v Illinois*, [167] found that the right to counsel was essential in order to protect the right against self-incrimination. The holding of the Supreme Court in *Miranda* can be summarised as follows:

> Statements obtained during custodial interrogation of the accused may not be admitted into evidence unless the prosecution can show the appropriate procedural safeguards were used to secure the privilege against self-incrimination. The appropriate procedural safeguards are that a person must be warned that she has the right to remain silent, that any statement that she makes may be used in evidence against her, and that she has a right to the presence of a legal representative and if substantial injustice would otherwise occur to legal representation at state expense. The failure to inform an accused of these rights will generally result in the exclusion of testimonial communications from evidence.

The link between the right to counsel and the privilege against self-incrimination (and other related rights) was succinctly restated by Froneman J in *S v Melani:*

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163 The constitutional right to legal representation specified in FC s 35 is restricted to arrested, detained and accused persons. This list embraces sentenced prisoners, see *Ehrlich v CEO, Legal Aid Board* 2006 (1) SACR 346 (E). See also *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Another* 2002 (5) SA 449 (SCA), 2002 (7) BCLR 756 (SCA).

164 See *Mhlekwa v Head of the Western Tembaland Regional Authority & Another; Feni v Head of the Western Tembuland Regional Authority* 2000 (2) SACR 596 (TK)(The court held that s 7(1) of the Regional Authority Courts Act infringed s 35(3)*(f)* in so far as it provided that neither the complainant nor the accused could be legally represented during criminal proceedings in a regional authority court.)

165 The constitutional right to legal representation is reflected in s 73 of the Criminal Procedure Act 51 of 1977. The constitutional right to legal representation is not restricted to South African citizens. See *S v Thomas* 2001 (2) SACR 608 (W)(The court held that it applies to non-South African citizens accused in South Africa.)

166 384 US 436 (1966). See, further, G Smith 'The Threshold Question in Applying *Miranda*: What Constitutes Custodial Interrogation?' 1974 (25) *South Carolina LR* 699, 735; *Harris v New York* 401 US 222 (1970); *Rhode Island v Innis* 446 US 291 (1980); *New York v Quarles* 467 US 649 (1984).

167 *Escobedo v Illinois* 378 US 478 (1964).

> The purpose of the right to counsel and its corollary to be informed of that right ... is thus to protect the right to remain silent, the right not to incriminate oneself and the

> right to be presumed innocent until proven guilty. Section 25(2) and 25(3) of the [Interim] Constitution make it abundantly clear that this protection exists from the inception of the criminal process; that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with the need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal process: in the 'gatehouse' of the criminal justice system (that is the interrogation process), as well as in its 'mansions' (the trial court). [168]

There have been conflicting views as to whether it is necessary to advise a person of her right to legal representation at every pre-trial stage. The most pragmatic approach is that in each case the crucial inquiry should be whether the accused, after having been apprised of her rights on arrest, was in a position to decide voluntarily how to exercise her rights at each subsequent pre-trial procedure. [169]

The common law did not recognise a right to legal representation for those unable to afford a lawyer. [170] The Final Constitution only affords detained and accused persons the right to be provided with legal assistance at state expense 'if substantial injustice would otherwise result'. [171] However, if legal representation is necessary to uphold the privilege against self-incrimination (and associated rights) and the protection of the right not to incriminate oneself is necessary to ensure a fair trial, then a person must have access to legal representation to realise the above rights and such representation should not be dependent on her income. The logical conclusion of this line of reasoning is that if the state finds itself unable to provide legal representation to an arrested, detained or accused person, then the police must refrain from interrogating persons who desire legal representation but who are not in a position to obtain it. [172] However, there can be little doubt that the reason for imposing a restriction on the substantive right to legal representation is the concern that the South African state simply does not have the resources to provide legal representation for every indigent accused. The right to legal representation could, otherwise, paralyse an already overburdened criminal justice system. Factors that will be taken into account in determining whether substantial injustice would result

168 See *S v Melani* 1996 (1) SACR 335, 348I–J (E); *S v Gasa* 1998 (1) SACR 446 (D); *S v Marx* 1996 (2) SACR 140 (W); *S v Viljoen* 2003 (4) BCLR 450 (T). However, such exclusion is not as automatic under FC s 35(5) as it was under *Miranda*. See *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Soci* 1998 (2) SACR 275 (E); *S v Orrie* 2005 (1) SACR 63 (C). See also DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003); PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2002) 215; *S v Mathebula* 1997 (1) SACR 10 19f–20a (W).

169 See *S v Shaba* 1998 (1) SACR 16 (T); *S v Shongwe* 1998 (2) SACR 321 (T); *S v Malefo* 1998 (1) SACR 127 (W); *Shabalala v S* 1999 (4) All SA 583 (N); *S v Soci* 1998 (2) SACR 275 (E); *S v Ngcobo* 1998 (10) BCLR 1248 (N); *S v Mfene* 1998 (9) BCLR 1157 (N); *S v Gumede* 1998 (5) BCLR 530 (D); *S v Nombewu* 1996 (2) SACR 396 (E). Cf *S v Mathebula* 1997 (1) SACR 10 (W); *S v Marx* 1996 (2) SACR 140 (W).

170 *S v Rudman and Another; S v Mthwana* 1992 (1) SA 343 (A).

171 FC s 35(2)*(c)* and s 35(3)*(g)*.

172 But see *Mgcina v Regional Magistrate Lenasia* 1997 (2) SACR 711 (W).

through the absence of legal representation include: the complexity of the case, [173] the severity of the potential sentence, [174] the ignorance and

indigence of the accused. [175] Where the potential for 'substantial injustice' is clear, a trial may not proceed in the absence of legal representation: the accused would have to make an informed decision to waive her right to legal representation. [176]

Where an accused is unrepresented, presiding officers have a duty to ensure that the accused is informed of her rights: [177] eg, the right to legal representation, and that this exercise should occur prior to the commencement of the trial. [178] Depending on the seriousness and complexity of the charge, or on the applicable legal rules, an accused should not only be told of his right to legal representation, he should also be encourage to exercise it. [179] Where there is the possibility of a lengthy term of imprisonment, an accused should be advised of this possibility and encouraged to avail himself of the services of a legal representative. [180] A presiding officer must also ensure that the accused is aware of and understands his right to legal representation at state expense, [181] and where appropriate of his right to appeal against the refusal of legal aid and/or his right to request the court to order that legal representation be provided. [182] The presiding officer must also be satisfied that

173 See, generally, *Pennington v The Minister of Justice* 1995 (3) BCLR 270 (C); *Msila v Government of the RSA* 1996 (3) BCLR 362 (C); *S v Khanyile* 1988 (3) SA 795 (N).

174 See *S v Moos* 1998 (1) SACR 372 (C)(The court held that substantive injustice would occur if the charge was one which would attract a sentence of imprisonment and the accused did not have legal representation.) See also *S v Du Toit* 2005 (2) SACR 411 (T).

175 See *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC). See also *S v Ambros* 2005 (2) SACR 211 (C).

176 *S v Manuel* 2001 (4) SA 1351 (W).

177 This obligation embraces a proper explanation of the proceedings and concepts such as 'cross-examination' and 'opportunity to address the court'. See *S v Lekhetho* 2002 (2) SACR 13 (O). See also *S v Matladi* 2002 (2) SACR 447 (T); *S v Njikaza* 2002 (2) SACR 481 (C); *S v Mathole* 2002 (2) SACR 484 (T); *S v Shiburi* 2004 (2) SACR 314 (W); *S v May* 2005 (2) SACR 331 (SCA); *S v Mokoena* 2005 (1) SACR 594 (T). See also *S v Lusu* 2005 (2) SACR 538 (E)(Plasket J condemned the magistrate's refusal of a postponement to facilitate an application for legal aid on the basis that the application was unlikely to succeed.) See also *S v Fielies* 2006 (1) SACR 302 (C); *S v Ndou* 2006 (2) SACR 497 (T); *S v Zwezwe* 2006 (2) SACR 599 (N); *S v Mseleku* 2006 (2) SACR 574 (D); S *v Hlangabezo* 2008 (1) SACR 218 (E); *S v Mabuza* 2009 (2) SACR 435 (SCA).

178 *S v Radebe, S v Mbonani* 1988 (1) SA 191 (T). See also *S v Van Heerden en Ander Sake* 2002 (1) SACR 409 (T); *S v Thusi* 2002 (12) BCLR 1274 (N); *S v Mdali* 2009 (1) SACR 259 (C). This duty is equally applicable in bail proceedings. See *S v Nzima* 2001 (2) SACR 345 (C). *S v Moetjie* 2009 (1) SACR 95 (T).

179 *S v Radebe, S v Mbonani* 1988 (1) SA 191, 196g (T). See also *S v Manale* 2000 (2) SACR 666 (NC); *S v Nkondo* 2000 (1) SACR 358 (W); *S v Sikhipha* 2006 (2) SACR 439 (SCA).

180 *S v Ndlovu* 2001 (1) SACR 204 (W); *S v Mbambo* 1999 (2) SACR 421 (W); *S v Dyani* 2004 (2) SACR 365 (E). See also *S v Tshidiso* 2002 (1) SACR 207 (W); *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W) ('*Ndlovu*').

the accused's choice not to be represented is an informed one. [183] An accused must be given a reasonable opportunity to obtain legal aid. [184] If an accused initially declines legal representation, but subsequently changes his mind, then he must be given the opportunity to obtain legal representation. [185] Similarly, if a legal representative withdraws, then the accused must be given the opportunity of applying to the Legal Aid Board for the appointment of another legal representative. [186] The duty to provide an accused with a fair opportunity

to obtain legal representation also arises in summary proceedings. [187] A decision of the Legal Aid Board not to provide representation may be reviewed for 'reasonableness'. However, the courts will be slow to overturn a decision of the Legal Aid Board. The Board is specifically designed to make funds available for legal representation and to decide when legal representation to indigent accused is warranted. [188] All that being said, the failure to inform an accused of his right to legal representation will only result in an unfair trial if it can be shown 'that the conviction has been tarnished by the irregularity'. [189]

The right to have legal representation at state expense does not include the right to have a legal representative of the accused's choice. [190] However, an accused is entitled to effective representation [191] and to be legally represented by a 'person who has placed himself or herself in a position to present' his or her case as instructed. [192] The legal representative must be given a reasonable opportunity to

181 *S v Visser* 2001 (1) SACR 401 (C); *S v Monyane* 2001 (1) SACR 115 (T); *S v Ambros* 2005 (2) SACR 211 (C); *Ndlovu* (supra).

182 *S v Ambros* 2005 (2) SACR 211 (C); *S v Du Toit (2)* 2005 (2) SACR 411 (T).

183 *S v Solomons* 2004 (1) SACR 137 (C).

184 *S v Lusu* 2005 (2) SACR 538 (E); *S v Makhandela* 2007 (2) SACR 620 (W); *S v Saule* 2009 (1) SACR 196 (CkHC).

185 *S v Pitso* 2002 (2) SACR 586 (C). See also *S v Gedezi* 2010 (2) SACR 363 (WCC).

186 *S v Kok* 2005 (2) SACR 240 (NC).

187 *S v Solomons* (supra).

188 *Legal Aid Board v S* 2011 (1) SACR 166 (SCA). This new position would appear to reflect a deviation from rather recent precedent that held that even if an accused does not meet the means test set by the Legal Aid Board, he will still retain his constitutional right to legal representation at state expense and that right must be explained to the accused. See *S v Cornelius* 2008 (1) SACR 96 (C); *S v Makhandela* 2007 (2) SACR 620 (W).

189 *S v May* 2005 (2) SACR 331 (SCA). See also *Hlantlalala v Dyanti NO* 1999 (2) SACR 541 (SCA); *S v Mshumpa* 2008 (1) SACR 126 (E).

190 See *S v Manguanyana* 1996 (2) SCR 283 (E); *S v Halgryn* 2002 (2) SACR 211 (SCA); *R v Mochebelele* 2010 (1) SACR 256 (LesA).

adequately represent his or her client. [193] In *S v Mofokeng,* [194]the court held that '[t]he right to legal representation exists during the whole of the legal process until the court has spoken the last word'. [195]

(ii) Admissions and confessions

The law as it stands makes a distinction between admissions and confessions in respect of admissibility in criminal trials. [196] The only requirement that needs to be met before an admission will be accepted into evidence is that it must be made voluntarily. [197] 'Voluntary' in this context has a very restricted meaning. An admission will be found to be involuntary only if it has been induced by a promise or threat proceeding from a person in authority. [198] FC s 35(1)*(c)* may well provide the courts with the opportunity for departing from the artificial and technical common-law interpretation of the requirement of 'voluntariness'. FC s 35(1)*(c)*

reflects the accused's pre-trial privilege against self-incrimination. It provides that an arrested person shall have the right 'not to be compelled to make any confession or admission that could be used in evidence against' him or her.

Nothing in FC s 35(1)*(c)* suggests that admissions and confessions should be treated differently. CPA s 217 requires a confession to be made freely and voluntarily whilst the maker is in his sound and sober senses and without having been unduly influenced thereto. In *R v Barlin,* Innes CJ held that the requirement of undue influence pertaining to confessions was elastic and went beyond the ambit of voluntariness. It was restricted to an inducement, threat or promise coming from a person in authority. [199] The constitutional entrenchment of the principles of due process and the right to a fair trial in FC s 35(3), as well as the wording of FC s 35(1)

191 *S v Mofokeng* 2004 (1) SACR 349 (W). See also *S v Du Toit (2)* 2005 (2) SACR 411 (T); *S v Halgryn* (supra); *S v Tandwa* 2008 (1) SACR 613 (SCA).

192 See *S v Charles* 2002 (2) SACR 492 (E). See also *Beyers v Director of Public Prosecutions, Western Cape* 2003 (1) SACR 164 (C); *S v Ntuli* 2003 (1) SACR 613 (W).

193 *B v S* 2003 (9) BCLR 955 (E).

194 *S v Mofokeng* 2004 (1) SACR 349 (W) at para 17. See also *S v Nkosi* 2010 (1) SACR 60 (GNP).

195 *Mahomed v National Director of Public Prosecutions* 2006 (1) SACR 495 (W) at para 7 (The court with reference to legal professional privilege held that the confidentiality of communications between an accused and his legal representative was fundamental to an accused's right to a fair trial.) See also *Bennett v Minister of Safety and Security* 2006 (1) SACR 523 (T).

196 See *S v Ralukukwe* 2006 (2) SACR 394 (SCA).

197 Section 219A of the Criminal Procedure Act 51 of 1977.

198 *R v Barlin* 1926 AD 459.

199 *R v Barlin* (supra).

(c), which draws no distinction between admissions and confessions, favours an interpretation of voluntariness which is indistinguishable from undue influence.

In *S v Agnew*, Foxcroft J questioned the artificial distinction drawn between confessions and admissions. [200] He noted that, historically, one of the reasons for the distinction was the assumption that admissions need not be guarded against to the same extent as confessions. [201] However, in many instances admissions could be just as damaging as confessions. [202] The *Agnew* court held that '[i]f full effect is given to the maxim that no one should be obliged to incriminate himself, then it is difficult to understand how incriminating statements contained in confessions should be treated differently from words amounting to admissions only'. [203] The obvious reason for taking this approach is that all the reasons for excluding involuntary confessions apply equally to involuntary admissions. Involuntary confessions and admissions are excluded not only because they are potentially unreliable, [204] but also because a conviction based on an involuntary admission or confession would be one obtained without due process of law. [205] The admission of a forced admission or confession would likewise be contrary to the right not to incriminate oneself. [206] As the South African Law Commission has noted, admissions, confessions and pointings out should all be subject to the same requirements of admissibility: namely that they must be made freely and voluntarily, in sound and sober senses

and without undue influence. [207] No admission or confession should be the product of coercion or abuse. [208]

200 *S v Agnew* 1996 (2) SACR 535 (C)('*Agnew*').

201 Ibid at 538.

202 Cf *R v Xulu* 1956 (2) SA 288 (A). See also *S v Orrie* 2005 (1) SACR 63, 76a–c (C).

203 *Agnew* (supra).

204 See *S v Radebe* 1968 (4) SA 410 (A) at 418-419.

205 *Brown v Allen* 344 US 443 (1953).

206 See *R v Duetsimi* 1950 (3) SA 674 (A); *S v Sheehama* 1991 (2) SA 860 (A).

207 South African Law Commission Project 73 *Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure — Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials* (August 2002). The various rights enumerated in FC s 35 also provide an entirely different basis for the exclusion of admissions and confessions. FC s 35(5) confers a discretion on the court to exclude evidence obtained in violation of any right in the Bill of Rights. So, for example, Leach J in *S v Mdyogolo* held that the failure to hold a trial-within-a-trial to determine the admissibility of a confession infringed the constitutional right to remain silent and constituted a fatal irregularity. 2006 (1) SACR (E). See also *Director of Public Prosecution, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA). For further discussion of trial-within-trial procedures, see § 52.10*(e)* below.

208 See *S v January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A).

Our highest appellate courts have yet to follow these sage recommendations. The existing distinction between admissions and confessions was first challenged in the Constitutional Court in *S v Molimi*. [209] Nkabinde J held that 'although the argument may be sound', the Court need not determine the ongoing validity of the distinction because it had not been raised in the lower courts. [210] Despite the express criticism of the rule, the common-law distinction between admissions and confessions was firmly reinforced by the Supreme Court of Appeal in *S v Libazi*. [211]

(iii) Ascertainment of bodily features

CPA s 37(1) authorises police officials to take fingerprints, palm prints or footprints of any person who has been arrested or charged. The police are also authorised to take such steps as are necessary to ascertain whether the body of any arrested person has any mark, characteristic or distinguishing feature or shows any condition or appearance. Obviously, evidence of this nature might incriminate the accused. The question then arises whether CPA s 37 is in conflict with the constitutional right not to be compelled to make an admission which can be used in evidence against the maker. Prior to legislative authorisation, there was some authority for the view that the ascertainment of bodily features, without the consent of an accused, infringed the common-law privilege against self-incrimination. In *R v Maleke,* the court refused to admit evidence of a footprint compelled by force. [212] Krause J expressed his objection to the admission of such evidence as follows: '[I]t compels an accused person to convict himself out of his own mouth; that it might open the door to oppression and persecution of the worst kind; that it is a negation of the liberty of the subject and offends against our sense of natural justice and fair play...' [213]

However, this line of reasoning was firmly reversed by the Appellate Division in *Ex parte Minister of Justice: In re R v Matemba.* [214] The court considered the admissibility of evidence of a palm-print taken by compulsion and found that the privilege

against self-incrimination applied only to testimonial utterances. Watermeyer JA held:

> Now, where a palm-print is being taken from an accused person, he is, as pointed out by Innes CJ in *R v Camane* (1925 AD 570, 575), entirely passive. He is not being compelled to give evidence or to confess, any more that he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in court. In my judgment,

209 2008 (3) SA 608 (CC), 2008 (5) BCLR 451 (CC), 2008 (2) SACR 76 (CC), [2008] ZACC 2.

210 Ibid at paras 48–49.

211 2010 (2) SACR 233 (SCA).

212 *R v Maleke* 1925 TPD 491.

213 Ibid at 534. See also *Gooprushad v R* 1914 35 NLR 87; *R v B* 1933 OPD 139.

214 *Ex parte Minister of Justice: In re R v Matemba* 1941 AD 75.

therefore, neither the maxim *nemo tenetur se ipsum prodere* nor the confession rule make inadmissible palm-prints compulsorily taken. [215]

This line of reasoning had been used to justify the admission of evidence of a thing or place pointed out, under coercion, by the accused. [216] In *S v Sheehama*, the Appellate Division found this reasoning to be untenable. It held that 'a pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out'. [217] Consequently, a pointing out, like any other extra-judicial admission, has to be made voluntarily before it will be admitted into evidence. However, although a pointing out like the ascertainment of bodily features usually results in the production of 'real' evidence, it can be distinguished from the latter in that it involves some degree of active or communicative conduct. [218]

In *S v Huma (2)*, Claassen J held that the taking of fingerprints did not constitute testimonial evidence by the accused and was therefore not in conflict with the privilege against self-incrimination. [219] The *Huma (2)* court relied heavily on the reasoning of the US Supreme Court in *Schmerber v California*. [220] In *Schmerber*, a majority of the Supreme Court held that the Fifth Amendment privilege against self-incrimination relates only to the testimonial or communicative acts of the accused and does not apply to non-communicative acts such as submission to a blood test. This approach was adopted by the Supreme Court of Appeal in *Levack v Regional Magistrate, Wynberg.* [221] In *Levack,* the Supreme Court of Appeal held that compelling an accused to submit a voice sample infringed neither the right to remain silent nor the right not to give self-incriminating evidence. In*S v Orrie,* the High Court found that the involuntary taking of a blood sample for the purposes of DNA profiling infringed both the right to privacy and the right to bodily security and integrity, but that the infringement was justifiable. [222] Desai J, in *Minister of Safety and Security v Gaqa*, [223] confirmed an order compelling the respondent to submit himself to an operation for the removal of a bullet from his leg. In so doing, the High Court rejected the respondent's argument that to do so would infringe his constitutional right not to incriminate himself. The *Gaqa* court held that CPA ss 27 and 37 sanctioned the violence necessary to remove the

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215 *Ex parte Minister of Justice: In re Matemba* (supra) at 83.

216 See s 218 of the Criminal Procedure Act 51 of 1977.

217 *S v Sheehama* 1991 (2) SA 860 (A).

218 See *S v Binta* 1993 (2) SACR 553 (C).

219 *S v Huma (2)* 1995 (2) SACR 411, 419 (W). See also *S v Maphumulo* 1996 (2) SACR 84 (N); *Msomi v Attorney-General of Natal* 1996 (8) BCLR 1109 (N).

220 *Schmerber v California* 384 US 575 (1966).

221 2003 (1) SACR 187 (SCA).

222 *S v Orrie* 2004 (1) SACR 162 (C) at para 20.

223 *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

bullet, and that although these procedures constituted a serious infringement of dignity and bodily integrity, they met the requirements of the limitation clause. A similar application was made to the High Court in *Minister of Safety and Security v Xaba.* [224] The respondent's arguments were, it appears, limited to the right to be free from all forms of violence (FC s 12(1)*(c)*) and the right to have security and control over one's body (FC s 12(2)*(b)*). Southwood AJ held that the conclusion of the court in *Gaqa* was clearly wrong. In the absence of a law of general application authorising the specific constitutional infringements, Southwood AJ reasoned, the requirements of the limitation clause could not be met.

Can a clear distinction be made between the ascertainment of bodily features and testimonial or communicative statements? Black and Douglas JJ, dissenting in *Schmerber v California,* thought not:

> [T]he compulsory extraction of a petitioner's blood for analysis so that the person who analysed it could give evidence to convict him had both a 'testimonial' and a 'communicative nature'. The sole purpose of this project which to be successful was to obtain 'testimony' from some person to prove that the petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly 'communicative' in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that the petitioner was more or less drunk. [225]

The distinction between 'testimonial' and 'communicative' conduct is perhaps necessary in the absence of a limitation clause. FC s 36 permits the South African courts to take a more generous approach in determining the content of the right against self-incrimination without compromising the effective administration of the criminal justice system.

Another question that arises in relation to the ascertainment of bodily features is whether an accused must be advised of his or her right to legal representation prior to an identification parade being held. At present it appears to be an open question. Leveson J, in *S v Ngwenya*, held that the right to a fair trial did not require the accused to be advised of his right to legal representation at every stage of the pre-trial process and that the passive role played by the accused at the identification parade did not involve any process of self-incrimination. [226] In *S v Mokoena*, the court held that the failure to advise the accused of his right to legal representation at an identity parade merely affected the weight of the evidence and not its admissibility. [227] However, in *S v Mhlakaza*, the court found

the failure to advise the accused of their right to representation coupled with the accused's express objection to the absence of any legal representation, rendered the

224 *Minister of Safety and Security v Xaba* 2004 (1) SACR 149 (D).

225 *Schmerber* (supra) at 921 (Black J). The minority judgment in *Schmerber* was preferred by the Canadian Supreme Court in *R v Stillman* (1997) 42 CRR (2d) 189.

226 *S v Ngwenya* 1998 (2) SACR 503, 509 (W). See also *S v Zwayi* 1997 (2) SACR 772 (Ck); *S v Monyane* 2001 (1) SACR 115 (T); *S v Thapedi* 2002 (1) SACR 598 (T). See also *S v Hlalikaya* 1997 (1) SACR 613 (E)(The court held that there was no right to legal representation at a 'photo identification' parade.) However, the court in *S v Thapedi* 2002 (1) SACR 598 (T) referring to *US v Wade* 288 US 218 (1967), acknowledged that there may well be circumstances in which the right to a fair trial would require that the accused be represented at an identity parade.

evidence of the identification parade inadmissible; this approach has received little support in subsequent cases. [228]

52.5 Right to adequate time and facilities to prepare a defence [229]

The central role of access to information in enabling an accused to exercise his or her fair trial rights was recognised by the Constitutional Court in *Shabalala v Attorney-General of Transvaal*. [230] *Shabalala* abolished 'blanket docket privilege' and broadened the accused's access to state witnesses. The *Shabalala* Court's order provides the best summary of the prevailing position and reads as follows:

> A. 1. The 'blanket docket privilege' expressed by the rule in *R v Steyn* 1954 (1) SA 324 (A) is inconsistent with the Constitution to the extent to which it protects from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure is justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial in terms of s 25(3). [231]
>
> 2. The claim of the accused for access to documents in the police docket cannot be defeated merely on the grounds that such contents are protected by a blanket privilege in terms of the decision in *Steyn's* case.
>
> 3. Ordinarily an accused person should be entitled to have access to documents in the police docket which are exculpatory (or which are *prima facie* likely to be helpful to the defence) unless, in very rare cases, the State is able to justify the refusal of such access on the grounds that it is not justified for the purposes of a fair trial.
>
> 4. Ordinarily the right to a fair trial would include access to the statements of witnesses (whether or not the State intends to call such witnesses) and such of the contents of a police docket as are relevant in order to enable an accused person properly to exercise that right, but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. This would depend on the circumstances of each case.
>
> 5. The State is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or State secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

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227 *S v Mokoena* 1998 (2) SACR 642 (W). Cf *S v Mphala* 1998 (1) SACR 654 (W). See SE Van der Merwe 'Parade-uitkennings, Hofuitkennings en die Reg op Regverteenwoordiging: Enkele Grondwetlike Perspektiewe' 1998 (9) *Stellenbosch LR* 129 (Discusses and compares case law in South Africa, the United States and Canada.)

228 *S v Mhlakaza* 1996 (2) SACR 187 (C). See also *S v Mathebula* 1997 (1) SACR 10 (W).

229 FC 35(3)*(b)*.

230 *Shabalala v Attorney-General of Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC)('*Shabalala*').

231 This summary refers to IC s 25(3): the corresponding provision is now found in FC s 35(3).

6. Even where the State has satisfied the Court that the denial of access to the relevant documents is justified on the grounds set out in paragraph 5 hereof, it does not follow that access to such statements, either then or subsequently, must necessarily be denied to the accused. The Court still retains a discretion. It should balance the degree of risk involved in attracting the potential prejudicial consequences for the proper ends of justice referred to in paragraph 5 (if such access is permitted)

against the degree of the risk that a fair trial may not enure for the accused (if such access is denied). A ruling by the Court pursuant to this paragraph shall be an interlocutory ruling subject to further amendment, review or recall in the light of circumstances disclosed by the further course of the trial.

B. 1 Insofar as and to the extent that the rule of practice pertaining to the right of an accused or his legal representative to consult with witnesses for the State prohibits such consultation without the permission of the prosecuting authority, in all cases and regardless of the circumstances, it is not consistent with the Constitution.

2. An accused person has a right to consult a State witness without prior permission of the prosecuting authority in circumstances where his or her right to a fair trial would be impaired, if, on the special facts of a particular case, the accused cannot properly obtain a fair trial without such consultation.

3. The accused or his or her legal representative should in such circumstances approach the Attorney-General or an official authorised by the Attorney-General for consent to hold such consultation. If such consent is granted the Attorney-General or such official shall be entitled to be present at such consultation and to record what transpires during the consultation. If the consent of the Attorney-General is refused the accused shall be entitled to approach the Court for such permission to consult the relevant witness.

4. The right referred to in paragraph 2 does not entitle an accused person to compel such consultation with a State witness: —

(a) if such State witness declines to be so consulted; or

(b) if it is established on behalf of the State that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with his or her evidence or that it might lead to the disclosure of State secrets or the identity of informers or that it might otherwise prejudice the proper ends of justice.

5. Even in the circumstances referred to in paragraph 4*(b)*, the Court may, in the circumstances of a particular case, exercise a discretion to permit such consultation in the interest of justice subject to suitable safeguards. [232]

The application of this order does not appear to have given the state much trouble. Few cases have arisen out of a refusal to disclose. [233]

Shabalala was decided in terms of IC s 23. [234] The corresponding section of the Final Constitution, FC s 32, significantly departs from its predecessor in a number

232 *Shabalala* (supra) at para 72.

233 But see *S v Makiti* [1997] 1 All SA 291 (B)(The court clearly encourages disclosure as a default position); *S v Naude* 2005 (2) SACR 218 (W)(The court held that the prosecution retains the duty to bring previous inconsistent statements made by a state witness to the attention of the court.) See also *S v Mvelasi* 2005 (2) SACR 266 (O)(Regarding the ambit of the state's duty to disclose real evidence at trial.)

of ways. [235] For starters, under FC s 32, the right to information held by the state is no longer qualified by the requirement that the information is necessary for the exercise or protection of any other rights. However, FC s 32 needs to be enforced through the legislation enacted in terms of FC s 32(2): the Promotion of Access to Information Act ('PAIA'). [236] In terms of s 7, PAIA does not apply to ongoing criminal or civil proceedings. [237]

S v Rowand makes no direct reference to the distinction between the contents of the access to information clauses in the Interim Constitution and Final Constitution. [238] However, the content of the judgment implies that the High Court was cognisant of the change in wording. Labuschagne J held that the prosecution could not deny access to information on the basis that it was not contained in the collection of documents labelled the 'docket'. [239] Nor could the prosecution avoid disclosure by attempting to draw a superfluous distinction between the 'prosecution' and the 'state'. These conclusions are entirely in keeping with the purpose of FC s 32 and the holding of the Constitutional Court in *Shabalala.*

The most interesting finding in *Rowand* is that the relevance of the requested documents to the accused is not a factor in determining whether they should be disclosed. This part of holding constitutes a notable departure from *Shabalala.*

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234 IC s 23 read, in relevant part: '[e]very person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her... rights'.

235 FC s 32 reads:

(1) Everyone has the right of access to —

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

236 Act 2 of 2000.

237 But see *PFE International v Industrial Development Corporation of SA* 2011 (4) SA 24 (KZD)(Motala AJ held that s 7 of PAIA did not exclude the operation of PAIA where it was invoked to facilitate the production of or access to records required for civil litigation where there was no rule of court that made provision for such access. Consequently, it held that PAIA could be invoked where the records required were in the possession of person who was a party to the civil proceedings and the records in question were required prior to trial (eg for the purposes of pleading.) This decision was recently overturned in *PFE International Inc (BUI) & Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC), 2013 (1) BCLR 55 (CC), [2012] ZACC 21. See also *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP)(The High Court held that the raw data compiled by a third party in order to assist the state in assessing whether it was in the child's interest to testify through an intermediary in terms of s 170A of the CPA did not form part of the police docket. The applicant should have sought access to the documentation in terms of the relevant provisions of PAIA.)

238 2009 (2) SACR 450 (W).

239 Ibid at paras 17–18.

Shabalala permitted the state to deny access if the accused did not require the information to exercise his right to a fair trial. However, as noted above, FC s 32 and PAIA do not require that the information be necessary to protect a right. Relevance should no longer be seen as a requirement for access. Nevertheless, the state must be able to invoke the limitations clause to protect itself from vexatious requests for information (designed, inevitably, to force the wheels of justice to grind even more slowly.) In *Rowand*, however, the state did not invoke any legislation to limit the otherwise untrammelled right to access in FC s 32.

Shabalala was not entirely clear about the point in the proceedings at which an accused becomes entitled to access the docket. The right to such information only

arises once the accused has been charged. [240] However, even then, the right to docket access is not automatic and the prosecution is entitled to resist disclosure. [241] Access to the docket may also be refused when the court is asked to grant bail. [242] Here, as elsewhere, the court retains the discretion to override prosecutorial refusal. [243]

One might be tempted to ask whether courts ought to be in a position to determine whether a refusal, or failure to disclose infringes the right to a fair trial. In *S v Crossberg*, [244] Navsa JA considered whether the failure to disclose the statements of a number of witnesses had impaired the accused's right to a fair trial and, if so, what the appropriate remedy should be. In canvassing his options, Navsa JA leaned heavily upon the following passages from the judgment of the Canadian Supreme Court in *R v Taillefer:*

> First, the onus is on the accused to demonstrate that there is a *reasonable possibility* that the verdict might have been different but for the Crown's failure to disclose all of the relevant evidence. The accused does not have the heavy burden of demonstrating that it is probable or certain that the fresh evidence would have affected the verdict. ... As this court held in *Dixon*: "[i]mposing a test based on reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognises the difficulty of reconstructing accurately the trial process and avoids the undesirable effect of undermining the Crown's disclosure obligations. ...
>
> Second. Applying this test requires that the appellate court determine that there was a reasonable possibility that the jury, with the benefit of all the relevant evidence, might have had a reasonable doubt as to the acccused's guilt. ... [A]n overall effort must be

240 *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

241 See, generally, DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 604–615; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 171–175.

242 See s 60(14) of the Criminal Procedure Act 51 of 1977 and *S v Dlamini, S v Dladla, S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC). See also PAIA s 39(1)*(a)*(Permits officials to refuse PAIA requests for information that is covered by s 60(14) of the CPA.)

243 Presiding officers have a duty to advise unrepresented accused of their right of access to the docket. See *S v Shiburi* 2004 (2) SACR 314 (W).

244 2008 (2) SACR 317 (SCA).

made to reconstruct the overall picture of the evidence that would have been presented to the jury had it not been for the Crown's failure to disclose the relevant evidence. Whether there is a reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety. [245]

Navsa JA noted that, in *Taillefer,* the Supreme Court of Canada had distinguished between: *(a)* the inquiry into whether disclosure would have had an impact on the outcome of the trial; and *(b)* the inquiry into the overall fairness of the trial. In the circumstances of the case, the *Crossberg* court found that the missing statements were 'highly relevant to the outcome *and* to the issue of a fair trial'. [246] In sum, the probative value of the undisclosed statements was relevant to the outcome *and* the dishonesty of the police rendered the trial unfair.

In practice, it seems that the two inquiries will inevitably be closely connected. To demonstrate the difficulty in drawing a distinction between 'outcome' and

'fairness', consider the following question: would the unethical behaviour of the police result in an unfair trial if their actions would have had no bearing on the outcome of the trial? The answer is no. As a result, the two inquiries are invariably linked. [247]

In *Prinsloo v Bramley Children's Home,* the applicants, who were also the accused in respect of a charge involving two children (cited as the second and third respondents) made application for information not contained in the police docket. [248] The applicants sought access to the personal files of the two children kept by the Children's Home. The applicants sought the files in the hope that they might discover that the children had previously been involved in sexual misbehaviour or improper conduct. The court held that the right to a fair trial included 'the right to information in the possession of the State and possibly State witnesses in order to enable the applicants to prepare properly for their defence'. [249] However, it concluded that the requests for access in the instant matter were 'vague, superficial and unsupported by factual allegations'. [250] Furthermore, the applicants' fair trial rights had to be weighed against the children's right to privacy, emotional and psychological integrity and dignity in the context of a constitutional injunction that '[a] child's best interest is of paramount importance in every matter concerning the

245 (2004) 114 CRR (2d) 60 (SCC) at paras 81–2 quoted in *Crossberg* (supra) at paras 77–78.

246 *Crossberg* (supra) at para 80 (my emphasis).

247 Mlambo JA, dissenting, reached the surprising conclusion that the non-disclosure had a minimal impact on the outcome of the trial. For a contrary view, supporting the conclusion of Navsa JA, see *Crossberg* (supra) at paras 153–156 (Ponnan JA, in a separate judgment, rebuts Mlambo JA's conclusion that non-disclosure was immaterial.) See also *Mngomezulu v NDPP* 2008 (1) SACR 105 (SCA);*S v Rozani; Rozani v Director of Public Prosecutions, Western Cape* 2009 (1) SACR 540 (C); *S v Makiti* [1997] 1 All SA 291 (B); *S v Naude* 2005 (2) SACR 218 (W); *S v Mvelasi* 2005 (2) SACR 266 (O).

248 2005 (2) SACR 2 (T)('*Bramley Children's Home*').

249 Ibid at 8i–j.

250 Ibid at 7f.

child'. [251] The applicants therefore bore the onus of establishing that the resultant infringements of the children's rights in the event of the success of the application were justified. Release of the requested information would be justifiable if the information was essential to the applicants' defence and if access was necessary at this stage of the proceedings to enable them to prepare their defence: '[T]hey must prove on a balance of probabilities that, unless the information sought is obtained immediately, their right to a fair trial will be irreparably infringed.' [252] The court noted that a party wishing to obtain information not contained in the police docket from a third party must establish the relevance of the evidence that is sought and that this showing must be done with reference to the issues between the state and the applicant. This 'test' for the release of documents would, in effect, require the applicants to disclose the basis of their defence. [253] This early disclosure of the applicants' defence did not infringe the right to remain silent as the choice as to whether to disclose remained with

the applicant. The applicant had to accept the consequences of disclosure and non-disclosure. [254]

52.6 Right to adduce and challenge evidence

The right to a fair trial includes the right to adduce and challenge evidence. [255] This right affects both the rules governing the admissibility of evidence and the conduct of presiding officers. Presiding officers must ensure that unrepresented accused are aware of their right to adduce evidence and must assist accused in exercising their right to testify. [256] Ntsebeza AJ, in *S v Ismail* held that a magistrate had been responsible, inter alia, for two gross irregularities: excluding relevant evidence and failing to give the accused an opportunity to address the court on the admissibility of the evidence. [257] In *S v Muller,* the High Court held that the right to a public trial embraces the right to adduce and to challenge evidence: these rights, in turn, encompass the right to address the court on the merits. [258]

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251 FC s 28(2).

252 *Bramley Children's Home* (supra) at 12a.

253 Given that the applicants hoped to turn up some prior sexual history, they would also have had to satisfy the relevance requirements of s 227 of the Criminal Procedure Act 51 of 1977. See § 52.8*(d)* infra.

254 See *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC), 2001 (1) SACR 1 (CC). See § 52.4*(b)* supra, for further discussion of the right to remain silent.

255 FC s 35(3)*(i)*.

256 *S v Matladi* 2002 (2) SACR 447 (T).

257 2006 (1) SACR 593 (C).

258 2005 (2) SACR 451 (C).

(a) Cross-examination

The failure to allow cross-examination will generally be viewed as a serious irregularity that encroaches upon the accused's right to a fair trial. [259] Presiding officers have a duty to advise unrepresented accused of their right to cross-examine and to provide an explanation as to how this procedure should be undertaken. [260]

What are the consequences if an accused is denied the right to cross-examine? The High Court in *S v Nnasolu* [261] held that a magistrate's failure to allow the accused to cross-examine a state witness on a relevant aspect of his testimony constituted both an irregularity at common law and an infringement of the accused's constitutional right to adduce and challenge evidence. [262] While the *Nnasolu* court excluded that part of the evidence that had not been subject to cross-examination, it held that the irregularity had not resulted in a 'failure of justice'. In reaching this conclusion, the court applied the test set out in *S v Msithing*:

> [A] fundamental irregularity which violates an accused's right to a fair trial must result in a failure of justice. If the irregularity is not of a fundamental nature, the focus shifts to what would have happened but for the irregularity. The setting aside of the conviction based on the violation of the right to a fair trial in circumstances of a minor 'tainting' of the proceedings will undermine the 'pressing social need' to prosecute crime. [263]

Having set out the above test, the *Nnasolu* court reached the conclusion that the irregularity was not fundamental. This approach creates some uncertainty as to the proper relationship between the 'failure of justice' standard and the 'but for' test. Stewart AJ's reasoning appears to run as follows. Despite the fact that the 'tainted evidence' was integral to the court *a quo*'s reasoning, cross-examination would have made little difference to the weight accorded the evidence. In any event, sufficient evidence had been adduced to sustain a conviction (without the inclusion of the 'tainted evidence'.) The logic of *Nnasolu* suggests that deciding whether or not an irregularity is 'fundamental' is inevitably tied to the 'but for' test. For a presiding officer to disallow cross-examination on evidence that he or she clearly regards as important to the fact-finding process surely constitutes a serious violation of the fair trial right. The only reason that it should not, arguably, result in a failure of justice is because, in retrospect, the cross-examination would have made no difference to the outcome. This approach may well be an appropriate way of ensuring that the criminal justice system is not undermined by unduly technical acquittals. However, it would be misleading to suggest that a bright line divides the two inquiries. Moreover, it strains credulity to contend that the right to a fair trial has not been limited — even if reasonably and justifiably so.

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259 *S v Heslop* 2007 (1) SACR 461, 473 (SCA). See *S v Mgudu* 2008 (1) SACR 71 (N); *S v Kok* 2005 (2) SACR 240 (NC); *R v Ndawo* 1961 (1) SA 16 (N); *S v Malatji* 1998 (2) SACR 622 (W). See also *S v Manqaba* 2005 (2) SACR 489 (W)(See further discussion at § 52.6 infra).

260 *S v Ndou* 2006 (2) SACR 497 (T); *S v Tyebela* 1989 (2) SA 22 (A).

261 2010 (1) SACR 561 (KZP).

262 Ibid at paras 16–18.

263 2006 (1) SACR 266, 273 (N).

That strain is also evident in the *Nnasolu* court's succinct justification for the exclusion of the tainted evidence: 'In the result, the magistrate's refusal to allow ... cross-examination was an irregularity and the evidence elicited by the magistrate with regard to the voice identification must consequently be excluded'. [264] A reader can be forgiven for not tracking the High Court's logic. The voice identification evidence in question did not flow from the magistrate's restriction on cross-examination. This evidence existed prior to the restriction. In reaching its conclusion, the *Nnasolu* court makes no reference to FC s 35(5) or to the common-law discretion to exclude evidence when prejudicial effect exceeds probative value. Nor does the court refer to FC s 38, which might have been invoked as a ground for excluding evidence as a form of 'appropriate relief'. For the sake of doctrinal coherence, it might have been better if the *Nnasolu* court had elected to accord no weight to the evidence rather than excluding it altogether.

(i) Hearsay

The effective exercise of the court's truth seeking function in adversarial systems is dependent on the parties' ability to present evidence and to cross-examine witnesses. The right to challenge and to adduce evidence can be fulfilled both by calling witnesses and through cross-examination. However, in *S v Ndhlovu,* the Supreme Court of Appeal held that the right to challenge evidence does not necessarily require the right to cross-examine. [265] In *Ndhlovu,* the Supreme Court of Appeal was required to consider, inter alia, the constitutionality of s 3 of the Law of Evidence Amendment Act. [266] Section 3 governs the admissibility of hearsay

evidence. Section 3(4) defines hearsay as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. It is clear from s 3(1) that the general rule is that hearsay evidence is inadmissible subject to three exceptions: *(a)* where the party against whom the evidence is adduced consents to its admission; *(b)* where the person upon whose credibility the probative value of the evidence depends testifies; and *(c)* where a court is of the opinion that it is in the interests of justice that the hearsay be admitted.

The court in *Ndhlovu* identified the following disadvantages that may accrue as a result of the admission of hearsay evidence. First, it is 'not subject to the reliability checks applied to first-hand testimony' and secondly, 'its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it'. [267] Presumably it was on the basis of such potential prejudice that counsel for the accused based the assertion that the accused's constitutional right to challenge evidence was infringed. The court noted that s 3 is primarily an exclusionary rule and that its significant departure from the common law was intended to create 'supple standards within which courts may

264 *S v Nnasolu* (supra) at para 18.

265 *S v Ndhlovu* 2002 (2) SACR 325 (SCA)('*Ndhlovu SCA*'). But see *S v Msimango* 2010 (1) SACR 544 (GSJ).

266 Act 45 of 1988.

267 *Ndhlovu SCA* (supra) at para 13. See also *Harksen v Attorney General Cape* 1999 (1) SA 718 (C).

consider whether the interests of justice warrant the admission of hearsay notwithstanding the procedural and substantive disadvantages its reception might entail'. [268] Cameron JA held that the criteria to be taken into account in applying the interests of justice test were 'consonant with the Constitution' [269] and reiterated the court's reluctance to admit or rely 'on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so'. [270]

Cameron JA set out a number of criteria that presiding officers ought to consider in order to ensure that an accused's fair trial rights are upheld when 'hearsay evidence' is offered. These criteria require judges: *(a)* to actively guard against the inadvertent admission or 'venting' of hearsay evidence; [271] *(b)* to ensure that the significance of the contents of s 3 are properly explained to an unrepresented accused; [272] and *(c)* to protect an accused from 'the late or unheralded admission of hearsay evidence'. [273] These requirements are not to be found in the 1988 Act but rather in the courts' application of the Act.

In *S v Molimi*, the Constitutional Court emphasised the import of the third of these safeguards: the importance of a timeous, clear and unambiguous ruling on admissibility. [274] It stressed that there is no burden on the accused to request clarification from the presiding officer: 'There is no obligation on the defence to assist the prosecution in the execution of its duties and the advancement of its case. If that were so, an unwarranted burden would be imposed on the accused who has to contend with the allegations levelled against him or her. That might

also have the potential of increasing the risk of convictions which are likely not to be in accordance with justice.' [275] Nkabinde J stressed that the failure to pay proper attention to appropriate procedural guards set out in *Ndhlovu* — such as the timeous and unambiguous ruling on the admissibility of evidence — would likely undermine the accused's right to a fair trial and threaten the legitimacy of judicial proceedings. [276]

268 *Ndhlovu SCA* (supra) at para 14. See also *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA).

269 *Ndhlovu SCA* (supra) at para 16.

270 Ibid at para 16.

271 See also *S v Zimmerie* 1989 (3) SA 484, 492 F–H (C); *S v Ramavhale* 1996 (1) SACR 639, 651c (A).

272 See also *S v Ngwani* 1990 (1) SACR 449 (N).

273 *Ndhlovu SCA* (supra) at para 18. See also *S v Ralukukwe* 2006 (2) SACR 394 (SCA).

274 2008 (3) SA 608 (CC), 2008 (5) BCLR 451 (CC), 2008 (2) SACR 76 (CC), [2008] ZACC 2.

275 *S v Molimi* (supra) at para 40.

276 Ibid at paras 41-42.

In *Ndhlovu*, Cameron JA had also underscored the 'rigorous legal framework' created by s 3 and referred to the level of scrutiny to which a decision to admit hearsay evidence is subject. [277] The point is that a decision to admit evidence is not simply an exercise of judicial discretion but a decision of law that can be overruled by an appeal court. [278] The court also noted that the manner in which s 3 regulates the admission of hearsay evidence is 'in keeping with developments in other democratic societies based on human dignity, equality and freedom'. [279] It concluded that the constitutional right to challenge evidence had not been infringed. The crux of the court's reasoning is found in the following passage:

> It has correctly been observed that the admission of hearsay evidence 'by definition denies an accused the right to cross-examine', since the declarant is not in court and cannot be cross-examined. I cannot accept, however, that 'use of hearsay evidence by the State violates the accused's right to challenge evidence by cross-examination', if it is meant that the inability to cross-examine the source of a statement in itself violates the right to 'challenge' evidence. The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant. [280]

Although not expressly articulated, Cameron JA's interpretation of the right to challenge evidence rejects a notional approach to the interpretation of rights. Woolman describes this (common, if undesirable) approach as follows: 'an interpretive method which holds that any activity ... which could notionally fall within the ambit of a right would be protected'. [281] There can be little doubt that the right to challenge evidence must ordinarily include the right to cross-examine. The admission of hearsay evidence, by virtue of the definition of hearsay, excludes the cross-examination of the person upon whom the probative value depends. Therefore we must assume that the Supreme Court of Appeal eschewed a notional approach and adopted what Woolman describes elsewhere as a value-based

approach to rights interpretation. [282] Had it not done so, the Supreme Court of Appeal would have been forced to engage in the second, justificatory stage of limitations analysis. [283] This reading of *Ndhlovu* — and its value-based approach to rights analysis — is confirmed by the Constitutional Court in *S v Molimi*. Nkabinde J

277 *Ndhlovu SCA* (supra) at para 22.

278 See *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1997 (1) SA 1, 27E (A).

279 *Ndhlovu SCA* (supra) at para 23.

280 Ibid at para 24.

281 S Woolman '*Beinash v Ernst & Young*: The Right Consistency' (1999) 15 *SAJHR* 166, 173.

282 See also S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

held that the *Ndhlovu* approach 'may be understood as narrowing the ambit of the right to challenge evidence as guaranteed in [FC s 35(3)*(i)*]'. [284] The *Molimi* Court declined to decide whether *Ndhlovu* was, in fact and in law, correct.

In *S v Libazi,* [285] the Supreme Court of Appeal adopted a more generous approach to the interpretation of FC s 35(3)*(i).* The *Libazi* court had to consider whether the court *a quo* had correctly admitted an extra-curial admission by a co-accused who had implicated the appellant, but who had died prior to trial. It noted that the right to cross-examine is integral to the accused's capacity to assert actively his rights of defence. The court, whilst questioning the correctness of the *Ndhlovu* approach, did not disavow it. Instead Mlambo JA distinguished the two cases on the basis that in *Ndhlovu* the maker of the statement in question had testified but disavowed the content of his 'hearsay' statement, whereas in *Libazi* the maker of the statement was absent (having died). Furthermore, the absent declarant was an accomplice, to which a well-established cautionary rule applied. These two factors would militate against the admission of the statement, even if one adopted the *Ndhlovu* approach.

(ii) Cross-examination of the child witness

CPA s 170A permits a court to appoint a person as an intermediary through whom examination, cross-examination and re-examination of a child will take place. In *K v The Regional Court Magistrate NO*, the court rejected the argument that s 170A infringed the right to cross-examine and consequently concluded that there was no necessity to enter into a limitations analysis. [286] This position accords with the view expressed by the South African Law Commission that the use of an intermediary would not inhibit the purpose of cross-examination: '[t]he purpose of "translated" cross-examination is not to weaken intelligent and even sharp cross-examination, but rather to limit aggressiveness and intimidation towards the

283 For a more detailed discussion of this case, see PJ Schwikkard 'The Challenge to Hearsay' (2003) 120 *SALJ* 63. Challenges based on the right to adduce and challenge evidence were also rejected by the courts in the following cases: *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC) at para 21 (Held that s 72(4) of the Criminal Procedure Act 51 of 1977 did not infringe the right to adduce and challenge evidence); *S v Dodo* 2001 (1) SACR 301 (E)(The court held that s 51(1) and s 51(3) of the Criminal Law Amendment Act 105 of 1997 (minimum sentencing provisions) affected the weight to be attached to evidence and did not infringe the right to adduce and challenge evidence); *S v Van der Sandt* 1997 (2) SACR 116 (W)(The court rejected an argument that s 212 curtailed the right to cross-examine.)

284 *Molimi* (supra) at para 47.

285 2010 (2) SACR 233 (SCA).

286 *K v The Regional Court Magistrate NO* 1996 (1) SACR 434 (E).

child witness'. [287] The child witness also has the right to be protected against unfair cross-examination. [288]

The High Court in *S v Mokoena, S v Phaswane* ('*Mokoena*') raised, *mero motu,* concerns about the constitutionality of legislation regulating the testimony of a child witness. [289] Bertelsmann J concluded that ss 153, 158, 164 (read with ss 162 and 163, 192 and 206) and s 170A of the Criminal Procedure Act [290] ('CPA') were, in terms of FC s 28, [291] unconstitutional. [292] In addition to the specific protections afforded children by FC s 28, Bertelsmann J relied upon the Children's Act, [293] international law and the extensive literature on the topic, to arrive at the conclusion that the child victim and child witness were extremely vulnerable and disadvantaged participants in adversarial criminal procedures. Within this hotly contested framework, courts must ensure that children 'are protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings'. [294]

In terms of s 170A of the CPA, a child witness would only receive the protections afforded by the Act — intermediaries — if the court concluded that testifying would cause the witness 'undue stress'. Unfortunately, the phrase had been interpreted in some High Court cases to require something more than the 'ordinary stress' of a young victim in a sexual offence cases. [295] For Bertelsmann J, the requirement of 'undue stress' placed a limitation upon the best interests of the child that was

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287 For a more detailed discussion of s 170A and decided cases, see E Du Toit et al *Commentary on the Criminal Procedure Act* (2011) 22–30A — 32C; PJ 'Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148. See also *S v Domingo* 2005 (1) SACR 193 (C); *S v Staggie* 2003 (1) SACR 232 (C); PJ Schwikkard & SE van der Merwe *Principles of Evidence* (2009) 381; *S v F* 1999 (1) SACR 571 (C)(Section 158 may be used to allow other vulnerable witnesses to testify via closed circuit television.)

288 *Tshona & Others v Regional Magistrate, Uitenhage & Another* 2001 (8) BCLR 860 (E). The courts have recognized some limits to the protection afforded to the child witness. See, for example, *S v Manqaba* 2005 (2) SACR 489 (W)(Court held that the presiding officer's refusal to allow cross-examination of the 12 year old rape complainant on the basis of a previous inconsistent statement infringed the accused's fair trial right to adduce and to challenge evidence.) See also *R v Ndawo* 1961 (1) SA 16 (N).

289 2008 (5) SA 578 (T), 2008 (2) SACR 216 (T)('*Mokoena*').

290 Act 51 of 1977.

291 A Pantazis, A Friedman & A Skelton 'Children's Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS1, July 2009) Chapter 47.

292 Many of these provisions had already been amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

293 Act 38 of 2005 (Section 42(8) 'emphasises that the proceedings of the children's courts should be held in a locality that should be specifically adapted to put children at ease and should be conducive to an informal conduct of proceedings'. *Mokoena* (supra) at para 43.)

294 *Mokoena* (supra) at para 50.

295 See *S v Stefaans* 1999 (1) SACR 182 (C); *S v F* 1999 (1) SACR 571 (C).

neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress

or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable. [296]

The High Court concluded that s 170A(1) was unconstitutional in so far as it granted a court a discretion as to whether to appoint an intermediary in respect of child witnesses in criminal proceedings and ordered that the section be read to mandate the appointment of intermediaries. [297]

The High Court's declarations of invalidity were referred to the Constitutional Court for confirmation. In *DPP v Minister of Justice and Constitutional Development,* Ngcobo J rejected the High Court's declarations of invalidity. [298] He held that if '[p]roperly interpreted and applied in the light of FC s 28(2)', s 170A(1) served to protect the best interests of the child complainant. [299] The Constitutional Court held that previous inconsistency in the interpretation and application of s 170A by the High Courts [300] should not lead to a finding of constitutional invalidity. [301] Justice Ngcobo sought, instead, to lay down guidelines for a constitutionally consistent implementation of s 170A. First, the meaning of the phrase 'undue mental stress or suffering' should be interpreted in accordance with the objective of s 170A: 'to protect child complainants from exposure to undue mental stress or suffering when they give evidence in court'. [302] Second, 'it must be accepted that a child complainant in a sexual offence who testifies without the assistance of an intermediary faces a high risk of exposure to undue mental stress or suffering'. [303] Third, a child need not 'first be exposed to undue mental or suffering, before an

296 *Mokoena* (supra) at para 79.

297 Ibid at para 85 (Court ordered that the section should read as follows: 'Subject to subsection(4), whenever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court shall appoint a competent person as an intermediary for each witness under the biological age of eighteen years in order to enable such witness to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of proceedings, and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.')

298 2009 (4) SA 222 (CC), 2009 (7) BCLR 637 (CC), 2009 (2) SACR 130 (CC), [2009] ZACC 8 ('*DPP*').

299 Ibid at para 177.

300 Ibid at para 81.

301 Ibid at para 117.

302 Ibid at para 100.

intermediary may be appointed'. [304] Fourth, it should be standard practice for a child to be assessed prior to testifying in order to determine whether an intermediary ought to be appointed. [305] Fifth, presiding officers have a duty in each case to enquire whether an intermediary should be appointed (including where the prosecution fails to bring an application for an intermediary). [306] Presiding officers, in making this determination must 'apply the best-interests principle by considering how the child's rights and interests are, or will be, affected by allowing the child complainant in a sexual offence case to testify without the aid of an intermediary'. [307] Sixth,

the inquiry into the desirability of appointing an intermediary is not one which [308] attracts a burden of proof: 'It is an enquiry which is conducted on behalf of the interests of a person who is not party to the proceedings but who possesses constitutional rights.' [309] Seventh, the *DPP* Court found that a discretion whether or not to appoint an intermediary was necessary in order to ensure that each child's individual interests were met; [310] in some cases it might be in the child's best interest to directly confront the accused. [311]

Despite creating these constitutionally compliant guidelines for reading CPA s 170A, the Court acknowledged that court proceedings were generally traumatic for a child witness, and that, as a result, the appointment of an intermediary would likely enhance the truth-seeking function of the trial court. The Court's goal in saving s 170A was the creation of an environment 'conducive to a trial that is fair to all'. [312]

Although Bertelsmann J was overturned, his objective — ensuring the appointment of intermediaries in all cases involving child witnesses — might yet be achieved. If properly construed, then the principles enunciated by the Constitutional Court in *DPP* should make it virtually impossible for a court, (particularly in a sexual

303 Ibid at para 109.

304 Ibid at para 110.

305 Ibid at para 111.

306 Ibid at para 112.

307 Ibid at para 113.

308 *DPP* (supra) at para 116. See also P Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148.

309 *DPP* (supra) at para 114.

310 Ibid at para 123

311 Ibid at para 127.

312 Ibid at para 114.

offence case) to avoid the appointment of an intermediary for a child. [313] However, given the well-entrenched, and somewhat conservative, practices of the bench, the 'best interests of the child' would have been better served if entrenched in amendments to the CPA or in an entirely new piece of legislation.

Section 158(5) of the CPA requires a court to provide reasons for refusing an application for a child complainant to give evidence by means of closed-circuit television, if the child is below the age of 14 years. Section 170A(7) creates an identical obligation when a court refuses an application for the appointment of an intermediary. Bertelsmann J in *Mokoena* held that the discrimination between children above and below the age of 14 was irrationally discriminatory and unconstitutional. Courts, he held, should always provide reasons.

In *DPP v Minister of Justice*, the Constitutional Court found that neither sections precluded the giving of reasons for children over the age of 14. Interpreted in light of the Constitution, the sections required the courts to give reasons no matter the age of the child. The wording of the sections merely emphasised the additional vulnerability of younger children by requiring that reasons be given immediately in respect of the younger group. For children over the age of 14, it was acceptable to give reasons at a later stage or at the end of the case. [314] Again the Constitutional Court appears to have avoided a declaration of unconstitutionality but achieved the same objective as the High Court: reasons for all refusals. But here too, it may be that the normative value — and the practical effect — of constitutional interpretation could be enhanced by legislative amendment.

(iii) The hostile witness

At common law, a party may not cross-examine their own witness unless the court has declared the witness hostile. In *Chambers v Mississipi,* the United States Supreme Court questioned the rationale of the rule. [315] Normally, a party who calls a witness vouches for the credibility of that witness. The *Chambers* Court held that, under the circumstances, the rule infringed the accused's right to defend himself. The lack of a coherent rationale for this rule — inherited from English law — makes it difficult to disagree with Van der Merwe's assertion that the rule needs to be reconsidered in the context of the accused's right to a fair trial. [316]

(b) Record of bail application

The right to adduce evidence includes the right to testify, to call witnesses [317] and if necessary to receive assistance in ensuring that defence witnesses are able to

313 See *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GNP).

314 *DPP* (supra) at para 161.

315 410 US 284 (1973).

316 Schwikkard & Van der Merwe (supra) at 459. While we believe the rule undesirable, the justification for the rule remains coherent. Witnesses may offer their support in pre-trial depositions and affidavits, and even agree to lend support in open court. However, as both English and American courts have made transparent, a witness may change her story for any number of reasons (ie, intimidation, *animus* or a genuine inability to stand up to cross-examination in the courtroom.)

attend court. [318] In *S v Aimes,* the court was required to solve the following dilemma: could the record of accused No 1's bail application, which had been unconstitutionally obtained, be adduced by accused No 2. [319] It was clear that the admission of the bail record would render the trial unfair in respect of accused No 1, at the same time that its exclusion would render the trial unfair in respect of accused No 2. No 2's right to adduce evidence would be violated. The court ruled that the bail record of accused No 1 could be admitted for the sole purpose of assisting accused No 2 in his defence, subject to the proviso that it was not admissible against accused No 1. [320]

Bail applications often involve unrepresented accused. The courts have repeatedly held that a duty rests upon a presiding officer to assist the unrepresented accused in exercising his or her right to adduce and to challenge evidence. [321]

However, the reach of trial fairness extends beyond the accused. In *S v Basson,* the Constitutional Court was seized with an appeal against the acquittal ofDr Wouter Basson. [322] One of the issues before the court was the admissibility of the bail record. At the bail proceedings in question, the state had made use of the record of prior proceedings conducted under the Investigation of Serious

Economic Offences Act ('ISEO'). [323] In terms of ISEO a witness examined under s 5(6) may not claim the privilege against self-incrimination. [324] However, the section also provides that the record of the examination may not be used in subsequent criminal proceedings against the witness. Dr Basson had been questioned for 39 days under the ISEO, without legal representation. His examiner turned out to be the same person who represented the state in Basson's subsequent bail proceedings.

At trial, prior to pleading, the defence applied for a ruling on the admissibility of the bail proceedings. The trial court found the record of the bail proceedings to be inadmissible. The state appealed against this ruling on two bases: (1) the trial court should not have heard argument on the admissibility of the bail record at such an

317 See *S v Younas* 1996 (2) SACR 272 (C); *S v Gwala* 1989 (4) SA 937 (N).

318 See *Pennington v Minister of Justice* 1995 (3) BCLR 270 (C). See, generally, N Steytler *Constitutional Criminal Procedure* (1998) 345.

319 *S v Aimes* 1998 (1) SACR 343 (C).

320 See also *S v Jeniker (2)* 1993 (2) SACR 464 (C).

321 See, for example, *S v Simxadi* 1997 (1) SACR 169 (C); *S v Stowitzki* 1995 (2) SA 525 (NmHC);*S v Sishi* [2000] 2 All SA 56 (N), *S v Dyani* 2004 (2) SACR 365 (E); *S v Mungoni* 1997 (2) SACR 366 (V), 1997 (8) BCLR 1083 (V).

322 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10 ('*Basson*').

323 Act 117 of 1991.

324 Section 5(8).

early stage; and (2) the trial court should not have made a ruling on the inadmissibility of the entire record. The Supreme Court of Appeal declined to deal with the issue on the ground that it arose from matters of fact and did not concern a question of law.

The *Basson* Court held that the SCA had erred. It concluded that the admissibility of the bail record was a constitutional matter. [325] Although CPA s 60(11B)*(c)* stipulates that the record of the bail proceedings should form part of the trial record, the Constitutional Court had previously held in *S v Dlamini* [326] that the trial court retains a discretion to exclude the bail record if its admission would render the trial unfair. Given the Constitutional Court's clear and repeated view that a trial court 'is best placed to determine what will constitute a fair trial or not', [327] the Justices turned their minds to devising a means of evaluating the trial court's exercise of that discretion. It held:

> [T]he test on appeal is not whether the trial Court was correct in the exercise of its discretion to exclude evidence on the grounds that it may render the trial unfair. The question is whether ... the lower Court has not exercised its discretion judicially, or been influenced by wrong principles of law or a misdirection on the facts, or reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and legal principles. [328]

After applying this test to the case at hand, the *Basson* Court concluded that no grounds existed to interfere with the exercise of the trial court's discretion either in regard to the timing of argument, or the scope of the ruling. [329] The state had not argued that the exclusion of the bail record had rendered the trial unfair. And as the Court noted: 'An allegation that an interlocutory ruling was wrongly made which may have had a material impact on the outcome of a case is not sufficient to demonstrate that the trial was unfair'. [330] The nature of the interlocutory proceedings meant that the ruling 'could have been revisited at any point during the

trial'. [331] One striking theme running through the *Basson* Court's deliberations is the acceptance of the proposition that in determining the admissibility of evidence, considerations of trial fairness apply *both* to the accused *and the prosecution*. [332]

(c) State privilege

325 *Basson* (supra) at para 12.

326 1999 (4) SA 623 (CC), 1999 (7) BCLR (CC), 1999 (2) SACR 51 (CC), [1999] ZACC 8.

327 *Basson* (supra) at para 109.

328 Ibid at para 117.

329 Ibid at para 119.

330 Ibid at para 120.

331 *Basson* (supra) at para 121.

State privilege allows a government to assert that information in its possession is privileged from disclosure in court on the basis that it would be against the public interest to disclose such information. The question that then arises is whether a court can override the claim of state privilege in the interests of justice.

At common law, *Duncan v Cammel Laird* was taken as authority for the proposition that the executive had the final say in state privilege cases and that the courts had no power to override a clear assertion of privilege by an appropriate executive official. [333] Post-1961, the English courts departed from this position whilst the South African courts remained bound by *Duncan.* However, 1967 marked a decisive shift. In *Van der Linde v Calitz* [334] the Appellate Division chose to follow the Privy Council in *Robinson v State of South Australia (No 2)* [335] rather than the House of Lords in *Duncan.* The Appellate Division held that the court had the final say as to whether state privilege should be upheld. However, it left open the question as to whether the court also possessed such power with respect to issues of national security. Section 29 of the General Law Amendment Act answered this question. It ousted the courts' jurisdiction in respect of a claim of state privilege pertaining to state security. This ouster clause was incorporated into s 66 of the Internal Security Act. [336] After the repeal of the Internal Security Act in 1996, the common law was reinstated. It must now, however, be interpreted in light of the Final Constitution.

FC s 35(3)'s right to adduce evidence is not the only provision that will influence the interpretation of the common law of evidence regarding state privilege. FC s 165 vests judicial authority in the courts and enables the courts to determine their own rules. FC s 32(1) provides that everyone has the right to access any information held by the state. FC s 34 ensures access to courts and a fair hearing.

Joffe J, in *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*, held that in light of the Final Constitution the following approach should be taken in dealing with a claim of state privilege:

332 Ibid at para 113 ('When a trial court assesses the question whether the admission of evidence would render the trial unfair, it has to consider a range of factors: the nature of the evidence in question, and how much of it is of advantage to the parties; the need to be fair not only to the accused but also to the prosecution, in the interests of the broader community; the need to ensure that a trial can run efficiently and reasonably quickly; and the reasons underlying the fact that the admission of the evidence may render the trial unfair. These are complex factors which may well pull in different directions. If the evidence is wrongly admitted and the trial is rendered unfair, the accused will clearly have a right to raise that on appeal and the question for an appeal court will be whether the trial was unfair. The more difficult question arises, as in this case, where the evidence is excluded on the basis that its admission may render the trial unfair. An assessment of whether the evidence would have rendered the trial unfair is inevitably hypothetical and difficult to assess in the relatively rarefied atmosphere of an appellate court. It is indeed a matter which the trial court is best placed to judge.')

333 [1942] 1 All ER 587 (HL).

334 1967 (2) SA 239 (A).

335 1931 AC 704.

336 Act 74 of 1982.

1. The Court is not bound by the *ipse dixit* of any cabinet minister or bureaucrat irrespective of whether the objection is taken to a class of documents or a specific document and irrespective of whether it relates to matters of State security, military operations, diplomatic relations, economic affairs, cabinet meetings or any other matter affecting the public interest.

2. The Court is entitled to scrutinise the evidence in order to determine the strength of the public interest affected and the extent to which the interests of justice to a litigant might be harmed by its non-disclosure.

3. The Court has to balance the extent to which it is necessary to disclose the evidence for the purpose of doing justice against the public interest in its non-disclosure.

4. In this regard the onus should be on the State to show why it is necessary for the information to remain hidden.

5. In a proper case that Court should call for oral evidence, in camera where necessary, and should permit cross-examination of any witnesses or probe the validity of the objection itself. [337]

The above five principles track those first formulated by Zeffertt, Paizes and Skeen who add a sixth principle:

> [T]he onus borne by the state is widely regarded as being a heavy one which is not discharged by vague appeals to considerations of candour or emotive reliance on such things as 'national security' and 'diplomatic relations' (or both), but requires the state to show (i) the *likelihood* (as opposed to the possibility) of *particular* (as opposed to generic) injury; and (ii) that this injury is greater than that which would be caused to the interests of justice by non-disclosure. [338]

Finally, Van der Merwe suggests that after a court has inspected a document in private, then it should, in certain circumstances, be permitted to grant partial disclosure in order to best accommodate the competing interests of the parties. [339]

(d) Informer's privilege

The informer's privilege can be viewed as a form of state privilege. In terms of this privilege, no question may be asked and no document may be received in evidence that would tend to reveal the identity of an informer or the content of the information supplied by him. The court must ensure that this privilege is upheld regardless of whether the parties to the litigation seek to enforce it.

In *Ex parte Minister of Justice: In re Pillay,* the court held that the informer's privilege might be relaxed where: *(a)* it was in the interests of justice; *(b)* where it was necessary to show the accused's innocence; and *(c)* where there was no

337 1999 (2) SA 279, 343–344 (T).

338 DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 655; See also D Zeffertt 'Evidence' (1996) *Annual Survey of South African Law* 803, 813.

339 Schwikkard & Van der Merwe (supra) at 164. See also *Independent Newspapers (Pty) Ltd v Minister for Intelligence Service: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), [2008] ZACC 6 (While the Court did not deal directly with state privilege as a rule of evidence, the judgment fully explores the right to open justice.)

reason for secrecy — say, where everybody knows who the informer is. [340] The constitutionality of this privilege was considered in *Els v Minister of Safety and Security.* [341] The applicant said that he was entitled to the documents in terms of his constitutional right to access to information. The court found that there was an infringement of the accused's constitutional right of access to information but that it was justifiable. In reaching this conclusion the court took the following factors into consideration: *(a)* the person who gave the information was an informer who had been used over a number of years and had given information that had led to successful prosecutions; *(b)* the informer gave the information in confidence; *(c)* confidentiality was essential to the police-informer relationship; *(d)* it would be against public interest to expose informers to claims for damages; *(e)* the police rely heavily on informers; *(f)* the police had taken adequate steps to ensure that the informer was reliable; *(g)* disclosing the informer's identity would have far-reaching effects and would be against the public interest in that informers are essential in the battle against organised crime; *(h)* there was nothing to suggest that the informer was mendacious or malicious; *(i)* the applicant's interest in claiming damages was outweighed by the public interest in keeping the informer's identity secret. Van der Merwe is of the opinion that the informer's privilege *per se* is not unconstitutional but that the constitutional right to a fair trial must be considered when deciding whether and when the privilege must yield to constitutional dictates. [342]

(e) Interpretation

The right to adduce and challenge evidence requires compliance with FCs 35(3)*(k)*, which vouchsafes the right 'to be tried in a language that the accused person understands, or, if that is not practicable to have the proceedings interpreted in that language'. [343]

In *S v Manzini*, Tshiqi J stressed the importance of competent interpretation in ensuring the fairness of a trial. [344] He lamented the 'alarming[ly] poor performance by the interpreter' [345] and concluded that the appellant's constitutional right to a fair trial had been breached as a result. In setting aside the sentence and conviction the court explained:

> A presiding officer ... relies on the interpreter to interpret correctly what is being said by a witness. If what is being conveyed to the presiding officer is incorrect, then the

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340 1945 AD 653. See also *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W); *S v Du Toit* 2005 (1) SACR 47 (T)(The court refused to grant an order prohibiting the publication of the name of a state witness on the basis that in the circumstances the potential infringement of trial fairness and press freedom outweighed the interests of the witness.)

341 1998 (2) SACR 93 (NC). See also *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (2) SACR 284 (T).

342 See Schwikkard & Van der Merwe (supra) at 169–170.

343 For more on FC s 35(3)*(k)*, see F Snyckers & J Le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) § 51.5*(l)*.

344 2007 (2) SACR 107 (W).

345 Ibid at 108.

presiding officer may not be in a position to make correct findings on contradictions and credibility of witnesses. This would in turn affect the reliability and the evaluation of the evidence of the

witnesses as a whole. The respective legal representatives, who may not be conversant with the language of the witness, will also not be in a position to conduct proper examination of the witnesses, and may in the end make incorrect submissions to the court. [346]

Binns-Ward AJ raised a similar concern in *S v Mponda*. [347] Inadequate interpretation had resulted in the poor translation of the accused's evidence into English. Moreover, the evidence adduced against the accused had not been satisfactorily translated into 'a language with which he was sufficiently conversant'. [348] This failure to provide adequate interpretation infringed the accused's right to a fair trial in terms of s 35(3)*(k)*. [349]

The courts' concern with the quality and the regulation of interpretation was reiterated in *S v Saidi*. [350] Yekiso J noted that s 6(2) of the Magistrates' Courts Act [351] gave effect to FC s 35(3)(*k*) [352] by providing that if 'evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant', the court must appoint an interpreter to translate for the accused. [353] This proviso applies irrespective of the language in which the evidence is proferred, and independent of whether the accused's lawyer understands the language in which the evidence is offered. The Magistrates' Court Rules attempt to ensure an appropriate level of interpretation by requiring both permanent and casual interpreters to take

346 *S v Manzini* (supra) at 109.

347 2007 (2) SACR 245 (C).

348 Ibid at para 17.

349 The court also stressed the importance of ad hoc interpreters being properly sworn in. Ibid at para 34 ('[W]hen the services of an ad hoc interpreter are used in trial proceedings it is essential that the presiding officer formally satisfy him- or herself as to the relevant expertise of the interpreter. This would ordinarily be done by swearing in the interpreter in open court during the proceedings and by appropriately questioning the interpreter to establish his or her linguistic competence before the interpreter commences with the function of interpreting any evidence.') See also *S v Naidoo* 1962 (2) SA 625 (A).

350 2007 (2) SACR 637 (C).

351 Act 32 of 1944.

352 Although the reported judgment refers to subsection (*c*), it is clearly subsection (*k*) that the court intended to invoke.

353 Magistrates' Court Act s 6(2) reads: '[i]f, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or whether the representative of the accused is conversant with the language used in the evidence or not.'

an oath that they will interpret 'truly and correctly' and to the best of their ability. [354] Endorsing the approach of Binns-Ward AJ in *Mponda*, Yekiso J held that a presiding officer should be satisfied that the appointed interpreter has the appropriate expertise, which could be established through questioning, before he or she is sworn in. The record of the court *a quo* did not reflect any enquiry into the linguistic competency of the interpreter and, in one instance, it remained unclear as to whether the interpreter had been sworn in at all. Yekiso J held that the accused's testimony, as translated by an unsworn interpreter, had the status of unsworn testimony and was consequently inadmissible. This deprived the accused

of his constitutional right to adduce and challenge evidence and violated his right to a fair trial. [355]

S v Mbezi represents how extremely deleterious an accused's inability to understand the proceedings can be with respect to her ability to secure a fair trial. [356] During the trial, the presiding magistrate realized that that the accused could neither hear nor understand the proceedings. The accused, who had severely impaired hearing, could neither lip-read nor understand sign language. Despite reasonable attempts by the court *a quo* to comply with s 35(3)*(k)* of the Constitution, the accused remained unable to understand the proceedings. This conundrum, Dlodlo J held, meant that it was not possible for the accused to have a fair trial. There was no choice but to conclude that a failure of justice had occurred. [357]

52.7 Equality and dignity

The common law contains a number of rules of evidence that curtail the ability of children and women to give evidence. The invidious distinctions between women and men lack a rational basis and, for the most part, ought to be found constitutionally infirm. The Criminal Law (Sexual Offences and Related Matters) Amendment Act [358] ('Sexual Offences Act') addresses most of these iniquities through significant and much needed changes to the rules of evidence applied in sexual offence cases.

(a) Cautionary rule: Complainants in sexual offence cases

The iniquities of the cautionary rule applicable to complainants in sexual offence cases have been well documented and are, consequently, not repeated here. [359] This rule was soundly rejected by the Supreme Court of Appeal in *S v Jackson.* The *Jackson* court held that the common-law cautionary approach to complainants in

354 Magistrates' Court Rule 68(1).

355 *Saidi* (supra) at para 21.

356 2010 (2) SACR 169 (WCC).

357 The court ordered that the proceedings be started *de novo* at the discretion of the Director of Public Prosecutions, 'provided that the apparent disability of the accused 1 be taken care of'. Ibid at para 12.

358 Act 32 of 2007.

sexual offence cases was irrational and had no place in our law. [360] The court in *Jackson* made it clear that the only instance in which the testimony of a complainant or any witness could be treated with caution was when there was an evidentiary basis for doing so. [361] It was this qualification that led the Law Commission to conclude that *Jackson* was capable of being interpreted so as to retain the cautionary rule in respect of some sexual offence cases 'because of the nature of the case'. [362] At the time that the Law Commission report was published, this concern about

the exception to the new rule might have been easily dismissed. However, subsequent applications of *Jackson* by the High Courts appear to have proved the Law Commission right. For example, in *S v Van der Ross*, Thring J clearly found that the sexual 'nature of the offence' was a matter over and above the single witness status of the complainant and that this single witness status still required the court to take a doubly cautious approach. [363] Any ambiguity that could have been read into *Jackson* has, hopefully, been eliminated by the Sexual Offences Act. Section 60 of the Act provides that '[n]otwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

(b) Children

Given the body of literature that indicates that children are able to give reliable evidence, [364] the cautionary rule applicable to the evidence of children is certainly susceptible to constitutional scrutiny. The abolition of the cautionary rule applicable to children was recommended by the Law Commission in its *Sexual Offences Report*. [365] However, this recommendation does not seem to have found favour with the legislature and is not reflected in the Sexual Offences Act. A possible explanation for the legislature's silence in this regard is that it would not necessarily make sense to abolish the cautionary rule *only* in respect of children testifying in sexual offence

359 See South African Law Commission, Project 107 *Sexual Offences Discussion Paper* (2002) at paras 31.2.4.5–31.2.4.10; S Jagwanth & PJ Schwikkard 'An Unconstitutional Cautionary Rule' 1998 (11) *SACJ* 87; D Symthe & B Pithey (eds) *Sexual Offences Commentary Act 32 of 2007* (2011) 23–25.

360 1998 (1) SACR 470, 476 (SCA). See also *S v Zuma* 2006 (2) SACR 191, 212 (W).

361 See also *S v Mponda* 2007 (2) SACR 245 (C); *S v Cornick* 2007 (2) SACR 115 (SCA); *S v M* 2006 (1) SACR 135 (SCA) (Cameron JA, dissenting) at paras 271–273; *S v Gentle* 2005 (1) SACR 420 (SCA).

362 South African Law Commission, Project 107, *Sexual Offences Report* (2002) 472 at para 31.2.4.7.Cf *S v Zuma* 2006 (7) BCLR 790, 856 (W).

363 *S v Van der Ross* 2002 (2) SACR 362, 365 (C).

364 See J Spencer & R Flin *The Evidence of Children: The Law and Psychology* (1993). See also PJ Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' (1996) *Acta Juridica* 148.

365 *SALC Sexual Offences Report* (supra) at para 5.2.3.

cases. This anomaly could be avoided by providing for appropriate amendments to the Criminal Procedure Act [366] and the Civil Proceedings Evidence Act. [367]

Getting rid of the cautionary rule applicable to children's evidence is by no means a novel idea. In England, the cautionary rule applicable to children's evidence was abrogated by s 34(2) of the Criminal Justice Act of 1988. The Supreme Court of Canada has also rejected the notion that children's testimony is inherently unreliable and consequently needs to be treated with special care. [368]

In line with this international trend, a number of recent cases show a promising shift in the manner in which the cautionary rule is applied to children. In *S v MG,* the defence challenged the court *a quo's* findings on credibility on the basis that it had failed to pay sufficient attention to the cautionary rule applicable to a single, child witness. [369] Jones J did not appear to take the age or the single status of the witness, on its own, as cause for diminishing the credibility of the witness. Instead, he took care to sift through the evidence in order to establish the absence or the

presence of a factual basis for taking a cautionary approach. He summarised his approach as follows:

> It is therefore necessary to examine the quality of the evidence of the single child witness in this case, in the light of the background facts, the inherent probabilities, and her merits and demerits as a witness. What are the weaknesses in the State case? What are the reasons, if any, for the need to apply a cautionary rule to the facts and circumstances of this case? [370]

In South African law, age is not the determining factor in deciding whether a child is competent to testify. Under the Criminal Procedure Act, children will be competent to testify if they can appreciate the duty to tell the truth. [371] The obvious consequence of this state of the law is that presiding officers must inquire as to whether children understand what it means to tell the truth. No similar test is applied to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty. Truth and the duty to tell the truth are abstract notions that a young child might not be able to understand or explain. However, the rarefied nature of such abstractions does not mean that children cannot give a reliable account of relevant events.

366 Act 51 of 1977.

367 Act 25 of 1965.

368 *R v W (R)* (1992) 74 CCC (3d) 134. See also *S v B (G)* (1990) 56 CCC (3d) 200.

369 2010 (2) SACR 66 (ECG).

370 *S v MG* (supra) at para 9. See also *S v MN* 2010 (2) SACR 225 (KZP)(Similar, although less explicit, approach was taken to the cautionary rule.) Cf *S v Hanekom* 2011 (1) SACR 430 (WCC).

371 Criminal Procedure Act 51 of 1977 s 164 ('CPA')('Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.')

Adults are presumed to be competent witnesses and the party alleging incompetence bears the onus of proof. [372] In testing the competence of an adult there may be two inquiries: (i) the witness's ability to understand the nature of the oath; and (ii) the witness's ability to communicate. [373] Where adults do not understand the nature of the oath, they may give unsworn evidence after being admonished to tell the truth. [374] The purpose of administering the oath or admonishing a witness to tell the truth is primarily to encourage the witness to tell the truth. [375] However, in assessing credibility, the court will place little weight, if any, on the fact that a witness took the oath or was admonished to tell the truth. The ability to reason morally does not mean that a person will behave morally. The court, in assessing credibility, will look to such factors as coherence under cross-examination, evidence of surrounding circumstances and demeanour. The fact that a child cannot understand or articulate its understanding of the duty to tell the truth does not necessarily hinder the court in its assessment of credibility. The second leg of the competence inquiry is far more important. Clearly, a child who cannot communicate and who is unable to give an understandable coherent account of the relevant events will be of little assistance to the court. On the other hand, a child who does not understand the duty to speak the truth but who is able to give an accurate account of relevant events will be of great assistance.

But does the court need to test a child's ability to communicate prior to the child testifying? Wigmore, recognising the difficulties and futility of assessing a child's credibility prior to the child giving evidence, wrote that 'it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem worth.' [376] Over a two decades ago in England, the Pigot Committee concluded that the requisite inquiry into the child's ability to tell the truth:

> ... appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced. [377]

The English legislation was consequently amended to make the sole criterion for competence the ability to communicate with the court. [378]

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372 See CPA s 192 and s 42 of the Civil Proceedings Evidence Act 25 of 1965.

373 *R v Ranikolo* 1954 (3) SA 255 (O). See *Stephen's Digest of the Law of Evidence* (12th Edition, 1946); *Wigmore on Evidence* (Vol II, 3rd Edition) 506, 596.

374 Section 41 of the Civil Proceedings Evidence Act 25 of 1965, CPA s 164.

375 *S v Munn* 1973 (3) SA 734 (NC).

376 Wigmore (supra) at 509, 601.

377 *Report of the Advisory Group on Video Recorded Evidence* (1989).

378 In England and Wales the applicable legislative provisions are to be found in s 53 of the Youth Justice and Criminal Evidence Act 1999.

In the United States, the Federal Rules of Evidence do not distinguish between children and adults, and consequently a child can testify without a preliminary testing of competency. [379] Similarly, in *S v Katoo* Jafta, AJA (as he then was) held that one way of determining the competency of a 16-year-old 'imbecile' would be to allow the child to testify so that the court could form its own opinion on the witness' ability to provide reliable testimony. [380]

Provided the accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence test could in any way infringe the accused's right to a fair trial. In addition, the requirement that a judge must be satisfied that a child understands the duty to speak the truth before the child is considered a competent witness 'singles out some of society's most vulnerable members for treatment that effectively deprives them of the protection and the vindication of the criminal justice system'. [381] Birch notes that 'child abuse occurs in part because of the inequalities between child and adult in size, knowledge and power' and that these inequalities 'have been institutionalised by one-sided rules of evidence'. [382] The abandonment of the 'competency test' will increase the potential for successful prosecutions and will act as a buttress for a child's constitutional right to security and freedom from abuse.

Consistent with foreign jurisprudence, the South African Law ReformCommission's *Sexual Offences Report* recommended that the ability to communicate be the sole criterion for determining competence. [383] Once again, thisrecommendation did not find favour with the legislature.

In *S v Mokoena; S v Phaswane* [384] the High Court declared that the proviso to s 164(1) was unconstitutional and invalid. This result would have made the ability to communicate with the court the sole criteria for competency in respect of children and would have brought South African law into line with other Anglo-American jurisdictions. [385]

Unfortunately, when the Constitutional Court decided the appeal in *DPP v Minister of Justice and Constitutional Development*, it found the proviso necessary in order to ensure the accused's right to a fair trial. [386] It reached this conclusion without reference to international law or foreign practice. However, the damage wrought by

379 See, generally, L McGough *Child Witnesses* (1994) 98.

380 2005 (1) SACR 522, 528a–b (SCA).

381 A Harvison Young 'Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues' (1992) 11 *Canadian Journal of Family Law* 11, 19.

382 D Birch 'Children's Evidence' (1992) *Criminal Law Review* 262, 269.

383 SALRC *Sexual Offences Report* (supra) at para 4.3.4.

384 2008 (2) SACR 216 (T)('*Mokoena*').

385 See PJ Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' in R Keightly (ed) *Children's Rights* (1996) 148.

DPP can be contained if one accepts the proposition that the failure to admonish a child to tell the truth in terms of the proviso in s 164(1) would only render a trail unfair where non-compliance would result in a substantive failure of justice. [387] This gloss on *DPP* would be one way of promoting the values embedded in FC s 28 without undermining the accused's right to a fair trial.

A closely related question is when should criminal proceedings involving children — whether as accused or as witnesses — be held behind closed doors? The CPA distinguishes between sexual offences and other offences. For sexual offences, s 153(3) permits the complainant (or her parent or guardian) to request that the proceedings be held in camera. Under s 153(3A), when a child testifies in a sexual offence case, the public *must* be excluded. For non-sexual cases, CPA s 153(5) confers a discretion on the court to hold the trial in camera if one of the witnesses is a child, while s 153(4) requires that the trial must be held in camera where the accused is a child.

The High Court in *Mokoena* found that there was no rational justification to distinguish between child witnesses and accused children, particularly in relation to sexual offences. [388] For witnesses, the court has a discretion as to whether or not to hold the proceedings in camera. The court has no discretion in respect of a child accused. The Constitutional Court in *DPP* again disagreed. Ngcobo J (as he then was) held that the child witness and child accused were not similarly situated because a witness would only be in court while she was testifying whereas an accused was required to be present throughout the proceedings. The rational basis for distinguishing between the two categories of children was the amount of time each spent in the courtroom. Ngcobo J argued that the discretion to permit child witnesses to testify in open court was necessary in order to protect the important principle of open justice. [389]

(c) Previous consistent statements

At common law, the general rule is that previous consistent statements are considered irrelevant and are therefore inadmissible. One exception to this rule applies to a prior consistent statement made by a complainant in a sexual offence case. The effect of this rule is that if the complainant does not make a report as soon as reasonably possible after the alleged incident, the court can draw a negative inference about her credibility. Even prior to the enactment of the Sexual Offences Act in 2007, some cases expressly acknowledged that no necessary correlation obtains between late reporting and unreliability. [390] However, the approach of our

386 2009 (4) SA 222 (CC), 2009 (2) SACR 130 (CC), 2009 (7) BCLR 637 (CC), [2009] ZACC 8 ('*DPP*') at paras 165–167.

387 See *S v Motaung* 2007 (1) SACR 476 (SE); cf *S v Swartz* 2009 (1) SCR 452 (C).

388 *Mokoena* (supra) at para 108.

389 *DPP* (supra) at para 146.

390 See, for example, *Holtzhauzen v Roodt* 1997 (4) SA 766 (W); *S v Cornick* 2007 (2) SACR 115 (SCA).

courts has not been uniform. [391] Fortunately, the Sexual Offences Act appears to have acknowledged the strong body of social science evidence that indicates that victims of sexual offences may postpone reporting the offence for a considerable period. Section 58 of the Act provides that a previous consistent statement made by the complainant in a sexual offence case will be admissible and that the court 'may not draw any inference only from the absence of such previous consistent statement'. [392] Section 59 of the Act prohibits the court from drawing an inference from a delay in reporting the offence. [393]

The prohibition on drawing an inference from the absence of a previous consistent statement appears to be a non-sequitur. For the rule to make any sense there would always have to have been a previous consistent statement made in a court of law. However, a previous consistent statement also refers to a statement made out of court that is similar to the statement made by the witness in court. For the matter to have come to court the complainant must have told somebody about the incident. The issue in each instance is not whether (or where) a previous consistent statement was made — but when it was made. Section 59 of the Act may well have the desired effect of making High Court evaluations of delays both consistent and fair to the alleged victim of a sexual assault. [394]

The same effect might have been achieved by simply retaining the general exception that applies to all types of case and allows previous consistent statements to be admitted when there is an allegation of recent fabrication. This approach was adopted by the Canadian legislature. [395] Indeed, it can be argued that if previous consistent statements are irrelevant in relation to other categories of offence, it

is difficult to see why they should be relevant in sexual offence cases. Conversely, another way of ameliorating the different and discriminatory application of the rules of evidence to complainants in sexual offence cases is to narrow the common-law restriction on the admission of previous consistent statements in all cases. Singh argues that the Law Commission did not go far enough in this regard and would have done better to follow the approach adopted in the United Kingdom. [396] Section 120(7) of the United Kingdom's Criminal Justice Act 2003 permits all first reports

391 See, for example, *S v Van der Ross* 2002 (2) SACR 362 (C); *S v Zuma* 2006 (2) SACR 191 (W); *S v Naude* 2005 (2) SACR 218 (W).

392 Sexual Offences Act s 58 reads: 'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.'

393 Sexual Offences Act s 59 reads: 'In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.'

394 Compare the approach taken in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) and *S v M* 1999 (1) SACR 664 (C) with *S v De Villiers* 1999 (1) SACR 297 (O); *S v Van der Ross* 2002 (2) SACR 362 (C) and *S v Naude* 2005 (2) SACR 218 (W). Unfortunately, as matters currently stand in 2013, the positive effect of s 59 on the conduct of sexual offense cases by our trial courts appears to be rather limited: see *S v Dyira* 2010 (1) SACR 78 (ECG); *S v Leve* 2011 (1) SACR 87 (ECG).

395 Section 275 of the Canadian Criminal Code.

provided they are made 'as soon as could reasonably be expected' to be admitted into evidence, not only to show consistency but also as evidence of their content.

The difficulty with the UK's approach is this: if we allow all previous consistent statements to be admitted as evidence, there is a high risk of the courts being subjected to a great deal of irrelevant evidence. On the other hand, as soon as the admissibility of first reports is restricted to those made 'as soon as reasonably expected', complainants in sexual offence cases are prejudiced. The social science evidence indicates that there can be no 'reasonable expectation' in respect of the time of reporting a sexual offence. In this respect, the Law Commission proposals as reflected in the Act are to be preferred.

However, Singh's argument extends to the *use* of previous consistent statements. He favours the recent change in English law which allows a previous consistent statement to be admitted as evidence of its *contents*. And this is really the nub of the issue. If the sole purpose of admitting the previous consistent statement was to show consistency, [397] then the common law recent fabrication rule would be sufficient. It would have the advantage of circumventing the requirements that the statement be made 'as soon as reasonably expected'. The English approach has merit if it is accepted that an immediate report makes it more likely that the complainant's allegations are true. The *difficulty* that then arises is that presiding officers, who have previously drawn negative inferences from the failure to report, must now conclude that although an early report makes the allegation more likely to be true, the late reporting in sexual offences does not make the allegations less likely to be true. Given the limited probative value of a previous consistent statements, it may indeed be prudent to interpret s 58 as going no further than permitting previous consistent statements to be admitted to establish consistency.

(d) Character of the complainant in sexual offence cases

In all criminal cases where the complainant testifies he or she may be cross-examined, and the cross-examiner may ask questions that are pertinent to exposing the witness's credibility or lack thereof. However, the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is solely directed at establishing that the complainant has a bad character is prohibited, as is evidence of good character. Nevertheless, in a few exceptional categories of cases

the complainant's character is viewed as relevant. One of these exceptions is the character of the complainant in sexual offence cases.

There is a common-law rule that, in a case involving a charge of rape or indecent assault, the accused may adduce evidence as to the complainant's bad reputation for lack of chastity. Prior to 1989, [398] CPA s 227 provided that in sexual offence cases the admissibility of evidence as to the 'character of any woman' would be determined by the application of the common law. In terms of the common law the

396 K Singh 'Evaluating the "First Report": The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences' (2006) 19 *SACJ* 37.

397 See, for example, *S v Gentle* 2005 (1) SACR 420 (SCA) at para 19.

398 The Criminal Law and Criminal Procedure Act Amendment Act 39 of 1989 introduced significant amendments to s 227.

defence could question the complainant as to her previous sexual relations with the accused. [399] The accused was prohibited from leading evidence of the complainant's sexual relations with other men. [400] However, the complainant could be questioned on this aspect of her private life in cross-examination because it was considered relevant to credibility. Evidence to contradict any denials could be led only if such evidence was relevant to consent. [401] The South African Law Commission in 1985 noted that, in practice, the application of CPA s 227 resulted in few (if any) restrictions being placed on the admissibility of sexual history evidence. [402] In accordance with the recommendation of the Law Commission, CPA s 227 was amended. [403] In terms of the amendment both cross-examination and the leading of evidence on the prior sexual history of the complainant was prohibited except on application to court. Leave to cross-examine or to adduce such evidence would only be granted subsequent to a demonstration of relevance.

Prior to the amendments to CPA s 227 in 1989, the common-law provision had been criticised on a number of grounds: *(a)* whilst cross-examination concerning prior sexual history traumatised and humiliated the victim, the evidence it elicited was irrelevant and at most established a general propensity to have sexual intercourse; *(b)* evidence of this nature is held to be inadmissible in other cases and there are no grounds for admitting it where the case is of a sexual nature; *(c)* the possibility of such cross-examination deterred victims from reporting the offence. The reforms introduced by the 1989 amendment to CPA s 227 did not escape criticism. The objections were simple: the very purpose for which the amendments were enacted was undermined by the discretion conferred on judicial officers. [404] The same judicial officers who in the past failed to exercise their discretion to

exclude irrelevant previous sexual history evidence were now asked to exercise the very same discretion, albeit preceded by an application held *in camera*. Indeed, in *S v M,* the Supreme Court of Appeal noted that 'the members of this Court are not aware of any instance where s 227(2) has been applied in this country. It seems

399 *R v Riley* 1987 18 QBD 481. As this type of evidence was always considered relevant to the issue, evidence could be adduced to contradict a denial.

400 *R v Adamstein* 1937 CPD 331.

401 *R v Cockcroft* 1870 11 Cox CC 410; *R v Cargill* 1913 2 KB 271.

402 Project 45 *Report on Women and Sexual Offences* (1985) 48.

403 By s 2 of the Criminal Law and Criminal Procedure Amendment Act 39 of 1989.

404 See J Temkin 'Sexual History Evidence' (1993) *Criminal Law Review* 3. Temkin identifies one of the major problems underlying the relevance test, namely, that relevance is an insufficiently objective criterion. She refers to the following apt description by L'Heureux-Dubé J in *R v Seaboyer; R v Gayme* [1991] 2 SCR 577, 83 DLR (4th) 193:

> Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge's experience, common sense and/or logic ... There are certain areas of enquiry where experience, common sense and logic are informed by the stereotype and myth ... This area of the law [sexual history evidence] has been particularly prone to the utilization of stereotypes in determinations of relevance.

likely that it is more honoured in the breach that in the observance'. [405] It had been thought that one way of addressing this ongoing problem would be to specify criteria for relevance. The Law Commission, in its *Sexual Offences Report*, had recommended a set of appropriate criteria endorsed by the Supreme Court of Appeal in *S v M*. These recommendations have, subsequently, been enacted as legislation. The Sexual Offences Act amends CPA s 227 so as to provide that the following criteria are taken into account in determining relevance:

> ... whether such evidence or questioning —
>
> *(a)* is in the interests of justice, with due regard to the accused's right to a fair trial;
>
> *(b)* is in the interests of society in encouraging the reporting of sexual offences;
>
> *(c)* relates to a specific instance of sexual activity relevant to a fact in issue;
>
> *(d)* is likely to rebut evidence previously adduced by the prosecution;
>
> *(e)* is fundamental to the accused's defence;
>
> *(f)* is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
>
> *(g)* is likely to explain the presence of semen or the source of pregnancy or disease or injury to the complainant, where it is relevant to a fact in issue. [406]

The amendment also stipulates that an application to lead or to cross-examine on prior sexual history will not be permitted if the purpose of such evidence is to support an inference that the complainant — '*(a)* is more likely to have consented to the offence being tried; or *(b)* is less worthy of belief.' [407] The court is required to give reasons for granting or refusing the application. [408]

The trial court clearly still retains some discretion. That such discretion persists creates the danger that, in the absence of judicial training, old practices will endure. However, the requirement that reasons be given for allowing such evidence should ensure that presiding officers at least apply their minds to the relevance of the evidence. The discretion which requires that the court must be satisfied that the accused's right to a fair trial is not compromised was no doubt in part shaped by the decision of the Canadian Supreme Court in *R v Seaboyer; R v Gayme.* [409] *In Seaboyer*, the Canadian Supreme Court struck down the so-called 'rape shield' provision in s 276 of the Criminal Code on the basis that its application would permit the exclusion of evidence relevant to the accused's defence.

405 2002 (2) SACR 411 (SCA) at para 17. See also *S v Zuma* 2006 (2) SACR 191 (W)(Section 227 was expressly applied.) For further discussion, see PJ Schwikkard *Juta's Quarterly Review* 'Evidence' (2006) 2. See also *Prinsloo v Bramley Children's Home* 2005 (2) SACR 2 (T); *S v Katoo* 2005 (1) SACR 522 (SCA).

406 CPA s 227(5).

407 CPA s 227(6)

408 CPA s 227(7).

409 [1991] 2 SCR 577, 7 CR (4th) 117, 66 CCC (3d) 321.

52.8 Rule 31 of the Constitutional Court rules [410]

Rule 31(1) of the Constitutional Court rules [411] provides that any party to any proceedings before the court, and an *amicus curiae* properly admitted by the court, shall be entitled, in documents lodged in terms of the rules of the Constitutional Court, to canvass factual material which is relevant to the determination of the issues and which does not appear on the record. [412] The proviso, however, is that such facts must be either common cause or otherwise incontrovertible, [413] or of an official, scientific, technical or statistical nature, capable of easy verification. [414] In terms of rule 31(2) all other parties are entitled to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Constitutional Court. [415]

Rule 31 should be understood in the context of the distinction drawn between 'adjudicative' and 'legislative facts'. This distinction, recognised by the Constitutional Court in *S v Lawrence* [416] was first elucidated by Kenneth Culp Davis. [417] He explained the distinction as follows:

> When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive and intent — the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts. Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case.

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410 See, generally, PJ Schwikkard & SE van der Merwe *Principles of Evidence* (3rd Edition, 2009) 493-497.

411 Government Notice R1675 in *GG* 25726 of 31 October 2003.

412 On evidence and amicus curiae, see G Budlender 'Amicus Curiae' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8. On relevant rules and procedures of court regarding the admission of evidence, see K Hofmeyr 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5. See also K Hofmeyr & N Ferreira 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS6, forthcoming) Chapter 5.

413 Constitutional Court Rule 31(1)*(a)*.

414 Constitutional Court Rule 31(1)*(b)*.

415 Rule 31, contains the same provisions as rule 34 of the Constitutional Court rules under the Interim Constitution. Government Notice, No 16204, 6 January 1995 and rule 30 as set out in Government Notice, No 575, 29 May 1998.

416 *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC), 1997 (2) SACR 540 (CC), [1997] ZACC 11 ('*S v Lawrence*'). In drawing the distinction between legislative and adjudicative facts the court held that the question of who bears the burden of proof is less important when dealing with legislative facts than when adjudicative facts are in issue.

417 K Davis 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harvard LR* 364.

> They relate to the parties, their activities, their properties, their businesses. Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. In the great mass of cases decided by courts and by agencies, the legislative element is either absent, unimportant, or interstitial, because in most cases the applicable law and policy have been previously established. But

> whenever a tribunal is engaged in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record ... The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's finding of adjudicative facts must be supported by evidence, but finding or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence. [418]

Rule 31 cannot be relied upon by the parties in respect of facts which are essentially 'adjudicative'. In respect of these facts, the parties are bound by the evidence on the record and the normal common-law and statutory rules which govern judicial notice. But for purposes of 'legislative facts', the parties may go beyond the record of the case by relying on rule 31. Judicial notice of legislative facts might be necessary when the court must decide upon the constitutional validity of a statute or a common-law rule 'upon grounds of policy, and the policy is thought to hinge upon social, economic, political or scientific facts'. [419]

Rule 31 allows for the submission of evidence similar to that found in American 'Brandeis briefs'. Peter Hogg offers the following support for the 'Brandeis brief':

> There are two justifications for the Brandeis brief. The first is the pragmatic one that the Brandeis brief may be the only practicable way to inform the court of the full range of professional opinion on a particular point of social science. It is true that expert opinion evidence could be adduced, but on many topics no one expert or group of experts could easily canvass the entire range of professional opinion within the limits of the law of evidence, and especially the hearsay rule. Moreover, any attempt to do so by conventional sworn testimony, subject to cross-examination, would be extremely time-consuming and expensive ... The second justification for the Brandeis brief is more principled and more conclusive. The nature of judicial review is such that it is not necessary to prove legislative facts as strictly as adjudicative facts. While a court must reach a definitive conclusion on the adjudicative facts which are relevant to the disposition of litigation, the court need not be so definite in respect of legislative facts in constitutional court cases. The most that the court can ask in respect of legislative facts is whether there is a rational basis for the legislative judgment that the facts exist. [420]

The Constitutional Court has on several occasions referred to and relied upon so-called discussion documents submitted by the parties. [421] One useful example appears in *S v Lawrence.* In *Lawrence,* the Court was required to determine the constitutionality of certain provisions of the Liquor Act. The appeal was subject to the provisions of the Interim Constitution and the appellants conceded that

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418 K Davis 'Judicial Notice' (1955) 55 *Columbia LR* 945, 952. See also K Davis *Administrative Law Treatise* (Vol 3, 2nd Edition, 1980) § 15.2.

419 EW Clearly (ed) *McCormick on Evidence* (2nd Edition, 1984) § 328.

420 P Hogg 'Proof of Facts in Constitutional Cases' (1976) 26 *University of Toronto Law Journal* 387, 396.

the magistrate had correctly convicted them. Their sole defence was that the provisions in terms of which they had been convicted were unconstitutional.

No evidence relevant to the constitutionality of the provisions in issue was contained in the appeal record. After the noting of the appeal to the Constitutional Court, the representatives of the appellants and the Attorney-General agreed that 'expert affidavits' would be lodged by the appellants, the Attorney-General being entitled to lodge answering affidavits, and the appellants could then lodge replying affidavits.

Expert affidavits were lodged by the appellants, the Attorney-General and the Minister of Trade and Industry. In addition, appellants' counsel at the hearing tendered numerous extracts from publications purportedly relied upon by one of the appellants' experts. No accompanying affidavit by the expert offered an explanation as to why the extracts had not been dealt with in his affidavit. Counsel for the Attorney-General and counsel for the Minister of Trade and Industry objected to the admission of these extracts as well as the 'expert affidavits' lodged by the appellants on the basis that they exceeded the ambit of rule 34 of the (interim) Constitutional Court rules. In response the appellants made an application in which it was contended that the affidavits were admissible in terms of rule 19 [422] and rule 34. Alternatively, the appellants requested that the Court exercise its general power under rule 35 to condone non-compliance with its provisions.

The *Lawrence* Court rejected the appellants' submission that the general rule, permitting new evidence on appeal only in exceptional circumstances, did not apply to an appeal based on a constitutional question falling exclusively within the jurisdiction of the Constitutional Court. Chaskalson P (as he then was) held that nothing had prohibited the appellants from placing the evidence on record at the time of their trial: they could also have taken the opportunity of tendering such evidence when appealing to the High Court. [423]

The *Lawrence* Court also dismissed the appellants' contention that rule 19 of the (interim) Constitutional Court rules (regulating the procedure to be followed in appeals in which leave to appeal is required) permitted parties to supplement the trial record with new evidence. It held that rule 19 'prescribes a procedure for

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421 See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC), [1995] ZACC 3; *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC); S *v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC), [1995] ZACC 14; *Ferreira v Levin NO; Vryenhoek v Powell* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC), [1995] ZACC 13; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC), [2000] ZACC 17; *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC), [2000] ZACC 28. Cf *S v Katamba* 2000 (1) SACR 162 (NmS) (O'Linn AJA expressed some disquiet at the extension of the boundaries of judicial notice.)

422 Rule 19 of the interim rules is virtually identical with rule 20 of the current rules. For more on the new Constitutional Court rules, and which rules supplant the old rules, see K Hofmeyr 'Rules and Procedures in Constitutional Matters' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

423 See also *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), (2000) 1 BCLR 39 (CC), [1999] ZACC 17; *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC), [1997] ZACC 9. Cf *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC), 2001 (1) SACR 217 (CC), [2000] ZACC 28.

circumscribing the record and not a means for introducing new evidence on appeal'. [424] In the absence of an express provision in rule 19 facilitating the introduction of new evidence, an interpretation of the rule which required all eleven judges of the Constitutional Court to hear disputed evidence could not be justified. The Court held that the circumstances of the cases did not justify the exercise of its powers in terms of rule 33 to admit new evidence and that only

those portions of the new evidence that fell within the parameters of rule 34 would be admitted.

In drawing the distinction between legislative and adjudicative facts, the *Lawrence* Court held that the question of who bears the burden of proof is less important when dealing with legislative facts than when adjudicative facts are in issue. The *Lawrence* Court then proceeded to take judicial notice of the legislative fact that:

> [E]xcessive consumption of liquor is universally regarded as a social evil. It is linked to crime, disturbance of the public order, impairment of road safety, damage to health, and has other deleterious social and economic consequences. [425]

The appellants, who objected to the restrictions imposed by the Liquor Act on hours during which the holder of a grocer's wine licence may sell table wine, argued that restricted hours do not reduce alcohol-related problems and that such restrictions were therefore irrational. In support of this contention, the appellants submitted an affidavit of an expert witness referring to studies undertaken in other countries. The Minister of Trade and Industry relied on the affidavit of a different expert witness who disputed the correctness of this proposition. The *Lawrence* Court held that it was inappropriate in the circumstances for the court to prefer one expert above the other. Chaskalson P held that:

> The expert evidence was not placed before the Court in a proper form and the attempt to cure the defect by tendering unverified extracts from publications on which the expert is said to have relied is unacceptable. The proposition relied upon by the appellants is, moreover, not 'common cause or otherwise incontrovertible' nor does it depend on 'official, scientific, technical or statistical' material that is capable of 'easy verification'. In any event the conflict is not decisive of the case. The question to be decided is not whether the policy underlying the Liquor Act is an effective policy; it is whether there is a rational basis for such policy related to the purpose of the legislation. [426]

The *Lawrence* Court did accept evidence contained in another of the appellants' expert affidavits to the effect that the control of the availability of alcohol is a recognised means of combating the adverse effects of alcohol. That the same expert disputed the efficacy of such measures was not relevant. The Court was required to determine whether there was a rational basis for the policy related to the purpose of the legislation, not the efficacy of the policy.

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424 *S v Lawrence* (supra) at para 19.

425 *S v Lawrence* (supra) at para 54.

426 Ibid at para 68. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC), [2002] ZACC 1 ('*Prince II*').

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* O'Regan J held that evidence sought to be introduced in terms of rule 31 was inadmissible since it was 'all put in issue by the respondent ...[and] therefore [had] to be excluded on that basis alone'. [427] In short, if the evidence sought to be adduced under rule 31 is controvertible, then it is inadmissible. [428] Even if the evidence is incontrovertible, its

admissibility depends on the nature and the substance of the dispute. [429] The facts canvassed in the evidence must be relevant to the dispute. [430]

The Constitutional Court's approach to Rule 16A of the Uniform Rules of Court is also noteworthy. Rule 16A deals with amici curiae and permits them to make 'submissions'. A two-judge bench of the High Court had held that amici curiae could not introduce new evidence. In Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp & Others, the Constitutional Court overruled this finding. [431] Courts of first instance, it held, should consider all available evidence: 'They should not knowingly leave relevant evidence that could have been received by them to be adduced at the appellate level.' [432] The Children's Institute Court concluded that 'submissions' should be interpreted to include evidence.

52.9 Privacy and privilege

(a) Professions

The legal recognition of a privilege attaching to communications between categories of people inevitably creates two conflicting social goods: (1) a polity's interest in preserving and in promoting certain relationships; and (2) the interest of the legal system (and others responsible for the administration of justice) in ensuring that all relevant evidence is before the court. Historically, preference has been given to the latter interest. Consequently, professional privilege pertains only to the lawyer-client relationship and is not enjoyed (at least to the same degree) by other professional relationships. [433] Bankers possess a limited privilege: they need not produce their

427 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC), [2004] ZACC 20 at para 38.

428 *In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC), 2002 (10) BLCR 1023 (CC), [2002] ZACC 13; *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC), [2004] ZACC 8 at para 45; *Prince II* (supra) at para 11.

429 *Prince II* (supra) at para 10.

430 *S v Shaik* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC), 2008 (1) SACR 1 (CC), 2008 (1) SACR 1 (CC), [2007] ZACC 19 at para 19; *Prince II* (supra) at para 11.

431 [2012] ZACC 25.

432 Ibid at para 29.

433 See, for example, *Trust Sentrum (Kaapstad) (Edms) Bpk v Zevenburg* 1989 (1) SA 145 (C); *Howe v Mabuya* 1961 (2) SA 635 (D); *Chantrey Martin v Martin* 1953(2) All ER 691.

books unless ordered to do so by the court. [434] Conversely, while privilege is generally not accorded to a doctor-patient relationship, [435] any statement made by an accused during court-mandated observation by a health care professional for mental observation will be inadmissible in criminal proceedings 'except to the extent to which it may be relevant to the determination' of her 'mental condition'. [436]

Priests, insurers and accountants do not enjoy any professional privilege. Journalists too can be compelled to disclose the sources of their information. [437]

However, it would appear that some relief is available to these professionals if they can establish that they have a 'just excuse' for not testifying. [438]

Despite the limited scope of professionally-based privilege at common law, some professional communications may be protected from disclosure by the constitutional right to privacy. FC 14*(d)* provides that everyone has the right not to have the privacy of their communications infringed. A communication between doctor and patient may well be regarded as a personal and private communication. Where the state seeks to compel disclosure of such a communication, either party might assert that a privilege attaches to their relationship in terms of FC s 14. However, that prima facie recognition of privilege may, of course, be overcome if the state is able to establish that a law of general application reasonably and justifiably limits the alleged privilege (in terms of FC s 36).

A constitutional recognition of privilege grounded in the right to privacy would not necessarily constitute a radical departure from the common law as has been understood in other jurisdictions. For example, the putative FC s 14-based privilege could be squared with Wigmore's preconditions for the recognition of a privilege: [439]

(1) the communication must originate in a confidence that it will not be disclosed;

(2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

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434 CPA s 236(4); Civil Proceedings Evidence Act 25 of 1965 ('CPEA') s 31 .

435 *Botha v Botha* 1972 (2) SA 559 (N); *Davis v Additional Magistrate, Johannesburg* 1989 4 SA 299 (W).

436 See CPA ss 77, 78 and 79 and, especially, s 79(7).

437 *S v Pogrund* 1961 (3) SA 868 (T); *S v Cornelissen; Cornelissen v Zeelie NO* 1994 (2) SACR 41 (W) (Court, whilst holding that no legally recognized privilege gave journalists immunity from testifying, found that under the circumstances the journalist had a just excuse for not testifying.) See also *Munusamy v Hefer NO* 2004 (5) SA 112 (O)(High Court held that *Cornelissen* should not be interpreted as authority for the view that journalists have the right to be called only as witnesses of the last resort.) For more on the protection afforded journalists and other members of the media under FC s 16, the freedom of expression, see D Milo, G Pennfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42.

438 See *Cornelissen* (supra).

439 Wigmore (supra) at para 2285.

(3) the relationship must be one that in the opinion of the community ought to be sedulously fostered;

(4) the injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit gained through the correct disposal of the litigation. [440]

(b) Spouses

Spouses are entitled to refuse to disclose communications from the other spouse that were made during the marriage. [441] Despite the general decline of personal privacy due to public and private surveillance, and the intrusion of social media into the previously private domain, this privilege remains intact because the public opinion still finds the revelation of intimate exchanges unacceptable and would be outraged if spouses could be forced by the courts to disclose communications received from each other. [442]

The only pre-requisites for the existence of the privilege is that the communication must have been made whilst the spouses were married. The

privilege persists after divorce with regard to communications made whilst the couple were still married. [443]

In terms of CPA s 199, each spouse may refuse to answer a question that the other spouse could not have been compelled to answer. [444] However, should the spouse who received the communication wish to disclose it, the other spouse can do nothing to prevent such disclosure: the marital privilege can only be claimed by the spouse to whom the communication was made. The traditionally accepted view is that a third person who hears or intercepts the communication cannot be prevented from disclosing it. [445] This common-law approach may well be challenged on the basis that it infringes the constitutional right to privacy. [446] Indeed, the very loss of

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440 C Tapper *Cross & Tapper on Evidence* (10th Edition, 2004) 494. See *S v Makhaye* 2007 (1) SACR 369 (N)(Court suggested that if these conditions were met, then a privilege between confessant and spiritual adviser might arise.) Cf *S v Mshumpa* 2008 (1) SACR 126 (E); *Smit v Van Niekerk NO* 1976 (4) SA 292 (A); *S v B* 1980 (2) SA 946 (A). See also *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC), [2002] ZACC 7 (Court left the question open.)

441 See CPA s 198 and CPEA s 10. A marriage encompasses indigenous law marriages as well as a marriages concluded under any system of religious law. See CPA s 195(2) and CPEA s 10A.

442 DT Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 619.

443 See CPA s 198(2) and CPEA s 10(2). However, widows or widowers cannot claim the privilege.

444 Zeffertt, Paizes & Skeen (supra) at 620 ('It has been suggested that the privilege not to answer questions which tend to incriminate the other spouse must be regarded as excluded by implication in those cases in which one spouse is a compellable witness in a prosecution against the other.')

445 See *Rumping v DPP* 1962 (3) All ER 256.

446 FC s 14. See, generally, *S v Hammer* 1994 (2) SACR 496 (C).

private space generally may warrant the expansion of this privilege — especially as it pertains to third parties.

Some commentators may argue that little justification exists for favouring the privacy of marital relationships above other personal or professional relationships. But rather than diminishing the scope of the marital privilege, this contention actually cuts the other way: it suggests that the privilege ought to be extended to persons with whom one shares equally intimate, and integral, aspects of one's life.

It may be true that this common-law privilege originated in a conception of marriage that is no longer shared by the vast majority of us or was originally designed to protect the interest of one spouse (the husband) rather than some idyll of marital bliss. And it is certainly interesting to note that a majority of the Australian High Court has recently found insufficient authority for the existence of the privilege at common law. [447] But whether we should more vigourously defend such private spaces or let all our intimate relationships attrite in the face of ever greater public and private impositions on the self is a matter that our highest courts will invariably be asked to address in due course. Our Constitution invites this very debate.

(c) Parents and children

Section 192 of the CPA (read together with CPA s 206) makes it clear that parents/guardians can be compelled to testify against their children/wards, and vice versa. Our courts do not recognize a privilege pertaining to communications between parent and child. In terms of CPA s 73(3), even when parents participate in and support their child in criminal proceedings against the child, the law offers the parents no sanctuary from prosecutors who might wish the parents to offer testimony that incriminates their progeny.

But surely one might ask whether sound public policy militates against forcing parents to testify against their children. In *S v M,* the Appellate Division held that CPA s 73(1) and 73(2), read together, conferred a right upon a child to be assisted

by a parent or guardian from the time of the child's arrest, in the same manner as an adult would be entitled to the assistance of a legal adviser. [448] If parental assistance is equivalent to the assistance of a legal adviser, then it follows that parent-child communications in this context should be afforded the same privilege as communications between a legal adviser and a client.

However, even where a parent does not appear to assist the child in legal proceedings, constitutional grounds for holding that communications between parent and child should be privileged may still exist. In the United States, the courts have recognized that confidential communications between children and their parents, guardians or other caretakers are privileged from disclosure on the basis of the constitutional right to privacy. [449] When read together with the right to family or

447 *Australian Crime Commission v Stoddart* [2011] HCA 47.

448 1993 (2) SACR 487 (A). See also *S v Manuel* 1997 (2) SACR 505 (C)(Court stressed the importance of parental assistance); *S v N* 1997 (1) SACR 84 (TkSC).

449 *In re A & M* 61 AD 2d 426, 403 NYS 2d 375 (1978); *People v Fitzgerald* 101 Misc 2d 712, 422 NYS 2d 309.

parental care in FC s28(1)*(b)*, FC s 14 is surely susceptible to a similar interpretation. [450]

52.10 Unconstitutionally obtained evidence

(a) Scope of discretion and rationale

FC s 35(5) provides a remedy for constitutional breach to arrested, detained and accused persons at the trial stage of criminal proceedings with respect to unconstitutionally obtained evidence. However, this remedy for a constitutional breach [451] is not restricted to arrested, detained and accused persons alone. [452] Moreover, the rationale underlying the rule is far broader than that of providing a remedy for any single aggrieved individual. The rule is seen as playing an integral role in ensuring constitutional and judicial integrity in the criminal justice system as a whole. It is designed to promote a rule of law culture and overall constitutional compliance by the police, the prosecutorial services and other law enforcement agencies. [453] FC s 35(5) provides that '[e]vidence obtained in a manner that violates

any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

The Interim Constitution did not contain an express exclusionary rule. However, the courts under the Interim Constitution developed an exclusionary rule either through reliance on their common-law discretion to exclude evidence [454] or by

450 See Neil Van Dokkum 'Unwelcome Assistance: Parents Testifying Against Their Children' (1994) 7 *SACJ* 213. Article 2(21) of the African National Congress' draft Bill of Rights gave recognition to parent-child privilege. See also *S v Hammer* 1994 (2) SACR 496 (C)(An 18-year-old accused, whilst in police custody, after receiving permission to write a letter to his mother, asked a member of the South African Police Services to deliver the letter to his mother. The policeman, instead of delivering the letter, read it and handed it over to the prosecution. Although the court did not base its decision on the constitutional right to privacy, it found the evidence to be inadmissible because it had been improperly obtained. The court found that the policeman had, in all probability, committed an *injuria* against the accused, that he had acted unlawfully and immorally in reading and handing the letter over to the Attorney-General, and that this action constituted a serious and deliberate breach of the accused's common-law right to privacy. The court further concluded that the unfairly obtained evidence had to be excluded because to admit it would bring the administration of justice into disrepute.)

451 For a more extensive discussion of remedies, see M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 9.

452 See for example, *S v Mark* 2001 (1) SACR 572 (C)(Exclusion was sought on the basis that the witnesses' constitutional rights had been violated.) See also SE van der Merwe 'Unconstitutionally Obtained Evidence' in PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (3rd Edition 2009) 221.

453 See DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 625–630;Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 182 (Offers detailed discussion of the history and the rationale of the rule.)

454 See, for example, *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Mayekiso* 1996 (2) SACR 298 (C); *S v Hammer* 1994 (2) SACR 496 (C).

invoking s 7(4) of the Interim Constitution, which provided for 'appropriate relief'. [455] The 'exclusionary jurisprudence' developed during this period remains influential in the interpretation and application of FC s 35(5).

Once it has been established that a right in the Bill of Rights was unjustifiably infringed [456] in obtaining the evidence in question, then a court must exclude the evidence if its admission would: *(a)* render the trial unfair; or *(b)* otherwise be detrimental to the administration of justice. To admit evidence that would render the trial unfair will always be detrimental to the interests of justice. However, if admission would not render the trial unfair, its admission might nevertheless be detrimental to the interests of justice. The section is peremptory in so far as it directs the court to exclude evidence once the court has determined that admission would render the trial unfair or otherwise be detrimental to the administration of justice. [457] The court must exercise a value judgement in ascertaining whether either of these two conditions for exclusion exists: it is in this sense that the section is discretionary. [458]

A pre-requisite for exercising such discretion is the establishment of a link between the violation of the right and the procurement of the evidence. This issue has received relatively little attention from South African courts. It would appear that a generous approach is favoured in terms of which evidence obtained subsequent to the breach will be viewed as being obtained as a result of the breach — unless the accused has had an opportunity to re-assert his rights and thereby breaks the chain of events. [459] In order for the evidence to fall within the scope of FC s 35(5), it makes no difference whether the evidence was procured by the state or a private person. As long as the state seeks to use it, [460] then FC s 35(5) holds that

455 See, for example, *S v Melani* 1995 (2) SACR 141 (E); *S v Melani* 1996 (1) SACR 335 (E).

456 Where evidence is not obtained in violation of the Bill of Rights, but it is nevertheless determined that its admission would render the trial unfair, then such evidence should be excluded by virtue of the court's common-law discretion to exclude improperly obtained evidence. See *S v Kidson* 1999 (1) SACR 338 (W); *S v Mansoor* 2002 (1) SACR 629 (W); *S v Hena* 2006 (2) SACR 33 (SE)(Plasket J held that a non-Chapter 2 breach compounded a Chapter 2 breach.) See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 203.

457 See *S v Soci* 1998 (2) SACR 275, 394 (E). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 201; N Steytler *Constitutional Criminal Procedure* (1998) 36.

458 See *Pillay & Others v S* 2004 (2) BCLR 158 (SCA); *S v Lottering* 1999 (12) BCLR 1478 (N). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 214; N Steytler *Constitutional Criminal Procedure* (1998) 36.

459 See *S v Soci* 1998 (2) SACR 275, 293g–294d (E). See also Zeffertt, Paizes & Skeen (supra) at 638; Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 220.

460 See *S v Dube* 2000 (1) SACR 53 (N); *S v Hena* 2006 (2) SACR 33 (SE). Cf *S v Mansoor* 2002 (1) SACR 629 (W). See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 223.

it was obtained as a consequence of a constitutional violation. [461] In the absence of a constitutional breach, the evidence may still be excluded in terms of the court's common-law discretion to exclude evidence improperly obtained. [462]

(b) When will the admission of evidence render a trial unfair?

If the admission of evidence would be unfair to the prosecution, should it be excluded on that ground alone? It is clearly the accused's constitutional right to a fair trial which is sought to be protected by FC s 35 as a whole and consequently it would be consistent to interpret FC s 35(5) as being primarily concerned with protecting the accused's right to a fair trial. [463] However, fairness to the prosecution may well be a factor to be taken into account in determining whether the admission of evidence would 'otherwise be detrimental to the administration of justice'. [464] Exclusion of evidence that would result in substantial unfairness to the prosecution may well be detrimental to the administration of justice. [465]

The broad formulation of the right to a fair trial in *S v Zuma* [466] and *S v Dzukuda; S v Tshilo* [467] provides the grounds for arguing that even if one of the discrete sub-rights enumerated in FC s 35(3) as a component of the right to a fair trial is infringed, the admission of evidence procured as a result of such an infringement will not necessarily render the trial unfair. Although it can be argued that this approach requires a high degree of agility in separating two inquiries — namely *(a)* has a fair trial right been breached and *(b)* will admission of the evidence obtained as a result of the fair trial breach render the trial unfair — the courts have clearly shown themselves capable of meeting this challenge. [468] Consequently, if the breach of a recognised fair trial right is neither deliberate nor flagrant, and despite the violation

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461 See *S v M* 2002 (2) SACR 411 (SCA).

462 See, for example, *S v Mthethwa* 2004 (1) SACR 449 (E)(The court exercised its common-law discretion to exclude evidence obtained in breach of the Judges Rules on the basis that it would render the trial unfair and bring the administration of justice into disrepute.)

463 See Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229.

464 Cf *S v Madiba* 1998 (1) BCLR 38 (D). See Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229 (Van der Merwe seems to suggest that unfairness to the prosecution is a factor that can be taken into account in determining trial fairness vis-à-vis the accused.)

465 See *S v Basson* 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC), 2007 (1) SACR 566 (CC), [2005] ZACC 10 at para 113 (The court's approach reflects an acceptance that in determining the admissibility of evidence considerations of trial fairness apply both to the accused and the prosecution.)

466 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1.

467 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC), [2000] ZACC 16. See also § 52.2 supra.

468 *See S v Lottering* 1999 (12) BCLR 1478 (N); *S v Madiba* 1998 (1) BCLR 38 (D); *Key v Attorney-General, Cape Provincial Division* 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC), 1996 (2) SACR 113 (CC), [1996] ZACC 25;*S v M* 2002 (2) SACR 411 (SCA); *S v Ngcobo* 1998 (10) BCLR 1248 (N). Cf *S v Naidoo* 1998 (1) SACR 479 (N).

the 'police conduct was objectively reasonable having regard to the facts of the case,' [469] the admission of evidence might not render the trial unfair. [470]

In determining whether the admission of evidence will render a trial unfair, the court will take into account a complex matrix of competing and complimentary

factors. The court must take into account competing societal interests. In *Lawrie v Muir,* Lord Cooper expressed the conflict as follows:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict — *(a)* the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and *(b)* the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. [471]

Other factors the court will take into account include: the type and degree of breach; [472] the type and the degree of prejudice to the accused — if any; [473] and public policy. [474]

Partially due to the distinction made between testimonial or communicative acts and non-testimonial conduct resulting in the production of real evidence, [475] and the fact that real evidence inevitably exists irrespective of the constitutional breach, a court is less likely to find that the admission of real evidence will undermine trial fairness. [476] However, the courts are likely to be more cautious in admitting real evidence discovered as a result of a testimonial communication following a breach of the privilege against self-incrimination. In *S v Pillay* the Supreme Court of Appeal, *obiter*, appears to have approved the approach taken by the Canadian Supreme Court in *Burlingham v The Queen.* [477] In *Burlingham,* the court wrote: 'evidence derived (real or derived) from conscriptive evidence, ie self-incriminating evidence

469 Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 229.

470 See, for example, *S v Lottering* 1999 (12) BCLR 1478 (N).

471 *Lawrie v Muir* 1950 SC (J) 19, 26–27. See, for example, *S v Soci* 1998 (2) SACR 275 (E).

472 *S v Seseane* 2000 (2) SACR 225 (O). See, for example, *S v Lottering* 1999 (12) BCLR 1478, 1483D–E (N)(The court held that a flagrant and deliberate violation of a constitutional right must inevitably result in exclusion.) See also *S v Mphala* 1998 (1) SACR 388 (W).

473 *S v Soci* 1998 (2) SACR 275 (E); *S v Lottering* 1999 (12) BCLR 1478 (N).

474 Ibid.

475 See § 52.4*(c)*(iii) supra. Section 218 of the Criminal Procedure Act 51 of 1977 provides for the admission of real evidence discovered as a consequence of an inadmissible admission or confession. However, it remains subject to FC s 35(5).

476 See D Zeffert, A Paizes & A Skeen *The South African Law of Evidence* (2003) 639–641; Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 238. See, for example, *S v Mkhize* 1999 (2) SACR 632 (W); *S v R* 2000 (1) SACR 33 (W); *S v M* 2002 (2) SACR 411 (SCA).

obtained through a violation of a Charter right, will be excluded on grounds of unfairness if it is found that but for the conscriptive evidence the derivative evidence would not have been discovered'. [478] The Supreme Court of Appeal, finding that the real evidence had been discovered as a consequence of an infringement of the accused's right to privacy (and not in breach of a fair trial right), held that the admission of the impugned evidence would not render the trial unfair. [479] Despite the speed of the discovery, the court excluded the real evidence on the basis that its admission would be detrimental to the administration of justice.

In *S v Tandwa* [480] the accused identified, in court, money and an AK47. The court accepted that the pointing out had been made as a consequence of various acts of

police brutality directed at the accused. The trial judge, whilst excluding statements accompanying the pointing out, admitted the real evidence. He reasoned that it would be detrimental to the administration of justice to exclude the real evidence as it had been obtained independently prior to the police brutality and the accused was well positioned to provide an exculpatory explanation for his possession of the real evidence.

The Supreme Court of Appeal held that the trial judge had erred. FC s 35(5), the Court explained, 'plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused'. [481] The Court continued:

> Though 'hard and fast rules' should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilised injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating with barbarous and unacceptable conduct. [482]

In *S v Mthembu,* [483] the source of the evidence in question was not the accused, but a state witness who had been subject to torture during the investigation some four years prior to the trial. [484] The torture led to the discovery of the two highly pertinent items of real evidence. The Supreme Court of Appeal found that there was nothing in FC s 35(5) to suggest that it did not apply to violations of constitutional rights of a

477 *Burlingham v The Queen* (1995) 28 CRR (2d) 244.

478 2004 (2) SACR 419 (SCA) at para 89.

479 Ibid at para 90.

480 2008 (1) SACR 613 (SCA), [2007] ZASCA 34.

481 *S v Tandwa* (supra) at para 116.

482 Ibid at para 120.

483 2008 (2) SACR 407 (SCA), [2008] ZASCA 51.

person other than the accused. Cachalia JA held the fact that the witness's subsequent testimony was voluntary did not negate the fact that the real evidence was obtained through torture. The fact that the evidence was 'real' in nature and probably reliable could not assist the prosecution in the face of such an 'egregious human rights violation'. [485] To admit the evidence would be

> tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial. [486]

The Court was, nevertheless, prepared to admit other evidence that was referred to in the statement obtained by torture on the basis that it was discovered independently, prior to any constitutional violation. [487] In sum, while the 'real' nature of evidence might be a factor weighing in favour of admission, it is merely a factor that can be trumped by the right to a fair trial or the interests of the administration of justice.

(c) When will the admission of evidence be otherwise detrimental to the administration of justice?

The admission of evidence that would render the trial unfair will always be detrimental to the administration of justice. As a result, there will inevitably be an overlap between the two inquiries animated by FC s 35(5). The inquiry as to whether the admission of the evidence would be *otherwise* detrimental to the administration of justice arises when it is determined that the admission of the evidence would not render the trial unfair. The competing public interests identified in *Lawrie v Muir* [488] remain and, in relation to this second component of the FC s 35(5) test, were described in *S v Mphala* as follows:

> So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated. [489]

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484 Ibid.

485 Ibid at paras 31 and 36.

486 Ibid at para 36.

487 Ibid at para 35.

488 *Lawrie v Muir* 1950 SC (J) 19.

489 *S v Mphala* 1998 (1) SACR 388 (W).

Far greater weight is accorded to public opinion in determining whether admission would 'otherwise be detrimental to the administration of justice'. Unfortunately the high crime rate in South Africa — and concern about retaining public confidence in the criminal justice system — has resulted in some courts [490] and commentators being reluctant to remain within the parameters of the approach advocated by the Canadian Supreme Court in *R v Collins.* [491] The *Collins* approach requires a court to take into account the views of the reasonable person, who is usually the average person in the community, 'but only when the community's current mood is reasonable'. [492] However, the court in exercising its discretion must consider 'long-term community values' and not 'render a decision that would be unacceptable to the community when that community is not being wrought with passions or otherwise under passing stress due to current events'. [493] The danger of not giving due accord to 'long-term community values' is that the educational role

decisions of the court play in promoting constitutional values is sacrificed to the more expedient demands of placating the public. [494]

To date it would appear that the approach taken by the courts in the vast majority of cases has been rather prudent. Indeed, the courts have identified a number of factors that militate against admission. The evidence should not be admitted if its admission would encourage 'police officers to ignore or overlook the constitutional protection afforded to accused persons'. [495] In this regard, the absence of good faith and reasonableness in police conduct would constitute a barrier to admission. [496] However, good faith will not be sufficient where the infringement is a result of systemically poor practices: good faith cannot save improper conduct that arises from incorrect training, instruction or departmental directives. [497] Evidence will be excluded if its admission 'might create an incentive for law enforcement agents to

490 See *S v Ngcobo* 1998 (10) BCLR 1248, 1254 (W)('At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence'.) See also Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 235.

491 *R v Collins* 1987 (28) CCR 122.

492 Ibid at 136.

493 Ibid.

494 See *S v Naidoo* 1998 (1) SACR 479, 531a–b (N). McCall J writes:

> There may be those members of the public who will regard the exclusion of the evidence as being evidence of undue leniency towards criminals. 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 lessons which must be learnt from past mistakes 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.

495 *S v Lottering* 1999 (12) BCLR 1478, 1483 (N).

disregard an accused person's constitutional rights'. [498] The good faith must also be reasonable. [499] Reasonable good faith conduct has been identified with the need to promote public safety. [500]

The nature and the extent of the violation will inevitably be factors taken into consideration by the court in the exercise of its FC s 35(5) discretion in regard to both legs of the inquiry. [501] If there were alternative lawful means of obtaining the evidence, then the breach will be regarded as more serious. [502] If it is real evidence that is in issue, which pre-existed the breach, and it would have been discovered in any event, then it is more likely to lead to the conclusion that its exclusion would not be detrimental to the administration of justice. However, even if all these conditions exist in relation to real evidence, the court will still consider its admissibility in relation to all relevant facts. For example, in *S v Pillay* the court found that the real evidence in question would have been found irrespective of the breach against self-incrimination. (It would have been found in any event as a result of an earlier breach of the right to privacy arising out of an improper

telephone tap.) The court held that to admit a statement elicited from a person on a false undertaking that they would not be charged 'would be more harmful to justice than advance it'. [503] In reaching its conclusion, the court noted that in a society with a high crime rate the public must be encouraged to assist the police. [504] False undertakings undermine the public's faith in the criminal justice system.

(d) Entrapment

496 See, for example, *S v Naidoo* 1998 (1) SACR 479 (N); *S v Mphala* 1998 (1) SACR 388 (W); and *S v Hena* 2006 (2) SACR 33 (E)(Absence of good faith was taken into account in excluding the evidence.) But see*S v Madiba* 1998 (1) BCLR 38 (D)(Absence of bad faith and clearly reasonable conduct on the part of the police played an important role in the admission of the evidence.) Cf *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Nel* 2009 (2) SACR 37 (C); *S v Lachman* 2010 (2) SACR 52 (SCA); *S v Cwele* 2011 (1) SACR 409 (KZP).

497 See, for example, *S v Soci* 1998 (2) SACR 275 (E). Cf *S v Tsotetsi and Others (1)* 2003 (2) SACR 623 (W) read together with *S v Tsotetsi and Others (3)* 2003 (2) SACR 648 (W).

498 *S v Pillay* 2004 (2) SACR 419 (SCA) at para 94.

499 See DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 639; SE Van der Merwe 'Unconstitutionally Obtained Evidence' (supra) at 256.

500 See, for example, *S v Madiba* 1998 (1) BCLR 38 (D); *S v Lottering* 1999 (12) BCLR 1478 (N).

501 See *S v Mark* 2001 (1) SACR 572 (C); *S v Mkhize* 1999 (2) SACR 632 (W); *S v Pillay* (supra).

502 *S v Pillay* (supra); *S v Hena* (supra).

503 *S v Pillay* (supra) at para 96. Cf *Wesso v Director of Public Prosecutions, Western Cape* 2001 (1) SACR 674 (C).

504 *S v Pillay* (supra) at para 96.

CPA s 252A(3)*(a)* reads:

> If a court in criminal proceedings finds that in the setting of a trap or the engaging in an undercover operation the conduct goes beyond providing an opportunity to commit an offence, the court may refuse to allow such evidence to be tendered or may refuse to allow such evidence already tendered, to stand, if the evidence was obtained in an improper or unfair manner and that the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. [505]

However, in those instances where the entrapment evidence was unconstitutionally obtained, FC s 252A(3)*(a)* remains subject to the provisions of FC s 35(5). [506]

In terms of CPA s 252A(6), 'the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution'. The question of whether a balance of probabilities should indeed be the standard has given rise to some judicial debate. In *S v Reeding,* Bozalek J found that, on a plain reading of the section, the burden must be discharged on a balance of probabilities, not beyond a reasonable doubt. [507]

Steyn J reached the opposite conclusion in *S v Naidoo*. [508] However, her reasoning seems to be based on two errors. First, she misquotes the relevant extract from *Reeding* by inadvertently substituting the word 'appropriate' for 'inappropriate'. [509] Second, Steyn J quotes an extract from the judgment in *S v Kotzé* [510] in which Wallis AJA, in an obiter dictum, suggests that proof beyond a reasonable doubt was required in order to make s 252A(6) constitutionally compliant. Steyn J incorrectly

refers to this portion of Wallis AJA's judgment as a definitive ruling on the issue. Considering the wording of s 252A(6), her conclusion that proof beyond reasonable doubt is required is difficult to justify in the absence of a finding of invalidity of s 252A(6) by the Supreme Court of Appeal. [511]

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505 Section 252A(3)*(b)* instructs the court in determining the admissibility of evidence 'to weigh up the public interest against the personal interest of the accused' and lists a number of factors that must be taken into account in engaging in this exercise. For an example of the application of s 252A, see *Amod v S* 2001 (4) All SA 13 (E).

506 *S v Odugo* 2001 (1) SACR 560 (W). See also *S v Spies* 2000 (1) SACR 312 (SCA); *Mendes v Kitching* 1995 (2) SACR 634 (E); *S v Dube* 2000 (1) SACR 53 (N); *S v Hassen* 1997 (3) BCLR 377 (T); *S v Hayes* 1998 (1) SACR 625 (O); *S v Reeding* 2005 (2) SACR 631 (C); *S v Van der Bergh* 2009 (1) SACR 661 (C) See, generally, DT Zeffertt, A Paizes & A Skeen *The South African Law of Evidence* (2003) 643; E Du Toit et al *Commentary on the Criminal Procedure Act* (2007) 24–134.

507 2005 (2) SACR 631, 639–640 (C).

508 2010 (1) SACR 369 (KZN) at para 5.

509 The extract reads: 'In my view, however, this standard of proof is inappropriate in the context of determining the admissibility as opposed to the weight of the evidence and, moreover, sets the bar too high. Section 252(6) provides instead that an onus rests on the State to prove the admissibility of evidence on a balance of probabilities. This, in my view, is the correct standard of proof'. *Reeding* (supra) at 640a.

510 2010 (1) SACR 100 (SCA).

Nevertheless, even if not definitive, Wallis AJA's obiter assertion that s 252A(6) is unconstitutional will no doubt attract further attention. His argument can be summarised as follows: if the admissibility of a confession must be proved beyond a reasonable doubt, then so must the admissibility of entrapment evidence, as both concern evidence necessary to secure a conviction. To apply a different standard infringes the presumption of innocence and the right to remain silent. This reasoning, although superficially attractive, ignores several difficult conceptual problems. If this part of the court's dictum had not been obiter, the court would have paid more attention to the following issues:

(a) In a criminal trial, must the admissibility of all evidence be proved beyond a reasonable doubt? In applying the presumption of innocence, is it necessary to distinguish between the weight to be accorded to evidence and admissibility?

(b) Do confessions constitute a special category since they have been held to amount to the equivalent of a plea of guilty?

(c) Is a standard of proof appropriate in circumstances where the court is required to exercise a discretion?

(d) Should we draw a distinction between evidence excluded on grounds of policy and evidence excluded as a consequence of insufficient relevance?

These questions will have to be answered when a court is confronted directly with the constitutionality of s 252A(6).

(e) Trial-within-a-trial

CPA s 252A(7) states that the determination of admissibility in terms of CPA s 252A(3)*(a)* should take place in a trial-within-a-trial. As a general matter, the admissibility of all unconstitutionally obtained evidence in terms of FC s 35(5) should be determined by having a trial-within-a-trial. [512] However, the trial-within-a-trial may not be necessary where the facts are not disputed in any material way [513]or where voluntariness is not in issue. [514] In *S v Tsotetsi & Others (3)*, Visser AJ held that a ruling on admissibility in a trial-within-a-trial was interlocutory and could be reviewed at the end of the trial in light of all the evidence. [515] Cloete JA, in *S v*

511 Steyn J's interpretation of *Kotzé* may also be read as obiter, as it is unclear what bearing it had on the court's decision.

512 *S v Ntzweli* 2001 (2) SACR 361 (C); *S v Mhlakaza* 1996 (2) SACR 187 (C); *S v Maake* 2001 (2) SACR 288 (W); *S v Ngcobo* 1998 (10) BCLR 1248 (N); *S v Mayekiso* 1996 (2) SACR 298 (C). Cf *S v Vilakazi* 1996 (1) SACR 425 (T). See also *Director of Public Prosecutions v Viljoen* 2005 (1) SACR 505 (SCA) (The court held that the court *a quo* had erred in holding that the determination of a constitutional violation must be held prior to and separately from a trial-with-in-a-trial to determine the admissibility of a confession or other extra-curial statement.)

513 *S v Kidson* 1999 (1) SACR 338 (W); *S v Hena* 2006 (2) SACR 33 (E).

514 *S v Matsubu* 2009 (1) SACR 513 (SCA).

515 *S v Tsotetsi and Others (3)* 2003 (2) SACR 648, 654 (W). Cf *S v Ntuli* 1993 (2) SACR 599 (W).

Maputle & Another, noted that the fact that the nature of the impugned evidence becomes known to the court during FC s 35(5) proceedings will not render the trial automatically unfair. [516]

(f) Civil proceedings

The pre-dominant weight of authority holds that FC s 35(5) does not apply to civil proceedings. [517] However, unconstitutionally or otherwise improperly obtained evidence may be still excluded in terms of the common-law discretion to exclude such evidence. [518] Furthermore, since the common law must be developed so as to 'promote the spirit, purport and objects' [519] of the Bill of Rights, evidence may be excluded if it infringes the constitutional right to a fair civil trial. [520] However, an infringement of a constitutional right in the procurement of the evidence will not automatically lead to the exclusion of the evidence. [521] The case law has not developed sufficiently to identify all of the factors that may influence a decision to exclude evidence. However, one factor that appears to have emerged is whether the evidence in question could have been obtained, eventually, by lawful means. If the evidence could not have been so obtained, then a court is likely to be more reluctant to admit the evidence. [522] In *Protea Technology Ltd v Wainer,* Hefer J held:

> The common law rule is however inconsistent with the Constitution to this extent: it starts with the assumption that all evidence however obtained is admissible subject to the court's discretion to exclude it. If the common law is at odds with the Constitution the courts must, if that can realistically be done, develop the common law in such a manner as to promote the spirit, purport and object of the Bill of Rights. Such development requires the test of admissibility to be formulated differently: any evidence which depends upon the breach of a fundamental constitutional right can only be admitted if the admission of the evidence is justifiable by the standards laid down in s 36(1). Thus if a person proves, whether in civil or criminal proceedings, that a right identified in chap 2 of the Constitution (other than a non-derogable right) has been infringed, the onus lies upon the party who seeks to benefit in any way from that infringement to satisfy the Court that the common law (or a statute as the case may be) provides a limitation of the nature referred to in s 36(1). Prima facie, the complainant has the right to have it excluded. In order to decide whether the right should prevail

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516 2003 (2) SACR 15 (SCA) at para 11.

517 See *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) ('*Protea Technology*'); Zeffertt, Paizes & Skeen (supra) at 28–9 and 644–5; PJ Schwikkard & SE Van der Merwe *Principles of Evidence* (2009) 264; N Steytler *Constitutional Criminal Procedure* (1998) 38. Cf *Tap Wine Trading v Cape Classic Wines (Western Cape)* 1999 (4) SA 194 (C).

518 See *Shell SA (Edms) Bpk v Voorsitter, Dorperaad van die OVS* 1992 (1) SA 906 (O); *Motor IndustryFund Administrators Pty Ltd v Janit* 1994 (3) SA 56 (W); *Lenco Holdings Ltd v Ekstein* 1996 (2) SA 693 (N)('*Lenco Holdings*').

519 FC s 39(2).

520 FC s 34.

521 See, eg, *Fedics Group (Pty) Ltd v Matus* 1998 (2) SA 617 (C)('*Fedics Group*'); *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W).

522 See *Fedics Group* (supra); *Lenco Holdings* (supra).

with unmitigated force or whether it should be regarded as partially or wholly overridden, each case will have to be considered on its own facts and the discretion

exercised with judicial regard to the substance of s 36(1). Thus for example, that the breach of rights occurred in conjunction with the breach of criminal law is not of itself decisive. [523]

Hefer J's reasoning suggests that evidence obtained in breach of a constitutional right would only be admissible if the admission of the evidence was justifiable by the standard laid down in the limitations clause. [524] This approach conflates the limitations inquiry and an admissibility inquiry. And it would appear to be wrong as a matter of law. An admissibility inquiry turns, in large part, on 'the facts' surrounding the manner in which the evidence was secured. Limitations analysis focuses entirely on the justification offered for a 'law of general application' that impairs a constitutional right. [525] In short, admissibility inquiries are fact driven and are properly located within FC s 35(5). Limitations analysis would only occur when the evidence at issue was secured in terms of a law — common law or statute — that infringed a constitutional right. With respect, Hefer J would appear to have misunderstood the purpose of FC s 36 and what it is designed to justify. One would hope that the courts develop more coherent analytical structure regarding the admissibility of evidence in civil trials.

(g) Burden of proof and burden of justification

An accused who wishes to have evidence excluded in terms of s 35(5) of the FC bears the responsibility of objecting to the admissibility of the evidence. [526] Buys J in *S v Mgcina* [527] held that the state bore the burden of proving that the evidence was obtained without infringing the accused's constitutional rights. The applicable standard of proof was that of beyond reasonable doubt and the burden would arise once the accused alleged that the evidence had been procured as a consequence of an infringement. However, the accused did no have to prove the infringement. The allocation of the burden of the proof thereafter to prove admissibility or inadmissibility remains an open question. There are strong similarities between FC s 35(5) and s 24(2) of the Canadian Charter. Charter s 24(2) provides: Where in proceedings under ss (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.

523 *Protea Technology* (supra) at 1241–2 cited with approval by Lewis J in *Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 (2) SA 515 (W).

524 *Protea Technology* (supra) at 1241H–1242F.

525 See S Woolman & H Botha 'Limitations' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

526 *Key v Attorney General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC), 1996 (4) SA 187 (CC), [1996] ZACC 25 at para 14. See also *S v Naidoo* 1998 (1) BCLR 46 (D), 1998 (1) SACR 479 (D)('*Naidoo*').

527 2007 (1) SACR 82 (T).

The Canadian approach requires the accused to prove a Charter violation on a balance of probabilities. [528] Stuart asserts: 'Given that the accused has the burden of

establishing a Charter violation, it follows that the accused also bears the burden of justifying a remedy under s 24 or s 52 of the Charter'. [529] There is clear authority for this proposition in relation to s 24(2). In *R v Collins*, Lamer J held:

> [T]he use of the phrase 'if it is established' that places the burden of persuasion on the applicant, for it is the position which he maintains which must be established. Again, the standard of persuasion required can only be the civil standard of the balance of probabilities. Thus the applicant must make it more probable than not that the admission of the evidence would bring the administration of justice into disrepute. [530]

However, in *S v Naidoo,* [531] the High Court found that despite the similarities to be found in FC s 35(5) and Charter s 24(2), significant differences remain. Most significantly FC s 35(5) does not contain the words 'if it is established that'. This proviso justified Lamer J's conclusion that the applicant bore the burden of establishing on a balance of probabilities that the evidence should be excluded. [532] McCall J, in *Naidoo*, whilst taking note of the distinction, made no finding regarding the onus, if any, pertaining to establishing the exclusion of evidence.

Erasmus J in *S v Soci* [533] endorsing his own judgment in *S v Nombewu*, [534] seems to express the view that the question of onus does not arise regarding the exclusion of evidence in terms of FC s 35(5):

> In my view, the procedural principles which underlie our accusatorial system of criminal trials are inappropriate for such enquiry. The court at this stage is not required to decide whether the accused did in fact perform the alleged self-incriminating acts or acted voluntarily, or indeed whether he is guilty as charged. The exercise of its discretion requires that the court form a value judgment in regard to the fairness of the trial. A court cannot, I think, arrive at such judgment by way of the general rules relating to issues such as relevancy and judicial cognisance. Importantly, the rules of law relating to the burden of proof do not apply, either for the final decision on the question, or for proof of the individual facts which bear on that decision ... . [535]

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528 *R v Collins* (1987) 56 CR 193 (SCC)('*Collins*'). See also *R v Oakes* (1986) 19 CRR 308 (SCC). See further, § 52.11 infra.

529 D Stuart *Charter Justice in Canadian Criminal Law* (3rd Edition, 2001) 42.

530 *Collins* (supra) at 209.

531 *Naidoo* (supra) at 52.

532 The other distinctions between the two sections are: unlike s 35(5), s 24(2) does not specifically refer to the concept of a fair trial. (However, it is clear from *Collins* (supra) that this concept is incorporated in the Canadian exclusionary rule); furthermore s 24(2) refers to 'bringing the administration of justice into disrepute' whereas s 35(5) refers to the admission of evidence being 'detrimental to the interests of justice'.

533 1998 (3) BCLR 376 (E)('*Soci*').

534 1996 (2) SACR 396 (E)('*Nombewu*').

In determining which approach is to be preferred it is interesting to note that in Canada the defence must prove that 'it [is] more probable than not that the admission of the evidence would bring the administration of justice into disrepute'. [536] The advantage of taking such an approach is to encourage judicial rigour in the exercise of discretion. [537] It also requires a commitment to the degree of unfairness that will be tolerated within the legal system. If the balance of probabilities standard is applied then it must be accepted that the judicial system

is prepared to tolerate a reasonable possibility that the admission of the evidence would be unfair to the interests of justice.

The presumption of innocence clearly demands the exclusion of reasonable doubt as to the factual guilt of the accused determined in accordance with the 'comprehensive principles' of criminal liability. The determination of the relevancy of evidence, and hence its admissibility, plays an important role in ensuring the accuracy of the fact finding process. However, unconstitutionally obtained evidence is not excluded because it otherwise lacks relevance or compromises factual accuracy. It is excluded because its admission compromises constitutionally guaranteed rights. Its exclusion accords with the doctrine of legal guilt, in terms of which

> a person is not to be held guilty of a 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 a procedurally regular fashion and by authorities acting within competences duly allocated to them. [538]

If evidence is admitted despite the existence of a reasonable doubt as to fairness or whether it will be detrimental to the interests of justice, then the possibility arises of a conviction despite the existence of a reasonable doubt as to legal guilt. Simultaneously, the admission of the same piece of evidence may be material in ensuring that the prosecution has proved all the elements of its case beyond a reasonable doubt. An argument can be made that the presumption of innocence only requires the admissibility of evidence pertinent to factual guilt to be proved beyond a reasonable doubt, [539] and it is only when the question of admissibility of evidence is inextricably linked to proof of factual guilt that the standard of proof beyond reasonable doubt in respect of admissibility should rest on the state. This rubric would allow the court to distinguish between the different constitutional violations that potentially bring FC s 35(5) into play.

In *Mgcina,* the constitutional infringement in question pertained directly to the admissibility of a confession. [540] (The right in issue was the accused's FC s 35(2)*(b)* right to choose and to consult with a legal practitioner, and to be informed of this

535 *Soci* (supra) at 387 quoting from *Nombewu* (supra) at 420.

536 *Collins* (supra) at 522.

537 See D Mathias 'Fairness and the Criminal Standard of Proof' (1991) *New Zealand LJ* 159, 160.

538 HL Packer *The Limits of the Criminal Sanction* (1968) 166.

539 See § 52.4*(a)* supra.

right promptly.) Would the court's conclusion have been different if it was not the admissibility of a confession that was at stake? A confession is a very special type of evidence in that it is a statement that admits to all the elements of the offence charged. Consequently, if admissibility is not proved beyond a reasonable doubt by the state, there is a risk of conviction despite the existence of reasonable doubt as to factual guilt and consequently the presumption of innocence will also be infringed. [541]

However, where there is no possibility of unreliability, and relevance is not at issue, is it in the interests of the administration of justice to require the state to prove beyond a reasonable doubt that it did not infringe, say, the right to privacy and if it fails this hurdle that the admission of evidence will not be detrimental

to the interests of justice? There is no possibility of a conviction despite the existence of a reasonable doubt as to factual guilt and neither requiring the accused to establish an infringement of a right nor establishing that admission would be detrimental to the interests of justice seems unduly onerous where the question of factual guilt is not in issue.

Whether the accused must bear the burden of persuading the court that unconstitutionally obtained evidence must be excluded on a balance of probabilities, or the state bear the burden of proving inclusion beyond a reasonable doubt, will no doubt have an impact on the number of successful prosecutions. Whilst the presumption of innocence reflects society's tolerance that a number of guilty persons escape conviction in order to minimise the possibility of an erroneous conviction, such tolerance is not infinitely elastic. A system of criminal justice may still operate effectively where the effect of the presumption of innocence is that X number of guilty escape conviction in order to ensure that one innocent is not erroneously convicted. If X is the optimal number, then the presumption of innocence will reinforce the legitimacy of the criminal justice system. However, where the number of persons erroneously escaping conviction increases significantly, *or is perceived to increase significantly,* the very opposite will occur. Furthermore, whilst most people would not dispute the abhorrence of wrongly convicting a factually innocent person, there is far more ambiguity when the question of legal guilt is separated from factual guilt.

52.11 Limitations analysis

The burdens and standards of proof applicable in civil and criminal trials are not easily transposed into the context of constitutional breach and justification because the proportionality analysis called for by FC s 36 requires a determination which—

> is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected. [542]

540 2007 (1) SACR 82 (T).

541 *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC), [1995] ZACC 1.

542 *S v Manamela* 2000 (3) SA 1 (CC), 2000 (1) SACR 414 (CC), 2000 (5) BCLR 491 (CC), [2000] ZACC 5 at para 32; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC), [2000] ZACC 11 at para 31.

Our courts have held that a party alleging the violation of a constitutional right bears a burden of proving 'the facts upon which they rely for their claim of infringement of the particular right in question'. [543] It is not clear whether this burden is merely an evidentiary burden or a burden of proof, and no standard of proof has been specified by the Constitutional Court. [544]

Once a violation is established, the party wishing to establish that the violation is justifiable in terms of the limitations clause bears the burden of proving such

justification. [545] But again the Constitutional Court has been silent as regards the standard of proof, if any, that must be met.

Dicta to date would suggest that the burden is indeed merely an evidentiary one. For example, in *Phillips v Director of Public Prosecutions, Witwatersrand Local Division*, the burden was described as follows:

> The burden placed upon the State is no ordinary onus. The State should place before a Court evidence and argument on which it intends to rely in support of justification. Although absence of this evidence and argument does not necessarily result in invalidity of the challenged provision, it may tip the scales against the State, but in appropriate cases only. It follows that the absence of evidence and argument from the State does not exempt the Court from the obligation to conduct the justification analysis and to apply what was described by Somyalo AJ as 'the primary criteria enumerated in s 36 of the Constitution'. [546]

The aforementioned paragraph refers to Somyalo AJ's judgment in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development (Women's Legal Centre as Amicus Curiae).* The *Moise* Court observed:

> It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before Court the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. [547]

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543 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC), 1996 (1) SA 984 (CC), [1995] ZACC 13 ('*Ferreira*') at para 44; *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC), [1995] ZACC 3 at para 26.

544 For more on burdens in limitations analysis, see Woolman & Botha (supra) at § 34.6.

545 *Ferreira* (supra) at para 44; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) 491 (CC), 2001 (8) BCLR 765 (CC), [2001] ZACC 21 ('*Moise*') at para 19.

546 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC), [2003] ZACC 1 at para 20.

This approach — which goes no further than placing a duty on a party wishing to justify a limitation to adduce evidence of facts or policies in order to reduce the risk of losing — was endorsed by the Constitutional Court in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)*. [548] Here the Court noted the distinction between matters of fact which may be established by drawing of inferences from empirical data and matters of policy that are not always capable of such proof. It held that where a party relies on the underlying policy for justification, it

> should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable

> to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the Court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may, however, be cases where, despite the absence of such information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge. [549]

As the 'special type' of onus appears to be an evidentiary one, it will inevitably shift between the parties once prima facie proof in respect of a particular issue has been established. [550] This kind of shift of justification would not be the case if a 'real' onus or legal burden were placed on the parties. [551] It seems clear that the Constitutional Court is reluctant to impose any particular standard of proof on what is essentially a balancing process. [552] It would further appear that the burden of justification's functionality is restricted to assisting the court in conditions of uncertainty.

In contrast, the Canadian Supreme Court has clearly held that the party wishing to establish that the limitation of a Charter right is demonstrably justified in terms of

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547 *Moise* (supra) at para 19.

548 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC), [2004] ZACC 10 ('*NICRO*').

549 *NICRO* (supra) at para 36. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC), [2002] ZACC 1 at para 57; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng* 2001 (11) BCLR 1175 (CC), [2001] ZACC 4 at para 7.

550 Burden shifts are discussed in Woolman & Botha 'Limitations' (supra) at § 34.6. Woolman and Botha prefer to use the term 'burden of justification' to describe what is required at each stage of fundamental rights analysis, and to distinguish burdens in fundamental rights analysis from burdens in other forms of legal analysis.

551 For a discussion of the distinction between legal and evidentiary burdens, see D Zeffertt,A Paizes & A Skeen *The South African Law of Evidence* (2003) 121–124; PJ Schwikkard &S Van der Merwe *Principles of Evidence* (2009) 571.

552 See *NICRO* (supra) at para 37. For a critique of balancing, generally, see Woolman & Botha 'Limitations' (supra) at § 34.8.

s 1 of the Charter must do so on a preponderance of probability. [553] If a standard of proof is to be applied, the civil standard would seem most appropriate as the policy considerations that arise in the determination of guilt are absent. [554] However, it would seem artificial to attempt to impose either the civil or the criminal standard when a party attempts to discharge the burden of justifying the limitation of a fundamental right. It can be argued that the standard is already set by FC s 36: namely, the limitation must be reasonable and justifiable in a specified context, namely an open and democratic society based on human dignity, equality and freedom. It does not seem particularly useful to ask whether on a balance of probabilities (or beyond reasonable doubt) a limitation is reasonable and justifiable. The terms 'balance of probability' or 'beyond reasonable doubt' are not quantifiable measurements but rather the product of historical judicial intuition and there is no reason why a different standard of proof should not apply to limitations analysis. [555]

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553 *R v Oakes* [1986] 1 SCR 103, 50 CR (3d) 1, 24 CCC (3d) 321.

554 See § 52.4 supra.

555 See Woolman & Botha 'Limitations' (supra) at § 34.8 (The authors would appear to agree with this assessment.)