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CHAPTER 1

1. INTRODUCTION

Prior to the constitutionalisation of South Africa the courts applied the English common law to determine the admissibility of improperly or illegally obtained evidence. The English common law employed a strict inclusionary approach which was formulated as follows: "It matters not how you get it; if you steal it even, it would be admissible."¹ In essence relevance was the test and the courts were not concerned with how the evidence was obtained.² Facts are considered relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue.³ The result was that all relevant evidence was admissible and irrelevant evidence inadmissible, but with the notable exception that the courts had a discretion to exclude relevant evidence if the strict rules of evidence would operate unfairly against the accused.⁴

In 1994 South Africa became a constitutional democracy with the interim Constitution⁵ as the supreme law. In the Bill of Rights were guaranteed rights, which overlapped with some of the common law procedural and evidentiary rights of a criminally charged person. For example, the right to be informed of the rights to remain silent, to be presumed innocent, not to incriminate oneself and not testify during trial, and the right to a fair trial.⁶ The interim Constitution did not expressly govern the admissibility of unconstitutionally obtained evidence.⁷ Notwithstanding, the courts extended an exclusionary remedy to the victims of fundamental rights violations, in the evidence gathering process.⁸ However, as could be expected, the courts did not immediately agree on the legal basis for the exclusion of unconstitutionally obtained evidence.⁹ Nevertheless, unconstitutionally obtained

¹ *R v Leatham* 1861 Cox CC 498 at 501; quoted in Schwikkard and Van der Merwe *Principles of evidence* at 184; Langenhoven *Onggrondwetlik verkreë getuienis* at 17.

² Zeffertt and Paizes *Law of evidence* at 716.

³ *R v Mpanza* 1915 AD 348 at 352-353.

⁴ Schwikkard and Van der Merwe *Principles of evidence* at 205-206; see also *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 22.

⁵ Constitution of the Republic of South Africa, Act 200 of 1993.

⁶ See respectively, sections 25(2)(a), 25(2)(d), 25(3), 25(3)(c).

⁷ Schwikkard and Van der Merwe *Principles of evidence* at 208.

⁸ Ally *Constitutional exclusion* at 104.

⁹ Schwikkard and Van der Merwe *Principles of evidence* at 209.

evidence was excluded when courts relied on the “appropriate relief” provision contained in section 7(4) of the interim Constitution,¹⁰ invoked the common-law discretion to meet the demand of constitutional due process¹¹ and in some cases, the courts applied the strict exclusionary rule in respect of unconstitutionally obtained evidence.¹²

In respect of the admissibility of evidence the Constitution of the Republic of South Africa, 1996 brought a marked departure from the earlier position in that it contains a provision requiring the exclusion of evidence in the case of rights infringement. This provision is section 35(5) – in essence a remedy to protect a person’s fundamental rights in a criminal trial against the admission of unconstitutionally obtained evidence. All common law and statutory provisions which used to regulate the admissibility of evidence must now also be tested against the provisions of section 35(5). Moreover, judgments delivered under the interim Constitution must be distinguished from those decided under section 35(5).¹³

Section 35(5) reads as follows:¹⁴

“Evidence 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.”

Since the final Constitution is markedly different from the interim Constitution, it is only logical to question the impact of section 35(5) on the law of evidence. This question has prompted much writing and discussion.¹⁵ All the issues relating to this question have not yet been resolved, and perhaps none more so than specifically the question to what extent current arguments are still influenced by the common-law position. One such issue, in respect of which the final word has definitely not been spoken, relates to the admissibility of real evidence. Our common law certainly distinguished real evidence from testimonial evidence, but the current position remains unclear and largely unexplored.

¹⁰ *S v Melani* 1995 (2) SACR 141 (E).

¹¹ *S v Motloutsi* 1996 (1) SACR 78 (C).

¹² *S v Mathebula* 1997 (1) SACR 10 (W); Schwikkard and Van der Merwe *Principles of evidence* at 209.

¹³ *S v Huma* (2) 1995 (2) SACR 411 (W).

¹⁴ See, in general, Schwikkard and Van der Merwe *Principles of evidence* at 214.

¹⁵ See, in general, Schwikkard and Van der Merwe *Principles of evidence*; Langenhoven *Ongrondwetlik verkreeë getuienis*; Zeffertt and Paizes *Law of evidence*; Ally *Constitutional exclusion*.

Our courts have delivered divergent judgments on the application and interpretation of section 35(5). Legal certainty will only be achieved when the Constitutional Court rules on all its aspects, whereas to date the Constitutional Court has not yet attended to section 35(5). The purpose of this study is to determine as closely as possible as to what is the current position and what the situation should ideally be within a constitutional democracy. This is where this study found its origin and what it focuses on. Throughout this study, it has been deemed important to set out the legal position with respect to testimonial evidence, before it is possible to distinguish the position with respect to real evidence.

2. RESEARCH QUESTIONS

When applying the common law, no person may be compelled to give evidence incriminating himself.¹⁶ It is not a mere compulsion but testimonial compulsion that forms the crux of this rule. Based on this principle, the courts used to distinguish between real and testimonial evidence. The following questions arise: (i) Can a clear distinction be made between real evidence and testimonial or communicative statements? (ii) to what extent has the common law rule survived in the constitutional era - both with respect to its exclusionary and inclusionary aspects? (iii) could compelled real evidence be self-incriminating at all? and (iv) the constitutionality of section 37 of the Criminal Procedure Act, 1977.

Unconstitutionally obtained evidence must be excluded under section 35(5), if admission will result in an unfair trial or otherwise be detrimental to the administration of justice. A review of the section 35(5) case law reveals that in certain decisions, the evidence was excluded, whereas in others, the evidence was ruled admissible, without a clear distinction between the circumstances of the relevant cases. The question arises whether such different decisions are consistent and predictable?

The main research focus of this thesis, is to discuss the questions mentioned as above and finding the answers to them.

¹⁶ *S v Sheehama* 1991 (2) SA 860 (A) at 881; *R v Camane* 1925 AD 575.

3. A BRIEF HISTORICAL BACKGROUND

3.1 Compelled evidence and the privilege against self-incrimination

By the early 1900s,¹⁷ when determining the admissibility of evidence, the South African courts were still employing the English common law principle that no one could be compelled to give evidence incriminating himself.¹⁸ If the accused was forced to incriminate himself such evidence would be excluded, regardless of whether the compulsion took place before or during the trial. This principle applied to all evidence and as a result, even real evidence obtained against the accused in an unlawful manner would be excluded.¹⁹ The reliability of the evidence made no difference. For example, the court in *Maleleke*²⁰ ruled that real evidence obtained through compulsion was to be inadmissible. The finding was not based on a general principle that improperly obtained evidence was inadmissible.²¹ The Court treated the case through the privilege against self-incrimination, because of the way in which the evidence was obtained.²² The reason for the exclusion of such evidence being that it compelled an accused to convict himself, that it might open the door to abuse, as well as that it offended the public's sense of natural justice and fair play.²³

The Appellate Division in *Camane*²⁴ confirmed the common law principle that no one could be compelled to give evidence incriminating the individual either before or during the trial. However, the privilege against self-incrimination extended only to testimonial compulsion. The Court concluded that an accused may be compelled in court to show "his features, his complexion, his stature, mutilations, or marks on his body." The Court observed that evidence of this nature would be obtained whilst the accused was passive and thus not

¹⁷ *Roe v William Harvey* 1769 (98) ER 305; *Ibrahim v Rex* 1914 AC 599; *Rex v Voisin* 1918 (1) KB 531; see also *Wigmore Evidence* at sections 2250, 2263 and 1150; *Phipson Evidence* at 263; *Taylor Evidence* at 267.

¹⁸ *R v Camane* 1925 AD 575.

¹⁹ *R v Goopurshad* 1914 (35) NLR 87; *R v Gama* 1916 EDL 34; *R v Maleleke* 1925 TPD 491; *R v B* 1933 OPD 139.

²⁰ *R v Maleleke* 1925 TPD 491.

²¹ Zeffertt and Paizes *Law of evidence* at 716-717.

²² *R v Maleleke* 1925 TPD 491; see also *R v Goopurshad* 1914 (35) (NLR) 89: The court excluded fingerprints obtained through compulsion. See also Du Toit *et al Criminal Procedure* at 3-3: "The common law distinction between testimonial communications and non testimonial ascertainment of bodily features (the establishment of real evidence as it were) was not appreciated in earlier South African decisions"; Schwikkard and Van der Merwe *Principles of evidence* at 134.

²³ *R v Maleleke* 1925 TPD 491 at 534.

²⁴ *R v Camane* 1925 AD 570.

testimonial compulsion.²⁵ The Court reasoned that the kernel of the privilege against self-incrimination was not merely compulsion, but *testimonial* compulsion.

The question whether compelled real evidence could be self-incriminating at all was considered in *Matemba*.²⁶ *In casu*, the prosecution tendered the palm print of the accused, which was obtained without his consent. This evidence was employed to prove that the accused was the person who had left his palm print on the windowsill, which identified him as the person who had broken into the premises. The court *a quo* excluded the evidence on the grounds that an accused person could not be compelled to furnish evidence against himself in the absence of a statutory authorisation. Real evidence obtained in this manner could not be used against an accused person. The Appellate Division held that the reasoning of the court *a quo* obscured the real issues and was not an accurate exposition of the law. The legality of the methods used to obtain the evidence is one matter and the question of admissibility is another. These questions should be kept separate and not joined as the court *a quo* did when it said that an accused person could not be compelled to furnish evidence against himself. The Appellate Division concluded that there was nothing illegal in the way the evidence was obtained. The Court reasoned that it was unnecessary to decide the question of legality as section 2 of Act 39 of 1926 authorised a peace officer to take the palm prints of an arrested person.

The Court considered whether evidence obtained through compulsion was admissible. Evidence obtained through compulsion could, under the English common law, be excluded in terms of two separate and distinct principles. The first was the maxim *nemo tenetur se ipsum prodere* (or *accusare*) and the second the rule which excluded an extra-judicial confession by an accused person, unless such confession was freely and voluntarily made.²⁷ The *nemo tenetur* maxim forbade an attempt to extract from an accused's lips an admission of his guilt. Again the Court concluded that privilege against self-incrimination extended to testimonial compulsion. The Court referred with approval to *Camane* and agreed that the mere giving of a fingerprint specimen did not make the accused a compellable witness against himself.²⁸ The forced taking of a fingerprint did not constitute testimony about his

²⁵ *R v Camane* 1925 AD 570 at 585.

²⁶ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75.

²⁷ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75 at 80-81.

²⁸ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75 at 82; see, in general, Du Toit *et al Criminal*

body, but of his body. If the evidence obtained did not amount to a communication, written or oral statement, upon which reliance was to be placed, as involving knowledge of the facts and the operations of his mind in expressing it, the demand made upon him was not a testimonial one.²⁹ The Court concluded that the common law privilege against self-incrimination applied to testimonial utterances only, and did not extend to real evidence.

The Court found that the second principle, the confession rule, prescribed the exclusion of confessions, specifically statements not freely and voluntarily made. The rationale for the exclusion of compelled confessions was the untrustworthiness of such evidence. The Court noted that an accused person was passive when a palm print was being taken. He is not compelled to give evidence or to confess any more than he is being compelled to give evidence or to 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. Therefore the Court concluded, neither the maxim *nemo tenetur se ipsum prodere* nor the confession-rule ruled out palm prints taken against a person's will.³⁰

3.2 Self-incrimination and pointing-out

Since *Matemba*, the courts more readily included real evidence obtained by improper means. This reasoning was used to justify admission of evidence of a thing or place pointed out by the accused, even when coerced.³¹

The Appellate Division in *Sheehama*,³² however rejected this reasoning. In the present case the Court had to decide whether the evidence regarding "a pointing out" was admissible, if it was obtained involuntary and by force. The Court confirmed the difference between actions and statements. Evidence of a thing or place pointed-out, even if the pointing-out was coerced, was admissible.³³ On the other hand a confession or admission obtained

procedure at 3-8.

²⁹ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75 at 82.

³⁰ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75 at 82-83.

³¹ Schwikkard and Van der Merwe *Principles of evidence* at 135; *R v Samhando* 1943 AD 608 at 611-615; *S v Tsotsobe* 1983 (1) SA 856 (A) at 864-865; *S v Shezi* 1985 (3) SA 900 (A) at 906-907; *S v Sheehama* 1991 (2) SA 860 (A) at 877.

³² *S v Sheehama* 1991 (2) SA 860 (A).

³³ *S v Ismail* (1) 1965 (1) SA 446 (N) at 450; *S v Shezi* 1985 (3) SA 900 (A) at 906-907; *S v Tsotsobe* 1983 (1) SA 856 (A) at 864-865; *R v Duetsimi* 1950 (3) SA 674 (A) at 677.

through coercion was inadmissible.³⁴ The Court proceeded to review existing case law on this point and noted as follows, The Appellate Division, in *Samhando*,³⁵ included evidence of a pointing out which formed part of an admission that was obtained through force. The pointing out in *Samhando* resulted in the discovery of the deceased blood spattered clothing. The Court included this evidence based on the so-called “theory of confirmation by subsequently discovered facts” which originated in England. This principle was an exception to the general rule that statements by an accused should be free and voluntary. The reasoning was that the justification for exclusion –the unreliability of the evidence – vanishes if the admissions can be proved to be true by other evidence.³⁶ The fact or thing discovered as a result of coercion (so called “element of discovery”) provided the guarantee of truth and reliability. The Court in *Sheehama* emphasised that the *Samhando* exception was not applicable to the facts of *Sheehama* because the appellant did not point out anything that was not already in the public domain.³⁷

The Appellate Division distinguished *Duetsimi*³⁸ from *Samhando* when the court held that evidence of a pointing out is inadmissible, if the pointing out formed part of an inadmissible confession.³⁹ In *Duetsimi* evidence connected with a crime was not discovered as a result of a pointing out but as a result of information given by the accused in a statement. The confession was ruled inadmissible because it was not made in the presence of a peace officer and not because it was obtained involuntarily or by force. The effect of *Duetsimi* was neutralised by the successive amendments to the Criminal Procedure Act.⁴⁰ Evidence of a pointing out that was inadmissible if obtained in similar circumstances to *Duetsimi* was, in terms of the amendments, made admissible. The question arose whether section 245(2) of the Criminal Procedure Act, 1955 made admissible evidence of a pointing out obtained by

³⁴ *S v Sheehama* 1991 (2) SA 860 (A) at 877; see also *R v Samhando* 1943 AD 608 at 611-615; *S v Shezi* 1985 (3) SA 900 (A) at 906-907.

³⁵ *R v Samhando* 1943 AD 608.

³⁶ *R v Samhando* 1943 AD 608 at 613.

³⁷ *S v Sheehama* 1991 (2) SA 860 (A) at 877-878.

³⁸ *R v Duetsimi* 1950 (3) SA 674 (A).

³⁹ *R v Duetsimi* 1950 (3) SA 674 (A) at 677: “It seems to be clear that all the pointing out was part of a single course of conduct, and if it was an elaboration of an inadmissible confession the whole of it should have been excluded.”

⁴⁰ Section 274 of Act of 1917 was superseded by section 42 of Act 29 of 1955 which in turn was superseded by section 245(2) of Criminal Procedure Act 56 of 1955 which has since been superseded by section 218(2) of the Criminal Procedure Act 51 of 1977.

force. In *Ismail*⁴¹ and cases following it,⁴² the High Court stated that section 245(2) confirmed *Samhando*, and further extended its (*Samhando's*) impact to situations where pointing outs form part of an inadmissible confession.⁴³

The Court in *Sheehama* disagreed that evidence of a forced pointing out is admissible. The Court reasoned as follows.

Firstly, the court ruled that a pointing out is in principle an admission. The Court reasoned that a pointing out was in essence a “communication by conduct”- a statement by the person making a pointing out. The Court noted that this was consistent with the reasoning adopted in *Camane*⁴⁴ when the court stated that an accused cannot be forced to point out evidence against his will. The court in *Sheehama* concluded that *Camane* is authority that evidence obtained by means of a forced pointing out is inadmissible.⁴⁵ The Court argued further that it was possible that a pointing out under certain circumstances could be an extra-curial admission by the accused and as such must in terms of the common law and section 219A of the Criminal Procedure Act, 1977, be freely and voluntarily obtained.

Secondly the Court considered the provisions of section 218(2) of the Criminal Procedure Act, 1977. The Court held that section 218(2) provided that evidence of a pointing out could be admissible if it forms part of an inadmissible statement and not that it must be admitted.⁴⁶ The section does not provide the court with any form of discretion to exclude or include evidence of a pointing out, but that the court could exclude evidence of a pointing out on material grounds of inadmissibility. In other words, if evidence of a pointing out would otherwise be inadmissible it will not be admissible because it forms part of an inadmissible confession. The Court ruled that evidence of a pointing out was therefore inadmissible if obtained through force. This was the case also when the pointing out formed part of an inadmissible confession or admission.⁴⁷

⁴¹ *S v Ismail* (1) 1965 (1) SA 446 (N).

⁴² *S v Shezi* 1985 (3) SA 900 (A); *S v Tsotsobe* 1983 (1) SA 856 (A).

⁴³ *S v Sheehama* 1991 (2) SA 860 (A) at 878-879.

⁴⁴ *R v Camane* 1925 AD 570 at 575: “Now, evidence may be oral or written, or it may even be by signs or gestures. If a man accused of theft leads an investigator to the spot where the stolen property is found, and points to it, that is as much evidence as if he said ‘There it is’. And he cannot be forced to do that.”

⁴⁵ *S v Sheehama* 1991 (2) SA 860 (A) at 879.

⁴⁶ *S v Sheehama* 1991 (2) SA 860 (A) at 880.

⁴⁷ *S v Sheehama* 1991 (2) SA 860 (A) at 880-881.

Finally, the Court concluded that decisions that advocated that pointing outs do not amount to an extra-curial admission and that the evidence of a forced pointing out is admissible, were clearly wrong.⁴⁸ The Court rejected the previous decisions not only on legal grounds but also normative considerations. In respect of the latter the Court stated that there existed a fundamental objection to the admissibility of evidence obtained through coerced pointings out.⁴⁹ Evidence of a pointing out was therefore inadmissible if obtained through force. The Court by ruling that the pointing out is a “communication by conduct” attempted to bridge the gap between testimonial and non-testimonial evidence.

*January*⁵⁰ is a case which followed on *Sheehama* and which took the *Sheehama* development further. The question considered in *January* is whether proof of an involuntary pointing out by the accused is admissible in a criminal trial if something relevant to the charge is discovered as a result thereof.⁵¹ In *Sheehama* nothing was discovered as a result of the involuntary pointing out and the Court accordingly refrained from expressing a view on the admissibility of evidence of a pointing out covered by the *Samhando* exception.⁵² The Court in *January* stated that it was difficult to reconcile the reasoning in *Sheehama* with the recognition of the *Samhando* exception, unless section 219A of the Criminal Procedure Act, 1977 preserved the common law as set out in *Samhando* or that a provision in the Criminal Procedure Act rendered admissible an involuntary admission leading to the discovery of a relevant thing. The Court proceeded to consider whether the ruling in *Duetsimi* is still applicable⁵³ - namely that evidence of a pointing out is inadmissible if the pointing out is part of a single course of conduct and if it was an elaboration of an inadmissible confession. The Court found it unnecessary to consider whether the decision in *Samhando* was clearly wrong. The Court arrived at its decision without referring to any provision in the Constitution. The Court accepted that *Samhando* correctly gave effect to the English law of evidence – insofar as an involuntary pointing out was concerned - and that the law did not change before 31 May 1961.⁵⁴ The Court considered the meaning of section 219A. Section

⁴⁸ *S v Sheehama* 1991 (2) SA 860 (A) at 880.

⁴⁹ *S v Sheehama* 1991 (2) SA 860 (A) at 880.

⁵⁰ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 806.

⁵¹ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 802.

⁵² *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 805.

⁵³ *R v Duetsimi* 1950 (3) SA 674 (A) at 677.

⁵⁴ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 806.

219A had no precursor in the 1917⁵⁵ and 1955⁵⁶ Acts, nor did the initial 1977 Act⁵⁷ as originally enacted contain a similar section. Section 219A stated that evidence of an extra-judicial admission by an accused is admissible in evidence against him provided that it is proved to have been voluntarily made. Based on the words of the section, evidence of an involuntary admission is inadmissible and linguistically the subsection permits no exception.⁵⁸ The Court concluded that section 219A (1) does not preserve the *Samhando* exception. Proof of a pointing out by an accused which is involuntary by reason of something said or done by a person in authority, is inadmissible in a criminal trial even if something relevant to the charge is discovered as a result thereof.⁵⁹ The Court further reasoned that its decision was also based on policy. The Court noted that in the last century there had been a marked shift in the justification for excluding evidence of involuntary confessions and admissions- and it is now firmly established in English law that an important reason was one of policy.⁶⁰ The involuntary statements were inadmissible because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions.⁶¹

3.3 Section 37: Self-incrimination distinguished from evidence of bodily features

At common law no person may be compelled to produce evidence that incriminates himself, either before or during the trial.⁶² It is not mere compulsion but testimonial compulsion that forms the kernel of the rule. Therefore, the person might be compelled to furnish autoptic evidence, where he is passive and required to produce such things as his physical features. Section 37 of the Criminal Procedure Act, 1977 authorise the police to ascertain prints and bodily appearance against the will of an accused. These provisions are reinforced by section 225 which, inter alia, determines that evidence shall not be inadmissible by reason only of the fact that the evidence in question was not obtained in accordance with section 37,⁶³ and

⁵⁵ Criminal Procedure and Evidence Act, 1917.

⁵⁶ Criminal Procedure Act, 1955.

⁵⁷ Criminal Procedure Act, 1977.

⁵⁸ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 806-807.

⁵⁹ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 807-808.

⁶⁰ *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801 (A) at 807; Referring to *Wong Kam-ming v The Queen* [1980] AC 247 (PC) 261.

⁶¹ *S v Khumalo* 1992 SACR 411 (N); *January; Prokureur-Generaal, Natal v Khumalo* 1994 (2) SACR 801; see also *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 23.

⁶² Zeffertt and Paizes *Law of evidence* at 731.

⁶³ Section 225 (1).

that the admissibility of such evidence is not affected by the fact that it was taken or ascertained against the wish or will of the accused concerned.⁶⁴

Early South African decisions suggested that the effect of section 37 was to exclude the common law *maxim nemo tenetur se ipsum accusare* from the ascertainment of bodily features.⁶⁵ The maxim does not infringe this rule - no person may be compelled to supply evidence that incriminates him, either before or during the trial - because at common law the maxim was applicable neither to procedures relating to the ascertainment of bodily features nor to the taking of blood samples.⁶⁶ It follows that section 37 should not be interpreted in the light of the common-law privilege against self-incrimination which is embodied in the maxim.⁶⁷ The privilege against self-incrimination was limited to testimonial utterances or communications and did not extend to real evidence emanating from an accused. In essence a distinction was made between being obliged to make a statement against interest and the ascertainment of bodily features.⁶⁸

4. RESEARCH METHODS AND SOURCES

The literature study and comparative legal methods are used in this thesis to answer the problem question. Both research designs (literature study and comparative legal method) are sufficient for doctoral studies in law.⁶⁹ The research methods are appropriate to address the gap presented in the research questions.

⁶⁴ Section 225 (2).

⁶⁵ See, in general, Du Toit *et al Criminal procedure* at 3-2.

⁶⁶ See generally *Seetal v Pravitha* 1983 (3) SA 827 (D) 830 (H) and 846 (H)–847 (C) where *Schmerber v California* 384 US 757 (1966) was cited with apparent approval by Didcott J.

⁶⁷ Du Toit *et al Criminal procedure* at 3-2 to 3-3: “The common-law ambit of the privilege against self-incrimination is confined to communications, whereas Chapter 3 deals with the ascertainment of an accused's bodily or physical features or conditions which are not obtained as a result of a communication emanating from the accused.”; see also *Nkosi v Barlow* 1984 (3) SA 148 (T) at 154; *S v Duna* 1984 (2) SA 591 (C) at 595G–H and 596B; *S v Binta* 1993 (2) SACR 553 (C) at 562d–e.

⁶⁸ *S v Binta* 1993 (2) SACR 553 (C) at 562d–e.

⁶⁹ Bryant *The portable dissertation* at 61-94 and 100-108; Hofstee *Constructing a good dissertation* at 112,117-118,120-122; see in general Roberts *The dissertation journey* at 110-111; Badenhorst *Dissertation writing* at 155; Venter *et al Regsnavoring* at 221; Mouton *Master's and Doctoral studies* at 49 and 86.

4.1 Literature study

The purpose of the literature study is to gain a proper understanding and provide an overview of the scholarship on the field of study.⁷⁰ Although literature study is not a suitable dissertation research design for purposes of producing anything substantially new, it is commonly used in the legal field because it can produce a new perspective on what has gone before.⁷¹ Sources used for the current student are legislation and case law, and secondary literature such as books, journals and dissertations.⁷² The literature was analysed, interpreted and the findings used in the development of the arguments.

4.2 Comparative legal study

4.2.1 Appropriateness of method

The comparative method is generally used to resolve specific legal problems. Comparative method involves the comparison of different legal systems with the purpose to find solutions or new legal developments or to compare similar legal rules or problems.⁷³ Venter argues that it is virtually impossible to imagine work of a jurisprudential nature without a comparative basis.⁷⁴ The appropriateness of a comparative analysis is confirmed in *Bernstein*⁷⁵ when the Court noted its usefulness especially where foreign courts have grappled with the same issues confronting our courts. The Court also warned that it would be folly to ignore interpretations of similar provisions especially if a constitutional provision is manifestly modelled on a particular provision in another country's constitution.

In this thesis the legal system of South Africa is compared with some foreign jurisdictions. The purpose is to identify an appropriate guide for the exclusionary test in section 35(5) and concepts with comparable meanings. In order to achieve such an end it was necessary to obtain information on the content of the applicable foreign legal rules; to analyse the legal

⁷⁰ Hofstee *Constructing a good dissertation* at 121.

⁷¹ Hofstee *Constructing a good dissertation* at 121-122; Bryant *The portable dissertation* at 62.

⁷² Hofstee *Constructing a good dissertation* at 121.

⁷³ Venter *et al Regnavorsing* at 209-213.

⁷⁴ Bryant *The portable dissertation* at 61-94, 108; Hofstee *Constructing a good dissertation* at 112, 120-122; see in general Roberts *The dissertation journey* at 110-111; Badenhorst *Dissertation Writing* at 155; Venter *et al Regnavorsing* at 221.

⁷⁵ *Bernstein v Bester* 1996 (2) SA 751 (CC).

rules in order to understand their full impact in their own legal system; to distinguish the similarities and differences existing between the legal rules in South Africa and those of the foreign systems were considered.

4.2.2 Countries chosen for comparison

This study compares the exclusionary provisions and the laws related to exclusions in the legal systems of South Africa, Canada, United States of America and Namibia. These countries' legal systems share a common legal-historic past in that its evidentiary rules and procedures are directly or indirectly traced to the English common law. They all form part of the so-called Anglo-American law of evidence family and employ adversarial trial proceedings. All these countries abandoned parliamentary sovereignty at some stage in their history, and adopted a written constitution as the supreme law. To a greater or lesser degree, they thereby distanced themselves from the common law inclusionary approach. Canada employ an exclusionary rule expressly provided for in its Constitution, whereas Namibia and the United States of America apply a judicially created exclusionary rule.⁷⁶

The study considers case law in South Africa, Canada, United States of America and Namibia as available on 30 November 2013.

5 THE NATURE OF REAL EVIDENCE: ATTEMPTING A DEFINITION

The central focus of this thesis is to explore how the courts in South Africa should approach the admissibility of real evidence unconstitutionally obtained. Real evidence consists of things (objects), which upon proper identification becomes, of itself, evidence.⁷⁷ Examples of real evidence are a knife, photograph, voice recording, letter or even the appearance of a

⁷⁶ Schwikkard and Van der Merwe *Principles of evidence* at 31.

⁷⁷ Schwikkard and Van der Merwe *Principles of evidence* at 395 referring to definition in *S v M* 2002 (2) SACR 411 (SCA); Sopinka, Lederman and Bryant *The law of evidence in Canada* at 17; see also Nokes 1949 *TLQR* 57 at 59 and 64: "Though definition proves elusive, it is suggested that real evidence might be described as (1) the physical appearance and demeanour of witnesses when in court, and of other persons and animals present in the court or its precincts for examination by the tribunal; (2) material objects, other than those deemed to be documents, produced for such examination; and (3) any place, property or thing which is lawfully examined by the tribunal out of court."; Zeffertt and Paizes *Law of evidence* at 849: "The evidence is usually intended for the court to look at, but it may also listen, smell, taste or feel. The judge is entitled to rely upon his or her own perceptions and to draw such inferences as may reasonably be drawn without the need for expert qualifications."; Schutte 2000 *SACJ* 57; Ally *Constitutional exclusion* at 299; *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 22.

witness in the witness box. In most cases real evidence should be supplemented by the testimony of witnesses to be of assistance to the court.⁷⁸ Sopinka *et al* argue that in its widest sense real evidence includes any evidence where the court acts as a witness through the use of its own senses to make observations and draw conclusions rather than relying on the testimony of a witness.⁷⁹

Real evidence can, for the purposes of this thesis, be further sub-divided into non-bodily objects; bodily features; and derivative real evidence.

5.1 Non-bodily real evidence

Non-bodily real evidence could be in the form of a weapon,⁸⁰ money,⁸¹ photographic image,⁸² letters,⁸³ motor vehicles and metal boxes.⁸⁴

5.2 Bodily evidence

Bodily evidence (or autoptic evidence) emanates from the body of the accused or any third party and includes evidence derived from a sample of blood,⁸⁵ hair samples, fingerprints and bodyprints,⁸⁶ voice samples,⁸⁷ buccal and DNA samples⁸⁸ and even a bullet surgically removed from the body of a suspect.⁸⁹ In *Gaqa*⁹⁰ the court reasoned that while a bullet is clearly not a mark, characteristic or distinguishing feature of the respondent's body, a police officer may nevertheless take the necessary steps to determine whether a person's body shows the bullet – which constitutes a condition or appearance under section 37(1)(c) of the

⁷⁸ Zeffertt and Paizes *Law of evidence* at 849; Schwikkard and Van der Merwe *Principles of evidence* at 396.

⁷⁹ Sopinka, Lederman and Bryant *The law of evidence in Canada* at 17; Zeffertt and Paizes *Law of evidence* at 849; Schutte 2000 SACJ 57; Ally *Constitutional exclusion* at 299; *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 22.

⁸⁰ *S v Tandwa* 2008 (1) SACR 613 (SCA); see also *S v Madiba* 1998 (1) BCLR 38 (D).

⁸¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 78; *S v Tandwa* 2008 (1) SACR 613 (SCA).

⁸² Section 37(d) of Criminal Procedure Act, 1977.

⁸³ *S v M* 2002 (2) SACR 411 (SCA) at para 31.

⁸⁴ *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 21.

⁸⁵ *S v Orrie* 2004 (1) SACR 162 (C).

⁸⁶ *S v Huma* (2) 1995 (2) SACR 411 (W); see also sections 36B and 36C of Criminal Procedure Act, as amended by the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

⁸⁷ *Levack v Regional Magistrate, Wynberg* 2003 (1) SACR 187 (SCA).

⁸⁸ See the proposed amendments in terms of the Criminal Law (Forensic Procedures) Amendment Bill [B9-2013].

⁸⁹ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); see also *Minister of Safety and Security v Xaba* 2004 (1) SACR 149 (D).

⁹⁰ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

Criminal Procedure Act.⁹¹ Section 37 permits an official to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance.

5.3 Derivative real evidence

Derivative real evidence is evidence discovered as a result of information gleaned from compelled self-incriminating statement which includes a statement by conduct⁹² obtained in violation of a fundamental right.⁹³ The Supreme Court of Appeal in a number of cases considered the aspect of derivative evidence. In *Tandwa*⁹⁴ the court held that the money discovered by the police was derivative evidence because it was procured as a result of information provided in a coerced testimonial communication made by the accused whose rights were violated by the deliberate and flagrant conduct of the police. Similarly in *Mthembu*⁹⁵ the court held that the evidence (a Toyota Hilux and a metal box) was derivative real evidence because the evidence was discovered as a result of information in a testimonial communication which was precipitated by torture and assaults. In *Pillay*⁹⁶ the money discovered in the ceiling of the accused was considered derivative evidence. *In casu* the police raided the accused's house. When the police entered the house they informed the accused that they intended to use her and the members of the family as witnesses. This induced the accused to make the statement that led to the discovery of the money. The Court held that the money was derivative evidence because it was discovered because of statements made by the accused; statements which were obtained in violation of the accused's rights to privacy, to silence and not to incriminate herself.

6 LIMITATIONS TO THIS STUDY

This thesis is limited to a detailed analysis of the admissibility of real evidence and does not address issues related to testimonial evidence only. Reference is made to concepts such as

⁹¹ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 658.

⁹² *S v Sheehama* 1991 (2) SA 860 (A).

⁹³ Schwikkard and Van der Merwe *Principles of evidence* at 241-242; *S v Pillay* 2004 (2) SACR 419 (SCA); Zeffertt and Paizes *Law of evidence* at 729.

⁹⁴ *S v Tandwa* 2008 (1) SACR 613 (SCA).

⁹⁵ *S v Mthembu* 2008 (2) SACR 407 (SCA).

⁹⁶ *S v Pillay* 2004 (2) SACR 419 (SCA).

the common law, testimonial evidence and the privilege against self-incrimination, however, the referencing is only briefly mentioned. The common law analysis is specifically limited to the distinction between testimonial and real evidence. Similarly reference is made of sections 36, 35(3) of the Constitution, as well as section 37 of the Criminal Procedure Act 51 of 1977. The discussion of these sections in the Constitution and the Criminal Procedure Act is not comprehensive. The provisions is only included in the context of determining the question to the admissibility of unconstitutionally obtained real evidence. It follows that the recent legislative amendments introduced by the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010,⁹⁷ dealing with the procedural aspects relevant to the ascertainment and custody of evidence, falls beyond the ambit of this thesis.

7 SUMMARY

The overarching issue addressed in this thesis is the impact of fundamental rights on the law of evidence. The focal point is to explore whether the common law distinction between real and testimonial evidence is applied or should be applied when evaluating the admissibility of real evidence under section 35(5) of the Constitution. The focus is on real evidence because testimonial evidence has been the subject of substantial research already, while real evidence is still in the process of development.⁹⁸

The scope, application and interpretation of section 35(5) are explored with the view to determine factors relevant to a determination of unconstitutionally obtained real evidence only. This is done firstly by considering the rationale for the exclusionary rule in general, and then to consider in detail what the current legal position is regarding the exclusion or otherwise of real evidence that has been obtained in an unconstitutional manner in the chosen jurisdictions: South Africa (Ch 3), Canada (Ch 4), the United States of America (Ch 5) and Namibia (Ch 6). The final chapter (Ch 7) contains the conclusions and recommendations.

⁹⁷ Section 2 inserted ss 36A, 36B and s 36C into the Act; and section 3 of Act 6 of 2010 amended the existing section 37 of the Act.

⁹⁸ Schwikkard and Van der Merwe *Principles of evidence*; Langenhoven *Ongrondwetlik verkreë getuienis*; Zeffertt and Paizes *Law of evidence*; Ally *Constitutional exclusion*; *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 22.

CHAPTER 2

THE RATIONALE FOR THE EXCLUSIONARY RULE

1. INTRODUCTION

There is a general consensus that the exclusionary rule's¹ function is to provide a legal framework for determining the circumstances under which unconstitutionally or illegally obtained evidence, may be excluded in criminal proceedings.² The exclusionary rule is not considered a remedy of the particular accused, but it seeks to discourage the unconstitutional obtainment of evidence.³

Evidence obtained by law enforcement authorities, by means which violate rules or principles established by the constitution, other statutes or the courts of any jurisdiction will, because of the exclusionary rule, generally be inadmissible in a court of law.⁴ However, as noted in Chapter 1, South African courts delivered diverse judgments concerning the appropriate application of the exclusionary rule as specified in section 35(5) of the Constitution.⁵

The uniform application of the exclusionary rule requires agreement about the foundational rationale of the exclusionary rule.⁶ In other words, the proper scope of the exclusionary rule can be settled only after a clear understanding of its rationale.⁷ In the absence of a settled rationale for the exclusionary rule our courts will be plagued by uncertainty in terms of its scope. This problem contributes to an uncertain legal framework for determining the circumstances under which unconstitutionally obtained evidence, could be excluded in

¹ In this thesis "exclusionary rule" means a rule which excludes real, documentary and oral evidence unconstitutionally obtained by evidence gatherers responsible for the prevention, detection, investigation and prosecution of crime. This definition is derived from Van der Merwe 1992 *Stell LR* 173 at 175.

² *Herring v US* 555 US 135 (2009); Heffernan and Lovely 1991 *University of Michigan JL Reform* 311; Shanks 1983 *Tulane LR* 648; Canon 1982 *South Texas LJ* 559 at 571; Schlesinger and Wilson 1980 *Duquesne LR* 225 at 226 .

³ Davies 2002 *Criminal LQ* 21 at 30.

⁴ *Herring v US* 555 US 135 (2009); *US v Leon* 468 US 897 (1984); Brinegar 1981 *Vanderbilt LR* 213; *US v Calandra* 414 US 338 (1974); Oaks 1970; *University of Chicago LR* 665.

⁵ *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Mthembu* 2008 (2) SACR 407 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA); *S v Naidoo* 1998 (1) SACR 479 (N).

⁶ Ally *Constitutional exclusion* at 33.

⁷ Mellifont *The derivative imperative* at 19; Schlesinger and Wilson 1980 *Duquesne LR* 225 at 226.

criminal proceedings. The result is the indiscriminate application of the exclusionary rule and the potential erosion of the integrity of the legal system.

Extensive research has been done in South Africa and beyond our borders on the rationale for the exclusionary rule.⁸ It is unnecessary to repeat such research in detail, but I refer to several of these authorities in order to determine how court decisions on the admissibility of unconstitutionally obtained evidence are affected in South Africa, by the rationale used by the court for exclusion. The final purpose of this determination is to establish how the admissibility of real evidence is affected.

2. RATIONALES FOR THE EXCLUSIONARY RULE

The applicable rationale determines the scope and impact of the exclusionary rule and provides the justification as to why relevant real evidence is in certain instances excluded or included.⁹ I use the descriptor “rationale” to include principles, purposes, objectives, aims, and theoretical or philosophical underpinnings of exclusion.

During the period of the Constitution of the Republic of South Africa, 1993 the courts developed an exclusionary remedy in criminal trials.¹⁰ The exclusionary remedy was brought about by a combination of the deterrence rationale, remedial imperative and judicial integrity rationale, which are the main rationales put forward by various commentators.¹¹ Since the introduction of section 35(5) in the Constitution of the Republic of South Africa, 1996 the South African courts employed one or more of the rationales for excluding unconstitutionally obtained real evidence.

The effect of each rationale invariably creates a different end result. The rationale of the remedial imperative, or corrective justice, proceeds from the premise that an unfair advantage achieved by the prosecution, by rights infringements, must be undone by the

⁸ *Ally Constitutional exclusion*; Langenhoven *Ongrondwetlik verkreë getuienis*; Schwikkard and Van der Merwe *Principles of evidence*; Zeffertt and Paizes *Law of evidence*; Van der Merwe 1992 *Stell LR* 173.

⁹ *Ally Constitutional exclusion*; Mellifont *The derivative imperative* at 17.

⁹ Mellifont *The derivative imperative* at 16.

¹⁰ See Chapter 1 at para 1.

¹¹ *Ally Constitutional exclusion* at 84; *S v Tandwa* 2008 (1) SACR 613 (SCA); Davies 2002 *Criminal LQ* 21 at 30; Schwikkard and Van der Merwe *Principles of evidence* at 189-194; Oaks 1970 *University of Chicago LR* 665 at 668; Zeffertt and Paizes *Law of evidence* at 712.

removal of the effects of any such advantage.¹² The objective of the deterrent rationale is to deter the future unconstitutional conduct of state agents. Emphasis is therefore laid on the disciplinary function of the courts.¹³ Deterrence should not be viewed in a narrow sense - meaning the exclusionary rule does not inflict punishment on police who violate fundamental rights (immediate deterrence). Deterrence should instead be viewed in the light of the exclusionary rule's "educative" role and ultimate preventive effect.¹⁴ The educative function is performed when courts in its judgments fashion public opinion, rather than expressing it. The exclusionary rule prevents constitutional breaches because it provides an incentive for compliance.¹⁵ The aim of the judicial integrity rationale, is to dissociate the courts (protect its integrity) from the constitutional rights violations against the accused during criminal investigations.¹⁶

It is evident that there is some overlap between the rationales.¹⁷ The rationales in essence share a concern about rights protection and because thereof, should not necessarily always be divided into completely separate compartments.

2.1 The Deterrence Rationale

Supporters of this rationale argue that the purpose of the exclusionary rule is to deter police misconduct. Deterrence is achieved because the police will not act unconstitutionally or illegally, if they cannot get any benefit from that action. Put differently, if the unconstitutional conduct does not assist the police, they will refrain from such conduct.

2.1.1 Origin of the deterrence rationale

The historical development of the deterrence rationale can be traced back to the United States Supreme Court judgment of *Elkins*.¹⁸ The Court held that it was the purpose of the exclusionary rule to deter (to compel respect for the constitutional guarantee in the only

¹² *Ally Constitutional exclusion* at 39-40; see also Van der Merwe 1992 *Stell LR* 173.

¹³ *Ally Constitutional exclusion* at 42.

¹⁴ Schwikkard and Van der Merwe *Principles of evidence* at 189.

¹⁵ Schwikkard and Van der Merwe *Principles of evidence* at 190.

¹⁶ Naudé 2008 *SACJ* 168 at 182 fn 65; Van der Merwe 1992 *Stell LR* 173 at 190.

¹⁷ Van der Merwe 1992 *Stell LR* 173 at 190: The author argues that deterrence is largely a by-product of the judicial integrity rationale.

¹⁸ *Elkins v US* 364 US 206 (1960).

effectively available way) by removing the incentive to disregard it.¹⁹ The Supreme Court has in subsequent cases affirmed that the purpose of the exclusionary rule is to deter.²⁰

2.1.2 Objectives of deterrence

The deterrence rationale encompasses two different objectives.²¹ First it seeks to discipline police officers who obtained evidence unconstitutionally, by excluding that evidence.²² The second is to deter future misconduct by police in the evidence gathering phase.²³ Although there might be a theoretical difference between the objectives of the rationale it is argued that they are inextricably linked: it is the discipline that creates the deterrence.²⁴

South African legal commentators differ on the importance of the deterrence rationale. Naudé argues that the exclusionary rule is mainly there to prevent or deter the violation of constitutionally guaranteed rights.²⁵ This, he claims, will ensure that the police and prosecution will act with due regard of a person's civil liberties and ensure adherence to due processes. The rationale will also ensure that the courts act according to their constitutional duty and contribute to upholding of constitutional principles which govern the criminal justice system.²⁶ Ally argues that in order for exclusion to serve as an effective deterrent, a constitutional violation must necessarily lead to exclusion, which leaves no room for discretion. However, since section 35(5) leaves a court with discretion when considering whether exclusion would be unfair or detrimental to the administration of justice, he concludes, this rationale is not determinative of the admissibility assessment under section 35(5).²⁷

Section 35(5) should be interpreted with all three of the primary rationales in mind. Factual circumstances may arise which require aspects of section 35(5) to be interpreted with a

¹⁹ *Elkins v US* 364 US 206 (1960) at 217-220; Shanks 1983 *Tulane LR* 648 at 679.

²⁰ *Herring v US* 555 US 135 (2009); *US v Leon* 468 US 897 (1984) at 920: "By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused."; see in general Heffernan 1989 *Wisconsin LR* 1193-1254.

²¹ Zeffertt and Paizes *Law of evidence* at 712.

²² Mellifont *The derivative imperative* at 41; see also Zeffertt and Paizes *Law of evidence* at 712.

²³ Mellifont *The derivative imperative* at 42.

²⁴ Mellifont *The derivative imperative* at 42.

²⁵ Naudé 2008 *SACJ* 168 at 181.

²⁶ Naudé 2008 *SACJ* 168 at 181; see also *S v Melani* 1996 (1) *SACR* 141(E); *S v Malefo* 1998 (1) *SACR* 127 (WLD).

²⁷ Ally *Constitutional exclusion* at 41.

deterrence foremost in mind. Deterrence would not however be the only basis upon which unconstitutionally obtained evidence should be excluded: the discretionary test in section 35(5) is still the starting point.²⁸ Thus regardless of deterrence, unconstitutionally obtained evidence must be excluded, if it will render the trial unfair or otherwise be detrimental to the administration of justice.²⁹ Deterrence is not dependent on the certainty of exclusion.

2.1.3 Real evidence and the deterrence rationale

The South African courts in certain circumstances, when determining the admissibility of unconstitutionally obtained real evidence, premise the application of the exclusionary remedy on the deterrence rationale. *Pillay*³⁰ states a case in point. In the Supreme Court of Appeal, the appellant disputed the admissibility of real evidence (money) discovered by the police in her home. The appellant alleged that the police had gained knowledge of the location of the money by means of having illegally monitored her telephone conversations. The prosecution conceded that the order to monitor the appellant's phone was obtained on false information contained in the supporting affidavit. The Court ruled that the monitoring order was illegally sought and obtained. The subsequent monitoring by the police was therefore illegal.³¹ The Court concluded that the real evidence was discovered as a result of a violation of the following constitutional rights. First, her right to privacy³² was violated in that her private communications were illegally monitored following the unlawful tapping of her telephone line. Secondly, her right to remain silent and her right against self-incrimination³³ were breached in that she was induced to make the statement that led to the finding of the money in the ceiling of her house.³⁴ The Court reasoned that inclusion of the evidence might create an incentive for law enforcement agents to disregard accused persons' constitutional rights.³⁵ Creating such an incentive, particularly where a judicial

²⁸ Naudé 2008 SACJ 168 at 182.

²⁹ Naudé 2008 SACJ 168 at 182.

³⁰ *S v Pillay* 2004 (2) SACR 419 (SCA).

³¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 77.

³² Section 14.

³³ Section 35(3)(h) and (j).

³⁴ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 85.

³⁵ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 98.

officer has been misled, was highly undesirable and admission would have harmed the administration of justice.³⁶

2.1.4 Weaknesses of the deterrent principle

The appropriateness of the deterrence rationale to the exclusionary rule has been interrogated by various legal commentators who identified specific inherent anomalies and weaknesses. I have only provided an overview of these comments. It should be noted that the weight of the different arguments are sometimes influenced by the particular procedures followed by the relevant jurisdiction. For example, the admissibility of evidence in the United States of America is determined during pre-trial motions, and the fact finders (the jury) are then never exposed to inadmissible evidence.³⁷

(a) Risk of Detection, Conviction and Punishment

The idea behind using the exclusionary rule as a deterrent is that law enforcement officers are penalised by excluding otherwise reliable evidence.³⁸ Legal commentators argue that the exclusionary rule appears to be subject to serious limitations in its direct deterrent effect upon improper police behaviour,³⁹ meaning that in practice this objective is not achieved. The arguments are the following.

Firstly, judgments of suppression of evidence invariably have no direct impact on police behaviour, as it normally does not directly sanction the policeman's illegal or unconstitutional conduct.⁴⁰ Similarly, the exclusionary rule does not hold any indirect sanction for the police officer, as the constitutional violation would in all likelihood have

³⁶ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 94.

³⁷ See Chapter 5 at para 2.1.

³⁸ *People v Defore* 242 NY 13, 21, 150 NE 585 (1926); *US v Leon* 468 US 897 (1984) at 942; *Herring v US* 555 US 135 (2009); Oaks 1970 *University of Chicago LR* 665 at 720.

³⁹ Naudé 2008 *SACJ* 168 at 183; Dripps 2010 *Fordham Urban LJ* 743 at 747-748: "If police seize evidence in violation of the Fourth Amendment, the evidence may be suppressed, but the police are not automatically fined or jailed."; see also Oaks 1970 *University of Chicago LR* 720; Mellifont *The derivative imperative* at 45; Kamisar 2003 *Harvard JL and Public Policy* 119 at 129-130.

⁴⁰ Dripps 2010 *Fordham Urban LJ* 743; Heffernan and Lovely 1991 *University of Michigan JL Reform* 311 at 325; Cann and Egbert 1980 *Howard LJ* 299 at 309: "Obviously, where the object of the police activity is not a trial and conviction there is no motivation to fear the consequences of the exclusionary rule." Oaks 1970 *University of Chicago LR* 665 at 726: "So far as police command control is concerned, it is a notorious fact that police are rarely, if ever, disciplined by their superiors merely because they have been guilty of illegal behaviour that caused evidence to be suppressed."

been forgotten by the time he learns of the judgment.⁴¹ The criticism that exclusion has no direct impact on police behaviour had been challenged by Kamisar. He argues that logic and intuition suggests that the exclusion of evidence and the concomitant loss of convictions must have some impact on the behaviour of police.⁴² One can reasonably assume that deterrence in the context of the exclusionary rule should have the same impact on police misconduct, as the rules of criminal law have on the conduct of the general public.⁴³ However, the exclusionary rule does not directly inflict punishment on the police. It cannot be expected that the exclusionary rule should deter the police the way criminal law is supposed to work.⁴⁴ The exclusionary rule influences the police -being members of a police department- by systemic deterrence through its institutional compliance with constitutional standards.⁴⁵ In certain situations the exclusion of evidence serves as a basis for performance evaluations which in turn cause police to increase skills levels which will ensure compliance with and respect for the law.⁴⁶ The argument that exclusion does not hold any indirect sanction does not have the same weight in South Africa. In *Mthembu*⁴⁷ the court found that the police treated the law with contempt and should be held accountable. The Court referred the judgment to the policemen's supervisors and prosecuting authorities for possible disciplinary, administrative or criminal action.⁴⁸

Secondly, the exclusionary rule as deterrent is limited to official actions which involve the procurement of evidence during investigations which result in a prosecution.⁴⁹ Evidence illegally and unconstitutionally obtained and not presented as evidence during a criminal trial, will therefore not be detected and penalised through the exclusionary rule. This means that the exclusionary rule will not operate in the critical pre-trial area of law enforcement.⁵⁰

⁴¹ Kaplan 1974 *Stanford LR* 1027 at 1032-1033; Oaks 1970 *University of Chicago LR* 665 at 725.

⁴² Naudé 2008 *SACJ* 168 at 183; Kamisar 1987 *Michigan LR* 1.

⁴³ Kamisar 1987 *Michigan LR* 1 at 34 fn 147; see also Dripps 2010 *Fordham Urban LJ* 743; Heffernan and Lovely 1991 *University of Michigan JL Reform* 311 at 360; Stewart 1983 *Columbia LR* 1365 at 1389; Oaks 1970 *University of Chicago LR* 665 at 720.

⁴⁴ Kamisar 1987 *Michigan LR* 1 at 34 fn 147; Stewart 1983 *Columbia LR* 1365 at 1395.

⁴⁵ Kamisar 1987 *Michigan LR* 1 at 34 fn 147; see also, Dripps 2010 *Fordham Urban LJ* 743 at 749-750; Naudé 2008 *SACJ* 168 at 183; *S v Soci* 1998 (2) *SACR* 275 E.

⁴⁶ Naudé 2008 *SACJ* 168 at 183.

⁴⁷ *S v Mthembu* 2008 (2) *SACR* 407 (SCA).

⁴⁸ *S v Mthembu* 2008 (2) *SACR* 407 (SCA) at para 39.

⁴⁹ *US v Leon* 468 US 897 (1984) at 953; *Terry v Ohio* 392 US 1 (1968) at 9-10; Stewart 1983 *Columbia LR* 1365 at 1395; Shanks 1983 *Tulane LR* 648 at 654; Dripps 2010 *Fordham Urban LJ* 743; Kamisar 2003 *Harvard JL and Public Policy* 119 at 126.

⁵⁰ Mellifont *The derivative imperative* at 46; *Eleuteri v Richman* 26 NJ 506 141 A 2d 46; *Elkins v US* 364 US 206

In these circumstances the court is precluded from detecting and pronouncing on the unlawful conduct of law enforcement agents. This is unlikely to happen in South Africa. The courts are more likely to detect and pronounce on this issue of exclusion, because the question of admissibility is dealt with during a trial-within-a-trial. In *Mthembu*⁵¹ the court excluded evidence obtained during investigation from an accomplice who was not prosecuted. *In casu* the prosecution failed to lead evidence regarding the circumstances under which the identification parade was held. Notwithstanding, the Court detected several irregularities regarding the identification parade, such as that the appellant was denied the presence of a legal representative; the persons in the parade did not have similar or related physical characteristics; they were not similarly dressed; they were not told that the suspect might not be present; and there was no evidence that the witness made a prior identification which bore any resemblance to the appellant.

Thirdly, an investigating officer would not be deterred if his misconduct would not lead to the gathering and subsequent inclusion of incriminating evidence against an accused.⁵² The exclusionary rule will therefore not be able to deter illegal conduct such as physical abuses of persons in custody, unnecessary destruction of property, illegal detentions (unless leading to the acquisition of evidence), taking or soliciting bribes and extorting money on threats of arrest or other sanctions.⁵³ This weakness is not applicable in South Africa. In *Mthembu*⁵⁴ the police assaulted the accomplice. As a result of the torture the accomplice pointed out the location of incriminating evidence. The accomplice was not prosecuted but his testimony and the evidence pointed out was used against the accused. The Court through exclusion deterred the physical abuses by the police even when the evidence obtained was not included in the trial of the accomplice.

(1960) 218; Oaks 1970 *University of Chicago LR* 665 at 720-721: "On the subject of conduct likely to result in prosecution, Chief Justice Warren made the point succinctly in *Terry v Ohio*: 'Regardless of how effective the rule may be where obtaining convictions is an important objective of the police,' it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal."; Kaplan 1974 *Stanford LR* 1027 at 1031.

⁵¹ *S v Mthembu* 2008 (2) SACR 407 (SCA).

⁵² Stewart 1983 *Columbia LR* 1365 at 1389.

⁵³ Stewart 1983 *Columbia LR* 1365 at 1389; Oaks 1970 *University of Chicago LR* 665 at 720; see also in general Dripps 2010 *Fordham Urban LJ* 743; Heffernan and Lovely 1991 *University of Michigan JL Reform* 311 at 360.

⁵⁴ *S v Mthembu* 2008 (2) SACR 407 (SCA).

The different procedures applicable in South Africa, gainsays much of the criticism originally formulated in the United States of America. Based on *Mthembu* the criticisms do not carry much weight and our courts are more likely to detect and pronounce on the issue than in the United States of America.

(b) Minimal correctional effect against the errant policeman

The impact of the exclusionary rule is misplaced being the second argument against deterrence as rationale and impacts negatively on the prosecutor who is attempting to obtain a conviction by seeking illegally obtained evidence to be admitted into evidence.⁵⁵ The implication is that the police transgress but the prosecutor is the one who suffers.

The question asked is to what extent this criticism also applies in South Africa. Here in South Africa the independence of the South African Police Services is guaranteed and entrenched in section 205 of the Constitution. The police have been established by national legislation which also provides for its powers and functions.⁵⁶ The legislative mandates of the police are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic as well as their property, furthermore to uphold and enforce the law.⁵⁷ Section 179 of the Constitution also provides for a single, independent National Prosecuting Authority. The National Prosecuting Authority has also been established in terms of the national legislation.⁵⁸ The powers of the prosecuting authority are to institute criminal proceedings on behalf of the state and perform functions incidental thereto.⁵⁹ In short, these departments are independent and have different functions because of their legislative mandates.

Because exclusion of evidence occurs during the criminal trial it appears to be most effective in deterring prosecutors from acting illegally. In *Coetzee*⁶⁰ the court opined that there are inherent dangers to the prosecution if they act contrary to undertakings not to prosecute, in

⁵⁵ *S v Mthembu* 2008 (2) SACR 407 (SCA); *Herring v US* 555 US 135 (2009) see Justice Ginsburg opinion at 11; *Oaks* 1970 *University of Chicago LR* 665 at 727; *Cann and Egbert* 1980 *Howard LJ* 299 at 310: "[T]he rule ignores the intent of the offender, and it is a single invariable sanction applied without regard for the gravity of the offense."

⁵⁶ South African Police Services Act 68 of 1995.

⁵⁷ Section 205(3) of the Constitution.

⁵⁸ National Prosecuting Authority Act 32 of 1998.

⁵⁹ Section 179(2) of the Constitution.

⁶⁰ *S v Coetzee* 1990 (2) SACR 534 (A).

return for the testimony of a suspect. The prosecutor should avoid any prejudice to the accused who previously agreed to be a witness. The implication is that the accused becomes a witness against himself. Any statements obtained from such a witness on the undertaking not to prosecute with a subsequent breach of the undertaking will result in the exclusion of the statement.⁶¹

It is arguable that the exclusionary rule has minimal correctional effect against the errant policeman.⁶² Legal commentators however discourage this narrow traditional view of deterrence and rather prefer to highlight its educative⁶³ and preventative effect instead of immediate deterrence.⁶⁴

(c) Competing norms of behaviour

The third argument against deterrence as rationale is that the impact of the exclusionary rule on police misconduct during the procurement of evidence is neutralised by the prevailing competing formal norms of police behaviour.⁶⁵ Even where the prosecution was unsuccessful due to the illegal action of the police the implicated police officer is assured of the support of his colleagues so long as he acted in conformity with administrative norms of the police organisation.⁶⁶ The exclusionary rule, although focused on the misbehaviour of the policeman, is oblivious to the fact that the policeman approaches his job with departmental expectations and with the fear of departmental discipline for improper

⁶¹ *S v Coetzee* 1990 (2) SACR 534 (A) at 541.

⁶² *S v Pillay* 2004 (2) SACR 419 (SCA) at 428; Oaks *University of Chicago LR* 665 at 727; Stewart 1983 *Columbia LR* 1365 at 1386: "Leonard Reisman, the former New York City Deputy Police Commissioner in charge of legal matters, in describing the effects of the *Mapp* case, said: 'The *Mapp* case was a shock to us. We had to reorganise our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the US Supreme Court had ruled that evidence obtained without a warrant-illegally if you will-was admissible in state courts. So the feeling was, why bother?'"

⁶³ See para 2.3.2 below.

⁶⁴ Schwikkard and Van der Merwe *Principles of evidence* at 189; Oaks 1970 *University of Chicago LR* 668; Kamisar 1987 *Michigan LR* 1 at 30: "Application of the exclusionary rule sometimes means that an apparently guilty defendant goes unpunished, but this occurs 'to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions...The innocent and society are the principal beneficiaries of the exclusionary rule.'"

⁶⁵ Stewart 1983 *Columbia LR* 1365 at 1399; Oaks 1970 *University of Chicago LR* 665 at 727: "Skolnick found that norms located within police organization are more powerful than court decisions in shaping police behaviour."

⁶⁶ Oaks 1970 *University of Chicago LR* 665 at 727; Heffernan and Lovely 1991 *University of Michigan JL Reform* 311.

conduct.⁶⁷ These rewards and sanctions are more important to the officer than the threat of exclusion of illegally or unconstitutionally obtained evidence. The court's judicial review through the exclusionary rule thus does not seem to have the reforming effect over competing norms of police behaviour. In *Leon*⁶⁸ the court noted that the operation of the rule is not suited to achieve this reforming effect because the judicial review focuses on the individual police actions and not the department's policy.⁶⁹ Put differently, the department's policy does not form part of the merits of the review and consequently cannot be claimed to have been reviewed.⁷⁰ The weight of this criticism might depend on the jurisdiction involved. In South Africa, because the question of admissibility is dealt with during a trial-within-a-trial, chances are that our courts would detect and pronounce on a state department's policy or systemic abuse.⁷¹

2.2 Remedial imperative

2.2.1 Objectives of remedial imperative

The "remedial imperative" seeks to vindicate constitutional rights.⁷² Adherents of this rationale claim that the exclusionary rule's purpose is not only to deter unconstitutional conduct by law enforcement, but to serve as an effective internal tool for maintaining and protecting the value system as a whole.⁷³ The rationale is based on the idea that courts should uphold the rights of accused persons during criminal trials.⁷⁴ The primary goal of the criminal justice system is not only to secure a conviction but to secure a conviction in terms of procedures which duly and properly acknowledge the rights of an accused during pre-trial, trial and post-trial proceedings.⁷⁵ The principle demands that state institutions respect

⁶⁷ Kaplan 1974 *Stanford LR* 1027 at 1050; Heffernan and Lovely 1991 *University of Michigan JL Reform* 311 at 358.

⁶⁸ *US v Leon* 468 US 897 (1984).

⁶⁹ *US v Leon* 468 US 897 (1984) at 918; Oaks 1970 *University of Chicago LR* 665 at 727.

⁷⁰ *US v Leon* 468 US 897 (1984) at 916; *Herring v US* 555 US 135 (2009) Justice Ginsburg opinion at 4.

⁷¹ *S v Mthembu* 2008 (2) SACR 407 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA); *S v Hena* 2006 (2) SACR 33 (SE) at 41-42.

⁷² *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) at para 1.

⁷³ Schwikkard and Van der Merwe *Principles of evidence* at 193.

⁷⁴ Mellifont *The derivative imperative* at 49; see also Ally *Constitutional exclusion* at 39.

⁷⁵ Schwikkard and Van der Merwe *Principles of evidence* at 190; Zeffertt and Paizes *Law of evidence* at 713; Kaplan 1974 *Stanford LR* 1027 at 1040; Naudé 2008 *SACJ* 168 at 181; Mellifont *The derivative imperative* at 49.

the accused's rights and consequently should not be allowed to benefit from the use of evidence which was obtained illegally.⁷⁶

As a result the remedial imperative or protective principle requires that evidence be excluded where an accused has not been treated in accordance with particular minimal standards.⁷⁷ Schwikkard and Van der Merwe state further that it is a fallacy to regard a criminal justice system as a due process system, if the remedies to rights violations are limited to civil litigation and to institute criminal charges.⁷⁸ Unconstitutionally obtained evidence should therefore be excluded as its admission might compromise more important constitutional values.⁷⁹ There are exceptions where the limitations clause (section 36) may be applicable. The exclusionary remedy in this way ensures legality in the criminal process.⁸⁰

2.2.2 Due process principle

The exclusionary rule is founded in the concept of due process, which rejects the idea that there must be ascertainment of truth at any cost.⁸¹ An effective due process system must have the inherent ability to correct abuses within the system.⁸²

In South Africa the weight of the argument that the exclusionary rule is founded in the concept of due process is weakened because of the relationship between liberty deprivation and criminal procedure rights. The due process jurisprudence originated in the United States of America and was subsequently applied in Canada. In both jurisdictions the due process

⁷⁶ Davies 2002 *Criminal LQ* 21 at 30: "The protective principle requires that where a suspect has not been treated in accordance with a particular minimal standard he should not suffer any disadvantage thereby. Thus when rights are violated the fruits of the violation cannot be used in the subsequent prosecution. The principle demands that rights be taken seriously, that once certain minimal standards have been proclaimed a remedy must be available when these standards are not met."; Naudé 2008 *SACJ* 168 at 181.

⁷⁷ Schwikkard and Van der Merwe *Principles of evidence*; Zeffertt and Paizes *Law of evidence*; Davies 2002 *Criminal LQ* 21.

⁷⁸ Schwikkard and Van der Merwe *Principles of evidence* at 190-192.

⁷⁹ Naudé 2008 *SACJ* 168 at 181; Heffernan 1989 *Wisconsin LR* 1193 at 1202.

⁸⁰ Naudé 2008 *SACJ* 168 at 181.

⁸¹ Naudé 2008 *SACJ* 168 at 182; Zeffertt and Paizes *Law of evidence* at 713; Schwikkard and Van der Merwe *Principles of evidence* at 190: "The exclusionary rule might at times cause factually guilty individuals to escape the consequences of their actions, but this is justified as it is not the purpose of the rule to afford a remedy to the accused but it ensures its citizens that they will not in future be subjected to constitutional violations by investigative authorities and or the prosecution."; Shanks 1983 *Tulane LR* 648 at 666: "The fundamental purpose of an inquisitorial trial is to find the truth, whereas the ultimate goal of the adversary criminal trial is to safeguard the defendant's rights, that is, to insure that procedures utilised in the trial do not operate unfairly against the defendant."

⁸² Van der Merwe 1992 *Stell LR* 173 at 193.

provision has residual operation in the sphere of criminal justice rights (fair trial rights).⁸³ The fair trial rights are considered to be merely illustrative of the generic due process rights. The due process rights would operate independently and would inform the ambit of all the criminal justice rights including fair trial rights.⁸⁴ This approach is not followed in South Africa. The South African courts emphasised the difference between criminal procedure rights (section 35) and the right not to be arbitrarily deprived of liberty (section 12).⁸⁵ The due process right is separated from the right to a fair trial on the grounds that they apply to different stages of the criminal process. The right to a fair trial is broader than the list of specific fair trial rights listed in section 35(3).⁸⁶ The courts have in effect rejected recourse to other general rights, including due process rights, once a matter has been understood to raise fair trial questions.⁸⁷

2.2.3 The principle of self-correction

Advocates of this principle argue that the efficiency of a due process system is dependent on the ability to correct abuses, when established, within the system.⁸⁸ A legal system without the ability to correct its own abuses cannot claim to require due process, as it would then tolerate a violation of exactly those rights which it claims to guarantee.⁸⁹

2.2.4 Real evidence and the remedial imperative

The remedial imperative was applied in *Tandwa*⁹⁰ when the Supreme Court of Appeal excluded unconstitutionally obtained real evidence. The court *a quo* admitted real evidence (money and an AK47 rifle) even though the statements accompanying the pointing out were inadmissible. On appeal the accused argued that the real evidence should have been excluded because it was unconstitutionally obtained and that admitting it rendered his trial unfair or otherwise detrimental to the administration of justice. *In casu* the police's conduct violated a number of the accused's constitutional rights, including the right to freedom and

⁸³ *In RE BC Motor Vehicle Act* [1985] 2 SCR 486 at 502.

⁸⁴ Woolman and Bishop *Constitutional law* at 51-3.

⁸⁵ See in general *Ferreira v Levin*, *Vryenhoek v Powell* 1996 (1) SA 984 (CC); *Nel v Le Roux* 1996 (3) SA 562 (CC); *De Lange v Smuts* 1998 (3) SA 785 (CC); Woolman and Bishop *Constitutional law* at 51-2: "This wall prevents 'due process' see page from FC s 12 to FC s 35 respectively."

⁸⁶ *S v Zuma* 1995 (2) SA 642 (CC).

⁸⁷ *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC).

⁸⁸ Schwikkard and Van der Merwe *Principles of evidence* at 192.

⁸⁹ Schwikkard and Van der Merwe *Principles of evidence* at 192.

⁹⁰ *S v Tandwa* 2008 (1) SACR 613 (SCA).

security of the person, the right to be free from all forms of violence, the right not to be treated or punished in a cruel inhuman or degrading way and as a detained person, the right not to be compelled to make any confession or admission that could be used in evidence against the accused.⁹¹ The Court found that the rights violations were severe since they stemmed from the deliberate and flagrant conduct of the police.⁹² There was a high degree of prejudice because of the close causal connection between the violation and the subsequent discovery of the real evidence. The Court held that section 35(5) is designed to protect individuals from police conduct in breach of fundamental rights.⁹³ Inclusion of the real evidence in the circumstances of this case would render the provision nugatory. The evidence was accordingly excluded.

2.3 Judicial integrity

Proponents of this rationale reject the notion that deterrence is the sole objective in excluding illegally obtained evidence.⁹⁴ The key feature of the rationale is the desire to protect the integrity of the justice system. The court's power to give effect to the rationale lies in the implied powers of the court to protect the integrity of its processes.⁹⁵

2.3.1 Origin of judicial integrity rationale

In the 1928 judgment of *Olmstead*,⁹⁶ the Supreme Court of the United States considered and applied the judicial integrity rationale for the exclusionary rule. The Court reasoned that

⁹¹ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 128.

⁹² *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 128.

⁹³ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 121.

⁹⁴ Force 1981 *Tulane LR* 148 at 181; *Elkins v US* 364 US 206 (1960) at 223-224: "Crime is contagious. If the government becomes a law breaker, it breeds contempt for law, it invites every man to become a law unto himself, and it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means -to declare that the government may commit crimes in order to secure the conviction of a private criminal -would bring terrible retribution. There is another reason why the deterrence theory cannot stand as the sole rationale for the exclusionary rule. In the United States, courts do not supervise or control police departments. Courts have no power to formulate general guidelines or rules under which police departments operate. If a court promulgated a comprehensive code of regulations for the investigation of crime and the apprehension of suspects, it would, perhaps, not be extravagant to characterize its actions as a violation of the doctrine of separation of powers. Courts do not run the executive branch, and cannot tell the executive branch how to run itself. Suggesting that courts can formulate rules for the sole purpose of guiding police behavior comes dangerously close to saying that courts can formulate general rules of police behavior. It seems more likely that rather than deterrence, the integrity of judicial proceedings was a more prominent consideration in creating the exclusionary rule, and one that has a sounder constitutional justification."

⁹⁵ Mellifont *The derivative imperative* at 36.

⁹⁶ *Olmstead v US* 277 US 438 (1928).

if evidence was unconstitutionally obtained by the prosecution the court should not allow such iniquities to succeed.⁹⁷ Brandeis J, although dissenting, commented that in a government of laws the existence of government will be compromised if it fails to observe the law itself.⁹⁸

The imperative of judicial integrity has in subsequent judgments been identified as an important rationale of the exclusionary rule.⁹⁹ In *McNabb*¹⁰⁰ the court held that a conviction resting on evidence secured through flagrant disregard of the accused's rights cannot be allowed to stand without making the courts accomplices in wilful disregard of the law.

In *Mapp*¹⁰¹ the focus of the court was on judicial integrity. The Court reasoned that the admission of illegally obtained evidence adversely affected the integrity of the criminal justice system. Accordingly the Court rejected the notion that the exclusionary rule was optional in state criminal trials. Evidence obtained in breach of fundamental rights was now also constitutionally inadmissible in state courts.¹⁰² Shanks argue that the judgment appears to have been a reaction to the perceived inability of other methods to effectively deter official constitutional violations.¹⁰³

2.3.2 Objectives of judicial integrity rationale

The objective of the judicial integrity rationale is to protect the court's integrity. Two concerns are tightly interwoven in this rationale. The first concern is that the courts maintain "clean hands" by not accepting evidence obtained by "dirty ones".¹⁰⁴ The second concern is that exclusion of such evidence will garner public praise as an effort by the courts to guarantee constitutional rights.¹⁰⁵ The rationale requires the public interests of convicting the guilty and maintaining the court processes to be weighed against each other.¹⁰⁶

⁹⁷ *Olmstead v US* 277 US 438 (1928); Dripps 2010 *Fordham Urban LJ* 743.

⁹⁸ *Olmstead v US* 277 US 438 (1928) at 485.

⁹⁹ Schwikkard and Van der Merwe *Principles of evidence* at 192; Shanks 1983 *Tulane LR* 648 at 653.

¹⁰⁰ *McNabb v US* 318 US 332 (1943).

¹⁰¹ *Mapp v Ohio* 367 US 643 (1961).

¹⁰² *Mapp v Ohio* 367 US 643 (1961).

¹⁰³ Shanks 1983 *Tulane LR* 648 at 650: "The police and the courts, as two independent branches of government responsible for the administration of justice, should not co-operate in violations of constitutional rights."

¹⁰⁴ Mellifont *The derivative imperative* at 36; Shanks 1983 *Tulane LR* 648 at 653; Ally *Constitutional exclusion* at 44.

¹⁰⁵ Schwikkard and Van der Merwe *Principles of evidence* at 192: "The four interrelated facets to this rationale, namely, that by admitting unconstitutionally obtained evidence (a) courts themselves will violate

In *Hena*¹⁰⁷ the court considered both these concerns. The Court observed that judges on taking office take an oath of office in which they swear or affirm to uphold and protect the Constitution and the human rights entrenched in it and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the law, including the Constitution. Judges should guard against condoning the abuse and or violation of constitutional abuses at the risk of eroding fundamental rights through lack of vigilance or for the sake of expediency.¹⁰⁸ In *casu* the Court recognised that the central role of the judiciary is the protection of the integrity of the criminal justice system and the promotion of acceptable investigation techniques.¹⁰⁹ The evidence in *Hena* revealed that the police abdicated their obligations by allowing street committees to perform their duties. It was unacceptable and patently unlawful as there was no political or administrative oversight and consequently the court was not surprised that the street committee resorted to taking the law into its own hands. To ignore this systemic abuse, the Court stated, both undermine the Constitution and the integrity of the criminal justice system and consequently justified the exclusion of the tainted evidence.¹¹⁰

The educative functions of court judgments feature prominently when they exclude evidence that would taint the integrity of the criminal justice system. Chaskalson P, emphasised, in *Makwanyane*,¹¹¹ the educative function of the courts when he stated that the act of exclusion serves the purpose of fashioning public opinion, rather than expressing it. The courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms. The duty of the courts involves educating the public that the Constitution is not a set of high-minded values designed to protect criminals, but is in fact a shield which protects all citizens from official abuse. This the court should achieve by communicating in plain language understandable to the common man.

the Constitution; (b) courts will act contrary to their oath to uphold the Constitution; (c) courts will indirectly encourage violations of the Constitution; and (d) courts will somehow create the impression that they sanction or condone unconstitutional conduct by government officials.”; Shanks 1983 *Tulane LR* 648 at 654; Davies 2002 *Criminal LQ* 21 at 24; see also Ally Constitutional exclusion at 44.

¹⁰⁶ Mellifont *The derivative imperative* at 40.

¹⁰⁷ *S v Hena* 2006 (2) SACR 33 (SE).

¹⁰⁸ *S v Hena* 2006 (2) SACR 33 (SE) at 41-42.

¹⁰⁹ Mellifont *The derivative imperative* at 36.

¹¹⁰ *S v Hena* 2006 2 SACR 33 (SE); see also the discussion in Schwikkard and Van der Merwe *Principles of evidence* at 192; Shanks 1983 *Tulane LR* 648 at 653.

¹¹¹ *S v Makwanyane* 1995 (3) SA 391 CC at 431.

*Tandwa*¹¹² is an example of a judgment where the court endeavoured to shape public opinion. The Supreme Court of Appeal noted the struggle in our society to maintain law and order against the scourge of violent crime and corruption. The difference between the law breakers and those committed to the administration of justice is the commitment of the latter to moral ends and moral means. The Court was emphatic that the attainment of a just order can only be achieved through means that have moral authority.¹¹³ This authority will be forfeited if the courts condone coercion and violence and other corrupt means in sustaining order. The Court ruled that the exclusionary rule is designed to protect individuals from police methods which violate fundamental rights. The evidence was excluded, as inclusion would have made the exclusionary rule nugatory.

2.3.3 Real evidence and the judicial integrity rationale

The Supreme Court of Appeal in *Mthembu*¹¹⁴ applied the judicial integrity rationale to justify exclusion of real evidence unconstitutionally obtained. *In casu* the discovery of the real evidence (a Hilux motor vehicle and a metal box) followed the torturing of the witness. The issue in the case was whether this real evidence must be excluded because of the torture. The Court observed that the absolute prohibition on the use of torture in both our law and in international law demands that any evidence which is obtained as a result of torture must be excluded in any proceedings. The Court reasoned that if it were to admit the evidence the court would have to ignore the manner (torture) in which the police obtained this evidence. This amounts to involving the judicial process in moral defilement which would compromise the integrity of the judicial process and dishonour the administration of justice. The real evidence was for these reasons considered to be inadmissible.

Similarly in *Tandwa*¹¹⁵ the Supreme Court of Appeal excluded real evidence (bucket and money). The Court found that the real evidence was tainted with the blemish of the police brutality. The Court ruled that the trial was rendered unfair because the evidence was obtained by means which violated basic civilised injunctions against assault and compulsion. Inclusion of the evidence would mean that the court was associating itself with barbarous

¹¹² *S v Tandwa* 2008 (1) SACR 613 (SCA).

¹¹³ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 121.

¹¹⁴ *S v Mthembu* 2008 (2) SACR 407 (SCA).

¹¹⁵ *S v Tandwa* 2008 (1) SACR 613 (SCA).

and unacceptable conduct. The evidence was accordingly considered not fit for reception.¹¹⁶ Likewise in *Pillay*¹¹⁷ the Supreme Court of Appeal excluded the derivative (real) evidence on the ground that inclusion would bring the administration of justice into disrepute.¹¹⁸ The appellant was given an undertaking that she would not be charged if she were to provide incriminating information against the accused. Notwithstanding, the appellant was later criminally prosecuted. The Court reasoned that the conduct by the prosecution adversely affected the administration of justice.

3. CONCLUSION

The South African courts have applied the exclusionary rule in diverse circumstances when considering the admissibility of unconstitutionally obtained real evidence. In the judgments cited the courts did not favour one single rationale. The courts have not been as bold as the judiciary in the United States of America who has exclusively elected the deterrence principle to justify the imposition of the exclusionary rule. Legal commentators such as Davies support the approach of not selecting one rationale in preference to the other two.¹¹⁹ Instead one should examine the common theme that runs through each of the three rationales: that of taking rights seriously. When done, the evidence obtained in violation of a right ought generally to be excluded. By excluding the evidence the integrity of the justice system remains protected. The alternative is that rights are not taken seriously and in this situation none of the above principles can justify the exclusion of evidence obtained in violation of the Constitution.¹²⁰

In the following chapter I consider the application of section 35(5) in South Africa.

¹¹⁶ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 89 and 120.

¹¹⁷ *S v Pillay* 2004 (2) SACR 419 (SCA).

¹¹⁸ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 96.

¹¹⁹ Davies 2002 *Criminal LQ* 21.

¹²⁰ Davies 2002 *Criminal LQ* 21 at 32.

CHAPTER 3

THE EXCLUSION OF UNCONSTITUTIONALLY OBTAINED REAL EVIDENCE IN SOUTH AFRICA

1. INTRODUCTION

The common law approach, prior to the enactment of section 35(5) of the Constitution, to the issue of illegally obtained evidence, was that relevant evidence was admissible in both criminal and civil cases and that the court should not concern itself with how it was obtained.¹ This approach in criminal proceedings was however substantially changed with the introduction of section 35(5).² Section 35(5) envisages the exclusion of evidence obtained in an unconstitutional manner.³

The Constitutional Court have to date not had the opportunity to interpret section 35(5). On the other hand legal scholars, the Supreme Court of Appeal and the high courts have made meaningful contributions towards its interpretation.⁴ Common principles emerged that guide the courts in determining which factors may play a role in determining whether evidence should be received or excluded.

Section 35(5) reads as follows:

“Evidence 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.”

¹ Currie and De Waal *The bill of rights* at 308.

² Currie and De Waal *The bill of rights* at 308.

³ *S v Naidoo* 1998 (1) SACR 479 (N) at 489 and 499-502; De Vos 2011 *TSAR* 268 at 270: “It follows that evidence that has been obtained improperly or illegally - but not in violation of a constitutional right - must still be determined in accordance with the common law discretion.”; De Vos 2009 *SACJ* 433; Zeffertt and Paizes *Law of evidence* at 505; Ally 2011 *Stell LR* 376-395; Naudé 2008 *SAPL* 166-183; Ally 2010 *SALJ* 694 at 712; Du Toit *et al Criminal procedure* at 95-980; Currie and De Waal *The bill of rights* at 308; Terblanche *et al Evidence* at 192.

⁴ Schwikkard and Van der Merwe *Principles of evidence* at 181-259; Du Toit *et al Criminal procedure* at 24-98H to 24-9N-12; Steytler *Constitutional criminal procedure* at 33-40; Zeffertt and Paizes *Law of evidence* at 625-641; Ally 2010 *CILSA* 239; Naudé 2009 *SAPL* 506; *S v Mthembu* 2008 (2) SACR 407 (SCA); *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA); *S v M* 2002 (2) SACR 411 (SCA); *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA).

An analysis of the wording contains a constitutional directive to exclude unconstitutionally obtained evidence only where admission of the evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Clearly, therefore, section 35(5) provides for two exclusionary legs, which are couched in broad language and requires a value judgment to be made.⁵ The two-stage admissibility analysis consists of, what Ally has described as, a substantive phase (whether the disputed evidence should either be received or excluded) and a threshold phase (jurisdictional facts).⁶

In this chapter, I first, consider the procedural aspects associated with an application under section 35(5). In this regard procedural matters such as the location of the threshold burden and the appropriateness of the trial-within-a-trial procedure for purposes of an admissibility assessment are considered.

Second, I explore the threshold requirements under section 35(5). They are the following: (a) The beneficiaries of the exclusionary remedy; (b) the meaning of the phrase “obtained in a manner,” or the so-called causal connection requirement; (c) whether “standing” is a threshold requirement under section 35(5); and (d) the violation of a constitutional right. A court must be satisfied that all threshold requirements have been satisfied before it proceeds to consider the substantive phase of section 35(5).

Third, I explore the substantive phase of the exclusionary rule. The substantive phase introduces a so-called two-legged test:⁷ firstly, a determination of whether the admission would render the trial unfair or, secondly, whether it would otherwise be detrimental to the administration of justice. I follow an approach which keeps the two legs of the test separate. It is trite law that in determining whether admission would have one of the two identified consequences, a court is required to make a value judgment by considering all the circumstances.⁸ For now, though, I consider some of the more important factors in so far as they apply to the more specific question of admissibility of unconstitutionally obtained real evidence.

⁵ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 92; see also Currie and De Waal *The bill of rights* at 806.

⁶ Ally 2011 *Stell LR* 376; see also Ally *Constitutional exclusion* at 210-211.

⁷ Zefferdt and Paizes *Law of evidence* at 505; Schwikkard and Van der Merwe *Principles of evidence* at 225; *S v Pillay* 2004 (2) SACR 419 (SCA); *S v Naidoo* 1998 (1) SACR 479 (N).

⁸ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 92; Schwikkard and Van der Merwe *Principles of evidence* at 215.

Finally, I examine how the courts apply the principles, identified in both the procedural and substantive phase, to real evidence and in the process consider the procedures set out in the provisions of section 37 of the Criminal Procedure Act, 1977.

2. PROCEDURAL MATTERS

2.1 Threshold burden

The Constitution does not expressly mention where the onus is located in section 35(5) challenges. The Constitutional Court has yet to decide on the incidence and nature of the onus, if any, in section 35(5) applications. The views expressed in case law and the opinions of legal scholars cannot be reconciled. Two dominant views exist. The one view advocates that the accused should bear the burden of showing that the impugned evidence had been obtained through a violation of rights and the other view suggests that the prosecution should bear the burden of proving that the disputed evidence has been obtained in a constitutional manner, once the accused alleges that it has been unconstitutionally obtained.

In *Viljoen*⁹ the Supreme Court of Appeal stated that an accused bears the burden of showing that the police violated his constitutional rights in the process of procuring the evidence.¹⁰ *In casu* the accused was charged with the murder of his wife. The accused challenged the admissibility of the evidence on the basis that the police failed to inform him of his right to remain silent when taking his confession. This breach, the accused argued, constituted a violation of his rights which rendered the information disclosed during these proceedings inadmissible. The Supreme Court of Appeal held that an accused should be informed of the right to remain silent because failure to inform an uninformed accused might result in an unfair trial. Unfairness, the Court reasoned, in the trial process will only result where the accused proved that he did not have knowledge of the right to remain silent and therefore had to be informed thereof. *In casu* the accused failed to place any such evidence before

⁹ *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA).

¹⁰ See also *Ally* 2010 SACJ 22 at 29; *S v Zwayi* 1997 (2) SACR 772 (CKH); *Quozeleni v Minister of Law and Order* 1994 (3) SA 625 (EC).

the court and the Court accordingly ruled that the court *a quo* erred in holding that the right to remain silent had been violated.

*Mgcina*¹¹ is an example of the view that the prosecution bears the burden, which arises only when the accused first raises the issue of admissibility of unconstitutionally obtained evidence. *In casu* the accused lodged an appeal against his conviction on two charges of murder and five counts of attempted murder. The convictions were secured by the prosecution by tendering a confession obtained from the accused while participating in a pointing out. The accused on appeal challenged the admissibility of the confession on two grounds. Relevant to this discussion is the argument that the confession should be excluded because the evidence had been obtained in breach of his right to legal representation. The accused argued that the prosecution bears the burden of proving beyond reasonable doubt that the appellant was properly informed of the right to legal representation.¹² The Court noted the conflicting approaches in previous judgments delivered on this point, but favoured the approach in *Brown*.¹³ The Court reasoned that for the same reasons that the onus at common law rested on the state to prove that a confession was freely and voluntarily made, so was it on the prosecution to prove beyond reasonable doubt that the constitutional rights of the accused were not infringed during the evidence gathering phase.¹⁴ The Court concluded that the prosecution bears the burden of proof that the evidence had been obtained in a constitutional manner.¹⁵ In other words, once the accused asserts that the evidence had been unconstitutionally obtained and challenged the admissibility thereof, the prosecution bears the burden of proving that the evidence had been obtained in a constitutional manner.¹⁶ The Court added that the prosecution need not disprove the violation of each and every conceivable fundamental right. It is only in cases when the accused alleges that the evidence was obtained in a manner that infringed one or more of those rights, that the prosecution must prove the converse beyond a reasonable doubt. This decision appears to have substantial support amongst legal commentators.¹⁷

¹¹ *S v Mgcina* 2007 (1) SACR 82 (T).

¹² *S v Mgcina* 2007 (1) SACR 82 (T) at 93-94.

¹³ *S v Brown* 1996 (2) SACR 49 (NC).

¹⁴ *S v Mgcina* 2007 (1) SACR 82 (T) at 95; see also Zefferdt and Paizes *Law of evidence* at 757-760.

¹⁵ *S v Mgcina* 2007 (1) SACR 82 (T) at 95.

¹⁶ *S v Mgcina* 2007 (1) SACR 82 (T) at 95-96; see also Woolman and Bishop *Constitutional law* at 52-66.

¹⁷ Woolman and Bishop *Constitutional law* at 52-66; Schwikkard and Van der Merwe *Principles of evidence* at

I prefer the approach of Schwikkard and Van der Merwe, which to a limited extent accommodates the *Mgcina* ruling. The authors propose the following approach: First the accused should allege but need not prove that his constitutional rights have been infringed and that it should be excluded. Secondly, the court should, during the trial-within-a-trial, bear in mind the distinction between facts pertaining to admissibility as opposed to matters of judgment and value (weight of evidence). Failure by the prosecution to prove beyond reasonable doubt any factual matter will result in the accused receiving the benefit of the doubt. Thirdly, when the factual findings have been made and the court is satisfied that the evidence has been obtained in violation of the accused constitutional rights, it is required to exercise its discretion and make a value judgment on whether admission would result in one of the consequences identified in section 35(5).¹⁸ Based on this approach there can be no question of an onus in respect of this decision. *Viljoen* should be rejected because (a) the language of section 35(5) does not saddle an accused with the onus and, (b) the accused's right to remain silent, the privilege against self-incrimination and the presumption of innocence could be violated if the accused should bear the onus to prove that his rights have been violated.¹⁹

A review of the case law reveals that the nature of the evidence, more importantly whether it is real evidence or not, does not affect the issue of onus.²⁰

2.2 Trial-within-a-trial

It is trite law that aspects of admissibility and criminal liability are separated by our courts. A trial-within-a-trial should be held when considering section 35(5) applications.²¹ The trial-within-a-trial procedure ensures that: (a) an accused can testify freely about admissibility and not expose himself to cross-examination concerning his guilt and (b) the accused is entitled to a decision whether evidence is included before testifying in the main trial.²² In

260; *Ally* 2010 SACJ 22 at 31- 37.

¹⁸ Schwikkard and Van der Merwe *Principles of evidence* at 260-261.

¹⁹ *Ally* 2010 SACJ 22 at 35.

²⁰ *S v Mthembu* 2008 (2) SACR 407 (SCA); *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA); see in general *S v Naidoo* 1998 (1) SACR 479 (N); *S v Gumede* 1998 (5) BCLR 530 (D); *S v Soci* 1998 (2) SACR 275 (E).

²¹ Currie and De Waal *The bill of rights* at 811; Schwikkard and Van der Merwe *Principles of evidence* at 259; *Ally* 2012 PELJ 476 at 480; Zeffertt and Paizes *Law of evidence* at 761; *S v Lachman* 2010 (2) SACR 52 (SCA); *S v Dos Santos* 2010 (2) SACR 382 (SCA).

²² Schwikkard and Van der Merwe *Principles of evidence* at 259.

certain cases the failure to hold the trial-within-a-trial to determine admissibility of evidence can amount to a failure of justice, which renders the trial unfair.²³ However there are situations where the admissibility of evidence can be determined without holding a trial-within-a-trial. For example, in *Hena*²⁴ the parties agreed that the issue will be dealt with in argument because the facts upon which the issue was to be decided were common cause.²⁵ A ruling on admissibility in a trial-within-a-trial is interlocutory and could be reviewed at the end of the trial in light of all the evidence.²⁶

Our courts have on several occasions been requested to determine questions of admissibility by means of pre-trial motion on the grounds that a warrant authorising the search and seizure of evidence be declared invalid²⁷ or that legislation authorising a search be declared unconstitutional.²⁸ The Constitutional Court has however discouraged the use of the pre-trial remedy if it circumvents the application of section 35(5) or if it delays finalisation of criminal proceedings.²⁹

3. THRESHOLD REQUIREMENTS

The jurisdictional facts (threshold requirements) in section 35(5) must be satisfied before the exclusionary remedy becomes operative.³⁰ In addition the threshold requirements serve the purpose of separating irrelevant claims from those that have merit. Failure to establish the threshold requirements will result in the court refusing to consider the actual test for the exclusion of unconstitutionally obtained evidence, which is to consider whether admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.³¹ In other words a court must be satisfied that all threshold

²³ *S v Nzweli* 2001 (2) SACR 361 (C).

²⁴ *S v Hena* 2006 (2) SACR 33 (SE).

²⁵ See in general Schwikkard and Van der Merwe *Principles of evidence* at 259; Zeffertt and Paizes *Law of evidence* at 760-761; Currie and De Waal *The bill of rights* at 811.

²⁶ *S v Tsotetsi* (3) 2003 (2) SACR 648 at 654.

²⁷ *Zuma v National Director of Public Prosecutions* 2006 (1) SACR 468 (D); *Bennett v Minister of Safety and Security* 2006 (1) SACR 523 (T).

²⁸ *Magajane v Chairperson, North-West Gambling Board* 2006 (2) SACR 447 (CC).

²⁹ *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 13; see also Ally 2012 PELJ 476 at 482.

³⁰ Ally 2011 *Stell LR* 376 at 376.

³¹ Schwikkard and Van der Merwe *Principles of evidence* at 216; Ally 2011 *Stell LR* 376 at 376.

requirements have been satisfied before it proceeds to consider the substantive phase of section 35(5).

The threshold requirements explored below are:

- (a) The beneficiaries of the exclusionary remedy, more specifically the rights of a suspect who is neither arrested nor detained;
- (b) The meaning of the phrase “obtained in a manner,” also referred to as the “causal connection requirement.” In this regard the nature of the link between the impugned evidence and the initial constitutional infringement is discussed;
- (c) The so-called standing aspect. Under the concept standing I examine the important question whether an accused should demonstrate that his rights have been infringed before he may challenge the admissibility of the impugned evidence. Moreover, I consider the issue whether an accused can rely on the exclusionary remedy in the event that the rights of an innocent third party and not the rights of the accused, during the evidence gathering process, have been infringed.
- (d) The violation of a constitutional right. Police conduct authorised by statute or common law can limit an accused fundamental rights. In this regard section 36(1) of the Constitution can assist in determining the constitutional validity of the impugned statute or common law.³²

3.1 Beneficiary of exclusionary remedy

Section 35 mentions only the accused, detained or arrested persons.³³ Therefore, in terms of a literal interpretation, these are the only persons protected by its provisions.³⁴ The position of a person suspected of having committed a crime, but who is neither arrested nor detained, has been a source of conflicting judgments.

³² *S v Naidoo* 1998 (1) SACR 479 (N) at 500; see also in general Schwikkard and Van der Merwe *Principles of evidence* at 223-224.

³³ *Ally* 2010 CILSA 239 at 240; Naudé 2009 SAPL at 506.

³⁴ *Ally* 2010 CILSA 239 at 240.

3.1.1 The “suspect” and section 35 rights

Our case law and legal authorities is conflicted on whether the rights in section 35 should be interpreted to also include protection for a suspect,³⁵ or whether suspects are sufficiently protected by other legal principles³⁶ or whether a “detained suspect” is entitled to be informed about certain rights.³⁷

*Sebejan*³⁸ is an example of a case where the court stated that section 35 should be interpreted to also include protection for a suspect. *In casu* the accused challenged the admissibility of a statement made when she was a suspect. The question the Court had to determine was whether constitutional rights operated to the benefit of the accused at the time she made the statement to the police and whether such rights were breached.³⁹ The Court found that the police considered the accused to be a suspect, but failed to inform her of her rights when interacting with her. The Court stated that the conduct to deceive a suspect into believing that she is a witness when in actual fact evidence is being sought to strengthen the State’s case is “inimical to a fair pre-trial procedure.” In these circumstances the Court found that suspects are entitled to fair pre-trial procedures (fair trial rights).⁴⁰ The fair pre-trial procedures must be similar to the rights which would accrue to an accused when arrested,⁴¹ including the rights to remain silent and to be informed of the right to remain silent; the right to be informed of the consequences of making any statement; the right to choose and to consult with a legal practitioner and to be informed of this right promptly.⁴² The judgment is authority that a suspect should be afforded general trial rights.⁴³ The police should inform a suspect of his constitutional rights, if there was a clear indication of criminal involvement, at a stage before the police first interacted with a suspect.⁴⁴ The rights information (manner in which the protective cautions are extended to

³⁵ *S v Sebejan* 1997 (1) SACR 626 (W).

³⁶ *S v Mthethwa* 2004 (1) SACR 449 (E); *S v Van der Merwe* 1998 1 SACR 194 (O); *S v Ndlovu* 1997 (12) BCLR 1785 (N); Naudé 2009 SAPL 506 at 507.

³⁷ Naudé 2009 SAPL 506 at 507.

³⁸ *S v Sebejan* 1997 (1) SACR 626 (W); see also *S v Orrie* 2005 (1) SACR 63 (C).

³⁹ *S v Sebejan* 1997 (1) SACR 626 (W) at 628.

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

⁴¹ *S v Sebejan* 1997 (1) SACR 626 (W) at 635; Ally 2010 CILSA 239 at 256.

⁴² *S v Sebejan* 1997 (1) SACR 626 (W) at 636.

⁴³ Naudé 2009 SAPL 506 at 509.

⁴⁴ Naudé 2009 SAPL 506 at 510.

a suspect, as well as the nature and extent of the protective cautions) should be similar to the position of an accused when detained or arrested.⁴⁵

*Khan*⁴⁶ is an example of a case where the court found that section 35 is not applicable to suspects.⁴⁷ In essence the Court argued that suspects are sufficiently protected by other legal principles. The Court declined to follow *Sebejan* after it embarked on an extensive review of authority on the question of whether a person was entitled to be informed of his or her rights prior to the point of arrest.⁴⁸ The Court concluded that the rights of “suspects” are adequately catered for by the application of the well-established provisions of the Judges’ Rules.⁴⁹ The Court agreed with the opinion in *Van der Merwe*⁵⁰ that when a person is warned in terms of the Judges’ Rules, expression is given to the provisions of the Constitution.⁵¹ The Court reasoned that forcing the police to warn the accused both in terms of the Judge’s Rules and his constitutional rights would result in an imbalance between the need to protect the rights of the person and the importance of not impeding the police in evidence gathering.⁵² On the facts of the case the Court held that the police possessed a reasonable apprehension that the appellant was a suspect and were accordingly obliged to caution the appellant in terms of the Judges’ Rules, before the appellant proceeded to produce the drugs in question. Evidence obtained without informing the accused of his rights in terms of the Judges’ Rules could be excluded on the grounds of fairness and public policy. The court may also exclude, in terms of its common law discretion, improperly and illegally obtained evidence.⁵³

In certain situations an indication of criminal involvement only arises after the police have started to interact with someone who felt obliged to respond to questioning. In these instances, it has been argued, a suspect, like in the case of a detainee, is entitled to be

⁴⁵ Naudé 2009 SAPL 506 at 510.

⁴⁶ *S v Khan* 2010 (2) SACR 476 (KZP).

⁴⁷ See also *S v Ngwenya* 1998 (2) SACR 503 (W); *S v Mathebula* 1997 (1) SACR 10 (W); *S v Ndlovu* 1997 (12) BCLR 1785 (N); *S v Mthethwa* 2004 (1) SACR 449 (E) at 453; *S v Van der Merwe* 1998 (1) SACR 194 (O).

⁴⁸ *S v Khan* 2010 (2) SACR 476 (KZP).

⁴⁹ See in general the following sources about Judges’ Rules: Du Toit *et al Criminal procedure* Appendix A; *S v Mthethwa* 2004 (1) SACR 449 (E); *S v Van der Merwe* 1998 (1) SACR 194 (O); *S v Khan* 2010 (2) SACR 476 (KZP).

⁵⁰ *S v Van der Merwe* 1998 (1) SACR 194 (O).

⁵¹ *S v Khan* 2010 (2) SACR 476 (KZP) at 484.

⁵² *S v Khan* 2010 (2) SACR 476 (KZP) at 481–484; see also *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792.

⁵³ Naudé 2009 SAPL 506 at 510.

warned of his rights, even though he was strictly speaking not detained at the time of questioning.⁵⁴ In other words, the argument goes, a suspect that can be seen as a detained person, will be entitled to the relevant rights.⁵⁵ Detention is then determinative of the moment when a person should be warned. This approach requires a broad interpretation of “detention.” The central question is how one determines whether a suspect has been detained or not. Generally detention refers to physical constraint but it can be argued that a person is in lawful custody if there has been a deprivation of freedom.⁵⁶ The Supreme Court in Canada held that the concept detained includes “psychological detention” of a person which consists of three elements: first, police must have directed a demand to a person; then, there should be compliance with the demand which results to a deprivation of liberty and finally, the person must believe that he has no other choice but to comply.⁵⁷ Ally agrees that “informational duties” arise from the moment the police embark on an adversarial relationship with suspects.⁵⁸ In South Africa an adversarial relationship will not necessarily emerge when an individual becomes a suspect but arises when an individual is required to establish or disprove the existence of evidence linking them to the crime.⁵⁹ The test is objective. A relevant factor would be the subjective belief of the person suspected of wrongdoing at the time of his interaction with the police.⁶⁰

3.1.2 Definition of the word “suspect”

Most of the authorities support the notion that although section 35 does not refer to suspects, some suspects should also have the section 35-rights.⁶¹ The question arises who is a suspect and who is not.

A number of definitions have been formulated to describe what a suspect is or could be.⁶² Generally a person is a suspect if investigators, in the absence of certain proof, believe that

⁵⁴ Naudé 2009 SAPL 506 -507.

⁵⁵ Naudé 2009 SAPL 506.

⁵⁶ Steytler *Constitutional criminal procedure* at 151-152; Naudé 2009 SAPL 506 at 507.

⁵⁷ Ally *Constitutional exclusion* at 152.

⁵⁸ Ally 2010 CILSA 239 at 259.

⁵⁹ Ally *Constitutional exclusion* at 150; Naudé 2009 SAPL 506.

⁶⁰ Naudé 2009 SAPL 506.

⁶¹ *S v Sebejan* 1997 (1) SACR 626 (W); *S v Orrie* 2005 (1) SACR 63 (C); Naudé 2009 SAPL 506; Steytler *Constitutional criminal procedure* at 151-152; Ally *Constitutional exclusion* at 152.

⁶² *S v Sebejan* 1997 (1) SACR 626 (W); *S v Khan* 2010 (2) SACR 476 (KZP).

he is guilty of a crime or a person suspected of a crime or offence.⁶³ The High Court in *Sebejan* stated that the belief can be “some apprehension” that a person might have committed an offence, and that person’s version of events is mistrusted.⁶⁴ On the other hand the courts in *Khan*⁶⁵ and *Ndlovu*⁶⁶ held that the phrase “some apprehension” sets the standard too low and suggested the adoption of an objective element such as a “reasonable apprehension.”⁶⁷ In other words a mere suspicion does not mean that the police have enough suspicion.⁶⁸ It is submitted that the phrase “reasonable apprehension” introduces an element of objectivity to the enquiry as to whether the person is in fact a suspect at the relevant time.⁶⁹ A subjective and objective analysis should be employed to ascertain whether the person is a suspect.⁷⁰ The subjective belief of the police should be taken into account when determining whether the accused is a suspect.⁷¹

3.1.3 Conclusion

Common to all the approaches referred to above is that “suspects” are entitled to “certain protective cautions” in certain circumstances.⁷² The distinction between the approaches in *Sebejan* and *Khan* is the manner in which the protective cautions are extended to a suspect, as well as the nature and extent of the protective cautions.⁷³ I prefer the approach followed in *Sebejan*. Ally submits that this view is closely aligned to an “emerging consensus of opinion” developing in national and international jurisprudence.⁷⁴ The approach is also significantly aligned to a contextual and purposive interpretation of the provisions of section 35.⁷⁵ Based on this, the suspect must be informed of his fair trial rights and must be

⁶³ Naudé 2009 *SAPL* 506 at 511.

⁶⁴ *S v Sebejan* 1997 (1) SACR 626 (W) at 631-632.

⁶⁵ *S v Khan* 2010 (2) SACR 476 (KZP).

⁶⁶ *S v Ndlovu* 1997 (12) BCLR 1785 (N).

⁶⁷ *S v Khan* 2010 (2) SACR 476 (KZP) at 484; *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792B.

⁶⁸ Naudé 2009 *SAPL* 506 at 527.

⁶⁹ *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792; see also Ally *Constitutional exclusion* at 153.

⁷⁰ Ally *Constitutional exclusion* at 153.

⁷¹ Ally *Constitutional exclusion* at 153.

⁷² *S v Khan* 2010 (2) SACR 476 (KZP) at 483.

⁷³ *S v Khan* 2010 (2) SACR 476 (KZP) at 483; see also Currie and De Waal *The bill of rights* at 805.

⁷⁴ Ally 2010 *CILSA* 239 at 259.

⁷⁵ Ally 2010 *CILSA* 239 at 242.

permitted to rely on the due process rights, in the Bill of Rights.⁷⁶ Comparative law supports the view that a “detained suspect” should accordingly be informed of his fair trial rights.⁷⁷

Naudé, even before the judgment in *Khan* was delivered, argued that the definition of the concept suspect in *Sebejan* is broad and leaves a number of unanswered questions.⁷⁸ He reasoned that the police may become suspicious of a person only after interacting with him. Because the interaction between the police and the individual can take place under a variety of circumstances, it becomes necessary to further refine the meaning of a “suspect.” The definition of the concept suspect in *Khan* and *Ndlovu* is therefore preferred. A person is a suspect if, in the absence of certain proof, investigators have a reasonable apprehension that he is guilty of a crime or a person suspected of a crime or offence.

3.2 Connection requirement

The phrase “obtained in a manner” in section 35(5) is also known as the connection requirement.⁷⁹ The wording implies that an adequate link should be established between the constitutional breach and the manner of discovery of the evidence.⁸⁰ In the absence of such a link the accused would not be entitled to the exclusionary remedy.⁸¹ The issue is in essence a factual question. The courts have not been consistent in their approach when interpreting this phrase. The diverse interpretational approaches resulted in uncertainty about the nature of the link that is required in section 35(5).

In *Orrie*⁸² the High Court adopted a literal approach and held that a strict or direct causal link is required. A causal connection requirement entails that an accused must demonstrate that the impugned evidence would not have been discovered “but for” the violation. *In casu* the defence challenged the admissibility of a statement, initially on the grounds that the accused had not been made aware that he was a suspect and had not been warned of his rights to silence and legal representation. The defence later argued that the accused’s

⁷⁶ *Ally Constitutional exclusion* at 151.

⁷⁷ With respect to Canadian law, see *R v Therens* [1985] 1 SCR 613 at 644; *R v Grant* [2009] 2 SCR 353; *R v Suberu* [2009] 2 SCR 4.

⁷⁸ Naudé 2009 SAPL 506 at 512.

⁷⁹ *S v Zuko* [2009] 4 All SA 89 (E) at para 18; *Ally 2011 Stell LR* 376 at 377.

⁸⁰ *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 34; *S v Mark* 2001(1) SACR 572 (C); Naudé 2009 *Obiter* 607 at 621; *Ally Constitutional exclusion* at 163; Currie and De Waal *The bill of rights* at 806.

⁸¹ *Ally Constitutional exclusion* at 163.

⁸² *S v Orrie* 2005 (1) SACR 63 (C).

attitude was that if he had known that he was a suspect and had rights, he would have remained silent and waited for his lawyer. In determining whether evidence has been “obtained in a manner” the Court considered determinative the fact that applicant did not establish that he would have relied on the assistance of state provided counsel. The Court noted the Canadian authority⁸³ and stated that no causal link was required between the rights violation and the evidence sought to be excluded. The Canadian Supreme Court stated that the *nexus* requirement under section 24(2) was satisfied for purposes of the exclusionary remedy as long as the rights violation occurred in the course of obtaining the evidence. The Court instead elected not to follow the Canadian authority.⁸⁴ The Court preferred a more practical approach to the exclusionary rule, one in which the keystone is the right to a fair trial. The Court found that failure to warn the accused of his rights did not lead to him suffering any prejudice. The accused therefore did not perform the incriminatory acts “but for” a preceding constitutional violation. The evidence was ruled admissible. The conclusion of the Court in effect rejected a liberal approach to the interpretation of the phrase.

The Supreme Court of Appeal in *Pillay*⁸⁵ and the High Court decisions of *Soci*⁸⁶ and *Ntlantsi*⁸⁷ are examples of cases that rejected a causal connection requirement as determinative and confirmed that the “connection” requirement may be satisfied by a temporal connection between the violation and the discovery of the evidence. A temporal sequence implies that the unconstitutionally obtained evidence was obtained after the rights violation. In other words the violation and the procurement of the evidence are to be part of the same transaction.⁸⁸

In *Pillay* the court applied a temporal sequence analysis when determining the nature of the link. The Court held that the accused’s right to remain silent and her right against self-incrimination were infringed, in that she was unfairly induced to make the statement that led to the finding of the money in the ceiling of her house.⁸⁹ The rights violations and the

⁸³ *R v Brydges* [1990] 1 SCR 190.

⁸⁴ *S v Orrie* 2005 (1) SACR 63 (C) at 73.

⁸⁵ *S v Pillay* 2004 (2) SACR 419 (SCA).

⁸⁶ *S v Soci* 1998 (2) SACR 275 (E).

⁸⁷ *S v Ntlantsi* [2007] 4 All SA 941 (C).

⁸⁸ *Ally* 2011 *Stell LR* 376 at 378.

⁸⁹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 85.

discovery of the evidence was therefore part of the same chain of events (transaction). The temporal sequence analysis was approved and applied when the Court held that the incriminating statement resulted in the discovery of the money.⁹⁰ The Court confirmed that a temporal sequence requirement was sufficient for the purposes of this threshold requirement.

If the violation is part of a chain of events that results in discovery of evidence the important question is whether there is a sufficient connection between violation and discovery, which is a factual issue. In these situations either the temporal or causal connection must be strong; meaning the connection between the violations and the discovery of the evidence should not be too remote.⁹¹ *Mthembu*⁹² provides an example. The state witness in this case was arrested and subsequently tortured by the police when in custody. As a result of the torture the witness made a statement which implicated the appellant in the theft of the motor vehicle and robbery. The torture also resulted in the discovery of the metal box linking the accused to the robbery.⁹³ The witness four years later testified in the case against the accused. Before he testified the court warned the witness in terms of section 204 of the Criminal Procedure Act 51 of 1977. The section 204 warning is given to a witness by the court when he will be required by the prosecution to answer questions which may incriminate him. The witness thereafter voluntarily testified.⁹⁴ The issue the Court had to determine was whether the evidence obtained during the section 204 procedure had been “obtained” within the meaning of section 35(5). The Court found that there was a strong causal connection between discovery of the real evidence and the infringement. In this regard the Court accepted that the discoveries were made as a result of the police torture.⁹⁵ In respect of the statement the Court found that there was a temporal connection because the witness made the statement immediately after the discovery of the real evidence at his home following the torture. It is arguable that at this stage of the court’s analysis it is clear that a strong causal, as well as temporal connection existed.⁹⁶ The subsequent voluntary testimony of the witness the Court found did not detract from the fact that information

⁹⁰ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 85.

⁹¹ *Ally* 2011 *Stell LR* 376 at 354.

⁹² *S v Mthembu* [2008] 3 All SA 159 (SCA).

⁹³ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 10.

⁹⁴ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 22.

⁹⁵ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 33.

⁹⁶ *Ally* 2011 2 *Stell LR* 376 at 385.

contained in the statement, the vehicle and metal box, was obtained through torture.⁹⁷ This reasoning confirms that despite the lapse of time between the making of the statement and the testimony in court, the causal link between the torture and the testimony was not interrupted. The witness must have been aware, having been warned in terms of section 204 of the Criminal Procedure Act, that any deviation would have serious consequences for him. The Court also observed from the witness' testimony that even after the lapse of four years the fearsome and traumatic effects of the torture were still with him. The Court accepted that there was an inextricable link between the torture and the nature of the evidence tendered in court and that the torture has stained the evidence irredeemably.⁹⁸ The Court found that the temporal connection was weak, because of the lapse of time between the making of the statement and the testimony in court. A strong causal connection existed between the breach violation and the testimony of the witness. Although the witness testified voluntarily it could not separate the contents of his testimony from the torture.⁹⁹

The approach in *Pillay* and *Mthembu* is to be preferred. Evidence obtained after a right infringement will be viewed as being obtained as a result of the infringement - unless the accused had an opportunity to reassert his rights and break the chain of events.¹⁰⁰ The temporal sequence or causal connection test, whichever is the stronger, should be applied to satisfy the threshold requirement. This approach is aligned to a purposive and generous approach when interpreting the phrase "obtained in a manner."

3.3 So-called standing requirement

In the United States of America¹⁰¹ and Canada¹⁰² an accused must have "standing" before he can rely on the exclusionary rule.¹⁰³ Standing requires that the rights of the accused himself have to be infringed, with the result that infringement of a third person's rights will not give the accused standing to object to the admissibility of evidence. Put differently, an accused is disqualified to challenge the admissibility of unconstitutionally obtained evidence at his trial

⁹⁷ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 34.

⁹⁸ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 34; Naudé 2008 SAPL 166 at 180.

⁹⁹ *Ally Constitutional exclusion* at 170.

¹⁰⁰ Currie and De Waal *The bill of rights* at 806.

¹⁰¹ *Rakas v Illinois* 439 US 128 (1978).

¹⁰² *R v Edwards* 1994 22 CRR (2d) 29 (SCC).

¹⁰³ Schwikkard and Van der Merwe *Principles of evidence* at 221; Ally 2011 *Stell LR* 376 at 386.

only when the rights of a third person had been infringed. The question arises whether there is such a restriction as far as section 35(5) is concerned.

The Supreme Court of Appeal in *Mthembu*¹⁰⁴ for the first time since the advent of the Constitution dealt with the issue of standing.¹⁰⁵ In the present case the Court embraced a liberal (broad) approach to the question of standing. *In casu* the police assaulted an accomplice and as a result obtained incriminating evidence against the accused. The accused challenged the admissibility of the evidence of the accomplice. The Court held that a plain reading of section 35(5) requires the exclusion of unconstitutionally obtained evidence from any person, not only from an accused.¹⁰⁶ The Court reasoned that there was no principle or policy not to interpret the provision in this way. Against this background the Court held that the evidence of a third party may accordingly be excluded in applications under section 35(5), where the circumstances of the case warrant it.¹⁰⁷ The Court concluded that the effect that admission of the disputed evidence would have on the integrity of the criminal justice system ultimately informs the standing requirement.¹⁰⁸

Legal commentators seem opposed to read in a standing requirement to the provisions of section 35(5) and also favour a broad threshold requirement.¹⁰⁹ A broad approach suggests that an accused should have standing, if he can show that the violation of a third party's rights has an impact on his own fundamental rights.¹¹⁰ This approach is in line with a generous and purposive interpretation of the provisions of section 35(5). A restrictive interpretation should not be followed for the following reasons: the exclusionary remedy is not necessarily a personal remedy,¹¹¹ the narrow interpretation of the threshold requirement has the potential to frustrate the efficiency of the exclusionary remedy provided by section 35(5),¹¹² the words of the provision do not support such a restrictive

¹⁰⁴ *S v Mthembu* [2008] 3 All SA 159 (SCA).

¹⁰⁵ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 27: The Court specifically stated that, at the time, this was the first and only case dealing with the issue of standing.

¹⁰⁶ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 27; Ally 2011 *Stell LR* 376 at 390.

¹⁰⁷ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 27.

¹⁰⁸ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 26; Ally 2011 *Stell LR* 376 at 390-391.

¹⁰⁹ Zeffertt and Paizes *Law of evidence* at 739; Steytler *Constitutional criminal procedure* at 35; Schwikkard and Van der Merwe *Principles of evidence* at 221-222; Ally 2011 *Stell LR* 376 at 388-395; Currie and De Waal *The bill of rights* at 806.

¹¹⁰ Steytler *Constitutional criminal procedure* at 35; Schwikkard and Van der Merwe *Principles of evidence* at 221-222; Ally 2011 *Stell LR* 376 at 388-395; Naudé 2008 *SAPL* 166 at 177.

¹¹¹ Schwikkard and Van der Merwe *Principles of evidence* at 222; Naudé 2008 *SAPL* 166 at 178.

¹¹² Ally 2011 *Stell LR* 376 at 392.

interpretation,¹¹³ the liberal interpretation of standing is closely aligned to the primary rationales of the section 35(5)¹¹⁴ and the exclusionary remedy's goal of protecting the fundamental rights of the accused cannot be achieved if section 35(5) is activated in respect of evidence obtained only in breach of the constitutional right of an accused.¹¹⁵

3.4 Violation of the Right

The police are empowered and authorised in terms of certain statutes and common law rules to obtain evidence from the accused.¹¹⁶ Police conduct in terms of these statutes might violate one or more of the accused fundamental rights. These fundamental rights include the rights to privacy, dignity, not to be tortured and conceivably even the right to property.¹¹⁷ In certain situations an accused may allege that the evidence was unconstitutionally obtained, even if in terms of such a statute, in that the statute amounts to a constitutionally impermissible limitation. The so-called limitation clause analysis is applicable when the constitutional validity of the authoritative rule of law is challenged. As far as the "limitation clause analysis" affects the current research, the legal principles are the same, regardless of the right involved. Therefore, I only discuss the right to privacy in some detail in this thesis, because much of the comparative work had been informed by issues of privacy, specifically in the context of search and seizure.

Evidence obtained when the law was considered valid would not necessarily be excluded if the court declares that law unconstitutional.¹¹⁸ A court must, under section 35(5), in the exercise of its discretion, consider the circumstances in which the evidence was obtained. It

¹¹³ *S v Mthembu* 2008 (2) SACR 407 (SCA); Zeffertt and Paizes *Law of evidence* at 739, Van der Merwe 1992 *Stell LR* 173 at 187; Schwikkard and Van der Merwe *Principles of evidence* 221; Langenhoven *Ongrondwetlik verkreë getuienis* at 373; Currie and De Waal *The bill of rights* at 806.

¹¹⁴ Ally 2011 *Stell LR* 376 at 391-392; *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 26; Ally *Constitutional exclusion* at 192-193; Steytler *Constitutional criminal procedure* at 38; Schwikkard and Van der Merwe *Principles of evidence* at 221- 222. Currie and De Waal *The bill of rights* at 805: "The rule is seen as playing an integral role in ensuring constitutional and judicial integrity in the criminal justice system as a whole, as well as promoting constitutional compliance by the police and prosecutorial services."

¹¹⁵ Ally 2011 *Stell LR* 376 at 392; Schwikkard and Van der Merwe *Principles of evidence* at 222.

¹¹⁶ Section 2 of the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010; section 3 of Act 6 of 2010 (amending section 37 of the Criminal Procedure Act); section 8A(8) of the South African Schools Act 84 of 1996; sections 112 and 113 of the Firearms Control Act 60 of 2000; chapter 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment 32 of 2007.

¹¹⁷ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 127: The right to dignity in section 10; *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D): The right to freedom and security of the person in section 12(1)(c); in general see Zeffertt and Paizes *Law of evidence* at 726.

¹¹⁸ *S v Naidoo* 1998 (1) SACR 479 (N) at 500.

follows that a finding of invalidity of a law under section 36(1) must be taken into account by the court when it later exercises its discretion under section 35(5).¹¹⁹

A two-stage analysis is employed to determine whether a right to privacy has been infringed upon. The first stage involves interpreting the right, which involves a determination of the scope of the right and whether the law or conduct breached the right. The second stage is triggered only if there is an infringement. A court must then consider whether the law or conduct is justifiable under the limitation clause.¹²⁰

3.4.1 Legitimate expectation of privacy

The first stage involves understanding the values underpinning the right and the fundamental interest it protects.¹²¹ The constitutional right to privacy is confined to aspects of a person's life or to conduct in regard to which a legitimate expectation of privacy is held.¹²² Both individuals and juristic persons are entitled to the right to privacy.¹²³ A legitimate expectation means that one must have a subjective expectation of privacy that society is prepared to recognise as objectively reasonable.¹²⁴ Based on this police conduct would be unlawful if it is contrary to an accused's subjective expectation to privacy and is objectively unreasonable.¹²⁵ The subjective component recognises that the right to privacy cannot be claimed if the party consented to having his privacy invaded.

To assess the objective aspect of privacy has proven to be problematic. The Constitutional Court gave some guidance in this regard when it held that the scope of the right to privacy has to be demarcated with reference to the rights of others and the interest of the community.¹²⁶ As a result of the application of this guideline our courts have identified three

¹¹⁹ Schwikkard and Van der Merwe *Principles of evidence* at 223-224.

¹²⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 100-102; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) 437 at para 17 and 18.

¹²¹ Bilchitz 2011 TSAR 568 at 572.

¹²² *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) at para 42; *Basdeo Search and seizure* at 41-43.

¹²³ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty)Ltd: In re: Hyundai Motor Distributors (Pty)Ltd v Smit* 2000 (10) BCLR 1079 (CC).

¹²⁴ *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) at 1239; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty)Ltd: In re: Hyundai Motor Distributors (Pty)Ltd v Smit* 2000 (10) BCLR 1079 (CC) at 235; *Basdeo Search and seizure* at 41.

¹²⁵ *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) at 1239.

¹²⁶ *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at para 67.

areas where an individual's subjective expectation of privacy would usually be regarded by society as objectively reasonable. The three areas of privacy are: those relating to the body of the person;¹²⁷ those relating to a territorial or spatial aspect;¹²⁸ and those occurring in the context of communication or information transfer.¹²⁹

3.4.2 Limitation

During the second stage a court must consider whether the violation of the right is justifiable in terms of the limitation clause of the Constitution.¹³⁰ The justification analysis is undertaken on the basis of the criteria in section 36 which provides:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;–

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.”

The limitation must meet two requirements to satisfy section 36. First, it must constitute a law of general application and, secondly, it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹³¹

(a) Law of general application

The “law of general application” requirement arises from an important principle of the rule of law, namely that rules should be stated in a clear and accessible manner.¹³² The limitation

¹²⁷ *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at para 75.

¹²⁸ *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

¹²⁹ *Bernstein v Bester* 1996 (4) BCLR 449 (CC); *Basdeo Search and seizure* at 43.

¹³⁰ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC); *Powell v Van der Merwe* 2005 (5) SA 62 (SCA); *Zuma v National Director of Public Prosecutions* 2006(1) SACR 468 (D).

¹³¹ *S v Makwanyane* 1995 3 SA 391 (CC) at paras 100-102; *Bilchitz* 2011 TSAR 568-579.

¹³² *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47.

must be authorised by a law that must be of general application. The Constitutional Court has not given a complete interpretation of the phrase “law of general application” but has explicitly set out what would qualify as a law of general application. For example original and delegated legislation, the common law and exercises of executive rule-making all constitute a law of general application provided that they are accessible and precise.¹³³ Unauthorised administrative action¹³⁴ and employment practices by companies¹³⁵ do not satisfy this requirement, and therefore does not qualify as a law of general application.

If an applicant establishes that the rule limiting the right is a law of general application, a court must under section 36 determine whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36(1). This has become known as the proportionality test.

(b) Proportionality test

The proportionality enquiry is a factual one.¹³⁶ As noted above, section 36(1) sets out factors relevant to the limitations enquiry: (1) the nature of the right; (2) the importance of the purpose of the limitation; (3) the nature and extent of the limitation; (4) there must be proportionality between the limitation and its purpose; and (5) less restrictive means to achieve the purpose.¹³⁷

The factors listed in section 36 are not exhaustive but are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable.¹³⁸ The factors are simply indications in the overall

¹³³ *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC) at para 27; *S v Thebus* 2003 (6) SA 505 (CC) at para 65; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC): Kriegler J in a separate concurrence at para 136 held that all common law, regardless of its origin, including statutory, regulatory and tribal custom, would qualify as a law of general application.

¹³⁴ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 82.

¹³⁵ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 41.

¹³⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

¹³⁷ See, in general, *Brümmer v Minister of Social Development* 2009 (6) SA 323 (CC); *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC); *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at 777; *Iles* 2007 SAJHR 69 at 77; *Bilchitz* 2011 TSAR 568-579; *Woolman* 1997 SAJHR 103 at 110.

¹³⁸ *S v Manamela* 2000 (3) SA 1 (CC) at para 32-33; *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 70; *Mohlomi v Minsiter of Defence* 1997 (1) SA 124 (CC).

assessment whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹³⁹ Once the assessment is done for all these factors involved, then only must they be weighed up, but ultimately the section 36 analysis is one of proportionality, which involves an assessment of competing values on a case-by-case basis.¹⁴⁰ The factors are now discussed in what follows.

The nature of the right

The assessment of this factor considers the importance of the values that the right advances in the context in which it is sought to be applied.¹⁴¹ The important question asked in this enquiry is how important it is to protect this right from infringement given its nature. The Constitutional Court included the importance of the right as a factor to be considered alongside the nature of the right notwithstanding the fact that neither section 36(1) nor section 33 in the interim constitution contain the phrase “the nature and importance of the right.”¹⁴² Legal scholars argue that this implies that there is a hierarchy of rights in the Constitution meaning that the importance of the right will determine the stringency of the limitation test. This means that if right A is more important than right B it will always be given precedence over right B. Accordingly certain rights will be hard to justify infringing than others.¹⁴³ Despite the use of the clause the courts have consistently rejected the notion of any such hierarchy of rights in the Constitution.¹⁴⁴ The question which right should dominate over another is a fact-specific enquiry and the outcome will vary from case to case.¹⁴⁵

The importance of the purpose of limitation

In *Magajane*¹⁴⁶ the Court interpreted this factor to mean that a court must carefully review the public interest served by the statutory provision and determine the weight that this

¹³⁹ *S v Manamela* 2000 (3) SA 1 (CC) at para 32.

¹⁴⁰ *S v Manamela* 2000 (3) SA 1 (CC) at para 33.

¹⁴¹ *Iles* 2007 SAJHR 69 at 81; see also *Woolman* 1997 SAJHR 103 at 108: The author suggests that this factor should form part of the of the fundamental right analysis stage.

¹⁴² *S v Makwanyane* 1995 (3) SA 391 (CC); *Iles* 2007 SAJHR 69 at 77.

¹⁴³ *Iles* 2007 SAJHR 69 at 78-79.

¹⁴⁴ *Mthembi- Mahanyele v Mail and Guardian Ltd* 2004 (6) SA 329 (SCA) at para 40-42.

¹⁴⁵ *Iles* 2007 SAJHR 69.

¹⁴⁶ *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) at para 65.

purpose should carry in the proportionality review. If the state interest is not important the limitation will be unconstitutional regardless of the remainder of the enquiry.¹⁴⁷ Protecting our society against the use of drugs through legislation has, in this instance, been held to be an important state interest.¹⁴⁸

Nature and extent of the limitation

This factor involves an assessment of the effect of the limitation on the right itself. It assesses how the conduct or law limits the right and the extent to which the limitation curtails the enjoyment of the right.¹⁴⁹ This inquiry invariably invites a cost-benefit analysis.¹⁵⁰ In *Mdyide*¹⁵¹ the court held that the potential harm to the viability of the functioning of the Road Accident Fund should the “knowledge requirement” for condonation be introduced outweighs the possible negative impact of the provision in its present form.¹⁵² The Court found that the person’s right to access to the court had been limited; however it found that the limitation was justifiable.¹⁵³

The relationship between a limitation and the purpose of the limitation

This factor is also referred to as the rational connection test.¹⁵⁴ During the assessment of this factor the court considers whether the purpose of the limitation, regardless of importance, is reasonably related to the means used to achieve the purpose.¹⁵⁵ The Constitutional Court has held that the use of a reverse onus provision that made the possession of drugs prima facie proof of trafficking was not rationally related to the stated objective, namely curbing the trafficking in narcotics.¹⁵⁶ The Constitutional Court also held that prescription regulation in the Road Accident fund legislation was rationally connected

¹⁴⁷ *Iles* 2007 SAJHR 69 at 82; *Woolman* 1997 SAJHR 103 at 110.

¹⁴⁸ *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC); *Beinash Beinash v Ernst & Young and Others* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125, [1998] ZACC 19; see also *Van Der Mescht* 1996 SACJ 287.

¹⁴⁹ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at 49.

¹⁵⁰ *Woolman* 1997 SAJHR 103 at 110; see in general *Bilchitz* 2011 TSAR 568-579.

¹⁵¹ *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC).

¹⁵² *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at para 93.

¹⁵³ *Bilchitz* 2011 TSAR 568 at 570.

¹⁵⁴ *Ferreira v Levin and Vryenhoek v Powell* 1996 (1) BCLR 1 (CC) at para 126.

¹⁵⁵ *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 33-34; *Iles* 2007 SAJHR 69 at 83.

¹⁵⁶ *S v Zuma* 1995 (2) SA 642 (CC).

to a legitimate purpose of high public importance, namely the continued existence and maximum efficiency of a fund, for the compensation of people injured in road accidents.¹⁵⁷

Is the limitation chosen the least restrictive means, to achieve the purpose?

This factor requires the court to determine whether some or other formulation would achieve the same purpose but infringe the right less.¹⁵⁸ In other words the less restrictive means requirement necessitates considering other means that could be available.¹⁵⁹

In practice this enquiry to determine the least restrictive means has in South Africa caused an outcry from members of the legislature and the executives. This is what the courts have referred to as the fundamental problem of judicial review.¹⁶⁰ The dilemma is whether it is proper for the courts to substitute their judgments as to what is reasonable and justifiable and necessary for that of an elected legislature.

The courts should not only approve the least restrictive means. If so, the courts would limit the legislature's choices, to those means which are the least restrictive of all possible means.¹⁶¹ This the Constitutional Court discouraged by holding that the least restrictive means test should not be used to limit the range of legislative choice in a specific area.¹⁶²

4. SUBSTANTIVE PHASE

The relationship between the two aspects of section 35(5), trial fairness and detriment to the administration of justice, have been considered by the courts and various legal scholars. It is generally accepted that the purpose of section 35(5) is principally one test, namely whether the admission of evidence would be detrimental to the administration of justice.¹⁶³ The test relating to trial fairness is a specific manifestation of this broader test. The admission of evidence that would result in an unfair trial will also be detrimental to the

¹⁵⁷ *Road Accident v Mdeyide* 2011 (2) SA 26 (CC) at para 79.

¹⁵⁸ *Iles* 2007 SAJHR 69 at 84.

¹⁵⁹ *Bilchitz* 2011 TSAR 568 at 575.

¹⁶⁰ *S v Makwanyane* 1995 3 SA 391 (CC) at para 107.

¹⁶¹ *S v Williams* 1995 (3) SA 625 (CC); *Brümmer v Minister of Social Development* 2009 (6) SA 323 (CC) at para 70.

¹⁶² *S v Manamela* 2000 (3) SA 1 (CC) at para 34.

¹⁶³ *Currie and De Waal The bill of rights* at 806.

administration of justice.¹⁶⁴ It is foreseen that the admission of evidence that would not render the trial unfair may be excluded because its inclusion could be detrimental to the administration of justice.¹⁶⁵ However, section 35(5) involves two inquiries which should be kept separate, because rules applicable to the one are not necessarily applicable to the other.¹⁶⁶

As stated, a number of South African scholars have considered the interpretation and application of section 35(5). I refer to these authorities and sources and address the developments including considering comparative law sources which have not to date been explored. The various issues considered are dealt with by only referring to the most influential cases on the aspect, and not all of them.

4.1 The first leg of the test in section 35(5): trial fairness

Section 35(5) provides that a court must exclude unconstitutionally obtained evidence if admission would render the trial unfair. As real evidence can also be obtained unconstitutionally, this provision applies equally to real evidence.

Courts have a discretion when determining “trial fairness.” The discretion must be exercised after considering all the facts of the case, more specifically along fair trial principles.¹⁶⁷ The court must take into account competing societal interests.¹⁶⁸ Prominent though in the assessment is the public interest in protecting the fundamental rights of the accused.¹⁶⁹

In determining whether the admission of evidence will render a trial unfair the court will take into account the “nature of the evidence,” “nature of the right” and the “discoverability

¹⁶⁴ *S v Mthembu* [2008] 3 All SA 159 (SCA); *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 116; *Ally Constitutional exclusion* at 546; De Vos 2011 TSAR 268 at 274; *Ally* 2010 SALJ 694 at 722; Schwikkard and Van der Merwe *Principles of evidence* at 255; Naudé 2009 *Obiter* 607 at 627; Currie and De Waal *The bill of rights* at 809: “As a result, there will inevitably be an overlap between the two enquiries impelled by s 35(5).”

¹⁶⁵ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 116; *Ally Constitutional exclusion* at 546.

¹⁶⁶ Steytler *Constitutional criminal procedure* at 36. De Vos 2011 TSAR 268 at 274; Currie and De Waal *The bill of rights* at 805-811; Naudé 2009 *Obiter* 607 at 627; De Vos 2011 TSAR 268 at 274.

¹⁶⁷ Schwikkard and Van der Merwe *Principles of evidence* at 215; see also *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 117; Currie and De Waal *The bill of rights* at 807-809.

¹⁶⁸ Currie and De Waal *The bill of rights* at 808: the authors quoted *Lawrie v Muir* 1950 SC (J) 16, 26-27: “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 merely formal or technical ground.”

¹⁶⁹ *Ally* 2010 SALJ 694 at 713.

analysis". For now, though, I will consider only the "nature of the evidence" and "discoverability analysis" factors.

4.1.1 The nature of the evidence

(a) Real evidence and trial fairness

When it comes to analysing the admission of unconstitutionally obtained real evidence the South African courts have adopted the *Collins*¹⁷⁰ fair trial framework in order to determine whether admission of real evidence would render the trial unfair.¹⁷¹ In *Collins* the court held that unconstitutionally obtained real evidence "will rarely operate unfairly for that reason alone."¹⁷² The *ratio* is that real evidence not only pre-existed the Charter breach but also exists irrespective thereof.

(b) Real evidence emanating from the accused and trial fairness

Our courts have since the adoption of the Constitution employed the *Collins* fair trial test, which is closely aligned to the approach in *Matemba*.¹⁷³ In instances where courts have to determine the admissibility of testimonial evidence, they excluded the evidence because it accepted that there is a need to protect the accused from improper self-incrimination.¹⁷⁴ Evidence of this nature was excluded as it tended to render the trial unfair: the evidence did not pre-exist the constitutional violation and it affected the right against self-incrimination as one of the fundamental tenets of a fair trial.¹⁷⁵

Our courts have consistently since *Matemba* held that the privilege against self-incrimination is confined to testimonial evidence and does not extend to real evidence emanating from an accused.¹⁷⁶ As a result the courts found that the involuntary taking of DNA from the accused,¹⁷⁷ a voice sample¹⁷⁸ and fingerprints¹⁷⁹ did not violate the right to self-incrimination and therefore would not have rendered the trial unfair.¹⁸⁰

¹⁷⁰ *R v Collins* (1987) 28 CRR 122 (SCC).

¹⁷¹ *Ally Constitutional exclusion* at 295.

¹⁷² *R v Collins* (1987) 28 CRR 122 (SCC) at 137.

¹⁷³ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75; See the discussion in chapter 1 at para 3.1.

¹⁷⁴ Zeffertt and Paizes *Law of evidence* at 724.

¹⁷⁵ Zeffertt and Paizes *Law of evidence* at 725.

¹⁷⁶ Schwikkard and Van der Merwe *Principles of evidence* at 238.

¹⁷⁷ *S v R* 2000 (1) SACR 33 (W).

It seems as if the common law rule that no person may be compelled to supply evidence that incriminates him either before or during the trial survived the transition from pre to post constitution. However, in the dissenting judgment in *Pillay* the minority observed that the courts in Canada extended the trial fairness test.¹⁸¹ In *Stillman*¹⁸² the court reasoned that the compelled production of bodily parts is as great an invasion of the essence of the person as are compelled statements. Autoptic evidence obtained without consent or in the absence of statutory authorisation would therefore generally tend to affect the fairness of the trial. In order to reach this conclusion, the majority in *Stillman* extended the common-law privilege against self-incrimination to include evidence of bodily substances from an accused. This Schwikkard and Van der Merwe refers to as the “*Stillman* modification”.¹⁸³

South African courts have been keen to follow section 24(2) judgments and the question is whether our courts should adopt the “*Stillman* modification” for purposes of section 35(5) when confronted with the admissibility of evidence of unconstitutionally obtained autoptic evidence. Schwikkard and Van der Merwe observe that the reliance on the “*Stillman* modification,” if confronted with the admissibility of evidence of unconstitutionally obtained bodily samples, for the purposes of section 35(5) “would be totally unnecessary and somewhat artificial.”¹⁸⁴ The authors argue that the incorporation of the “*Stillman* modification” into our law would serve no purpose except to disturb the well-settled distinction between the self-incriminating testimonial evidence and real evidence obtained from the body of the accused. The authors argue that the drafters of section 35(5) had in mind that there would be unconstitutionally obtained evidence which if admitted would not render the trial unfair but which should be excluded as its inclusion would be detrimental to the administration of justice.¹⁸⁵ Unconstitutionally obtained autoptic (bodily) evidence falls within the latter category. The fact that the impugned evidence is excluded because its admission would be detrimental to the administration of justice does not make the

¹⁷⁸ *Levack v Regional Magistrate, Wynberg* 2003 (1) SACR 187 (SCA); *S v Orrie* 2004 (1) SACR 162 (C).

¹⁷⁹ *S v Huma* (2) 1995 (2) SACR 411 (W) at 417.

¹⁸⁰ Schwikkard and Van der Merwe *Principles of evidence* at 239.

¹⁸¹ *R v Stillman* (1997) 42 CRR (2d) 189 (SCC).

¹⁸² *R v Stillman* (1997) 42 CRR (2d) 189 (SCC).

¹⁸³ Schwikkard and Van der Merwe *Principles of evidence* at 239.

¹⁸⁴ Schwikkard and Van der Merwe *Principles of evidence* at 241; De Vos 2011 TSAR 268 at 275- 277; Zeffertt and Paizes *Law of evidence* at 735-736.

¹⁸⁵ Schwikkard and Van der Merwe *Principles of evidence* at 238-239; De Vos 2011 TSAR 268 at 276; *S v Pillay* 2004 (2) SACR 419 (SCA).

protection of the accused's body less worthy of protection.¹⁸⁶ The minority opinion, in *Pillay*, on the point also expressed its reservations in our courts adopting the *Stillman* approach. The majority, as well as the minority found it difficult to see how real evidence, having an independent existence, can ever be said to render the trial unfair. The fact that our courts have not adopted the *Stillman* fair trial analysis is to be welcomed.¹⁸⁷

4.1.2 Discoverability analysis

What has been discussed so far can be influenced by the following situation: if the discovery of the evidence is linked to the unconstitutional participation of the accused, the question of admissibility might be influenced by the fact that the evidence could have been discovered by lawful means.¹⁸⁸ This is where the so-called "discoverability analysis" comes in. The focus of the discoverability analysis is to assess whether the prosecution had any means to procure the disputed evidence other than those used to obtain it.¹⁸⁹

4.2 Second leg of test in section 35(5): detriment to the administration of justice

If the admission of unconstitutionally obtained evidence would not render the trial unfair, such evidence must be excluded if inclusion would be detrimental to the administration of justice. It is through the public interest standard, that a court can ascertain whether the admission of the disputed evidence would be detrimental to the administration of justice.¹⁹⁰ The public interest is determined by weighing and balancing the objectives of respect for the Bill of Rights (particularly by law enforcement) and respect for the judicial process (particularly by the man in the street).¹⁹¹ It is the only manner in which one can ascertain if the admission or exclusion of the disputed evidence would be detrimental to the administration of justice.¹⁹²

To achieve this balance of interests a court must consider "all the circumstances" when determining whether the admission of evidence would bring the administration of justice

¹⁸⁶ Schwikkard and Van der Merwe *Principles of evidence* at 241; De Vos 2011 TSAR 268 at 277.

¹⁸⁷ De Vos 2011 TSAR 268 at 275.

¹⁸⁸ *Ally Constitutional exclusion* at 363.

¹⁸⁹ *Ally* 2005 SACJ 66 at 69.

¹⁹⁰ *S v Zuko* [2009] 4 All SA 89 (E) at para 21.

¹⁹¹ Currie and De Waal *The bill of rights* at 809; see also *S v Mphala* 1988 (1) SACR 388 (W).

¹⁹² *Ally* 2005 1 SACJ 66 at 71; Currie and De Waal *The bill of rights* at 809-811; *S v Mphala* 1998 (1) SACR 654 (W) at 658.

into disrepute.¹⁹³ Under the second leg of the admissibility analysis, the court should consider the seriousness of the constitutional infringement¹⁹⁴ and the effect that exclusion may have on the integrity of the administration of justice.¹⁹⁵

4.2.1 Seriousness of the constitutional infringement

A relevant consideration under this factor is the good faith conduct of the police.

(a) Good faith conduct

The good faith of police, as an exception to the exclusionary rule, have been considered and applied in foreign jurisdictions like Canada and the United States.¹⁹⁶ Clear principles emanated from these jurisdictions concerning the extent and the role “good faith” can or should play in the exclusion of evidence, more specifically in the assessment of the seriousness of the constitutional violation.¹⁹⁷ It is clear that the “good faith” exception relates to the manner in which the police officers obtain evidence during the evidence gathering phase. Central to this aspect are the questions whether: (a) section 35(5) allows a good faith exception; and (b) whether a subjective or an objective test should be applied to assess whether police acted in good faith. A central issue is whether South African courts should condone negligent or inadvertent infringements of the law by police as good faith violations.

(i) Good faith exception and section 35(5)

In *Motloutsi*,¹⁹⁸ a case decided under the interim Constitution, the Supreme Court of Appeal pointed out that an exclusionary rule that allows for a good faith exception creates a risk of encouraging police officers to remain ignorant of the rights of suspects, accused and arrested persons.¹⁹⁹ The Court articulated its reasoning as follows:

“To hold otherwise would be to hold what to many people would be an absurd position, namely that the less a police officer knew about the Constitution and

¹⁹³ *S v Nell* 2009 (2) SACR 37 (C) at para 21.

¹⁹⁴ Schwikkard and Van der Merwe *Principles of evidence* at 248-259.

¹⁹⁵ Alty 2012 *PELJ* 476 at 480.

¹⁹⁶ Schwikkard and Van der Merwe *Principles of evidence* at 251.

¹⁹⁷ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 117.

¹⁹⁸ *S v Motloutsi* 1996 (1) SACR 78 (C).

¹⁹⁹ *S v Motloutsi* 1996 (1) SACR 78 (C) at 87.

indeed, of the law itself, the more likely he would be to have the evidence which he obtained in breach of the law (and/ or the Constitution) admitted in Court.”²⁰⁰

Notwithstanding the reservations expressed in *Motloutsi*, the presence or absence of good faith on the part of police arose directly and indirectly in several cases decided under section 35(5). Guidance has been provided by the courts in determining whether police conduct should be classified as a *bona fide* violation. The courts classified violations as “good faith” when it was motivated by the need to promote public safety and urgency²⁰¹ and when the impropriety was neither flagrant nor deliberate.²⁰² The distinction always only becomes meaningful within the grey area between clearly inadmissible and clearly admissible. It appears that constitutional violations termed “good faith” would weigh heavily in favour of the reception of evidence obtained as a result thereof.²⁰³ It follows that a finding of “good faith” may in certain cases deny the accused access to an exclusionary remedy.

(ii) Good faith test

Good faith must be reasonable and an objective test must be applied.²⁰⁴ Our courts have in judgments considered both objective and subjective factors to determine if police conduct could be termed as good faith. It appears that unconstitutional conduct of the police is mitigated if reasonable and justifiable,²⁰⁵ *bona fide*²⁰⁶ and subjectively honest conduct.²⁰⁷ Conduct would also be termed good faith in situations when the police officers relied on an Act of Parliament that has not been declared unconstitutional, or a reported case of the highest court which has not been over-ruled,²⁰⁸ or the consent of the legal representatives

²⁰⁰ *S v Motloutsi* 1996 (1) SACR 78 (C) at 87.

²⁰¹ *S v Madiba* 1998 (1) BCLR 38 (D); Zeffertt and Paizes *Law of evidence* at 726: “In *S v Madiba*, Hurt J allowed the admission of real evidence obtained when policemen had, without announcement, kicked down a door in circumstances where a ‘shoot-out’ might have occurred if ‘more prosaic methods of arrest and search had been adopted’ by the police.”

²⁰² *S v Dos Santos* 2010 (2) SACR 382 (SCA) at para 23-24.

²⁰³ *S v Mthembu* [2008] 3 All SA 159 (SCA).

²⁰⁴ Schwikkard and Van der Merwe *Principles of evidence* at 256.

²⁰⁵ *S v Tandwa* 2008 (1) SACR (SCA) at para 117; see also *S v Pillay* 2004 (2) SACR 419 (SCA) at para 93: The Court stated that the subjective and honest conduct of the police did not make the infringement less serious.; *S v Mthembu* [2008] 3 All SA 159 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA) dissenting Scott JA at para 16; see also *S v Motloutsi* 1996 (1) SACR 78 (C); *S v Madiba* 1998 (1) BCLR 38 (D); Schwikkard and Van der Merwe *Principles of evidence* at 241-254.

²⁰⁶ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 136.

²⁰⁷ *S v Shongwe* 1998 (2) SACR 321 (T); *S v Pillay* 2004 (2) SACR 419 (SCA) dissenting Scott JA at para 16.

²⁰⁸ *S v Motloutsi* 1996 1 SACR 78 (C) at 88.

of the accused was obtained and that at the time no standard practice existed regarding the obtainment of consent in respect of the securing of the evidence.²⁰⁹

4.2.2 The integrity of the administration of justice

Relevant considerations under this factor are: the seriousness of the charges faced by the accused, importance of the evidence to secure a conviction and whether public opinion should be a weighty factor when this group is considered.

(a) Seriousness of the charges

Relevant under this factor, is the seriousness of the offence charged and not the seriousness of the crime committed.²¹⁰ The seriousness of the charge can be determined by considering facts that are not in dispute in the main trial,²¹¹ facts in the trial-within-a-trial,²¹² and the allegations in the charge sheet.²¹³ Due regard should be had, when considering this factor, to the presumption of innocence and the values sought to be protected by the fundamental rights.²¹⁴ Our courts have delivered different outcomes in judgments because of the weight attributed to this factor.²¹⁵ In *Shongwe*²¹⁶ the court emphasised the seriousness of the charges factor and admitted the evidence.²¹⁷ In *Melani*²¹⁸ the court considered the seriousness of the charge factor but it was not determinative to its decision.²¹⁹ Recently the Supreme Court of Canada ruled that the more serious an offence, the greater likelihood that the administration of justice would be brought into disrepute by its exclusion.²²⁰ The Court however qualified this observation by stating that this factor has the potential to “cut both ways” and will not always weigh in favour of admission.²²¹ This means, depending on the circumstances that evidence which links an accused to serious charges may be excluded.²²²

²⁰⁹ *S v R* 2000 (1) SACR 33 (W).

²¹⁰ *Ally* 2012 *PELJ* 476 at 490.

²¹¹ *S v Naidoo* 1998 (1) SACR 479 (D) at 507-522.

²¹² *S v Malefo* 1998 (1) SACR 127 (W) at 133 and 138.

²¹³ *S v Malefo* 1998 (1) SACR 127 (W) at 133 and 138.

²¹⁴ *Ally* 2012 *PELJ* 476 at 490.

²¹⁵ *S v Melani* 1996 (1) SACR 335 (E); *S v Shongwe* 1998 (2) SACR 321 (T).

²¹⁶ *S v Shongwe* 1998 (2) SACR 321 (T).

²¹⁷ *S v Shongwe* 1998 (2) SACR 321 (T) at 344-345.

²¹⁸ *S v Melani* 1996 (1) SACR 335 (E).

²¹⁹ *S v Melani* 1996 (1) SACR 335 (E) at 353.

²²⁰ *R v Côté* 2011 SCC 46 at para 54.

²²¹ *R v Côté* 2011 SCC 46 at para 54.

²²² *Ally* 2012 *PELJ* 476 at 493.

It is submitted that an inflexible line of reasoning should not be determinative of the admissibility assessment.²²³

(b) Importance of the evidence to secure conviction

In *Pillay* the majority held that the “importance of the evidence to secure a conviction” should be considered under this factor in order to determine what effect the admission of the disputed evidence would have on the integrity of the criminal justice system.²²⁴ As a result the court excluded the evidence.

The importance of the evidence to secure conviction is a factor that courts should consider in conjunction with the constitutional rights guaranteed in the Bill of Rights.²²⁵ In short, the “importance of the evidence” factor should not be determinative of the outcome of the admissibility assessment.

(c) Public opinion

The third group of factors are concerned with the public interest in crime control. South Africa suffers from a high crime rate which in turn makes it difficult for courts to maintain the balance set out in *Mphala*.²²⁶ The question is whether public opinion should play a role in the admissibility assessment and if so what weight should be attached to it.²²⁷

The Constitutional Court stated that public opinion does play a role in exercising the discretion established by the Constitution, but courts should not be slaves to the “current mood” of society.²²⁸ Although public opinion is a factor to be considered the court should be mindful of the fact that it is entrusted with the responsibility of upholding the guarantees in the Bill of Rights.²²⁹

In practice the weight that should be attached to this factor has proven difficult to pin down. The majority in *Pillay* articulated the parameters within which a court should assess the community views or public opinion: Courts should take into account the views of the

²²³ Ally 2012 PELJ 476 at 492.

²²⁴ *S v Pillay* 2004 (2) BCLR 158 (SCA) at para 97; see also *S v Matlou* 2010 (2) SACR 342 (SCA) at para 32.

²²⁵ Ally 2012 PELJ 476 at 501; see also *S v Pillay* 2004 (2) BCLR 158 (SCA) at para 97.

²²⁶ *S v Mphala* 1998 (1) SACR 388 (W).

²²⁷ Ally 2012 PELJ 476 at 482-483.

²²⁸ *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 88.

²²⁹ *S v Melani* 1996 (2) BCLR 174 (EC).

reasonable person, who is usually the average person in the community whose current mood is reasonable.²³⁰ In contrast, the minority in *Pillay*, because of the high crime rate and the level of public confidence in the criminal justice system, was reluctant to stay within parameters set out in the majority judgment of *Pillay*. Public opinion was accorded far greater weight in determining whether admission of evidence would otherwise be detrimental to the administration of justice.²³¹

The minority view in *Pillay* has been criticised. Although detriment to the administration of justice involves the exercise of a value judgement while considering the public views the assessment should not be equated with a consideration of public opinion.²³² In *Williams*²³³ Langa, Deputy President of the Constitutional Court, emphasised the importance of this distinction when he held that South African courts should interpret the Constitution in accordance with the "values that underlie an open and democratic society based on human dignity, freedom and equality," instead of "contemporary standards of decency."²³⁴ In the light hereof, it is noteworthy that Langa DP intended to impress on South African courts that the prevailing public mood should occupy a subsidiary role in relation to the long-term values sought to be achieved by the Constitution.²³⁵

5. PRINCIPLES DETERMINING THE ADMISSIBILITY OF REAL EVIDENCE

In this part of the thesis I examine how the South African courts applied the principles identified when they interpreted the substantive and procedural phases of section 35(5), when determining the admissibility of unconstitutionally obtained real evidence. In the process I also consider the procedures provided by the provisions of section 37 of the Criminal Procedure Act, 1977.

²³⁰ See also Currie and De Waal *The bill of rights* at 809; see also *S v Pillay* 2004 (2) SACR 419 (SCA) at para 92.

²³¹ Ally 2012 *PELJ* 476 at 484 and the sources referred to in fn 40; *S v Pillay* 2004 (2) BCLR 158 (SCA) at para 126.

²³² Ally 2012 *PELJ* 476 at 484; see also *S v Williams* 1995 (7) BCLR 861 (CC) at para 36-37.

²³³ *S v Williams* 1995 (7) BCLR 861 (CC).

²³⁴ *S v Williams* 1995 (7) BCLR 861 (CC) at para 36-37.

²³⁵ See also Schwikkard and Van der Merwe *Principles of evidence* at 250.

5.1 Conscriptio analysis

The Supreme Court of Appeal delivered conflicting judgments when it applied the *Collins* trial framework to determine the admissibility of real evidence. *S v M*²³⁶ is an example of a case where the court determined the trial fairness requirement based on the real evidence divide. *In casu* the Supreme Court of Appeal had to determine whether the inclusion of real evidence (a letter) in the trial of the accused complied with the notions of basic fairness as required in section 35 of the Constitution. The Court classified the letter as real evidence of a documentary nature because it did not conscript (incriminate) the accused against himself.²³⁷ The Court referred to the Canadian decision of *Jacoy*²³⁸ and held that, despite the letter being improperly obtained, its admission does not adversely affect the fairness of the trial of the appellant. In other words real evidence should be treated differently when compared to testimonial evidence. Unconstitutionally obtained real evidence, it was asserted, would more readily be admitted than testimonial evidence.²³⁹ The reasoning was that real evidence does not conscript the accused against him in the manner of testimonial evidence. The Court assessed trial fairness without considering the manner in which evidence had been obtained.

On the other hand in *Pillay*²⁴⁰ the Supreme Court of Appeal stated that the admission of real evidence could compromise trial fairness, if the accused had been compelled to participate in its creation or location and the evidence could not have been discovered by lawful means.²⁴¹ The Court held that the issue of the impact of unconstitutionally obtained evidence on trial fairness depended not on the nature of the evidence, whether real or testimonial, but rather on whether or not it would only have been found with the compelled assistance of the accused.²⁴² The admission of conscriptive evidence would render the trial unfair.²⁴³ The concept conscription conveys the meaning of unconstitutional conduct by

²³⁶ *S v M* [2002] 3 All SA 599 (A); also see *S v Mkhize* 1999 (2) SACR 632 (W).

²³⁷ *S v M* [2002] 3 All SA 599 (A) at para 27.

²³⁸ *R v Jacoy* (1988) 38 CRR 290 at 298; *R v Burlingham* [1995] 28 CRR 2d 244 (SCC) at para 88-89; see also *Thomson Newspapers Ltd et al v Director of Investigation and Research et al* (1990) 67 DLR (4th) 161 at 256 quoted in *S v Pillay* 2004 (2) SACR 419 (SCA) at para 88.

²³⁹ *S v M* [2002] 3 All SA 599 (A) at para 31; *S v Mkhize* 1999 2 SACR 632 (W): The High Court held that unconstitutionally obtained real evidence (a pistol) was admissible.

²⁴⁰ *S v Pillay* 2004 (2) SACR 419 (SCA).

²⁴¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89.

²⁴² *S v Pillay* 2004 (2) SACR 419 (SCA) at para 88.

²⁴³ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 88.

police that unlawfully infringes the constitutional procedural rights of the accused, which causes him to participate in the production of the impugned evidence.²⁴⁴

The Supreme Court of Appeal in *Tandwa*²⁴⁵ and *Mthembu*²⁴⁶ qualified the impact of *Pillay*. Section 35(5) envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.²⁴⁷ The Supreme Court of Appeal in both decisions held that the admissibility of derivative real evidence will attract fair trial considerations on account of the manner in which it was obtained, specifically in the case of torture. The trial is rendered unfair because it introduces into the process of proof against the accused evidence obtained by means that violated basic civilised injunctions against assault and compulsion.²⁴⁸ Schwikkard and Van der Merwe suggest that *Tandwa* is not support that all derivative evidence must at all times attract fair trial considerations.²⁴⁹ The authors conclude that the Supreme Court of Appeal aligned itself with the Canadian approach (admissibility of derivative evidence) only insofar as the matter involved violence and not a mere technical violation of a guaranteed right.²⁵⁰

As an intermediate conclusion it can be argued that our courts should follow *Pillay* as qualified by the reasoning in *Tandwa*. The Courts opted for a purposive interpretation of the right to a fair trial by seeking the goals this right seeks to achieve.²⁵¹ The judgments confirm that the primary purpose of trial fairness in section 35(5) is to ensure the prevention of conscription.²⁵² It follows that trial fairness should not be determined on whether or not the evidence is real or testimonial but rather whether an accused had been compelled to incriminate himself. Central to the determination is the manner in which the evidence had been obtained. Our courts clearly distinguish between testimonial and real evidence in the context of the privilege against self-incrimination, but the same cannot be said about the

²⁴⁴ *Ally Constitutional exclusion* at 362.

²⁴⁵ *S v Tandwa* 2008 (1) SACR 613 (SCA).

²⁴⁶ *S v Mthembu* [2008] 3 All SA 159 (SCA).

²⁴⁷ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 116.

²⁴⁸ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 120.

²⁴⁹ Schwikkard and Van der Merwe *Principles of evidence* at 245.

²⁵⁰ Schwikkard and Van der Merwe *Principles of evidence* at 245.

²⁵¹ *Ally Constitutional exclusion* at 327.

²⁵² *Ally Constitutional exclusion* at 327 and 362: "In a manner similar to their Canadian counterparts, the South African Supreme Court of Appeal has chosen to discard the concept 'self-incrimination' from its terminology and replaced it with 'conscription'."

enquiry into the fairness of the trial in terms of section 35(5) of the Constitution.²⁵³ The courts generally do not, under section 35(5) determinations, distinguish real evidence from other evidence such as testimonial evidence, nor have they considered why it might or should be different.

5.2 Discoverability analysis

The courts have applied both the discovery doctrine and the independent source doctrine when considering whether real evidence would- but for the unconstitutional conduct- have been discovered by lawful means. The exclusion of such evidence would generally be detrimental to the administration of justice.²⁵⁴

5.2.1 Discoverability doctrine

The inevitable discovery doctrine has its origin in the United States of America.²⁵⁵ The doctrine of inevitable discoverability provides that unconstitutionally obtained real evidence which would inevitably have been discovered by alternative means should not be excluded on the grounds of unfairness regardless of the information arising from the unconstitutional conduct.²⁵⁶ The court must consider whether the prosecution had any other means to procure the disputed evidence than those used to secure it.²⁵⁷ The rationale underlying this doctrine is that the state gains an unfair advantage it would not have had if this were not for the unconstitutional infringement. Excluding evidence after the employment of the discoverability analysis may result in the parties being restored to the position they were in immediately prior to the infringement (*status quo ante*).

The Supreme Court of Appeal adopted the doctrine of inevitable discovery in the case of *Pillay* by relying on Canadian jurisprudence in this regard.²⁵⁸ Like the Canadian authorities the Court enquired if the evidence would have been discovered “but for” the violation.²⁵⁹

²⁵³ De Vos 2011 TSAR 268 at 276.

²⁵⁴ Schwikkard and Van der Merwe *Principles of evidence* at 258.

²⁵⁵ *Nix v Willaimes* 467 US 431 (1984).

²⁵⁶ Ally 2005 SACJ 66 at 69; *Nix v Williams* 467 US 431 (1984) at 444; Naudé 2008 SACJ 168 at 169.

²⁵⁷ Ally 2005 SACJ 66 at 69.

²⁵⁸ Naudé 2008 SACJ 168 at 169; Ally *Constitutional exclusion* at 330; *R v Burlingham* (1995) 28 CRR 2d 244 (SCC); *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89; *S v Tandwa* 2008 (1) SACR 613 (SCA).

²⁵⁹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89; *R v Burlingham* (1995) 28 CRR 2d 244 (SCC); *R v Stillman* (1997) 42 CRR (2d) 180 (SCC).

The Court found that the illegal monitoring did not constitute conscriptive evidence and the money would have been found even in the absence of a violation of the constitutional rights of the accused.²⁶⁰ In the circumstances the Court held that admission of evidence would not render the trial unfair because the real evidence would inevitably have been discovered.²⁶¹

The doctrine has been criticised and problems in its application have been identified. The minority opinion in *Pillay* agreed with the majority but took the matter further. The minority warned that a rigid application of the discoverability doctrine might lead to astonishing consequences. The minority argued that most fair-minded people, especially in South Africa with its high crime rate, would balk at the idea of a murderer being acquitted because evidence of the discovery of the victim's concealed body would render the trial unfair.²⁶² As a result the court stated that an inflexible approach should be discarded. Because of the inherent speculative nature of the doctrine, courts should demand a higher standard of proof especially because a constitutional breach has been perpetrated.²⁶³ As a result some legal commentators propose that the doctrine of inevitability to be substituted with the so-called independent source doctrine.²⁶⁴

5.2.2 Independent source doctrine

The independent source doctrine entails that unconstitutionally discovered real evidence would be admissible, if subsequent to such discovery, the real evidence is seized through sources independent from the initial unconstitutional discovery.²⁶⁵

Du Toit *et al*²⁶⁶ submitted that the independent source doctrine was applied in *Lachman*.²⁶⁷ In this case the accused was convicted of corruption. The charge arose from his attempt to solicit a bribe from the state witness in return for sorting out his tax problems. On appeal the accused challenged the admissibility of evidence on two grounds. He argued that the cell phone was unlawfully seized and also that he was denied access to legal representation.

²⁶⁰ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89-90.

²⁶¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 90.

²⁶² *S v Pillay* 2004 (2) SACR 419 (SCA) minority judgment at para 8.

²⁶³ Naudé 2008 SACJ 168 at 180; see also Schwikkard and Van der Merwe *Principles of evidence* at 200.

²⁶⁴ Naudé 2008 SACJ 168 at 185; Du Toit *et al Criminal procedure* at 98N- 5.

²⁶⁵ Schwikkard and Van der Merwe *Principles of evidence* at 196 and the sources referred to there; *Murray v US* 487 US 533 (1988); Du Toit *et al Criminal procedure* at 98N-5.

²⁶⁶ Du Toit *et al Criminal procedure* at 98N-5.

²⁶⁷ *S v Lachman* 2010 (2) SACR 52 (SCA) at para 36; see also Du Toit *et al Criminal procedure* at 98N-5.

The Court firstly, accepted that even if the accused refused consent for the desk to be searched, the ultimate result, the retrieval of the cell phone, would still have followed.²⁶⁸ Secondly, even if the accused retained an attorney one of two courses could have been adopted. One, he could have consented to the search, alternatively he may have insisted on the police obtaining a search warrant. Confronted with the latter option the police could either have conducted a search and seizure on the basis that they had reasonable grounds to believe that a search warrant would be issued should they apply therefore and that the delay in obtaining the warrant would defeat the object of the search. Alternatively, the police would have secured the accused's desk and returned with a search warrant. The retrieval of the incriminating evidence (a cell phone) would therefore have been inevitable.²⁶⁹

5.2.3 Conclusion

I agree with the approach advocated by *Du Toit et al.* The authors prefer an approach that avoids dogmatic rules and which takes into account all the circumstances in addressing the two questions raised in section 35(5).²⁷⁰ They accept that evidence that satisfies the independent source doctrine would be less likely to render the trial unfair or be detrimental to the interest of justice, if received, than evidence that satisfies the less strict test favoured by the Supreme Court of Appeal in *Pillay*.

5.3 Real evidence obtained through compulsion

The Supreme Court of Appeal have consistently held that compelling an accused to submit to the ascertainment of bodily features (real evidence) infringed neither the right to remain silent nor the right not to give self-incriminating evidence.²⁷¹ It is generally accepted that the compulsory ascertainment of bodily features authorised by legislation such as chapter 3 of the Criminal Procedure Act, 1977, can infringe on the accused fundamental rights: for example the accused has the right to his dignity, the right to freedom and security for the

²⁶⁸ *S v Lachman* 2010 (2) SACR 52 (SCA) at para 36.

²⁶⁹ *S v Lachman* 2010 (2) SACR 52 (SCA) at para 36; *Du Toit et al Criminal procedure* at 98N-5.

²⁷⁰ *Du Toit et al Criminal procedure* at 98N- 5.

²⁷¹ *Levack v Regional Magistrate Wynberg* 2003 (1) SACR 187 (SCA); *S v Orrie* 2004 (1) SACR 162 (C) at para 20.

person and to be free from all forms of violence, as well as the right to bodily and psychological integrity.²⁷²

5.3.1 Objective reasonableness of a right

The following discussion provides an example of how the courts determine objective reasonableness (legitimate expectation of a fundamental right) when faced with an application to obtain real evidence through compelled surgery under section 37 of the Criminal Procedure Act. In *Gaqa*²⁷³ the court allowed a police official to use the necessary violence to search the accused including any necessary surgical procedure to be performed by a duly qualified medical doctor and paramedic to remove a bullet for the purpose of ballistic tests. The Court considered the bullet to be real evidence as opposed to the furnishing of oral or testimonial evidence by the accused. The surgical intervention to remove the bullet would therefore not violate the right to self-incrimination but would be a serious breach of the respondent's human dignity and an act of State-sanctioned violence against his body. The Court stated that the order sought involves the limitation of rights and accepted that fundamental rights may be limited in terms of section 36(1) of the Constitution, if the limitation is reasonable and justifiable in an open and democratic society. The Court referred to *Dotcom Trading*²⁷⁴ and concluded that reasonableness of such surgical procedures depended on a case by case approach in which the individual's interests in privacy and security are weighed against society's interest in conducting the procedure.²⁷⁵ The Court assessed the individual's interest by considering the following factors: the bullet was lodged in the respondent's leg (thigh) and the evidence of an orthopaedic surgeon who stated that the bullet could be removed through a simple procedure, whereby the respondent would have a general anesthetic. The police alleged that in the absence of the bullet there would be no other evidence against the respondent.²⁷⁶ These factors were weighed against the following public interests: The Court observed that a refusal of an order would result in a serious crime remaining unsolved, law enforcement would be stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the

²⁷² See respectively sections 10, 12(1)(c) and 12(2).

²⁷³ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

²⁷⁴ *Dotcom Trading 121 (Pty)Ltd t/a Live Africa Network News v The Honourable Mr Justice King NO 2000 (4) ALL SA 128 (C)*.

²⁷⁵ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); *Winston v Lee* 470 US 753 (1985).

²⁷⁶ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 659.

resolution of such crime. Although the intrusion was substantial, the Court concluded that the community interest must prevail in this case. Because the Court found that the interest of society overshadowed the interest of the accused the Court ordered the removal of the bullet.²⁷⁷ On the other hand the court in *Xaba*²⁷⁸ refused to give a similar order. Although the facts in *Xaba* were similar to *Gaqa* the court did not consider itself bound by *Gaqa*. The Court did not comment on the *Gaqa*'s analysis of reaching a balance between the interests of the individual and the interests of the community. However, the Court emphasised that the answer to this complex problem of reaching a balance between the interests of the individual and the interests of the community in having crimes solved by using surgical intervention posed by similar cases like this should be dealt with by the legislature.²⁷⁹

5.3.2 Law of general application

Under section 36(1) a law of general application can validly limit a right in the Bill of Rights. Sections 36B and C, and 37 of the Criminal Procedure Act, 1977, are examples of a law of general application which authorises the police to obtain (through compulsion, if necessary) a person's fingerprints,²⁸⁰ a blood sample,²⁸¹ a voice sample;²⁸² or to take part in an identification parade.²⁸³ The question arises whether the procedures in section 37 sanctions the violence necessary to ascertain bodily evidence.

The discussion of the cases *Gaqa* and *Xaba* above also casts light on the current issue. In *Gaqa*²⁸⁴ the applicant sought an order to have a bullet surgically removed for the purpose of ballistic tests. The respondent contended that there was no statutory or common-law authorisation for the relief sought. The Court opined that both sections 27 and section 37(1)(c) of the Criminal Procedure Act, 1977, permit the violence necessary to remove the bullet.²⁸⁵ Section 27 provides that a police official who may lawfully search any person may use such force as may be reasonable and necessary to overcome any resistance against such

²⁷⁷ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 659.

²⁷⁸ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

²⁷⁹ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 714-715.

²⁸⁰ See in general *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

²⁸¹ *S v Orrie* 2004 (1) SACR 162 (C).

²⁸² *Levack v Regional Magistrate, Wynberg* 2003 (1) SACR 187 (SCA).

²⁸³ *S v Mphala* 1998 (1) SACR 654 (W).

²⁸⁴ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

²⁸⁵ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 658.

force. The Court found that section 27 permitted police to use any reasonable force to conduct a search. The facts of the case will of course determine the force required for the search.²⁸⁶ The Court further stated that section 37(1)(c) authorise a police official to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance. The Court accepted that a bullet was clearly not a mark, characteristic or distinguishing feature of the body but a policeman may take the necessary steps to determine whether the body shows the bullet – a “condition or appearance” – which may be linked to the murder weapon.²⁸⁷ The Court further held that the police have a constitutional duty in terms of section 205(3) of the Constitution to investigate crimes. The police would be hamstrung in fulfilling this constitutional duty without the bullet. In short, the Court held that sections 27 and 37 were laws of general application as required by the limitation clause.

The court in *Xaba*,²⁸⁸ in similar circumstances to those in *Gaqa*, opined that the conclusions reached there are clearly wrong and declined to follow them. The Court, in *Xaba*, concluded that section 27 and 37(1)(c) did not permit a police official to use the necessary violence to obtain the surgical removal of a bullet. The Court held that a search of a person in section 27 was not meant to include a surgical operation under general anaesthetic to remove an object from the body of a person. The Court reasoned that: (a) the usual meaning of search of a person did not include performing surgeries, (b) the police official to whom powers were given in the various circumstances got them regardless of whether or not he was qualified to do what was contemplated and the legislature would not have vested in a layman the power to perform surgery, and (c) because section 37 of the Criminal Procedure Act prohibited a police official from taking a blood sample and the legislature would hardly have forbidden this if it intended to allow him to remove a bullet in the way contemplated in this case.²⁸⁹ The Court concluded that since the police may not search a person by operating on his body the police cannot use the reasonable force authorised by section 27. Since the police may not delegate the power to search, the police may not ask a doctor to

²⁸⁶ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 657.

²⁸⁷ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 658.

²⁸⁸ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

²⁸⁹ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 712-713.

do this in his stead. As a result the search warrant that authorises the police officer to search, in doing so does not authorise such surgical intervention, nor could it.

The Court considered the provisions of section 37(1)(c) by stating that its construction must be read in the context of section 37(2)(a). Section 37(1)(c) was not meant to empower a police official to himself engage in surgery neither to take a blood sample.²⁹⁰ Section 37(1)(c) was also not intended to give the police the power to delegate to a medical practitioner to perform an operation on the accused as it is section 37(2)(a) which deals with police empowerment of a medically qualified person and not section 37(1)(c). Section 37(2)(a) empowers any registered medical practitioner to do things if requested thereto by any police official. If so requested the medical practitioner may take such steps including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to has any mark, characteristic or distinguishing feature or shows any condition or appearance. The range of steps which may be deemed necessary does not include the surgical removal of a bullet under general anaesthetic. The Court reasoned that the legislature did not intend this because of its repeated use of the expression “including the taking of a blood sample” in section 37. The Court concluded that the legislature indicated that only the limited surgery involved in a taking blood sample was to be included and not the steps which could be deemed to include the more far reaching surgery contemplated in this case.²⁹¹

6. SUMMARY

The following principles discussed in this chapter are clear and need no further attention: that a trial-within-a-trial should be held when considering section 35(5) applications, whether standing is a requirement under section 35(5) and the good faith conduct of the police as a factor to determine the seriousness of the constitutional violation.

The following principles are still subject to differences of opinion, or where value could be added with the comparative perspective that is to follow, whether as far as the principles

²⁹⁰ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 713-714.

²⁹¹ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 714.

themselves are concerned, or merely in their practical application: incidence and nature of the onus, section 35 should be interpreted to also include protection for a suspect who is neither arrested nor detained, meaning of concept suspect, the nature of the link required by the words “obtained in a manner”, the factors a court must consider in the substantive phase of section 35(5): the “nature of the evidence;” “discoverability analysis,” “nature of the right,” the seriousness of the charges, importance of the evidence to secure conviction and current mood of society and lastly, the constitutionality of section 37 of the Criminal Procedure Act.

In chapter 4, I consider the exclusionary rule jurisprudence in Canada. The interpretation and application of section 24(2) of the Charter is explored and specifically the approach adopted by the courts in determining the admissibility of unconstitutionally obtained real evidence.

CHAPTER 4

THE EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE UNDER SECTION 24(2) OF THE CANADIAN CHARTER

1. INTRODUCTION

Section 35(5) of the South African Constitution and section 24(2) of the Canadian Charter are couched in strikingly similar terms.¹ It is therefore not strange that South African courts consider Canadian section 24(2) jurisprudence when making determinations under section 35(5).² In this chapter a comparative analysis is undertaken to, determine which principles Canadian courts employ under the exclusionary remedy and to identify the pitfalls South African courts should avoid under section 35(5) applications.

Prior to the adoption of the Charter there was no rule of law or judicial discretion to exclude evidence because of the improper or illegal method by which it was obtained.³ The general rule of admissibility was that all relevant, probative and reliable evidence would be admitted in court.⁴ The *rationale* was that the purpose of a criminal trial was not to assess whether the police officers acted legally but rather whether the accused acted illegally. It was accordingly considered appropriate that the illegality of an officer's conduct is to be addressed in other legal proceedings. The common law inclusionary rule effectively prevented the courts from dissociating themselves from the police illegal conduct in criminal trials.⁵

¹ Ally 2010 SACJ 22 at 23; *S v Naidoo* 1998 (1) SACR 479 (N).

² Naudé 2008 SACJ 168 at 170; see also *Director of Public Prosecutions, Transvaal v Viljoen* [2005] 2 All SA 355 (SCA): The court followed the *Collins* approach that an accused bears the burden of showing on a balance of probabilities that the police violated his or her Charter rights; *S v Pillay* 2004 (2) SACR 419 (SCA): The Supreme Court of Appeal adopted the doctrine of inevitable discovery by referring to Canadian case law; *S v Soci* 1998 (2) SACR 275 (E): The court adopted a purposive approach to the interpretation of section 35(5); *S v Naidoo* 1998 (1) SACR 479 (N): The court remarked that a few cases have been decided in respect of section 35(5) and therefore it is useful to consider Canadian decisions because it is closely modeled on section 24(2) of the Charter.

³ Schwikkard and Van der Merwe *Principles of evidence* at 201.

⁴ Bryant, Lederman and Fuerst *The law of evidence* at 541; Hogg *Constitutional law* at 41-2.

⁵ Bryant, Lederman and Fuerst *The law of evidence* at 587.

The Law Reform Commission of Canada in 1975 recommended an amendment to the Canadian *Evidence Act* to include a judicial discretion excluding illegally obtained evidence.⁶ The recommendation was ignored and never implemented. The most stinging criticism against the common law inclusionary rule came from the 1981 Macdonald Commission.⁷ The Macdonald Commission concluded that it is the attitude of the senior officers in the police to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful. The conclusion by the Macdonald Commission influenced the outcome of parliamentary hearings in 1982 which culminated in the proclamation of the Charter and the adoption, in section 24(2), of an exclusionary remedy for unconstitutionally obtained evidence.

Section 24(2)⁸ is the product of a compromise between the perpetuation of the common law position (the common law generally refused to reject evidence because of how it was obtained)⁹ and the American rule that excluded crucial evidence even as a result of minor violations.¹⁰ Section 24(2), referred to as the exclusionary remedy, directs that all evidence, regardless of its probative value, whether real or in the form of out of court statements, obtained in violation of rights, must be excluded if it would tend to bring the administration of justice into disrepute.¹¹ The exclusionary remedy is the primary basis for excluding evidence under the Charter.¹² The provision introduced a change in philosophy in Canada with respect to the admissibility of evidence illegally obtained by state agents.¹³ Reliability

⁶ *Report on law of Evidence* at 22.

⁷ *MacDonald Commission Report*.

⁸ Constitution Act, 1982.

⁹ See in general Chapter 1; see also Schwikkard and Van der Merwe *Principles of evidence* at 201.

¹⁰ *R v Buhay* [2003] 1 SCR 631; *R v Stillman* [1997] 1 SCR 607; *R v Burlingham* [1995] 2 SCR 206 at para 84; *R v Strachan* [1988] 2 SCR 980 at para 52; *R v Grant* [1993] 3 SCR 223; *R v Simmons* [1988] 2 SCR 495; *R v Begin* [1955] SCR 593; *R v Wray* [1970] 4 CCC 1; *R v Jacoy* [1988] 2 SCR 548; Mitchell 1987-1988 *Criminal LQ* 165; Paciocco and Stuesser *The law of evidence* at 3; Mitchell "Excluding evidence" at 4; Skinnider "Improperly or illegally obtained evidence" at 7; Bozzo *The exclusion of evidence* at 5; Stuart 2010 *Southwestern Journal of International Law* 313 at 315; Davison 1993 *Criminal LQ* 493; Hession 1998 *Criminal LQ* 93 at 119; Eberdt 2011 *Appeal* 65-85 at para 8; Hogg *Constitutional Law* at 41-2; Davies 2002 *Criminal LQ* 21 at 22; Bryant, Lederman and Fuerst *The law of evidence* at 551.

¹¹ *R v Côté* [2011] 3 SCR 215; *R v Greffe* [1990] 1 SCR 755; *R v Genest* [1989] 1 SCR 59; *R v Collins*, [1987] 1 SCR 265; *R v Simmons* [1988] 2 SCR 495 at para 60; *R v Therens* [1985] 1 SCR 613 at para 11 and 70-76; *R v Strachan* [1988] 2 SCR 980 at para 36; Stewart 2009 *CR* 97 at 101; Morissette 1984 *McGill LJ* 522 at 525; Shugar *Judicial discretion* at 47; Bozzo *The exclusion of evidence* at 1-43; Mitchell "Excluding evidence" at 1; Paciocco and Stuesser *The law of evidence* at 3; Jull 1987-1988 *Criminal LQ* 178 at 182.

¹² *R v Therens* [1985] 1 SCR 613; *R v Nolet* [2010] 1 SCR 851 at para 16-17; *R v Dawson* [1987] 2 SCR 461; *Vancouver (City) v Ward* [2010] SCR 28 at para 1; Paciocco and Stuesser *The law of evidence* at 7; Santoro 2007 *Alberta LR* at 1.

and relevance as determinative factors have been discarded and pertinent to the exclusionary remedy would be for courts to consider the manner of the obtainment of evidence.¹⁴ The Charter made the rights of the individual and the fairness and integrity of the judicial system paramount.¹⁵

Section 24(2) of the Charter reads as follows:

“Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the 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.”

The test set out in section 24(2)-what would bring the administration of justice into disrepute having regard to all the circumstances- is broad and imprecise.¹⁶ In 1987 the Supreme Court of Canada in *Collins*¹⁷ shed important light on the factors relevant to determining admissibility of Charter violation evidence under section 24(2). The Court identified three groups of factors relevant to a section 24(2) inquiry: (1) whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself, (2) the seriousness of the Charter violation, and (3) the effect of excluding the evidence on the long-term repute of the administration of justice.¹⁸

In *Collins* the court held that admission of real evidence obtained in a manner that violates the Charter will rarely operate unfairly for that reason alone.¹⁹ The Court distinguished real

¹³ *R v Hebert* [1990] 2 SCR 151; see also *Hunter v Southam Inc* [1984] 2 SCR 145; Mitchell “*Excluding evidence*” at 3; Paciocco and Stuesser *The law of evidence* at 3; Bozzo *The exclusion of evidence* at 5; Bryant, Lederman and Fuerst *The law of evidence* at 541; Madden 2011 *Canadian Criminal LR* 229; Eberdt 2011 *Appeal* 65-85 at para 1; Stuart 2010 *Southwestern Journal of International Law* 313 at 315-316;.

¹⁴ *R v Grant* [2009] 2 SCR 353 at para 80-84; *R v Wray* [1971] SCR 272; *R v Hebert* [1990] 2 SCR 151; *R v Burlingham* [1995] 2 SCR 206; *R v Rothman* [1981] 1 SCR 640; Mitchell “*Excluding evidence*” at 1; Paciocco and Stuesser *The law of evidence* at 1-2; Watt’s *Manual of evidence* at 41.01; Stuart 2010 *Southwestern Journal of International Law* 313 at 319.

¹⁵ *R v Hebert* [1990] 2 SCR 151; *R v Burlingham* [1995] 2 SCR 206.

¹⁶ *R v Grant* [2009] 2 SCR 353 at para 60.

¹⁷ *R v Collins* [1987] 1 SCR 265.

¹⁸ *R v Collins* [1987] 1 SCR 265 at 284; see also Naudé 2009 *Obiter* 607 at 609; Bryant, Lederman and Fuerst *The law of evidence* at 566.

¹⁹ *R v Collins* [1987] 1 SCR 265 at 284.

evidence from other evidence because real evidence existed irrespective of the violation and its use does not render the trial unfair.²⁰ The Court emphasised that the situation is very different with respect to cases where, after a violation of the *Charter*, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of evidence of this nature would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination.²¹ In short, the Supreme Court drew a distinction between real evidence and self-incriminating evidence obtained as a result of a Charter violation.²² The admission of unconstitutionally obtained real evidence would not affect trial fairness because it existed irrespective of the Charter breach.²³

The Supreme Court of Canada in *Stillman*²⁴ replaced the distinction between real evidence and testimonial evidence and held that the relevant distinction is between conscriptive and non-conscriptive evidence.²⁵ Evidence is conscriptive when an accused is compelled by the state through unconstitutional conduct to incriminate himself by means of a statement, by the use of the body or the production of bodily samples.²⁶ The crucial element which distinguishes non- conscriptive evidence from conscriptive evidence is not whether the evidence may be characterised as “real” or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter.²⁷

Subsequent to the ruling in *Stillman* the courts formulated separate tests for the exclusion of conscriptive evidence and non-conscriptive real evidence. Conscriptive evidence was generally inadmissible- because of its presumed impact on trial fairness- unless if it would have been independently discovered.²⁸ Once it was found that the evidence in question was

²⁰ *R v Collins* [1987] 1 SCR 265 at 284; Naudé 2009 *Obiter* 607 at 611: “Such evidence therefore has an independent existence and usually possesses an ‘objective reliability’.”

²¹ See in general Naudé 2009 *Obiter* 607 at 611.

²² *R v Collins* [1987] 1 SCR 265; *R v Jacoy* [1988] 2 SCR 548 at para 17-20; see also Ally 2005 SACJ 66 at 68; Naudé 2009 *Obiter* 607 at 609.

²³ *R v Jacoy* [1988] 2 SCR 548 at para 17-20; see, in general Ally 2005 SACJ 66 at 68; Naudé 2009 *Obiter* 607 at 609.

²⁴ *R v Stillman* [1997] 1 SCR 607.

²⁵ Bryant, Lederman and Fuerst *The law of evidence* at 571.

²⁶ *R v Stillman* [1997] 1 SCR 607 at para 74-80.

²⁷ *R v Stillman* [1997] 1 SCR 607 at para 77.

²⁸ *R v Grant* [2009] 2 SCR 353 at para 64.

conscriptive the courts did not consider the other factors of *Collins*.²⁹ This resulted in the courts applying an “all-but-automatic exclusionary rule” for non-discoverable conscriptive evidence, despite reminders that “all the circumstances” must always be considered under section 24(2).³⁰ On the other hand the courts applied a more flexible balancing test in the case of non-conscriptive real evidence, by employing the other two groups of factors, being the seriousness of the Charter violation and the effects to the repute of the administration of justice in admitting the evidence.³¹ The courts blindly developed presumptions: Evidence that was conscriptive and otherwise non-discoverable was excluded whereas non-conscriptive real evidence would be admitted.³²

In July 2009, in *Grant*,³³ the Supreme Court of Canada made the *Collins/ Stillman* framework obsolete by rejecting the fair trial theory upon which it was based. A new flexible three step analysis, which applies to all kinds of evidence, was adopted which met the requirement that the court must consider “all the circumstances” when determining admissibility.³⁴

The following principles governing exclusion are explored and discussed in what follows: procedural matters, threshold requirements and the issue whether admission of the evidence in the proceedings would bring the administration of justice into disrepute.

2. PROCEDURAL MATTERS

2.1 Pre-trial motion

The Charter does not provide procedural directions for section 24(2) applications.³⁵ The question of admissibility is often dealt with during a *voir dire* at the start of the trial or once an indictment has been served. Similar to the procedure in South Africa the admissibility issue is separated from the assessment of the criminal liability to ensure that the rights to be presumed innocent, to remain silent and not to testify during the trial proceedings are

²⁹ *R v Hebert* [1990] 2 SCR 151; see also *R v Mellenthin* [1992] 3 SCR 615.

³⁰ *R v Orbanski* [2005] 2 SCR 3 *per* LeBel J; *R v Burlingham* [1995] 2 SCR 206 *per* Sopinka J; see in general *R v Grant* [2009] 2 SCR 353 at 391.

³¹ See, in general, *R v Grant* [2009] 2 SCR 353 at para 63-66.

³² See, in general, *R v Grant* [2009] 2 SCR 353 at para 63-66.

³³ *R v Grant* [2009] 2 SCR 353.

³⁴ *R v Grant* [2009] 2 SCR 353 at 67-72; see also Naudé 2009 *Obiter* 607 at 612.

³⁵ *R v Mills* [1986] 1 SCR 863; see also Mitchell “Excluding evidence” at 5.

protected. The proceeding ensures that the accused cannot during the main trial be cross-examined about the contents of his testimony led during the admissibility enquiry.³⁶

A ruling made in respect of the admissibility of evidence is final.³⁷ As a result it rarely happens that a court may be called upon during the trial to reconsider the admissibility issue based on new facts that arose during the trial.³⁸ This is not a problem in South Africa because the admissibility question is dealt with during a trial-within-a-trial as part of the trial process.³⁹ An accused may, based on new evidence, invite the court to reconsider the admissibility assessment at any stage of the trial proceedings.⁴⁰

A review of the Supreme Court cases in Canada reveals that most applications for exclusion are made during the trial.⁴¹ This is so because the admissibility of evidence is not usually challenged until it is actually tendered.⁴²

2.2 Threshold burden

The applicant bears the onus of establishing the existence of the prerequisites under section 24(2).⁴³ Firstly, he bears the onus of persuading the court on a balance of probabilities that his rights have been infringed.⁴⁴ The applicant must assert with reasonable particularity the grounds upon which the application for exclusion is made.⁴⁵ The applicant need not prove all facts on which his claim is based. For example it would be unnecessary to prove undisputed facts or facts of which a court should take judicial notice.⁴⁶ Secondly, the applicant has to prove that an adequate connection exists between the Charter breach and the impugned evidence.⁴⁷ Thirdly, the phrase “if it is established” places the onus on the

³⁶ *Ally Constitutional exclusion* at 175-176.

³⁷ *Ally Constitutional exclusion* at 407.

³⁸ *Ally Constitutional exclusion* at 407.

³⁹ *S v Tsotetsi* (3) 2003 (2) SACR 648 at 654; *Ally Constitutional exclusion* at 535.

⁴⁰ *S v Tsotetsi* (3) 2003 (2) SACR 648 at 654; *Ally Constitutional exclusion* at 535.

⁴¹ Mitchell “*Excluding evidence*” at 6.

⁴² Mitchell “*Excluding evidence*” at 6; *Ally Constitutional exclusion* at 468.

⁴³ *R v Mayo* [2012] NPSC 53 at para 21; *R v Collins* [1987] 1 SCR 265; *R v Campbell* [2011] 2 SCR 549; *R v Harper* [1994] 3 SCR 343; *R v Sinclair* [2010] 2 SCR 310; *R v Willier* [2010] 2 SCR 429; *R v Nolet* [2010] 1 SCR 851 at para 27; *R v Horan* (2008) ONCA 589 237 CCC (3d) 514; *R v Loewen* [2011] 2 SCR 167; Naudé 2009 *Obiter* 607; *R v McCrimmon* [2010] 2 SCR 402; *R v Patrick* [2009] 1 SCR 579; *R v Cornell* [2010] 2 SCR 142; Jull 1987-1988 *Criminal LQ* 178.

⁴⁴ *R v Harper* [1994] 3 SCR 343; *R v Collins* [1987] 1 SCR 265 at 277; Jull 1987-1988 *Criminal LQ* 179.

⁴⁵ *R v Hamill* (1988) 41 CCC (3d) 1 (Ont CA).

⁴⁶ *R v Cobham* [1994] 3 SCR 360.

⁴⁷ *R v Strachan* [1988] 2 SCR 980; *R v Goldhart* [1996] 2 SCR 463.

applicant to ultimately persuade the court that admission of the evidence could bring the administration of justice into disrepute.⁴⁸ The courts interpreted the word “would” to mean “could,” which presents a less onerous burden on the applicant. Proof of something that could occur is a subset of proof that it would occur, meaning that the onus imposed by section 24(2) has been reduced from an onus to establish an almost certain effect to a burden to establish a potential effect.

Although the burden is on the applicant to persuade the court it does not mean that he at all times during the inquiry bears the onus.⁴⁹ It is a general rule that the burden of persuasion is bound to drift to the state since many factors in question are within the knowledge of the Crown.⁵⁰ For example, under the discoverability principle the prosecutor bears the onus to establish that evidence could have been obtained independently from the Charter breach and not for the accused to prove that the police could have obtained the evidence “but for” their unconstitutional conduct.⁵¹ The ratio is that the prosecutor is considered a public officer engaged in the administration of justice. The prosecutor as representative of the Crown has the responsibility of establishing and maintaining the good representation of the system of justice.⁵²

The standard of persuasion is the civil standard of a balance of probability.⁵³ An accused seeking exclusion must establish that it is more probable than not that the admission of the evidence would bring the administration of justice into disrepute.⁵⁴

3. THRESHOLD REQUIREMENTS

The threshold requirements, which must be satisfied under section 24(2) includes: the applicant’s rights or freedoms must have been violated and the applicant must establish that the impugned evidence have been “obtained in a manner.”

⁴⁸ *R v Collins* [1987] 1 SCR 265 at para 30; Hogg *Constitutional law* at 41-8; Bozzo *The exclusion of evidence* at 6.

⁴⁹ *R v Bartle* [1994] 3 SCR 173.

⁵⁰ *R v Bartle* [1994] 3 SCR 173; *R v Harper* [1994] 3 SCR 343; *R v Collins* [1987] 1 SCR 265 at para 22; Watt’s *Manual of evidence* at 41.01-9; Jull 1987-1988 *Criminal LQ* 178.

⁵¹ Hogg *Constitutional law* 41-9.

⁵² Jull 1987-1988 *Criminal LQ* 178 at 187.

⁵³ *R v Collins* [1987] 1 SCR 265 at para 30; Hogg *Constitutional law* at 41-8.

⁵⁴ *R v Collins* [1987] 1 SCR 265 at para 30; Hogg *Constitutional law* at 41-8.

3.1 Beneficiary of the exclusionary remedy

The Charter provides a number of rights that arise on arrest or detention.⁵⁵ For example in section 9 an individual is entitled to the right not to be arbitrarily detained and more specifically in section 10(b) the right to retain and instruct counsel without delay and to be informed of that right. The wording of these fundamental rights, similar to section 35 of the South African Constitution, suggests that the Charter protections are limited to only arrested and detained individuals and does not extend to a suspect who is neither arrested nor detained. It appears that the fact of detention identifies the point at which rights connected to detention are triggered.⁵⁶ In the circumstances it is important to determine the meaning of the concept detention in the context of the Charter.

3.1.1 The meaning of detention

Detention can have different meanings. In a narrow sense detention refers only to situations where the police take explicit control over the person and command obedience.⁵⁷ The concept detention can also have an expansive meaning suggesting that a detention may even be established upon a fleeting interference or delay by the police. Practically a person stopped by the police would be regarded as being detained in a sense of being delayed or kept waiting.

Neither of these extreme positions offered an acceptable meaning to the concept detention as used in the Charter.⁵⁸ Applying a generous, purposive and contextual approach the court in *Therens*⁵⁹ settled on a definition between the two rejected extreme positions.⁶⁰ The Court reasoned that the purpose of the right against arbitrary detention is to protect individual liberty from unjustified interference.⁶¹ The principle of the right to choose underlies the

⁵⁵ *Ally* 2010 *CILSA* 239 at 249.

⁵⁶ *R v Grant* [2009] 2 SCR 353 at para 12 and 22.

⁵⁷ *R v Chromiak* [1980] 1 SCR 471 at 478-479; see also *R v Currie* (1983) 4 CCC (3d) 217 (NSSCAD): The court decided that the meaning given to the word "detained" in *Chromiak* should be applied to the word detention in section 10 of the Charter.

⁵⁸ See in general *R v Mann* [2004] 3 SCR 59 at para 19; *R v Therens* [1985] 1 SCR 613 at 644.

⁵⁹ *R v Therens* [1985] 1 SCR 613.

⁶⁰ *R v Therens* [1985] 1 SCR 613 at 644; see also *R v Grant* [2009] 2 SCR 353 at para 15; *R v Suberu* [2009] 2 SCR 460; *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3; *R v Collins* [1987] 1 SCR 265; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

⁶¹ *R v Therens* [1985] 1 SCR 613 at 644; see also *R v Grant* [2009] 2 SCR 353 at para 20; *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307.

concept of liberty and when an accused is detained the choice to do otherwise is removed. Liberty for Charter purposes is therefore not restricted to mere freedom from physical restraint but incorporates the broader entitlement to make decisions of fundamental importance free from state interference. The meaning of detention is therefore informed by the need to safeguard this choice without impairing effective law enforcement.⁶² The guiding principle formulated by the courts, asserts that a person is detained if he submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.⁶³ Based on this the Canadian cases distinguish between physical and psychological detention.⁶⁴

3.1.2 Physical and psychological detention

Detention under the Charter refers to a suspension of an individual's liberty interest by a significant physical and psychological restraint.⁶⁵ To determine the presence of psychological detention poses some challenges. Psychological restraint that amounts to detention has been recognised in two situations. It is manifested if the subject is legally obliged to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct, that he has no choice but to comply.⁶⁶ This means an element of psychological compulsion is sufficient to make the restraint of liberty involuntary. The *rationale* is that a detention may be affected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.⁶⁷ The question is whether the conduct in the circumstances supports a reasonable conclusion that the accused had no choice but to comply.

The Supreme Court found that the following relevant circumstances may guide the courts in determining if a reasonable person in the subject's position would have concluded that his right to choose how to interact with the police had been removed:

⁶² *R v Therens* [1985] 1 SCR 613 at 644; *R v Sinclair* [2010] 2 SCR 310; *R v Grant* [2009] 2 SCR 353 at para 28.

⁶³ *R v Therens* [1985] 1 SCR 613 at 644; *R v Grant* [2009] 2 SCR 353 at para 28; *R v Suberu* [2009] 2 SCR 460.

⁶⁴ *Ally* 2010 *CILSA* 239 at 249.

⁶⁵ *R v Sinclair* [2010] 2 SCR 310 at para 39; *R v Grant* [2009] 2 SCR 353 at para 44; ; *R v Suberu* [2009] 2 SCR 460 at para 7; *R v Ladouceur* [1990] 1 SCR 1257; *R v Thomsen* [1988] 1 SCR 640; *R v Hufsky* [1988] 1 SCR 621; *R v Therens* [1985] 1 SCR 613.

⁶⁶ *R v Grant* [2009] 2 SCR 353.

⁶⁷ *R v Therens* [1985] 1 SCR 613 at 644; *R v Grant* [2009] 2 SCR 353; *R v Suberu* [2009] 2 SCR 460.

1. The circumstances giving rise to the encounter as would reasonably be perceived by the accused. For example whether the police were providing general assistance; maintaining general order; making general enquiries regarding a particular occurrence; singling out the individual in a focussed investigation; or whether the policeman was orientating himself to the situation rather than intending to deprive the appellant of his liberty.⁶⁸
2. The nature of the police conduct including the language used, for example whether the police was respectful in the questioning,⁶⁹ the use of physical contact; the place where the interaction occurred and preliminary questioning to find out whether to proceed.⁷⁰
3. The particular characteristics or circumstances of the individual as they bear on the dynamics of the encounter, for example the minority status of the individual and level of experience, personal circumstances and feelings or knowledge.⁷¹

This approach has been criticised for being too “claimant centred,” meaning the existence or non-existence of a Charter detention solely depends on the perceptions of the reasonable person in the individual’s shoes.⁷² A subjective perspective may result in many police-citizen encounters being seen as involving a detention. The net would be too broad as most of those who are detained do not believe that they require the services of a counsel. A claimant centred approach does not take adequately into account what the police knows insofar as the information is conveyed to the person stopped, but what the police may not consider to be in their interest to convey.⁷³ In the absence of explicit criteria courts would also tend to read into the “reasonable person” their own perceptions of the moment at which the person in their view should be warned of his right to counsel.⁷⁴ The test would as a result be uncertain in its application since much depends on the particular qualities attributed to the hypothetical reasonable person in the shoes of the individual

⁶⁸ *R v Suberu* [2009] 2 SCR 460 at para 32.

⁶⁹ *R v Grant* [2009] 2 SCR 353 at para 50.

⁷⁰ *R v Suberu* [2009] 2 SCR 460.

⁷¹ *R v Grant* [2009] 2 SCR 353.

⁷² *R v Suberu* [2009] 2 SCR 460 at para 48; *R v Grant* [2009] 2 SCR 353; Quigley 2009 CR 88 at 89.

⁷³ *R v Grant* [2009] 2 SCR 353 at para 178.

⁷⁴ *R v Grant* [2009] 2 SCR 353 at para 174.

stopped.⁷⁵ A further criticism against the reasonable person test is the problem to define what information this fictional person possesses.⁷⁶

The test should be objective and the focus must be on the police conduct in the context of the surrounding legal and factual situation and how that conduct would be perceived by a reasonable person in the situation it develops.⁷⁷ Although the test is objective, subjective factors may be relevant to answer the question whether there is a detention.⁷⁸ The question is whether the police conduct taken as a whole supports a reasonable conclusion that the individual had no choice but to comply. The presence of detention should be determined by taking into account (1) the objective facts of such encounters, whether or not evident to the person stopped, (2) the perception of the police in initiating the encounter, whether evident to the person stopped and (3) whatever information the police possessed at the time, which may not be known to the person stopped, as well as whatever change in the police perception occurred as the encounter developed.⁷⁹

3.1.3 Detention for investigative purposes

Prior to *Grant*⁸⁰ and *Suberu*⁸¹ it was not always clear whether a person could rely on Charter rights if detained for investigative purposes.⁸² The court in *Mann*⁸³ raised the possibility that not every Charter detention would trigger Charter protection rights.⁸⁴ *In casu* the Court accepted that a common law power authorised the police to conduct brief “investigative detentions” on a standard of reasonable suspicion.⁸⁵ In these cases the police are required only to advise the person of the reason of the detention.⁸⁶ The Court declined to mention

⁷⁵ *R v Grant* [2009] 2 SCR 353 at para 170; *R v Suberu* [2009] 2 SCR 460 at para 58; Dawe and McArthur “Charter detention” at 11-12.

⁷⁶ *R v Grant* [2009] 2 SCR 353 at para 172.

⁷⁷ *R v Grant* [2009] 2 SCR 353 at 379; *R v Therens* [1985] 1 SCR 613; Dawe and McArthur “Charter detention” at 7.

⁷⁸ *R v Grant* [2009] 2 SCR 353 at para 31; Dawe and McArthur “Charter detention” at 7.

⁷⁹ *R v Grant* [2009] 2 SCR 353 at para 180.

⁸⁰ *R v Grant* [2009] 2 SCR 353.

⁸¹ *R v Suberu* [2009] 2 SCR 460.

⁸² *R v Mann* [2004] 3 SCR 59; *R v Suberu* [2009] 2 SCR 460; Dawe and McArthur “Charter detention” at 12.

⁸³ *R v Mann* [2004] 3 SCR 59.

⁸⁴ *R v Suberu* [2009] 2 SCR 460 at para 3; *R v Hufsky* [1988] 1 SCR 632; *R v Mann* [2004] 3 SCR 59; Stuart 2010 *Southwestern Journal of International Law* 313 at 322.

⁸⁵ *R v Mann* [2004] 3 SCR 59; see also *R v Mayo* [2012] NPSC 53 para 8.

⁸⁶ *R v Mann* [2004] 3 SCR 59; *R v Orbanski* [2005] 2 SCR 3; Dawe and McArthur “Charter detention” at 1.

whether the detainee had to be warned of the right to counsel.⁸⁷ In *Suberu* the court answered the question left unanswered in *Mann* in the affirmative. Investigative detentions trigger the right to counsel the moment the individual is detained.⁸⁸ The Charter protection rights are however not engaged by delays that involve no significant physical or psychological restraint.

3.2 Standing requirement

The question who may challenge the admissibility of evidence under section 24(2) is usually discussed by the courts with reference to the issue of “standing.” The section 24(1) standing requirement is incorporated in section 24(2) by the words, “where, in proceedings under subsection 1...” The standing requirement under section 24(2) is therefore limited to the express standing requirements of section 24(1).⁸⁹ The wording of section 24(1) directs that the exclusionary remedy applies to applicants whose rights have been denied or infringed. Section 24(1) reads:

*“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”*⁹⁰

Individuals as well as juristic persons, whose rights or freedoms guaranteed by the Charter have been violated, may apply for a remedy under section 24(2).⁹¹ An application for the exclusionary remedy under section 24(2) must be based on a violation of the applicant’s own Charter rights.⁹² The question arises whether the exclusionary rule finds application if an accused applies for the exclusion of evidence obtained through the violation of the Charter rights of a third party.

The Canadian courts generally attach a narrow interpretation to the wording of section 24(2) holding that the exclusionary remedy applies only to evidence obtained in

⁸⁷ *R v Mann* [2004] 3 SCR 59; see also *R v Orbanski* [2005] 2 SCR 3.

⁸⁸ *R v Suberu* [2009] 2 SCR 460; see also *R v Grant* [2009] 2 SCR 353; *R v Mayo* [2012] NPSC 53 at para 14.

⁸⁹ Bryant, Lederman and Fuerst *The law of evidence* at 554.

⁹⁰ Emphasis added.

⁹¹ *R v Edwards* [1996] 1 SCR 128; *R v Belnavis* [1997] 3 SCR 341; *R v Chueng* (1997) 119 CCC (3d) 507; *R v Spinelli* (1995) 101 CCC (3d) 385; *R v Pugliese* (1992) 71 CCC (3d) 295; *R v Solomon* [1997] 3 SCR 696; *Borowski v Attorney General of Canada* [1989] 1 SCR 342; Dawe and McArthur “Charter detention” at 47.

⁹² *R v Wijesinha* [1995] 3 SCR 422; *R v Edwards* [1996] 1 SCR 128 at para 55; *R v Belnavis* [1997] 3 SCR 341 at para 19-20; Skinnider “Improperly or illegally obtained evidence” at 22.

contravention of the applicant's rights.⁹³ An accused can therefore not claim a constitutional remedy pursuant to section 24(2) based on the alleged violation of a Charter right of a third party.⁹⁴ The legal position is illustrated by the facts in *Edwards*.⁹⁵ The appellant was arrested on charges of possession of drugs which was located in the flat of his girlfriend. The Court noted that a claim for relief under section 24(2) can only be made by the person whose Charter rights have been infringed.⁹⁶ The appellant's right to challenge the legality of a search depended upon him, establishing that his personal rights to privacy have been violated. No personal right of the appellant was affected by the police conduct at the apartment and as a result he could not contest the admissibility of the evidence pursuant to section 24(2) of the Charter.⁹⁷

It appears that the Supreme Court in *Thompson*⁹⁸ suggested that an accused might have standing to bring a section 24(2) application to exclude evidence where a third party's Charter rights have been violated. The Court held that the extent of invasion of a third party's rights is constitutionally relevant to the issue of whether there has been an unreasonable search and seizure.

I favour the *Thompson* approach because courts should have the means to exclude unconstitutionally obtained evidence in order to dissociate themselves from the illegal conduct of the police.⁹⁹ As a result exclusion of such evidence will also deter violations of fundamental rights in general.¹⁰⁰

⁹³ *R v Edwards* [1996] 1 SCR 128; *R v Wijesinha* [1995] 3 SCR 422; *R v Paolitto* (1994) 91 CCC (3d) 75 (Ont CA).

⁹⁴ *R v Edwards* [1996] 1 SCR 128; *R v Wijesinha* 1995 100 CCC (3d) 410; *Borowski v Attorney General of Canada* [1989] 1 SCR 342; Bryant, Lederman and Fuerst *The law of evidence* at 555.

⁹⁵ *R v Edwards* [1996] 1 SCR 128.

⁹⁶ *R v Edwards* [1996] 1 SCR 128 at para 45.

⁹⁷ *R v Edwards* [1996] 1 SCR 128 at para 52. See also *R v Arason* (1992) 78 CCC (3d) 1; *R v Patrick* [2009] 1 SCR 579; *R v Tessling* [2004] 3 SCR 432; *R v Feeney* [1997] 2 SCR 13; *R v Grant* [1993] 3 SCR 223.

⁹⁸ *R v Thompson* [1990] 2 SCR 1111; *R v Montoute* (1991) 62 CCC (3d) 481 (Alta CA): The court applied the "Thompson approach."

⁹⁹ Penney 2004 *McGill LJ* 105.

¹⁰⁰ Penney 2004 *McGill LJ* 105.

3.3 Evidence “obtained in a manner”

Section 24(2) states that only evidence “obtained in a manner” could be subject to exclusion.¹⁰¹ The exclusionary remedy does not apply if evidence is obtained before or in the absence of a Charter violation.¹⁰² It appears from the words of the provision that there must be some connection or relationship between the Charter infringement and the obtaining of the impugned evidence.¹⁰³ Conflicting opinions have emerged regarding the nature of the connection required.¹⁰⁴ Several judgments suggest that the connection between the breach and the evidence must amount to a strict causal relationship.¹⁰⁵ In other cases a broader test was adopted which focuses on the entire chain of the events during which the Charter violation occurred and the evidence was obtained.¹⁰⁶

The strict causal relationship entails that the connection between the impugned evidence and the breach must be one of causation, similar to the “but for” causation requirement of tort law.¹⁰⁷ A causal relationship is established for example in situations where a statement was obtained as a result of the investigator’s reference to the earlier statement made by the appellant.¹⁰⁸ In this approach causation is determinative in answering the question whether evidence was obtained in a manner that infringed a Charter right.¹⁰⁹

The strict causal requirement presented several pitfalls. The inquiry tends to focus narrowly on the actions directly responsible for the obtaining of the evidence rather than the entire course of events leading to the discovery.¹¹⁰ As a result it promotes a restrictive view of the relationship between a Charter violation and the discovery of evidence.¹¹¹ The causal

¹⁰¹ Bryant, Lederman and Fuerst *The law of evidence* at 555.

¹⁰² *R v Harper* [1994] 3 SCR 343.

¹⁰³ *R v Therens* [1985] 1 SCR 613 at para 18; Mitchell “Excluding evidence”; Watt’s *Manual on evidence* at 41.01; Paciocco and Stuesser *The law of evidence* at 17.

¹⁰⁴ *R v Therens* [1985] 1 SCR 613; *R v Manninen* [1987] 1 SCR 1233 at 1245; *R v Black* [1989] 2 SCR 138 at 163.

¹⁰⁵ *R v Trask* (1983) 6 CCC (3d) 132 (Nfld CA); *R v Cohen* (1983) 5 CCC (3d) 156; Bryant, Lederman and Fuerst *The law of evidence* at 555.

¹⁰⁶ *R v Plaha* (2004) 189 OAC 376 at para 45; *R v Wittwer* [2008] 2 SCR 235; *R v Goldhart* [1996] 2 SCR 463 at para 33; *R v Therens* [1985] 1 SCR 613 at para 66; *R v Strachan* [1988] 2 SCR 980; *R v Flintoff* (1998) 16 CR (5th) 248 (Ont CA); Paciocco and Stuesser *The law of evidence* at 19.

¹⁰⁷ *R v Upton* [1988] 1 SCR 1083; see also *R v Strachan* [1988] 2 SCR 980; *R v Brydges* [1990] 1 SCR 190; Hession 1998 *Criminal LQ* 93 at 102; Bozzo *The exclusion of evidence* at 6, Paciocco and Stuesser *The law of evidence* at 17.

¹⁰⁸ *R v Wittwer* [2008] 2 SCR 235.

¹⁰⁹ *R v Trask* (1983) 6 CCC (3d) 132 (Nfld CA) at 137.

¹¹⁰ *R v Strachan* [1988] 2 SCR 980 at para 40.

¹¹¹ *R v Strachan* [1988] 2 SCR 980 at para 37; *R v Goldhart* [1996] 2 SCR 463 at para 34; *R v Therens* [1985] 1

connection is often unhelpful in determining whether evidence can attract the application of section 24(2).¹¹² In the absence of the causal relationship evidence could not have been obtained in a manner that infringed the Charter and therefore section 24(2) was not invoked to exclude the evidence in question.¹¹³ A further concern is that the courts should avoid being placed in the position of having to speculate whether or not the evidence would have been discovered had the Charter violation not occurred.¹¹⁴ The events surrounding the obtainment of the evidence are complex and dynamic and it could be an exercise in sophistry to isolate the events that caused the evidence to be discovered from those that did not.¹¹⁵ Based on this it will never be possible for a court to state with certainty what would have taken place had a Charter violation not occurred.¹¹⁶

In *Strachan*¹¹⁷ the Supreme Court adopted a purposive and generous approach in determining if evidence had been “obtained in a manner.” The Court stated that a temporal link between the Charter violation and the impugned evidence is sufficient to engage section 24(2).¹¹⁸ A temporal connection is established if both the breach and the discovery of the evidence are part of the same chain of events.¹¹⁹ An assessment of a temporal connection is not a simple counting of the minutes or hours between the breach and the obtainment of the impugned evidence.¹²⁰ The approach was redefined by the court holding that a sufficient relationship exists if the violation occurred in the course of carrying out some “integral component in a series of investigative tactics which led to the unearthing of the evidence in question.”¹²¹ A temporal and tactical linkage would be sufficient to consider

SCR 613.

¹¹² *R v Strachan* [1988] 2 SCR 980; *R v Bartle* [1994] 3 SCR 173; *R v Goldhart* [1996] 2 SCR 463 at para 36; *R v Therens* [1985] 1 SCR 613.

¹¹³ *R v Strachan* [1988] 2 SCR 980 at para 35.

¹¹⁴ *R v Strachan* [1988] 2 SCR 980; see also Hession 1998-1999 *Criminal LQ* 100.

¹¹⁵ *R v Strachan* [1988] 2 SCR 980 at para 39.

¹¹⁶ *R v Strachan* [1988] 2 SCR 980 at para 39.

¹¹⁷ *R v Strachan* [1988] 2 SCR 980.

¹¹⁸ *R v Strachan* [1988] 2 SCR 980 at 1005.

¹¹⁹ *R v Wittwer* [2008] 2 SCR 235; *R v Strachan* [1988] 2 SCR 980; *R v Flintoff* (1998) 16 CR (5th) 248 (Ont CA); *R v Kokesch* [1990] 3 SCR 3; *R v Grant* [2009] 2 SCR 353; *R v Therens* [1985] 1 SCR 613 at para 66; *R v Strachan* [1988] 2 SCR 980 at para 37; *R v Church of Scientology of Toronto* (1997) 7 CR (5th) 267; *R v Wiley* [1993] 3 SCR 263; *R v Grant* [1993] 3 SCR 223; *R v Plant* [1993] 3 SCR 281; Parfett 2002 *Alberta LR* 318- 319; Paciocco and Stuesser *The law of evidence* at 19.

¹²⁰ *R v Plaha* (2004) 189 OAC 376 at para 50-52.

¹²¹ *R v Grant* [1993] 3 SCR 255; *R v Wiley* [1993] 3 SCR 263; *R v Plant* [1993] 3 SCR 281.

the exclusion of evidence under section 24(2) despite the fact that the police misconduct was not directly involved in the acquisition.¹²²

The notion that a requirement of strict causation is determinative under section 24(2) was accordingly discarded.¹²³ Causation has however not been discarded entirely.¹²⁴ Several courts have since adopted a test that does not require an applicant to show that specific evidence was obtained by means of a constitutional violation, but rather that the Charter violation and the discovery of the evidence were part of a single chain of events.¹²⁵ Therefore the meaning of the phrase “obtained in a manner” could plausibly lie in a spectrum running from a relationship of strict causation (obtained as a direct result of a Charter violation) to a relationship of mere temporality (obtained in the course of a larger transaction in which a Charter violation occurred) or that which is contextual (evidence linked through association).¹²⁶

The court in *Wittwer*¹²⁷ ruled that a contextual connection would satisfy the requirement of evidence obtained in a manner that violated a Charter right. *In casu* the accused was interviewed on two occasions by the police. During the first interview the accused confessed and made a statement in respect of sexual activities involving minors. The accused was not warned of his right to counsel and upon realising the error the police conducted a second interview with the accused. During the second interview the accused refused to make a statement. It was only when the accused was confronted by the police with the content of his first statement that he made another incriminating statement. The statement obtained during the second interview, the appellant argued on appeal, became inseparably linked to the statement unconstitutionally obtained during the first interview. Considering whether

¹²² *R v Grant* [1993] 3 SCR 223; Mitchell “Excluding evidence” at 16; Skinnider “Improperly or illegally obtained evidence” at 10.

¹²³ *R v Strachan* [1988] 2 SCR 980; see also *R v Plaha* (2004) 189 OAC 376 at para 45; *R v Wittwer* [2008] 2 SCR 235; *R v Goldhart* [1996] 2 SCR 463 at para 33; *R v Therens* [1985] 1 SCR 613 at para 66; *R v Flintoff* (1998) 16 CR (5th) 248 (Ont CA); Paciocco and Stuesser *The law of evidence* at 19; Stuart 2010 *Southwestern Journal of International Law* 313 at 330.

¹²⁴ *R v Strachan* [1988] 2 SCR 980; see also *R v Grant* [2009] 2 SCR 353; *R v Goldhart* [1996] 2 SCR 463; *R v Church of Scientology of Toronto* (No 2) (1992) 74 CCC (3d) 341.

¹²⁵ *R v Strachan* [1988] 2 SCR 980 at para 46; see also *R v Plaha* (2004) 189 OAC 376 at para 45; *R v Wittwer* [2008] 2 SCR 235; *R v Goldhart* [1996] 2 SCR 463 at para 33; *R v Therens* [1985] 1 SCR 613 at para 66; *R v Flintoff* (1998) 16 CR (5th) 248 (Ont CA); Paciocco and Stuesser *The law of evidence* at 19; Stuart 2010 *Southwestern Journal of International Law* 313 at 330.

¹²⁶ *R v Plaha* (2004) 24 CR (6th) 360, 188 CCC (3d) 289; *R v Wittwer* [2008] 2 SCR 235; *R v Flintoff* (1998) 16 CR (5th) 248 (Ont CA).

¹²⁷ *R v Wittwer* [2008] 2 SCR 235.

evidence had been obtained in a manner that infringed the appellant's Charter rights the court concluded that the connection was contextual. The link is contextual because any gap that might have existed between the two statements was intentionally bridged by the police through the association of one with the other in the course of the appellant's interrogation.¹²⁸

The courts employ a proximity analysis to determine the strength of the connection when the discovery of the evidence is part of the chain of events.¹²⁹ An examination of the strength of the connection obliges the court to consider the "entire chain of events" that led to the discovery of the evidence.¹³⁰ Remoteness should therefore be measured by taking into account each link in the chain of the circumstances leading to the discovery of the evidence in each particular case.¹³¹ The case of *Goldhart*¹³² is an example of this approach. *In casu* the court *a quo* failed to examine the entire relationship which resulted in the erroneous characterisation of the strength of the connection. Although ruling that there was a strong causal connection the court *a quo* failed to consider a further factual finding that the *viva voce* evidence by the witness was delivered by choice. The Supreme Court concluded that this finding upon a proper evaluation might well have led the court *a quo* to the conclusion that the causal connection was tenuous and that the temporal link was weakened by the intervening events of the accomplice's voluntary decision to testify.¹³³

In the case of derivative evidence the discoverability doctrine¹³⁴ allows the court to determine the strength of the causal connection between the Charter infringing self-incrimination and the resultant evidence.¹³⁵ The impact on the accused's underlying interest against self-incrimination would be reduced the more likely the obtainment is without the statement.¹³⁶

¹²⁸ *R v Wittwer* [2008] 2 SCR 235 at para 22; *R v Plaha* (2004) 189 OAC 376 at para 51.

¹²⁹ See also *R v Brydges* [1990] 1 SCR 190; *R v Goldhart* [1996] 2 SCR 463.

¹³⁰ *R v Goldhart* [1996] 2 SCR 463 at para 40; *R v Bartle* [1994] 3 SCR 173.

¹³¹ *R v Strachan* [1988] 2 SCR 980; *R v Goldhart* [1996] 2 SCR 463.

¹³² *R v Goldhart* [1996] 2 SCR 463.

¹³³ *R v Goldhart* [1996] 2 SCR 463 at para 45.

¹³⁴ The discoverability doctrine is discussed in para 5.2 at page 105.

¹³⁵ *R v Côté* [2011] 3 SCR 215.

¹³⁶ *R v Côté* [2011] 3 SCR 215 at para 66.

In situations where the connection is tenuous or too remote the evidence may not have been obtained in a manner that infringes or denies Charter rights.¹³⁷ The strength of the connection between the evidence obtained and the Charter breach is a question of fact.¹³⁸ The applicability of section 24(2) should be dealt with on a case by case basis and there is no hard and fast rule for determining when evidence obtained following Charter breach violation becomes too remote.¹³⁹

4. THE ADMISSION OF EVIDENCE BRINGS THE ADMINISTRATION OF JUSTICE INTO DISREPUTE

Section 24(2) directs that a court should exclude evidence if its admission would bring the administration of justice into disrepute having regard to all the circumstances. This test is broad and imprecise and provides little guidance to the question as to what considerations enter into making the determination.¹⁴⁰ Cases decided prior to *Collins* failed to provide technical certainty on its application.¹⁴¹ In *Collins* the court first organised the factors to be considered in determining whether the admission of unconstitutionally obtained evidence would bring the administration of justice into disrepute.¹⁴² The factors were divided into three groups based on their effect on the repute of the administration of justice.¹⁴³ The first group of factors considered whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against him. The second group pertains to the seriousness of the Charter breach and the third group concerns the possibility that the administration of justice could be brought into disrepute by excluding evidence even though

¹³⁷ *R v Strachan* [1988] 2 SCR 190; see also *R v Goldhart* [1996] 2 SCR 463; *R v Debot* [1989] 2 SCR 1140; *R v Plaha* (2004) 189 OAC 376 at para 45; Hession 1998-1999 *Criminal LQ* 93 at 101; Bryant, Lederman and Fuerst *The law of evidence* at 559.

¹³⁸ *R v Goldhart* [1996] 2 SCR 463 at para 35-40; see also *R v I (LR) and T (E)* [1993] 4 SCR 504.

¹³⁹ *R v Goldhart* [1996] 2 SCR 463; see also *R v Simon* [2008] OJ No 3072 [69] (CA); *R v Therens* [1985] 1 SCR 613; *R v Kokesh* [1990] 3 SCR 3; *R v Strachan* [1988] 2 SCR 980 at para 46; *R v Grant* [1993] 3 SCR 223; *R v Wiley* [1993] 3 SCR 263; *R v Plant* [1993] 3 SCR 281; Paciocco and Stuesser *The law of evidence* at 17; Santoro 2007 *Alberta LR* 1 at 41.

¹⁴⁰ *R v Grant* [2009] 2 SCR 353 at para 60; Paciocco and Stuesser *The law of evidence* at 3; Stuart 2010 *Southwestern Journal of International Law* 313 at 316; Santoro 2007 *Alberta LR* 1 at 32-33.

¹⁴¹ See in general the discussion in introduction to this chapter; Paciocco and Stuesser *The law of evidence* at 3; Eberdt 2011 *Appeal* 65-85 at para 8.

¹⁴² *R v Collins* [1987] 1 SCR 265; see also Mitchell "Excluding evidence" at 22; Skinnider "Improperly or illegally obtained evidence" at 11; Santoro 2007 *Alberta LR* 1 at 4.

¹⁴³ *R v Collins* [1987] 1 SCR 265; see also Paciocco and Stuesser *The law of evidence* at 3; Fuerst 2008-2009 *National Journal of Constitutional Law* 147.

it was obtained in violation of the Charter.¹⁴⁴ The *Collins* test was later modified in *Stillman*.¹⁴⁵ The Court created a virtually automatic exclusion for evidence deemed to be conscriptive unless it would have been independently discovered. The Court defined conscriptive evidence as follows:

“Evidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.”¹⁴⁶

The *Collins/Stillman* test was criticised for effectively reducing the courts ability to consider “all the circumstances” associated with the obtainment of the impugned evidence.¹⁴⁷ Determinative to the inquiry was an analysis of whether or not a Charter breach had occurred regardless of the circumstances in which the evidence was obtained. In *Grant*¹⁴⁸ the Supreme Court of Canada significantly changed the analytical framework for exclusion and the law governing the exclusion of evidence under the Charter.¹⁴⁹ The Court discarded the trial fairness branch of the *Collins* test and “repackaged the remaining *Collins* factors into a new three-prong test.”¹⁵⁰ Based on *Grant*, the court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system with regard to the three lines of inquiry: (1) the seriousness of the Charter-violation conduct, (2) the impact of the breach on the Charter-protected interest of the accused and (3) society’s interest in the adjudication of the case on its merits.¹⁵¹ Although the lines of inquiry do not

¹⁴⁴ *R v Collins* [1987] 1 SCR 265; see also *R v Grant* [2009] 2 SCR 353 at para 61; *R v Black* [1989] 2 SCR 138; *R v Brydges* [1990] 1 SCR 190; *R v Kokesch* [1990] 3 SCR 3; *R v Stillman* [1997] 1 SCR 607; *R v Orbanski* [2005] 2 SCR 3 at para 91; *R v Buhay* [2003] 1 SCR 631; *R v Caslake* [1998] 1 SCR 51 at para 32-35; Davison 1993 *Criminal LQ* 494; Mahoney 1999 *Criminal LQ* 443; Dawe and McArthur “Charter detention” at 304; Hession 1998-1999 *Criminal LQ* 93; Jull 1987-1988 *Criminal LQ* 183.

¹⁴⁵ *R v Stillman* [1997] 1 SCR 607.

¹⁴⁶ *R v Stillman* [1997] 1 SCR 607 at para 80.

¹⁴⁷ *R v Grant* [2009] 2 SCR 353 at para 60-65 and 100-107; *R v Burlingham* [1995] 2 SCR 206; Eberdt 2011 *Appeal* 65-85 at para 12-13; Milward *Lawyers weekly* 11; Paciocco 1997 *Canadian Criminal LR* 163; Mahoney 1999 *Criminal LQ* 443; Penney 2004 *McGill LJ* 105.

¹⁴⁸ *R v Grant* [2009] 2 SCR 353.

¹⁴⁹ *R v Grant* [2009] 2 SCR 353; *R v Harrison* [2009] 2 SCR 494; *R v Côté* [2011] 3 SCR 215 at para 45; Dawe and McArthur “Charter detention” at 1; Paciocco and Stuesser *The law of evidence* at 3; Eberdt 2011 *Appeal* 65-85 at para 2-12; Russomano *For the defence*; Stuart 2010 *Southwestern Journal of International Law* 314.

¹⁵⁰ *R v Grant* [2009] 2 SCR 353 at para 71; *R v Harrison* [2009] 2 SCR 494; *R v Mayo* [2012] NPSC 53 at para 19; Dawe and McArthur “Charter detention” at 31; Eberdt 2011 *Appeal* 65-85 at para 16.

¹⁵¹ *R v Grant* [2009] 2 SCR 353 at para 3 and 71; *R v Côté* 2011 SCC 46 at para 36; *R v Beaulieu* [2010] 1 SCR 248 at para 6-7; *R v Nolet* [2010] 1 SCR 851 at para 54; *R v McCrimmon* [2010] 2 SCR 402; *R v Morelli* [2010] 1 SCR 253 at para 11; *R v Harrison* [2009] 2 SCR 494; Davison 1993 *Criminal LQ* 494, Mahoney 1999 *Criminal LQ* 443; Dawe and McArthur “Charter detention” at 1-23; Mitchell “Excluding evidence” at 22; Madden 2011

track the categories of considerations set out in *Collins*, it captures the factors relevant to the section 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.¹⁵² Because *Grant* did not change the relevant factors in the section 24(2) analysis, earlier section 24(2) cases remains relevant.¹⁵³ A court must after an assessment of the *Grant* three lines of inquiry, which encapsulates consideration of all the circumstances, determine on balance whether the admission of the evidence obtained unconstitutionally would bring the administration of justice into disrepute.¹⁵⁴

4.1 Seriousness of the breach

The first line of the *Grant* test does not differ significantly from the second factor in the *Collins* test. The main concern of this inquiry is to preserve public confidence in the rule of law and its processes.¹⁵⁵ The more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves, by excluding evidence linked to that conduct.¹⁵⁶ The focus of the inquiry is an assessment of the seriousness of the state conduct that led to the Charter breach. Charter violations vary in seriousness. Inadvertent, minor violations and good faith conduct may minimally undermine the public confidence in the rule of law whereas a wilful or reckless disregard of the Charter will adversely affect public confidence in the rule of law if the admission of evidence could bring the administration of justice into disrepute. Good faith conduct by a police officer reduces the need for the court to dissociate itself from the police conduct.¹⁵⁷

Canadian Criminal LR 229 at 230; Mahoney 1999 *Criminal LQ* 476-477; Stuart 2010 *Southwestern Journal of International Law* 313 at 316.

¹⁵² *R v Grant* [2009] 2 SCR 353 at para 71; see also *R v Beaulieu* [2010] 1 SCR 248; *R v Loewen* [2011] 2 SCR 167; *R v Côté* [2011] 3 SCR 215 at para 46.

¹⁵³ *R v Grant* [2009] 2 SCR 353 at para 3; *R v Côté* [2011] 3 SCR 215 at para 46; *R v Beaulieu* [2010] 1 SCR 248 at para 7; Dawe and McArthur “*Charter detention*” at 31.

¹⁵⁴ *R v Grant* [2009] 2 SCR 353 at para 85-87.

¹⁵⁵ *R v Grant* [2009] 2 SCR 353 at para 73; *R v Harrison* [2009] 2 SCR 494 at para 22; *R v Collins* [1987] 1 SCR 265; *R v Kokesch* [1990] 3 SCR 3; Mitchell “*Excluding evidence*” at 25; Watt’s *Manual of evidence* at 41.01.

¹⁵⁶ *R v Grant* [2009] 2 SCR 353 at para 72; *R v Harrison* [2009] 2 SCR 494 at para 22; *R v Côté* [2011] 3 SCR 215 at para 47.

¹⁵⁷ *R v Kokesch* [1990] 3 SCR 3; *R v Buhay* [2003] 1 SCR 631; *R v Greffe* [1990] 1 SCR 755; *R v Stillman* [1997] 1 SCR 607; *R v Grant* [2009] 2 SCR 353; *R v Hamill* [1987] 1 SCR 301; *R v Sieben* [1987] 1 SCR 295; *R v Simmons* [1988] 2 SCR 495; *R v Jacoy* [1988] 2 SCR 548.

4.1.1 The presence or absence of good faith

In the absence of extenuating circumstances the Canadian courts were initially reluctant to accept a plea of good faith on the part of the police officers who gathered the evidence in inadvertent breach of the Charter.¹⁵⁸ It appears that the courts limited good faith as a factor under section 24(2) to those situations otherwise categorised as exigent circumstances. This is illustrated in *Therens*.¹⁵⁹ A breath sample was taken from the accused, suspected of impaired driving, without warning him of his right to counsel. The police argued that their failure to afford the accused an opportunity to retain and instruct counsel should be condoned because it was based on the judicial precedent in *Chromiak*.¹⁶⁰ In *Chromiak* the court held that there was no right to counsel under similar language of the Canadian Bill of Rights. In *Therens* the court held that the police violated the accused's Charter right and that admission thereof would bring the administration of justice into disrepute. The judgment suggests that the question whether the police acted in good faith or not is irrelevant when determining whether admission would bring the administration of justice into disrepute. The breath sample was accordingly excluded.¹⁶¹

In *Simmons*¹⁶² the court held that good faith on the part of the police will reduce the need for the court to dissociate itself from the police conduct.¹⁶³ In *casu* the police searched the accused without first having informed her of her right to retain and instruct counsel. Drugs were found on her person. The Court held that the search violated the accused's right to counsel. The Court however did not exclude the evidence and pointed out that at the time of the search the officers had no way of knowing that they violated a Charter right. It reasoned that the breach occurred not long after the Charter came into force. A further contributing factor was that the breach occurred several years before *Therens* in which the court formulated the meaning of detention in section 10(b). It further observed that at the time of the breach, *Chromiak* stood for the proposition that investigative detentions of this sort were not detentions of the type requiring persons to be advised of their right to

¹⁵⁸ Hogg *Constitutional law* at 41-20.

¹⁵⁹ *R v Therens* [1985] 1 SCR 613; *R v Hebert* [1990] 2 SCR 151; Eberdt 2011 *Appeal* 65-85 at para 24.

¹⁶⁰ *R v Chromiak* [1980] 1 SCR 471.

¹⁶¹ *R v Therens* [1985] 1 SCR 613.

¹⁶² *R v Simmons* [1988] 2 SCR 495.

¹⁶³ *R v Simmons* [1988] 2 SCR 495; see also *R v Blake* (2010) 71 CR (6th) 317, 251 CCC (3d) 4 (Ont CA); *R v Hamill* [1987] 1 SCR 301; *R v Sieben* [1987] 1 SCR 295; *R v Jacoy* [1988] 2 SCR 548; *R v Duarte* [1990] 1 SCR 30; *R v Mann* [2004] 3 SCR 59.

counsel.¹⁶⁴ The Court explained the different outcome to *Therens*. It reasoned that the accused in *Therens* was conscripted against himself and that the use of the breath sample tended to adversely affect the fairness of the trial process. In *Simmons*, the court pointed out, the evidence obtained through the search was real evidence which existed irrespective of the Charter violation. The explanation suggests that it was not the police conduct that resulted in the exclusion of evidence in *Therens* but rather the nature of the evidence. The Court's reasoning paved the way to the development of a good faith doctrine under section 24(2).¹⁶⁵

The courts have since held that the police act in good faith if they relied on the constitutionality of legislation,¹⁶⁶ there existed uncertainty whether certain conduct constituted a Charter breach,¹⁶⁷ conduct was inadvertent or minor;¹⁶⁸ or where there was a threat of danger or that there is a real risk evidence will be destroyed.¹⁶⁹ At the opposite end of the spectrum are Charter violations committed in demonstrable bad faith, for example wilful, deliberate and flagrant breaches,¹⁷⁰ Charter-infringing conduct that is part of a pattern of abuse,¹⁷¹ pattern of illegality,¹⁷² systemic or institutional failures in Charter compliance.¹⁷³ The courts will not condone ignorance of Charter standards nor will it equate negligence or wilful blindness with good faith.¹⁷⁴

¹⁶⁴ *R v Simmons* [1988] 2 SCR 495 at 535.

¹⁶⁵ Hogg *Constitutional law* at 41-22; *R v Sieben* [1987] 1 SCR 295; *R v Hamill* [1987] 1 SCR 301; *R v Grant* [1993] 3 SCR 223; *R v Wiley* [1993] 3 SCR 263; *R v Plant* [1993] 3 SCR 281; *R v Duarte* [1990] 1 SCR 30; *R v Wiggins* [1990] 1 SCR 62; *R v Thompson* [1990] 2 SCR 1111; *R v Wong* [1990] 3 SCR 36.

¹⁶⁶ *R v Sieben* [1987] 1 SCR 295; *R v Hamill* [1987] 1 SCR 301; *R v Harding* (2010) ABCA 180; *R v Mlnnes* (2010) BCSC 1270.

¹⁶⁷ *R v Morelli* [2010] 1 SCR 253 at para 99; *R v Buhay* [2003] 1 SCR 631; *R v Wijesinha* 1995 100 CCC (3d) 410; *R v Duarte* [1990] 1 SCR 30; *R v Wiggins* [1990] 1 SCR 62; *R v Thompson* [1990] 2 SCR 1111; *R v Wong* [1990] 3 SCR 36.

¹⁶⁸ *R v Wise* [1992] 1 SCR 527; *R v Strachan* [1988] 2 SCR 980 at para 52; *R v Lamb* [1989] 1 SCR 1036; *R v Kokesch* [1990] 3 SCR 3.

¹⁶⁹ *R v Therens* [1985] 1 SCR 613; *R v Tremblay* [1987] 2 SCR 435; *R v Strachan* [1988] 2 SCR 980 at para 51; *R v Silveira* [1995] 2 SCR 297; Stuart 2010 *Southwestern Journal of International Law* 313 at 318.

¹⁷⁰ *R v Hosie* (1996) 107 CCC (3d) 385 (SCC); *R v Kokesch* [1990] 3 SCR 3; *R v Stillman* [1997] 1 SCR 607; *R v Buhay* [2003] 1 SCR 631; *R v Harrison* [2009] 2 SCR 494; *R v Morelli* 2010 SCC 8; *R v Feeney* [1997] 2 SCR 13; *R v Burlingham* [1995] 2 SCR 206; *R v Clarkson* [1986] 1 SCR 383; *R v Buhay* [2003] 1 SCR 631; *R v Grant* [2009] 2 SCR 353 at para 75; Stuart 2010 *Southwestern Journal of International Law* 313 at 328.

¹⁷¹ *R v Grant* [2009] 2 SCR 353 at para 75; *R v Morelli* [2010] 1 SCR 253 at para 103; *R v Pohoretsky* [1987] 1 SCR 945; *R v Genest* [1989] 1 SCR 59; *R v Greffe* [1990] 1 SCR 755; *R v Buhay* [2003] 1 SCR 631; *R v Belvanis* [1997] 3 SCR 341.

¹⁷² *R v Greffe* [1990] 1 SCR 755; *R v Lauriente* (2010) 74 CR (6th) 145 CCC (3d) 492; *R v Stillman* [1997] 1 SCR 607; *R v Feeney* [1997] 2 SCR 13.

¹⁷³ *R v Harrison* [2009] 2 SCR 494 at para 24-25; *R v Lamy* (1993) 22 CR (4th) 89, 80 CCC (3d) 558; *R v Stillman*

4.1.2 The meaning of good faith

The bona fides of police officers who commit a Charter violation is a relevant factor in determining the seriousness of the breach. The courts use good faith in a broad and a narrow sense.¹⁷⁵ In a narrow sense the conduct would be classified “good faith” if the police relied on an investigative technique which is later declared unconstitutional.¹⁷⁶ Good faith in a narrow sense is easily objectively determined. The question is whether express authority for the investigative technique is either present or absent. A finding of good faith in a narrow sense will usually result in the inclusion of the evidence. In other words if the court finds good faith, the inquiry as to seriousness of the violation need go no further.¹⁷⁷

In a broad sense good faith simply refers to an absence of malice and an honest belief by the police that they act constitutionally. The facts in *Grant*¹⁷⁸ provide an example. The Court held that the police conduct should be classified as “good conduct” because the breach was not egregious or deliberate. Although the police went too far in detaining the accused and directing questions at him, the question when an encounter becomes a detention was not settled by the courts. Accordingly the police’s failure to advise the accused of his right to counsel based on their mistaken view that they had not detained him was understandable. The conduct was not considered to be in bad faith.

Coughlan argues that the application of this broad formulation has produced inconsistencies in which the terms good faith and bad faith have been applied by the courts.¹⁷⁹ The dangers in using labels such as good faith and bad faith is that police conduct can run the gamut from blameless conduct, through negligence, to conduct demonstrating a blatant disregard for Charter rights. Coughlan argues that Charter breaches by the police should not be regarded as in good faith simply because there was an honest belief in guilt or a lack of

[1997] 1 SCR 607; Paciocco and Stuesser *The law of evidence* at 31.

¹⁷⁴ *R v Grant* [2009] 2 SCR 353 at para 75; *R v Genest* [1989] 1 SCR 59; *R v Kokesch* [1990] 3 SCR 3; *R v Buhay* [2003] 1 SCR 631; *R v Di Palma* (2008) 235 CCC (3d) 1; *R v Harris* 35 CCC (3d) 1 (Ont CA); *R v Klimchuk* (1991) 67 CCC (3d) 385 (BCCA); *R v Morelli* [2010] 1 SCR 253; *R v Mayo* [2012] NPSC 53 at para 20.

¹⁷⁵ Bryant, Lederman and Fuerst *The law of evidence* at 589; Watt’s *Manual of evidence* at 41.03.

¹⁷⁶ *R v Hamill* [1987] 1 SCR 301; *R v Simmons* [1988] 2 SCR 495; *R v Wijesinha* 1995 100 CCC (3d) 410; Coughlan 2011 *Canadian Criminal LR* 197 at 208.

¹⁷⁷ *R v Hebert* (1990) 2 SCR 151; *R v Hamill* [1987] 1 SCR 301; *R v Simmons* [1988] 2 SCR 495; *R v Jacoy* [1988] 2 SCR 548; Coughlan 1992 *CR-ART* 304 at 305.

¹⁷⁸ *R v Grant* [2009] 2 SCR 353; see also *R v Harrison* [2009] 2 SCR 494: The court found that the lack of good faith on behalf of the police officers was sufficient to necessitate exclusion of the evidence.

¹⁷⁹ Coughlan 2011 *Canadian Criminal LR* at 197.

malice but should be construed narrowly as, for example, relying on a technique subsequently held to be unconstitutional.¹⁸⁰

These two meanings have not been kept separate nor have the courts adopted a definitive position on the matter.¹⁸¹ In *Kokesch*¹⁸² the majority, failing to find statutory justification for the conduct of the police, noted that the conduct was not mitigated by good faith. The Court recognised that good faith will justify admission, but used it in a technical sense when it stated that the officer could not be said to have acted in good faith when he ought to have known that he did not have the powers he purported to exercise.¹⁸³ The Court held that in the absence of such justification the seriousness of the Charter violation is enhanced, which favours exclusion.

Stuart argues that the courts should abandon the use of the politically and emotionally charged labels of good or bad faith which contribute to uncertainty and inconsistency.¹⁸⁴ He states that the courts are familiar with deciding whether conduct is intentional or negligent. An intentional breach would be especially serious and a violation negligently performed should be categorised as serious.¹⁸⁵ Misconception and ignorance of Charter standards would only be mitigating factors where the Crown has shown due diligence by the police to comply with Charter standards. Decisions would be more consistent if it was made clear that the seriousness of a breach can be justified where the police made a diligent effort to comply with the Charter. In other words in the case of negligent investigations the standard should be whether the police acted professionally and carefully and not just to avoid gross negligence.¹⁸⁶

4.1.3 Test for good faith

In *Buhay*¹⁸⁷ the Supreme Court stated that good faith must be reasonable.¹⁸⁸ At the heart of the assessment under this line of the inquiry is the mental state and objective

¹⁸⁰ Coughlan 2011 *Canadian Criminal* LR 197; see also Coughlan 1992 *CR-ART* 304 at 306.

¹⁸¹ Coughlan 1992 *CR-ART* 304 at 306.

¹⁸² *R v Kokesch* [1990] 3 SCR 3.

¹⁸³ See also minority decision *R v Wise* [1992] 1 SCR 527.

¹⁸⁴ Stuart 2010 *Southwestern Journal of International Law* 313 at 328.

¹⁸⁵ *Ally Constitutional exclusion*: see Annexure D.

¹⁸⁶ Stuart 2010 *Southwestern Journal of International Law* 313 at 329.

¹⁸⁷ *R v Buhay* [2003] 1 SCR 631.

¹⁸⁸ *R v Buhay* [2003] 1 SCR 631 at para 59-61.

reasonableness of the police conduct in relation to the Charter breach.¹⁸⁹ In *Booth*¹⁹⁰ the court summed up the test by stating that intention of the police is a factor of the process of determining how serious the conduct was but not the answer.¹⁹¹

The test is objective.¹⁹² Ultimately a finding of good faith will turn on the subjective question of the honesty of the mistaken belief and on the objective question of the reasonableness of that belief.¹⁹³ Good faith is determined by assessing police conduct in the entire evidence gathering process, as well as the mental state of the police.¹⁹⁴ In *Harrison*¹⁹⁵ the court stated that factors to be considered by the court is not confined to the time of the breach but may include the officer's testimony about Charter compliance.¹⁹⁶ The attempt by the officer to mislead the court was considered a factor when determining the seriousness factor. It is not part of the Charter breach but it is conduct that the court should dissociate itself.¹⁹⁷ The Court was not prepared to condone the brazen and flagrant Charter breach as it does not enhance the long-term repute of the administration of justice.¹⁹⁸

5. IMPACT ON THE CHARTER PROTECTED INTEREST OF THE ACCUSED

The second prong in *Grant* involves an assessment of the seriousness of the infringement from the perspective of the accused.¹⁹⁹ This inquiry calls for an evaluation of the extent to which the infringement actually undermined the interests protected by the right

¹⁸⁹ Bryant, Lederman and Fuerst *The law of evidence* at 596.

¹⁹⁰ *R v Booth* 2010 ABQB 797 [2010] AJ No 1476.

¹⁹¹ *R v Booth* 2010 ABQB 797 [2010] AJ No 1476; *R v Loewen* [2011] 2 SCR 167; *R v Mellenthin* [1992] 3 SCR 615; *R v Kokesch* [1990] 3 SCR 3; *R v Wong* [1990] 3 SCR 36.

¹⁹² *R v Mellenthin* [1992] 3 SCR 615; *R v Kokesch* [1990] 3 SCR 3; *R v Wong* [1990] 3 SCR 36.

¹⁹³ *R v Kokesch* [1990] 3 SCR 3; *R v Genest* [1989] 1 SCR 59; *R v Simmons* [1988] 2 SCR 495; *R v Jacoy* [1988] 2 SCR 548.

¹⁹⁴ *R v Mann* [2004] 3 SCR 59; *R v Belnavis* [1997] 3 SCR 341; *R v Buhay* [2003] 1 SCR 631.

¹⁹⁵ *R v Harrison* [2009] 2 SCR 494.

¹⁹⁶ *R v Harrison* [2009] 2 SCR 494; *R v Côté* [2011] 3 SCR 215 at para 31 endorsed the approach in *Harrison*.

¹⁹⁷ *R v Harrison* [2009] 2 SCR 494 at para 26: "As Cronk JA observed, 'the integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s 24(2) of the Charter. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority.'"; Stuart 2010 *Southwestern Journal of International Law* 313 at 323.

¹⁹⁸ *R v Harrison* [2009] 2 SCR 494 at para 39.

¹⁹⁹ *R v Grant* [2009] 2 SCR 353 at para 76; *R v Mann* [2004] 3 SCR 59; *R v Nolet* [2010] 1 SCR 851 at para 54; *R v Harrison* [2009] 2 SCR 494 at para 28; *R v Côté* [2011] 3 SCR 215 at para 47; Watt's *Manual of evidence* at 41.04; *R v Morelli* [2010] 1 SCR 253 at para 104; Stuart 2010 *Southwestern Journal of International Law* 313 at 318; Mitchell "Excluding evidence" at 26; Eberdt 2011 *Appeal* 65-85 at para 19.

infringed.²⁰⁰ The more serious the impact is on the protected interest, the greater the risk that admission of the evidence will signal to the public, that Charter rights are of little actual availability to them thus breeding cynicism and bringing the administration of justice into disrepute.²⁰¹ Considerations relevant to this inquiry are the nature of the evidence, discoverability analysis and nature of the right.

5.1 Nature of the evidence

In *Grant* the Supreme Court adopted a flexible approach when it discarded the *Stillman* self-incrimination test. The nature of evidence secured is now a key consideration in assessing the degree of intrusion.²⁰² The self-incriminatory character of evidence remains therefore a relevant and weighty consideration, but is not a decisive factor anymore.²⁰³ Evidence will be admissible even if its admission offends the principle against self-incrimination.²⁰⁴ For example, a statement might be admissible in circumstances if the suspect was clearly informed of his choice to speak to the police, even if the caution about the suspect's right to counsel were technically flawed.²⁰⁵ A serious infringement of the applicable interests increases the risk that admission of the evidence would bring the administration of justice into disrepute.²⁰⁶

In *Grant* the court observed that certain patterns emerged with respect to particular types of evidence, which serve as guides to future determinations under section 24(2).²⁰⁷ It appeared that the interest engaged by unconstitutionally obtained real evidence affected different rights. Usually in the case real evidence a person's section 8 rights is violated, which provides protection against an unreasonable search and seizure. The Court, on the other hand, observed that statements (testimonial evidence) engaged the principle against self-incrimination.²⁰⁸

²⁰⁰ *R v Grant* [2009] 2 SCR 353 at para 76-77.

²⁰¹ *R v Grant* [2009] 2 SCR 353 at para 76; *R v Mayo* [2012] NPSC 53 at para 21.

²⁰² *R v Grant* [2009] 2 SCR 353 at para 77; Paciocco and Stuesser *The law of evidence* at 8.

²⁰³ Dawe and McArthur "*Charter detention*" at 33.

²⁰⁴ *R v Grant* [2009] 2 SCR 353; Dawe and McArthur "*Charter detention*" at 41.

²⁰⁵ *R v Grant* [2009] 2 SCR 353 at para 95.

²⁰⁶ *R v Grant* [2009] 2 SCR 353 at para 77.

²⁰⁷ *R v Grant* [2009] 2 SCR 353 at para 86.

²⁰⁸ *R v Grant* [2009] 2 SCR 353 at para 89.

5.1.1 Bodily evidence

It has been claimed that the greatest change brought about by *Grant* is the approach to bodily evidence.²⁰⁹ Bodily evidence includes evidence such as DNA, breath and blood samples. The Court held that *Collins/Stillman* erroneously equated bodily evidence with statements. The Court reconfirmed the common law position that bodily samples are not communicative and therefore not self-incriminatory in the way statements are.²¹⁰ Courts should apply a flexible test based on all the circumstances.²¹¹ The Court observed that the judiciary's negative reaction to unconstitutionally obtained bodily samples is not founded on the compelled participation of the accused in the investigation but rather to the violation of the privacy and dignity of the individual that obtaining the evidence involves. It concluded that the nature and the degree of intrusion are therefore better addressed with reference to the interest in privacy, bodily integrity and human dignity.²¹²

5.1.2 Non-bodily physical evidence

Examples of non-bodily physical evidence are photographs, sketches, surveys, articles found in possession of the accused,²¹³ articles found at the scene of the crime, articles connecting the accused with the crime, videotapes, tape recordings,²¹⁴ and documents. The factors which may influence an assessment of the impact of the violation on the Charter interest include the manner in which the evidence was obtained and the degree in which the manner of discovery undermines the Charter protected privacy interest of the accused.²¹⁵ Body cavity searches and strip searches are generally categorised as more serious intrusions into privacy rights than other personal searches, such as pat down or frisk searches. On the other hand a pat down of one's person tend to be more serious than property searches, while searches of one's home are more serious than one's car or office.²¹⁶

²⁰⁹ Mitchell "Excluding evidence" at 28; Watt's *Manual of evidence* at 41.01.

²¹⁰ *R v Grant* [2009] 2 SCR 353 at para 105.

²¹¹ *R v Grant* [2009] 2 SCR 353.

²¹² *R v Grant* [2009] 2 SCR 353 at para 104.

²¹³ *R v Buhay* [2003] 1 SCR 631: The police discovered drugs in the locker rented by the accused; *R v Simmons* [1988] 2 SCR 495 and *R v Golden* [2001] 3 SCR 679: The accused was strip searched and drugs obtained from his body.

²¹⁴ *R v Nokolovski* (1994) 19 OR (3d) 676 (CA), rev'd [1996] 3 SCR 1197.

²¹⁵ Paciocco and Stuesser *The law of evidence* at 9 and 38; Mitchell "Excluding evidence" at 30.

²¹⁶ *R v Harrison* [2009] 2 SCR at para 31.

In *Golden*²¹⁷ the court had to assess the seriousness of the breach on a rights interest, the reasonable expectation to protection against unreasonable search and seizure. *In casu* the police observed the accused dealing and trafficking in drugs. The police on the strength of their observation decided to arrest the accused. Upon arrest the police conducted a pat down search and discovered no weapons or narcotics. The police decided to make a visual inspection of the accused underpants and buttocks. The police removed the clothes with force and conducted the search in unsanitary conditions. The police saw a plastic protruding from the accused buttocks and proceeded to retrieve it. The packet contained drugs. The Court held that the manner in which the search was conducted was regarded unreasonable as it infringed on the accused's rights against the unreasonable search and seizure.²¹⁸

5.1.3 Derivative evidence

Derivative evidence is physical evidence discovered as a result of an unlawfully obtained statement.²¹⁹ In *Burlingham*²²⁰ the accused was subjected to intensive and manipulative interrogation by the police in violation of his right to counsel. The accused eventually gave a full confession, including a statement that the murder weapon could be found at the bottom of a frozen river. The gun the police retrieved from the river was derivative evidence.

In *Grant* the court concluded that section 24(2) applications involving derivative evidence must pursue the usual three lines of inquiry outlined, taking into account the self-incriminatory origin of the evidence as well as its status as real evidence. *In casu* the Court held that unconstitutionally obtained statements will be subject to a "presumptive general, although not automatic" rule of exclusion.²²¹ Because the derivative evidence is obtained through unconstitutionally obtained statements the intrusion will be significant unless the breach was technical and had no impact on the accused to make an informed choice, or the statement would have been made notwithstanding the Charter breach, or the derivative evidence would have been discovered even had there been no Charter breach.²²² It follows

²¹⁷ *R v Golden* [2001] 3 SCR 679.

²¹⁸ Section 8; see also *R v Golden* [2001] 3 SCR 679 at para 117.

²¹⁹ *R v Grant* [2009] 2 SCR 353 at para 116; Mitchell "Excluding evidence" at 31; *R v Feeney* [1997] 2 SCR 13.

²²⁰ *R v Burlingham* [1995] 2 SCR 206.

²²¹ *R v Grant* [2009] 2 SCR 353 at para 92-96; Mitchell "Excluding evidence" at 31.

²²² Mitchell "Excluding evidence" at 31.

that non-discoverable derivative evidence will under the *Grant* test not automatically be excluded. The impact of the violation on the Charter's right interest may be lessened if the evidence was independently discoverable. Conversely non-discoverable evidence aggravates the impact of the breach on the accused's interest in being able to make an informed choice to talk to the police.²²³

5.2 Discoverability analysis

The discoverability test was applied in cases where real evidence was located as a result of an inadmissible statement.²²⁴ There are two principal bases upon which it could be demonstrated that the evidence would have been discovered. The first is where discovery of the evidence was inevitable and second is where an independent source of the evidence exists.²²⁵ In other words, the Crown must show on a balance of probabilities that the discovery of the evidence would have been inevitable²²⁶ or that the police would have availed themselves of an alternate legal means to obtain the evidence.²²⁷ The rationale underpinning this doctrine is that the prosecution gained an unfair advantage it would not have had, if the rights of the accused had not been violated.²²⁸ The discoverability doctrine was applied in *Black*.²²⁹ In the present case the accused was charged with murder but was never afforded a reasonable time to appoint and retain counsel. During an interview with the police the accused made incriminating statements.²³⁰ The police accompanied the accused to her house where she produced a knife, the murder weapon.²³¹ The Court ruled inadmissible the statement made by the accused because it violated her right against self-incrimination. The knife was admitted. The Court ruled that admission of the knife would not render the trial unfair because it would have been discovered in any event.²³²

Discoverability, under the *Collins/Stillman* trial fairness theory, attenuated the impact of the unconstitutional conduct on the accused's right against self-incrimination and his fair trial

²²³ Mitchell "Excluding evidence" at 31.

²²⁴ Bryant, Lederman and Fuerst *The law of evidence* at 580.

²²⁵ *R v Colarusso* [1994] 1 SCR 20; see also *R v Stillman* [1997] 1 SCR 607 at para 102.

²²⁶ *R v Stillman* [1997] 1 SCR 607; see also *R v Black* [1989] 2 SCR 138.

²²⁷ *R v Colarusso* [1994] 1 SCR 20; see also *R v Evans* [1996] 1 SCR 8.

²²⁸ See *Ally* 2005 *SACJ* 66 at 69.

²²⁹ *R v Black* (1989) 55 CCC (3d) 1.

²³⁰ *R v Black* (1989) 55 CCC (3d) 1 at 6.

²³¹ *R v Black* (1989) 55 CCC (3d) 1 at 7.

²³² *R v Black* (1989) 55 CCC (3d) 1 at 27; see in general *R v Silveira* [1995] 2 SCR 297; *R v Mellenthin* [1992] 3 SCR 402.

rights.²³³ The discoverability rule was thus clearly linked to the protection of the right against self-incrimination and the assessment of trial fairness.²³⁴

In *Grant* and subsequent decisions the court accepted that the conscriptive -discoverability doctrine has been justifiably criticised as overly speculative.²³⁵ For example, the doctrine led courts and counsel into various complicated and time-consuming attempts to “second guess” police and other investigatory agencies; judgments hinge more upon the outcome of the intellectual engagement between litigants and the presiding officer than upon the actual facts of the circumstances as presented to the court and the potential for speculation is limitless.²³⁶ Based on this the Court cautioned against speculation. It held that in cases where discoverability cannot with any confidence be determined, discoverability will have no impact on the section 24(2) inquiry.²³⁷ In other words, discoverability should be applied only in exceptional circumstances where it can confidently say that the evidence would have been obtained notwithstanding the Charter breach.

The Court ruled that discoverability should no longer be determinative of admissibility.²³⁸ Notwithstanding, discoverability continues to play a useful role in the section 24(2) analysis. Discovery continues to be relevant to the first and second prongs of the *Grant* analysis,²³⁹ namely; the seriousness of the Charter-infringing state conduct and the impact of the breach on the Charter-protected interests of the accused. Moreover it retains a role in assessing the actual impact of the breach on the protected interest of the accused.²⁴⁰ If the Crown would have discovered the evidence without the Charter breach, the intrusion is less intrusive and exclusion is less likely to follow.²⁴¹ For example, discoverability will lessen the impact of the illegal search on the accused privacy and dignity interest protected by the Charter if the police demonstrate to the court that they had reasonable and probable

²³³ Davison 1993 *Criminal LQ* 508.

²³⁴ Hogg *Constitutional law* at 41-15; Penney 2003 *McGill LJ* 105 at 132.

²³⁵ *R v Grant* [2009] 2 SCR 353 at para 120; Stuart 2010 *Southwestern Journal of International Law* 313 at 329; Mahoney 1999 *Criminal LQ* 464; Stuart 1996 *CR* 351.

²³⁶ Davison 1993 *Criminal LQ* 506; Stuart 2010 *Southwestern Journal of International Law* 313 at 329; Santoro 2007 *Alberta LR* 1 at 41-16.

²³⁷ *R v Grant* [2009] 2 SCR 353 at para 122; *R v Côté* [2011] 3 SCR 215 at para 70; Quigley 2009 *CR* 92.

²³⁸ *R v Grant* [2009] 2 SCR 353 at para 121; *R v Nolet* [2010] 1 SCR 851 at para 54.

²³⁹ *R v Côté* [2011] 3 SCR 215 at para 74.

²⁴⁰ *R v Grant* [2009] 2 SCR 353 at para 122; *R v Côté* [2011] 3 SCR 215 at para 65-70; *R v Nolet* [2010] 1 SCR 851 at para 54; Paciocco and Stuesser *The law of evidence* at 42; see also criticism by Stuart 2010 *Southwestern Journal of International Law* 313 at 330.

²⁴¹ Stuart 1996 *CR* 352; Mitchell “*Excluding evidence*” at 23; Paciocco and Stuesser *The law of evidence* at 35.

grounds that a crime had been committed and that the evidence was found at the place of the search.²⁴²

5.3 Nature of the right

State agents in Canada may through compulsion obtain real evidence from an individual. The legal authority to search and seize is generally authorised by statute law or common law.²⁴³ In the process of gathering evidence several of the accused fundamental rights could possibly be breached. In this thesis I focus on the right to privacy.²⁴⁴ Section 8 of the Charter provides Canadians with a substantive right that protects them against an unreasonable search or seizure.²⁴⁵ An accused relying on the protection under section 8 is required to demonstrate, first that he has a reasonable expectation of privacy and second, if he has such an expectation, that the search by the police was unreasonable.²⁴⁶ In order for a search to be reasonable, a search must be authorised by law, the law itself must be reasonable and the manner in which the search was carried out must be reasonable.²⁴⁷

A search that is unreasonable may be subject to exclusion by virtue of section 24(2) of the Charter.²⁴⁸ The question whether to exclude evidence after it has been established that section 8 has been violated, should be decided upon, by weighing the societal interest in truth-finding and suppression of crime against the particular privacy interest infringed.

5.3.1 Right of privacy

(a) Reasonable expectation of privacy

Prior to the adoption of the Charter the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were

²⁴² *R v Côté* [2011] 3 SCR 215 at para 71.

²⁴³ *Hunter v Southam Inc* [1984] 2 SCR 145; *R v Grant* [1993] 3 SCR 223: Warrantless search of drugs authorised under section 10 of the *Narcotic Control Act*, RSC 1985 c N-1 [rep SC 1996 c 19 s94]; Michaelson 2008 *Supreme Court Law Review* 87 at 90.

²⁴⁴ See discussion in para 3.4.1 in chapter 3.

²⁴⁵ Section 8; Section 7: protects the accused right to security of the person; see also *R v Grant* [2009] 2 SCR 353 at para 99.

²⁴⁶ *R v Collins* [1987] 1 SCR 265; *R v Edwards* [1996] 1 SCR 126; *Hunter v Southam Inc* [1984] 2 SCR 145.

²⁴⁷ *R v Cornell* [2010] 2 SCR 142; *R v Collins* [1987] 1 SCR 265; *R v Garofoli* [1990] 2 SCR 1421; *R v Stillman* [1997] 1 SCR 607 at para 25 ; *R v Debot* [1989] 2 SCR 1140; *R v Caslake* [1998] 1 SCR 51 ; *R v Golden* [2001] 3 SCR 679 at para 44; *R v SAB* (2003) SCC 60.

²⁴⁸ *Hunter v Southam Inc* [1984] 2 SCR 145.

linked to the law of trespass.²⁴⁹ The meaning of legal protection of privacy did not extend beyond what was generally accepted to be private to individuals, being an individual's home, property and secret and confidential information.²⁵⁰ It was therefore not strange when in *Entick*²⁵¹ the court refused to authorise a search to discover evidence that might link the accused to certain seditious libels. The Court ruled that the plaintiff was protected from the intended search by the ordinary law of trespass because of the lack of proper legal authority for the search or seizure.

After the adoption of the Charter the Supreme Court in *Hunter*²⁵² stated that the privacy protection under section 8 protects people and not places and is therefore not restricted to notions of property and trespass.²⁵³ The Court firmly rejected a narrow property based purpose for the section 8 right and emphatically stated that it has a wider ambit than enunciated in *Entick*. The wording of section 8 does not restrict it to the protection of property nor can it be associated with the law of trespass.²⁵⁴ This means that section 8 is intended to protect more than simply intrusions against property or property rights. In several subsequent decisions the courts affirmed that the right against unreasonable search and seizure is predicated on the right to privacy.²⁵⁵ Although the courts advocated a broad general right to be secured from unreasonable search and seizure they stressed that it only protected a reasonable expectation of privacy. The limiting term "reasonable" implies that an assessment be made on the facts whether the public interest to privacy must give way to the governments interest in intruding on the individuals privacy to advance its goals of law

²⁴⁹ *Hunter v Southam Inc* [1984] 2 SCR 157.

²⁵⁰ *Entick v Carrington* (1765) 19 St Tr 1029 1 Wils KB 275 at 291 quoted in *Hunter v Southam Inc* [1984] 2 SCR 145 at 158: "...[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser, though he does no damage at all, if he will tread upon his neighbour's ground, he must justify it by law."

²⁵¹ *Entick v Carrington* (1765) 19 St Tr 1029 1 Wils KB 275.

²⁵² *Hunter v Southam Inc* [1984] 2 SCR 145.

²⁵³ *Hunter v Southam Inc* [1984] 2 SCR 145 at 158.

²⁵⁴ *Hunter v Southam Inc* [1984] 2 SCR 145 at 158-159; Hogg *Constitutional law* at 48-13: "The presence of a reasonable expectation of privacy thus became the deciding line between a seizure of evidence, to which s 8 was potentially applicable and a gathering of evidence, to which s 8 had no application."

²⁵⁵ *R v Collins* [1987] 1 SCR 265; *Hunter v Southam Inc* [1984] 2 SCR 145; *R v Stillman* [1997] 1 SCR 607; *R v Edwards* [1996] 1 SCR 128; Skinnider "Improperly or illegally obtained evidence" at 22; Pink and Perrier *Crime to punishment* at 471.

enforcement.²⁵⁶ If no reasonable expectation of privacy is established then section 8 need not be considered because no search or seizure has occurred.²⁵⁷

(b) Test for reasonable expectation

Determining whether an individual has a reasonable expectation of privacy the courts initially approached the question by undertaking a normative analysis that was largely disconnected from the actual facts of the case. The facts of *Duarte*²⁵⁸ are a case in point. In this case the accused agreed to purchase drugs from a police informer. The parties concluded the transaction in an apartment which had been wired to intercept and record their conversation. The police and the informer consented to the interception of the communication. The question the Court considered pertinent was not whether the accused had a reasonable expectation of privacy in his communication with the informer and police, but rather whether individuals generally in society would expect that their private communications with others would not be intercepted by the state without prior judicial authorisation.²⁵⁹

The Supreme Court of Canada in *Edwards*²⁶⁰ abandoned the normative analysis in favour of an approach that examined all the circumstances in deciding whether an individual had a reasonable expectation of privacy.²⁶¹ *In casu* the Court held that a reasonable expectation of privacy would be determined on an assessment of the totality of circumstances which would include, circumstances such as the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access, existence of a subjective expectation

²⁵⁶ *Hunter v Southam Inc* [1984] 2 SCR 145 at 159-160; see also *R v Edwards* [1996] 1 SCR at 128 -130.

²⁵⁷ *Hunter v Southam Inc* [1984] 2 SCR 145: The Supreme Court of Canada held unanimously that an individual have a reasonable expectation of privacy with respect to computerised information that was personal and confidential; *R v Tessling* [2004] 3 SCR 432: The court held that thermal images was not a search within section 8; *R v Kang- Brown* [2008] 1 SCR 456: The court considered the sniff of a sniffer dog constituted a search; *R v Dyment* [1988] 2 SCR 417: The accused had a reasonable expectation of privacy with respect to the vial and the police infringement of that expectation of privacy was a seizure within s 8; Hogg *Constitutional law* at 48-5 to 48-12.

²⁵⁸ *R v Duarte* [1990] 1 SCR 30.

²⁵⁹ *R v Duarte* [1990] 1 SCR 30; see also *R v Kang- Brown* [2008] 1 SCR 456: The court applied the same type of generalised normative analysis.

²⁶⁰ *R v Edwards* [1996] 1 SCR 128; see also *R v Plant* [1993] 3 SCR 281: The court in assessing whether the individual held a reasonable expectation of privacy the court looked to a number of factors; The approach was restated in *R v Tessling* [2004] 3 SCR 432.

²⁶¹ *R v Edwards* [1996] SCR 128; Pink and Perrier *Crime to punishment* at 471.

of privacy and the objective reasonableness of the expectation.²⁶² The approach provides a flexible framework and the outcome of any given factual scenario, which is likely to be more closely aligned with our common experience and societal expectation that would lead to more predictable outcomes we consider just.²⁶³

An approach that examines all the circumstances is to be preferred. Several problems have been identified with the normative analysis.²⁶⁴ The outcome of any reasonable expectation enquiry is dependent on how the question is framed rather than the actual facts of the case. The general approach of the normative analysis is disconnected from the facts which inevitably lead to outcomes that are no longer consonant with our common experience and societal expectation. The approach also risks diverting the purpose of the inquiry into the reasonable expectation of privacy being, whether the individual's dignity, integrity and autonomy be advanced or diminished by validating privacy claims. Finally the approach fails to provide police officers with sufficient guidance during investigations.²⁶⁵

5.3.2 Limitation of rights

(a) Authorised by law

The police may forcibly seize real evidence if authorised by statute law or common law.²⁶⁶ In other words agents of state can only enter onto or confiscate someone's property when the law specifically permits it. If not authorised they are constrained by the same rules regarding theft and trespass as everyone else.²⁶⁷ A search is unreasonable if not authorised by specific statute or common law; if not carried out in accordance with the procedural and substantive requirements of the law; or if the scope of the search exceeds the limits for which the law granted authority to search.²⁶⁸

²⁶² See in general *R v Buhay* [2003] 1 SCR 631; *R v Edwards* [1996] 1 SCR 128; *R v Tessling* [2004] 3 SCR 432; *US v Gomez* 16 F3d 254 (8th Cir 1994); *R v Krist* (1995) 100 CCC (3d) 58 (BCCA); *R v Evans* [1996] 1 SCR 8.

²⁶³ Michaelson 2008 *Supreme Court LR* 87 at 99.

²⁶⁴ Michaelson 2008 *Supreme Court LR* 87 at 96-98.

²⁶⁵ Michaelson 2008 *Supreme Court LR* 87 at 96-98.

²⁶⁶ *R v Shoker* [2006] 2 SCR 399 at para 3; *R v Stillman* [1997] 1 SCR 607.

²⁶⁷ *R v Caslake* [1998] 1 SCR 51 at para 12.

²⁶⁸ *R v Caslake* [1998] 1 SCR 51 at para 12.

(i) Authorised by specific law

In *Stillman* the police forcibly obtained bodily samples and teeth impressions from the accused whilst in detention. The accused argued at his trial that the evidence obtained should be excluded because the search and seizure was unreasonable as it was not authorised by statute or the common law.²⁶⁹ The Court agreed that the bodily samples could not have been authorised under the existing statutory provisions. The Court observed that the investigative warrants under section 487²⁷⁰ of the Criminal Code only provided authority to search places. An alternative argument by the Crown that the search and seizure of the evidence was authorised by the common law, the Court rejected as well. The Court held that the common law search and seizure incident to arrest did not extend to the obtainment of bodily samples. Accordingly the Court held that the search and seizure of the accused was unreasonable. In the wake of *Stillman* the legislature noted that parliament has expressly limited the scope of the general investigative warrant as it relates to the interference with the bodily integrity of any person. Parliament subsequently enacted section 487.0(2) which permits a search warrant to issue for the seizure of handprints, fingerprint, foot impressions, teeth impression or other print or impression of the body or any part of the body.²⁷¹

The existence of implied statutory powers has been acknowledged by the courts.²⁷² For example, teachers would have implied authority for conducting reasonable searches of students based on the statutory obligations of schools and teachers to maintain order and discipline.

(ii) Compliance with procedural and substantive requirements of the law

Compliance with the law is an essential element of reasonableness.²⁷³ For example, in *Grant*²⁷⁴ the police conducted a search under section 10 of the Narcotic Control Act.²⁷⁵ Section 10 authorises police officers to search without a warrant a place other than a

²⁶⁹ *R v Legere* (1988) 89 NBR (2d) 361; see, in general Quigley *Criminal law* at 175-176.

²⁷⁰ *Criminal Code* RSC 1985 c C-46.

²⁷¹ *Criminal Code* s 487.01(2).

²⁷² *R v M* [1998] 3 SCR 393 at para 51; *R v Shoker* [2006] 2 SCR 399 at para 22.

²⁷³ Hogg *Constitutional law* at 48-42 to 48-43; *R v Kokesch* [1990] 3 SCR 3; *R v Caslake* [1998] 1 SCR 51.

²⁷⁴ *R v Grant* [1993] 3 SCR 223.

²⁷⁵ Narcotic Control Act, 1970.

dwelling-house, if they have reasonable grounds to believe that it contains a narcotic in respect of which an offence has been committed. *In casu* the Court held that a search undertaken in a dwelling without the necessary prior authorisation is rendered unreasonable and in violation of section 8 of the Charter. This approach was followed in *Feeney*²⁷⁶ as well. *In casu* the Court decided that section 8 requires a warrant for entry into a dwelling house in order to make an arrest. The *Criminal Code* did not make provision for this requirement; however the Court held that it should be read in. Subsequent to *Feeney* parliament amended the *Criminal Code*.²⁷⁷ The amendment makes provision for a warrant to enter a dwelling to make an arrest and for entry without warrant by reason of exigent circumstances²⁷⁸ if it would be impractical to obtain a warrant.

(iii) Scope of the search exceeds the limits for which the law granted authority

The court in *Mann*²⁷⁹ found that the police detained a suspect for investigation purposes and subsequently proceeded to conduct a pat-down search for weapons. The police felt a soft object in the pocket of the suspect, reached in and discovered drugs. The Court held that the search and seizure of the drugs by searching the suspect's pocket went beyond the search for weapons permitted by the common law as likely to occur during a so-called investigative detention. The power to search subsequent to the arrest is an exception to the ordinary requirements for a reasonable search, in that it requires neither a warrant nor independent reasonable and probable grounds. The Court held that the evidence was obtained without lawful authority which amounted to a breach of section 8 and accordingly excluded the evidence under section 24(2).²⁸⁰

The Canadian courts do not have the power, unless specifically authorised, to enforce or order the accused to subject themselves to a search and seizure not provided for in any statutory or common law. The rationale is that it is up to the legislature and not the courts

²⁷⁶ *R v Feeney* [1997] 2 SCR 13.

²⁷⁷ SC 1997 c 39 adding ss 529-529.5 to the *Criminal Code*.

²⁷⁸ Exigent circumstances include the threat of imminent bodily harm or death and the threat of the imminent loss or destruction of evidence.

²⁷⁹ *R v Mann* [2004] 3 SCR 59.

²⁸⁰ *R v Mann* [2004] 3 SCR 59; See also *R v Caslake* [1998] 1 SCR 51: The court held that search was not conducted within the bounds of the legitimate purposes of search incident to arrest.

to balance the accused's Charter rights against society's interest in effectively monitoring their conduct.²⁸¹

An illegal search is an element which impacts on the determination of the reasonableness of a search under section 8 of the Charter.²⁸² This is significant because the common law rule was that illegally obtained evidence was admissible if relevant and could therefore not be excluded.²⁸³ Illegally obtained evidence is a breach of section 8 (it is unreasonable) and can now be excluded under section 24 (2) of the Charter.²⁸⁴

(b) Law must be reasonable

A search is reasonable if the law that authorises it is reasonable as well. Laws that fail to meet the minimum constitutional standards in section 8 are in breach thereof. Under section 1 of the Charter the courts have the ability to review legislation and determine if the legislation is inconsistent with the Charter. Section 1 of the Charter reads:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

*Oakes*²⁸⁵ is the seminal case in Canada on the interpretation of the meaning of “reasonable” and “demonstrably justified in a free and democratic society.” The court in *Oakes* devised a set of criteria against which limitations on rights and freedoms must be measured. In other words even if legislation violates section 8 it can still be upheld as a reasonable limit under section 1. The four *Oakes* test criteria are; firstly, the law must have a sufficiently important objective, secondly, the law must be rationally connected to the objective, thirdly, the law must not infringe a right more than is necessary to meet the objective and lastly the law must not have a disproportionately severe effect.²⁸⁶

²⁸¹ *R v Shoker* [2006] 2 SCR 399 at para 25; *Hunter v Southam Inc* [1984] 2 SCR 145; *R v Golden* [2001] 3 SCR 679 at para 103; Schmitz 2006 *The lawyers weekly*; Anand 2009 CR 25.

²⁸² *Hunter v Southam Inc* [1984] 2 SCR 145.

²⁸³ *R v Kokesch* [1990] 3 SCR 3.

²⁸⁴ Hogg *Constitutional law* at 48-43.

²⁸⁵ *R v Oakes* [1986] 1 SCR 103.

²⁸⁶ *R v Oakes* [1986] 1 SCR 103; see also *R v Orban* [2005] 2 SCR 3 at para 54; *R v Golden* [2001] 3 SCR 679 at 104; *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835; *R v Tse* [2012] 1 SCR 531; Choudry 2006 *Supreme Court Law Review* 501-526.

(i) Sufficiently important objective

The first step in the *Oakes* test is to assess whether the impugned legislation pursue an objective that is sufficiently important to justify limiting a Charter right. The objective of legislation can be ascertained from the wording of the statute, the intention of parliament or the legislative history. The identification of the legislative objective is not always clear and has proved difficult to determine.²⁸⁷

At which level the objective is determined by a discretionary choice of the reviewing court.²⁸⁸ *Oakes* provides guidelines to determine whether the objective achieves the levels of sufficient importance, in order to justify overriding a Charter right. The objective must be consistent with the values of a free and democratic society; the objective must relate to concerns which are pressing rather than merely trivial and the objective must be directed to “the realisation of collective goals of fundamental importance.”²⁸⁹ These guidelines were applied in *Butler*.²⁹⁰ The accused sold pornographic material which was seized following the execution of a search warrant by the police. The applicant was subsequently charged with possession and distribution of obscene materials. He argued that the definition of obscenity in the *Criminal Code* impermissibly violated the right to freedom of expression contained in section 2(b) of the Charter. The Court agreed that the *Criminal Code* violated section 2(b) of the Charter, but upheld it as a reasonable limitation under section 1. The Court reasoned that prohibition of obscene material captured by the section served a pressing and substantial objective aimed at preserving equality and to prevent harm to females.²⁹¹

²⁸⁷ Hogg *Constitutional law* at 38-19 to 38-20.

²⁸⁸ Hogg *Constitutional law* at 38-23.

²⁸⁹ *R v Oakes* [1986] 1 SCR 103 at para 69.

²⁹⁰ *R v Butler* [1992] 1 SCR 452.

²⁹¹ *R v Butler* [1992] 1 SCR 452; see also *R v Oakes* [1986] 1 SCR 103 at para 76: “The objective of protecting our society from the grave ills associated with drug trafficking, is in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1 to a large extent, self-evident. The first criterion of a section 1 enquiry, therefore, has been satisfied by the Crown.”; see also *R v Tse* [2012] 1 SCR 531: Regarding the first question the court in *Tse* held that the objective of preventing serious harm to persons or property in exigent circumstances is pressing and substantial.

(ii) Rational connection

The second step in the *Oakes* test requires the law to be rationally connected to the objective of the law. In other words the law must be designed to achieve the objectives in question and should not be arbitrary unfair or based on irrational considerations.²⁹² This step is undertaken only after finding that the objective of the law is sufficiently important to justify in principle the limiting of the Charter right. The rational connection requirement implies that there must be a causal relationship between the objective of the law and the measures enacted by the law.²⁹³ A causal relationship does not have to be established through direct evidence only. A causal connection based on reason or logic would suffice.²⁹⁴ The point is illustrated in *Oakes*. *In casu* the Court had to determine the constitutionality of section 8 of the *Narcotic Control Act*.²⁹⁵ The section provided that proof of possession of drugs raised a presumption that the possession was for the purpose of trafficking. The legislation in effect cast the burden on the accused to prove that he was not in possession with the intent to deal in narcotics. The question the Court had to consider was whether the reverse onus clause in section 8 was rationally related to the objective of curbing drug trafficking. In the absence of a rational connection the reverse onus clause could be the cause of unjustified and erroneous convictions of drug trafficking of persons guilty only of possession of narcotics.²⁹⁶ The Court observed that it would be irrational to infer that a person has intent to traffic on the basis of his or her possession of a small quantity of drugs.²⁹⁷ The reverse onus did not satisfy the rationality requirement as it did not refer to the quantity of drugs in the possession of the accused.²⁹⁸

(iii) Least drastic means

The least drastic measure requirement is the third step in the *Oakes* test. This step has also been described as the minimum impairment test, because it requires that the limit on the Charter right be the least drastic means to achieve the objective. Determining whether the

²⁹² *R v Oakes* [1986] 1 SCR 103 at para 70.

²⁹³ Hogg *Constitutional law* at 38-35.

²⁹⁴ *R v Oakes* [1986] 1 SCR 103 at 156-158.

²⁹⁵ Narcotic Control Act in Canada, 1970.

²⁹⁶ *R v Oakes* [1986] 1 SCR 103 at para 77.

²⁹⁷ *R v Oakes* [1986] 1 SCR 103 at para 78.

²⁹⁸ *R v Oakes* [1986] 1 SCR 103 at para 78; see also in general *R v Tse* 2012 SCC 16 at para 97.

law limiting the Charter right is the least drastic is not self-evident from the legislation.²⁹⁹ In *Edwards Books and Art*³⁰⁰ the court held that some margin of appreciation had to mitigate the least drastic means requirement.³⁰¹ This means courts should allow the legislature some latitude to consider which legal framework limiting a fundamental right is reasonable for the legislature to impose.³⁰²

In *Ramsden*³⁰³ the accused advertised upcoming performances of his band by affixing posters to hydro poles contrary to a city by-law banning posters on public property. He was charged under the by-law and while not denying the offences, argued that the by-law was unconstitutional because it was inconsistent with the guarantee of freedom of expression in section 2(b) of the Charter. The issues before court were whether the by-law limited the relevant right and if so, whether such limitations were demonstrably justified under section 1. The Court found that by prohibiting posters entirely littering, aesthetic blight and associated hazards were avoided. The complete ban on posters however, did not restrict expression as little as is reasonably possible. Many alternatives to a complete ban existed. The Court held that proportionality between the effects and the objective was not achieved because the benefits of the by-law were limited while the abrogation of the freedom was total.³⁰⁴

(iv) Proportionality

The proportionality requirement is the last step in the *Oakes* test for justification. It requires proportionality between the effects of the measures responsible for limiting the Charter right and the objective which has been identified as of sufficient importance.³⁰⁵ In *Alberta*³⁰⁶ the court reasoned that the first three steps of the *Oakes* test are anchored in an assessment of the law's purpose whereas the fourth step takes full account of the "severity of the deleterious effects of a measure on individuals or groups." In *Tse*³⁰⁷ the Supreme Court applied the proportionality test and held that the legislation did not satisfy the

²⁹⁹ *R v Edwards Books and Art* [1986] 2 SCR 713.

³⁰⁰ *R v Edwards Books and Art* [1986] 2 SCR 713.

³⁰¹ *R v Edwards Books and Art* [1986] 2 SCR 713.

³⁰² *R v Edwards Books and Art* [1986] 2 SCR 713; Hogg *Constitutional law* at 38-39.

³⁰³ *Ramsden v Peterborough (City)* [1993] 2 SCR 1084.

³⁰⁴ *Ramsden v Peterborough (City)* [1993] 2 SCR 1084 at 1105-1106; see also *Dunmore v Ontario* [2001] 3 SCR 1016; see also cases in which Criminal code provisions failed the least-drastring-means test; *R v Logan* [1990] 2 SCR 731; *R v Hess* [1990] 2 SCR 906.

³⁰⁵ Hogg *Constitutional law* at 38-43.

³⁰⁶ *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567.

³⁰⁷ *R v Tse* [2012] SCR 531.

requirement. The Court concluded that the obligation to give notice to intercepted parties would not impact in any way the ability of the police to act in emergencies.³⁰⁸ Notice would enhance the ability of targeted individuals to identify and challenge invasions to their privacy and seek meaningful remedies. The Court ruled that Parliament's goal of preventing reasonably apprehended serious harm could still be achieved by implementing this accountability mechanism. The court in *Tse* concluded that the provision fails to satisfy the second stage of the *Oakes* test and ruled that the impugned legislation was unconstitutional.³⁰⁹

(c) Manner of search unreasonable

An authorised search must be conducted in a reasonable manner. The manner of the search is unreasonable in circumstances where the police authority to arrest was exceeded,³¹⁰ invasive strip searches,³¹¹ the compelled obtainment of bodily samples notwithstanding the accused refusing consent and if the police during a search showed considerable disregard for the accused's dignity and physical integrity.³¹²

The conduct of the search must as a whole be assessed in light of all the circumstances. The question is whether the overall search and not whether every detail of the search in isolation is appropriate.³¹³ During the review of the decision of the police to act as they did the following factors must be considered: Firstly, the decision of the police must be judged against what was known or should reasonably have been known to them at the time,³¹⁴ secondly, the police must be allowed some discretion in the manner they decide to execute the search.³¹⁵ In *Cornell*³¹⁶ the police executed a warrant by entering the house of the accused without prior warning and by battering down the door. The accused argued that the evidence should be excluded on the ground that the search was executed in an unreasonable manner. The Court rejected his argument and included the evidence in the trial. The evidence revealed that the police's conduct was motivated by concerns of safety

³⁰⁸ *R v Tse* [2012] SCR 531 at para 98

³⁰⁹ *R v Tse* [2012] SCR 531 at para 99.

³¹⁰ *R v Stillman* [1997] 1 SCR 607 at para 46; *R v Mayo* [2012] NPSC 53 at para 17.

³¹¹ *R v Golden* [2001] 3 SCR 679 at para 105.

³¹² *R v Stillman* [1997] 1 SCR 607; *R v Golden* [2001] 3 SCR 679 at para 116.

³¹³ *R v Cornell* [2010] 2 SCR 142 at para 31.

³¹⁴ *R v Cornell* [2010] 2 SCR 142 at para 23.

³¹⁵ *R v Cornell* [2010] 2 SCR 142 at para 24.

³¹⁶ *R v Cornell* [2010] 2 SCR 142.

to them, the accused and to avoid the possible destruction of evidence, if the accused had the opportunity to do so. The Court accordingly held that the police was justified in their conduct and the search was accordingly reasonable in the circumstances.

6. SOCIETY'S INTEREST IN ADJUDICATION OF THE CASE ON ITS MERITS

Grant discontinues asking the pro-admissibility balancing question of whether exclusion will bring the administration of justice into disrepute and replaces it with a consideration of impact of exclusion on the public interest in the truth-seeking function of the court.³¹⁷ This line of the inquiry asks the question whether the truth seeking function of the criminal process would be better served by the admission or exclusion of the evidence.³¹⁸ The weight afforded society's interest in adjudication of the case on the merits varies according to the reliability of the evidence, the importance of the evidence to the case for the prosecution and the seriousness of the offence charged.³¹⁹

6.1 Reliability

The courts prior to *Grant* did not recognise the reliability principle.³²⁰ The minority in *Burlingham*³²¹ attempted to develop a guiding reliability principle which was rebuffed by the majority.³²² In *Grant* the court ruled that the reliability of evidence is relevant in determining the impact exclusion will have on the public interest in truth finding. It however cautioned that the reliability factor is not a return to the common law approach as formulated in *Wray*.³²³ In *Wray* the court held that reliable evidence is admissible regardless of how it was obtained. *Grant* held that *Wray* is inconsistent with the wording of section 24(2), which mandates that the court considers all the circumstances, not just the reliability of the

³¹⁷ *R v Grant* [2009] 2 SCR 353 at para 79; *R v Askov* [1990] 2 SCR 1199 at 1219-1220; Watt's *Manual of evidence* at 41.01; Davies 2002 *Criminal LQ* 23.

³¹⁸ *R v Côté* [2011] 3 SCR 215 at para 47; *R v Grant* [2009] 2 SCR 353; Mitchell "Excluding evidence" at 42; Paciocco and Stuesser *The law of evidence* at 35; Stuart 2010 *Southwestern Journal of International Law* 313 at 318; Eberdt 2011 *Appeal* 65-85 at para 20.

³¹⁹ *R v Grant* [2009] 2 SCR 353; *R v Harrison* [2009] 2 SCR 494.

³²⁰ *R v Côté* [2011] 3 SCR 215 at para 113; *R v Stillman* [1997] 1 SCR 607; Dawe and McArthur "Charter detention" at 25.

³²¹ *R v Burlingham* [1995] 2 SCR 206.

³²² *R v Burlingham* [1995] 2 SCR 206 at para 37-39, 85 and 146; see also *R v Belvanis* [1997] 3 SCR 341; *R v White* (2007) 47 CR (6th) 271 (Ont CA).

³²³ *R v Grant* [2009] 2 SCR 353 at para 80.

evidence.³²⁴ This approach was endorsed in *Harrison*³²⁵ where the court excluded reliable evidence after a finding that the Charter breach was serious and the impact significant. A breach that undermines the reliability of the evidence is generally excluded because the inclusion of unreliable evidence will not serve the accused's fair trial interest, or the public's desire to uncover the truth.³²⁶ Excluding reliable evidence may on the other hand undermine the truth-seeking functions of the justice system and render the trial unfair from the public's perspective.³²⁷

6.2 Importance to prosecution

The exclusion of evidence may adversely affect the reputation of the administration of justice if it substantially diminishes the strength of the prosecution's case.³²⁸ Although an important pro-inclusionary consideration prior to *Grant*, it was not determinative.³²⁹ In *Grant* the court opined that this factor is a corollary to the inquiry into the reliability.³³⁰ The admission of unreliable evidence is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused and likewise will the exclusion of reliable evidence have an adverse effect on the reputation of the administration of justice where the remedy weakens the prosecution.³³¹

6.3 The seriousness of the offence

The seriousness of the offence was prior to the *Grant* decision an important pro-inclusionary consideration in determining the effect exclusion would have on the reputation of the administration of justice.³³² The rationale was that the more serious the offence is, the greater the likelihood that the administration of justice would be brought into disrepute by the exclusion of the evidence. Exclusion of evidence did not follow automatically in serious

³²⁴ Stuart 2010 *Southwestern Journal of International Law* 313 at 327.

³²⁵ *R v Harrison* [2009] 2 SCR 494.

³²⁶ *R v Yamka* 2011 CarswellOnt 327 (Ont SCJ); Watt's *Manual of evidence* at 41.01; *R v Mayo* [2012] NPSC 53 at para 21.

³²⁷ *R v Côté* [2011] 3 SCR 215 at para 47; Paciocco and Stuesser *The law of evidence* at 43.

³²⁸ *R v Grant* [2009] 2 SCR 353 at para 83; *R v Beaulieu* [2010] 1 SCR 248; *R v Morelli* [2010] 1 SCR 253 at para 107.

³²⁹ *R v Silveira* [1995] 2 SCR 297; *R v Buhay* [2003] 1 SCR 631.

³³⁰ *R v Grant* [2009] 2 SCR 353; *R v Côté* [2011] 3 SCR 215 at para 47: The court endorsed *Grant*.

³³¹ *R v Grant* [2009] 2 SCR 353 at para 83; *R v Côté* [2011] 3 SCR 215 at para 47.

³³² *R v Collins* [1987] 1 SCR 265; *R v Stillman* [1997] 1 SCR 607; *R v Silveira* [1995] 2 SCR 297; *R v Colarusso* [1994] 1 SCR 20; *R v Jacoy* [1988] 2 SCR 548; *R v Feeney* [1997] 2 SCR 13; *R v Stillman* [1997] 1 SCR 607; Eberdt 2011 *Appeal* 65-85 at para 28.

cases.³³³ In *Grant* the court observed that this factor may be a consideration but neutralised its impact by suggesting that it has the potential to cut both ways.³³⁴ The Court observed that the public has an interest in seeing a determination on the merits where the offence is serious and on the other hand also has an interest in having a justice system that is above reproach especially in cases where the penalties can be severe.³³⁵ Put differently, *Grant* has rendered the factor largely immaterial to section 24(2) inquiries.³³⁶ The Court opined that the section 24(2) goals operate independently of the seriousness of the offence charged and noted that the section addresses the long term interest of the administration of justice and not the immediate impact of how the people view the justice system.³³⁷ The shift means that the seriousness of the offence will not be the focus to measure the public's reaction to the exclusion of evidence. Applying the principle in context the Court concluded that short term clamour for a conviction in a particular case must not deafen the court to the longer term reputation of the administration of justice.³³⁸

In *Harrison*³³⁹ it appears as if the seriousness of the offence might still be a relevant consideration. The Court considered the seriousness of the offence factor but cautioned that it should not weigh heavily in the analysis.³⁴⁰ Allowing the seriousness of the offence to overwhelm the section 24(2) analysis would deny those charged with serious offences of the fundamental rights afforded all Canadians, in effect declaring that in the administration of criminal law the ends justify the means.³⁴¹ Although the Supreme Court cautioned against an over reliance, it however failed to clarify what degree of reliance is permissible.³⁴² The fact that courts are encouraged to balance the short-term and longer term reputation of the

³³³ *R v Feeney* [1997] 2 SCR 13; *R v Stillman* [1997] 1 SCR 607.

³³⁴ *R v Grant* [2009] 2 SCR 353; *R v Harrison* [2009] 2 SCR 494 at para 34; *R v Côté* [2011] 3 SCR 215 at para 53; Paciocco and Stuesser *The law of evidence* at 45 Commenting on *Harrison*: "It has to be wondered why the seriousness of the offence was recognised as a valid consideration if it will in fact have no material bearing on the outcome;" Eberdt 2011 *Appeal* 65-85 at para 28; Russomano "For the defence"; Stuart 2010 *Southwestern Journal of International Law* 313 at 319; *R v Mayo* [2012] NPSC 53 at para 21.

³³⁵ *R v Grant* [2009] 2 SCR 353 at para 84 and 191.

³³⁶ *R v Grant* [2009] 2 SCR 353; Paciocco and Stuesser *The law of evidence* at 45.

³³⁷ *R v Grant* [2009] 2 SCR 353; Eberdt 2011 *Appeal* 65-85 at para 5; Paciocco and Stuesser *The law of evidence* at 45.

³³⁸ *R v Grant* [2009] 2 SCR 353 at para 84; *R v Harrison* [2009] 2 SCR 494.

³³⁹ *R v Harrison* [2009] 2 SCR 494.

³⁴⁰ *R v Harrison* [2009] 2 SCR 494 at para 83; Stuart 2010 *Southwestern Journal of International Law* 313; Quigley 2009 *CR* 88 at 93; Mitchell "Excluding evidence" at 26.

³⁴¹ *R v Harrison* [2009] 2 SCR 494 at para 40.

³⁴² Eberdt 2011 *Appeal* 65-85 at para 31.

justice system is a discretion not to be overly influenced by the seriousness of the offence.³⁴³

The minority judgment in *Grant*, delivered by Judge Binnie, disagreed that the factor is neutral in the analysis relating to the maintenance of the reputation of the administration of justice.³⁴⁴ Judge Binnie disagreed with the majority that this line of the inquiry should strike a balance between the public concern for sustaining prosecutions and the principle that all stand equal before the law. He restated his opinion in *Harrison* that the interest of an accused person in the exclusion of evidence is irrelevant to the analysis of the branch of the public interest in adjudication on the merits.³⁴⁵ He reasoned that the rights of the accused have already been considered under the first and second branches of the framework and to import this concern into the third branch of the framework would be illogical as it concerned society's interest in the adjudication on the merits.³⁴⁶ He emphasised that society will have a greater interest in adjudication on the merits when it involves a serious crime.³⁴⁷ Assessing the seriousness of the offence is as important as determining whether evidence is reliable or essential.³⁴⁸ The judge concluded that the majority approach is inconsistent with the purpose of section 24(2) of the Charter which is to maintain public confidence in the administration of justice.

I am of the view that seriousness of the offense should be considered a factor in this line of the inquiry. The degree of reliance must however not be weighty or determinative of the outcome of this line of the inquiry. This approach would be in line with the prescribed wording in section 24(2) that all circumstances be considered when the court exercises its judicial discretion. The approach will be consistent with the flexibility principle that is the essence of the *Grant* section 24(2) analytical framework.

³⁴³ Quigley 2009 CR 88 at 92-93; see also *R v Grant* [2009] 2 SCR 353 at para 84.

³⁴⁴ *R v Grant* [2009] 2 SCR 353 at para 216; Stuart 2010 *Southwestern Journal of International Law* 313 at 319.

³⁴⁵ *R v Harrison* [2009] 2 SCR 494 at para 70.

³⁴⁶ *R v Grant* [2009] 2 SCR 353 at para 222; *R v Harrison* [2009] 2 SCR 494 at para 44.

³⁴⁷ *R v Grant* [2009] 2 SCR 353 at para 217-222; *R v Campbell* 2009 CarswellOnt 5949 [2009] OJ No 4132 70 CR (6th) 66 at para 69-70 (Ont SC J).

³⁴⁸ *R v Grant* [2009] 2 SCR 353 at para 222.

7. SUMMARY

In Canada the admissibility of evidence is usually challenged by means of a pre-trial motion. The wording of section 24(2) clearly suggests that the burden of persuasion is upon the applicant seeking exclusion. The standard for establishing disrepute is the civil standard of the balance of probabilities.

A person is entitled to police information duties when he is detained. The Supreme Court stated that detention in the context of the Charter refers to the suspension of a person's liberty interest by a significant physical and psychological restraint.³⁴⁹ The test is whether a reasonable person would have believed that he had no alternative but to co-operate.

Neither a causal nor a temporal connection between the Charter violation and the evidence is, on its own necessarily sufficient to engage the provisions of section 24(2) if the evidence and the breach is too remote.³⁵⁰ The whole of the relationship, on a case-by-case basis, must be considered in the context of the factual determination of the connection between the evidence obtained and the breach.³⁵¹ An applicant under section 24(2) must establish that one or more of his fundamental rights, and not merely the rights of a third party, have been infringed or denied.³⁵²

In *Grant* and *Harrison* the Supreme Court of Canada reconsidered the *Collins/ Stillman* analysis for judging disrepute for the purposes of section 24(2) exclusion. The Supreme Court discarded the *Stillman* approach to admissibility, as well the fair trial theory. The Court adopted a new three-step test. The admissibility of all types of evidence under section 24(2) must be determined by considering the three lines of inquiry identified in *Grant*. The test involves an inquiry into the effect admission may have on the repute of the justice system, having regard to the seriousness of the police conduct, the impact of the Charter breach on the protected interests of the accused. The three step analysis, treats statements and bodily samples differently for the purposes of admission, reduces the importance of discoverability, renders the seriousness of the offence almost immaterial under section 24(2) and discontinuous asking the pro-admissibility question of whether exclusion will bring

³⁴⁹ *R v Grant* [2009] 2 SCR 353 at para 44.

³⁵⁰ Bryant, Lederman and Fuerst *The law of evidence* at 560.

³⁵¹ Bryant, Lederman and Fuerst *The law of evidence* at 560.

³⁵² *R v Collins* [1987] 1 SCR 265 at 276-277.

the administration of justice into disrepute and replaces it with a consideration of the impact of exclusion on the public interest in the truth-seeking function of trial.³⁵³

In Chapter 5, I discuss the exclusionary rule jurisprudence in the United States of America and in the process assess how the courts deal with the admissibility of unconstitutionally obtained real evidence.

³⁵³ Paciocco and Stuesser *The law of evidence* at 1 and 45.

CHAPTER 5

THE EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES OF AMERICA CONSTITUTION

1. INTRODUCTION

The focus in this Chapter is on the application of the exclusionary rule in the United States of America. The reason for including the United States of America in this study is that it has a richer body of exclusionary rule jurisprudence than South Africa. As such it is a valuable resource to determine the reasoning behind the principles of the exclusionary rule.¹ The rationale of the exclusionary rule has been dealt with in some detail by South African legal commentators.² I will not repeat these sources, but will take their writings further and update their contribution with the latest cases and discussions. In this regard I specifically explore the narrow issue of the admissibility of unconstitutionally obtained real evidence.

The United States Supreme Court developed a number of exclusionary regimes to each of the Fourth,³ Fifth,⁴ Sixth⁵ and Fourteenth Amendments to the US Constitution.⁶ The discussion in this Chapter focuses on the Fourth Amendment exclusionary rule. It is a useful place to examine the United States law because it is the first exclusionary rule to be developed in the USA and its jurisprudence has substantially shaped the development of the other exclusionary regimes.⁷

¹ S39(1)(b) Act 108 of 1996, substituted by s 1(1) of the Citation of Constitutional Laws Act No. 5 of 2005: "[W]hen interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law."; see in general Chapter 2: The origin of the exclusionary rule can be traced to early Fourth Amendment jurisprudence; Schwikkard and Van der Merwe *Principles of evidence* at 194: The authors argue that the exceptions created by the Supreme Court in the USA can assist the South African courts to determine whether admission of the evidence would otherwise be detrimental to the administration of justice.

² Schwikkard and Van der Merwe *Principles of evidence* at 193-200; see also Zeffertt and Paizes *Law of evidence* at 711-775; Basdeo *Search and seizure; Ally Constitutional exclusion*.

³ *Weeks v US* 232 US 383 (1914); *Mapp v Ohio* 367 US 643, 654-655 (1961).

⁴ *Bram v US* 168 US 532, 548 (1897); *Blackburn v Alabama* 361 US 199, 205 (1960).

⁵ *US v Wade* 388 US 218, 237-239 (1967); *Massiah v US* 377 US 201, 206-207 (1964).

⁶ *Miller v Fenton* 474 US 104 (1985); *Rochin v California* 342 US 165 (1952); see in general Mellifont *The derivative imperative* at 100.

⁷ Mellifont *The derivative imperative* at 100; Taslitz and Paris *Constitutional criminal procedure* at 523; see also Roberson *Criminal justice* at 119; *Weeks v US* 232 US 383 (1914); *Mapp v Ohio* 367 US 643, 654-655 (1961).

The Fourth Amendment to the USA Constitution reads:

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

The Fourth Amendment protects the right to be free from unreasonable searches and seizures but contains no provision expressly precluding the use of evidence obtained in violation of its directions.⁸ The courts until the early 20th century affirmed that there was no general power in the common law to exclude real (non-confessional) evidence obtained illegally or improperly.⁹ The courts generally authorised the use of real evidence even though it was obtained in violation of the search and seizure provisions.¹⁰ In 1914 the Supreme Court in *Weeks*¹¹ rejected the common law rule and adopted the exclusionary rule which prescribes that evidence obtained by unreasonable search and seizure would usually be excluded.¹² The exclusionary remedy, the Court reasoned, was necessary because other remedies, civil monetary relief or criminal prosecution of offending officers had not been

⁸ *Davis v US* 180 L Ed 2d 285, 290 (2011); see also *Herring v US* 555 US 135 (2009); *Arizona v Evans* 514 US 1, 10 (1995); *US v Leon* 468 US 897, 906 (1984); Taslitz and Paris *Constitutional criminal procedure* at 550.

⁹ Mellifont *The derivative imperative* at 101.

¹⁰ *Adams v New York* 192 US 585 (1904): The courts will not inquire into the means by which evidence otherwise admissible was acquired; *Weeks v US* 232 US 383, 396 (1914): “[T]he underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence.”; *US v La Jenue Eugenie* 26 F Cas 832, 843-844 (CCD Mass 1822) quoted in Mellifont *The derivative imperative* at 101 fn 15; Klotter and Kanovitz *Constitutional law* at 170.

¹¹ *Weeks v US* 232 US 383 (1914).

¹² *Weeks v US* 232 US 383, 398 (1914); see also *Mapp v Ohio* 367 US 643 (1961): The court held that the exclusionary rule applied to every court and law enforcement officer in the nation; *Alderman v US* 394 US 165, 171 (1969): “[T]he exclusionary rule fashioned in *Weeks* and *Mapp* excludes from the criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights.”; *US v Calandra* 414 US 338, 348 (1974): “[T]he majority characterised the rule as a judicially created remedy, when applicable, forbids the use of improperly obtained evidence at trial.”; *Davis v US* 180 L Ed 2d 285, 290 (2011): “[T]o supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of Fourth Amendment violation.”; Klotter and Kanovitz *Constitutional law* at 168 and 170: “[T]his rule is not a provision of the Fourth Amendment itself, but is a rule that has been framed by the courts.”

effective.¹³ In *Silverthorne Lumber Co.*¹⁴ the court extended the exclusionary rule to derivative evidence.¹⁵

The exclusionary rule serves two dominant functions. In essence the courts created the exclusionary rule to safeguard Fourth Amendment rights through the exclusionary rule's goals of deterrence and maintaining judicial integrity.¹⁶ The exclusionary rule serves to deter lawless conduct by law enforcement officers as well as maintain the judicial integrity of the justice system by closing the doors of the court to any use of evidence unconstitutionally obtained.¹⁷ The exclusionary rule is not a personal constitutional right because the application of the rule is restricted to those areas where its remedial objective is more effective.¹⁸ The exclusionary rule applies both to the investigatory and accusatory stages of a criminal prosecution.

In the early years since the adoption of the exclusionary rule a substantial body of case law developed which established a broad rule requiring exclusion of all evidence obtained by or derived from a breach of the Fourth Amendment.¹⁹ The employment of an inflexible exclusionary rule became unpopular because of the automatic rule of exclusion irrespective

¹³ *Weeks v US* 232 US 383 (1914); *Mapp v Ohio* 367 US 643 (1961); see also Bloom 1992 *American J Crim L* 71 at 79; LaFave and Israel *Criminal procedure* at 107.

¹⁴ *Silverthorne Lumber Co. v US* 251 US 385 (1920).

¹⁵ *Silverthorne Lumber Co. v US* 251 US 385 (1920); see also *Nardone v US* 308 US 338 (1939); *Wong Sun v US* 371 US 471 (1963): The court extended the exclusionary rule to evidence that was the indirect product or "fruit" of unlawful police conduct; *Alderman v US* 394 US 165, 171 (1969); Bloom 1992 *American J Crim L* 71 at 80.

¹⁶ See in general *Davis v US* 131 S Ct 2419 (2011); *US v Calandra* 414 US 338, 348 (1974).

¹⁷ *Elkins v US* 364 US 206 (1960): "[I]ts purpose is to deter-to compel respect for the constitutional guarantee in the only effectively available way-by removing the incentive to disregard it." and at 222: "[T]he rule also serves another vital function- the imperative of judicial integrity."; *Linkletter v Walker* 381 US 618 (1965): The rule is characterized as an effective deterrent to illegal police action; *Terry v Ohio* 392 US 1 (1968): The court stressed that the rule's major thrust is a deterrent one; see also *Arizona v Evans* 514 US 1, 10 (1995); see also *Davis v US* 131 S Ct 2419 (2011); LaFave and Israel *Criminal procedure* at 107: "[T]he purposes of the exclusionary rule are of more than academic concern, for the Court's perception of them will determine the scope and ultimately the fate of the exclusionary rule."; Shively 2008-2009 *Vaparaisol Univ LR* 407 at 441; Taslitz and Paris *Constitutional criminal procedure* at 97: "[M]odern courts view the Fourth Amendment as serving one primary function: limiting the discretion of police and government agents to violate liberty, privacy, and possessory rights."

¹⁸ *Davis v US* 180 L Ed 2d 285, 293 (2011): It is not a constitutional right nor is it designed to redress the injury occasioned by an unconstitutional search; see also Moran 2011 *Ohio State J Crim L* 363 at 369; Cammack 2010 *American J Comp L* 631; De Golian 2012 *Mercer LR* 751 at 752; Gross 2011 *Santa Clara LR* 545 at 548; Taslitz and Paris *Constitutional criminal procedure* at 551.

¹⁹ Bloom 1992 *American J Crim L* 71 at 79.

of how technical, minor or unintended the breach was.²⁰ The courts appreciated the potential risk to the administration of justice and adopted the cost-benefit analysis to determine the applicability of the exclusionary rule to the facts of the case. The cost-benefit analysis involves weighing of the deterrent benefit of exclusion against the costs in terms of lost evidence.²¹ The exclusionary rule does not apply when its social costs, including the loss of probative and reliable evidence, outweigh the deterrent benefits. Based on this the Supreme Court in several cases modified the exclusionary rule if its application would serve no deterrent function and its unbending application would impede unacceptably the truth-finding functions of the court.²²

The application of the cost benefit analysis caused the Court to create exceptions to the exclusionary rule.²³ The peremptory exclusionary rule is currently subject to a number of court created exceptions which are relevant when considering the admissibility of illegally obtained real evidence. The exceptions to the exclusionary rule are based on the "standing" doctrine,²⁴ the "objective justification" doctrine,²⁵ the "attenuated taint" doctrine,²⁶ the "inevitable discovery" doctrine,²⁷ the "independent source" doctrine,²⁸ and the "good faith" doctrine.²⁹ To determine the admissibility of real evidence obtained through compulsion a

²⁰ Taslitz and Paris *Constitutional criminal procedure* at 551: The indiscriminate application of an inflexible exclusionary rule generated disrespect for the law and administration of justice; *US v Payner* 447 US 727 (1980); *Wong Sun v United States* 371 US 471 (1963); *Silverthorne Lumber Co v US* 251 US 385 (1920); *Nardone v US* 308 US 338 (1939); Cammack 2010 *American J Comp L* 631 at 641.

²¹ *US v Leon* 468 US 897 (1984); see also De Golian 2012 *Mercer LR* 751; Gross 2011 *Santa Clara LR* 545 at 546: "[I]n these decisions the court claims that it has always been reluctant to employ the exclusionary rule due to the costs it imposes on society, namely the obfuscation of truth, the thwarting of law enforcement objectives and the freeing of dangerous criminals."

²² *Boyd v US* 116 US 616 (1886); *Weeks v US* 232 US 383 (1914); *Silverthorne Lumber Co. v US* 251 US 385 (1920); *Gouled v US* 255 US 298 (1921); *Agnello v US* 269 US 20 (1925); *Olmstead v US* 277 US 438 (1928); *Lustig v US* 338 US 74 (1948); *Wolf v Colorado* 338 US 25 (1949); *Elkins v US* 364 US 206 (1960); *Mapp v Ohio* 367 US 643 (1961); *Wong Sun v US* 371 US 471 (1963); *Davis v Mississippi* 394 US 721 (1969); *US v Calandra* 414 US 338 (1974); *Stone v Powell* 428 US 465 (1976); *US v Leon* 468 US 897 (1984); *Immigration and Naturalisation Service v Lopez-Mendoza* 468 US 1032 (1984); Taslitz and Paris *Constitutional criminal procedure* at 523.

²³ *Illinois v Gates* 462 US 213 (1983); *US v Leon* 468 US 897, 911 (1984): "[I]s a product of considerations relating to the exclusionary rule and the constitutional principles it is designed to protect."; Shively 2008-2009 *Vaparaisol Univ LR* 407 at 410-411; Mellifont *The derivative imperative* at 138; see also Grey 2008 *University of San Francisco LR* 621 at 635.

²⁴ *Rakas v Illinois* 439 US 128 (1978).

²⁵ *Devenpack v Alford* 543 US 146 (2004).

²⁶ *Wong Sun v US* 371 US 471 (1963).

²⁷ *Nix v Williams* 467 US 431 (1984).

²⁸ *Murray v US* 487 US 533 (1988).

²⁹ *US v Leon* 468 US 897 (1984).

court must in addition to the exclusionary rule exceptions consider whether the state complied with the constitutional standards set out in the Fourth Amendment. In this regard I discuss the meaning of the phrase “unreasonable search and seizure.” Important procedural matters considered in this chapter are the location and nature of the onus and the motion to suppress procedure. In what follows these principles are dealt with by only referring to the most influential cases on the relevant aspect and not all of them.

2. PROCEDURAL MATTERS

2.1 Motion to suppress

A motion to suppress evidence obtained by illegal search and seizure must be issued and filed in advance of trial.³⁰ The application may be in the form of a Notice of Motion and supporting affidavit wherein the affiant sets out the evidence (operative facts) forming the basis for the relief. The applicant would ask the court to review the method by which the evidence was obtained and to determine whether the admission of the evidence is constitutional. The prosecution may oppose an application by refuting the allegations on an affidavit. In the absence of an affidavit the applicant may elect to testify or call witnesses to prove the operative facts. Evidence delivered in support of the motion may not be used against the accused at his trial on the question of guilt or innocence.³¹ If the applicant successfully brought the validity of the search and seizure into issue the onus is on the prosecution to prove its constitutional validity.³² The evidence will be excluded at a defendant’s later trial if the motion to suppress is upheld. Ordinarily the question of admissibility is unlikely to be reconsidered at trial.³³ The finding to suppress may only be reconsidered by the trial court if new or additional evidence were produced on the issue or substantially affecting the credibility of the evidence adduced at the pre-trial hearing of motion.³⁴

³⁰ Taslitz and Paris *Constitutional criminal procedure* at 210; LaFave and Israel *Criminal procedure* at 500.

³¹ *Simmons v US* 390 US 377 (1968).

³² LaFave and Israel *Criminal procedure* at 503.

³³ LaFave and Israel *Criminal procedure* at 515.

³⁴ LaFave and Israel *Criminal procedure* at 515: “[I]t would seem that a defendant is entitled to a redetermination of his claim at trial only if new evidence comes to light which was unavailable at the time of the original hearing on the motion through no fault of the movant.”; see also *Brinegar v US* 338 US 160, 162-163 (1949): “[A]t the trial the court overruled petitioner’s renewal of objection.”

2.2 Onus

The courts generally agree that the burden of proof is on the accused on issues involving whether the defendant has standing, whether the government engaged in a search or seizure, whether there was government action and whether the evidence sought to be suppressed is the fruit of the poisonous tree.³⁵ The burden of proof resorts with the prosecution to prove exceptions to the fruit of the poisonous tree doctrine. The onus will be with the prosecution to prove that there was an independent source for evidence or that it inevitably would have been discovered even without the illegal search.³⁶ The burden of proof is ordinarily satisfied by preponderance of the evidence.³⁷

3. EXCEPTIONS TO THE EXCLUSIONARY RULE

3.1 Standing doctrine

In the USA an accused must have standing before he can object to the admission of unconstitutionally obtained evidence.³⁸ A person must be able to demonstrate that he had a "reasonable expectation of privacy" in the place that was searched or the thing that was seized. In this part of the thesis I also explore the question whether a person has standing if rights of a third party have been infringed when obtaining evidence.³⁹ A further aspect considered is whether a detainee may rely on the guarantees in the Fourth Amendment. In other words whether conduct that neither rises to the level of a search and seizure within the meaning of the Constitution falls outside the purview of the Fourth Amendment.

³⁵ *Alderman v US* 394 US 165, 183 (1969).

³⁶ *Alderman v US* 394 US 165, 183 (1969): "[T]he United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted."; see also *Brown v Illinois* 422 US 590 (1975); Taslitz and Paris *Constitutional criminal procedure* at 211.

³⁷ *Nardone v US* 308 US 338 (1939); Taslitz and Paris *Constitutional criminal procedure* at 211.

³⁸ Zeffertt and Paizes *Law of evidence* at 738-739; Schwikkard and Van der Merwe *Principles of evidence* at 193-200; *Rakas v Illinois* 439 US 128 (1978): One must therefore show that the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

³⁹ *Alderman v US* 394 US 165, 172 (1969); *Rakas v Illinois* 439 US 128 (1978); *Wong Sun v US* 371 US 471 (1963); *Rawlings v Kentucky* 448 US 98 (1980); *US v Payner* 447 US 727 (1980); see also Roberson *Criminal justice* at 53: "[B]ecause the phrase 'of the people' is immediately qualified by the use of the more individualistic language of 'persons' twice in the amendment and nowhere else in the Constitution, the courts have accepted the phrase to protect the individual private rights of persons and have not considered the phrase to refer to the people solely in the collective sense."

3.1.1 Reasonable expectation of privacy

An application to suppress the evidence obtained through an illegal search and seizure may only be moved by an individual whose privacy has been invaded.⁴⁰

(a) Scope of the right to privacy

The privacy concept under the Fourth Amendment was until the latter half of the 20th century tied to common-law trespass and property law concepts.⁴¹ In the common law authority, *Carrington*,⁴² the court articulated the significance of property rights in search and seizure analysis:

“Our law hold the property of every man so sacred that no man can set his foot upon his neighbours close without his leave; if he does he is a trespasser, though he does no damage at all if he will tread upon his neighbour’s ground, he must justify it by law.”

In line with the common law position the Supreme Court in *Olmstead*⁴³ held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search. The Court reasoned that the absence of a physical trespass or seizure of a physical object foreclose a Fourth Amendment inquiry.⁴⁴ This approach was known as the property approach.⁴⁵

In *Katz*⁴⁶ the court deviated from the *Olmstead* exclusively property approach.⁴⁷ *In casu* the state unlawfully attached an electronic device to the outside of a telephone booth to

⁴⁰ *US v Leon* 468 US 897, 910 (1984): “[S]tanding to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct.”; *Harris v US* 331 US 145 (1947); *Davis v US* 328 US 582 (1946); see also LaFave and Israel *Criminal procedure* at 460: “[T]he standing rule the court explained on another occasion, is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government’s unlawful conduct would result in imposition of a criminal sanction on the victim of the search.”

⁴¹ LaFave and Israel *Criminal procedure* at 124: “[F]or some years the Supreme Court was of the view that for there to be a Fourth Amendment search there must have been a physical intrusion into a constitutionally protected area.”

⁴² *Entick v Carrington* 95 Eng Rep 807 (CP 1765).

⁴³ *Olmstead v US* 277 US 438 (1928).

⁴⁴ *Olmstead v US* 277 US 438, 457, 464 (1928); see also *Goldman v US* 316 US 129 (1942): The court held that electronic surveillance accomplished without the physical penetration of petitioners premises by tangible object did not violate the Fourth Amendment; Taslitz and Paris *Constitutional criminal procedure* at 102.

⁴⁵ Roberson *Criminal justice* at 66.

⁴⁶ *Katz v US* 389 US 347 351 (1967).

monitor the defendant's conversations. The Court observed that the existing authority to determine whether police violated the Fourth Amendment was the so-called trespass doctrine. Under this inquiry Fourth Amendment rights apply only if there has been a physical intrusion into a house or office. The Court observed that the advent of modern technology allowed law enforcement agents to electronically intercept conversations without physical intrusion into any house or office. It was clear that the Fourth Amendment cannot turn on the presence or absence of a physical intrusion into any given enclosure.⁴⁸ The Court concluded that the Fourth Amendment protects people and not places.⁴⁹ The threshold question, the Court reasoned, is whether the means by which the challenged evidence was acquired infringed the defendant's reasonable expectation of privacy.⁵⁰ Applying this framework to the facts the court ruled that the defendant's Fourth Amendment right was infringed through the attachment of an eavesdropping device to a public telephone booth.⁵¹

(b) The impact of *Katz* opinion on so-called trespass test

The courts appear to suggest that *Katz* abandoned the trespass doctrine and substituted it with the reasonable expectation of privacy inquiry.⁵² In other words it is no longer sufficient to allege possession or ownership of seized goods to establish the interest.⁵³ The Supreme

⁴⁷ *Katz v US* 389 US 347 351, 353 (1967).

⁴⁸ *Katz v US* 389 US 347 351, 353 (1967): "[B]ut the premise that property interests control the right of the Government to search and seize has been discredited in *Warden v Hayden* 387 US 294 [1967]."; see also *Jones v US* 362 US 257 (1960): The court rejected the use of property concepts to determine whether the movant had the necessary interest or standing to obtain exclusion of the unlawfully seized evidence; Taslitz and Paris *Constitutional criminal procedure* at 100.

⁴⁹ *Katz v US* 389 US 347 351, 353 (1967).

⁵⁰ *Katz v US* 389 US 347, 353, 360 (1967): The term reasonable expectation was coined by Justice Harlan in *Katz v US* 389 US 347 351 (1967) in his concurring judgment. The majority used the words "privacy upon which he justifiably relied." see also *Bond v US* 529 US 334 (2000); *California v Ciraolo* 476 US 207 (1986); *Smith v Maryland* 442 US 735 (1979).

⁵¹ *Katz v US* 389 US 347 351, 353 (1967): "[T]he fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."; see also *US v Jacobsen* 466 US 109,121-122 (1984): "[F]or it is well settled that it is constitutionally reasonable for law enforcement officials to seize effects that cannot support a justifiable expectation privacy without a warrant, based on probable cause to believe they contain contraband."; LexisNexis *Criminal procedure* at 3.

⁵² Note dissenting opinion by Alito J in *US v Jones* 181 LEd 2d 911, 919 (2012); see also *Rakas v Illinois* 439 US 128, 143 (1978); LexisNexis *Criminal procedure* at 3.

⁵³ *Rakas v Illinois* 439 US 128 (1978): Passengers in automobile had no privacy interest in interior of the car and could not object to illegal search; see also, *US v Padilla* 508 US 77 (1993); *Rawlings v Kentucky* 448 US 98 (1980): Fearing imminent police search, defendant deposited drugs in companion's purse where they were discovered in course of illegal search; defendant had no legitimate expectation of privacy in her purse, so that his Fourth Amendment rights were not violated, although hers were.

Court in *Jones*⁵⁴ revisited the approach attributed to *Katz*. *In casu* the Court held that an attachment of a Global Positioning-system (GPS) tracking device to an individual's vehicle and subsequent use of that device to monitor the vehicle's movements on public streets constitute a search within the meaning of the Fourth Amendment.⁵⁵ The prosecution argued that no search occurred since the accused had no reasonable expectation of privacy in the area of the Jeep accessed by the police agents and in the locations of the Jeep on the public roads which were visible to all.⁵⁶ The Court opined that the accused Fourth Amendment rights do not rise or fall with the *Katz* formulation. Courts must assure preservation of that degree of privacy against the state that existed when the Fourth Amendment was adopted. The Court accepted that since its adoption the Fourth Amendment was understood to embody a particular concern for government trespass upon persons, houses papers and effects. In support of this the Court observed that the text of the Fourth Amendment reflects its close connection to property. If this was not the case it would have referred simply to the right of the people to be secure against unreasonable searches and seizures making the phrase "in their persons houses papers and effects" superfluous.⁵⁷ Consistent with this understanding Fourth Amendment jurisprudence was tied to common-law trespass at least until the latter half of the 20th century. The Court concluded that *Katz* did not repudiate that understanding. The Court held that the *Katz* reasonable expectation of privacy test has been added to and did not substitute the common law trespass test and therefore, rejected the interpretation that *Katz* should be the exclusive test.⁵⁸ The Court conceded that the *Katz* test may be applied in situations where there is no physical trespass involving merely the transmission of electronic signals without physical trespass.⁵⁹

(c) Test for reasonable expectation of privacy

In *Katz* Judge Harlan in his concurring judgment articulated a two-fold test to determine if an individual has a reasonable expectation of privacy at the searched location.⁶⁰ Firstly, an individual has to exhibit an actual (subjective) expectation of privacy and, secondly, the

⁵⁴ *US v Jones* 181 LEd 2d 911, 919 (2012).

⁵⁵ *US v Jones* 181 LEd 2d 911, 918 (2012).

⁵⁶ *US v Jones* 181 LEd 2d 911, 919 (2012).

⁵⁷ *US v Jones* 181 LEd 2d 911, 918 (2012).

⁵⁸ *US v Jones* 181 LEd 2d 911, 920 (2012).

⁵⁹ *US v Jones* 181 LEd 2d 911 (2012).

⁶⁰ *Katz v US* 389 US 347 351, 361 (1967).

expectation must be one that society is prepared to recognise as reasonable.⁶¹ LaFave and Israel conclude that the ultimate question under *Katz* is a value judgment. The courts must assess whether the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints which involves the guarantee of privacy and freedom consistent with the aims of a free and open society.⁶²

(i) Subjective expectation of privacy

Under the first leg of the test, the person must demonstrate that he really did expect the area or item to be private, not that he might or often expects privacy. In *Rakas*⁶³ the passenger in a car failed to prove that he had any legitimate expectation of privacy in the area searched, namely in the locked glove compartment and the area under the front passenger seat.⁶⁴ The Court held that he could not successfully claim the protections of the Fourth Amendment.⁶⁵ In other decisions the court considered the following factors to determine subjective expectation of privacy: the location where the search occurs,⁶⁶ whether the individual assumed the risk that certain information will not be kept private,⁶⁷ property interests,⁶⁸ social custom,⁶⁹ and situations where it is generally accepted that individuals have a reduced expectation of privacy.⁷⁰

(ii) Society recognise as reasonable

Secondly, the accused must establish that the expectation to privacy is objectively one that society is willing to recognise as reasonable. The question is whether the individual's privacy

⁶¹ *Katz v US* 389 US 347 351, 361 (1967); Taslitz and Paris *Constitutional criminal procedure* at 104.

⁶² LaFave and Israel *Criminal procedure* at 126.

⁶³ *Rakas v Illinois* 439 US 128 (1978).

⁶⁴ *Rakas v Illinois* 439 US 128, 148 (1978).

⁶⁵ *Rakas v Illinois* 439 US 128 (1978).

⁶⁶ *Hester v US* 265 US 57 (1924): The court held that the special protection accorded by the Fourth Amendment to people in their person's houses, papers and effects' are not extended to open fields.

⁶⁷ *Hoffa v US* 385 US 293 (1966) (admissions made to an informant); *California v Greenwood* 486 US 35 (1988) (home garbage once put outside the house); *USCA Const amend 4 MGLA Const amend Art 14 Com v Cabral* 69 Mass App Ct 68 866 N.E. 2d 429 (2007) (no reasonable expectation of privacy in spittle lifted from a sidewalk or DNA evidence derived there from).

⁶⁸ *Rakas v Illinois* 439 US 128, 143 (1978).

⁶⁹ *Minnesota v Olson* 495 US 91 (1990): The court held that Olson had a privacy interest in the premises because of his status as an overnight guest. By longstanding social custom, the court said, we seek temporary shelter when we are in between jobs or homes or when we house-sit for a friend as well as when we travel to a strange city to visit relatives out of town.

⁷⁰ *New Jersey v TLO* 469 US 325 (1985): The court held that school students have reduced privacy rights expectations.

is objectively reasonable. The accused might claim that he expected something to be private but society as a whole would disagree.

The Supreme Court in *Ciraolo*⁷¹ held that police conduct was a reasonable invasion of the accused right to privacy. The police received a tip that marijuana was growing in the defendant's backyard. The police were unable to view the backyard because of two high fences, one ten feet high, enclosing the property. The police secured a plane and flew over the defendant's house at an altitude of 1000 feet, within public navigable airspace and were able to identify marijuana plants with unassisted vision.⁷² The police subsequently obtained a search warrant and seized the marijuana. The Supreme Court affirmed the conviction holding that although the defendant manifested a subjective expectation of privacy, that expectation was unreasonable since any member of the public flying in that airspace could have seen everything that the officers observed.⁷³ The Court reasoned that in this day and age where flights in the public airways are regular, it is unreasonable for the respondent to expect that the plants were constitutionally protected from being observed.⁷⁴

A person is entitled to the Fourth amendment protection of an area he seeks to preserve as private even if accessible to the public.⁷⁵ As a result the courts held that citizens maintain a reasonable expectation of privacy in the "curtilage" immediately surrounding their home, but not in the "open fields" and "wooded areas" extending beyond this area,⁷⁶ in the automobile that he or she is driving, but not in items that are in "plain view" from outside

⁷¹ *California v Ciraolo* 476 US 207 (1986).

⁷² *California v Ciraolo* 476 US 207, 209 (1986).

⁷³ *California v Ciraolo* 476 US 207, 213-214 (1986).

⁷⁴ *California v Ciraolo* 476 US 207, 215 (1986); see also *Minnesota v Olson* 495 US 91, 96 (1990): "[W]e need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognise as reasonable."; *Minnesota v Carter* 525 US 83 (1998): The evidence revealed that out of town defendants came to another's apartment for the sole purpose of packaging the cocaine, had never been to the apartment before and were only in the apartment for approximately 2,5 hours. The court focused on three factors in finding that the defendants had no reasonable expectation of privacy in the apartment searched: (1) The purely economical nature of the transaction engaged in there, (2) the relatively short period of time in the apartment and (3) the lack of any previous connections between the two defendants and the occupant of the apartment."; see also *California v Greenwood* 486 US 35 (1988): The Court reasoned this was no search because the defendants had no subjective expectation of privacy in their garbage that society accepts as objectively reasonable.

⁷⁵ *Katz v US* 389 US 347 (1967).

⁷⁶ *Hester v US* 265 US 57 (1924).

the vehicle.⁷⁷ On the other hand people do not have reasonable expectations of privacy in personal characteristics.⁷⁸

3.1.2 Evidence obtained through infringement of third party rights

An application to suppress the evidence obtained through an illegal search and seizure may only be moved by an individual whose privacy has been invaded.⁷⁹ The courts have therefore consistently ruled that an applicant cannot rely on the exclusionary rule to suppress evidence illegally obtained through a violation of a third person's privacy.⁸⁰ In other words the Fourth Amendment rights are personal rights which may not be asserted vicariously. The facts in *Alderman*⁸¹ are illustrative of the point. *In casu* the defendant moved for the suppression of evidence allegedly unlawfully obtained by the police, through electronic surveillance of a co-accused's place of business. All the accused argued that the state conduct breached their Fourth Amendment rights and tainted their convictions.⁸² The accused demanded a re-trial if any of the evidence used to convict them was the product of unauthorised surveillance, regardless of whose Fourth Amendment rights the surveillance violated.⁸³ The Court noted that the accused appear to assert an independent constitutional right of their own, to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment.⁸⁴ This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it was rejected by the court as being inconsistent with prior cases. The Court stated that the established principle is that

⁷⁷ *Coolidge v New Hampshire* 403 US 443 (1971).

⁷⁸ *US v Dionisio* 410 US 1, 93 Sct. 764 35 LED 2d 67 (1973).

⁷⁹ *US v Leon* 468 US 897, 910 (1984): "[S]tanding to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct."; *Harris v US* 331 US 145 (1947); *Davis v US* 328 US 582 (1946); see also LaFare and Israel *Criminal procedure* at 460: "[T]he standing rule the court explained on another occasion, is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."

⁸⁰ *Weeks v US* 232 US 383 (1914); *Mapp v Ohio* 367 US 643 (1964); *Goldstein v US* 316 US 114 (1942); *Alderman v US* 394 US 165, 171 (1969); *Rakas v Illinois* 439 US 128 (1978); *US v Leon* 468 US 897 (1984); *US v Ceccolini* 435 US 268 (1978); *US v Calandra* 414 US 338 (1974).

⁸¹ *Alderman v US* 394 US 165 (1969).

⁸² *Alderman v US* 394 US 165, 168 (1969).

⁸³ *Alderman v US* 394 US 165, 171 (1969): "[A]t the very least, it is urged that if evidence is inadmissible against one defendant or conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his co-defendant or co-conspirator."

⁸⁴ *Alderman v US* 394 US 165, 171 (1969): "[I]n *Mapp* and *Weeks* the defendant against whom the evidence was held to be inadmissible was the victim of the search."

a party seeking suppression of the evidence can only obtain the benefit of the exclusionary rule if he was the victim of an unlawful search and seizure as opposed to one who claims prejudice only through use of evidence gathered as a consequence of a search or seizure directed at a third party.⁸⁵ The Fourth Amendment rights are personal rights and accords no special standing to co-conspirators or co-defendants and therefore may not be vicariously asserted.⁸⁶

The Court opined that the deterrent benefits stemming from third-party challenges are low because the actual victims of misconduct will normally have ample motivation to challenge the misconduct.⁸⁷

Cammack⁸⁸ opines that a rule that entitles- only those who have suffered an unlawful search or seizure to invoke the exclusionary rule is arguably in tension with the current rationale for the rule as designed to deter Fourth Amendment violations. The author further submits that the logic of deterrence would seem to dictate that applying the exclusionary rule more widely would have the effect of further reducing the frequency of the Fourth Amendment violations. The author concludes that in limiting the exclusionary rule to the victims of unlawful searches or seizures, opens the possibility that police will conduct searches which they know are unlawful, in anticipation that those against whom the unlawfully obtained evidence is to be used, will lack standing to seek exclusion.⁸⁹

Standing is also a requirement in Canada.⁹⁰ The situation is different in South Africa where the entitlement to the exclusionary remedy does not demand a link between the breach of

⁸⁵ *Alderman v US* 394 US 165, 171-172 (1969); see also *Rakas v Illinois* 439 US 128 (1978): A defendant has standing to object to the admission of unconstitutionally seized evidence only if such seizure violated that defendant's Fourth Amendment rights. In other words, a defendant may not assert another person's rights; *Jones v US* 362 US 257, 261 (1960); Cammack 2010 *American J Comp L* 631 at 642.

⁸⁶ *Alderman v US* 394 US 165, 172 (1969); *Rakas v Illinois* 439 US 128 (1978); *Wong Sun v US* 371 US 471 (1963); *Rawlings v Kentucky* 448 US 98 (1980): Standing to invoke the rule has thus been limited to cases in which the prosecution seeks to use the fruits of an illegal search or seizure against the victim of police misconduct; *US v Payner* 447 US 727 (1980): "[B]ecause the improperly seized evidence was offered against a bank customer rather than the bank officer whose rights were violated, the Supreme Court held that the district court lacked authority to exclude it."

⁸⁷ *Alderman v US* 394 US 165, 174-175 (1969); *Jones v US* 362 US 257 (1960): (Defendant had standing because he had the permission of the owner to be in the apartment); *US v Decoud* 456 F 3d 996 (Defendant did not have standing because he denied ownership of the property); Milligan 2007 *Cardozo LR* 2739 at 2782-2783.

⁸⁸ Cammack 2010 *American J Comp L* 631.

⁸⁹ Cammack 2010 *American J Comp L* 631 at 642.

⁹⁰ Zeffertt and Paizes *Law of evidence* at 711-775; Schwikkard and Van der Merwe *Principles of evidence* at 221.

an accused fundamental right and the securing of the evidence.⁹¹ There is no such restriction under section 35(5).⁹² The Supreme Court of Appeal explained in *Mthembu*⁹³ that the exclusionary remedy is applicable to unconstitutionally obtained evidence improperly obtained from any person, not only from the accused.⁹⁴

3.1.3 Seizure under Fourth Amendment

(a) Detention or arrest

The seizure of an individual is affected either by the application of physical force,⁹⁵ however slight,⁹⁶ or where that is absent, submission to an officer's show of authority to restrain the subject's liberty.⁹⁷ The question when and whether a seizure occurs with respect to application of physical force has not been as difficult to determine as when and whether a show of authority constitutes a seizure.

A show of authority does not constitute a seizure if the subject does not yield.⁹⁸ In *Hodari*⁹⁹ the police approached the accused and advised him that he is under arrest. The accused escaped before the police could arrest him. The police gave chase and subsequently arrested the defendant and recovered the drugs which he abandoned just before the police tackled him. The Court held that even if it accepted that the police's pursuit constituted a show of authority enjoining the defendant to submit, because he did not comply with that

⁹¹ *S v Mthembu* 2008 2 SACR 407 (SCA); Schwikkard and Van der Merwe *Principles of evidence* at 221.

⁹² Schwikkard and Van der Merwe *Principles of evidence* at 217.

⁹³ *S v Mthembu* 2008 2 SACR 407 (SCA).

⁹⁴ Schwikkard and Van der Merwe *Principles of evidence* at 218.

⁹⁵ *California v Hodari* 499 US 621, 624-625 (1991); *Terry v Ohio* 392 US 1, 19 n 1 (1968); see *Whitehead v Keyes*, 85 Mass 495, 501 (1862): "[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him."

⁹⁶ *California v Hodari* 499 US 621-622, 626 (1991): An arrest discontinue during the period of fugitivity.

⁹⁷ *US v Mendenhall* 446 US 544 (1980); *California v Hodari* 499 US 621 (1991): "[T]he word seizure in the Fourth Amendment the court declared means a laying on of the hands or application of physical force to restrain movement even when it is ultimately unsuccessful and also submission to the assertion of authority as to which the subject does not yield."

⁹⁸ *California v Hodari* 499 US 621, 626 (1991).

⁹⁹ *California v Hodari* 499 US 621 (1991).

command, he was not seized until he was tackled.¹⁰⁰ The drug abandoned while the accused was running was not the fruit of a seizure.¹⁰¹

In *Mendenhall*,¹⁰² the court formulated an objective test to determine whether a show of authority constitutes a seizure. A person is seized under the Fourth Amendment if considering all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.¹⁰³ In other words the court will look at all the circumstances of the encounter from the viewpoint of a hypothetical reasonable man in the position of the subject to determine whether the subject was detained or arrested.¹⁰⁴ Factors relevant to a determination of whether an individual has a reasonable belief that he is not free to leave includes the degree of police force or authority, the duration of time of the contact, the display of a weapon by an officer, the amount of restriction of movement of the suspect, seriousness of the suspected crime, danger to police and or citizens surrounding the police contact.¹⁰⁵

The situations that accused find themselves in at times have made it difficult for the courts to literally apply the so-called free to leave test. The free to leave test is employed to determine whether a defendant's movement had been restricted by the police conduct. The Supreme Court resolved the issue in *Bostick*.¹⁰⁶ *In casu* the police boarded a bus and without reasonable suspicion questioned the defendant, requested his consent to search his luggage for drugs and advised him of his right to refuse consent. The defendant consented and the officers arrested the accused after finding cocaine in his luggage. The defendant applied for the suppression of the drugs on the ground that it had been seized in violation of his Fourth Amendment rights.¹⁰⁷ The sole issue for determination by the Court was whether a police encounter on a bus necessarily constitutes a seizure within the meaning of the Fourth Amendment. The Supreme Court observed that the courts erred in focusing on the literal

¹⁰⁰ *California v Hodari* 499 US 621, 626, 629 (1991); see also Leen "Educational manual" at 38.

¹⁰¹ *California v Hodari* 499 US 621, 629 (1991).

¹⁰² *US v Mendenhall* 446 US 544, 554 (1980).

¹⁰³ *US v Mendenhall* 446 US 544, 554 (1980).

¹⁰⁴ Leen "Educational manual" at 36: "[M]endenhall establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."

¹⁰⁵ *US v Mendenhall* 446 US 544, 554 (1980); Taslitz and Paris *Constitutional criminal procedure* at 301; Leen "Educational manual" at 32.

¹⁰⁶ *Florida v Bostick* 501 US 429 (1991).

¹⁰⁷ *Florida v Bostick* 501 US 429, 432 (1991).

meaning of the words free to leave, rather than on the principle that the words were intended to capture.¹⁰⁸ The Court opined that the free to leave inquiry is not an accurate measure of an encounter's coercive effect when a person is seated on a bus about to depart or has no desire to leave or would not feel free to leave even if there were no police present.¹⁰⁹ The Court stated the free to leave analysis is inapplicable and the appropriate test is whether, taking into account all of the circumstances surrounding the encounter, a reasonable passenger would feel free to decline the officers' requests or otherwise terminate the encounter.¹¹⁰ The rule is applicable to encounters on the street, airport lobbies and equally applies to encounters on a bus.¹¹¹

(b) Stop and Frisk (Investigative detention)

In certain situations the police detain individuals for the sole purpose to investigate. The question arises whether an individual in these situations may rely on the guarantees in the Fourth Amendment. In other words, whether conduct that neither rises to the level of a search and seizure within the meaning of the Constitution falls outside the purview of the Fourth Amendment.¹¹²

In *Terry*¹¹³ the court considered whether a stop and frisk (detention for investigative purposes and so-called surface searches) by police officers constitute conduct outside of the purview of the Fourth Amendment. *In casu* a police officer observed the unusual conduct of defendant and two other men and concluding that these men contemplated a daylight robbery, proceeded to detain and search them. The defendant in a pre-trial motion moved for the suppression of the firearms discovered during the search to be introduced at his trial. The question the Court had to determine was when and whether the police seized the defendant and when and whether the police conducted a search. The Court rejected the

¹⁰⁸ *Florida v Bostick* 501 US 429, 435 (1991).

¹⁰⁹ *Florida v Bostick* 501 US 429, 435-436 (1991): The present case is analytically indistinguishable from *INS v Delgado* 466 US 210, 215 (1984). Like the workers in that case, Bostick's freedom of movement was restricted by a factor independent of police conduct - i.e., by his being a passenger on a bus.

¹¹⁰ *Florida v Bostick* 501 US 429, 436, 439 (1991); see also *INS v Delgado* 466 US 210, 215 (1984): "[N]o seizure occurred when INS agents visited factories at random, stationing some agents at exits while others questioned workers, because, even though workers were not free to leave without being questioned, the agents' conduct gave them no reason to believe that they would be detained if they answered truthfully or refused to answer."; Taslitz and Paris *Constitutional criminal procedure* at 302.

¹¹¹ *Florida v Bostick* 501 US 429, 439-440 (1991).

¹¹² See in general Schwikkard and Van der Merwe *Principles of evidence* at 197.

¹¹³ *Terry v Ohio* 392 US 1, 19 (1968).

argument that stop and frisk conduct is outside of the purview of the Fourth Amendment because neither action constitutes a search or seizure within the meaning of the Constitution.¹¹⁴ The Court stated that a distinction between stop and arrest and on the other hand frisk and search seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen.¹¹⁵ The Court concluded that the Fourth Amendment governs seizures of individuals which do not eventuate in arrest in traditional terminology.¹¹⁶ The Court held that whenever a police officer by means of physical force or show of authority on an individual restrains his freedom to walk away he has seized that person.¹¹⁷ The Fourth Amendment, the Court found, is applicable as a limitation upon police conduct if the police officer stopped short of something called a “technical arrest” or a “full blown search.”¹¹⁸

(c) Interference with possessory interest

A person has standing in the case of a seizure of a thing, if he demonstrates that he has a substantial possessory interest in that property.¹¹⁹ The courts employ the principles of property law to determine possessory interest.¹²⁰ An individual does not have standing to suppress evidence in circumstances where he has been a passenger in a vehicle and not the owner of the vehicle or the weapons seized;¹²¹ drugs in the purse of his girlfriend¹²² or where the accused is charged with the possession of stolen mail.¹²³

3.2 The Objective Justification Doctrine

The exclusionary rule will not apply in cases where an officer may have misidentified the proper justification for a search or seizure, but his conduct can actually be justified on some

¹¹⁴ *Terry v Ohio* 392 US 1, 16 (1968).

¹¹⁵ *Terry v Ohio* 392 US 1, 18 (1968).

¹¹⁶ *Terry v Ohio* 392 US 1, 17 (1968).

¹¹⁷ *Terry v Ohio* 392 US 1, 19 (1968).

¹¹⁸ *Terry v Ohio* 392 US 1, 19 (1968).

¹¹⁹ *Jones v US* 362 US 257 (1960): Property interest was held to sufficient predicate for standing under the Fourth Amendment.”; *US v Jacobsen* 466 US 109, 113 (1984); *Rakas v Illinois* 439 US 128 (1978): The courts have held that an accused don’t have standing who does not have property or possessory interest; Klotter and Kanovitz *Constitutional law* at 251.

¹²⁰ *US v Jacobsen* 466 US 109, 113 (1984); Taslitz and Paris *Constitutional criminal procedure* at 143.

¹²¹ *Rakas v Illinois* 439 US 128 (1978).

¹²² *Rawlings v Kentucky* 448 US 98 (1980).

¹²³ *US v Salvucci* 448 US 83 (1980).

objective basis. This is generally referred to as the objective justification doctrine. In *Devenpeck*¹²⁴ the court considered the question whether an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not closely related to the offense stated by the arresting officer at the time of arrest. The accused approached a disabled automobile and its passengers by activating his “wig-wag” headlights. Noticing the approaching law enforcement officer the accused hurried to his car and drove away. The police suspected the accused of impersonating a police officer and pursued his vehicle and pulled him over. In the vehicle the police noticed a pair of handcuffs and observed that he was listening in on a police frequency on a special radio. The police questioned the accused about the headlights and whether he was a police officer. In the course of the questioning the police noted that the defendant recorded their conversation. The police proceeded to arrest him for unlawfully recording their conversation. In the criminal trial the charges were dismissed against the accused. The accused instituted a claim for damages for unlawful arrest and imprisonment. Both claims were founded upon the allegation that the police arrested him without probable cause in violation of the Fourth and Fourteenth Amendment. The court *a quo* held that the probable-cause inquiry is confined to the known facts bearing upon the offence actually invoked at the time of arrest and that (in addition) the offence supported by these known facts must be closely related to the offense that the officer invoked. The Court found no basis in precedent or reason for the limitation.¹²⁵ The case law reveals that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.¹²⁶ The Court concluded that the important issue determined is whether the circumstances viewed objectively justify the action rather than standards that depend upon the subjective state of mind of the officer.¹²⁷ *In casu* the officer's conduct was objectively justifiable. The arrest was lawful and therefore there could be no exclusion of evidence.

¹²⁴ *Devenpeck v Alford* 543 US 146 (2004).

¹²⁵ *Devenpeck v Alford* 543 US 146, 153 (2004).

¹²⁶ *Devenpeck v Alford* 543 US 146, 153 (2004); see also *Whren v US* 517 US 806, 812—813 (1996) (reviewing cases); *Arkansas v Sullivan* 532 US 769 (2001).

¹²⁷ *Devenpeck v Alford* 543 US 146 (2004); see also *Whren v US* 517 US 806, 814 (1996); *Horton v California* 496 US 128, 138 (1990).

3.3 Attenuated taint doctrine

The attenuation doctrine recognises an exception to suppression if the connection between the constitutional breach and the discovery of the evidence becomes so attenuated (weak) that the deterrent effect of the exclusionary rule no longer justifies the social costs.¹²⁸ The notion of the “dissipation of the taint” attempts to mark the point at which the adverse effects of the unconstitutional conduct become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.¹²⁹ The Supreme Court in *Hudson*¹³⁰ identified two forms of attenuation. The first is based on the nature of the causal links between the constitutional violation and the discovery of the evidence and the second on the relationship between the purposes served by the rule that was violated and the exclusion of the evidence.¹³¹

3.3.1 Nature of the causal connection

(a) The so-called but for requirement

In *Wong Sun*¹³² the court stated that it need not hold that evidence is the fruit of the poisonous tree simply because it would not have been obtained but for the illegal actions of the police.¹³³ *In casu* the accused was unlawfully arrested and subsequently released. A few days later the accused voluntarily returned and made a confession to the police. The Court accepted that the accused would never have confessed but for the prior arrest. Notwithstanding, the Court held that the connection between his unlawful arrest and the statement had become so attenuated as to dissipate the taint. If the illegal action of the police has been established, the question is rather whether the evidence has been improperly obtained or whether the connection between the constitutional breach and the discovery of the evidence is so weak that its admissibility is not purged by the primary taint.¹³⁴

¹²⁸ *Nardone v US* 302 US 379 (1937); see also Schwikkard and Van der Merwe *Principles of evidence* at 195.

¹²⁹ Cammack 2010 *American J Comp L* 631 at 644; *Brown v Illinois* 422 US 590 (1975); Mellifont *The derivative imperative* at 137.

¹³⁰ *Hudson v Michigan* 547 US 586 (2006).

¹³¹ *Hudson v Michigan* 547 US 586, 593 (2006); Cammack 2010 *American J Comp L* 631 at 645.

¹³² *Wong v Sun v US* 371 US 471 (1963).

¹³³ *Wong v Sun v US* 371 US 471 (1963).

¹³⁴ *Wong v Sun v US* 371 US 471 (1963).

The “but for” as determinative factor of the issue has been rejected in several other decisions by the Supreme Court.¹³⁵ In *Segura*¹³⁶ the court stated that the “but for” test is not sufficient to resolve the question of admissibility when it is claimed that evidence obtained as a result of a previous constitutional breach is “tainted” or is “fruit” of a prior illegality. Grey agrees that a “but for” test would have very broad and far reaching effects in excluding evidence that could have no meaningful relationship to the initial illegality.¹³⁷

The court resolved the question of attenuation by considering the totality of the circumstances.¹³⁸ A determination of the question of attenuation may not be premised on the mere fact that a constitutional violation was a “but-for-cause” of obtaining evidence.¹³⁹ The courts enumerated three factors in determining whether there has been sufficient attenuation: the temporal proximity of the illegality and the illegal evidence, the presence of intervening circumstances and the purpose and flagrancy of the misconduct and the willingness of the witness to testify.¹⁴⁰

(b) Proximity of the illegality and the illegal evidence

The proximity between the actual illegality and the evidence obtained is a factor to consider when determining whether there has been sufficient attenuation. It is not a mathematically precise test involving a determination of how much time must pass in order to purge the taint.¹⁴¹ Generally a shorter lapse of time between the constitutional violation and the acquisition of the impugned evidence will more often result in a court concluding that the

¹³⁵ *US v Leon* 468 US 897 (1984); see also *Brown v Illinois* 422 US 590 (1975); *Wong v Sun v US* 371 US 471 (1963); *Roberson Criminal Justice* at 121: The Court rejected the mechanical application of the exclusionary rule to every item of evidence that has a causal connection with police misconduct.

¹³⁶ *Segura v US* 468 US 796 (1984).

¹³⁷ Grey 2008 *University of San Francisco* LR 621.

¹³⁸ *USCA Const Amend 4 State v Hummons* 253 P 3d 275 (Ariz 2011); see also *US v Ceccolini* 435 US 268, 274 (1978): “[T]he issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well.”

¹³⁹ Grey 2008 *University of San Francisco* LR 621.

¹⁴⁰ *Wong Sun v US* 371 US 471 (1963); *Brown v Illinois* 422 US 590 (1975); *US v Ceccolini* 435 US 268, 276 (1978); *Segura v US* 468 US 796 (1984); *USCA Const Amend 4 US v Gaines* 668 F 3d 170 (4th Cir 2012).

¹⁴¹ *US v Ceccolini* 435 US 268, 279-280 (1978).

evidence is tainted.¹⁴² For example, in *Wong Sun* the court suppressed a statement taken from the defendant in his bedroom immediately after his unlawful arrest.¹⁴³

(c) The presence of intervening circumstances

A court need not exclude evidence if an intervening event purges the taint of the initial illegality.¹⁴⁴ Illegally obtained evidence is deemed to have lost its taint if several intervening events are established between the constitutional breach and its acquisition. The court in *Wong Sun* refused to exclude a confession obtained from the accused. The Court held that the illegally obtained evidence lost its taint of the earlier Fourth Amendment violation through the intervening act when the accused voluntarily returned to the police station and provided a written statement.¹⁴⁵

(d) The purpose and flagrancy of the misconduct

The exclusionary rule need not apply if the purpose and flagrancy of the police misconduct was not intended to discover the impugned evidence. In *Ceccolini*¹⁴⁶ the court refused to suppress the testimony of a witness whose identity was learned as a result of constitutional violation. The Court found that the police's illegality was not designed or intended to discover the identity of the witness.¹⁴⁷ The essence of the analysis is whether the evidence was discovered as a result of the exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.¹⁴⁸

(e) Willingness of the witness to testify

This factor does not merely require that the statement meet the Fifth Amendment standard of voluntariness but the conduct should be sufficiently an act of free will to purge the

¹⁴² *Brown v Illinois* 422 US 590,604 (1975): "[B]rown's first statement was separated from his illegal arrest by less than two hours and there was no intervening event of significance whatsoever."

¹⁴³ *Wong Sun v US* 371 US 471 (1963); see also *US v Ceccolini* 435 US 268 (1978).

¹⁴⁴ *Wong v Sun v US* 371 US 471 (1963); see also *Clark v US* 755 A 2d 1026 (DC 2000).

¹⁴⁵ *Wong v Sun v US* 371 US 471 (1963); see also *US v Ceccolini* 435 US 268 (1978).

¹⁴⁶ *US v Ceccolini* 435 US 268 (1978).

¹⁴⁷ *US v Ceccolini* 435 US 268 (1978); see also *Brown v US* 411 US 223 (1973); *Dunaway v New York* 442 US 200, 218 (1979).

¹⁴⁸ *Wong v Sun v US* 371 US 471, 488 (1963); see also *Brown v Illinois* 422 US 590, 605 (1975).

primary taint.¹⁴⁹ The court in *Brown*¹⁵⁰ considered the meaning of the words free will. The issue determined by the court was whether the statements by the accused were to be excluded as the fruit of the illegal arrest, or should be included in the trial because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest. The Court observed that it is not merely required that the statement meet the standard of voluntariness but that the question whether a confession is the product of a free will must be answered on the facts of each case, no single fact is dispositive.¹⁵¹ Factors considered by the court included: the *Miranda* warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct and the voluntariness of the witness.¹⁵²

3.3.2 The relationship between the purposes of the rule that was violated and suppression

In *Hudson*¹⁵³ the court articulated a second form of attenuation based on the relationship between the purposes served by the rule that was violated and the exclusion of the evidence.¹⁵⁴ *In casu* the court observed that the interests served by the “knock-and-announce” rule include protection against violence that could occur if the occupant mistakenly believed that the officers were intruders, the protection against destruction of property caused by the unnecessary forced entry, and the protection of privacy and dignity interests that can be compromised by a sudden entrance. Since the exclusion of evidence obtained following a violation of the “knock-and-announce” rule furthered none of these interests the court found the discovery of the evidence to be attenuated.¹⁵⁵

¹⁴⁹ *Wong Sun v US* 371 US 471, 486 (1963).

¹⁵⁰ *Brown v Illinois* 422 US 590 (1975).

¹⁵¹ *Brown v Illinois* 422 US 590, 603 (1975).

¹⁵² *Brown v Illinois* 422 US 590, 603-604 (1975); see also *US v Ceccolini* 435 US 268, 279 (1978): (Testimony an act of free will because the witness was in no way coerced or even induced by official authority.); Taslitz and Paris *Constitutional criminal procedure* at 542-543.

¹⁵³ *Hudson v Michigan* 547 US 586 (2006).

¹⁵⁴ *Hudson v Michigan* 547 US 586, 593 (2006).

¹⁵⁵ *Hudson v Michigan* 547 US 586 (2006); Cammack 2010 *American J Comp L* 631 at 645.

3.4 The Inevitable Discovery doctrine

The Supreme Court in *Nix*¹⁵⁶ held that logic, experience and common sense necessitated the adoption of the inevitable discovery doctrine as an exception to the exclusionary rule.¹⁵⁷ In this seminal case the court not only adopted and employed the inevitable discovery doctrine but defined the rationale and formulated certain principles underlying it. In *casu* the defendant was arrested for the murder of a 10 year old girl. The police subsequent to the arrest gave defence counsel undertakings that the accused would not be questioned concerning the facts of the case. Whilst escorting the accused to the place where he was to be charged one of the officers began a conversation with him that ultimately resulted in the accused making incriminating statements and directing the officers to the child's body. The issue before the court was whether the illegally obtained evidence pertaining to the discovery and condition of a murder victim's body, could properly be admitted on the ground that the evidence would inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place.¹⁵⁸ Employing the inevitable discovery doctrine the Court held that although the evidence was illegally obtained it should be included in the trial.¹⁵⁹ The doctrine, the Court intimated, rests on the rationale that society's interest in the purpose of deterrence and the public interest in the inclusion of all probative evidence of a crime are properly balanced by putting the police in the same, not a worse position that they would have been in if no police error or misconduct had occurred.¹⁶⁰ The inevitable discovery doctrine requires that the prosecution shows by a preponderance of evidence that the police would have discovered the evidence by lawful

¹⁵⁶ *Nix v Williams* 467 US 431 (1984).

¹⁵⁷ *Nix v Williams* 467 US 431 (1984); Shively 2008-2009 *Vaparaisol Univ LR* 407 at 415; Bloom 1992 *American J Crim L* 71 at 82-83: "[T]he inevitable discovery exception had its genesis in *Somer v US* 138 F 2d 790 (2d Cir 1943)... However the Second Circuit remanded to the lower court to retry the issue of evidence admissibility stating that the inquiry may show that quite independently [from the information unlawfully obtained from the defendants wife] the officers would have waited for *Somer* and have arrested him exactly as they did. If... it appears that they did not need the information the seizure may have been lawful. The circuit court did not define this holding as an inevitable discovery nor did it address it in terms of the exception to the fruits doctrine."; Grey 2008 *University of San Francisco LR* 621 at 638; LaFave and Israel *Criminal procedure* at 475: "[T]his rule which is recognized by the vast majority of lower courts and has been accepted by the Supreme Court is in a sense a variation upon the 'independent source' theory."

¹⁵⁸ Shively 2008 *Vaparaisol Univ LR* 407 at 415.

¹⁵⁹ *Nix v Williams* 467 US 431, 448 (1984); Cammack 2010 *American J Comp L* 631 at 643-644; Bloom 1992 *American J Crim L* 71 at 82-83.

¹⁶⁰ *Nix v Williams* 467 US 431, 443 (1984); see also Grey 2008 *University of San Francisco LR* 621 at 638: Its goal is to put the police in the same not a worse position.

means. The police successfully demonstrated that they had planned to search the area where the body was found the next day. The Court concluded that despite the defendant's statement about the location the police would have found the evidence even without the illegal conduct.¹⁶¹ In summary, the inevitable discovery doctrine prescribes that although evidence is prematurely found through an unreasonable search or seizure, it need not be suppressed if it would have been found lawfully in due course.¹⁶² The state must establish by a preponderance of evidence that at the time of the misconduct or after the misconduct there was an independent line of police investigation underway which developed facts not as result of the misconduct and would have led to the discovery of the evidence.

The inevitable discovery doctrine could apply, if the prosecution establishes that there was a standard inventory procedure in effect that would have turned up the same evidence.¹⁶³ For example, the court refused to suppress the discovery of cocaine in a misrouted suitcase because the cocaine would have been found by the airline when it searched the suitcase for identity of the owner.¹⁶⁴ The inevitable discovery doctrine requires more than an argument about things that in retrospect the police could have done and therefore would not apply in cases where the police have probable cause to search without a warrant but argue that they could have acquired a search warrant.¹⁶⁵

Supporters of the doctrine argue that it is logical and will serve well, the goal of the exclusionary rule, by denying the state the use of illegally obtained evidence and at the same time it minimises the opportunity for the defendant to receive an undeserved and socially undesirable benefit.¹⁶⁶ The doctrine is, on the other hand, criticised because it is based on conjecture and may potentially encourage police to take short cuts whenever evidence may be more readily obtained by illegal rather than by legal means.¹⁶⁷

¹⁶¹ *Nix v Williams* 467 US 431, 449-450 (1984).

¹⁶² Klotter and Kanovitz *Constitutional law* at 181.

¹⁶³ Leen "*Educational manual*" at 10.

¹⁶⁴ *US v Kennedy* 61 F 3d 494 (6th Cir 1995); *US v Larsen* 127 F 3d 984 (10th Cir 1997).

¹⁶⁵ *US v Allen* 159 F 3d 82 (4th Cir 1998).

¹⁶⁶ Shively 2008 *Vaparaisol Univ LR* 407 at 424-425.

¹⁶⁷ Shively 2008 *Vaparaisol Univ LR* at 424-425; LaFave and Israel *Criminal procedure* at 475.

3.5 The Independent Source Doctrine

The Supreme Court holdings clearly state that the exclusionary rule has no application where the State learned of the evidence from an independent source.¹⁶⁸ The rationale of the independent source doctrine is premised on the notion that if there is an independent source for challenged evidence the police should be placed in no worse a position than if the unlawful conduct had not occurred.¹⁶⁹ In other words the independent source doctrine continues to balance protecting constitutional rights while also avoiding a situation where the police are placed in a worse position than before a tainted search.¹⁷⁰ The independent source doctrine does not require the prosecution to establish the existence of a separate or distinct line of inquiry leading to the same evidence.¹⁷¹

Under the independent source doctrine evidence illegally discovered without a search warrant is admissible if the evidence is later found and legally seized based on information independent of the illegal search.¹⁷² In *Segura*¹⁷³ federal agents unlawfully entered the accused's apartment and remained there until a search warrant was obtained. The search warrant was untainted because the affidavit in support of the search warrant did not refer to the unlawful search but was rather based on the information possessed by the agents

¹⁶⁸ *Wong Sun v US* 371 US 471, 487-488 (1963): The court in *Wong Sun* quoted from *Silverthorne* the proposition that the exclusionary rule has no application when the Government learned of the evidence from an independent source; *Nardone v US* 302 US 379 (1937): "[T]hat facts have been improperly learned by wiretapping does not render them inadmissible in a criminal prosecution if knowledge of them has also been gained from an independent source."; *US v Wade* 388 US 218, 242 (1967).

¹⁶⁹ *Nix v Williams* 467 US 431, 443 (1984); *Murray v US* 487 US 533, 537-541 (1988); see also Schwikkard and Van der Merwe *Principles of evidence* at 196.

¹⁷⁰ Yeater 2009 *Duquesne Criminal LJ* 1 at 9.

¹⁷¹ *US v Fode Amadou Fofana* No 09-4397 US 6th Circuit at 1: "[A]lthough the actual documentation seized during the search must be suppressed, evidence obtained legally and independently of the search is not suppressible, even if the Government cannot show that it would have discovered its significance without the illegal search."

¹⁷² *US v Price* 558 F 3d 270 (3d Cir 2009): The court held that even if the application did not refer to evidence from the initial search of the basement the warrant contained probable cause from independent sources. The independent source doctrine allows evidence that was initially obtained illegally but was seized without regard to the tainted search: quoting *Murray v US* 487 US 533 (1988); *Segura v US* 468 US 796 (1984); Mellifont *The derivative imperative* at 125-126. The effect of the independent source exception is that the evidence obtained will be the result of a lawful investigation rather than the fruit of the poisonous tree; Grey 2008 *University of San Francisco LR* 621 at 636: "[T]he independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently by lawful activities untainted by the initial illegality. Even though evidence may have been initially unconstitutionally discovered through illegal police conduct if the evidence is subsequently uncovered by a lawful means unrelated to or independent of an earlier tainted one, the evidence will not be excluded from trial."

¹⁷³ *Segura v US*, 468 US 796 (1984).

before they entered the apartment. The Court held that the evidence obtained through the execution of the warrant was admissible because it was discovered pursuant to an independent source unconnected to the invalid entry.¹⁷⁴

In *Segura* the court left unanswered the question of the admissibility of evidence discovered before the police obtained the search warrant. In *Murray*¹⁷⁵ the court answered this question. *In casu* informants advised federal agents that the accused were trafficking in illegal drugs. The police decided to monitor and conduct surveillance on the accused. Agents observed the accused driving vehicles into a warehouse and leaving. The vehicles driven by the defendants were stopped and lawfully searched and they were found to contain drugs. Based on this information the agents forced their way into the warehouse where they saw a number of marijuana bales.¹⁷⁶ They left without disturbing the bales and returned with a search warrant. In applying for the search warrant the agents relied on the evidence of an informant and the results of the vehicle search. The police did not mention their illegal entry into the warehouse or the drugs discovered.¹⁷⁷ The opinion of the Court was that the taint of the illegal search was erased by the subsequent legal warrant search. The warrantless entry did not contribute either to the issuance of a warrant or to the discovery of the evidence during the lawful search pursuant to the warrant. The Court refused to suppress the evidence discovered in the warehouse and stated that the evidence would be admissible so long as the fruits of the illegal search were not used to obtain the warrant.¹⁷⁸ The doctrine applies to evidence obtained for the first time during an independent lawful search, as well as to evidence initially discovered during an unlawful search but later obtained independently from activities untainted by the initial illegality.¹⁷⁹

¹⁷⁴ *Segura v US*, 468 US 796, 814 (1984); *Hudson v Michigan* 547 US 586,601 (2006): "[W]hile acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock and announce;" *Taslitz and Paris Constitutional criminal procedure* at 534.

¹⁷⁵ *Murray v US* 487 US 533 (1988).

¹⁷⁶ *Murray v US* 487 US 533, 535 (1988).

¹⁷⁷ *Murray v US* 487 US 533, 542 -543 (1988).

¹⁷⁸ *Murray v US* 487 US 533 (1988); see also *Silverthorne Lumber Co v US* 251 US 385 (1920): "[I]f knowledge of them is gained from an independent source they may be proved like any others but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.;" *Taslitz and Paris Constitutional criminal procedure* at 535.

¹⁷⁹ *Murray v US* 487 US 533, 537 (1988); *Segura v US* 468 US 796 (1984).

3.6 The Good Faith doctrine

3.6.1 Nature of the Good faith exception

In the mid 1980s the Supreme Court created the good faith exception to the exclusionary rule, implicitly repudiating the notion that the exclusionary rule was a necessary corollary of the Fourth Amendment.¹⁸⁰ The doctrine permits the inclusion of evidence illegally obtained through police conduct that was objectively reasonable and pursued in good faith.¹⁸¹ The good faith doctrine was employed to the facts in *Leon*.¹⁸² The police in this case seized drugs on reliance of a warrant they believed to be valid but was later determined to be unsupported by probable cause. A review of the case law revealed that the Fourth Amendment has never been interpreted to proscribe the inclusion of unconstitutionally obtained evidence in all proceedings or against all persons.¹⁸³ The Court observed that the driving policy behind the creation of the exclusionary rule was to deter law enforcement officers from acting unlawfully.¹⁸⁴ The evidence revealed that the officer's conduct was in good faith because they believed that they were acting lawfully and therefore excluding the evidence would not serve the deterrent purpose of the exclusionary rule.¹⁸⁵ The deterrent purpose of the exclusionary rule would further not be served in this case because the misconduct was the result of an error by a magistrate and not the police and there was no evidence suggesting that the judiciary are inclined to ignore or subvert the Fourth Amendment.¹⁸⁶ The Court concluded that the exclusionary rule's purposes will only be rarely served by applying it in such circumstances.¹⁸⁷

¹⁸⁰ *Massachusetts v Sheppard* 468 US 981 (1984); *US v Leon* 468 US 897 (1984).

¹⁸¹ *US v Leon* 468 US 897 (1984); *Massachusetts v Sheppard* 468 US 981, 987-988 (1984).

¹⁸² *US v Leon* 468 US 897 (1984).

¹⁸³ *US v Leon* 468 US 897, 905 (1984): The court referred to *Stone v Powell* 428 US 465.

¹⁸⁴ *US v Leon* 468 US 897, 908 (1984); see *US v Calandra* 414 US 338, 348 (1974): The court declined to allow grand jury witnesses to refuse to answer questions based on evidence obtained from an unlawful search or seizure since any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best; *Michigan v Tucker* 417 US 433 (1974): "[W]here official action was pursued in complete good faith, the deterrence rationale loses much of its force."

¹⁸⁵ *US v Leon* 468 US 897, 926 (1984).

¹⁸⁶ *US v Leon* 468 US 897, 916 (1984): Also referred to in subsequent cases as the *Leon* framework; see also *Massachusetts v Sheppard* 468 US 981, 990-991 (1984): "[S]uppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve."

¹⁸⁷ *US v Leon* 468 US 897, 926 (1984).

Leon is not an authority in that the good faith doctrine applies generally in situations where searches are executed in reliance on warrants. The good faith exception recognised by the court will not apply in situations if it is unreasonable for the executing officers to presume it to be valid. For example: if the judicial officer issues a warrant, was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;¹⁸⁸ where the issuing magistrate wholly abandoned his judicial role (in such circumstances no reasonably well trained officer should rely on the warrant),¹⁸⁹ a warrant based on an affidavit so lacking in *indicia* of probable cause to render official belief in its existence entirely unreasonable,¹⁹⁰ and lastly a warrant that is so facially deficient, namely failing to particularise the place to be searched or the things to be seized.¹⁹¹

In *Leon* the court took a narrow view and limited the good faith exception to those instances where the officer conducted a search pursuant to a warrant issued by a detached and neutral magistrate.¹⁹² The court has since *Leon* extended the good faith doctrine to a number of other contexts. In *Krull*¹⁹³ the court considered whether the good faith exception to the exclusionary rule should be recognised when officers acted in objectively reasonable reliance upon a statute authorising warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.¹⁹⁴ The Court held that the approach used in *Leon* is equally applicable to the present case. The suppression of evidence obtained by an officer acting in good faith reasonable reliance on a statute, would have as little deterrent effect on the officer's actions, as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant.¹⁹⁵ The Court found that the

¹⁸⁸ *Franks v Delaware* 438 US 154 (1978).

¹⁸⁹ *Lo-Ji Sales v New York* 442 US 319 (1979): In this case the court held that the judge allowed himself to become a member if not the leader of the search party. The court reasoned that evidence obtained when the judge has abandoned his or her judicial role is inadmissible because the officer who relies on a warrant issued by such a judge is not acting in good faith, and the evidence subsequently obtained is therefore inadmissible.

¹⁹⁰ *Brown v Illinois* 422 US 590, 610-611 (1975).

¹⁹¹ *Massachusetts v Sheppard* 468 US 981, 988-991 (1984); Taslitz and Paris *Constitutional criminal procedure* at 555-556.

¹⁹² Bloom 1992 *American J Crim L* 71 at 89.

¹⁹³ *Illinois v Krull* 480 US 340, 342 (1987).

¹⁹⁴ *Illinois v Krull* 480 US 340, 342 (1987).

¹⁹⁵ *Illinois v Krull* 480 US 340, 349 (1987).

police officer's reliance on the statute was objectively reasonable.¹⁹⁶ The Court stated that its holding would not have followed if (a) the legislature wholly abandoned its responsibility to enact constitutional laws or (b) if a reasonably well trained officer should have known that the statute was unconstitutional.¹⁹⁷

In *Evans*¹⁹⁸ the court applied the *Leon* framework and concluded that it supports a categorical exception to the exclusionary rule for clerical errors of court employees.¹⁹⁹ In *casu* the warrantless search was based on an error made by a court employee, rather than by a police officer. The evidence did not reveal that the police officer did not act objectively reasonably when he relied upon the police computer record.²⁰⁰ The Court opined that the exclusion of evidence at trial would not sufficiently deter future errors because court clerks are not adjuncts to law enforcement teams.²⁰¹

Evans left unresolved the issue whether evidence should be suppressed if the police committed the error. The authority since *Evans* stood for the proposition that police act in good faith if they rely on information supplied by courts, legislatures and other police agencies. The Supreme Court had not approved the admission of evidence seized unconstitutionally by police relying on their own mistaken information. The court in *Herring*²⁰² further extended the scope of the exception by holding that police act in good faith if they rely on information supplied by a police clerk in a separate county. The Court stated that the exclusionary rule does not apply to evidence found due to negligence regarding a government database, as long as the arresting police officer relied on that database in good faith and that the negligence was not pervasive.²⁰³ The Court denied suppression of evidence seized pursuant to an invalid arrest warrant on the grounds that the police had not exhibited deliberate reckless or grossly negligent conduct or recurring or systemic negligence.

¹⁹⁶ *Illinois v Krull* 480 US 340, 356 (1987).

¹⁹⁷ *Illinois v Krull* 480 US 340, 355 (1987); see also Leen "Educational manual" at 14.

¹⁹⁸ *Arizona v Evans* 514 US 1 (1995).

¹⁹⁹ *Arizona v Evans* 514 US 1, 16 (1995).

²⁰⁰ *Arizona v Evans* 514 US 1, 16 (1995).

²⁰¹ *Arizona v Evans* 514 US 1, 14 (1995).

²⁰² *Herring v US* 555 US 135 (2009).

²⁰³ *Herring v US* 555 US 135 (2009): The court held that the police conduct constituted good faith because the officer's error was not deliberate and the officers involved were not culpable; *People v Robinson* 224 P 3d 55 (Cal 2010): In *People v Robinson* the court declined to apply the exclusionary rule to evidence acquired in violation of the Fourth Amendment by a police agency relying on its own mistaken information.

In *Davis*²⁰⁴ the good faith exception was further extended to a warrantless search conducted in reasonable reliance on binding appellate precedent. In *Davis* the accused was a passenger in the vehicle stopped by the police and later arrested and charged for illegal possession of a firearm. The accused brought a motion to suppress the evidence of the gun tendered by the prosecution. The question in *Davis* was whether the exclusionary remedy is available when the police conduct a search in compliance with binding precedent that is later overruled.²⁰⁵ The accused argued that the evidence should be suppressed in light of the recent judgment in *Gant*.²⁰⁶ *Gant* overruled the longstanding principle that a lawful arrest of a recent occupant of a vehicle justifies a search even after the arrestee is secured. The court in *Gant* held that once the person is secured, a subsequent vehicle search may only be conducted where there is reason to believe the search will reveal evidence of the arrest offence. The Court refused to suppress the gun and accepted that under *Gant* the vehicle search subsequent to Davis's arrest would not have been permissible. The Court held that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule because suppression would not serve to deter police misconduct in these circumstances and because it would come at a high cost to both the truth and public safety.²⁰⁷

3.6.2 Cost-benefit analysis

The exclusionary rule applies only if the goal of deterrence is furthered. The Court adopted the cost-benefit analysis to determine when the goal of deterrence is furthered.²⁰⁸ In the cost-benefit analysis the extent to which application of the rule advances the deterrent benefits of exclusion is weighed against the social costs of exclusion.²⁰⁹ The benefit of the exclusionary rule is the goal of deterrence on the future unlawful conduct of law

²⁰⁴ *Davis v US* 180 L Ed 2d 285 (2011).

²⁰⁵ *Arizona v Gant* 556 US 332 (2009).

²⁰⁶ *Arizona v Gant* 556 US 332 (2009).

²⁰⁷ *Davis v US* 180 L Ed 2d 285, 296-297, 302 (2011).

²⁰⁸ *Hudson v Michigan* 547 US 586, 596 (2006); *US v Leon* 468 US 897, 909, 921 (1984): Deterrence is a necessary condition for exclusion but not sufficient, the analysis must also account for the substantial cost generated by the rule; *US v Calandra* 414 US 338, 348 (1974): Specifically acknowledging use of the cost/benefit analysis to determine whether application of the exclusionary rule is appropriate; *Alderman v US* 394 US 165, 174-175 (1969); Grey 2008 *University of San Francisco LR* 621 at 633; Bloom 1992 *American J Crim L* 71 at 88.

²⁰⁹ *Davis v US* 180 L Ed 2d 285, 294 (2011); *Herring v US* 555 US 135, 141 (2009).

enforcement officers.²¹⁰ Grey argues that there are two other important factors to consider in the analysis of the deterrent benefit of the rule, namely; whether other forms of deterrence exist, such as civil suits or internal police discipline and secondly, whether the strength of the incentive to commit the forbidden act is addressed.²¹¹ The primary costs is that the exclusionary rule interferes with the truth seeking functions of a criminal trial by barring relevant and trustworthy evidence and setting free the guilty.²¹² The exclusionary rule is employed only if the goals of deterrence outweigh its social costs. If the costs are deemed to outweigh the minimal benefits of exclusion even though the police misconduct amounts to a constitutional violation, to exclude the evidence from trial would do little or nothing to deter officers from engaging in such conduct in the future.²¹³

In *Herring*²¹⁴ a review of the case law revealed that the purpose of the exclusionary rule is to deter deliberate reckless or grossly negligent conduct or in some circumstances recurring or systemic negligence.²¹⁵ Based on this the Court slightly recalibrated the cost-benefit analysis applied in *Leon* and its progeny by focussing on the flagrancy of the police misconduct. The Court held that the exclusionary rule is triggered only when the police conduct is sufficiently deliberate and exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system. This, the Court reasoned, is consistent with the *Leon* line of cases wherein the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue.²¹⁶ The majority viewed culpable conduct as that which is deliberate, reckless, or grossly negligent, or in some circumstances recurring or systemic negligence (pattern of repeated mistakes on validity of warrants).²¹⁷ The court in *Davis*²¹⁸ affirmed the necessity for culpable action as a prerequisite for deterrence. The Court opined that conduct absent of culpability is not deliberate enough to

²¹⁰ Grey 2008 *University of San Francisco* LR 621 at 633-634.

²¹¹ Grey 2008 *University of San Francisco* LR 621 at 633-634.

²¹² *Illinois v Gates* 462 US 213 (1983).

²¹³ Grey 2008 *University of San Francisco* LR 621 at 635.

²¹⁴ *Herring v US* 555 US 135 (2009).

²¹⁵ *Herring v US* 555 US 135 (2009); see also *US v Leon* 468 US 897, 905 (1984).

²¹⁶ *Herring v US* 555 US 135, 143 (2009); see also *Davis v US* 180 L Ed 2d 285 (2011).

²¹⁷ *Davis v US* 180 L Ed 2d 285, 295 (2011); *Herring v US* 555 US 135 (2009); De Golia 2012 *Mercer* LR 751 at 764-765: "[D]avis narrowed the exclusionary rule by strongly affirming that evidence will only be excluded when police disregard Fourth Amendment rights by acting deliberately, recklessly or with gross negligence. Although the Supreme Court addressed the applicability of the exclusionary rule to culpable conduct in *Herring*, the Supreme Courts holding in *Davis* illustrates that culpable conduct is a requirement for exclusion."

²¹⁸ *Davis v US* 180 L Ed 2d 285 (2011).

yield meaningful deterrence. Accordingly, the Supreme Court held that the officer's reliance on binding precedent did not create sufficient culpability and therefore deterring such behaviour would not be conducive to achieve the goal of the exclusionary rule.²¹⁹ The police acted in strict compliance with binding precedent and their behaviour was not wrongful.

The analysis of deterrence and culpability is not an inquiry into the subjective knowledge of the police.²²⁰ The officer's knowledge and experience may be a factor to consider but is not determinative.²²¹ A mistaken belief or ignorance of constitutional standards alone does not qualify as good faith. The state must establish not only that the officer had a subjective good-faith belief that his actions were lawful, but also that it was objectively reasonable for the officer to hold that belief. The objective inquiry is confined to the question whether a reasonably well-trained officer would have known that the conduct was illegal in light of all of the circumstances.²²² In *Herring* the court found that the recordkeeping errors were the result of isolated negligence attenuated from the arrest. The Court concluded that the conduct at issue was not so objectively culpable as to require exclusion and therefore bar the jury from considering all the evidence. The Court said:

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.”²²³

²¹⁹ *Davis v US* 180 L Ed 2d 285, 304-309 (2011); see also dissenting judgment of Breyer J: The judge suggests that *Davis* limited the application of the exclusionary rule only to culpable behaviour thereby limiting the exclusionary rule's application and therefore eroding the Fourth Amendment; De Golia 2012 *Mercer LR* 751 at 760-762.

²²⁰ *Herring v US* 555 US 135 (2009); see also *Davis v US* 180 L Ed 2d 285 (2011); *US v Leon* 468 US 897 (1984).

²²¹ *Beck v Ohio* 379 US 89 (1964): If subjective good faith alone were the test the protections of constitutional rights would evaporate and be conditional on the discretion of the police; see also Harvard law review association 2009-2010 *Harvard LR* 153 at 159: “[T]he language in Chief Justice Roberts majority opinion in *Herring* does not clearly indicate whether the decision should be interpreted as a continuation of this trend of creating specific narrow categorical exceptions to the exclusionary rule or as something more.”

²²² *Illinois v Krull* 480 US 340, 356-357 (1987); *Davis v US* 180 L Ed 2d 285 (2011): The court emphasised the objectively reasonable nature of the officer's reliance on a statute; Laurin 2011 *Columbia LR* at 670 at 672.

²²³ *Herring v US* 555 US 135 (2009).

It appears that evidence will be included if the constitutional violation by police occurred through inadvertent or accidental conduct after making a good faith attempt to obey the law.²²⁴

4. REAL EVIDENCE OBTAINED THROUGH COMPULSION

The admissibility of unconstitutionally obtained real evidence should not only be considered against the principles underlying the exclusionary rule but it should be assessed against the provisions and standards of the Fourth Amendment.²²⁵ Under the Fourth Amendment search and seizures must be reasonable to be held constitutional. Reasonableness is determined on a case-by-case basis because it is dependent on the context within which the search takes place.

4.1 So-called reasonable balancing test

The obtainment of real evidence, whether by means of a warrant or warrantless, is reasonable if the state establishes a superior interest in the search and seizure. To determine whether a state has a superior interest the courts employ the so-called reasonable-balancing test.²²⁶ The balancing test involves weighing the level of intrusiveness of the state conduct against the state interest in the search and seizure. Accordingly, the search and seizure is reasonable if the state's interest outweighs the level of intrusiveness into the individual's privacy interest.²²⁷

In *Camara*²²⁸ the court applied this test to determine whether the state conduct in question (warrantless search authorised by legislation) was reasonable. The appellant awaited trial on a charge that he violated the San Francisco Housing Code by refusing to permit a warrantless inspection of his residence. In an application to stop his prosecution he argued

²²⁴ *Herring v US* 555 US 135 (2009): "[W]hen police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply."; see also *Brewer v Williams* 430 US 387 (1977); Mellifont *The derivative imperative* at 123.

²²⁵ *Katz v US* 389 US 347 (1967); Roberson *Criminal justice* at 55.

²²⁶ *Camara v Municipal Court* 387 US 523, 528 (1967); see also Taslitz and Paris *Constitutional criminal procedure* at 98.

²²⁷ Grey 2008 *University of San Francisco LR* 621 at 627; see also *Terry v Ohio* 392 US 1 (1968).

²²⁸ *Camara v Municipal Court* 387 US 523 (1967).

that the ordinance authorising the warrantless inspections was unconstitutional. He alleged the ordinance violated the Fourth Amendment by authorising municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein.²²⁹ The Court affirmed that the Fourth Amendment standard is reasonableness, meaning the state interest must outweigh the intrusion upon personal freedom.²³⁰ The Court intimated that the reasonable balancing test gives recognition to the competing public and private interest at stake and in so doing fulfils the purpose behind the constitutional right to be free from unreasonable invasions of privacy.²³¹ The Court held that the legislation authorising the warrantless search caused significant intrusions upon the interests protected by the Fourth Amendment because it subjected the accused to the discretion of the law enforcement agents whether to invade private property. The state's interest, the Court opined, can equally be attained through warrant procedures. The Court determined that this substantial weakening of the Fourth Amendment's protections outweighed the justification for upholding the warrantless searches.²³²

Similarly the Supreme Court held reasonable the search of scholars for the presence of drugs,²³³ the fruits and instrumentalities of crime;²³⁴ as well as searches or seizures which involves finger prints,²³⁵ blood,²³⁶ urine samples,²³⁷ fingernail and skin scrapings,²³⁸ voices and handwriting exemplars.²³⁹ The courts require a more substantial justification for searches undertaken in situations where society recognises a heightened expectation of privacy such as the physical penetration of the body.²⁴⁰

²²⁹ *Camara v Municipal Court* 387 US 523, 536-537 (1967).

²³⁰ *Camara v Municipal Court* 387 US 523, 534-535, 536-537 (1967); see also *US v Price* 558 F 3d 270, 277 (3d Cir 2009); *Terry v Ohio* 392 US 1, 21 (1968): There is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.

²³¹ *Camara v Municipal Court* 387 US 523, 539 (1967); see also *Terry v Ohio* 392 US 1, 21 (1968).

²³² *Camara v Municipal Court* 387 US 523, 534, 539-540 (1967); see also *US v Jacobsen* 466 US 109,125 (1984).

²³³ *Veronia School District v Acton* 515 US 646 (1995) at 664-665; see also *Board of Education v Earls* 122 SCt 2559 (2002) at 2565.

²³⁴ *US v Lefkowitz* 285 US 452, 465-466 (1932).

²³⁵ *Davis v Mississippi* 394 US 721 (1969).

²³⁶ *Schmerber v California* 384 US 757 (1966).

²³⁷ *Skinner v Railway Labor Executives' Ass'n* 489 US 602 (1989).

²³⁸ *US v Dionisio* 410 US 1 (1973).

²³⁹ *US v Dionisio* 410 US 1 (1973).

²⁴⁰ *Winston v Lee* 470 US 753, 767 (1985); Taslitz and Paris *Constitutional criminal procedure* at 176.

4.2 Physical penetration of the body

A compelled surgical intrusion into the individual's body for evidence requires an inquiry into the facts and circumstances to determine whether the intrusion is justifiable. Thus, the reasonableness of a particular practice is determined by balancing the individual's right to protection for personal privacy and bodily dignity against illegal intrusions into the body against the prosecution's interest in gathering evidence necessary to determine the accused guilt or innocence.²⁴¹

In *Schmerber*²⁴² the court considered the question whether the means and procedures employed during the taking of a blood sample respected the relevant Fourth Amendment standards of reasonableness.²⁴³ The accused moved for the suppression of evidence obtained as a result of blood obtained from his body without his consent. The Court intimated that the reasonableness of a surgical intrusion should be determined on a case-by-case approach. To determine if the procedure meets the reasonableness standard, the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. Considering the privacy interest the Court held that the test was reasonable in the sense that such tests are common place and involve virtually no risk, trauma or pain and that the blood was taken by a physician in a hospital environment according to accepted medical practices.²⁴⁴ Weighed against the privacy interest is the community's interest in fairly and accurately determining guilt or innocence. The evidence revealed that a blood test is effective to determine the degree to which an accused is under the influence, there had been a clear indication that the extraction would produce evidence of crime (defendant was intoxicated while driving), and the blood test was of vital importance to prove the crime.²⁴⁵ The Court concluded that the compelled blood test was reasonable for Fourth Amendment purposes.²⁴⁶ The Court recognised society's interest in maintaining the individual's integrity to privacy and therefore cautioned that although the Constitution does not forbid minor intrusions by the prosecution into the body of the

²⁴¹ Gittles 1985 *The journal of criminal law and criminology* 972.

²⁴² *Schmerber v California* 384 US 757 (1966); see also Schwikkard and Van der Merwe *Principles of evidence* at 135-136, 238-239.

²⁴³ *Schmerber v California* 384 US 757, 768 (1966).

²⁴⁴ *Schmerber v California* 384 US 757, 771 (1966).

²⁴⁵ *Schmerber v California* 384 US 757, 771 (1966); see also Minton 1978 *Missouri LR* 133 at 136.

²⁴⁶ *Schmerber v California* 384 US 757, 771 (1966).

accused under stringently limited conditions in no way permits more substantial intrusions or intrusions under other conditions.²⁴⁷

Schmerber did not articulate the difference between permissible “minor” intrusions and impermissible “major” intrusion. Notwithstanding, the Court, in the context of the Fourth Amendment held that reasonableness is properly decided on the facts and circumstances of each case.²⁴⁸

The court extended the *Schmerber* framework to the context of court-ordered surgical intrusions.²⁴⁹ In *Winston*²⁵⁰ the complainant was approached by the accused where after an exchange of gun fire ensued resulting in both parties sustaining injuries. The accused was later found suffering from a gunshot wound to the chest and taken to hospital. At the hospital the complainant identified the accused as the assailant. The prosecution subsequently brought an application for an order directing the accused to undergo surgery using local anaesthetic to remove the bullet. Based on the expert medical testimony the court *a quo* granted the order. Prior to the surgery the x-rays revealed that the bullet was lodged much deeper than anticipated and that the surgeon subsequently recommended general anaesthetic. The Court reasoned that the competing interests that arise in extracting blood from a suspect (*Schmerber*) are similarly raised when a suspect undergoes surgery for the removal of bullets. Employing the *Schmerber* framework the Court stated that the individual’s interest in personal privacy and bodily integrity should be weighed against the community’s interest in fairly and accurately determining guilt.²⁵¹ The court’s inquiry therefore must focus on the extent of the intrusion on the respondent’s privacy interests and on the state’s need for evidence.²⁵² In determining whether medical tests and procedures are reasonable the Court considered the extent to which the procedure threatens the individual’s safety or health, the extent of the intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity and the importance of the

²⁴⁷ *Schmerber v California* 384 US 757, 772-773 (1966); see also *Minton* 1978 *Missouri LR* 133 at 136.

²⁴⁸ *Minton* 1978 *Missouri LR* 133 at 136.

²⁴⁹ Gitley 1985 *The journal of criminal law and criminology* 972 at 982: “[S]imilar competing interest between individual bodily privacy and legitimate governmental objectives emerge in both body cavity and surgical intrusion cases.”

²⁵⁰ *Winston v Lee* 470 US 753 (1985).

²⁵¹ *Winston v Lee* 470 US 753, 762 (1985).

²⁵² *Winston v Lee* 470 US 753, 763 (1985).

evidence to the prosecution's case.²⁵³ Considering the community's interest in the truth finding function of the courts the Court observed that the prosecution failed to establish a compelling need to intrude into the accused's body which in turn limited the need to compel the accused to undergo the surgery. In addition the Court found that the state had available substantial evidence to prove its case. The Court ruled that to compel surgery would be an unreasonable search under the Fourth Amendment and would violate the accused right to be secure in his person.²⁵⁴ The Supreme Court observed that the medical procedure is an example of the more substantial intrusion cautioned against in *Schmerber*.

Discussions of these judgments gave rise to a number of points of view. For example, Gitle's argues that *Winston* offers little practical guidance concerning the relative weights to be assigned to each interest. The opinion fails to discuss at what point the prosecution's evidentiary needs will outweigh the suspect's Fourth Amendment interests and furthermore does not address whether the heinousness of the crime committed should be considered in the balancing test.²⁵⁵ Taslitz²⁵⁶ opines that the court does not usually balance the privacy and public interests on a case-by-case basis. He suggests that the courts engage in balancing privacy and public interests with the sole purpose to craft a new rule for future cases to fit into a certain category. The effect of such a new rule is that at the hearing of future cases the court will first assess whether it falls within the created category and if it does, applies the rule to the facts in order to determine whether the police acted reasonably.²⁵⁷

²⁵³ *Winston v Lee* 470 US 753, 761-764 (1985).

²⁵⁴ *Winston v Lee* 470 US 753, 766 (1985); see also *Rochin v California* 342 US 165 (1952): Some medically assisted intrusions such as forcible administration of an emetic to induce vomiting have not been permitted by the courts; Gitle's 1985 *The journal of criminal law and criminology* 972 at 985: "[T]his flexibility is desirable to the extent that trial courts capably can weigh and assess the credibility of evidence and testimony to determine whether a 'substantial justification' exists to compel surgery under the facts of a particular case. At the same time, however, this flexibility may lead to inconsistent results among the lower courts."

²⁵⁵ Gitle's 1985 *The journal of criminal law and criminology* 972 at 981.

²⁵⁶ Taslitz and Paris *Constitutional criminal procedure* at 98.

²⁵⁷ Taslitz and Paris *Constitutional criminal procedure* at 98, 169: "[I]n addition the Court engages in what we call 'categorical balancing.' When faced with a new set of facts, it uses balancing to craft a rule to govern that category of facts. In future cases courts employ a two step analysis: first, determining the applicable category and second, deductively applying the court's categorical rule to the facts. If the case does not fit an existing category, then the court must engage in balancing to craft a new categorical rule."

5. CONCLUSION

There are fundamental differences between the exclusionary rule applicable in the USA and South Africa. The South African exclusionary rule is discretionary and is contained in the Constitution whereas in the USA a strict court-created exclusionary rule is employed. Notwithstanding these important distinctions the South African courts can benefit with regard to the interpretation of a number of aspects from the USA jurisprudence.

The admission of unconstitutionally obtained real evidence may be challenged in South Africa in a trial-within-a-trial process but in the USA (like in Canada) a motion to suppress must be issued and filed prior to the trial. Except for this distinction the processes are substantively comparable. Real evidence will be excluded at a defendant's later trial if the motion to suppress is upheld. The onus in both jurisdictions rests on the accused and must be satisfied on a preponderance of the evidence.²⁵⁸ The onus resorts with the prosecution, for example in proving that there was an independent source for unconstitutionally obtained real evidence or that it inevitably would have been discovered even without the illegal search.²⁵⁹

In contrast to the USA and Canada the threshold requirement of standing is not applicable to South Africa because of the difference in the rationale of the exclusionary rule and the wording of section 35(5). In the USA a person must demonstrate that he had a "reasonable expectation of privacy" in the place that was searched or the real evidence that was seized. An individual has a reasonable expectation of privacy if he exhibits an actual (subjective) expectation of privacy and secondly, the expectation must be one that society is prepared to recognise as reasonable.²⁶⁰ The exclusionary remedy does not apply in circumstances where real evidence was illegally obtained through a violation of a third person's privacy.²⁶¹ The admissibility of real evidence may be challenged by a person if obtained by means of physical force or show of authority on an individual, which restrains his freedom to walk

²⁵⁸ *Nardone v US* 308 US 338 (1939); Taslitz and Paris *Constitutional criminal procedure* at 211.

²⁵⁹ *Alderman v US* 394 US 165, 183 (1969): "[T]he United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted."; see also *Brown v Illinois* 422 US 590 (1975); Taslitz and Paris *Constitutional criminal procedure* at 211.

²⁶⁰ *Katz v US* 389 US 347 351, 361 (1967); Taslitz and Paris *Constitutional criminal procedure* at 104.

²⁶¹ *Weeks v US* 232 US 383 (1914); *Mapp v Ohio* 367 US 643 (1964); *Goldstein v US* 316 US 114 (1942); *Alderman v US* 394 US 165, 171 (1969); *Rakas v Illinois* 439 US 128 (1978); *US v Leon* 468 US 897 (1984); *US v Ceccolini* 435 US 268 (1978); *US v Calandra* 414 US 338 (1974).

away or where the search and seizure stopped short of something called a “technical arrest” or a “full blown search.”²⁶² A person also has standing in the case of a seizure of real evidence if he demonstrates that he has a substantial possessory interest in that property.²⁶³

In the USA unconstitutionally obtained real evidence is generally inadmissible, except when any of the exceptions created by the courts finds application. The exceptions to the exclusionary remedy include the "objective justification" doctrine,²⁶⁴ the "attenuated taint" doctrine,²⁶⁵ the "inevitable discovery" doctrine,²⁶⁶ the "independent source" doctrine,²⁶⁷ and the "good faith" doctrine.²⁶⁸ The exceptions to the exclusionary rule have been adopted because suppression of real evidence in certain cases would not serve the twin purposes of the exclusionary rule, namely deterrence and judicial integrity. The exceptions created by the Supreme Court of the USA can assist South African courts in its interpretation of section 35(5) more especially as regards the second leg of the test, that is, whether admission of the real evidence would otherwise be detrimental to the administration of justice.²⁶⁹

In addition to the exclusionary exceptions the USA courts must consider whether real evidence has been obtained in compliance with the standards of the Fourth Amendment. The Fourth Amendment requires that evidence should not be obtained through an unreasonable search and seizure. A search and seizure is reasonable if the state's interest outweighs the level of intrusiveness into the individual's privacy interest.²⁷⁰

The USA Constitution does not contain a specific right to privacy but it is implicitly guaranteed in the Fourth Amendment. In cases where real evidence is obtained through compulsion both the South African courts and the USA courts stress the importance of the right to privacy and associated rights. The courts in the USA apply a so-called reasonable

²⁶² *Terry v Ohio* 392 US 1, 19 (1968).

²⁶³ *Jones v US* 362 US 257 (1960): Property interest was held to sufficiently predicate for standing under the Fourth Amendment; *US v Jacobsen* 466 US 109, 113 (1984); *Rakas v Illinois* 439 US 128 (1978): The courts have held that an accused does not have standing who does not have property or possessory interest; Klotter and Kanovitz *Constitutional law* at 251.

²⁶⁴ *Devenpack v Alford* 543 US 146 (2004).

²⁶⁵ *Wong Sun v US* 371 US 471 (1963).

²⁶⁶ *Nix v Williams* 467 US 431 (1984).

²⁶⁷ *Murray v US* 487 US 533 (1988).

²⁶⁸ *US v Leon* 468 US 897 (1984).

²⁶⁹ Schwikkard and Van der Merwe *Principles of evidence* at 194.

²⁷⁰ Grey 2008 *University of San Francisco LR* 621 at 627; see also *Terry v Ohio* 392 US 1 (1968).

balancing test to determine the reasonableness of search and seizure of real evidence. Real evidence obtained through compulsion in circumstances where the person has a decreased expectation of privacy, is usually considered reasonable. In circumstances of heightened expectation of privacy the courts require additional justification. For example, the courts in the USA employ the *Schmerber* framework to determine the admissibility of real evidence emanating from the body of an accused. The court's inquiry focuses on the extent of the intrusion on the respondent's privacy interests and on the state's need for evidence.²⁷¹ The test involves balancing the individual's interest in personal privacy and bodily integrity against the community's interest in fairly and accurately determining guilt.²⁷² This framework cannot assist the South African courts because of the inherent limitation of the scope of the right to privacy which produces a narrow meaning of the right to privacy.²⁷³

In Chapter 6, I examine how the courts in Namibia interpret and apply the exclusionary remedy to unconstitutionally obtained evidence.

²⁷¹ *Winston v Lee* 470 US 753, 763 (1985).

²⁷² *Winston v Lee* 470 US 753, 762 (1985).

²⁷³ *Basdeo Search and seizure* at 56-57.

CHAPTER 6

THE EXCLUSIONARY RULE IN NAMIBIA

1. INTRODUCTION

In this Chapter the comparative study regarding the interpretation and application of the exclusionary rule is extended to the Republic of Namibia. Prior to the independence of the Republic of Namibia its judiciary applied the laws of South Africa and as a result became a mere extension of the judicial system of South Africa.¹ This arrangement substantially changed with the introduction of the Namibian Constitution. The Constitution created a sovereign nation and an independent judiciary with its apex the Supreme Court.² The Supreme Court is the final appeal tribunal although it sits in certain circumstances as Court of first instance.³ The Namibian Constitution did not absolutely sever the proverbial legal umbilical cord with South Africa.⁴ This appears from the Constitution which provides that the decisions by the South African courts are binding on the courts of Namibia until independence.⁵ The South African Criminal Procedure Act⁶ is further applicable in Namibia and the countries' respective constitutions share similarly worded provisions in their respective bills of rights, for example the fair trial rights expressed in article 12(1)(a) of the Namibian Constitution and section 35(3) of the South African Constitution.⁷ Article 12(1)(a) provides:

¹ *S v Scholtz* 1998 (NR) 207 at 215; see also Amoo *Introduction to law* at 69.

² *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 113: "Article 81 provides that a decision of the Supreme Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all provisions of Chapter 3 relating to fundamental human rights."; Amoo *Introduction to law* at 69.

³ Cilliers and Amoo *The role of the court* at 15.

⁴ Amoo *Introduction to law* at 70.

⁵ Constitution of Namibia Act 1 of 1990, article 66(1); see also *Myburgh v Commercial Bank of Namibia* 2000 NR 255.

⁶ *Criminal Procedure Act*, 51 of 1977.

⁷ *S v Kapika (1)* 1997 NR 285 at 288.

“In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.”

A comparable study of the Namibian jurisprudence is useful particularly as the courts and legal commentators would have grappled with legislative and constitutional issues similar to those confronting the South African courts.⁸

The focus of the study undertaken is to establish how the courts approach the question of admissibility regarding unconstitutionally obtained evidence, more particularly real evidence emanating from the accused. Principles adopted and employed by the Namibian courts when determining admissibility of illegally obtained evidence is identified and discussed with the view to determine to what extent the approaches can be implemented in the South African context.

An aggrieved person whose fundamental rights or freedoms under the Constitution has been infringed or threatened shall be entitled to approach a court to protect such right or freedom.⁹ A person who relies on the exclusionary remedy must establish particular threshold and procedural requirements. In this regard it is important to ascertain how the Namibian courts define and interpret the following: the beneficiary of fundamental rights; standing requirement, the trial-within-a-trial procedure and whether the accused bears the onus of proving that his fundamental rights have been violated.

In contrast to the South African Constitution, the Namibian Constitution does not have an exclusionary provision. Notwithstanding, the Namibian courts apply a discretionary exclusionary rule.¹⁰ The ratio is that in certain situations fairness might require that evidence unconstitutionally obtained be excluded and in other situations fairness will

⁸ *Bernstein v Bester* 1996 (2) SA 751 (CC) at 811I-812A.

⁹ Constitution of Namibia Act 1 of 1990, article 25(2).

¹⁰ *S v Shikunga* 1997 NR 156; see also *S v Kanduvazo* 1998 NR 1; *S v De Wee* 1999 NR 122 at 127; *S v Kapika* (1) 1997 NR 285.

require that evidence, albeit obtained unconstitutionally, be admitted.¹¹ The Supreme Court of Namibia formulated an exclusionary test to guide and assist in the exercise of the discretion. Evidence improperly and unlawfully obtained may be excluded if the irregularity is fundamental and it taints the conviction.¹² In the case of unconstitutionally obtained real evidence additional factors such as the lawfulness and the constitutionality of the impugned law, rule or action are considered. Similar to the preceding Chapters, these principles are dealt with by only referring to the most influential cases on the relevant aspect, and not all of them.

2. PROCEDURAL MATTERS

2.1 Trial-within-a-trial procedure

The admissibility of evidence is usually determined during a so-called trial-within-a-trial procedure.¹³ The question of admissibility is a question of law and therefore separately resolved from the question of guilt.¹⁴

In *Malumo*¹⁵ the court considered the admissibility of evidence regarding an admission or pointing-out by the accused in a trial-within-a-trial.¹⁶ The evidence revealed that the police deliberately and consciously violated the accused constitutional rights. The Court based on the nature of the constitutional violation and the possibility that admission of the evidence might in case, of an eventual conviction taint the verdict, exercised its discretion and excluded the evidence.¹⁷

The nature of a trial-within-a-trial procedure has been described as a “watertight compartment, with no spill-over into the main trial...”¹⁸ and as a “one way glass where one

¹¹ *S v Kutamudi* 2002 NAHC 8; see also *S v Bruwer* 1993 NR 219.

¹² *S v Kukame* 2007 (2) NR 815 at 816 and 838-839; see also Hinz, Amoo and van Wyk *The constitution at work* at 315.

¹³ *S v Malumo* (2) 2007 (1) NR 198 at 204.

¹⁴ *S v Malumo* (2) 2007 (1) NR 198 at 207.

¹⁵ *S v Malumo* (2) 2007 (1) NR 198.

¹⁶ *S v Malumo* (2) 2007 (1) NR 198 at 207-208.

¹⁷ *S v Malumo* (2) 2007 (1) NR 198 at 216.

¹⁸ *S v Sithebe* 1992 (1) SACR 347 (A) at 351.

is prevented from peering into the trial-within-a-trial from the main trial.”¹⁹ The *ratio* is that an accused person must be at liberty to challenge the admissibility of evidence in a trial-within-a-trial without the fear of inhibiting his election whether or not to testify on the issue of his alleged guilt.²⁰ A court must make its ruling on the admissibility or otherwise of evidence at the conclusion of the trial-within-a-trial, before the main trial may proceed.²¹

In *Malumo*²² the court stated that a trial-within-a-trial procedure is interlocutory and if new evidence appears later in the trial which is relevant to the question of admissibility a court may and should reconsider its earlier decision. A court need not wait until the end of the trial before considering the admissibility of new facts which appeared during the trial.²³ This principle was employed in *Tjiho*.²⁴ The evidence of the investigating officer, in the Court *quo* was ruled admissible at the end of a trial-within-trial. During the trial and under cross-examination the police officer testified, confirming the accused’s version that he had advised the accused that an oral statement not reduced to writing could not be used as evidence against him. The applicant argued that because the decision regarding admissibility is interlocutory it is the court’s duty to consider such matter again if other relevant evidence comes to light.²⁵ The prosecution argued that the court should not consider the admissibility of the evidence at that stage, but only at the end of the case after all the evidence has been adduced. After a review of the authority the court concluded that there is no authority for the proposition that the court must wait until the end of the case before reconsidering the question of admissibility if new facts regarding the statement come to light during trial.²⁶ The circumstances of each case will determine the procedure to be followed.²⁷ *In casu* the court opined that the evidence was complete and properly before the court and that it was obliged to give its decision on this evidence. The Court reasoned that if this is not done the accused might have to subject him to cross-examination on evidence that appears to be inadmissible.²⁸ This, the Court concluded, may cause

¹⁹ *S v Michindu* 2000 (2) SACR 313 (W) at 315.

²⁰ *S v Malumo* 2010 (1) NR 35 at 39.

²¹ *S v Malumo* (2) 2007 (1) NR 198 at 207.

²² *S v Malumo* (2) 2007 (1) NR 198 at 207.

²³ *S v Tjiho* (1) 1990 NR 242 at 246.

²⁴ *S v Tjiho* (1) 1990 NR 242.

²⁵ *S v Tjiho* (1) 1990 NR 242 at 246.

²⁶ *S v Tjiho* (1) 1990 NR 242 at 246.

²⁷ *S v Tjiho* (1) 1990 NR 242 at 246.

²⁸ *S v Tjiho* (1) 1990 NR 242 at 246.

incalculable prejudice to the accused because, if the evidence had been excluded at an earlier stage, the accused might have made different procedural decisions. The prejudice, the Court concluded, cannot be remedied by excluding the evidence at a later stage.²⁹ The Court was not satisfied that the confession was freely and voluntarily made and ordered that it was inadmissible and would not form part of the record on which the court would come to a decision.³⁰

In *Malumo*³¹ the court referred to the South African case *Muchindu*³² wherein the court determined the question whether evidence obtained earlier, during the trial, is relevant in the determination of the issues in the trial-within-a-trial.³³ The Court opined that any party in the criminal trial may during the trial-within-a-trial refer to evidence already led in the main trial and that the court may consider such evidence as may be appropriate.³⁴

2.2 Onus

It is trite law that the onus resort with a litigant, who must persuade the court on a balance of probabilities that he is an aggrieved person and that his fundamental right or freedom has been infringed or threatened.³⁵ The Namibian Constitution distinguishes between fundamental rights and freedoms.³⁶ The difference between a right and a freedom is that a right means that the state must intervene when necessary to protect a person when he exercises the right³⁷ whereas a freedom means that the state must not intervene or interfere when an individual exercises the freedom.³⁸

²⁹ *S v Tjiho* (1) 1990 NR 242 at 246.

³⁰ *S v Tjiho* (1) 1990 NR 242 at 249.

³¹ *S v Malumo* 2010 (1) NR 35.

³² *S v Muchindu* 2000 (2) SACR 313 (W).

³³ *S v Malumo* 2010 (1) NR 35 at 39.

³⁴ *S v Malumo* 2010 (1) NR 35 at 40, referring to *S v Muchindu* 2000 (2) SACR 313 (W) at 317.

³⁵ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 55; see also *S v Vries* 1996 (2) SACR 638 (Nm) at 665-667; *S v Van Den Berg* 1995 NR 23 at 40-41.

³⁶ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 94: "The South African Constitution, both the interim Constitution of 1993 and the final Constitution of 1996 contained in the Constitution of the Republic of South Africa Act No. 108 of 1996, makes no distinction between fundamental rights and freedoms as is the position in Namibia. The general qualification clause in the South African Act applies to both fundamental rights and freedoms."

³⁷ For example, art 14(3) of the Constitution provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

³⁸ For example, art 21(1)(a) of the Constitution guarantees that every person has the right to freedom of speech and expression.

The location of the initial onus is the same for fundamental rights and freedoms. However, whether an applicant must satisfy the court as to the meaning, content and ambit of the particular right or freedom, depends on whether a right or freedom has been violated.³⁹

The Supreme Court in *Alexander*⁴⁰ affirmed the decision in *Africa Personnel Services*⁴¹ that the person who alleges a breach of his constitutional rights must prove the breach. The appellant, in *Alexander*, challenged the constitutionality of section 21 of the Extradition Act.⁴² The Court observed that section 21 of the Namibian Extradition Act permits a person to apply for bail at all stages up until a committal order is made. The applicant pointed out that the position in Namibia is not consistent with extradition legislation in other foreign jurisdictions where an accused is generally permitted to apply for bail up to the stage when he is surrendered to the foreign state. The Court held that the impugned legislation effectively denied applicant the right to bail, which constituted an infringement on his right to liberty.⁴³

In the case of the fundamental freedoms, the initial burden is on the person alleging an infringement to prove the infringement and as part thereof, satisfies the court with regard to the meaning, content and ambit of the fundamental freedom.⁴⁴ In *Kauesa*⁴⁵ the litigant failed to discharge the onus because he could not prove that he claimed the right to freedom of speech which fell within the definition and boundaries of the said freedom, the so-called regulated area. The Court found on the papers that his speech was false, defamatory and gravely injurious and in breach of the fundamental rights of others.⁴⁶

The location of the onus once a person has proved his fundamental freedom has been considered by the High Court and Supreme Court in *Kauesa*.⁴⁷ The High Court held that the

³⁹ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 94-95.

⁴⁰ *Alexander v Minister of Justice* 2010 (1) NR 328.

⁴¹ *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 (SC).

⁴² The Extradition Act 11 of 1998.

⁴³ *Alexander v Minister of Justice* 2010 (1) NR 328 at 365.

⁴⁴ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 96: "This initial onus corresponds to the 'initial onus' referred to by Chaskalson, P, in the decision of the South African Constitutional Court in *S v Mkwanyane and Another*."

⁴⁵ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC).

⁴⁶ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC); see also *S v Van Den Berg* 1995 NR 23 at 41-42 and 44.

⁴⁷ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC); *Kauesa v Minister of Home Affairs* (SA 5/94) [1995] NASC 3.

litigant who contends that the regulation is unconstitutional bears the onus to prove that the legislation is not reasonably justifiable in a democratic state and not on the state to show that it is justifiable.⁴⁸ On appeal the Supreme Court⁴⁹ overruled the High Court decision and held that, once the initial burden is discharged, the burden shifts to the party contending that the law, regulation or act in question providing for the exception or qualification, falls within the reasonable restrictions on the fundamental freedom.⁵⁰

The Namibian courts have in several judgments subsequent to *Kauesa* considered whether the ruling is applicable to fundamental rights. In *Van den Berg*⁵¹ the High Court ruled that the location of the onus may be different where an accused alleged that a fundamental right had been breached. The Court ruled that in the case of fundamental rights the onus should be on the complainant to prove the content of the right and to prove its infringement.⁵² Before it can be held that an infringement has taken place, it will be necessary to define the exact boundaries and content of the alleged fundamental right and the applicant will have to prove that the right or freedom claimed to have been infringed, falls squarely within the definition and boundaries of the said right.⁵³

*Vries*⁵⁴ revisited the question of onus in respect of fundamental rights. The Court first considered the extent to which the ruling of the Supreme Court in *Kauesa* is binding on the High Court. The Court stated that if *Kauesa* was construed to be applicable also to the onus when dealing with fundamental rights the decision is to that extent *obiter* and not applicable.⁵⁵ The decision was not binding because the Supreme Court did not distinguish between the fundamental rights and the freedoms, read with the limitations. The High Court ruled that when dealing with an alleged breach of a fundamental right, in contrast to the freedoms, the initial onus, as well as the overall onus is on the person who alleges a breach.⁵⁶ The rationale was that the Constitution has no limitation clause in regard to

⁴⁸ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 55.

⁴⁹ *Kauesa v Minister of Home Affairs* 1995 NASC 3.

⁵⁰ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC); see also *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 96.

⁵¹ *S v Van Den Berg* 1995 NR 23.

⁵² *S v Van Den Berg* 1995 NR 23 at 44.

⁵³ *S v Van Den Berg* 1995 NR 23 at 40-41.

⁵⁴ *S v Vries* 1996 (2) SACR 638 (Nm) at 666.

⁵⁵ *S v Vries* 1996 (2) SACR 638 (Nm) at 666.

⁵⁶ *S v Vries* 1996 (2) SACR 638 (Nm) at 667.

fundamental rights.⁵⁷ *In casu* the accused not only had to satisfy the court on a balance of probabilities that the provisions of the Stock Theft Act violated his dignity, he also had to prove that cruel, inhuman or degrading punishment should not be imposed on a convicted person.⁵⁸ The High Court judgment was affirmed by the Supreme Court in *The Chairperson of the Immigration Selection Board and Frank*⁵⁹ where the court held that, in regard to fundamental rights, the burden of proof remains on the applicant throughout. The applicant must prove that a fundamental right has been infringed at least in regard to all those fundamental rights where no express qualification or exception is provided for in the wording of the fundamental rights. The Court *obiter* opined that where an express qualification or exception is provided for as in the articles of the Constitution, the burden of proof may shift as in the case of the fundamental freedoms.⁶⁰

3. STANDING REQUIREMENT

The Namibian Constitution provides that only an aggrieved person may rely on the fundamental rights. Standing is limited to aggrieved litigants to avoid court rolls being cluttered with vexatious and frivolous litigation. The question of standing is generally inferred from the language of the infringed fundamental right and in cases where it does not confer standing on a person, the court will dismiss the action on the ground that it is not justiciable.⁶¹ A finding of non-justiciability implies that the litigation does not directly relate to the litigant or that none of his rights or interests are involved or the judgment would not adversely affect his rights, interests or legitimate expectation.⁶² A court of law would not entertain issues which are merely academic or hypothetical and where there was not a real or threatened infringement of a person's rights.

⁵⁷ *S v Vries* 1996 (2) SACR 638 (Nm) at 664-665: "For the same reasons the Namibian position must be distinguished from that in South Africa under the *interim Constitution* dispensation, where fundamental rights and freedoms are lumped together and a limitation clause made applicable to both. See the clear distinction drawn on the basis between the South African and USA position in the decision in *S v Makwanyane*."

⁵⁸ *S v Vries* 1996 (2) SACR 638 (Nm) at 667.

⁵⁹ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 95.

⁶⁰ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 95.

⁶¹ Hinz, Amoo and van Wyk *The constitution at work* at 123-124.

⁶² Hinz, Amoo and van Wyk *The constitution at work* at 123-124.

3.1 Aggrieved Person

The Namibian Constitution provides that an aggrieved person may enforce his constitutional rights in a competent court if his fundamental right or freedom guaranteed by the Constitution has been infringed or threatened.⁶³ This means that a litigant must show that he has standing by either alleging that a right of his was infringed or threatened by an invalid act.⁶⁴ In *Alexander*⁶⁵ the Supreme Court considered and applied this principle. *In casu* the appellant noted an appeal against the court *a quo*'s ruling that his challenge to the constitutionality of a provision in the Extradition Act was not ripe for hearing and therefore premature. The court *a quo* reached this decision after finding that there was no evidence that indicated that a right of the appellant had been threatened or infringed by the legislation. The impugned provision provides that once a person is committed and until he is removed from Namibia such a person may not be granted bail. The state argued the appellant's entitlement to bail may never arise and therefore a determination of the constitutionality of the impugned provision would be merely an academic or hypothetical issue, meaning that there was not a real or threatened infringement on the person's fundamental rights.⁶⁶ On the other hand the appellant argued that the law violated the Constitution and was therefore invalid from its inception. Based on this the appellant submitted that the issue of constitutionality was ripe for hearing.⁶⁷ The Court affirmed the principle that if an individual challenges the legislation on the basis that it is unconstitutional from inception he must still show that he has standing. It was not in dispute that the application of the impugned provision may result in the accused having to spend time in prison as a result of an invalid provision if the court should eventually make a finding of unconstitutionality. The prosecution, realising the danger hereof, submitted that the impugned legislation would be ripe for hearing once a magistrate was authorised to conduct the extradition enquiry and it was certain that the matter would proceed.⁶⁸ The Court opined that the threat of committal and the subsequent *ex lege* application of the impugned legislation is not dependant on whether proceedings will be protected, nor whether there

⁶³ Article 25(2).

⁶⁴ *Alexander v Minister of Justice* 2010 (1) NR 328 at 330.

⁶⁵ *Alexander v Minister of Justice* 2010 (1) NR 328.

⁶⁶ *Alexander v Minister of Justice* 2010 (1) NR 328 at 348.

⁶⁷ *Alexander v Minister of Justice* 2010 (1) NR 328 at 348.

⁶⁸ *Alexander v Minister of Justice* 2010 (1) NR 328 at 349.

would be a committal or not, in deciding whether the question of constitutionality is ripe for hearing.⁶⁹ The evidence revealed that the extradition proceedings had been set in motion by the provisional warrant of arrest and there was no indication that the matter would not run its course from there.⁷⁰ The Court was satisfied that the appellant's constitutional right to liberty was threatened and therefore the issue of the constitutionality of the legislation was ripe for hearing. The committal of the accused was therefore not necessary for the appellant to challenge the constitutionality of the impugned legislation.⁷¹

The Supreme Court in *Africa Personnel Services*⁷² considered whether a juristic person could be an aggrieved person. *In casu* the respondents challenged the applicant's right to seek constitutional review on the basis that it lacked standing. The respondent alleged that the appellant's fundamental rights had not been infringed or threatened by the impugned legislation and therefore the appellant could not claim to be an aggrieved person. The respondent specifically argued that the fundamental freedom on which the appellant relied for protection only vests in natural and not juristic persons.⁷³ The Court adopted a liberal and purposive approach to interpret the fundamental freedom. In assessing the purpose of the freedom the Court referred to its history and background and also to its intended objectives. The Court reasoned that freedoms exclusively apply to natural persons are qualified by words generally associated with natural persons, for example, "men," "women" and "children." In the absence of such a qualification the Court concluded that the phrase "all persons" must be construed to incorporate juristic persons.⁷⁴ The Court held that the applicant, a juristic person, had standing or was an aggrieved person under article 25(2).

3.2 Interested Person

The High Court stated in *Daniel*⁷⁵ that an interested person has standing in cases where his rights are existing, future or contingent. *In casu* the applicant sought an order declaring the minimum sentences provisions in the Stock Theft Act 12 of 1990 unconstitutional and invalid on the basis that the impugned provisions violated his rights to dignity and

⁶⁹ *Alexander v Minister of Justice* 2010 (1) NR 328 at 349.

⁷⁰ *Alexander v Minister of Justice* 2010 (1) NR 328 at 350.

⁷¹ *Alexander v Minister of Justice* 2010 (1) NR 328 at 350.

⁷² *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596.

⁷³ *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 at 624.

⁷⁴ *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596 at 630.

⁷⁵ *Daniel v Attorney-General* 2011 (1) NR 330.

equality.⁷⁶ Although the applicant was not sentenced, the Court found that if the impugned provision were to be unconstitutional some advantage would emerge to the applicant's position with reference to his future or contingent right not to be subject to cruel, inhuman or degrading punishment.⁷⁷ The Court ruled that the applicant is an interested person with an existing, future or contingent right to the determination of the constitutionality or not of the sentences handed down.⁷⁸ The Court accordingly rejected the argument that the application was purely academic or hypothetical.

3.3 Suspects

The Constitution specifically mentions the entitlement of persons arrested and detained to the fundamental rights. However, the Constitution does not expressly make provision for the right of a suspect to enforce any of the rights in the bill of rights. In *Malumo*⁷⁹ the court considered the question whether there was any constitutional duty upon a law enforcement officer to inform a suspect of the existence of a constitutional right. The Court observed that the witness was unsophisticated and therefore would have been ignorant of his constitutional rights or the right to have been warned in terms of Judges' rules. The Court adopted the approach formulated in the South African case of *Sebejan*⁸⁰ and opined that the police was under a duty to warn the accused according to Judge's rule and had a duty to inform him of his constitutional rights.⁸¹ The duty to warn the accused was not dependent on whether the accused person had at that stage been arrested or whether he was still regarded as a suspect.⁸² A suspect is entitled to the same rights as an accused person would have during pre-trial proceedings.⁸³ These rights include the right to legal representation, the right to be presumed innocent, the right to remain silent and the right against self-incrimination. A breach of the Judges' Rules may, for example, influence the determination

⁷⁶ Articles 9 and 10 of the Constitution.

⁷⁷ *Daniel v Attorney-General* 2011 (1) NR 330 at 338.

⁷⁸ *Daniel v Attorney-General* 2011 (1) NR 330 at 337.

⁷⁹ *S v Malumo* (2) 2007 (1) NR 198.

⁸⁰ *S v Sebejan* 1997 (1) SACR 626 (W).

⁸¹ *S v Malumo* (2) 2007 (1) NR 198 at 214.

⁸² *S v Malumo* (2) 2007 (1) NR 198 at 211-213.

⁸³ *S v Malumo* (2) 2007 (1) NR 198 at 214.

whether an incriminating statement had been made voluntarily or not, even though these Rules are administrative.⁸⁴

4. UNCONSTITUTIONALLY OBTAINED EVIDENCE

The question whether unconstitutionally obtained evidence should be admitted has received judicial attention in a number of cases in Namibia.⁸⁵ Other questions that have been raised are: whether a conviction should be quashed if the trial court was guilty of a breach of the appellant's fundamental right or prejudice the accused, whether the accused had a fair trial, and whether the admission of the evidence would bring the administration of justice into disrepute.⁸⁶

4.1 Nature of Exclusionary Rule

The Namibian courts employ a discretionary exclusionary rule. The Supreme Court in *Shikunga*⁸⁷ explained the rationale for adopting a discretionary exclusionary rule. The Court considered whether evidence obtained in conflict with the constitutional rights of an accused would vitiate the proceedings. Dealing with this vexed question the Court balanced two important competing considerations of public interest and policy.⁸⁸ The first consideration is that a guilty person should not be allowed to escape punishment simply because some constitutional irregularity was committed (the so-called truth finding purpose). The second consideration is the public interest in ensuring that the procedures adopted in securing such punishment are fair and constitutional, in other words, that the integrity of the judicial process is upheld.⁸⁹ The Court noted the tensions between these two different considerations and ruled that a constitutional irregularity would not *per se* vitiate legal proceedings.⁹⁰ *Shikunga* is therefore authority that the courts in Namibia employ a

⁸⁴ *S v Malumo* (2) 2007 (1) NR 198 at 212.

⁸⁵ *S v Forbes* 2005 NR 384 at 391; *S v Shikunga* 1997 NR 156 (SC); *S v Kukame* 2007 (2) NR 815; *S v De Wee* 1999 NR 122 (HC); *S v Malumo* (2) 2007 (1) NR 198 (HC); *S v Kapika* (1) 1997 NR 285.

⁸⁶ *S v Forbes* 2005 NR 384 at 391-393.

⁸⁷ *S v Shikunga* 1997 NR 156.

⁸⁸ *S v Shikunga* 1997 NR 156 at 164; see also *S v Forbes* 2005 NR 384 at 393.

⁸⁹ *S v Shikunga* 1997 NR 156 at 164-165.

⁹⁰ *S v Kukame* 2007 (2) NR 815 at 838.

discretionary exclusionary rule to exclude or allow evidence obtained in conflict with the constitutional rights of an accused.⁹¹

Following the approach by the Supreme Court in *Shikunga* the High Court in *De Wee*⁹² expressly rejected the application of an absolute exclusionary rule. *In casu* the accused challenged the admissibility of a confession on the ground that the police had failed to inform him of his right to consult with a legal representative. The accused relied upon the earlier decision in *Kapika*⁹³ where the court ruled that the prosecution had a duty to inform the accused of the right to consult with a legal practitioner during pre-trial procedures and to be informed of the right. The prosecution, on the other hand, argued that the police officers were unaware at the relevant time of this duty. Referring to *Shikunga* the Court confirmed that it is vested with a discretion to determine whether or not those irregularities would result in a failure of justice, which would taint a conviction, prejudice the accused or are of such a fundamental nature that evidence should be excluded.⁹⁴ In exercising its discretion the Court considered the fact that the accused was not aware of his right to consult a legal representative and observed that the accused would suffer a grave injustice if the evidence was included in the trial.⁹⁵ There was no information before the court which satisfied it that it would be fair to admit the confession in the absence of informing the accused of his right to consult with a legal representative. The Court ruled that fairness requires that the confession be excluded.⁹⁶

4.2 Exclusionary Test

In exercising its discretion to exclude or include unconstitutionally obtained evidence the courts proposed a test to guide this determination. The test prescribes that a court must consider the nature of the irregularity and its effect.⁹⁷ Although the test may at times be

⁹¹ *S v Shikunga* 1997 NR 156 at 170; see also *S v De Wee* 1999 NR 122 (HC); *S v Malumo (2)* 2007 (1) NR 198 (HC) at para 88.

⁹² *S v De Wee* 1999 NR 122.

⁹³ *S v Kapika (1)* 1997 NR 285.

⁹⁴ *S v De Wee* 1999 NR 122 at 127.

⁹⁵ *S v De Wee* 1999 NR 122 at 128-129.

⁹⁶ *S v De Wee* 1999 NR 122 at 129.

⁹⁷ *S v Kandovazu* 1998 NR 1 at 8.

helpful to achieve the balance between the conflicting public interest and policy, each case must be determined on its own merits.⁹⁸

4.2.1 Nature of irregularity: fair trial requirement

It is trite law that evidence obtained through a constitutional irregularity that is so fundamental that it can be said that there was in effect no trial, may be excluded.⁹⁹ *Kandovazu*¹⁰⁰ is an example where the Supreme Court applied the principle. The appellant appealed against his conviction on a charge of corruption. He argued in the Supreme Court that the High Court had failed to hold that the magistrate's refusal to order the prosecution to disclose the statements of witnesses in the police docket was an irregularity.¹⁰¹ He further submitted that the court *a quo* erred in finding that he had a fair trial based on the circumstances of the case. Central to the case is the meaning of a fair trial and whether or not it is reconcilable with a blanket docket privilege under the common law.¹⁰² The Court opined that the effect of refusing disclosure of the content of the docket without insisting on the prosecution to justify its objection to the production was to deprive the appellant of a fair trial within the meaning of the Constitution.¹⁰³ The refusal, the Supreme Court held, amounted to a breach of the accused's fundamental rights to a fair trial. The Court stated that if the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice *per se* has occurred.¹⁰⁴ The Court held that the constitutional irregularity negated the core of a fair trial and acquitted the accused without investigating the merits.¹⁰⁵

Similarly the High Court has set aside the conviction of the accused in cases where evidence was obtained through the deliberate and conscious violation of the constitutional right to legal representation and the right against self-incrimination, as well as the right to remain silent;¹⁰⁶ in cases where the accused's express election to exercise his right to a lawyer was simply ignored, alternatively that there was no clear indication beyond a reasonable doubt

⁹⁸ *S v De Wee* 1999 NR 122 at 128.

⁹⁹ *S v Shikunga* 1997 NR 156 at 170.

¹⁰⁰ *S v Kandovazu* 1998 NR 1.

¹⁰¹ *S v Kandovazu* 1998 NR 1 at 2.

¹⁰² *S v Kandovazu* 1998 NR 1 at 4.

¹⁰³ *S v Kandovazu* 1998 NR 1 at 6.

¹⁰⁴ *S v Kandovazu* 1998 NR 1 at 8.

¹⁰⁵ *S v Kandovazu* 1998 NR 1 at 8.

¹⁰⁶ *S v Malumo (2)* 2007 (1) NR 198 at 215-216.

that the accused had changed his mind or waived his right to legal representation before making the confession.¹⁰⁷

4.2.2 Effect on verdict: bring administration of justice into disrepute

The cases in Namibia unequivocally state that a conviction should either stand or be substituted with an acquittal on the merits if the irregularity adversely affects the verdict.¹⁰⁸ In *Shikunga* the Supreme Court adopted and applied this test. *In casu* the accused challenged the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977. Under this section a confession is deemed to be the truth as long as it appears so *ex facie* the document even in circumstances where the prosecution fails to prove that it had been obtained freely and voluntarily, with the accused in his sound and sober senses and without being unduly influenced thereto.¹⁰⁹ The effect of the section was to shift the onus to the accused to prove, on a balance of probabilities, that the confession was made involuntary and freely while he was in his sound and sober senses and without being unduly influenced.¹¹⁰ The section permitted the court to convict an accused whose guilt had not been established beyond reasonable doubt. A conviction under such circumstances constituted a violation of the right to a fair trial in which an accused is presumed innocent until proven guilty.¹¹¹ The Court proceeded to analyse the evidence to determine whether, in the light of the irregularity, the conviction could be upheld.¹¹² The appellant argued that constitutional irregularity was fatal and as such vitiated the conviction. The Court observed from the record of the proceedings that the court *a quo* admitted the confession but was able to convict on the objective facts (which were common cause) rather than relying on the content of the confession.¹¹³ Based on the evidence the Court concluded that the conviction could not be said to be unfair. The Court concluded that to overrule the conviction would not ensure a reinforcement of the constitutional right but would merely be a substitution of form for substance.¹¹⁴

¹⁰⁷ *S v Kukame* 2007 (2) NR 815 at 839.

¹⁰⁸ *S v Shikunga* 1997 NR 156 at 171.

¹⁰⁹ *S v Shikunga* 1997 NR 156 at 163.

¹¹⁰ *S v Shikunga* 1997 NR 156 at 171.

¹¹¹ *S v Shikunga* 1997 NR 156 at 163.

¹¹² *S v Shikunga* 1997 NR 156 at 171.

¹¹³ *S v Shikunga* 1997 NR 156 at 171.

¹¹⁴ *S v Shikunga* 1997 NR 156 at 171-172.

Similarly convictions have been upheld in cases where the State violated the accused's right to be informed of his right to legal representation but the court was satisfied that it did not amount to a failure of justice because of the level of education of the accused and assumption that he would have been aware of that right,¹¹⁵ and where the accused had been informed of his rights by the police at his arrest when taking of the statement.¹¹⁶

5. REAL EVIDENCE OBTAINED THROUGH COMPULSION

The State may obtain real evidence from the accused through compulsion if authorised by legislation or law. For example, section 37 of the Criminal Procedure Act permits a policeman who requests a blood sample from the accused to be taken by a doctor, who may also use force should the suspect refuse.¹¹⁷ Laws, actions and rules of this nature infringe upon the fundamental rights of a person, for example, the right to protection of liberty,¹¹⁸ respect for human dignity,¹¹⁹ privacy¹²⁰ and property.¹²¹

The Namibian Constitution does not have a general limitation clause applicable to fundamental rights,¹²² in contrast with the situation in South Africa and Canada. In Namibia the courts have to establish limits to constitutional rights through a narrow interpretation of the rights themselves. The question whether a rule, legislation or action is constitutionally permissible has for that reason to be determined within the larger issue of the definition of the fundamental right.¹²³

The Namibian courts, as a starting point, look for the meaning, content and ambit of a right or freedom in the words used and their plain meaning.¹²⁴ Where the constitutional provision is not precisely defined the Namibian courts employ a value-test based on the current values of the Namibian people to determine whether there is an infringement of a

¹¹⁵ *S v Bruwer* 1993 NR 219 (HC); see also *S v de Wee* 1999 NR 122 at 124.

¹¹⁶ *S v Forbes* 2005 NR 384 at 394.

¹¹⁷ *S v Eigowab* 1994 NR 192 at 210; see also *S v Vries* 1996 (2) SACR 638 (Nm) at 642.

¹¹⁸ Article 7.

¹¹⁹ Article 8.

¹²⁰ Article 13.

¹²¹ Article 16.

¹²² *S v Vries* 1996 (2) SACR 638 (Nm) at 664.

¹²³ *S v Vries* 1996 (2) SACR 638 (Nm) at 663.

¹²⁴ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 102.

particular right.¹²⁵ In *Vries*¹²⁶ the court supplemented the values test with the proportionality test, particularly in instances where the values test is inadequate. An Act of Parliament, promulgated after the independence of Namibia, is constitutionally permissible if permitted by the particular fundamental rights or freedoms.¹²⁷ The law providing for the limitation shall be a law of general application, not negate the essential content thereof, not be aimed at a particular individual and shall specify the ascertainable extent of such limitation and identify the article on which authority to enact such limitation is claimed to rest.¹²⁸

5.1 Establishing meaning in the wording

The content, meaning and ambit of a fundamental right may be determined by having regard to the dictionary meaning of the words and phrases contained in the fundamental right. The Supreme Court formulated the following basic approach to interpret provisions in the Constitution:

“It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.”¹²⁹

The guideline that the Constitution be interpreted broadly, liberally and purposively does not mean that the courts attribute a meaning whatever they might wish it to mean. The interpretation must be anchored *inter alia* in the language of the provisions of the Constitution.¹³⁰ The reality is that the conclusion will not always be liberal and may be conservative or a mixture of the two.¹³¹ *The Chairperson of the Immigration Selection Board and Frank* is an example of a case in which the Court applied these principles. The respondent conceded that reference to marriage in the Constitution refers to heterosexual

¹²⁵ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178.

¹²⁶ *S v Vries* 1996 (2) SACR 638 (Nm).

¹²⁷ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51.

¹²⁸ Article 22(a) and (b).

¹²⁹ *Government of the Republic of Namibia v Cultura* 2000 1994 (1) SA 407 (NmSC) at 418; *S v Van Den Berg* 1995 NR 23 at 39.

¹³⁰ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 101.

¹³¹ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 102.

marriages but argued that the concept marriage is not limited to heterosexual unions only. The Court reasoned that it was never contemplated that a homosexual relationship could be regarded as the natural and fundamental group unit of society.¹³² The Court stated that marriage is between men and women – not men and men or women and women. The Court further observed that the parties who agreed to the terms of the Constitution must at the time have been aware of the existence of homosexual relationships, but no provision was made for the recognition of such relationships as being equivalent to marriage or at all. This is a further indication that it was never intended to place homosexual relationships on an equal basis with heterosexual marital relationship.¹³³ The Court concluded that the concept marriage does not create a new type of family and the protection extended is limited to the natural and fundamental group unit of society as known at the time as an institution of Namibian society.¹³⁴ The Court rejected the respondents' claim that their right to family life was being infringed.

5.2 Values-Test

The Constitution contains rights which are clearly defined and others which are undefined and indicate that the content of the right and its limits and boundaries be sought in the law.¹³⁵ Apart from this, the rights are not further defined and it is for the courts to define their content and limitations.¹³⁶ In this regard the courts have to determine the fundamental rights' content and limitations by employing a value judgment based on the current values of the Namibian people.¹³⁷ The question to be answered in each case where the court has to make a value judgment is whether or not the alleged infringement constitutionally violates the fundamental right or freedom and is therefore constitutionally impermissible.¹³⁸

The courts have to make a value judgment on the issue of rights infringement and constitutionality. The value judgment may or may not at times coincide with the subjective

¹³² *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 119.

¹³³ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 118.

¹³⁴ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 120.

¹³⁵ *S v Van Den Berg* 1995 NR 23 at 41; see for example Articles 7 and 13.

¹³⁶ Cilliers and Amoo *The role of the court* at 36.

¹³⁷ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271.

¹³⁸ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 111.

norms of any particular judge.¹³⁹ It is important that the subjective views of individual judges be informed by objective factors. Objective factors include, for example, the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having a regard to the emerging consensus of values in the civilised international community which Namibians share.¹⁴⁰ These values are not static, which means the value judgment could vary from time to time. What might have been acceptable in the past may appear to be manifestly unconstitutional today.¹⁴¹

The Supreme Court in *The Chairperson of the Immigration Selection Board and Frank* held that the required information about the norms and values may be obtained, where appropriate, through an evidential enquiry. In the absence of an enquiry, the Court opined, the requirement to consider the Namibian norms and values will become a cliché to which mere lip service is paid.¹⁴² Methods which could be used to obtain the necessary facts for the purpose of the enquiry, include but is not limited to, taking judicial notice of notorious facts; testimony in *viva voce* form before the court deciding the issue; facts placed before the court by the interested parties as common cause; the compilation of special dossiers.¹⁴³

In *Minnies*¹⁴⁴ the court determined the contemporary values at the hand of the right not to be compelled to give evidence against oneself.¹⁴⁵ The State argued that section 218 of the Criminal Procedure Act confers a discretion upon the court to admit or exclude the evidence of a pointing out even when the pointing out forms part of an inadmissible confession or statement, on whatever grounds, even in circumstances where a self-incriminating statement had been beaten out of the accused.¹⁴⁶ The Court found that the accused had indeed been subjected to unlawful methods of interrogation.¹⁴⁷ Considering the admissibility of the evidence the Court observed that the Constitution provides that no

¹³⁹ Cilliers and Amoo *The role of the court* at 23.

¹⁴⁰ Cilliers and Amoo *The role of the court* at 23.

¹⁴¹ Cilliers and Amoo *The role of the court* at 23.

¹⁴² *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 110.

¹⁴³ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 110.

¹⁴⁴ *S v Minnies* 1990 NR 177.

¹⁴⁵ Article 12(1)(f).

¹⁴⁶ *S v Minnies* 1990 NR 177 at 192.

¹⁴⁷ *S v Minnies* 1990 NR 177 at 192.

person shall be compelled to give testimony against him.¹⁴⁸ This provision is peremptory and the court shall not admit into evidence testimony which has been obtained by torture.¹⁴⁹ The Court held that section 218 of the Criminal Procedure Act, 1977 should be interpreted in terms of the inviolable right to dignity in the Constitution.

The Supreme Court in *Namunjepo*¹⁵⁰ after a review of cases in Namibian courts held that the authorities generally agree that to determine whether the right to dignity has been violated, involves a value judgment based on the current values of the Namibian people reflected in its various institutions. The Namibian people share basic values with all civilised countries and therefore it is useful to look at interpretations of other jurisdictions although the determining factor remains the values expressed by the Namibian people as reflected in its various institutions.¹⁵¹

The Namibian parliament, courts, tribal authorities, common law, statute and tribal law, political parties, news media and trade unions, established Namibian churches, as well as other relevant community-based organisations can all be regarded as institutions for the purposes hereof.¹⁵² Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people.¹⁵³

5.2.1 Public opinion as indicator of contemporary values

In several judgments the Namibian High Court¹⁵⁴ equated public interest to the interest of the public. In *Vries*¹⁵⁵ the court held that evidence of current public opinion should be admissible as evidence of current values. *In casu* the Court explained that the contemporary values can be ascertained by taking judicial notice that Parliament passed the legislation for heavier sentences on the ground that the particular crime has escalated, farmers demanding protection from the State and the courts for their fundamental rights to life and

¹⁴⁸ Article 12(1)(f).

¹⁴⁹ *S v Minnies* 1990 NR 177 at 199.

¹⁵⁰ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271.

¹⁵¹ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271.

¹⁵² *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 106.

¹⁵³ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 106.

¹⁵⁴ *S v Van den Berg* 1995 NR 23; *S v Vries* 1996 (2) SACR 638 (Nm); *S v Strowitski* 1994 NR 265; see also *S v Nassar* 1994 NR 233.

¹⁵⁵ *S v Vries* 1996 (2) SACR 638 (Nm).

the security of their property.¹⁵⁶ The Court emphasised that current public opinion should be considered as evidence of current values if the views are well-founded and not transient. The public opinion must be consistent and corroborative of the general trend in society that an increase in crime should be redressed through heavier sentences as means to counteract the crime phenomenon. Applying these principles the Court concluded that it was inconsistent with current public opinion to impose a heavy mandatory sentence (a minimum of three years' imprisonment) in the case of the second conviction, because of a previous conviction in the distant past. This assumption of public opinion, the Court held, is consistent with the norms and values of the civilised community of nations of which Namibia is a part.¹⁵⁷

Public opinion should not be decisive and is definitely not a substitute for a duty vested in the courts to interpret the Constitution and uphold its norms. The court in *Vries* stated that the value of public opinion would differ from case to case, from fundamental right to fundamental right and from issue to issue.¹⁵⁸ This means that in some cases public opinion should receive very little weight, in others it should receive considerable weight. It is for the court to finally decide whether or not public opinion constitutes objective evidence of current community values.¹⁵⁹

In *Nassar*¹⁶⁰ the High Court confirmed that public opinion should not be determinative of the court's decision on the meaning of rights. *In casu* the Court held that the meaning of the right to a fair trial could not be determined through public opinion. The right to a fair trial concerns the rights of the individual and not the protection of the interest of the state. The *ratio* for the holding is that the state has an advantage in a criminal trial; it has access to police force, specialised prosecuting authority and expert witnesses. The state and the accused do therefore not stand on equal footing and the Court concluded that the right to a fair trial ensures that imbalance is redressed.¹⁶¹

¹⁵⁶ *S v Vries* 1996 (2) SACR 638 (Nm) at 672.

¹⁵⁷ *S v Nassar* 1994 NR 233 at 262.

¹⁵⁸ *S v Vries* 1996 (2) SACR 638 (Nm) at 658.

¹⁵⁹ *S v Vries* 1996 (2) SACR 638 (Nm) at 658; see also Cilliers and Amoo *The role of the court* at 31.

¹⁶⁰ *S v Nassar* 1994 NR 233 at 262.

¹⁶¹ *S v Tcoeib* 1999 NR 24 at 262.

The Supreme Court in *The Chairperson of the Immigration Selection Board and Frank* stated that public opinion could be established in properly conducted opinion polls; evidence placed before courts of law and judgments of court; referenda and publications by experts.¹⁶²

5.2.2 Exception to the value test: Absolute rights

The value judgment test is not applicable if the constitutional provision is absolute. In *The Chairperson of the Immigration Selection Board and Frank* the court explained that the concept “absolute” means that there is no general qualification to a freedom and also no specific qualification or exception contained in the right itself or in any part of the Namibian Constitution.¹⁶³ Article 6 is an example of an “absolute” fundamental right where no value judgment is brought into the equation.¹⁶⁴ It reads as follows: “No law may prescribe death as a competent sentence. No court or Tribunal shall have the power to impose a sentence of death upon any person. No execution shall take place in Namibia.”

An example of the practical functioning of this principle is found in the *Corporal Punishment* case.¹⁶⁵ *In casu* the Supreme Court considered the constitutionality of the legislative provisions for corporal punishment. The appellant argued that corporal punishment was in conflict with his fundamental right to dignity. The Court agreed.¹⁶⁶ The Constitution does not permit any derogation from the right to dignity and accordingly the obligation of the state is absolute and unqualified.¹⁶⁷ As a result the Court opined that no questions of justification can ever arise.¹⁶⁸ This meant that even in the case where the provisions of the impugned legislation avoided torture or cruel treatment or punishment, it was still unlawful because it authorises inhuman treatment or punishment or degrading treatment or punishment.¹⁶⁹

¹⁶² *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 107.

¹⁶³ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 103.

¹⁶⁴ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 103.

¹⁶⁵ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178.

¹⁶⁶ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 at 187-188.

¹⁶⁷ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 at 187.

¹⁶⁸ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 at 188.

¹⁶⁹ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178 at 188.

5.2.3 Proportionality test

In *Vries* the court noted that even though minimum sentence provisions in legislation violates the right to dignity of the accused, the value test was not appropriate to assess the constitutionality of such legislation. The Court reasoned that if that was the test every arrest, the fact of being charged, convicted and of any punishment of imprisonment imposed, would be unconstitutional and constitutionally impermissible.¹⁷⁰ The Court opined that a further test is required.¹⁷¹ A review of judgments in the United States of America revealed that the courts when they interpret and apply the prohibition “cruel and unusual punishment” make use of an “independent proportionality review.” This involves analysing whether a particular sentence amounts to an unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offence.¹⁷² The court in *Vries* adopted and applied the proportionality test to determine whether minimum sentence legislation would be unconstitutional and constitutionally impermissible.¹⁷³

(a) Requirements of proportionality test

Various factors have been considered when applying the test and as a result it has not been similarly worded.¹⁷⁴ Notwithstanding, the effect of what is to be considered is clear.¹⁷⁵ The test asks the question whether the limitation constitutes a disproportionate interference. In *Alexander* the court considered the following factors to determine whether the limitation is proportional: limitation must be rationally connected to the objective; the means chosen impair the right as little as possible and the limitation be such that its effect on the fundamental right is proportional to the objective.¹⁷⁶ The South African cases regarding the proportionality test discussed in Chapter 3 are also relevant to Namibian law. These South African sources are not repeated here, but I will refer to them in what follows.

¹⁷⁰ *S v Vries* 1996 (2) SACR 638 (Nm) at 671.

¹⁷¹ *S v Vries* 1996 (2) SACR 638 (Nm) at 673.

¹⁷² *S v Vries* 1996 (2) SACR 638 (Nm) 673; see also *S v Makwanyane* 1995 (3) SA 391 (CC) in which the Constitutional Court of South Africa accepted the proportionality test in part for the purposes of deciding whether the death sentence was constitutionally cruel, and inhuman and/or degrading.

¹⁷³ *S v Vries* 1996 (2) SACR 638 (Nm); *Africa Personnel Services v Government of Namibia* 2009 (2) NR 596.

¹⁷⁴ *S v Vries* 1996 (2) SACR 638 (Nm).

¹⁷⁵ *Alexander v Minister of Justice* 2010 (1) NR 328 at 364.

¹⁷⁶ *Alexander v Minister of Justice* 2010 (1) NR 328 at 364.

(i) Rationally connected to objective

The South African Constitutional Court considered the phrase “rationally connected to the objective” and held that a measure would serve a legitimate objective if it is rationally connected to the purpose of the limitation.¹⁷⁷ The Namibian courts have endorsed this test. In *Alexander* the court held that the state under the *Extradition Act* has a duty to surrender a person to a requesting state after his committal and that it should take all reasonable measures to enable the fulfilling of its duty.¹⁷⁸ The duty arises out of undertaking between states that they will surrender a requested person to the requesting state upon committal.¹⁷⁹ Compliance may in appropriate cases be achieved by depriving the person of his liberty. The Court opined that such a measure would serve a legitimate objective which is rationally connected to the purpose of limitation.¹⁸⁰ Similarly, the courts have held that there is a rational connection: between the enactments by Parliament of a minimum sentence in legislation to curb stock theft¹⁸¹ and between the *prima facie* evidence appearing *ex lege* a confession and the actual voluntariness thereof.¹⁸² On the other hand the courts have not found any rational connection if a court permits the chaining of a prisoner just because he had escaped.¹⁸³

(ii) Not negate the essential content

The phrase “not negate the essential content” formed part of the interim Constitution of South Africa.¹⁸⁴ The meaning implies that an ordinary law cannot effect what amounts to a suspension of a fundamental right or an amendment to the Constitution.¹⁸⁵ The phrase does not form part of the final Constitution. The South African courts, unlike its counterparts in Namibia, do not consider the phrase a factor in the proportionality test.

¹⁷⁷ *Ferreira v Levin and Vryenhoek v Powell* 1996 (1) BCLR 1 (CC) at para 126; *Government of Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 33-34; *Iles* 2007 SAJHR 69 at 83.

¹⁷⁸ *Alexander v Minister of Justice* 2010 (1) NR 328 at 365.

¹⁷⁹ *Alexander v Minister of Justice* 2010 (1) NR 328 at 365.

¹⁸⁰ *Alexander v Minister of Justice* 2010 (1) NR 328 at 365.

¹⁸¹ *Daniel v Attorney-General* 2011 (1) NR 330 at 332.

¹⁸² *S v Titus* 1991 NR 318 at 321-322.

¹⁸³ *Namunjepo v Commanding Officer, Windhoek Prison* 1999 NR 271 at 286.

¹⁸⁴ Sections 33(1)(b).

¹⁸⁵ *Cachalia et al Fundamental rights* 115

Section 21 in the Extradition Act¹⁸⁶ denies a person the right to apply for bail after his committal. In *Alexander* the prosecution justified the blanket prohibition by arguing that it had a duty to surrender a person to be extradited after his or her committal. The Court accepted that the person's right to liberty might give way if circumstances require in order for the state to comply with its duty to surrender the person. The Court was of the view that the legislature did not consider that circumstances might differ between persons and that there might be instances when the state does not require incarceration of the person at least until the surrender is imminent.¹⁸⁷ A blanket prohibition of bail left no scope for the Court to decide this issue on the evidence before it. In the circumstances the Court ruled that the duty of the state cannot override the constitutional right to liberty and it must therefore be rejected.¹⁸⁸ The state's duty to surrender the person after his committal completely trumped the fundamental right.¹⁸⁹ The enactment of a blanket prohibition on the granting of bail set out in the legislation negates the essential content of the right to liberty (right to apply for bail). The court in *Alexander* held that section 21 of the Extradition Act was arbitrary and unfair and accordingly struck it down.¹⁹⁰

(iii) Effects of rights should be proportionate

In order to pass the test of proportionality the legislature must use means that impair the right as minimally and as reasonably possible.¹⁹¹ In the exercise of this judicial discretion the court balances the fundamental rights and interests of the accused with that of the State and the prosecution.¹⁹² Important factors that should be considered are whether evidence has been lawfully obtained and whether the methods used are reasonable.

(aa) Balance of interest and rights

The judicial discretion to be exercised involves a balance between the interest of the state and the fundamental rights of the accused. In *Daniel* the High court accepted the argument

¹⁸⁶ Extradition Act 11 of 1998.

¹⁸⁷ *Alexander v Minister of Justice* 2010 (1) NR 328 at 365.

¹⁸⁸ *Alexander v Minister of Justice* 2010 (1) NR 328 at 366.

¹⁸⁹ *Alexander v Minister of Justice* 2010 (1) NR 328 at 366.

¹⁹⁰ *Alexander v Minister of justice* 2010 (1) NR 328 at 331-332.

¹⁹¹ *Iles* 2007 SAJHR 69 at 84; *Bilchitz* 2011 TSAR 568 at 575; *S v Makwanyane* 1995 3 SA 391 (CC) at para 107; *S v Manamela* 2000 (3) SA 1 (CC) at para 34.

¹⁹² *Daniel v Attorney-General* 2011 (1) NR 330 at 354-355; see also *S v Hausiku and Others* 2011 NAHC 158 at para 15; *S v Shipanga* 2010 NAHC 46.

of the applicant that the minimum sentence legislation is unconstitutional because the legislature has resorted to minimum sentences which are grossly disproportionate. The applicant alleged that Individuals caught and convicted are unfairly and unjustly punished. The sentence meted out is not because the crime deserves such a sentence, but rather to deter others from committing the same crime. Deterrence appears to be the cardinal feature of the minimum sentence regime. People sentenced under the minimum legislation are thus used as instruments of deterrence in violation of their right to dignity. The Court found that the minimum sentences are irrationally severe if compared to the sentences for other equally and more serious crimes.¹⁹³ For these reasons the Court held that the proportionality between the period of imprisonment and the offence should not be sacrificed on the “altar of deterrence.”¹⁹⁴

Likewise in *Hausiku*¹⁹⁵ the High Court held that although the test may be done in search of the truth, there is however a competing interest at stake such as the constitutional rights of the accused to a fair trial before an independent court to be concluded within a reasonable time.¹⁹⁶ In exercising its discretion the Court considered the fact that the state had ample opportunity to secure the saliva samples prior to the application being brought. The Court accordingly dismissed the application.¹⁹⁷

(bb) Lawful and reasonable

The principles of lawfulness and reasonableness set out in the South African judgments of *Gaga*¹⁹⁸ and *Xaba*¹⁹⁹ has been reinforced by the Namibian courts. In *Hausiku*²⁰⁰ the state brought an application in terms of section 37(3) authorising the police to take a sample of the accused’s saliva for purposes of forensic analysis. The first question the Court considered was whether the police are empowered to take samples of the saliva of the accused. The Court concluded that the police with the assistance of a medical practitioner

¹⁹³ *Daniel v Attorney-General* 2011 (1) NR 330 at 354.

¹⁹⁴ *Daniel v Attorney-General* 2011 (1) NR 330 at 354-355; see also *S v Hausiku and Others* 2011 NAHC 158 at para 15; *S v Shipanga* 2010 NAHC 46.

¹⁹⁵ *S v Hausiku and Others* 2011 NAHC 158 at para 15.

¹⁹⁶ *S v Hausiku and Others* 2011 NAHC 158 at para 15.

¹⁹⁷ *S v Hausiku and Others* 2011 NAHC 158 at para 15.

¹⁹⁸ *Minister of Safety and Security v Gaga* 2002 (1) SACR 654 (C).

¹⁹⁹ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

²⁰⁰ *S v Hausiku and Others* 2011 NAHC 158.

are empowered to take a sample of the saliva of the accused.²⁰¹ In *Shipanga*²⁰² the High Court confirmed that the taking of a blood sample is lawful and reasonable. The Court reasoned that the procedure for taking of blood samples is relatively painless, has become wide spread and also a vital tool in the administration of the criminal justice system.

There are no decided cases in Namibia where applications were brought for an order to secure evidence from the accused through more serious medical procedures. Having regard to *Shipanga* and *Hausiku* the courts must when determining applications of this nature balance the interest of the accused against that of the state. Important factors that should be considered are: the evidence must be lawfully obtained and the procedure or method followed to obtain the evidence must be reasonable. Courts will not authorise a medical procedure that holds a risk to the well-being of the accused.

(b) The so-called “Shocking test”

In *Vries* the court applied the so-called shocking-test, some form of the proportionality test, to determine whether a sentence was shocking or startling or disturbingly inappropriate.²⁰³ The test requires the court to ask whether the sentence is so excessive that no reasonable man would have imposed it. O’Linn J in a concurring judgment in *Vries* argues that the shocking test is an attempt to refine the proportionality test adopted by the courts in jurisdictions such as the United States of America, Canada and South Africa, including now the Namibian Supreme and High Courts.²⁰⁴ O’Linn J has no objection to such further refinement but regards it as unnecessary.²⁰⁵

(c) Place of Proportionality test

In *Vries* the court explained the place of the proportionality test in determining whether a law is unconstitutional. The proportionality test is to be regarded as part and parcel of the current values test.²⁰⁶ The proportionality test should be seen as flowing logically from the current values but is a more precise and practical yardstick to measure what is

²⁰¹ *S v Hausiku and Others* 2011 NAHC 158 at para 15.

²⁰² *S v Shipanga* 2010 NAHC 46.

²⁰³ *S v Vries* 1996 (2) SACR 638 (Nm) 643.

²⁰⁴ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC); see also *S v Tcoeib* 1999 NR 24.

²⁰⁵ *S v Vries* 1996 (2) SACR 638 (Nm) 674.

²⁰⁶ *S v Vries* 1996 (2) SACR 638 (Nm) 674.

constitutionally permissible.²⁰⁷ In *Vries* it was applied to measure what is regarded as constitutionally cruel and unusual punishment or unconstitutionally cruel, inhuman and degrading punishment.²⁰⁸ The proportionality test can be applied as an independent exercise of the courts discretion in determining whether a law, rule or action is constitutionally permissible or if a sentence is grossly disproportionate to the severity of an offence.²⁰⁹

5.3. Requirements of Article 22

Article 22 has been described as being unique to the Namibian Constitution because neither such a provision, nor anything resembling it is to be found in the Constitution of any other country.²¹⁰ Article 22 states that any law that provides a limitation²¹¹ must under article 22(a), be authorised by chapter 3 of the Constitution and must be of general application; may not negate the essential content of the right or freedom concerned; may not be aimed at a particular individual. The words any law refers to statutes and excludes the common law.²¹² The provisions of article 22(a) when interpreted broadly, liberally and purposively as laid down by the Supreme Court, is applicable to post and pre-independence statutes.²¹³ Van Wyk *et al* comments as follows on article 22: The words general application has the effect that no victimisation of or vendetta against persons or groups can take place. The authors further state that legislation which encroaches upon the essential content of a right is invalid.²¹⁴

Kauesa is an example of a case where the court had to determine whether legislation complied with the provisions of article 22(a). *In casu* the Court considered the constitutionality of Regulation 58(32) of Police Regulations which forbids comments unfavourably made in public upon the administration of the force or any other Government department. The question the Court had to determine was whether the regulation complied

²⁰⁷ *S v Vries* 1996 (2) SACR 638 (Nm) 674.

²⁰⁸ Cilliers and Amoo *The role of the court* at 23.

²⁰⁹ *S v Vries* 1996 (2) SACR 638 (Nm) 674; see also Cilliers and Amoo *The role of the court* at 24.

²¹⁰ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 65.

²¹¹ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 65.

²¹² *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 65.

²¹³ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 100; see also *Government of the Republic of Namibia v Cultura* 2000 [1994] (1) SA 407 (NmS) at 418F-G.

²¹⁴ Van Wyk, Wiechers and Hill *Namibia Constitutional and International law issues* at 39- 40; *Smith v Attorney General Bophutatswana* 1984 1 SA 196 (BSC).

with the provisions of article 22(a) of the Constitution. In this regard the Court reviewed decisions which dealt with the interpretation of similar statutory regulations and constitutional provisions in other jurisdictions. The Court approved and applied the approaches adopted in the Supreme Court of the United States of America minority decision of *Gasparinetti*,²¹⁵ the majority decision of *Parker*²¹⁶ and the unanimous decision of the European Court of Human Rights in the case of *Engel*.²¹⁷ From the aforesaid authority, it is clear that there is a need within the police department for unity and obedience and an equally strong necessity for public confidence. Accordingly, it is important that subordinates respect their superior officers. In the absence of rules limiting public criticism morale and public confidence in the police, they would likely be undermined. It does not absolutely prohibit criticism. Private communications is permissible but criticism which publicly disparages police policy and superiors are not permitted. Based on these reasons the Court held that Regulation 58(32) complied with article 22(a) of the Constitution in that it is of general application does not negate the essential content of the freedom of speech of expression and is not aimed at a particular individual.²¹⁸

Article 22(b) requires that the legislation must specify the ascertainable extent of such limitation and must identify the provision on which authority to enact the limitation is based.²¹⁹ The statutes contemplated in art 22(b) are those enacted subsequent to the coming into operation of the Namibian Constitution.²²⁰ Van Wyk *et al* state that the words “specify the ascertainable extent of the limitation and the article conferring the authority for the curtailment” ensures legal certainty which is an important factor in the achievement of both procedural and substantive justice.²²¹

²¹⁵ *Gasparinetti v Kerr* (1977) 568 F 2d 311.

²¹⁶ *Parker v Levy* 417 US 733.

²¹⁷ *Engel and Others v The Netherlands* Series A No 22 at 17.

²¹⁸ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 120.

²¹⁹ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 100.

²²⁰ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 65.

²²¹ Van Wyk, Wiechers and Hill *Constitutional and International law issues* at 39- 40.

6. CONCLUSION

Since the relevant constitutional provisions of South Africa and Namibia are not exactly the same, not all interpretations and applications of the exclusionary rule by the courts in Namibia are comparable. Both Namibian and South African courts generally consider the question of admissibility of all types of unconstitutionally obtained evidence by employing the so-called trial-within-a-trial procedure. The procedure ensures that the issues of admissibility and criminal liability of an accused are separated to ensure that the rights to be presumed innocent, to remain silent and not to testify during the trial proceedings are protected. The ruling is interlocutory but a court may on presentation of new evidence reconsider its previous decision. The South African courts have delivered diverse judgments on the question whether or not the accused bears the onus of showing that his rights have been infringed.²²² Despite dissension the South African Courts have consistently applied a “two-phased” approach to determine where the onus lies in respect of both rights and freedoms. The question on who bears the onus under the provisions of the Namibian Constitution depends on whether the alleged violation involves a right or a freedom. In the case of a fundamental right the accused bears the onus throughout. In the case of a freedom the accused bears the initial onus and thereafter it shifts to the state to prove that the infringement was reasonable and justifiable.

Courts in both jurisdictions hold that an applicant must establish the threshold requirements to succeed with an exclusionary remedy. Neither Constitution specifically mentions whether a suspect is entitled to rely on the fundamental rights. The Namibian courts adopted a generous and purposive approach as stated in the South African cases of *Sebejan*²²³ and *Orrie*²²⁴ by holding that a suspect is entitled to rely on the fundamental rights in the Constitution. It is not a requirement in Namibia for the applicant to show that the disputed evidence would not have been obtained “but for” the infringement. The Namibian courts adopted a narrow approach regarding the standing requirement. Article 25(2) is invoked only when a personal constitutional right of the accused is directly breached. This approach is contrary to the Supreme Court of Appeal judgment in *Mthembu*²²⁵ where the

²²² *Director of Public Prosecutions v Viljoen* [2005] 2 All SA 355 (SCA); contra *S v Mgcina* 2007 (1) SACR 82 (T).

²²³ *S v Sebejan* 1997 (1) SACR 626 (W).

²²⁴ *S v Orrie* 2005 (1) SACR 63 (C).

²²⁵ *S v Mthembu* [2008] 3 All SA 159 (SCA).

court held that an accused may challenge the admissibility of unconstitutionally obtained evidence procured in violation of the rights of a third party.

Namibian and South African courts apply a discretionary exclusionary rule. The exclusionary test by the Namibian courts involves a determination of whether admission or exclusion of evidence will affect the fairness of the trial or would be detrimental to the administration of justice. The concept trial fairness is determined by balancing the interest of the accused against the interest of society. In essence the exclusionary test in Namibia requires a determination of the nature of the irregularity and its effect.²²⁶ In Namibia unconstitutionally obtained evidence which is so fundamental that it can be said that there was in effect no trial must be excluded.²²⁷ The interpretation of the concept trial fairness in Namibia appears to be similar to the approach formulated in *Tandwa*²²⁸ as opposed to *Pillay*²²⁹ which advance a two-phased approach. The effect of the one stage approach is that once it is established that the exclusion or admission of evidence would affect trial fairness a further inquiry is unnecessary because the admission or exclusion of evidence of this nature would thus be detrimental to the administration of justice as well. The cases in Namibia unequivocally state that a conviction should either stand or be substituted with an acquittal on the merits if the irregularity brings the administration of justice into disrepute.²³⁰

The obtainment of real evidence through compulsion must be procured lawfully and constitutionally. Laws, rules and conduct will be constitutional if it falls within meaning of the fundamental rights and freedoms. The fundamental rights are defined with limitations, meaning the courts are obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. The South African Constitution deals with the limitation of rights through a general limitation clause. In *Zuma*²³¹ the court stated that this calls for a "two-stage" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in chapter 3 and limitations have to be justified through the application of the limitation clause.

²²⁶ *S v Kandovazu* 1998 NR 1 at 8.

²²⁷ *S v Shikunga* 1997 NR 156 at 171.

²²⁸ *S v Tandwa* 2008 (1) SACR 613 (SCA).

²²⁹ *S v Pillay* 2004 (2) SACR 419 (SCA).

²³⁰ *S v Shikunga* 1997 NR 156 at 171.

²³¹ *S v Zuma* 1995 (2) SA 642 (CC).

The rights and freedoms are defined by referring to the meaning of the words and employing a value test which was supplemented by the proportionality test. During the value test and the proportionality test the court exercise its discretion by means of balancing the interest of the accused against the public interest. Important factors are that the conduct, law or action must be lawful and reasonable. The courts will for example refuse to order the obtainment of evidence through compulsion from the body of a person in circumstances where no statutory authorisation exist as well as where the medical procedure involved pose a real risk to the well-being of the accused.

In Chapter 7, I make conclusions and recommendations based on the comparative study undertaken of the exclusionary jurisprudence in South Africa, Canada, the United States of America and Namibia.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

The constitutionalisation of South Africa started the process of transforming society and its political and legal systems.¹ One of the more important changes brought about is the incorporation of fundamental principles of criminal procedures in the Constitution.² The courts have a duty, as guardians of the Constitution, to safeguard fundamental rights and to prevent manipulation of the criminal justice system by the state.³

An important part of crime investigation is the obtainment of evidence, in the context of this thesis, the obtainment of real evidence. The Constitution imposes standards state agencies must adhere to when exercising powers for purposes of gathering evidence. Section 35(5) of the Constitution is a significant constitutional remedy for the infringement of the constitutional rights. The exclusionary provision does not provide for the automatic exclusion of unconstitutionally obtained evidence. Unconstitutionally obtained evidence must be excluded only if admission (a) renders the trial unfair, or (b) which is otherwise detrimental to the administration of justice.⁴

In common law no person may be compelled to supply evidence that incriminates him, either before or during the trial. In this regard the focus in this thesis is to seek answers to the research questions set out in chapter 1 and repeated here: (1) whether our courts distinguish real evidence from other evidence in section 35(5) applications, (2) whether a clear distinction can be made between real evidence and testimonial or communicative statements?, (3) to what extent has the common law rule survived in the constitutional era- both with respect to its exclusionary and inclusionary aspects?, (4) whether compelled real evidence could be self-incriminating at all?, (5) whether section 35(5) judgments are always

¹ *Shabalala v Attorney- General of Transvaal* 1995 (2) SACR 761 (CC) at para 18.

² *Basdeo Search and seizure* at 1.

³ *Basdeo Search and seizure* at 135.

⁴ *S v Mthembu* 2008 (2) SACR 407 (SCA) at para 25.

consistent and predictable?, and lastly (6) whether the procedures in section 37 of the Criminal Procedure Act, 1977 is constitutional.

The Constitution allows a court when interpreting the Bill of Rights to consider foreign law.⁵ In this regard I have undertaken a comparative study of the exclusionary rule jurisprudence of Canada, the United States of America and Namibia. The comparative analysis highlights the similarities and differences in the approach to the interpretation of the respective exclusionary provisions and also identifies principles which serve as a guide for the future development of section 35(5).

This Chapter consists of conclusions followed by recommendations. I specifically make recommendations on how our courts should interpret section 35(5) and propose legislative amendments to section 37 of the Criminal Procedure Act, 1977.

2. CONCLUSIONS

In this part of the Chapter conclusions are made in respect of the following aspects: the rationale of the exclusionary rule, the procedural requirements, the essential threshold requirements of the exclusionary rule and the factors relevant to the two tests embodied in section 35(5), that is whether admission of unconstitutionally obtained evidence would render the trial unfair (first leg), or otherwise will have a detrimental effect on the administration of justice (second leg).

2.1 Rationale of the exclusionary rule

The scope and impact of the exclusionary rule is determined by its rationale. It is generally accepted that the applicable rationale provides the justification why the exclusionary remedy is applied or not in certain instances.⁶ The question arises whether the appropriate rationale for the exclusionary rule in section 35(5) is the deterrence- or remedial imperative- or judicial integrity rationale when determining the admissibility of unconstitutionally obtained evidence. A comparative study reveals that the courts in the United States of America have exclusively elected the deterrence principle and the Canadian courts

⁵ Section 39(1)(c).

⁶ Mellifont *The derivative imperative* at 17.

emphasised the judicial integrity rationale. A review of the South African case law reveals that our courts do not favour any one of the rationales when determining the admissibility of evidence.

In *Pillay*⁷ the court appears to suggest that the purpose of the exclusionary rule is to deter police misconduct. The Court reasoned that inclusion of the derivative evidence might create an incentive for law enforcement agents to disregard constitutional rights.⁸

In *Tandwa*⁹ the court declared that the objective of section 35(5) is to protect individuals from police conduct in breach of fundamental rights. The real evidence was obtained as a result of assault and torture by the police on the accused. The Court found the rights violations severe because they stemmed from the deliberate and flagrant conduct of the police. The remedial imperative or protective principle served to justify the application of the exclusionary rule.

The Supreme Court of Appeal in *Mthembu*¹⁰ considered the question whether real evidence obtained as a result of torture must be excluded for that reason. Real evidence obtained through torture, would amount to involving the judicial process in moral defilement which would compromise the integrity of the judicial process and dishonour the administration of justice. Central to the judicial integrity rationale is the objective to protect the integrity of the justice system. The real evidence was for these reasons excluded.¹¹ Similarly in *Tandwa* the Supreme Court of Appeal excluded real evidence because inclusion of the evidence would mean that the court is associating itself with barbarous and unacceptable conduct.¹²

The Supreme Court of Appeal has clearly employed one or a combination of the deterrence-remedial imperative- or judicial integrity rationale to justify the exclusion of unconstitutionally obtained real evidence.¹³ Davies¹⁴ supports this approach when he argues that the focus should not be to select any specific rationale for the exclusionary rule

⁷ *S v Pillay* 2004 (2) SACR 419 (SCA).

⁸ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 98.

⁹ *S v Tandwa* 2008 (1) SACR 613 (SCA).

¹⁰ *S v Mthembu* 2008 (2) SACR 407 (SCA).

¹¹ *S v Mthembu* 2008 (2) SACR 407 (SCA); see also *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA).

¹² *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 89 and 120.

¹³ *S v Mthembu* 2008 (2) SACR 407 (SCA); *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Pillay* 2004 (2) SACR 419 (SCA).

¹⁴ Davies 2002 *Criminal LQ* 21.

when determining the admissibility of unconstitutionally obtained evidence.¹⁵ He submits that the proper approach should be to examine the common theme that runs through each of the three rationales, namely that of taking rights seriously. He argues that if rights are not taken seriously none of the above principles can justify the exclusion of evidence obtained in violation of the Constitution.¹⁶

2.2 Procedural matters

The appropriateness of the trial- within-a-trial procedure is examined, as well as the aspect of the location of the threshold burden. The argument in respect of the trial-within-a-trial procedure and the location of the onus is not affected when determining the admissibility of unconstitutionally obtained real evidence.

2.2.1 Procedure under section 35(5)

In the South African and Namibian jurisdictions challenges to the admissibility of unconstitutionally obtained evidence are usually dealt with during a trial-within-a-trial procedure. In the USA and Canada admissibility is challenged by means of a motion to suppress or pre-trial motion which is launched at the start of the trial or once an indictment has been served. Our courts have in the past permitted the challenge to address the question of admissibility by means of pre-trial motion. The Constitutional Court has however discouraged pre-trial applications to determine the admissibility of evidence when it is aimed exclusively to circumvent the exclusionary rule or if it delays finalisation of criminal proceedings.¹⁷

The proceedings share similar characteristics. During pre-trial motions and trial-within-a-trial proceedings courts would be asked to review the method by which the evidence was obtained and to determine whether the admission of the evidence is constitutional. The admissibility of evidence is challenged by means of the exclusionary rule. The procedure separates the admissibility issue from the assessment of the criminal liability to ensure that the rights to be presumed innocent, to remain silent and not to testify during the trial

¹⁵ Davies 2002 *Criminal LQ* 21.

¹⁶ Davies 2002 *Criminal LQ* 21 at 32.

¹⁷ *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 ZACC 13 at para 13; see also Ally 2012 *PELJ* 476 at 482.

proceedings are protected.¹⁸ As a result the testimony of an accused concerning admissibility could not be included when considering the issue of his guilt.¹⁹ A ruling on the admissibility or otherwise of evidence must follow at the conclusion of the trial-within-a-trial or pre-trial motion before proceeding with evidence in the main trial.

Different procedural rules are applicable to the proceedings. Because a trial-within-a-trial procedure is interlocutory a trial court may be called upon during any stage of the trial to reconsider the admissibility issue based on new facts that arose during the trial.²⁰ An accused in a criminal trial may during the trial-within-a-trial refer to evidence already led in the main trial.²¹ A ruling, during a pre-trial motion, in respect of the admissibility of evidence is final.²² A party is however entitled to a redetermination of the admissibility of evidence at his trial, only if new evidence comes to light which was unavailable at the time of the original hearing through no fault of the movant.²³

2.2.2 The threshold onus

In South Africa two dominant views exist on the questions of the incidence and nature of the threshold burden under section 35(5). The central question is whether the onus resorts with an applicant to prove a rights violation.

In *Viljoen*²⁴ the Supreme Court of Appeal stated that an accused bears the burden of showing that the police violated his constitutional rights in the process of procuring the evidence. A comparative overview of the threshold burden requirements in Namibia,²⁵ USA²⁶ and Canada²⁷ reveal that the applicant also bears the onus of establishing a constitutional violation. In Namibia the onus resorts with the applicant who must persuade the court on a balance of probabilities that he is an aggrieved person and that his fundamental right or

¹⁸ *Ally Constitutional exclusion* at 175-176.

¹⁹ Schwikkard and Van der Merwe *Principles of evidence* at 259.

²⁰ *Ally Constitutional exclusion* at 407 and 535.

²¹ *S v Malumo* 2010 (1) NR 35 at 40 referring to *S v Muchindu* 2000 (2) SACR 313 (W) at 317.

²² *Ally Constitutional exclusion* at 407.

²³ LaFave and Isreal *Criminal Procedure* 515; see also *Brinegar v US* 338 US 160, 162-163 (1949).

²⁴ *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA).

²⁵ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 55; *Alexander v Minister of Justice* 2010 (1) NR 328.

²⁶ *Alderman v US* 394 US 165, 183 (1969).

²⁷ *R v Collins* [1987] 1 SCR 265 at para 30.

freedom has been infringed or threatened.²⁸ The courts in Canada interpreted the phrase “if it is established” in section 24(2) that the accused bear the onus in showing on a balance of probabilities a Charter violation. In the USA the onus resorts with the applicant to prove the threshold requirements including rights infringements.

The approach in *Viljoen* and the assessment of the comparative study does not accord with a generous and purposive interpretation of section 35(5). The words in section 35(5) do not support an interpretation that the accused should bear the onus and moreover the approach does not protect the right to remain silent and the privilege against self-incrimination.²⁹ Accordingly, I support the following approach suggested by *Mgcina*³⁰ and elaborated on by Schwikkard and Van der Merwe:³¹

1. The accused should allege but need not prove a rights violation and that the evidence should be excluded;
2. Failure by the prosecution to prove beyond reasonable doubt any factual matter will result in the accused receiving the benefit of the doubt; and
3. When the court finds that evidence has been unconstitutionally obtained it is required to make a value judgment on whether the admission would result in one of the consequences identified in section 35(5). Based on this approach there can be no question of an onus in respect of this decision.

2.3 Threshold requirements

The threshold requirements explored are: the beneficiary of the exclusionary rule, the connection requirement, the aspect of standing and the violation of a constitutional right. The threshold requirements are not affected by the nature of the evidence, more specifically real evidence.

²⁸ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC) at 55; see also *S v Vries* 1996 (2) SACR 638 (Nm) 665-667; *S v Van Den Berg* 1995 NR 23 at 40-41.

²⁹ *S v Zuma* 1995 BCLR 401 (CC) at para 33; Ally 2010 SACJ 22 at 35.

³⁰ *S v Mgcina* 2007 (1) SACR 82 (T).

³¹ Schwikkard and Van der Merwe *Principles of evidence* at 260-261.

2.3.1 Beneficiaries

The question posed under this heading is whether a “suspect” is entitled to rely on section 35(5) given that section 35 does not explicitly mention that suspects may rely on the rights in the Bill of Rights.

In *Khan*³² the court stated that section 35 rights are not applicable to suspects because suspects are sufficiently protected by the application of the provisions of the Judges' Rules. The literal and legalistic interpretation of the concepts “arrested” and “detained” in *Khan* should not be followed. The generous and purposive interpretation in the *obiter* decision in *Sebejan*³³ is supported. *In casu* the court stated that section 35 should be interpreted to also include protection for a suspect. The courts in Namibia adopted a similar approach.³⁴ This approach is aligned to the primary rationale of the exclusionary rule which is the protection of judicial integrity while also serving a deterrent effect by influencing future police conduct.

A person is a suspect if the police, in the absence of certain proof, believe that he is guilty of a crime or he is suspected of a crime or offence.³⁵ The High Court delivered conflicting judgments on the nature of the belief required by the police. In *Sebejan*³⁶ the court stated that the belief can be “some apprehension” that a person might have committed an offence.³⁷

I agree with the approach in *Khan*.³⁸ The Court held that the phrase “some apprehension” set the standard too low and suggested instead a “reasonable apprehension.”³⁹ The question whether an individual is in fact a suspect is therefore answered by means of an objective inquiry.⁴⁰ In this process the subjective (belief of the police) should be considered to ascertain whether the person is a suspect.⁴¹

³² *S v Khan* 2010 (2) SACR 476 (KZP).

³³ *S v Sebejan* 1997 (1) SACR 626 (W).

³⁴ *S v Malumo* (2) 2007 (1) NR 198.

³⁵ Naudé 2009 SAPL 506 at 511.

³⁶ *S v Sebejan* 1997 (1) SACR 626 (W).

³⁷ *S v Sebejan* 1997 (1) SACR 626 (W) at 631-632.

³⁸ *S v Khan* 2010 (2) SACR 476 (KZP); see also *S v Ndlovu* 1997 (12) BCLR 1785.

³⁹ *S v Khan* 2010 (2) SACR 476 (KZP) at 484; *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792B.

⁴⁰ *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792; see also *Ally Constitutional exclusion* at 153.

⁴¹ *Ally Constitutional exclusion* at 153.

The concept “suspect,” is not sufficiently broad to protect a suspect who incriminates himself because he feels obliged to respond to police questioning. The “suspect” in these situations should, like a detainee, be warned of his rights, even though he was strictly speaking not detained at the time of questioning.⁴² It is submitted the courts should in these situations employ the interpretation of the concepts “detained” in Canada⁴³ and “seized” in the USA.⁴⁴ Psychological restraint is manifested in Canada if the subject is legally obliged to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he has no choice but to comply.⁴⁵ In the USA a person is seized either by the application of physical force,⁴⁶ however slight, or where that is absent, submission to an officer's show of authority to restrain the subject's liberty.⁴⁷ In Canada and the USA the courts apply an objective test to determine if a reasonable person would have concluded that his right to choose how to interact with the police had been removed or whether a show of authority constitutes a seizure. The question is whether the police conduct taken as a whole supports a reasonable conclusion that the individual had no choice but to comply. The presence of detention should be determined by taking into account (1) the objective facts of such encounters; (2) the perception of the police in initiating the encounter, (3) whatever information the police possess at the time.⁴⁸

Legal commentators agree that “informational duties” should arise the moment the police embark on an adversarial relationship with suspects.⁴⁹ An adversarial relationship will not necessarily emerge when an individual becomes a suspect but happens when an individual is required to establish or disprove the existence of evidence linking them to the crime.⁵⁰ The test is objective. A relevant factor would be the subjective belief of the person suspected of wrongdoing at the time of his or her interaction with the police.⁵¹

⁴² Naudé 2009 SAPL at 506 -507.

⁴³ *Ally Constitutional exclusion* at 490.

⁴⁴ See in general Naudé 2009 SAPL 506.

⁴⁵ *R v Grant* [2009] 2 SCR 353.

⁴⁶ *California v Hodari* 499 US 621, 624-625 (1991); *Terry v Ohio* 392 US 1, 19 n 1 (1968).

⁴⁷ *US v Mendenhall* 446 US 544 (1980); *California v Hodari* 499 US 621 (1991).

⁴⁸ *R v Grant* [2009] 2 SCR 353 at para 180; see also *US v Mendenhall* 446 US 544, 554 (1980).

⁴⁹ *Ally* 2010 CILSA 239 at 259; *Ally Constitutional exclusion* at 150; Naudé 2009 SAPL 506.

⁵⁰ *Ally* 2010 CILSA 239 at 259; *Ally Constitutional exclusion* at 150; Naudé 2009 SAPL 506.

⁵¹ Naudé 2009 SAPL 506.

2.3.2 Connection requirement

Section 35(5) implies that a link between the constitutional breach and the discovery of the evidence be established to satisfy the threshold requirement “obtained in a manner.” In the absence of such a link the accused would not be entitled to the exclusionary remedy.⁵² The courts have not been consistent on the nature of the link required to meet the connection requirement.

The High Court in *Orrie*⁵³ adopted a literal approach and held that a strict or direct causal link is required. The causal connection is satisfied when an applicant establish that the impugned evidence would not have been discovered “but for” the violation. The South African Supreme Court in *Pillay*⁵⁴ rejected the notion that a causal connection requirement is determinative of the connection requirement. This approach is aligned to a purposive and generous approach when interpreting the phrase “obtained in a manner.” Based on these cases the court could either apply a temporal sequence or causal connection test, whichever is the stronger, to satisfy the threshold requirement. A temporal sequence implies that the unconstitutionally obtained evidence was obtained after the rights violation. When the infringement forms part of a chain of events that leads to the discovery of evidence an important aspect of the threshold equation is whether the link is sufficient between the discovery and the violation.⁵⁵ In other words the link between the breach of the fundamental right must not be “too remote” from the discovery of the evidence. The strength of both the temporal and the causal connection is undertaken on a case-by-case basis.

A comparative review of section 24(2) reveals that the “obtained in a manner” requirement could be satisfied by means of a strict causation test (obtained as a direct result of a Charter violation), a relationship of temporality (obtained in the course of a larger transaction in which a Charter violation occurred) or contextual circumstances (evidence linked through association).⁵⁶ The contextual connection test involves an analysis of all the circumstances

⁵² *Ally Constitutional exclusion* at 163.

⁵³ *S v Orrie* 2005 (1) SACR 63 (C).

⁵⁴ *S v Pillay* 2004 (2) SACR 419 (SCA); see also *S v Tandwa* 2008 (1) SACR 613 (SCA); *S v Mthembu* [2008] 3 All SA 159 (SCA).

⁵⁵ *S v Mthembu* [2008] 3 All SA 159 (SCA).

⁵⁶ *R v Plaha* (2004) 24 CR (6th) 360, 188 CCC (3d) 289; *R v Wittwer* [2008] 2 SCR 235; *R v Flintoff* (1998) 16 CR

relevant to the evidence gathering to determine the connection requirement.⁵⁷ Ally suggests that the approach in the interpretation by the Supreme Court of Appeal in *Pillay*⁵⁸ and *Mthembu*⁵⁹ of the connection requirement serves to achieve an analogous purpose as that of the Canadian contextual connection requirement.⁶⁰ The courts in Canada employ a proximity analysis to determine the strength of the connection between the evidence obtained and the Charter breach.⁶¹ In situations where the connection is tenuous or too remote the evidence may not have been obtained in a manner that infringes or denies Charter rights.⁶² The issue of “strength” of the connection is a question of fact and should be determined on a case by case basis.⁶³

In the USA the attenuation doctrine recognises an exception to the exclusionary remedy if the connection between the constitutional breach and the discovery of the evidence becomes so attenuated (weak). The ratio for the exception is that the deterrent effect of the exclusionary rule no longer justifies the social costs.⁶⁴ There are two forms of attenuation.⁶⁵ The first is based on the nature of the causal link. Factors relevant to a determination of nature of the causal link: a constitutional violation was a “but-for-cause” of obtaining evidence, the temporal proximity of the illegality and the illegal evidence, the presence of intervening circumstances, the purpose and flagrancy of the misconduct and the willingness of the witness to testify.⁶⁶ Secondly, the discovery of evidence would be attenuated if exclusion of evidence would not further the purposes of the infringed fundamental right.⁶⁷

2.3.3 Standing threshold requirement

The research question explored in this part of the thesis is whether a person may rely on the exclusionary remedy when the rights of an innocent third party (and not that of the

(5th) 248 (Ont CA).

⁵⁷ Ally 2011 *Stell* LR 376 at 379.

⁵⁸ *S v Pillay* 2004 (2) SACR 419 (SCA).

⁵⁹ *S v Mthembu* [2008] 3 All SA 159 (SCA).

⁶⁰ Ally 2011 *Stell* LR 376 at 395.

⁶¹ *R v Strachan* [1988] 2 SCR 190.

⁶² *R v Strachan* [1988] 2 SCR 190.

⁶³ *R v Goldhart* [1996] 2 SCR 463 at para 35-40.

⁶⁴ *Nardone v US* 302 US 379 (1937); see also Schwikkard and Van der Merwe *Principles of evidence* at 195.

⁶⁵ *Hudson v Michigan* 547 US 586, 593 (2006); Cammack 2010 *American J Comp L* 631 at 645.

⁶⁶ *Wong Sun v US* 371 US 471 (1963); *Brown v Illinois* 422 US 590 (1975); *US v Ceccolini* 435 US 268, 276 (1978); *Segura v US* 468 US 796 (1984); *USCA Const Amend 4 US v Gaines* 668 F 3d 170 (4th Cir 2012).

⁶⁷ *Hudson v Michigan* 547 US 586 (2006); Cammack 2010 *American J Comp L* 631 at 645.

accused) had been infringed and the state seeks to rely on this evidence at the trial to secure a conviction.

The courts in Canada, USA and Namibia adopted a narrow interpretation to the standing requirement.⁶⁸ The ratio is that constitutional rights are considered to be personal rights. Standing is usually inferred from the language of the infringed fundamental right and in cases where it does not confer standing on a person the court will dismiss the action on the ground that it is not justiciable.⁶⁹ The exclusionary remedy therefore applies only to evidence obtained in contravention of the applicant's rights and cannot be claimed in circumstances where the right of a third party is violated.

The South African courts should not follow the decisions in Canada, USA and Namibia. The liberal approach adopted by the Supreme Court of Appeal in *Mthembu*⁷⁰ should be followed. The Court held that a person is entitled to the exclusionary remedy even in cases where evidence was obtained from a third party.⁷¹ Legal commentators agree that the "standing" requirement should not be determinative of the threshold requirement in section 35(5)⁷² for the following reasons: the exclusionary remedy is not a personal remedy,⁷³ the narrow interpretation of the threshold requirement has the potential to frustrate the efficiency of the exclusionary remedy provided by section 35(5);⁷⁴ the words of the provision do not support such a restrictive interpretation,⁷⁵ the liberal interpretation of standing is closely aligned to the primary rationales of the section 35(5),⁷⁶ and the goal of protecting the fundamental rights of vulnerable members of society cannot be achieved should an accused not be able to satisfy the threshold requirement in section 35(5).⁷⁷

⁶⁸ *R v Edwards* [1996] 1 SCR 128; *Alderman v US* 394 US 165, 171 (1969); *S v Malumo* (2) 2007 (1) NR 198.

⁶⁹ Hinz, Amoo and van Wyk *The constitution at work* at 123-124: Non-justiciability implies that the litigation does not directly relate to the litigant or that none of his rights or interests are involved or the outcome of which would not adversely affect his rights, interests or legitimate expectation.

⁷⁰ *S v Mthembu* [2008] 3 All SA 159 (SCA).

⁷¹ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 27.

⁷² Schwikkard and Van der Merwe *Principles of evidence* at 221; Naudé 2008 *SAPL* 166 at 177.

⁷³ Schwikkard and Van der Merwe *Principles of evidence* at 222; Naudé 2008 *SAPL* 166 at 178.

⁷⁴ Ally 2011 *Stell LR* 376 at 392.

⁷⁵ Zeffertt and Paizes *Law of evidence* at 739; Van der Merwe 1992 *Stell LR* 173 at 187.

⁷⁶ Ally 2011 *Stell LR* 376 at 391-392; *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 26; Ally *Constitutional exclusion* at 192-193; Steytler *Constitutional criminal procedure* at 38; Schwikkard and Van der Merwe *Principles of evidence* at 221- 222; Ally 2011 *Stell LR* 376 at 391-392.

⁷⁷ See in general Ally *Constitutional exclusion* at 493.

2.3.4 Violation of the right

Section 37 of the Criminal Procedure Act, 1977 which authorises the compulsory ascertainment of bodily features, may violate the right to privacy, the right to dignity, not to be tortured and conceivably even the right to property. The South African and Canadian Constitution and Charter respectively deal with the limitation of rights through a general limitation clause. The courts apply a "two-stage" approach. The first-stage involves interpreting the right which involves a determination of the scope of the right and whether the law or conduct breached the right. A broad rather than a narrow interpretation is given to the fundamental rights enshrined in the Constitution. The second stage is triggered only if there is an infringement. A court must then consider whether the law or conduct is justifiable under the limitation clause.⁷⁸

(a) Objective reasonableness of a right

In Canada and South Africa the "nature of the right" factor involves the determination of the scope of the fundamental right and whether it has been infringed. To determine whether a right has been breached a person must prove that he has a subjective expectation of privacy that society is prepared to recognise as objectively reasonable.⁷⁹ The subjective expectation component recognises that the right interest cannot be claimed if the party consented to having his right invaded. The objective reasonableness is assessed on a case by case basis in which the individual's rights interests are weighed against society's interest in the conduct, law or rule.⁸⁰ In this regard the reasonable expectation would be determined on an assessment of the totality of all circumstances.⁸¹

The judgments of *Gaqa* and *Xaba* provide an example of how the courts applied this principle when determining the reasonable expectation where evidence is required only to

⁷⁸ *S v Makwanyane* 1995 3 SA 391 (CC) at para 100-102; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) 437 at para 17-18; *S v Zuma* 1995 (2) SA 642 (CC).

⁷⁹ *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) 1239; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) at 235; *Basdeo Search and seizure* at 41; see also *R v Collins* [1987] 1 SCR 265; *R v Edwards* [1996] 1 SCR 126; *Hunter v Southam Inc* [1984] 2 SCR 145.

⁸⁰ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); *Winston v Lee* 470 US 753 (1985).

⁸¹ See in general *R v Buhay* [2003] 1 SCR 631; *R v Edwards* [1996] 1 SCR 128; *R v Tessling* [2004] 3 SCR 432; *US v Gomez* 16 F3d 254 (8th Cir 1994); *R v Krist* (1995) 100 CCC (3d) 58 (BCCA); *R v Evans* [1996] 1 SCR 8; *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C); *Winston v Lee* 470 US 753 (1985).

be discovered by surgery under section 37 of the Criminal Procedure Act, 1977. In *Gaqa*⁸² the court held that the reasonableness of surgical procedures depended on a case by case approach in which the individual's interests in privacy and security are weighed against society's interest in conducting the procedure.⁸³ The Court assessed the individual's interest by considering the following factors: the bullet was lodged in the respondent's leg (thigh), according to the orthopaedic surgeon, the bullet could be removed through a simple procedure under general anaesthetic and the police alleged that in the absence of the bullet there would be no other evidence against the respondent.⁸⁴ These factors were weighed against the following public interests: The Court observed that a refusal of an order would result in serious crime remaining unsolved, law enforcement would be stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crime. Although the intrusion was substantial, the Court concluded that the community interest must prevail in this case. The Court found that the interest of society overshadowed the interest of the respondent and ordered the removal of the bullet.⁸⁵ On the other hand the court in *Xaba*⁸⁶ refused to give a similar order. Although the facts in *Xaba* were similar to *Gaqa* the court did not consider itself bound by the *Gaqa*. The Court did not comment on *Gaqa's* analysis of reaching a balance between the interests of the individual and the interests of the community. However, the Court emphasised that the answer to this complex problem of reaching a balance between the interests of the individual and the interests of the community, in having crimes solved by using surgical intervention posed by similar cases like this should be dealt with by the legislature.⁸⁷

In the USA "reasonableness" is determined on a case-by-case basis. In *Schmerber*⁸⁸ the court considered the question whether the means and procedures employed during the taking of a blood sample respected the relevant Fourth Amendment standards of reasonableness.⁸⁹ To determine if the procedure meets the reasonableness standard the individual's interests in privacy and security are weighed against society's interests in

⁸² *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

⁸³ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C).

⁸⁴ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 659.

⁸⁵ *Minister of Safety and Security v Gaqa* 2002 (1) SACR 654 (C) at 659.

⁸⁶ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

⁸⁷ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 714-715.

⁸⁸ *Schmerber v California* 384 US 757 (1966); see also Schwikkard and Van der Merwe *Principles of evidence* at 135-136, 238-239.

⁸⁹ *Schmerber v California* 384 US 757, 768 (1966).

conducting the procedure. Considering the privacy interest the Court held that the test was reasonable in the sense that such tests are common place and involve virtually no risk, trauma or pain and that the blood was taken by a physician in a hospital environment according to accepted medical practices.⁹⁰ Weighed against the privacy interest is the community's interest in fairly and accurately determining guilt or innocence. The evidence revealed that a blood test is effective to determine the degree to which an accused is under the influence, there had been a clear indication that the extraction would produce evidence of crime (defendant was intoxicated while driving), and the blood test was of vital importance to prove the crime.⁹¹ The Court concluded that the compelled blood test was reasonable for Fourth Amendment purposes.⁹² The Court extended the *Schmerber* framework to the context of court-ordered surgical intrusions.⁹³ In *Winston*⁹⁴ the prosecution brought an application for an order directing the accused to undergo surgery using local anaesthetic to remove the bullet. The Court reasoned that the competing interests that arise in extracting blood from a suspect (*Schmerber*) are similarly raised when a suspect undergoes surgery for the removal of bullets. The following personal circumstances were taken into account: the extent to which the procedure threatens the individual's safety or health and the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Considering the community's interest the Court observed that the evidence was not important to the prosecution's case and the state had available substantial evidence to prove its case.⁹⁵ The Court ruled that to compel surgery would be an unreasonable search under the Fourth Amendment and would violate the accused right to be secure in his person.⁹⁶

In Namibia the courts have to establish limits to constitutional rights through a narrow interpretation of the rights themselves. The question whether a rule, legislation or action is constitutionally permissible has for that reason to be determined within the larger question

⁹⁰ *Schmerber v California* 384 US 757, 771 (1966).

⁹¹ *Schmerber v California* 384 US 757, 771 (1966); see also Minton 1978 *Missouri LR* 133 at 136.

⁹² *Schmerber v California* 384 US 757, 771 (1966).

⁹³ Gitles 1985 *The journal of criminal law and criminology* 972 at 982.

⁹⁴ *Winston v Lee* 470 US 753 (1985).

⁹⁵ *Winston v Lee* 470 US 753, 761-764 (1985).

⁹⁶ *Winston v Lee* 470 US 753, 766 (1985); see also *Rochin v California* 342 US 165 (1952); Gitles 1985 *The journal of criminal law and criminology* 972 at 985.

of the definition of the fundamental right.⁹⁷ The rights and freedoms are defined by referring to the meaning of the words⁹⁸ or through a value test⁹⁹ which is supplemented by the proportionality test. During the value test and the proportionality test the court exercise its discretion by means of balancing the interest of the accused against the public interest. The principles of lawfulness and reasonableness set out in the South African judgments of *Gaga*¹⁰⁰ and *Xaba*¹⁰¹ has been reinforced by the Namibian courts. In *Hausiku*¹⁰² the state brought an application in terms of section 37(3) authorising the police to take a sample of the accused's saliva for purposes of forensic analysis. The Court concluded that the police with the assistance of a medical practitioner are empowered to take a sample of the saliva of the accused.¹⁰³ In *Shipanga*¹⁰⁴ the High court confirmed that the taking of a blood sample is lawful and reasonable. The Court reasoned that the procedure for taking of blood samples is relatively painless, has become wide spread and also a vital tool in the administration of the criminal justice system. There are no decided cases in Namibia where applications were brought for an order to secure evidence from the accused through more serious medical procedures. Having a regard to *Shipanga* and *Hausiku* the courts must balance the interest of the accused against that of the state. Important factors that should be considered are: the evidence must be lawfully obtained and the procedure or method followed to obtain the evidence must be reasonable. Courts will not authorise a medical procedure that holds a risk to the well-being of the accused.

The Supreme Court in Canada, in *Edwards*¹⁰⁵ held that courts examine all the circumstances in deciding whether an individual has a reasonable expectation of privacy.¹⁰⁶ *In casu* the court held that a reasonable expectation of privacy would be determined on an assessment of the totality of circumstances which would include, circumstances such as the accused's presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate

⁹⁷ *S v Vries* 1996 (2) SACR 638 (Nm) 663.

⁹⁸ *The Chairperson of the Immigration Selection Board and Frank and Another* 2001 NASC 1 at 102.

⁹⁹ *Ex Parte Attorney-General: In Re Corporal Punishment* 1991 NR 178.

¹⁰⁰ *Minister of Safety and Security v Gaga* 2002 (1) SACR 654 (C).

¹⁰¹ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

¹⁰² *S v Hausiku and Others* 2011 NAHC 158.

¹⁰³ *S v Hausiku and Others* 2011 NAHC 158 at para 15.

¹⁰⁴ *S v Shipanga* 2010 NAHC 46.

¹⁰⁵ *R v Edwards* [1996] 1 SCR 128; see also *R v Plant* [1993] 3 SCR 281.

¹⁰⁶ *R v Edwards* [1996] SCR 128; *Pink and Perrier Crime to punishment* at 471.

access, existence of a subjective expectation of privacy and the objective reasonableness of the expectation.¹⁰⁷

(b) Limitation of rights

During the second stage a court must consider whether the violation of the right is justifiable in terms of the limitation clause of the Constitution. In Canada and South Africa the limitation must meet two requirements: (1) it must constitute a law of general application and must be, (2) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁰⁸

(i) “Law of general application”

The “law of general application” requirement arises from an important principle of the rule of law, namely, that rules should be stated in a clear and accessible manner.¹⁰⁹ The limitation must be authorised by a law that must be of general application. A law of general application could be legislation or the common law.¹¹⁰ Conduct is unreasonable if not authorised by specific statute or common law; if not carried out in accordance with the procedural and substantive requirements of the law; or if the scope of the conduct exceeds the limits for which the law granted authority.¹¹¹

The discussion of the cases in *Gaga*¹¹² and *Xaba*¹¹³ above casts light on the current issue. In *Gaga*¹¹⁴ the applicant sought an order to have a bullet surgically removed for the purpose of ballistic tests. The respondent contended that there was no statutory or common-law authorisation for the relief sought. The Court opined that both sections 27 and section 37(1)(c) of the Criminal Procedure Act, 1977, permit the violence necessary to remove the bullet.¹¹⁵ The Court found that section 27 permitted police to use any reasonable force to conduct a search. The Court further stated that section 37(1)(c) authorises a police official

¹⁰⁷ See in general *R v Buhay* [2003] 1 SCR 631; *R v Edwards* [1996] 1 SCR 128; *R v Tessling* [2004] 3 SCR 432; *US v Gomez* 16 F3d 254 (8th Cir 1994); *R v Krist* (1995) 100 CCC (3d) 58 (BCCA); *R v Evans* [1996] 1 SCR 8.

¹⁰⁸ *S v Makwanyane* 1995 3 SA 391 (CC) at para 100-102; Bilchitz 2011 TSAR 568-579.

¹⁰⁹ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 47.

¹¹⁰ *R v Shoker* [2006] 2 SCR 399 at para 3; *R v Stillman* [1997] 1 SCR 607.

¹¹¹ *R v Caslake* [1998] 1 SCR 51 at para 12.

¹¹² *Minister of Safety and Security v Gaga* 2002 (1) SACR 654 (C).

¹¹³ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

¹¹⁴ *Minister of Safety and Security v Gaga* 2002 (1) SACR 654 (C).

¹¹⁵ *Minister of Safety and Security v Gaga* 2002 (1) SACR 654 (C) at 658.

to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance. The Court accepted that a bullet was clearly not a mark, characteristic or distinguishing feature of the body but a policeman may take the necessary steps to determine whether the body shows the bullet- a condition or appearance- which may be linked to the murder weapon. The Court held that sections 27 and 37 were laws of general application as required by the limitation clause.

The court in *Xaba*,¹¹⁶ in similar circumstances to those in *Gaqa*, opined that the conclusions reached there are clearly wrong and declined to follow them. The Court, in *Xaba*, concluded that section 27 and 37(1)(c) did not permit a police official to use the necessary violence to obtain the surgical removal of a bullet. The Court held that a search of a person in section 27 was not meant to include an operation under general anaesthetic to remove an object from the body of a person. The Court concluded that since the police may not search a person by operating on his body the police cannot use the reasonable force authorised by section 27. Since the police may not delegate the power to search a person, the police may also not ask a doctor to do this in his stead. The Court considered the provisions of section 37(1)(c) by stating that its construction must be read in the context of section 37(2)(a). Section 37(1)(c) was not meant to empower a police official to himself engage in surgery neither to take a blood sample.¹¹⁷ Section 37(1)(c) was also not intended to give the police the power to delegate to a medical practitioner to perform an operation on the accused as it is section 37(2)(a) which deals with police empowerment of a medically qualified person and not section 37(1)(c). Section 37(2)(a) empowers any registered medical practitioner to do things specifically set out in section 37(1)(c) if requested thereto by any police official. The Court concluded that the legislature indicated that only the limited surgery involved in taking blood sample was to be included and not the steps which could be deemed to include the more far reaching surgery contemplated in this case.¹¹⁸

The Supreme Court of Canada considered this principle (law of general application) in *Stillman*.¹¹⁹ *In casu* the police forcibly obtained bodily samples and teeth impressions from

¹¹⁶ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D).

¹¹⁷ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 713-714.

¹¹⁸ *Minister of Safety and Security v Xaba* 2003 (2) SA 703 (D) at 714.

¹¹⁹ *R v Stillman* 1997 42 CRR (2d) 189 (SCC).

the accused whilst in detention. The Court agreed with applicant that the evidence obtained should be excluded because the search and seizure was unreasonable as it was not authorised by statute or the common law. The Court observed that the investigative warrants under section 487¹²⁰ of the Criminal Code only provided authority to search places. The Court also held that the common law search and seizure incident to arrest did not extend to the obtainment of bodily samples. Accordingly the Court held that the search and seizure of the accused was unreasonable. Indicators of reasonableness are: compliance with the law and where scope of the search exceeds the limits for which the law granted authority. The Canadian courts do not have the power, unless specifically authorised, to enforce or order accused to subject themselves to a search and seizure not provided for in any statutory or common law. The rationale is that it is up to the legislature and not the courts to balance the accused's Charter rights against society's interest in effectively monitoring their conduct.¹²¹

(ii) "Reasonable and justifiable"

If an applicant establishes that the rule limiting the right is a law of general application a court must determine whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including those listed in limitation clause.

What is "reasonable and justifiable" involves a determination on the facts.¹²² In Canada and South Africa the courts apply the proportionality test against which limitations on rights and freedoms must be measured.¹²³ The factors in the proportionality test include:

- (1) The nature of the right: an enquiry of how important it is to protect this right from infringement given its nature,¹²⁴
- (2) The importance of the purpose of the limitation: a court must carefully review the public interest served by the statutory provision,¹²⁵

¹²⁰ *Criminal Code* RSC 1985 c C-46.

¹²¹ *R v Shoker* [2006] 2 SCR 399 at para 25; *Hunter v Southam Inc* [1984] 2 SCR 145; *R v Golden* [2001] 3 SCR 679 at para 103; Schmitz 2006 *The lawyers weekly*; Anand 2009 CR 25.

¹²² *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

¹²³ *Alexander v Minister of Justice* 2010 (1) NR 328 at 360: The proportionality test in Namibia is similar except that it is applied to determine the meaning of the fundamental right.

¹²⁴ *Iles* 2007 SAJHR 69.

(3) The nature and extent of the limitation: an assessment of how the conduct or law limits the right,¹²⁶

(4) Rational connection: this element requires the law to be rationally connected to the objective of the law,¹²⁷ and

(5) The presence of less restrictive means to achieve the purpose: whether some or other formulation would achieve the same purpose but infringe the right less.¹²⁸

Once the assessment is done of all these factors, the factors must be weighed, but ultimately the “reasonableness analysis” is one of proportionality which involves an assessment of competing values on a case-by-case basis.¹²⁹

2.4 Substantive phase

South African courts relied on Canadian law to interpret section 35(5), more specifically the elements: whether admission of the evidence would render the trial unfair (first leg test)¹³⁰ or whether admission would otherwise be detrimental to the administration of justice (second leg test).¹³¹ Although there is overlapping of the tests, they are, in this study, kept separate.¹³²

The *Collins*¹³³ framework and the factors formulated to interpret section 24(2) were grouped into three categories: (1) considerations relevant in determining the effect of the admission of the evidence on the fairness of the trial, (2) considerations relevant to the seriousness of the Charter- violation and thus to the disrepute that will result from judicial

¹²⁵ *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) at para 65.

¹²⁶ *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) at para 49.

¹²⁷ *Fereira v Levin and Vryenhoek v Powell* 1996 (1) BCLR 1 (CC) at para 126.

¹²⁸ *Brümmer v Minister of Social Development* 2009 (6) SA 323 (CC); *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC); *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC); *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) at 777; *Iles* 2007 SAJHR 69 at 77; *Bilchitz* 2011 TSAR 568-579; *Woolman* 1997 SAJHR 103 at 110; see also *R v Oakes* [1986] 1 SCR 103; see also *R v Orbanski* [2005] 2 SCR 3 at para 54; *R v Golden* [2001] 3 SCR 679 at 104; *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835; *R v Tse* [2012] 1 SCR 531; *Choudry* (2006) 34 S C L R 501-526; *Iles* 2007 SAJHR 69 at 84.

¹²⁹ *S v Manamela* 2000 (3) SA 1 (CC) at para 33.

¹³⁰ Schwikkard and Van der Merwe *Principles of evidence* at 225-226.

¹³¹ Schwikkard and Van der Merwe *Principles of evidence* at 248-251.

¹³² Naudé 2009 *Obiter* 607 at 621.

¹³³ *R v Collins* (1987) 28 CRR 122 (SCC).

acceptance of evidence obtained through that violation, and (3) considerations that relate to the effect of excluding the evidence on the repute of the administration of justice.

In *Grant*¹³⁴ the court reviewed the *Collins* framework. The Court discarded the trial fairness test and formulated the following categories of factors to be considered: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused and (3) society's interest in the adjudication of the case on its merits. *Grant* does not track the categories set out in *Collins* but capture the factors relevant to the section 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.¹³⁵ The new test in Canada, like section 35(5), emphasises the main motivation behind the exclusionary rule: to exclude evidence if its admission would be detrimental to the administration of justice.

2.4.1 The first leg of the test in section 35(5): trial fairness

In Namibia unconstitutionally obtained evidence which adversely affects trial fairness must be excluded.¹³⁶ In executing its discretion to exclude unconstitutionally obtained evidence the courts consider the nature of the irregularity and its effect.¹³⁷ Although the test may at times be helpful to achieve the balance between the conflicting public interest and policy, each case must be clearly determined on its own merits.¹³⁸ In the USA the courts apply a costs benefit analysis before applying the exclusionary remedy. The courts weigh the costs of application of the rule against the benefits of its application to help determine whether exclusion of the evidence is warranted.

The South African courts adopted the *Collins*¹³⁹ conscription analysis (fair trial framework) when determining whether admission of unconstitutionally obtained real evidence would render the trial unfair.¹⁴⁰ The following *Collins*-factors are relevant to the fair trial assessment: the “nature of the evidence,” “discoverability analysis” and the “nature of the

¹³⁴ *R v Grant* [2009] 2 SCR 353.

¹³⁵ *R v Grant* [2009] 2 SCR 353 at para 71.

¹³⁶ *S v Shikunga* 1997 NR 156 at 171.

¹³⁷ *S v Kandovazu* 1998 NR 1 at 8.

¹³⁸ *S v De Wee* 1999 NR 122 at 128.

¹³⁹ *R v Collins* (1987) 28 CRR 122 (SCC).

¹⁴⁰ *Ally Constitutional exclusion* at 295.

right.” For now, though, I consider only the “nature of the evidence” and “discoverability analysis” factors.

(a) “Nature of the evidence”

(i) Real evidence and trial fairness

In *S v M*¹⁴¹ the Supreme Court of Appeal determined the trial fairness requirement based on the real evidence divide when the Court held that unconstitutionally obtained, real evidence would more readily be admitted than testimonial evidence.¹⁴² The *ratio* is that real evidence does not incriminate a person against him in the manner of testimonial evidence. The Court in *Pillay*¹⁴³ ruled that “the nature of the evidence” is not determinative of the trial fairness enquiry but is a factor when determining whether evidence should be classified as “conscriptive” or “non-conscriptive.”¹⁴⁴ Evidence is conscriptive when the accused in violation of his constitutional rights, is compelled to incriminate himself at the behest of the state by means of a statement, or the use of the body or the production of bodily samples.¹⁴⁵

The Supreme Court of Appeal in *Tandwa*¹⁴⁶ and *Mthembu*¹⁴⁷ qualified the impact of *Pillay*. In these decisions the courts rejected the notion that the fair trial requirement had a specific meaning and content. The Courts ruled that the fair trial requirement in section 35(5) is more flexible. In *Tandwa* the court stated that considering section 35(5) applications the relevant factors for purposes of determining trial fairness would include: the severity of the rights violations and the degree of prejudice to the accused, weighed against the public policy interest in bringing criminals to book.¹⁴⁸ The Supreme Court of Appeal in both decisions held that the admissibility of derivative real evidence will attract fair trial considerations on account of the manner in which it was obtained, specifically in the case of torture. The trial is rendered unfair because it introduces into the process of proof against the accused evidence obtained by means that violated basic civilised injunctions against

¹⁴¹ *S v M* [2002] 3 All SA 599 (A); also see *S v Mkhize* 1999 (2) SACR 632 (W).

¹⁴² *S v M* [2002] 3 All SA 599 (A) at para 31.

¹⁴³ *S v Pillay* 2004 (2) SACR 419 (SCA).

¹⁴⁴ *Ally Constitutional exclusion* at 327.

¹⁴⁵ *R v Grant* [2009] 2 SCR 353 at para 71.

¹⁴⁶ *S v Tandwa* 2008 (1) SACR 613 (SCA).

¹⁴⁷ *S v Mthembu* [2008] 3 All SA 159 (SCA).

¹⁴⁸ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 116-117; see, in general, also De Vos 2011 *TSAR* 268 at 275.

assault and compulsion.¹⁴⁹ Based on *Tandwa* and *Mthembu* there can be no automatic exclusion of evidence because the court retains a discretion and must make a value judgment based on the facts of each case.

The Canadian Supreme Court, in *Grant*,¹⁵⁰ stated that the assumption that the use of conscriptive evidence always or almost always renders the trial unfair was open for challenge.¹⁵¹ The Court also observed that in previous decisions it held that a fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness of the accused.¹⁵² The Court reasoned that it was “difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained.”¹⁵³ The Court stated that trial fairness is better conceived as an overarching systemic goal than as a distinct stage of section 24(2) analysis.¹⁵⁴ As a result the Court stated that it is no longer concerned about whether the evidence in question is conscriptive or non-conscriptive.¹⁵⁵ I agree with Naudé that, since trial fairness is not the cornerstone of the Canadian section 24(2) jurisprudence, *Grant* has brought the application of the Canadian test closer to that of the South African test.¹⁵⁶

In terms of *Grant*¹⁵⁷ the “nature of the evidence” factor is now a key consideration in assessing the degree of intrusion on the Charter interest.¹⁵⁸ The nature and degree of statements by the accused are assessed in the context of the principle against self-incrimination. Unconstitutionally obtained real evidence is assessed as follows: (1) bodily samples are addressed by reference to the interest in privacy, bodily integrity and human dignity,¹⁵⁹ (2) non-bodily physical evidence are addressed with reference to the manner in which the evidence was obtained and the degree that the manner of discovery undermines

¹⁴⁹ *S v Tandwa* 2008 (1) SACR 613 (SCA) at para 120.

¹⁵⁰ *R v Grant* [2009] 2 SCR 353.

¹⁵¹ *R v Grant* [2009] 2 SCR 353 at para 60-65; Naudé 2009 *Obiter* 607 at 613-614: “This first of all went against the requirement that the court must consider ‘all the circumstances’ when determining admissibility.”

¹⁵² *R v Grant* [2009] 2 SCR 353 at para 65.

¹⁵³ Naudé 2009 *Obiter* 607 at 624.

¹⁵⁴ *R v Grant* [2009] 2 SCR 353 at para 65.

¹⁵⁵ Mahoney 1999 *Crim LQ* 443 at 456; Stuart 2010 *Southwestern Journal of International Law* 313 at 324.

¹⁵⁶ Naudé 2009 *Obiter* 607 at 608.

¹⁵⁷ *R v Grant* [2009] 2 SCR 353.

¹⁵⁸ *R v Grant* [2009] 2 SCR 353 at para 77; Paciocco and Stuesser *The law of evidence* at 8.

¹⁵⁹ *R v Grant* [2009] 2 SCR 353 at para 104.

the Charter protected privacy interest of the accused,¹⁶⁰ (3) derivative evidence are addressed with reference to the self-incriminatory origin of the evidence as well as its status as real evidence. The infringement is less intrusive and exclusion is less likely to follow if the prosecution would have discovered the evidence without the Charter breach.¹⁶¹

The court in *Grant* also elaborated on the content of the new test (three lines of inquiry) in the context of statements, bodily evidence, non-bodily evidence and derivative evidence. The Court, in *Grant*, noted that the three lines of inquiry support the presumptive general, although not automatic, exclusion of statements by the accused. The Court reasoned that the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests (right against self-incrimination) affected will in most cases favour exclusion of unconstitutionally obtained statements. In addition the court reasoned that the third factor may be attenuated by a lack of reliability and that this, together with the historic tendency to treat statements differently from other evidence, explains why such evidence tends to be excluded.¹⁶² The courts must apply the three lines of inquiry to unconstitutionally obtained bodily evidence,¹⁶³ non-bodily physical evidence¹⁶⁴ and derivative real evidence.¹⁶⁵ Despite this distinction the court emphasised that the same three lines of inquiry must be pursued in case of each type of evidence.

The South African courts clearly distinguish between testimonial and real evidence in the context of the privilege against self-incrimination, but the same cannot be said about the enquiry into the fairness of the trial in terms of section 35(5) of the Constitution.¹⁶⁶ The courts generally do not under section 35(5) determinations, distinguish real evidence from other evidence such as testimonial evidence, nor considered why it might or should be different.¹⁶⁷ The comparative analysis reveals that neither in Namibia, United States of America nor Canada do the courts distinguish real evidence (nature of the evidence) as a factor when employing the exclusionary remedy. The South African courts should follow the

¹⁶⁰ Paciocco and Stuesser *The law of evidence* at 9 and 38; Mitchell *"Excluding evidence"* at 30.

¹⁶¹ Mitchell *"Excluding evidence"* at 23; Paciocco and Stuesser *The law of evidence* at 35.

¹⁶² *R v Grant* [2009] 2 SCR 353 at para 98.

¹⁶³ *R v Grant* [2009] 2 SCR 353 at para 107.

¹⁶⁴ *R v Grant* [2009] 2 SCR 353 at para 112.

¹⁶⁵ *R v Grant* [2009] 2 SCR 353 at para 121.

¹⁶⁶ De Vos 2011 *TSAR* 268 at 276 and 277.

¹⁶⁷ See in general Naudé 2009 *Obiter* 607 at 622-623.

Canadian approach set out in *Grant* and must consider the “nature of the evidence” when assessing the degree of intrusion on the constitutional right interest.¹⁶⁸

- (ii) Real evidence emanating from the accused and the right against self-incrimination

A question which is crucial under the fair trial enquiry is whether the manner in which the evidence was obtained violated the accused’s privilege against self-incrimination. Our courts have consistently since *Matemba*¹⁶⁹ held that the privilege against self-incrimination is confined to testimonial evidence (utterances or conduct with a communicative element such as pointing out) and does not extend to real evidence emanating from an accused.¹⁷⁰ However, in the dissenting judgment in *Pillay*¹⁷¹ the court observed that the Canadian courts equate the compelled production of bodily parts with compelled statements. *Stillman*¹⁷² changed the approach laid down in *Collins*¹⁷³ when the court ruled that the privilege against self-incrimination is not confined to testimonial utterances or communications, but that it extends to real evidence emanating from an accused, such as hair and blood samples.¹⁷⁴ This development eliminates the well-settled distinction between self-incriminating testimonial communications and incriminating real evidence obtained from the body of the accused.¹⁷⁵ The question is whether the South African courts should adopt *Stillman*.¹⁷⁶ Legal commentators argue that the incorporation of the *Stillman* modification into our law would be totally unnecessary and somewhat artificial.¹⁷⁷ The majority and minority opinion in *Pillay* found it difficult to see how real evidence, having an independent existence, can ever be said to render the trial unfair. The Canadian Supreme Court recently in *Grant* held that *Stillman* erroneously equated bodily evidence with statements. The Court reasoned that

¹⁶⁸ *R v Grant* [2009] 2 SCR 353 at para 77; Paciocco and Stuesser *The law of evidence* at 8.

¹⁶⁹ *Ex Parte Minister of Justice: In re R v Matemba* 1941 AD 75.

¹⁷⁰ Schwikkard and Van der Merwe *Principles of evidence* at 238; De Vos 2011 TSAR 268 at 275.

¹⁷¹ *S v Pillay* 2004 (2) SACR 419 (SCA).

¹⁷² *R v Stillman* 1997 42 CRR (2d) 189 (SCC).

¹⁷³ *R v Collins* [1987] 1 SCR 265 at para 37 ; Naudé 2009 *Obiter* 607 at 611: “In that case it was stated that, for purposes of the trial fairness element in section 24(2), there is a distinction between a situation where real evidence was obtained as a result of a constitutional right, the accused was conscripted against himself through a confession or other evidence emanating from him.”

¹⁷⁴ *R v Stillman* 1997 42 CRR (2d) 189 (SCC) at para 86.

¹⁷⁵ De Vos 2011 TSAR 268 at 272.

¹⁷⁶ *R v Stillman* 1997 42 CRR (2d) 189 (SCC).

¹⁷⁷ Schwikkard and Van der Merwe *Principles of evidence* at 241; De Vos 2011 TSAR 268 at 275- 277; Zeffertt and Paizes *Law of evidence* at 735-736.

bodily samples are not communicative and therefore not self-incriminatory in the way statements are.¹⁷⁸

(b) “Discoverability analysis”

The *Collins/ Stillman* framework prescribe that the admission of conscriptive evidence, as a general rule, would render the trial unfair. However conscriptive evidence (real or testimonial) will not render the trial unfair if the prosecution on a balance of probabilities demonstrate that discovery of the evidence was inevitable¹⁷⁹ or that the police would have availed themselves of an independent source to obtain the evidence.¹⁸⁰ The courts have applied both the discovery doctrine and the independent source doctrine when considering whether real evidence would- but for the unconstitutional conduct- have been discovered by lawful means.

In *Pillay*¹⁸¹ the Supreme Court of Appeal adopted the doctrine of inevitable discovery by relying on Canadian jurisprudence.¹⁸² The doctrine of inevitable discovery was also adopted by the Supreme Court of USA¹⁸³ as an exception to the exclusionary rule.¹⁸⁴ The rationale underlying this doctrine is that the state gains an unfair advantage it would not have had were it not for the unconstitutional infringement. Because of the rationale the police are put in the same, not a worse position that they would have been in if no police error or misconduct had occurred.¹⁸⁵ The inevitable discovery doctrine requires that the prosecution show by a preponderance of evidence that the police would have discovered the evidence by lawful means.¹⁸⁶ The Court found that the illegal monitoring did not constitute conscriptive evidence and the money would have been found even in the absence of a violation of the constitutional rights of the accused.¹⁸⁷ In the circumstances the Court held

¹⁷⁸ *R v Grant* [2009] 2 SCR 353 at para 105.

¹⁷⁹ *R v Stillman* [1997] 1 SCR 607; see also *R v Black* [1989] 2 SCR 138.

¹⁸⁰ *R v Colarusso* [1994] 1 SCR 20; see also *R v Evans* [1996] 1 SCR 8; De Vos 2011 TSAR 268 at 272.

¹⁸¹ *S v Pillay* 2004 (2) SACR 419 (SCA).

¹⁸² *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89; *S v Tandwa* 2008 (1) SACR 613 (SCA); see also *R v Burlingham* 1995 28 CRR 2d 244 (SCC); Naudé 2008 SACJ 168 at 169; Ally *Constitutional Exclusion* at 330.

¹⁸³ *Nix v Williams* 467 US 431 (1984).

¹⁸⁴ *Nix v Williams* 467 US 431 (1984).

¹⁸⁵ *Nix v Williams* 467 US 431, 443 (1984).

¹⁸⁶ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89; *R v Burlingham* 1995 28 CRR 2d 244 (SCC); *R v Stillman* 1997 42 CRR (2d) 180 (SCC); Ally 2005 SACJ 66 at 69; see also criticism by Naudé 2008 SACJ 168 at 180; Schwikkard and Van der Merwe *Principles of evidence* at 200.

¹⁸⁷ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 89-90.

that admission of evidence would not render the trial unfair because the real evidence would inevitably have been discovered.¹⁸⁸ The doctrine has been criticised and problems in its application have been identified. Some of the criticisms are: The rigid application of the discoverability doctrine might lead to astonishing consequences because of its inflexibility,¹⁸⁹ the inherent speculative nature of the doctrine, that the courts should demand a higher standard of proof, especially because a constitutional breach has been perpetrated.¹⁹⁰

In *Lachman*¹⁹¹ the Supreme Court of Appeal applied the independent source doctrine by holding that the retrieval of the incriminating evidence (a cell phone) would have been the “inevitable result” of a search, after the issue of a proper search warrant.¹⁹² Under the independent source doctrine, unconstitutionally discovered real evidence would be admissible, if subsequent to such discovery, the real evidence is seized through sources independent from the initial unconstitutional discovery.¹⁹³ The independent source doctrine continues to balance protecting constitutional rights while also avoiding a situation where the police are placed in a worse position than before a tainted search.¹⁹⁴ The independent source doctrine does not require the prosecution to establish the existence of a separate or distinct line of inquiry leading to the same evidence.¹⁹⁵

In *Grant*¹⁹⁶ and subsequent decisions, the Court ruled that discoverability should no longer be determinative of admissibility.¹⁹⁷ This approach is in line with the opinions of local and international scholars.¹⁹⁸ An approach that avoids dogmatic rules and takes into account all the circumstances in addressing the two questions raised in section 35(5) is preferred.¹⁹⁹ In Canada the discoverability doctrine continues to play a useful role in the section 24(2)

¹⁸⁸ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 90.

¹⁸⁹ *S v Pillay* 2004 (2) SACR 419 (SCA) minority judgment at para 8.

¹⁹⁰ Naudé 2008 SACJ 168 at 180; see also Schwikkard and Van der Merwe *Principles of evidence* at 200.

¹⁹¹ *S v Lachman* 2010 (2) SACR 52 (SCA) at para 36; see also Du Toit *et al Criminal procedure* at 98N-5.

¹⁹² *S v Lachman* 2010 (2) SACR 52 (SCA) at para 36; see also Naudé 2008 SACJ 168 at 185; Du Toit *et al Criminal procedure* at 98N- 5.

¹⁹³ Schwikkard and Van der Merwe *Principles of evidence* at 196 and the sources referred to; *Murray v US* 487 US 533 (1988); Du Toit *et al Criminal procedure* at 98N-5.

¹⁹⁴ Yeater 2009 *Duquesne Criminal LJ* 1 at 9.

¹⁹⁵ *US v Fode Amadou Fofana* No 09-4397 US 6th Circuit 1.

¹⁹⁶ *R v Grant* [2009] 2 SCR 353.

¹⁹⁷ *R v Grant* [2009] 2 SCR 353 at para 121; Naudé 2009 *Obiter* 607 at 619.

¹⁹⁸ Shively 2008 *Vaparaisol Univ LR* 407 at 424-425; LaFave and Israel *Criminal procedure* 475; Du Toit *et al Criminal procedure* at 98N- 5.

¹⁹⁹ Du Toit *et al Criminal procedure* at 98N- 5.

analysis. Discovery analysis retains a role in assessing the actual impact of the breach on the protected interest of the accused.²⁰⁰ If the Crown would have discovered the evidence without the Charter breach the intrusion is less intrusive and exclusion is less likely to follow.²⁰¹

2.4.2 The second leg of the test in section 35(5): Admission would be detrimental to the administration of justice

If the admission of unconstitutionally obtained evidence would not render the trial unfair, such evidence must be excluded if inclusion would be detrimental to the administration of justice. In *Mphala*²⁰² the court stated that the administration of justice is concerned about balancing, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and on the other hand, respect (particularly by the man on the street) for the judicial process. In striking the balance the South African courts answered the question whether admission would be detrimental to integrity of the administration of justice by taking into account the categories identified in *Collins*:²⁰³ the “seriousness of the violation” and “the effect admission would have on the integrity of the justice system.”

(a) Seriousness of the violation

A serious infringement is a factor that could justify the exclusion of unconstitutionally obtained evidence. The presence or absence of “good faith” is an indicator of whether rights violation should be termed serious, flagrant, deliberate or trivial, inadvertent or of a technical nature.²⁰⁴ In *Motloutsi*,²⁰⁵ a case decided under the interim Constitution, the Supreme Court of Appeal discouraged the application of a good faith exception to the exclusionary rule.²⁰⁶ On the other hand the Supreme Court of Appeal in *Mthembu*²⁰⁷ held that constitutional violations classified as “good faith” would weigh heavily in favour of the

²⁰⁰ *R v Grant* [2009] 2 SCR 353 at para 122; *R v Côté* [2011] 3 SCR 215 at para 65-70; *R v Nolet* [2010] 1 SCR 851 at para 54; Paciocco and Stuesser *The law of evidence* at 42; see also criticism by Stuart 2010 *Southwestern Journal of International Law* 313 at 330.

²⁰¹ Mitchell “*Excluding evidence*” at 23; Paciocco and Stuesser *The law of evidence* at 35.

²⁰² *S v Mphala* 1998 (1) SACR 388 (W) 657.

²⁰³ *R v Collins* [1987] 1 SCR 265.

²⁰⁴ *Ally Constitutional exclusion* at 528.

²⁰⁵ *S v Motloutsi* 1996 (1) SACR 78 (C).

²⁰⁶ *S v Motloutsi* 1996 (1) SACR 78 (C) at 87.

²⁰⁷ *S v Mthembu* [2008] 3 All SA 159 (SCA).

reception of evidence obtained as a result thereof.²⁰⁸ It follows that a finding of “good faith” may in certain cases deny the accused access to an exclusionary remedy. Good faith must be reasonable and an objective test must be applied.²⁰⁹ Our courts have in judgments considered both objective and subjective factors to determine if police conduct could be termed as good faith. It appears that unconstitutional conduct of the police is mitigated if reasonable and justifiable;²¹⁰ bona fide;²¹¹ and subjectively honest conduct.²¹²

In Canada the “seriousness of the Charter infringing state conduct” group of factors forms part of the first avenue of inquiry in terms of the *Grant*²¹³ decision. The “good faith” conduct by a police officer reduces the need for the court to dissociate itself from the police conduct.²¹⁴ The bona fides of police officers who commit a Charter violation is a relevant factor in determining the seriousness of the breach. The presence or absence of good faith is determined by means of an objective test.²¹⁵ Factors relevant to the assessment include the subjective honesty of the mistaken belief and the objective question of the reasonableness of that belief.²¹⁶ The police conduct in the entire evidence gathering process must be evaluated.²¹⁷ It is not only evidence regarding the breach that a court may consider but also evidence later obtained during the trial.²¹⁸

The Supreme Court of the United States of America recognises good faith as an exception to the exclusionary rule.²¹⁹ The doctrine permits the inclusion of evidence illegally obtained through police conduct that was objectively reasonable and pursued in good faith.²²⁰ Good faith is determined by means of an objective test which is confined to the question whether a reasonably well-trained officer would have known that the conduct was illegal in light of

²⁰⁸ *S v Mthembu* [2008] 3 All SA 159 (SCA).

²⁰⁹ Schwikkard and Van der Merwe *Principles of evidence* at 256.

²¹⁰ *S v Tandwa* 2008 (1) SACR (SCA) at para 117; see also *S v Pillay* 2004 (2) SACR 419 (SCA) at para 93.

²¹¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 136.

²¹² *S v Shongwe* 1998 (2) SACR 321 (T); *S v Pillay* 2004 (2) SACR 419 (SCA) dissenting Scott JA at para 16.

²¹³ *R v Grant* [2009] 2 SCR 353.

²¹⁴ *R v Kokesch* [1990] 3 SCR 3.

²¹⁵ *R v Mellenthin* [1992] 3 SCR 615; *R v Kokesch* [1990] 3 SCR 3; *R v Wong* [1990] 3 SCR 36.

²¹⁶ *R v Kokesch* [1990] 3 SCR 3; *R v Genest* [1989] 1 SCR 59; *R v Simmons* [1988] 2 SCR 495; *R v Jacoy* [1988] 2 SCR 548.

²¹⁷ *R v Mann* [2004] 3 SCR 59; *R v Belnavis* [1997] 3 SCR 341; *R v Buhay* [2003] 1 SCR 631.

²¹⁸ *R v Harrison* [2009] 2 SCR 494; *R v Côté* [2011] 3 SCR 215 at para 31 endorsed the approach in *Harrison*.

²¹⁹ *Massachusetts v Sheppard* 468 US 981 (1984); *US v Leon* 468 US 897 (1984).

²²⁰ *US v Leon* 468 US 897 (1984); *Massachusetts v Sheppard* 468 US 981, 987-988 (1984).

all of the circumstances.²²¹ The prosecution must establish not only that the officer had a subjective good-faith belief that his actions were lawful, but also that it was objectively reasonable for the officer to hold that belief.

(b) The effect admission would have on the integrity of the justice system

Under this group of factors the courts take into account the following considerations: the current mood of society, the seriousness of the charges and the importance of the evidence to secure a conviction. The Supreme Court of Canada, in *Grant*,²²² substituted this category with the so-called “society’s interest in the adjudication of the case on the merits” group of factors. The ratio is that a court should not only consider the negative impact of admission of the evidence on the repute of the administration of justice, but also the impact of failing to admit the impugned evidence.

(i) Seriousness of the charges

Relevant under this group of factors is the seriousness of the offence charged and not the seriousness of the crime committed.²²³ Our courts have delivered judgments with different outcomes because of the weight attributed to this factor.²²⁴ In *Shongwe*²²⁵ the court emphasised the seriousness of the charges factor and admitted the evidence.²²⁶ In *Melani*²²⁷ the court considered the seriousness of the charge factor but it was not considered determinative to its decision.²²⁸ A court should have a discretion to exclude evidence which links an accused to serious charges.²²⁹ An inflexible line of reasoning should therefore not be determinative of the admissibility assessment.²³⁰

In earlier decisions of the Supreme Court of Canada “the seriousness of the offence” factor was an important pro-inclusionary consideration.²³¹ The more serious is the offence, the

²²¹ *Illinois v Krull* 480 US 340, 356-357 (1987); *Davis v US* 180 L Ed 2d 285 (2011); Laurin 2011 *Columbia LR* 670 at 672.

²²² *R v Grant* [2009] 2 SCR 353.

²²³ *Ally* 2012 *PELJ* 476 at 490.

²²⁴ *S v Melani* 1996 (1) SACR 335 (E); *S v Shongwe* 1998 (2) SACR 321 (T).

²²⁵ *S v Shongwe* 1998 (2) SACR 321 (T).

²²⁶ *S v Shongwe* 1998 (2) SACR 321 (T) at 344-345.

²²⁷ *S v Melani* 1996 (1) SACR 335 (E).

²²⁸ *S v Melani* 1996 (1) SACR 335 (E) at 353.

²²⁹ *Ally* 2012 *PELJ* 476 at 493.

²³⁰ *Ally* 2012 *PELJ* 476 at 492.

²³¹ *R v Collins* [1987] 1 SCR 265; *R v Stillman* [1997] 1 SCR 607; *R v Silveira* [1995] 2 SCR 297; *R v Colarusso*

greater likelihood that the administration of justice would be brought into disrepute by its exclusion.²³² Recently in *Grant*²³³ the court neutralised the impact of this factor by stating that it has the potential to “cut both ways” and will not always weigh in favour of admission. The ratio was that the public has an interest in seeing a determination on the merits where the offence is serious and on the other hand, also has an interest in having a justice system that is above reproach especially in cases where the penalties can be severe.²³⁴ The shift means that the seriousness of the offence will not be the focus to measure the public’s reaction to the exclusion of evidence. Notwithstanding, the Supreme Court in *Harrison*²³⁵ considered the seriousness of the offence factor but cautioned that it should not weigh heavily in the analysis. The Court however failed to clarify what degree of reliance is permissible.²³⁶ The approach is in essence acknowledgment that the factor is not neutral in the analysis relating to the maintenance of the reputation of the administration of justice.

The approach in *Melani*, and the Canadian decisions in *Grant* and *Harrison* is supported. Seriousness of the offence should be considered a factor in this line of the inquiry. The degree of reliance must however not be weighty or determinative of the outcome of this line of the inquiry. This approach would be in line with the prescribed wording in section 24(2) and section 35(5) that all circumstances be considered when the court exercises its judicial discretion. The approach will be consistent with the flexibility principle that is advocated by legal authorities.²³⁷

(ii) Importance of the evidence to secure conviction

The “importance of the evidence to secure a conviction” is recognised as a factor to determine the effect admission of unconstitutionally obtained evidence would have on the administration of justice.²³⁸ The courts delivered conflicting judgments on the nature of the inquiry. In the minority judgment of *Pillay*²³⁹ the court linked the admissibility assessment to

[1994] 1 SCR 20; *R v Jacoy* [1988] 2 SCR 548; *R v Feeney* [1997] 2 SCR 13; *R v Stillman* [1997] 1 SCR 607; Eberdt 2011 *Appeal* 65-85 at para 28.

²³² *R v Côté* 2011 SCC 46 at para 54.

²³³ *R v Grant* [2009] 2 SCR 353.

²³⁴ *R v Grant* [2009] 2 SCR 353 at para 84 and 191.

²³⁵ *R v Harrison* [2009] 2 SCR 494.

²³⁶ *R v Harrison* [2009] 2 SCR 494 at para 83.

²³⁷ *R v Grant* [2009] 2 SCR 353; Ally 2012 *PELJ* 476 at 492.

²³⁸ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 97; see also *S v Matlou* 2010 (2) SACR 342 (SCA) at para 32.

²³⁹ *S v Pillay* 2004 (2) SACR 419 (SCA).

criminal culpability thereby effectively encroaching upon the presumption of innocence.²⁴⁰ The concern with such an analysis (taking into account the importance of evidence for a conviction) is that our courts must consider what impact exclusion would have on the outcomes of the case. Conversely the majority in *Pillay* emphasised the court's duty to protect the integrity of the criminal justice system.²⁴¹ As a result real evidence important to secure a conviction was excluded. The Court confirmed that the costs of exclusion should not determine the outcome of the admissibility assessment. The opposite approach implies that real evidence essential for a conviction on serious charges would be readily admitted.²⁴² This approach is strongly associated with the common law inclusionary rule which was overruled by section 35(5).

Ally suggests that the court may overcome the conflicting judgments by rather focussing on the "reliability of the evidence (nature of the evidence)."²⁴³ Support for this approach is found in Canadian case law. In *Grant*²⁴⁴ the court ruled that the reliability of evidence is relevant in determining the impact exclusion will have on the public interest in truth finding. The Court emphasised that the reliability factor is not a return to the common law approach as formulated in *Wray*.²⁴⁵ Consistent with this caution the court in *Harrison*²⁴⁶ excluded reliable real evidence after a finding that the Charter breach was serious and the impact significant. The reliability of the evidence is a key factor when determining the importance of the evidence for a successful prosecution. The ratio is that exclusion of reliable evidence may impact negatively on the truth seeking role of the criminal justice system, especially when the exclusion destroys the prosecution's case.²⁴⁷ Reliability should be a key consideration for the following reasons: the implicit erosion of the presumption of innocence will be avoided, reliability of evidence is not in conflict with an assessment of the public interest in crime control and the integrity of the criminal justice system, and an

²⁴⁰ Ally 2012 *PELJ* 476 at 498.

²⁴¹ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 97.

²⁴² Ally 2012 *PELJ* 476 at 501.

²⁴³ Ally 2012 *PELJ* 476 at 503.

²⁴⁴ *R v Grant* [2009] 2 SCR 353.

²⁴⁵ *R v Grant* [2009] 2 SCR 353 at para 80.

²⁴⁶ *R v Harrison* [2009] 2 SCR 494.

²⁴⁷ Ally 2012 *PELJ* 476 at 503; *R v Côté* 2011 SCC 46 at para 47.

assessment of the reliability of evidence is strongly aligned to the values in section 35(5), namely ensuring trial fairness and preserving the integrity of the criminal justice system.²⁴⁸

(iii) Public opinion

South Africa suffers from a high crime rate which in turn makes it difficult for courts to maintain the balance set out in *Mphala*.²⁴⁹ The question is whether public opinion should play a role in the admissibility assessment (determining whether the admission of evidence could result in detriment to the administration of justice) and if so what weight should be attached to it.²⁵⁰

The Constitutional Court in *Makwanyane*²⁵¹ stated that public opinion could be utilised when a value judgement is required, but courts should not be slaves to the “current mood” of society.²⁵² The minority in *Pillay*²⁵³ distinguished the approach followed in *Makwanyane* from the interpretation of section 35(5). Scott JA held that public opinion is a relevant factor in the admissibility assessment and should be a prominent consideration when the third group of factors (integrity of criminal justice system) is assessed.²⁵⁴ Although “detriment” involves the making of a value judgment while taking into account the contemporary view of the public, the assessment should not be equated with a consideration of public opinion.²⁵⁵ The Constitution should be interpreted in accordance with values that underlie an open and democratic society based on human dignity, freedom and equality, instead of contemporary values (Namibia) or standards of decency (USA). In Namibia the courts equated public interest to the interest of the public. The courts in Namibia held that current public opinion should be considered as evidence of current values if the views are well-founded and not transient.²⁵⁶

The majority in *Pillay* articulated the parameters within which a court should assess the community views or public opinion. Courts should take into account the views of the

²⁴⁸ Alty 2012 *PELJ* 476 at 504.

²⁴⁹ *S v Mphala* 1998 (1) SACR 388 (W).

²⁵⁰ Alty 2012 *PELJ* 476 at 482-483.

²⁵¹ *S v Makwanyane* 1995 (2) SACR 1 (CC).

²⁵² *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 88.

²⁵³ *S v Pillay* 2004 (2) SACR 419 (SCA).

²⁵⁴ De Vos 2011 *TSAR* 278.

²⁵⁵ Alty 2012 *PELJ* 476 at 484; see also *S v Williams* 1995 (7) BCLR 861 (CC).

²⁵⁶ *S v Van den Berg* 1995 NR 23; *S v Vries* 1996 (2) SACR 638 (Nm); *S v Strowitski* 1994 NR 265; *S v Nassar* 1994 NR 233.

reasonable person, who is usually the average person in the community whose current mood is reasonable.²⁵⁷

I support the view that South African courts should not allow public opinion to dictate its decision but should rather seek to educate the public about our constitutional values. Public opinion should occupy a subsidiary role in relation to the long term values sought to be achieved by the Constitution.²⁵⁸ This interpretation of the scope and function of public opinion is in harmony with the case law in Canada.²⁵⁹ If public opinion is in conflict with the provisions and objectives sought to be advanced by the Constitution, the latter must prevail.²⁶⁰ There are several undesirable consequences that may follow the overemphasis of the “current mood” of society. Firstly, it may become determinative of the admissibility assessment and may result in the regular inclusion of unconstitutionally obtained evidence especially where evidence is essential for conviction on serious charges. Secondly, an overemphasis of the current mood of society would unduly infringe upon the fundamental rights for example the presumption of innocence of an accused.²⁶¹

3. RECOMMENDATIONS

The Constitution contains a discretionary exclusionary rule which prohibits the automatic exclusion of unconstitutionally obtained evidence. Unconstitutionally obtained evidence must be excluded only if admission renders the trial unfair, or is otherwise detrimental to the administration of justice. In this part of the thesis, I recommend a different approach that our courts should follow when interpreting section 35(5) and propose legislative amendments to section 37 of the Criminal Procedure Act, 1977.

²⁵⁷ *S v Pillay* 2004 (2) SACR 419 (SCA) at para 92; *R v Collins* [1987] 1 SCR 265 (SCC) at para 33-34.

²⁵⁸ Schwikkard and Van der Merwe *Principles of evidence* at 250.

²⁵⁹ *R v Collins* [1987] 1 SCR 265; *R v Jacoy* [1998] 38 CRR 290 (SCC); *R v Feeney* [1997] 115 CCC (3d) 129 (SCC).

²⁶⁰ *Ally* 2012 PELJ 476 at 488.

²⁶¹ *Ally Constitutional exclusion* at 482.

3.1 How should the court interpret section 35(5)?

3.1.1 Procedural phase

The courts should employ one or a combination of the deterrence-, remedial imperative- or judicial integrity rationale to justify the exclusion of unconstitutionally obtained real evidence. The admissibility of unconstitutionally obtained evidence should be challenged during a trial-within-a-trial procedure. The onus to show a right infringement should not resort with a beneficiary of fundamental rights. The accused should only allege but need not prove a rights violation.

An accused should be permitted to challenge the admissibility of unconstitutionally obtained real evidence against him when he was a “suspect.” A person is a suspect if the police, in the absence of certain proof, have a “reasonable apprehension” that he is guilty of a crime or he is suspected of a crime or offence.²⁶² In situations where an individual had no choice but to comply in interactions between the police and a person, the courts should like the courts in Canada and the USA attach a broad interpretation to the concepts “detained” and “seize” respectively. The courts should apply an objective test to determine if a reasonable person would have concluded that his right to choose how to interact with the police had been removed or whether a show of authority constitutes a seizure.

A temporal sequence, causal connection test, or a contextuality test (evidence linked through association) could satisfy the connection requirement under section 35(5). The link between the breach of the fundamental right and the discovery of the evidence must not be “too remote.”

Standing is not a requirement under section 35(5). Accordingly an accused should be entitled to challenge the admissibility of unconstitutionally obtained evidence even in cases where evidence was obtained from a third party.²⁶³

The constitutional validity of laws empowering the compelled ascertainment of evidence may be challenged by an accused. In this regard the court should consider: Firstly whether the person has a subjective expectation of the right that society is prepared to recognise as

²⁶² *S v Khan* 2010 (2) SACR 476 (KZP) at 484; *S v Ndlovu* 1997 (12) BCLR 1785 (N) at 1792B.

²⁶³ *S v Mthembu* [2008] 3 All SA 159 (SCA) at para 27.

objectively reasonable.²⁶⁴ Secondly, whether the law or conduct is justifiable under the limitation clause. The court must consider whether the violation of the right is justifiable in terms of the limitation clause of the Constitution. The limitation must meet two requirements: it must constitute a law of general application and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁶⁵

3.1.2 Substantive phase

A court must under section 35(5) apply the two-legged test when determining the admissibility of unconstitutionally obtained evidence. Under the first leg the court should consider whether admission would affect trial fairness. Under the second leg the court must consider whether the admission of evidence obtained through a serious violation of rights would be tantamount to a judicial condonation of an unconstitutional conduct and what effect admission would have on the integrity of the justice system. The second leg inquiry is the over-arching test under section 35(5). It follows that factors taken into account in the first leg inquiry should be considered in the second leg inquiry.

(a) First leg of test: trial fairness

It is recommended that our courts discard the trial fairness factors identified in *Collins*²⁶⁶ and adopt the trial fairness approach adopted in *Grant*²⁶⁷ and *Tandwa*.²⁶⁸ The fair trial requirement in section 35(5) is flexible enough to permit a discretion which has to be exercised on the basis of the facts of the case.²⁶⁹ The “nature of the evidence,” “discoverability analysis” and the “nature of the right” should not be taken into account. In *Tandwa* the court stated that the following considerations should be taken into account:

- (a) the nature and extent of the constitutional breach (severity of the rights violation) also referred to as the “seriousness of the Charter infringing state

²⁶⁴ *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W) 1239; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 (10) BCLR 1079 (CC) at 235; *Basdeo Search and seizure* at 41; see also *R v Collins* [1987] 1 SCR 265; *R v Edwards* [1996] 1 SCR 126; *Hunter v Southam Inc* [1984] 2 SCR 145.

²⁶⁵ *S v Makwanyane* 1995 3 SA 391 (CC) at para 100-102; Bilchitz 2011 TSAR 568-579.

²⁶⁶ *R v Collins* [1987] 1 SCR 265.

²⁶⁷ *R v Grant* [2009] 2 SCR 353.

²⁶⁸ *S v Tandwa* 2008 (1) SACR (SCA).

²⁶⁹ Schwikkard and Van der Merwe *Principles of evidence* at 227-228; *S v Tandwa* 2008 (1) SACR (SCA) at para 117.

conduct” group of factors. This inquiry involves an evaluation of the seriousness of the conduct that caused the violation. The preservation of the public confidence in the rule of law must be weighed against the seriousness of the conduct by the authorities, which the rule of law requires to uphold constitutionally guaranteed rights.²⁷⁰ Good faith conduct by the police will reduce the need for the court to distance itself from the police conduct;

(b) the absence of prejudice to the accused: The question of prejudice is inseparable from the question of fairness in that a trial cannot be fair if an accused is prejudiced and a trial can hardly be unfair if there is an absence of prejudice;²⁷¹

(c) the need to ensure that exclusion of evidence does not tilt “the balance too far in favour of due process against crime control”;

(d) the interest of society and the public policy interest in bringing criminals to book.²⁷²

Even though trial fairness is closely linked to the privilege against compelled self-incrimination it (self-incriminating evidence) would not be subject to automatic exclusion. Moreover the courts have a discretion and will make a value judgment that depends on the facts of the case when determining the admissibility of statements, bodily evidence, non-bodily evidence physical evidence and derivative (real) evidence.

(b) Second leg of test: Detriment caused to the administration of justice

The second leg of the test should involve an inquiry into “the impact of the breach on the Charter protected interests of the accused” and “society’s interest in the adjudication of the case on its merits.”

²⁷⁰ Naudé 2009 *Obiter* 607 at 616.

²⁷¹ *S v Soci* 1998 (2) SACR 275 (E) 293-294; also refer to Schwikkard and Van der Merwe *Principles of evidence* at 227-228 fn 304 and the sources referred to there.

²⁷² See, in general Schwikkard and Van der Merwe *Principles of evidence* at 221-228; *S v Tandwa* 2008 (1) SACR (SCA) at para 117.

(i) “The impact on the Charter–protected interests of the accused”

The *Grant* second line of inquiry should be considered under this heading. The inquiry involves *an* assessment of the extent to which the violation actually undermined the interests protected by the right violated. Factors that should be taken into account are:

(aa) The “nature of the evidence” factor is a key consideration in assessing the degree of intrusion on the rights interest.²⁷³

(bb) The discoverability analysis could be applied to assess the actual impact of the breach on the protected interest of the accused.²⁷⁴ An infringement should not be termed serious if the prosecution would have discovered the real evidence without the rights infringement.

(ii) Society’s interest in the adjudication of the case on its merits

As was the previous position in Canada our courts employed the group of factors relevant to “the effect exclusion or admission would have on the reputation of the administration of justice.” This group of factors should be substituted with the category of factors relevant to determine “society’s interest in the adjudication of the case on its merits,” identified in *Grant*. The inquiry asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.²⁷⁵ Factors that should be considered are: public opinion, the seriousness of the charge and the importance of the evidence to secure a conviction. It is submitted that the reliability of the evidence is a key factor when determining the importance of the evidence for a successful prosecution.

3.2 Proposed amendments to section 37 of the Criminal Procedure Act, 1977

The constitutionality of the procedures in section 37 of the Criminal Procedure Act, 1977 sanctioning the solving of crimes by means of surgery is questionable. I recommend that the legislature amends the provisions in section 37 of the Criminal Procedure Act, 1977 as follows:

²⁷³ *R v Grant* [2009] 2 SCR 353 at para 77; Paciocco and Stuesser *The law of evidence* at 8.

²⁷⁴ *R v Grant* [2009] 2 SCR 353 at para 122; *R v Côté* [2011] 3 SCR 215 at para 65-70; *R v Nolet* [2010] 1 SCR 851 at para 54; Paciocco and Stuesser *The law of evidence* at 42.

²⁷⁵ Naudé 2009 *Obiter* 607 at 617.

1. An accused can only be compelled to subject him to surgery or any medical procedures to remove evidence from his body in terms of a valid court order authorised by a competent court.
2. The courts should specifically be authorised and given the power to order an accused to subject himself to surgery.
3. Section 37 should be amended by not only referring to the expression “including the taking of a blood sample” but incorporating the phrase “including the surgical removal of evidence from the body of the accused.”
4. Section 37 must empower a registered qualified medical doctor or paramedic to operate on the body of the accused to remove the evidence.
5. In applications under section 37 a court must consider whether the proposed medical intervention is reasonable. The inquiry must focus on the extent of the intrusion on the respondent’s privacy interests and on the state’s need for evidence.
6. The Court must assess the individual’s interest and all relevant factors including: where the evidence is located on the body of the accused, whether the medical procedure is complicated or simple, whether there is any other evidence against the accused. These factors must be weighed against the following public interests: whether a refusal by the court would result in serious crime remaining unsolved, law enforcement would be stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crime.
7. A court should make an order under section 37 if the interest of society overshadows the interest of the accused. In this regard the court must be satisfied: that the evidence would be relevant, of the probative value of the evidence, that the seriousness of the crime justify the medical intervention, that the intervention is not serious, that the medical procedures to be performed is in terms of acceptable medical practice and procedures and of the risks associated with the medical procedure and whether the state had available substantial evidence to prove its case.

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