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Prohibited Methods of Obtaining and Presenting Evidence
National Report
For
South Africa

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1. Introduction

I have been requested to prepare a national report for South Africa on prohibited methods of obtaining and presenting evidence. A questionnaire containing ten questions was sent to me, which is meant to serve as a guideline in preparing the report. The introductory part of the questionnaire and some of the questions give the impression that the focus of the report should be on criminal proceedings. This was confirmed by Prof Janet Walker, one of the co-general reporters. She invited me, however, to refer briefly to civil proceedings as well.

For the sake of maintaining a flowing narrative the report does not deal with the questions *seriatim*. It first gives a brief background to put the subject in perspective. Thereafter the focus falls on the position regarding the admissibility of illegally / unconstitutionally obtained evidence in criminal proceedings. This is followed by a brief description of the position in this regard in civil proceedings and a conclusion. The questions that are relevant for South Africa are covered under these headings.

2. Background

The South African legal system has a hybrid nature, which is due to historical developments in the Cape during the early 19th century. During the era when the Cape was under Dutch rule, from the middle of the 17th century to the end of the 18th century, Roman Dutch law which was the law of Holland, reigned in all spheres in the Cape. The dominant position of Roman Dutch Law was, however, curtailed in the early part of the 19th century when the British authority, which then ruled in the Cape, transformed the civil and criminal procedural systems, including the court structures, to conform mainly to the English system. Substantive law was, however, left intact. Needless to say, substantive law has been the subject of numerous legislative enactments in South Africa through the years but Roman Dutch common law still forms the foundation of large parts of especially private substantive law.[1]

The law of evidence, which regulates the proof of facts in both criminal and civil proceedings, was of course part and parcel of the English oriented procedural system that was introduced in the Cape. It follows that our law of evidence are characterized by the same salient features as the traditional English Model.[2] As a result of the influence of the jury on the English trial proceedings a body of rules regulating the admissibility of evidence developed.[3] This consists mainly of categories of evidence that are, as a rule, inadmissible.

Whilst there are also rules applicable to the evaluation of evidence and other matters pertaining to the trial proceedings, these exclusionary rules form the gravamen of the law of evidence. The South African law of evidence recognizes the following categories of evidence that are, as a rule, excluded:

(i) Character evidence
(ii) Similar fact evidence
(iii) Opinion evidence
(iv) Previous consistent statements

[1] On this development, see Cilliers, Loots & Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* (5th ed, 2009) 4-5.
[2] On the incorporation of English law of evidence into the South African law, see Schwikkard & Van der Merwe *Principles of Evidence* (3rd ed 2009) 25 *et seq*. (Hereafter *Principles*).
[3] *Ibid* 4-6.

These categories are excluded on the basis that the evidence is irrelevant.[4] In addition to this, evidence, which is relevant, can be excluded in terms of the rules relating to the various forms of privilege.[5] Apart from the previous categories of evidence, hearsay evidence is also excluded, although the court has a wide discretion to admit such evidence if it is in the interest of justice.[6] Finally, evidence can be excluded if it was obtained in an improper, illegal or unconstitutional manner. In this regard a distinction must be drawn between the legal position prevailing before and after the adoption of the Constitution of 1996.[7]

Prior to the Constitutional era South African courts followed the English common law inclusionary approach, in terms of which the determining test for the admissibility of evidence was relevance and the manner in which the evidence was obtained was, as a rule, of no concern to the court.[8] In *Kuruma, Son of Kaniu v R* the court qualified this approach by adding that "in a criminal case a judge always has a discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused".[9] South African courts also adopted the qualification of the general approach by endorsing a judicial discretion in criminal cases to exclude improperly or illegally obtained evidence. Although the courts' approach was not uniform the general trend was to exercise this discretion on grounds of fairness and public policy.[10]

The Interim Constitution[11] did not contain a provision dealing specifically with the admissibility of unconstitutionally obtained evidence. However, an *accused* was accorded the right to a fair trial and the courts merely adapted their common law discretion to meet the demands of the constitutional era.[12]

In its Bill of Rights the Constitution of 1996[13] (hereafter the Constitution) deals specifically with unconstitutionally obtained evidence in *criminal proceedings.* Section 35(5) provides 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.[14]

This provision deals only with *unconstitutionally* obtained evidence. 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. However, in my view such cases would be limited by reason of the extensive rights accorded to arrested and accused persons in the Constitution. Furthermore, in these cases the accused's right to a fair trial must be taken into account, which means that the test laid down in the section 35(5) should also be applied in this context.[15]

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[4] See *Principles* chapters 5-9.
[5] *Ibid* chapters 10-11.
[6] *Ibid* chapter 13.
[7] Constitution of the Republic of South Africa, 1996. The position in terms of the Interim Constitution 200 of 1993 was of short duration and will not be considered as such. (See *Principles* 208).
[8] *Kuruma, Son of Kaniu v R* 1955 AC 197, 203.
[9] *Ibid* 204.
[10] *Cf S v Forbes* 1970 2 SA 594 (C); *S v Hammer* 1994 2 SACR 496 (C).
[11] See note 7.
[12] See *Principles* 209.
[13] See note 7.
[14] Sec 35(5).
[15] See note 14. *Principles* 207; *S v Kidson* 1999 (1) SACR 338 (W) 349 b-c.

The position in civil proceedings regarding improperly or illegally obtained evidence before and after the adoption of the Constitution will be considered separately.[16]

3. The exclusion of unconstitutionally obtained evidence in criminal cases in terms of section 35(5) of the Constitution[17]

3.1 Elements of section 35(5)

It is evident from the wording of s 35(5) of the Constitution ("evidence … *must* be excluded …") that it places a *duty* upon the court to exclude evidence which has been obtained in a manner that violates any constitutional right. However, this duty is only activated if the admission of the unconstitutionally obtained evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. It seems equally clear that the court is also endowed with *discretion* to determine if one of the two stated consequences would ensue if the said evidence were to be admitted. Schwikkard and Van der Merwe give a succinct description of the court's duty and discretion in this regard:

> There is a duty to exclude if admission would have one of the consequences identified in the section. In this respect there is no discretion but a fixed constitutional rule of exclusion. However, in determining whether admission would have one of the two identified consequences a court is required to make a value judgment and in this respect there is a discretion which must, obviously, be exercised having regard to all the facts of the case, fair trial principles and, where appropriate, considerations of public policy.[18]

It seems clear, therefore, that there are three distinct elements contained in section 35(5). First, the court must determine if the evidence in question was obtained in a manner that violated any of the accused's constitutional rights. If the answer to this question is in the affirmative the next question is whether admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice. If the court, in the exercise of its discretion, has determined that one of the stated consequences would ensue, it reaches the final stage, which involves a duty to exclude the evidence. At this stage there is no discretion – only a duty.[19]

3.2 Section 24(2) of the Canadian Charter

It will be apposite to refer briefly to the position under section 24(2) of the Canadian Charter of Rights and Freedom (hereafter "the Charter"), since section 35(5) of our Constitution is clearly modeled on the former provision and our courts have been inclined to follow Canadian precedents.

> Section 24(2) of the Charter provides as follows:
>
> Where … a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[20]

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[16] See *infra* par 4.
[17] See note 14.
[18] *Principles* 215.
[19] The judge in *S v Hena* 2006 (2) SACR 33 (SE), who purported to exercise a discretion at this stage of the inquiry clearly misconstrued 35(5) – see De Vos "Judicial Discretion to Exclude Evidence in terms of s35(5) of the Constitution: *S v Hena* 2006 (2) SACR 33 (SE)" 2009 (3) *SACJ* 433.
[20] Cited in *Principles* 201.

It seems clear from the wording of the provision ("shall be excluded") that it also places a *duty* on the court to exclude evidence obtained in violation of any right enshrined in the Charter. However, this duty only arises in the event of the court making a finding that admission of such evidence would bring the administration of justice into disrepute. In determining this issue the judge is directed by section 24(2) to have regard to "all the circumstances". This means that the court must consider and balance a range of actions, which involves making a value judgment and, therefore, exercising a discretion.[21]

The framework within which this discretion is exercised and the factors to be taken into account have been the subject of contradictory decisions and critical academic comments in Canada.[22] In *R v Grant*[23] the Supreme Court of Canada broke new ground by declining to follow its own previous jurisprudence on the application of section 24(2) of the Charter and by adopting a revised approach in this regard. The Court was in essence confronted by two contradictory precedents, namely *R v Collins*[24] *and R v Stillman,*[25] decided in 1987 and 1997 respectively.

In *R v Collins*[26] Lamer J, writing for the majority, grouped the factors to be considered under section 24(2) into three categories, *viz* those that

(i) are "relevant in determining the effect of the admission of the evidence on the fairness of the trial";
(ii) are "relevant to the seriousness of the *Charter* violation and thus to the disrepute that will result from judicial acceptance of evidence obtained through that violation"; and
(iii) "relate to the effect of excluding the evidence. The question … is whether the system's repute will be better served by the admission or exclusion of the evidence …"

According to Lamer J the factors relevant to determining the fairness of the trial include the nature of the evidence in question. He explained further:

> Real evidence that was obtained in a manner that violated the *Charter* will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the *Charter* and its use does not render the trial unfair. However, 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 such evidence 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.[27]

In *R v Stillman*[28] the court adhered to the framework laid down in *R v Collins*[29] but adopted a different approach regarding the fair trial enquiry. Cory J writing for the majority, rejected the notion that the distinction between real evidence and testimonial evidence is of any significance in the context of the fair trial enquiry. The court held that instead it is crucial to

[21] *Cf* De Vos 2009 (3) *SACJ* 433 435.
[22] See the cases and articles cited in *R v Grant* 2009 SLC 32, [2009] 2 SCR 353 par 101.
[23] *Ibid*.
[24] [1987] 1 SCR 265 (Also [1987] 28 CRR 122 (SCC)).
[25] [1997] 1 SCR 607 (Also [1997] 42 CRR (2d) 189 (SCC)).
[26] [1987] 28 CRR 122 (SCC) 137-139.
[27] *Ibid* 137.
[28] [1997] 42 CRR (2d) 189 (SCC).
[29] *Supra* n 26.

determine if the challenged evidence was obtained in a conscriptive or non-conscriptive manner. Cory J explained:

> The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized 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*. Where the accused, as a result of a breach of the *Charter*, is compelled or conscripted to provide a bodily substance to the state, this evidence will be of a conscriptive nature, despite the fact that it may also be 'real' evidence. Therefore, it may be more accurate to describe evidence found without any participation of the accused, such as the murder weapon found at the scene of the crime, or drugs found in a dwelling house, simply as *non-conscriptive* evidence; its status as 'real' evidence, *simpliciter*, is irrelevant to the s 24(2) inquiry.[30]

The majority also rejected the common law rule that the privilege against self-incrimination is confined to testimonial evidence (*i.e.* utterances or conduct with a communicative element) and, therefore, not applicable to real evidence (*i.e.* physical objects or bodily substances). The court, therefore, held that the compelled provision of bodily substances "in breach of a *Charter* right for purposes of self-incrimination will generally result in an unfair trial as surely as the compelled or conscripted self-incriminating statement."[31]

In terms of Cory J's "fair trial analysis" the admission of non-conscriptive evidence would not render the trial unfair and the court will proceed to consider the two other questions stated in *R v Collins*[32] On the other hand, the admission of conscriptive evidence – both testimonial and real – would, as a rule, render the trial unfair and should be excluded solely on this basis.[33] However, if the challenged evidence would inevitably have been discovered by alternative non-conscriptive means its admission would generally not render the trial unfair.[34]

The contradictory decisions and critical arguments on the application of section 24(2) of the Charter alluded to above[35] persuaded the Supreme Court to revisit the issue in *R v Grant.*[36] In this case McLachlin CJ and Charron J, writing for the majority, encapsulated the criticism against the decision in *R v Stillman*[37] in these words:

> [I]t has been criticized for casting the flexible in 'all the circumstances' test prescribed by s 24(2) into a straight-jacket that determines admissibility solely on the basis of the evidence's conscriptive character rather than all the circumstances; for inappropriately erasing distinctions between testimonial and real evidence; and for producing anomalous results in some situations …[38]

In order to address these concerns the majority adopted a revised approach, which was phrased as follows:

> A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute

[30] [1997] 42 CRR (2d) 189 (SCC) 219. Emphasis in the original.
[31] *Ibid* 223.
[32] See n 26 *Supra*.
[33] It is then unnecessary to consider the other two questions since an unfair trial "would necessarily bring the administration of justice into disrepute" - *R v Stillman supra 231.*
[34] See *R v Stillman supra* 231 for a summary of this "fair trial analysis".
[35] n 22.
[36] n 23.
[37] [2009] 2 SCR 353.
[38] *Ibid* par 101.

> engages three avenues of inquiry, each rooted in the public interests engaged by s 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.[39]

Although trial fairness is not specifically mentioned in this new framework it is clearly a factor that can be accommodated under the second enquiry.[40] The court proceeded to elaborate on the content of this three lines of enquiry in the context of the following types of evidence.[41]

(i) Statements by the accused.[42]
(ii) Bodily evidence (i.e. substances taken from the body of the accused.[43]
(iii) Non-bodily physical evidence.[44]
(iv) Derivative evidence (i.e. "physical evidence discovered as a result of an unlawfully obtained statement")[45]

The court emphasized that the same three lines of enquiry must be pursued in the case of each type of evidence.

It seems that the revised framework adopted in *R v Grant* constitutes a more flexible approach than the framework laid down in *R v Collins*, as constricted by the conscriptive / non-conscriptive test in *R v Stillman*. The new framework can still accommodate the factors enunciated in *R v Collins* and it gives proper recognition to the requirement of "all the circumstances" contained in section 24(2) of the Charter. It also maintains the distinction between testimonial and real evidence.[46]

3.3 Application of tests contained in section 35(5) of the South African Constitution

The wording of s 35(5) of the Constitution ("or otherwise") makes it clear that the consequence "detrimental to the administration of justice", constitutes a broad criterion under which the other consequence, "unfair trial", must be accommodated. In other words, if admission of evidence would render the trial unfair, it would inevitably be detrimental to the administration of justice. However, if admission of the evidence would not render the trial unfair, it might be necessary nevertheless to exclude the evidence on the basis that admission would be detrimental to the administration of justice. In brief, whereas admission that would

[39] *Ibid* par 71.
[40] *Cf* the last sentence of the above *dictum* and see also par 65 of majority judgment.
[41] *Ibid* par 89 *et seq*.
[42] *Ibid* par 89.
[43] *Ibid* par 99.
[44] *Ibid* par 112.
[45] *Ibid* par 116.
[46] For a South African assessment of *R v Grant* see Naudé "The Revised Canadian Test for the Exclusion of Unconstitutionally Obtained Evidence" 2009 *Obiter* 607.

lead to an unfair trial would always be detrimental to the administration of justice, the reverse is not true. It is possible that admission would not result in an unfair trial but would be detrimental to the administration of justice.[47]

Although the question whether admission of the evidence would otherwise be detrimental to the administration of justice is an over-arching test, which embraces the test relating to the fairness of the trial, section 35(5) has created two separate tests that must be applied as such. A court must therefore, first enquire if the fairness of the trial would be affected by admission of the impugned evidence and if the answer is in the negative proceed with the second enquiry.

Naudé, however, expresses the view "that it is unnecessary to consider the two legs … as separate tests". According to him "[t]here should in principle only be one test: namely whether the admission of certain evidence would be detrimental to the administration of justice …"[48] He finds support for this opinion in the revised approach adopted in *R v Grant*.[49] However, in my view one should be mindful of the fact that the wording of section 24(2) of the Canadian Charter is quite different from that of section 35(5) of the Constitution. Whereas the Canadian provision lays down one broad test section 35(5) clearly provides for two tests. It is respectfully submitted that Naude's view is not supported by the wording of section 35(5) of the Constitution and that his reliance on *R v Grant* in this regard is misplaced.[50]

[47] *Principles* 215-216; *S v Tandwa* 2008 (1) *SACR* 613 (SCA) par 116.
[48] 2009 *Obiter* 608.
[49] *Ibid*; [2009] 2 SCR 353.
[50] *Cf Principles* 216; Steytler *Constitutional Criminal Procedure* (1998) 36.

3.3.1 Fair trial enquiry

The accused's right to a fair trial, which is embodied in section 35(3) of the Constitution, embraces a number of more specific rights. The rights that are of special importance in the present context are the right to be represented by counsel and to be informed of this right, the right to remain silent, the right not to be compelled to give self-incriminating evidence and, prior to the trial, the right not to be compelled to make any confession or admission that could be used in evidence against the accused.[51]

Once it has been established that the impugned evidence had been obtained in violation of any of the accused's constitutional rights the court must proceed with the fair trial enquiry, taking into consideration all the facts of the case, as well as certain factors such as "the nature and the extent of the constitutional breach, the presence or absence of prejudice to the accused, the need to ensure that exclusion of evidence does not tilt the balance too far in favour of due process against crime control, the interests of society and, furthermore, public policy."[52]

Our courts have thus far adhered to the common law principle that the privilege against self-incrimination is confined to testimonial evidence – *i.e.* utterances or conduct with a communicative element such as a pointing out.[53] An illustration in this regard would be where the police fail to inform an accused upon his arrest of his right to counsel and thereafter proceed to interrogate him continuously until he makes an incriminating statement. Such action would clearly constitute an infringement of the accused's right to remain silent and privilege against self-incrimination and the statement may be excluded on the basis that its admission would render the trial unfair. The right to counsel and to be inform thereof is of course crucial for the protection of the accused's right to remain silent and his privilege against self-incrimination.[54]

The privilege against self-incrimination is, therefore, not applicable to real evidence, which may take the form of bodily substances emanating from the accused or physical evidence discovered as a result of an unlawfully obtained statement from the accused (derivative evidence or fruit of the poisonous tree).[55]

Bodily evidence emanating from the accused includes substances such as hair samples, blood samples, fingerprints, voice samples and handwriting.[56] Non-bodily physical evidence discovered as a result of an unlawfully obtained statement from an accused may present itself in a variety of different types. Illustrations of such evidence are the discovery of the murder weapon[57] or the money taken in a robbery.[58] Both forms of real evidence may, of course, be highly incriminating, but they are not *self*-incriminating. Such evidence pre-existed the breach of the accused's constitutional rights and, thus, unlike a statement, it did not come into *being* because of the accused's action.

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[51] The latter right is contained in sec 35(1) of the Constitution.
[52] *Principles* 227-228 with reference to case law; *S v Tandwa* 2008 1 *SACR* 613 (SCA) par 117.
[53] *Principles* 238 and the cases cited there.
[54] *Cf S v Agnew* 1996 (2) SACR 535 (C); *Principles* 229.
[55] *Principles* 238-245.
[56] *Ibid* 238.
[57] *Cf R v Burlingham* [1995] 28 CRR (2d) 244 (SCC).
[58] *S v Tandwa* 2008 (1) SACR 613 (SCA).

It is to be welcomed that our courts have thus far declined to follow that part of the decision in *R v Stillman*[59] which extended the common law privilege against self-incrimination to include evidence of bodily substances emanating from an accused. Such an extension would be unnecessary and artificial.l[60] Where real evidence was obtained in an unconstitutional manner and the court's finding is that such action did not infringe the accused's privilege against self-incrimination and that admission of such evidence would not render the trial unfair, it does not mean that the evidence would be admitted. Depending on the facts (e.g the seriousness of the infringement), the court may still exclude the evidence on the basis that its admission would be detrimental to the administration of justice.[61]

Although our courts have adhered to the distinction between testimonial and real evidence in the context of the privilege against self-incrimination the same cannot be said about the inquiry into the fairness of the trial in terms of section 35(5) of the Constitution. At first our court followed the approach adopted in *R v Collins*[62] relating to the fair trial enquiry. For purposes of this enquiry they, therefore, distinguished between real evidence that was obtained in violation of the accused's constitutional rights and testimonial evidence that was acquired in like manner. On this basis a court could, therefore, find that real evidence obtained in such a manner would not render the trial unfair. Unlike a compelled statement, real evidence pre-existed the constitutional breach and was, therefore, not produced under compulsion of the accused.[63] This, of course, does not mean that such real evidence was necessarily admitted. It could still be excluded because its admission would be detrimental to the administration of justice.[64]

In *S v Tandwa*[65] the Supreme Court of Appeal declined to follow the *Collins* test for purposes of the fair trial enquiry and instead aligned itself with the reasoning in two later Canadian cases, namely *R v Burlingham*[66] and especially *R v Stillman.*[67] In *S v Tandwa*[68] two of the accused charged with robbery were severely assaulted by the police, as a result of which they made incriminating statements. One pointed out a part of the stolen money whilst the other pointed out a part of the stolen money and an AK 47 rifle. The trial court applied the *Collins* test by focusing on the nature of the evidence (testimonial or real) and excluded the statements accompanying the pointing out. The court, however, admitted the real evidence (the money and AK 47) that was discovered in this manner.[69] The Supreme Court of Appeal disagreed with this approach. Relying on *R v Stillman*[70] the court stated that the distinction between real and testimonial evidence in this context "is misleading, since the question should be whether the accused was compelled to provide the evidence".[71]

The Supreme Court of Appeal, in *S v Tandwa*, elaborated as follows on the factors that a court should take into account in determining whether admission of the challenged evidence would render the trial unfair:

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[59] Note 25.
[60] *Cf Principles* 240.
[61] Cf *Principles* 240.
[62] Note 24.
[63] *Cf S v Mkize* 1999 (2) SACR 632 (W).
[64] *Cf S v Pillay* 2004 (2) SACR 419 (SCA); *Principles* 238-239.
[65] 2008 (1) SACR 613 (SCA).
[66] [1995] 28 CRR (2d) 244 (SCC).
[67] Note 25.
[68] 2008 (1) SACR 613 (SCA).
[69] *Ibid* par 113.
[70] Note 25.
[71] 2008 (1) SACR 613 (SCA) par 125.

> [T]he courts must take into account competing social interests. The court's discretion must be exercised by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to […] accused persons. Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.[72]

The court proceeded to express itself as follows on the admissibility of the real evidence *in casu:*

> Though 'hard and fast rules' should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilized injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct.[73]

Against this background the court concluded that the evidence of the recovered money and AK 47 should have been excluded and proceeded to deal with the appeal on that basis.[74]

In my view the court conflated the two separate concepts embodied in section 35(5), *viz* whether admission would render the trial unfair and whether it would be detrimental to the administration of justice. It seems that some of the factors that the court considered in determining the fairness of the trial, like "public policy" and "basic civilized injunctions", should rather have been taken into account under the second leg of section 35(5). Since the issue was the admissibility of real evidence, the privilege against self-incrimination was clearly not applicable and it was also not considered by the court. On the other hand, the incriminating statements of the two accused were clearly obtained in a manner that violated this privilege and admission thereof would clearly have rendered the trial unfair. In my view the court should have answered the fair trial enquiry pertaining to the real evidence in the negative and proceeded to exclude such evidence on the basis that admission thereof would have been detrimental to the administration of justice. The fact that unconstitutionally obtained real evidence is excluded under the second leg of section 35(5) – and not in terms of the fair trial requirement – does not make the security of the accused's body "less worthy of protection".[75] The suggested approach would have kept the distinction between real and testimonial evidence intact in the context of the fair trial enquiry, which would have been in line with the position regarding the privilege against self-incrimination. At present the situation is confusing because the said distinction is maintained in the context of the privilege but not in the context of the fair trial enquiry.

[72] *Ibid* par 117.
[73] *Ibid* par 120.
[74] *Ibid* par 121 and 128.
[75] *Principles* 241.

The criticisms against the reasoning in *R v Stillman*[76] have been vindicated by the decision in *R v Grant*[77] which, in my view, will prove to be a seminal judgment. Hopefully the Supreme Court of Appeal will take note of this case and reconsider the *Tandwa* approach on the next occasion it is called upon to apply section 35(5) to real evidence.

3.3.2 Whether admission of evidence would be detrimental to the administration of justice

In *S v Mphala* Cloete J stated the following with regard to this leg of section 35(5):

> So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.[78]

It is a well-known fact that South Africa suffers from an unacceptably high level of violent crime. This makes it difficult for the courts to maintain the balance referred to above. It is submitted that the high crime rate and public opinion on the exclusion of incriminating evidence are factors that may persuade a court to admit evidence under the second leg of section 35(5), although it was obtained in violation of an accused's constitutional rights.[79]

Other factors that the courts take into account in the interpretation of the second leg of section 35(5) include good faith and reasonable conduct of the police as apposed to bad faith and unreasonable conduct of the police.[80] In a case where circumstances dictated that a police official act quickly to seize a dangerous weapon and he failed to warn the accused of his constitutional rights, it was held that evidence of the accused's pointing out of the weapon was admissible. In the opinion of the court it would not have been detrimental to the interests of justice to admit the evidence.[81] This was clearly an example of good faith and reasonable conduct on the part of the police. However, in another case the opposite occurred. The police infringed the accused's constitutional right to privacy in a flagrant manner by deliberately submitting false information under oath to a judge in order to obtain the necessary judicial permission to intercept and monitor certain telephonic conversations, which led them to the two accused. *In casu* the court held that admission of the telephonic conversations would be detrimental to the administration of justice.[82] This case serves as a "text-book example" of the effect of bad faith on the part of the police.[83]

Another factor that our courts would also take into account in this context is the inevitable discovery of real evidence or the discovery of such evidence on the basis of an independent source. This approach is in line with American and Canadian jurisprudence on the topic.[84]

Finally, a question, which to my knowledge has not engaged the attention of our courts, may be phrased as follows: "What would the position be if the accused were to use unconstitutional means to obtain evidence in support of his defence?" An illustration of this

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[76] Note 25.
[77] Note 22; Naudé 2009 *Obiter* 608.
[78] 1998 (1) SACR 654 (W) 657 g-h.
[79] *Cf S v Ngcobo* 1998 (10) BCLR 1248 (N).
[80] *Principles* 251-256.
[81] *S v Lottering* 1999 (12) BCLR 1478 (N) 1483.
[82] *S v Naidoo* 1998 (1) SACR 479 (N).
[83] *Cf Principles* 252.
[84] *Principles* 258-259.

would be where the accused violates a person's constitutional rights (e.g. the right to privacy) in order to obtain evidence. The fair trial enquiry would clearly not be applicable in this scenario since the right to a fair trial pertains specifically to the accused. However, it is submitted that such evidence could be excluded on the basis that its admission would be detrimental to the administration of justice.

4. Improperly or unlawfully obtained evidence in civil cases

The position in this regard can be stated briefly.

In terms of the common law position, prior to the adoption of the Constitution of 1996, recognition was accorded in several cases to a judicial discretion to exclude illegally or improperly obtained evidence.[85] In *Motor Industry Fund Administrators (Pty) Ltd v Janit* Myburgh J mentioned the following reasons justifying such a discretion:

> Modern technology enables a litigant to obtain access to the most private and confidential discussions of his opponent: his telephones can be tapped, a listening device can be planted in the boardroom (or bedroom) of the opponent, documents can be photostatted, tape recordings of meetings stolen.[86]

Myburgh J, therefore concluded that "as a matter of public policy, a court should have a discretion to exclude evidence which was unlawfully obtained."[87]

After the commencement of the constitutional era the judicial discretion in civil proceedings to exclude illegally or otherwise improperly obtained evidence was again specifically recognized. To deny the existence of such a discretion would, in the words of Brand J in *Fedics Group (Pty) Ltd v Matus*, be "a retrogressive step in the development of our law …".[88]

The Constitution also provides a basis for such a discretion although section 35(5) is only applicable to criminal proceedings. The Constitution guarantees the right to a fair trial to civil litigants, which clearly provides a framework within which this discretion can be exercised.[89] Section 34 provides as follows:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In *Lotter v Arlow*[90] the applicant in compulsory sequestration proceedings sought to introduce evidence against the respondents, which had been obtained in a manner that was not only unlawful but also constituted a deliberate infringement of the respondents' right to privacy. After confirming the common law discretion Bertelsmann J continued:

> Since the advent of the Constitution, the court is obliged to uphold its principles and foundational values. The citizen has a right to protection against violence of his or her fundamental rights. As a matter of public policy and in upholding the constitutional rights of the respondents, this court must set its face against the unwarranted intrusion into the private sphere of individuals. … This court has a

[85] *Cf Shell SA (Edms) Bpk v Voorsitter Dorperaad van die OVS* 1992 (1) SA 906 (O); *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 (3) SA 56 (W); *Lenco Holdings Ltd v Eckstein* 1996 (2) SA 693 (N).
[86] 1994 (3) SA 56 (W) 63H.
[87] *Ibid* 64A; see *Principles* 264.
[88] 1998 (2) SA 609 (C); *Principles* 264.
[89] De Vos "Civil Procedural Law and the Constitution of 1996; an Appraisal of Procedural Guarantees of Civil Proceedings" 1997 (3) *TSAR* 444.
[90] 2002 (6) SA 60 (T).

discretion to exclude evidence in civil matters which has been obtained in violation of the Constitution or '… by a criminal act or otherwise improperly'.[91]

Against this background Bertelsmann J concluded that "evidence which has been obtained in breach of a fundamental constitutional right can only be admitted if such admission would not lead to an unfair trial, or would not bring the administration of justice into disrepute."[92] He accordingly excluded the evidence on the basis that admission thereof would bring the administration of justice into disrepute.[93]

It is submitted that the right to a fair trial and the broader concept, repute of the administration of justice, constitute a sound basis for the exercise of this discretion.

5. Conclusion

The rules regulating the admissibility of improperly, illegally or unconstitutionally obtained evidence are aimed at protecting the rights of the accused in criminal proceedings and the parties in civil proceedings, as well as upholding the repute of the administration of justice. In the process relevant evidence may be excluded but the integrity of the system is maintained, which, in my view, is a worthy goal to pursue.

[91] *Ibid* 63J – 64 B referring to *Lenco Holdings Ltd v Eckstein* note 83 at 704C.
[92] *Ibid* 64 F.
[93] *Ibid* 65 G.