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DETERMINING THE EFFECT (THE SOCIAL COSTS) OF EXCLUSION UNDER THE SOUTH AFRICAN EXCLUSIONARY RULE: SHOULD FACTUAL GUILT TILT THE SCALES IN FAVOUR OF THE ADMISSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE?*

D Ally**

1 Introduction

The exclusion of unconstitutionally obtained evidence in criminal trials is a subject that frequently evokes a conflict between two equally important societal views. Crime control protagonists are repulsed by the acquittal of those who are factually guilty. They contend that society pays an excessive price when an accused is acquitted for the reason that unconstitutionally obtained evidence, crucial for a conviction on a serious charge, has been excluded. The social costs of exclusion are great under these circumstances, because a person who is factually guilty has not been brought to book. By contrast, fundamental rights advocates frown upon a conviction based on evidence procured by police conduct that unlawfully encroaches upon the constitutional rights of accused persons. In other words, there is a tension between the truth-seeking function of the criminal justice system and the protection of fundamental rights. The South African exclusionary rule was designed to strike a balance between these countervailing societal interests.

In terms of South African common law courts were, after *Ex Parte Minister of Justice in re R v Matemba*,[1] except for admissions,[2] confessions,[3] and pointings-out,[4] not

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1 *Ex Parte Minister of Justice in re R v Matemba* 1941 AD 75. In this case the admissibility of a palm print, taken against the will of the accused, was at issue. The Appellate Division of the Supreme Court held the evidence to be admissible, as the police conduct did not result in testimonial compulsion.

2 See s 219A *Criminal Procedure Act* 51 of 1977 (as amended) (hereafter the CPA).

especially concerned with the manner in which evidence had been obtained.[5] The rationale for the existence of the exceptions relevant to admissions, confessions and pointings-out is in the main a lack of voluntariness,[6] as well as the reliability principle.[7] The golden rule that applied was whether or not the evidence obtained was relevant to the issues and, if the answer was in the affirmative, such evidence would in general be admissible. The incorporation of section 35(5) into the *Constitution of the Republic of South Africa*, 1996[8] significantly changed this position. This provision reads as follows:

> Evidence obtained in a manner that violates any right contained in the Bill of Rights must be excluded if the admission of such evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

This provision suggests that evidence may be excluded (despite its relevance to the issues) if it was obtained as a result of an infringement of a right guaranteed in the Bill of Rights, and if its admission would cause either of the consequences that this provision seeks to prevent. Naudé[9] is of the opinion that the courts of South Africa

3 The admissibility of confessions is governed by s 217 of the CPA.

4 See for example *S v Nzama* 2009 2 SACR 326 (KZP), where the admissibility of a pointing-out was in contention recently. For a discussion of the concepts of admissions, confessions and pointings-out, see Schwikkard 1991 *SACJ* 326; Du Toit *et al Commentary* 24-66I, 24-66N to 24-66Q; also Kruger and Kriegler *Suid-Afrikaanse Strafproses* 621-624.

5 See *S v Matlou* 2010 2 SACR 342 (SCA) para 27; also Zeffertt and Paizes *Law of Evidence* 630; De Villiers (ed) *TRC Report* 191 sets out police practice in obtaining admissions and confessions in South Africa during that period as follows: "Numerous applicants [police officers] admitted that psychological and physical coercion was routinely used in both legal detentions and unlawful custody"; and at 619 the report concludes as follows: "It is accepted now that detention without trial allowed for the abuse of those held in custody, that torture and maltreatment were widespread and that, whilst officials of the former state were aware of what was happening, they did nothing about it." See also De Vos 2011 *TSAR* 269.

6 See *S v Januarie* 1991 2 SACR 682 (SE); *S v Sheehama* 1991 2 SACR 860 (A) and S *v Agnew* 1996 2 SACR 535 (C) 538. The admissibility of admissions, confessions and pointings-out are subject to technical requirements developed by the courts in their interpretation of the relevant sections, with the aim of creating procedural safeguards for the protection of the accused. For a discussion of the requirements for the admissibility of admissions, confessions and pointings-out, see Du Toit *et al Commentary* 24-50J to 24-82; also Kruger and Kriegler *Suid-Afrikaanse Strafproses* 541-568. For the legal position in England on this issue, see s 76(5) of the *Police and Criminal Evidence Act* 1986, as well as the matter of *Lam Chi-ming v R* 1991 LRC (Crim) 416 422.

7 *S v Matlou* 2010 2 SACR 342 para 27; also Schwikkard 1991 *SACJ* 321-323.

8 Henceforth referred to as the Constitution.

9 Naudé 2009 *Obiter* 627. The opinion has been expressed before that the *Grant* admissibility framework is in essence an assessment of the factors analysed during the era of *R v Collins* 1987 1 SCR 265 (SCC), but in different contexts – see Ally 2010 *SALJ* 710. The following remark by Cromwell J, made on behalf of the majority opinion in *R v Côte* 2011 SCC 46 para 46, confirms the correctness of this point of view: "In setting out this new framework, this Court made

should follow the Canadian admissibility framework recently adopted by the Supreme Court of Canada in *R v Grant*[10] to assess the admissibility of unconstitutionally obtained evidence. By contrast, De Vos[11] is of the view that such an approach is not aligned to the structure of section 35(5). The latter point of view is supported. It is submitted that the admissibility assessment should consist of two tests that must be clearly separated from each other for the reason that the assessment in each leg of the analysis serves to enhance different societal interests.[12] The discussion in this contribution is accordingly based upon this two-legged approach, as opposed to that followed in the current Canadian admissibility framework.[13] It must, however, be emphasised that section 24(2) *Canadian Charter* jurisprudence remains a valuable source for the interpretation of section 35(5).

Endorsing the approach adopted by the Supreme Court of Canada in the seminal decision of *R v Collins*,[14] the majority opinion of the Supreme Court of Appeal in *Pillay v S*[15] reasoned that three groups of factors must be considered in order to assess whether the disputed evidence should be either received or excluded.[16] The

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it clear that while these lines of inquiry did not precisely track the categories of considerations set out in earlier jurisprudence, they did capture the factors relevant to the s. 24(2) determination that had been set out in earlier cases. In *Beaulieu*, Charron J., writing for the Court, emphasized this point, and noted that *Grant* did not change the relevant factors in the s. 24(2) analysis". Compare the comment by the distinguished Canadian scholar, Stuart 2010 *Sw J Int'l L* 313, where he expresses the following view: "Much of the voluminous jurisprudence on section 24(2) over the past 27 years will be of little significance". I do, however, support Stuart's view that immediately follows the quoted sentence: "The Court has arrived at a revised discretionary approach to section 24(2) free of rigid rules, instead placing special emphasis on the seriousness of the breach rather than the seriousness of the offence or the reliability of the evidence. In my view, the Court has adopted a more sensible, carefully balanced and distinctive approach to the exclusion of unconstitutionally obtained evidence ..." – see Ally 2010 *SALJ* 712. One of the major departures from the *Collins* era is the fact that the conscripted/non-conscripted distinction has been discarded.

10 *R v Grant* 2009 66 CR (6th) 1 (SCC).

11 De Vos 2011 *TSAR* 268.

12 This approach should arguably be followed because of the textual differences between s 24(2) of the *Canadian Charter of Rights and Freedoms*, 1982 (henceforth "the Canadian Charter" or "the Charter") and s 35(5). Unlike the Canadian provision, which clearly sets out one criterion for the admissibility assessment, s 35(5) directs that South Africa's courts should determine firstly if admission of the evidence would render the trial unfair; and secondly what effect the exclusion or admission of the evidence would have on the integrity of the criminal justice system. In other words, the courts must demonstrate what effect the admission of the evidence would have on the fairness of the trial, whereas the Canadian courts are not bound by such a directive. See in this regard the comparable point of view held by De Vos 2011 *TSAR* 274.

13 See, in this regard, Ally 2010 *SALJ* 713.

14 *R v Collins* 1987 1 SCR 265 (SCC).

15 *Pillay v S* 2004 2 BCLR 158 (SCA).

16 *Pillay v S* 2004 2 BCLR 158 (SCA) paras 87 and 93.

first group of factors (trial fairness) is considered during the first leg of the admissibility assessment.[17] The first leg of the assessment relates to the phrase "[e]vidence … must be excluded if its admission would render the trial unfair". This assessment is concerned with the effect that admission of the disputed evidence would have on the fairness of the trial. During the first leg of the assessment the public interest in protecting the rights of the accused is the key concern.[18] This leg of the admissibility assessment is not explored in this article.[19]

The second leg of the admissibility analysis relates to the phrase "would be detrimental to the administration of justice".[20] The second and third groups of factors are evaluated during this leg of the admissibility assessment.[21] The second group of factors is concerned with the seriousness of the constitutional infringement,[22] and the third group of factors deals with the effect that exclusion may have on the integrity of the administration of justice.[23] In this contribution, I explore the third group of factors (also known as the "effect of exclusion on the integrity of the criminal justice system" or an assessment of the "costs of exclusion"). In doing so I wish to join a number of South African commentators who have already made meaningful contributions towards the interpretation of section 35(5) of the Constitution.[24]

17 *Pillay v S* 2004 2 BCLR 158 (SCA) paras 87-90.
18 Ally 2010 *SALJ* 713.
19 For a discussion of the first leg of the admissibility assessment, see Schmidt and Rademeyer *Bewysreg* 378; Van der Merwe "Unconstitutionally obtained evidence" (2009) 224-248, and the unpublished doctoral thesis by Ally *Constitutional Exclusion* 210-358.
20 See Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 248.
21 *Pillay v S* 2004 2 BCLR 158 (SCA) para 91, where the majority opinion introduced this leg of the assessment as follows: "This brings us to the second leg of the enquiry ..."
22 For a discussion of the second group of factors, see Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 248-259; Schmidt and Rademeyer *Bewysreg* 381-382.
23 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97, where Mpati DP and Motata AJA wrote the majority opinion and held as follows: "Lamer J, in the Collins case (at 138), says the question under section 24(2) of the Charter is whether the system's repute will be better served by the admission or the exclusion of the evidence. Our view is that the same applies under section 35(5) of the Constitution".
24 See for example the significant contribution made by Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 181-259, and his contribution in Du Toit *et al Commentary* 24-98H to 24-9N-12. See also Steytler *Constitutional Criminal Procedure* 33-40; Schwikkard "Evidence" 52-57 to 52-64; Schwikkard "Arrested, Detained and Accused Persons" 737-797; Naudé 2009 *SAPR/PL* 506; Naudé 2001 *SACJ* 38-58; Schwikkard 1997 *SAJHR* 446-457; Zeffertt and Paizes *Law of Evidence* 625-641; Schutte 2000 *SACJ* 318-57-68; Ally 2010 *SACJ* 22; Ally 2010 CILSA 239; De Villiers 1997 *TSAR* 615; De Villiers 1998 *TSAR* 20.

As said before, based on *R v Collins*,[25] the relevant factors considered under the third group of factors are the "seriousness of the charges faced by the accused" and the "importance of the evidence to secure a conviction". An important issue that arises when this group of factors is considered is if the reliability of the evidence (particularly real evidence) and its significance in proving factual guilt should play a prominent role in the assessment. Given that the third group of factors is concerned with the public interest in crime control, it has been suggested that public opinion should be a weighty factor when this group of factors is considered.[26] It is against this background that this contribution poses the following three questions: firstly, if the "current mood" of society should be accorded much weight when this group of factors is weighed and balanced against the other relevant factors during the admissibility assessment; secondly, if a consideration of the "seriousness of the charge" and "the importance of the evidence to secure a conviction" could possibly encroach upon the presumption of innocence;[27] and, finally, if factual guilt should be allowed to tilt the scales in favour of the admission of unconstitutionally obtained evidence if the evidence is essential for a conviction on a serious charge?

It is important to note that an admissibility assessment under section 35(5) is considered during a trial-within-a-trial.[28] Nevertheless, the practice has recently developed that an accused may challenge the admissibility of evidence by means of a pre-trial motion on the grounds that a warrant authorising the search and seizure of evidence be declared invalid[29] or that a provision contained in an Act of Parliament, authorising the issue and execution of a search warrant be declared

25 *R v Collins* 1987 1 SCR 265 (SCC).

26 Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 249.

27 For a discussion of this issue in the Canadian context, see Ally 2010 *SALJ* 705-706.

28 See *S v August* 2005 2 All SA 605 (NC); *S v Motloutsi* 1996 1 SACR 78 (C); *S v Melani* 1996 2 BCLR 174 (EC); *S v Mayekiso* 1996 2 SACR 298 (C); *S v Van der Merwe* 1997 19 BCLR (O); *S v Mathebula* 1997 1 BCLR 123 (W); *S v Soci* 1998 2 SACR 275 (E); *S v Madiba* 1998 1 BCLR 38 (D); *S v Mphala* 1998 1 SACR 388 (W); *S v Shongwe* 1998 9 BCLR 1170 (T); *S v Gumede* 1998 5 BCLR 530 (D); *S v Naidoo* 1998 1 SACR 479 (D); *S v Malefo* 1998 1 SACR 127 (W); *S v Ngcobo* 1998 10 BCLR 1248 (N); *S v Muravha* 1998 JOL 3994 (V); *S v Cloete* 1999 2 SACR 137 (C); *S v Hoho* 1999 2 SACR 159 (C); *S v R* 2000 1 SACR 33 (W); *S v Ndlovu* 2001 1 SACR 85 (W); *S v Mashumpa* 2008 1 SACR 128 (E); *S v Nell* 2009 2 SACR 37 (C); *S v Matlou* 2010 2 SACR 342 (SCA); *S v Dos Santos* 2010 2 SACR 382 (SCA); *S v Lachman* 2010 2 SACR 52 (SCA); *S v Mkhize* 2011 1 SACR 554 (KZD). See also Schmidt and Rademeyer *Bewysreg* 382; Du Toit *et al Commentary* 24-66D to 24-66J.

29 See *Bennett v Minster of Safety and Security* 2006 1 SACR 523 (T); *Mahomed v National Director of Safety and Security* 2006 1 SACR 495 (W); *Zuma v National Director of Public Prosecutions* 2006 1 SACR 468 (D).

unconstitutional.[30] However, in the decision of *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*,[31] the Constitutional Court discouraged the application of this pre-trial remedy when it is aimed exclusively at circumventing the application of section 35(5) or at delaying the finalisation of criminal proceedings.

It must be emphasised that although the focus in this contribution is centred on the third group of factors, it must be borne in mind that the section 35(5) assessment consists of a balancing exercise, where this group of factors should be weighed and balanced against other relevant factors before a court may decide whether either to admit or to exclude the disputed evidence.[32]

This article is presented in three parts. The introduction (part 1) is followed by a discussion of the effect of exclusion on the integrity of criminal justice (also known as the third group of *Collins* factors) in part two. The discussion in part two is sub-divided into three parts. It starts off by asking if the "current mood" of society should play a role in the admissibility assessment and, if so, should considerable weight be attached to it? Secondly, the "seriousness of the charge faced by the accused" is discussed, and thirdly, the "importance of the evidence in order to secure a conviction" is explored. This is followed by a short conclusion in part three, where a recommendation is made in regard to the assessment of the third group of factors.

2 The effect of exclusion on the integrity of the criminal justice system (the social costs of exclusion)

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

31 *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2008 ZACC 13 par 65; compare *S v Basson* 2007 1 SACR 566 (CC) para 262, where the Constitutional Court dismissed (in a different context) an application based on the contention that the issue of the admissibility of bail proceedings should not have been heard before the accused had been called upon to plead.

32 For a discussion of this balancing exercise, see Ally 2010 *SALJ* 712-723. However, compare the approach followed in *S v Mkhize* 2011 1 SACR 554 (KZD) para 51, where Govindasamy AJ applied an approach based on the "automatic" exclusion of unconstitutionally obtained evidence when he reasoned as follows: "I am in agreement with the learned Patel J in *Viljoen*'s case: there is no discretion afforded to a judicial officer when he/she is confronted with a situation where evidence is obtained unconstitutionally. To admit such evidence, contaminated as it is, will be a violation of the accused's rights, and, above all, will be prejudicial to the administration of justice."

Should public opinion play a role in determining whether the exclusion or the admission of the disputed evidence could result in "detriment" to the administration of justice? If so, what weight should be attached to it? These issues are addressed below.

2.1 The "current public mood" of society or public opinion[33]

The Constitutional Court was called upon in *S v Makwanyane*[34] to determine the relevance and weight to be attached to public opinion when interpreting the Bill of Rights. Chaskalson P held that public opinion does play a role when interpreting the Constitution, but courts should not be slaves to it.[35] In his often-quoted statement on this issue, Chaskalson P was prepared to assume that the majority of South Africans are in favour of the retention of the death penalty, and continued by demarcating the impact of public opinion when interpreting a constitutional provision as follows:[36]

> Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.

It should be emphasised that Chaskalson P discussed the task of public opinion not only in relation to the constitutionality of the death penalty, but also with the intention of providing guidance with regard to the interpretation of the provisions of the Bill of Rights. To state the obvious, section 35(5) forms an integral part of the Bill of Rights. It follows that this pronouncement by Chaskalson P should apply with equal force to the interpretation of section 35(5). Differently put, section 35(5) should be regarded not only as a constitutional remedy, but it should also be considered as a fundamental right and should be interpreted accordingly.

33 For a discussion of the Canadian position see Ally 2010 *SALJ* 699-670, where the relevance of the Canadian approach to the interpretation of s 35(5) in general, and the significance of the Canadian approach to this aspect of our exclusionary rule in particular are explored.

34 *S v Makwanyane* 1995 2 SACR 1 (CC).

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

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

In striking contrast to the approach adopted by Chaskalson P in *S v Makwanyane*,[37] Scott JA, writing a dissenting minority opinion in *Pillay v S*,[38] referred to the *caveat* issued by Chaskalson P in the former decision, but distinguished the approach followed by Chaskalson P from the interpretation of section 35(5), and reasoned as follows:[39]

> It seems to me, however, that the very nature of the second leg of the inquiry postulated in section 35(5) of the Constitution contemplates a reference to *public opinion*. It must, *at least*, therefore constitute an *important* element of the inquiry.

Scott JA reasoned that public opinion is a relevant factor in the admissibility assessment and that it should be accorded significant weight when the courts have to consider whether the admission or exclusion of the disputed evidence would be "detrimental to the administration of justice". Van der Merwe echoes this point of view when he argues that the phrase "would be detrimental to the administration of justice" is indicative of the fact that public opinion should be a prominent consideration when the third group of factors is assessed.[40] This argument is vulnerable to criticism. Even though the concept of "detriment" involves the making of a value judgment determined by a presiding officer while taking into account the contemporary views of the public at large, this assessment should not be equated with a consideration of public opinion. Langa DP in *S v Williams*[41] emphasised the importance of this distinction when he indicated that the South African *Constitution* is different from that of the United States. The President of the Constitutional Court 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],

37 *S v Makwanyane* 1995 2 SACR 1 (CC) para 88.
38 *Pillay v S* 2004 2 BCLR 158 (SCA).
39 *Pillay v S* 2004 2 BCLR 158 (SCA) para 126. Emphasis added.
40 Van der Merwe "Unconstitutionally Obtained Evidence" (2002) 234. He contends the following: "It is submitted that the courts are … fully entitled to lean in favour of crime control. … [I]t is probably true that public opinion – including *public acceptance* of a verdict and *support for the system* – must go into the scale as a *weighty factor*". (Emphasis added). See also De Vos 2011 *TSAR* 278.
41 *S v Williams* 1995 7 BCLR 861 (CC). Langa DP was the Deputy President of the Constitutional Court when this judgment was delivered.

freedom and equality", instead of "contemporary standards of decency".[42] 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*.[43]

It is suggested that the approach to the interpretation of the provisions of the Bill of Rights (chapter 2 of the *Constitution*) should – depending on the rationale and the text of its constituent provisions – as far as possible be in accordance with its broader purposes.[44] Put in another way, for the benefit of coherence and legal certainty there should sensibly be a consistent approach to the interpretation of the provisions of the Bill of Rights. Within this context, South African courts should, when determining whether to exclude or admit unconstitutionally obtained evidence under section 35(5), take note of the reminder provided by Chaskalson P in *S v Makwanyane*.[45] This is especially important when one takes into account that the *Makwanyane* court was called upon to provide a *remedy* for the vindication of constitutional guarantees – section 35(5) serves the equivalent purpose. It is accordingly submitted that South African courts should take note of public opinion when applying section 35(5), without seeking public popularity. Erasmus J is in favour of such an approach, as expounded by him in the decisions of *S v*

42 *S v Williams* 1995 7 BCLR 861 (CC) para 36-37. The judge intimated that the relationship between "contemporary standards of decency" and public opinion is uncertain, but added that he is unconvinced that they are synonymous. It should be stated that the concept of "human dignity" was not included as a constitutional value in the *Interim Constitution*. This constitutional value is included in the 1996 *Constitution*.

43 Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 250, is of the view that the over-emphasis on the "longer term constitutional values may result in a fairly rigid exclusionary rule – a result that the drafters of s 35(5) clearly wished to avoid". However, he correctly explains the predicament the courts would be faced with if public opinion were to be over-emphasised, in the following terms: "… over-emphasis of public opinion would result in a wide inclusionary approach – an approach which is … incompatible with a constitutional due process system".

44 See the approach followed by the European Court of Human Rights in *Klass v Germany* 1961, Series A No 28 para 68, where it was held that the interpretation of a provision of the European Convention must be "in harmony with the logic of the Convention"; see further the Canadian approach in *R v Big M Drug Mart Ltd* 1985 50 CCC (3d) 1 (SCC) which was followed by Chaskalson P in *S v Makwanyane* 1995 2 SACR 1 (CC) para 88.

45 *S v Makwanyane* 1995 2 SACR 1 (CC). Currie and De Waal (eds) *Bill of Rights Handbook* 10 describe this attribute of the *Constitution* in the following terms: "The new Constitution is a democratic pre-commitment to a government that is constrained by certain rules, including the rule that a decision of the majority may not violate the fundamental rights of an individual". See also Moseneke 2012 *SALJ* 17, where he reasons that a "tension clearly exists between democratic theory and constitutional supremacy. This is not a dilemma peculiar to our shores. It is perhaps endemic to all constitutional democracies".

Nomwebu[46] *and S v Soci*.[47] He notes that public opinion is influenced by the seriousness of the violation[48] and the seriousness of the charges,[49] especially when one has regard to the state of "lawlessness" prevailing in South Africa.[50] He also refers to the comments by Van der Merwe, where the latter correctly argues that the public might have a negative perception of the criminal justice system in the event that it is perceived as acquitting a dangerous criminal because of an infringement that could be classified as an insignificant technicality.[51] Erasmus J further cautions that it is dangerous to ignore such public perceptions. Moreover, the judge reasoned, a consideration of the "*prevailing* public mood"[52] provides a measure of flexibility to the application of the Bill of Rights and public acceptability of the values enshrined in the *Constitution*. Even so, the judge positioned the relevance of public opinion within its proper scope in section 35(5) challenges: [53]

> Not that a court will allow public opinion to dictate its decision (*S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 431C-F). The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial, and *vice versa*. … It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high-minded values designed to protect criminals from their just deserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish *their* constitutional rights. In other words, the courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man.

The approach of Erasmus J complements the dictum of Chaskalson P in *S v Makwanyane*,[54] while at the same time it is harmonious with the approach of Canadian counterparts as reflected in the decisions of *R v Collins*,[55] *R v Jacoy*[56] and

46 *S v Nomwebu* 1996 2 SACR 396 (E).
47 *S v Soci* 1998 2 SACR 275 (E).
48 The second group of factors.
49 The third group of factors.
50 *S v Nomwebu* 1996 2 SACR 396 (E) 648a-c; *S v Soci* 1998 2 SACR 275 (E) 295.
51 *S v Nomwebu* 1996 2 SACR 396 (E) 648a-c. This was also of concern to the full bench in *S v Desai* 1997 1 All SA 298 (W) 42b-f. See also Meintjies-Van der Walt 1996 *SACJ* 89.
52 *S v Nomwebu* 1996 2 SACR 396 (E) 648. Compare the Canadian approach followed in *R v Collins* 1987 1 SCR 265 (SCC) to the effect that the current mood of the public should be considered, only if it is *reasonable*.
53 *S v Nomwebu* 1996 2 SACR 396 (E) 648d-f and *S v Soci* 1998 2 SACR 275 (E) 295-296 (Emphasis in original).
54 *S v Makwanyane* 1995 2 SACR 1 (CC) para 88.
55 *R v Collins* 1987 1 SCR 265 (SCC).
56 *R v Jacoy* 1998 38 CRR 290 (SCC).

R v Feeney.[57] Moreover, the South African courts and commentators have expressed the view that the provisions contained in section 35(5) and section 24(2) of the *Canadian Charter of Rights and Freedoms* are remarkably similar.[58] For these reasons, it is suggested that the *dictum* of Erasmus J accurately sets out the scope and function of public opinion in section 35(5) challenges. Of great value for South African section 35(5) jurisprudence is the remark by Erasmus J that admissibility rulings should not be premised on public opinion.

Furthermore, there appears to be no convincing reason why the prudent approach adopted by Lamer J, in *R v Collins*,[59] to the effect that the courts are customarily the only "effective shelter for individuals and unpopular minorities",[60] should not be applicable to South African courts[61] when "detriment to the administration of justice" has to be determined under section 35(5). The provisions of section 35(5) were introduced into the Bill of Rights in order to protect persons accused of having allegedly committed a crime from the power of the majority. In the light hereof, the protection granted by section 35(5) should not be left to the majority, from which the accused needs protection.[62] No doubt the accused, when faced with the might of the prosecuting authority – with all its expertise and resources, representing the people of South Africa – represents a vulnerable minority. By showing a preparedness to protect the constitutional rights of the accused South African courts will instil public confidence in the criminal justice system. Unwillingness to do so may produce the

57 *R v Feeney* 1997 115 CCC (3d) 129 (SCC).

58 See for example *Pillay v S* 2004 2 BCLR 158 (SCA) para 91 and *S v Tandwa* 2008 1 SACR para 122; also Ally 2010 *SALJ* 695 where reference is made *inter alia* to Van der Merwe "Unconstitutionally Obtained Evidence" (2009) 214 and Viljoen "Law of Criminal Procedure and the Bill of Rights" 5B-50. See further De Vos 2011 *TSAR* 271.

59 *R v Collins* 1987 1 SCR 265 (SCC).

60 *R v Collins* 1987 1 SCR 265 (SCC) para 34.

61 In this regard, see the approach followed by Chaskalson P in *S v Makwanyane* 1995 2 SACR 1 (CC) dealing with the constitutionality of the death penalty. See also *S v Melani* 1996 2 BCLR 174 (EC) 352, where Froneman J concluded that: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity"; also Moseneke 2012 *SALJ* 18; compare Van der Merwe "Unconstitutionally Obtained Evidence" (2002) 324.

62 See in this regard the comments by Chaskalson P in *S v Makwanyane* 1995 2 SACR 1 (CC) para 88, where he reasoned that: "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected".

opposite result, which would be detrimental to the administration of justice. This argument is further fortified by the supremacy clause,[63] which dictates that the *Constitution* shall be the supreme law in South Africa. Consequently, in the event that public opinion is in conflict with the provisions and objectives sought to be advanced by the Constitution, the latter must surely prevail.[64]

Additionally, the undue emphasis on public opinion during the assessment of the third group of factors may disturb the very nature of the section 35(5) discretion. It could provide judges with the latitude to determine the admissibility issue based on their subjective views of the "current mood" of society. In such circumstances the possibility remains that the purposes sought to be achieved by section 35(5) might be hindered.[65] Ostensibly with the aim of preventing the personal perspectives of judges from interfering with their section 35(5) assessments, the decision in *R v Collins*[66] informs that judicial officers should refer to what they conceive to be the views of society at large, bearing in mind that they do not have an unfettered discretion: A presiding officer should constantly remind herself or himself that[67]

> … his [or her] discretion is grounded in community values. He [or she] should not render a decision that would be unacceptable to the community when the community is not being wrought in passion or otherwise under passing stress due to current events.

This *dictum* of Lamer J in *R v Collins*[68] clearly indicates that public attitudes towards exclusion or admission do matter[69] when a court determines the second leg of the

63 Section 2 of the *Constitution.*

64 Kentridge and Spitz "Interpretation" 11-16A, where they argue that: "The effect of the supremacy clause is to assign to the courts a role which extends beyond interpreting and enforcing the majority will, to the protection of the fundamental rights of individuals and minorities".

65 See for example the approach in *S v Shongwe* 1998 9 BCLR 1170 (T).

66 *R v Collins* 1987 1 SCR 265 (SCC).

67 *R v Collins* 1987 1 SCR 265 (SCC) para 34. See also *S v Melani* 1996 2 BCLR 174 (EC) 352, where this *dictum* was quoted with approval.

68 *R v Collins* 1987 1 SCR 265 (SCC) para 34.

69 The South African High Court adopted this approach. See, for example, *S v Melani* 1996 2 BCLR 174 (EC) 297, where the court dealt with the function of public opinion and its role in the admissibility assessment when the charges are of a serious nature, as follows: "At the time of delivery of this judgment it is, I think, fair to say that there is a widespread public perception that crime is on the increase … I venture to suggest that a public opinion poll would probably show that a majority of our population would at this stage of the history of our country be quite content if the courts allow evidence at a criminal trial, even if it was unconstitutionally obtained". Furthermore, Froneman J, in *S v Melani* 1996 2 BCLR 174 (EC) 352, was mindful of the fact that the "current public mood" of the public towards unconstitutionally obtained evidence favoured the

admissibility inquiry, provided that the "current mood" of society could not be characterised as unreasonable.[70] What could be categorised as unreasonable should not be left to the all-encompassing discretion of the presiding officer.[71] A presiding officer should always be mindful of the fact that he or she is interpreting a constitutional provision and his or her decision should therefore demonstrate that due regard has been given to the values that underpin the *Constitution*.[72]

More importantly, an over-emphasis on public opinion would necessarily imply that a consideration of the long-term effect that the regular admission of unconstitutionally obtained evidence would have on the integrity of the justice system would be relegated to an insignificant concern, especially when the evidence was important for a conviction on a serious charge.

In what follows, attention is paid to two factors which comprise the third group of factors. As stated before, these factors are the "seriousness of the charge" and the "importance of the evidence to secure a conviction".[73]

inclusion of evidence, but declined to be bound by such public attitudes, and observed as follows: "It is true that courts should hold themselves accountable to the public, but that does not mean that they should seek public popularity".

70 See *R v Collins* 1987 1 SCR 265 (SCC) paras 33-34.

71 *R v Collins* 1987 1 SCR 265 (SCC) paras 33-34.

72 *S v Melani* 1996 2 BCLR 174 (EC) 297 and *S v Nomwebu* 1996 2 SACR 396 (E) 648d-f.

73 In this regard the view of Stuart 2010 *Sw J Int'l L* 326 is of great importance: "... while reliability of evidence and whether the evidence is essential to the Crown's case are relevant considerations, they do not trump" during the balancing exercise that must be performed when our courts determine whether unconstitutionally obtained evidence should either be admitted or excluded.

2.2 The seriousness of the charge[74]

All open and democratic societies have, over the years, adopted norms that serve the purpose of categorising crimes according to the severity of their impact on society.[75] The seriousness of the charge is primarily determined by the punishment a court may impose.[76] Mahoney[77] suggests that the seriousness of the charge should not only be considered based on objective norms, but that any aggravating circumstances of a particular case, regardless of the offence charged, should be taken into account. A court may furthermore determine the seriousness of the charge faced by the accused by considering facts that are not in dispute in the main trial,[78] facts in the trial-within-trial,[79] and the allegations contained in the charge sheet.[80]

It should be emphasised that due regard should be had, when considering this factor, to the presumption of innocence and the values sought to be protected by this constitutionally entrenched right. The Constitutional Court has typified the presumption of innocence as "fundamental to our concepts of justice and forensic fairness".[81] What should therefore be assessed under this group of factors should be the seriousness of the *offence charged* and not the seriousness of the *crime committed*.[82]

74 Ally 2010 *SALJ* 704-705 discusses the Canadian approach to this group of factors. The courts of Canada have been reluctant to apply this group of factors (the "seriousness of the charge" and "the importance of the evidence to secure a conviction") prior to the decision in *R v Grant* 2009 66 CR (6th) 1 (SCC). In the *Grant* decision paras 79-84, the Supreme Court of Canada preferred to discuss the third group of factors under the heading "Society's interest in an adjudication on the merits". Three factors are considered under this line of inquiry: firstly, the reliability of the evidence; secondly, the importance of the evidence for the prosecution's case. However, this factor is relevant in a very limited sense – the exclusion of relevant, reliable evidence would have a more negative impact on the justice system where the exclusion in effect destroys the prosecution's case. A third factor is the seriousness of the offence. This factor is neutral: the failure to prosecute a serious charge may have an immediate negative effect on how society views the criminal justice system. However, the public must rest assured that, despite the seriousness of the charge, the courts do take rights-protection seriously. In other words, the short-term public outrage at the lack of a conviction does not mean that the judge must ignore the long-term integrity of the justice system.

75 Morissette 1984 *McGill LJ* 528.

76 Morissette 1984 *McGill LJ* 529.

77 Mahoney 1999 *CLQ* 461, next to fn 41 of his contribution.

78 See *S v Naidoo* 1998 1 SACR 479 (D) 507-522.

79 See *S v Malefo* 1998 1 SACR 127 (W) 133 and 138.

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

81 *S v Zuma* 1995 4 BCLR 401(CC) para 36.

82 See *S v Soci* 1998 2 SACR 275 (E) 297, where the importance of the presumption of innocence was highlighted, thus emphasising this distinction.

South African courts appear to acknowledge the presumption of innocence when they consider this factor.[83] In *S v Melani*[84] the charges against the accused were murder, robbery, and the unlawful possession of firearms and ammunition.[85] These are indisputably serious charges. The three accused were conscripted against themselves.[86] Froneman J observed that a public opinion poll would have suggested that the evidence should nevertheless be admitted, despite the seriousness of the constitutional violations. However, after the judge gave due consideration to the presumption of innocence, the evidence was excluded.[87] Froneman J based his decision on "the longer term purpose of the Constitution, to establish a democratic order based on, amongst others, the recognition of basic human rights".[88] The court made its admissibility ruling while emphasising that it was not bound by the "current mood" of society. In terms of this point of view, admission or exclusion hinges on a balance between the truth-seeking function of the courts and the preservation of the constitutional directive contained in section 35(5), that courts have a duty to safeguard the integrity of the justice system.

However, the perception should not be created that the more serious the charges, the lesser the protection accorded to an accused should be. Correspondingly, the courts should not be more amenable to exclude evidence when the charges are regarded as less serious.[89] The potential harmful effect of such an approach on the integrity of the criminal justice system is instantly recognisable. It is agreed with Stuart who argues that the Ontario Court of Appeal erred in *R v Grant*[90] by adopting the philosophy that the more serious the offence charged, the greater the probability that the administration of justice will be brought into disrepute by the exclusion of evidence which is important to secure a conviction, because this approach implies

83 See *S v Melani* 1996 2 BCLR 174 (EC).
84 *S v Melani* 1996 2 BCLR 174 (EC).
85 *S v Melani* 1996 2 BCLR 174 (EC) was decided in terms of the *Interim Constitution*. It is nonetheless submitted that the *Melani* court applied the rationale of s 35(5) when the admissibility challenge was considered. This explains the relevance of this decision, despite the fact that judgment was delivered in terms of the *Interim Constitution*.
86 Based on Canadian precedent, this means that the evidence has been obtained without constitutional compliance, or statutory authority, or the informed consent of the accused. See Ally 2010 *SALJ* 697.
87 *S v Melani* 1996 2 BCLR 174 (EC) 353.
88 *S v Melani* 1996 2 BCLR 174 (EC) 353.
89 This is one of the concerns raised by Canadian scholars. See Ally 2010 *SALJ* 705.
90 *R v Grant* 2006 38 CR (6th) 58.

that there should be "a *de facto* two-tier system where one zone is *Charter*-free and the police ends always justify the means".[91] An analogous line of reasoning was applied in the Australian case of *R v Dalley*,[92] where Spigelman CJ expressed the opinion of the court as follows:

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

These rigid approaches suggest that the seriousness of the charges should be an influential factor in the admissibility assessment. In my view, this approach implies that the less serious the charge faced by the accused, the greater constitutional protection should be accorded to him or her. Equally, the more serious the charge, the less likely it is that the evidence would be excluded.[93] This inflexible line of reasoning should not be determinative of the admissibility assessment. Such an approach implies that an accused may not rely on the presumption of innocence merely because the prosecution alleges that he or she has committed a serious offence. Differently put, the remedy contained in section 35(5) would be rendered superfluous if the accused faces a serious charge.[94] Stuart[95] highlighted the danger of this approach in heads of argument filed in the appeal of *R v Grant*.[96] In addition, such an approach flies in the face of the constitutional value of equal protection before the law and equal benefit of the law.[97] More to the point, it would offend the integrity of the justice system, and should primarily for this reason not be followed by the South African courts when this group of factors is considered.

91 Stuart *Heads of Argument* para 15, filed off record in the appeal of *R v Grant*, at the time of publication reported as 2009 66 CR (6th) 1 SCC.
92 *R v Dalley* 2002 NSWCCA 284 para 3.
93 See Davies 2002 *CLQ* 27, where he remarks that a proportionality test applied in this manner creates a "rights paradise" for those charged with trivial offences, but alleged rapists and murderers will find themselves in "a due process desert". He highlights at 29 the fact that a proportionality test runs counter to the presumption of innocence.
94 Davies 2002 *CLQ* 29 highlights the fact that a proportionality test, applied in this manner, runs counter to the presumption of innocence.
95 Stuart *Heads of Argument*. In para 15 he argues: "Without the remedy of exclusion in cases where the court considers the crime serious there will be a large number of criminal trials where the *Charter* will cease to provide protection".
96 *R v Grant* 2009 66 CR (6th) 1 SCC.
97 See s 9 of the *Constitution*.

The Supreme Court of Canada recently had the opportunity to deal with this issue in *R v Côté*,[98] which arguably gives effect to the goals sought to be achieved by both section 24(2) of the *Canadian Charter* and section 35(5) of the *Constitution*. The court accepted that, in general, "the more serious the offence, the greater the likelihood that the administration of justice would be brought into disrepute by its exclusion".[99] However, the court qualified this observation by adding that this factor has the "potential to 'cut both ways' and will not always weigh in favour of admission".[100] Cromwell J,[101] reasoned as follows:[102]

> While society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high.

This *dictum* conveys the clear message that the purpose sought to be advanced by the exclusionary rule is ultimately a significant factor in the admissibility assessment. Put in another way, it would – depending on the circumstances of each case – be appropriate to exclude unconstitutionally obtained evidence which links the accused to serious charges if the admission of such evidence would be harmful to the integrity of the administration of justice. Against this background, the approach followed in *S v Melani*[103] seems to be correct: even if the public has a crucial interest in a successful prosecution when the accused faces a serious charge, our courts should be mindful of the fact that they have been entrusted with the responsibility of upholding the guarantees contained in the Bill of Rights. In my view, the Bill of Rights has been designed to protect the "worst and the weakest amongst us" from the heightened public interest in securing a conviction when an accused faces a serious charge.[104] Differently put, the short-term public outcry when an accused facing a serious charge is acquitted because unconstitutionally obtained evidence that is

98 *R v Côté* 2011 SCC 46.
99 *R v Côté* 2011 SCC 46 para 54.
100 *R v Côté* 2011 SCC 46 para 54.
101 McLachlin CJ, Binnie, LeBel, Fish, Abella, Charron, Rothstein JJ concurring. Deschamps J dissenting.
102 *R v Côté* 2011 SCC 46 para 54.
103 *S v Melani* 1996 2 BCLR 174 (EC).
104 *S v Makwanyane* 1995 2 SACR 1 (CC) para 88.

essential to a conviction was excluded should not be allowed to disturb the long-term constitutional goal of enhancing the integrity of the criminal justice system.[105]

2.3 The importance of the evidence for a conviction

The Supreme Court of Canada indicated in *R v Collins*[106] that the "importance of the evidence to secure a conviction" should be considered under this group of factors in order to determine what effect the exclusion or admission of the disputed evidence would have on the integrity of the criminal justice system. This approach was endorsed by the majority judgment of the Supreme Court of Appeal in *Pillay v S*,[107] and recently applied by the same court in *S v Matlou*.[108] An important issue considered here is: should the Canadian precedent established in *R v Collins*[109] relating to this factor be applied by the courts of South Africa? Furthermore, is it possible to determine how important the evidence is for a successful prosecution without encroaching upon the presumption of innocence?

It is in the interests of the prosecution to demonstrate that the disputed evidence is essential for a conviction and that it should for that reason be received by the court. In other words, the prosecution must present evidence that suggests that the costs of exclusion would be high. Since the costs of exclusion would be high the prosecution would be entitled to argue that such evidence should be received rather than excluded because exclusion would, under the circumstances, be "detrimental" to the administration of justice. However, the importance of an impugned confession,

105 *S v Melani* 1996 2 BCLR 174 (EC) 353; *R v Grant* 2009 66 CR (6th) 1 (SCC) para 84; *R v Côté* 2011 SCC 46 para 48, where this contention was raised in the following terms by the majority judgment of the Supreme Court of Canada, citing *R v Harrison* 2009 SCC 34 para 40: "… the seriousness of the offence and the reliability of the evidence should not be permitted to 'overwhelm' the s. 24(2) analysis because this 'would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect declare that in the administration of criminal law 'the ends justify the means' ". The Court continued and underlined that: "In all cases, courts must assess the long-term repute of the administration of justice". This *dictum* was delivered in response to the judgment of the Court of Appeal, where the latter court emphasised the seriousness of the offence and held that the evidence must *inter alia* for this reason be admitted.

106 *R v Collins* 1987 1 SCR 265 (SCC) paras 36-39.

107 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97.

108 *S v Matlou* 2010 2 SACR 342 (SCA) para 32, where Bosielo JA reasoned (Leach and Cloete JJA concurring) that "it is clear from the proven evidence that the evidence of the pointings out by the first appellant and the concomitant utterances made by him were crucial to the State's case".

109 *R v Collins* 1987 1 SCR 265 (SCC).

admission or pointing-out may more often than not be demonstrated solely by means of the contents of the disputed testimonial evidence or the disputed incriminating conduct and the accompanying statement. It was held in the case of *S v January: Prokureur-Generaal, Natal v Khumalo*,[110] that the disputed evidence (the contents of the testimonial evidence) may not be admitted until the court has made a ruling on its admissibility after a trial-within-a-trial. Furthermore, the case of *S v Lebone*[111] effectively insulates the presumption of innocence from encroachment when the admissibility of testimonial evidence is the subject of the admissibility dispute.

The *Lebone* decision confirms the position in South African law that the prosecution may not lead evidence that discloses the contents of the disputed incriminating testimonial evidence unless the accused challenges its admissibility on the basis that the information therein contained is fabricated or that it originates from another source.[112] The prosecution may therefore not introduce evidence relating to the contents of the testimonial evidence obtained after a constitutional infringement, even in section 35(5) challenges, for the same reason that evidence of this nature was not allowed before the enactment of section 35(5).[113] As a consequence, when the prosecution is called upon to demonstrate the "importance of the disputed evidence to secure a conviction" – while the content of the disputed testimonial evidence is the only source – the prosecution would be faced with the dilemma presented by the *Lebone* and *January* decisions.

Nevertheless, a court should, when making the section 35(5) determination - based on the current admissibility framework[114] - include this factor (the importance of the evidence for a conviction) in its assessment when it makes a value judgment[115] as to whether the admission or exclusion of the impugned evidence would be detrimental

110 *S v January: Prokureur-Generaal, Natal v Khumalo* 1994 2 SACR 801 (A).
111 *S v Lebone* 1965 2 SA 837 (A); see also *S v Khuzwayo* 1990 1 SACR 365 (SCA); *S v Tsotsetsi* 1 2003 2 SACR 623 (W).
112 *S v Lebone* 1965 2 SA 837 (A) 841-842; *S v Tsotsetsi* 1 2003 2 SACR 623 (W) 627-628; see also Du Toit *et al Commentary* 24-66G and Zeffertt and Paizes *Law of Evidence* 566.
113 See *S v Tsotsetsi* 1 2003 2 SACR 623 (W) 628.
114 See for example the minority judgment in *Pillay v S* 2004 2 BCLR 158 (SCA) para 132; *S v Shongwe* 1998 2 SACR 321 (T) 344-345.
115 *S v Lottering* 1999 12 BCLR 1478 (N) 1483; *Pillay v S* 2004 2 BCLR 158 (SCA) paras 92 and 97. See also Steytler *Constitutional Criminal Procedure* 36; Van der Merwe "Unconstitutionally Obtained Evidence" (2002) 201.

to the administration of justice. The difficulty in making such an assessment while having due regard to the presumption of innocence was pointed out by McCall J in *S v Naidoo*,[116] when the judge observed that it "was by no means apparent at this stage of the trial quite how material the evidence is", but he nevertheless assumed its importance in view of the vigour with which the prosecution attempted to have it admitted and the defence sought to have it excluded.[117] Moreover, the *Januarie* and *Lebone* decisions clearly dictate that a consideration of factual guilt cannot be added to the admissibility assessment when the prosecution relies on testimonial evidence. The fact that an *onus* should not be applied to determine whether admission or exclusion would render the trial unfair or otherwise be "detrimental" to the administration of justice[118] may not assist the prosecution if the disputed evidence is not sufficiently linked to the charges.[119] This problem is highlighted by the decision by Van Reenen J in *S v Mayekiso,*[120] when the judge excluded the disputed real evidence, relying on the following reason: [121]

> Die Handves van Menseregte in Hoofstuk 3 van die Grondwet beliggaam, is juis, onder andere, daarop gerig om die individu teen magsmisbruik deur owerheidsorgane te beskerm en 'n erodering daarvan behoort, myns insiens, gedoog te word slegs waar die belangrikheid van die teenbelang wat deur die miskenning bevorder kan word vir dwingende redes so 'n afwyking regverdig. Die onderhawige is, myns insiens, nie so 'n geval nie, omdat dit nie moontlik is om vanuit die getuienis wat in die binneverhoor aangebied is die wesenlikheid van die items waarop beslag gelê is, in die vervolging van die beskuldigdes te bepaal nie.

Although this decision was delivered prior to the enactment of section 35(5), and despite the fact that the evidence in dispute was real evidence, its relevance is clear: the court considered "the importance of the evidence to secure a conviction". It also confirms the difficulty faced by the prosecution in presenting evidence, during a trial-

116 *S v Naidoo* 1998 1 SACR 479 (D). See also *S v Mphala* 1998 1 SACR 388 (W) 400.
117 *S v Naidoo* 1998 1 SACR 479 (D) 530.
118 See Van der Merwe "Unconstitutionally Obtained Evidence" (2002) 201; Steytler *Constitutional Criminal Procedure* 36.
119 *S v Mayekiso* 1996 2 SACR 298 (C) 306.
120 *S v Mayekiso* 1996 2 SACR 298 (C).
121 *S v Mayekiso* 1996 2 SACR 298 (C) 307. Loosely translated, this passage has the following meaning: The Bill of Rights, contained in chapter 3 of the *Constitution* has been designed *inter alia* to protect the individual against the abuse of power by government institutions. The erosion of the rights guaranteed in the Bill of Rights ought, in my view, be permitted only when the limitation of those rights is justified by countervailing and pressing societal needs. The present case is not such a case because, when the evidence tendered in the trial-within-a-trial is considered, it is not possible to assess the significance of the seized items in the successful prosecution of the accused. (Own translation).

within-a-trial, which may persuade a court that relevant evidence should be received in the face of a constitutional infringement, because it is important to secure a conviction of the accused.

The difficulty in making an assessment of the "importance of the evidence to secure a conviction" became obvious in the decisions of *S v Shongwe*[122] and the minority opinion in *Pillay v S*.[123] The *Shongwe* decision is briefly explored first, followed by a short discussion of the minority decision in *Pillay*. The accused in the *Shongwe* case faced serious charges. The accused was not informed about the right to legal representation, the right to remain silent, and the consequences of not remaining silent before he made a pointing-out and confessed to committing the crime.[124] While considering the admissibility of the disputed evidence, the court was of the opinion that "[a]s 'n *skuldige persoon* in hierdie omstandighede vry uitgaan, sal dit teenproduktief wees vir die bevordering van menseregte ...".[125] This *dictum* might create the impression among reasonable, objective and informed persons that factual guilt informed or significantly influenced the outcome of the admissibility assessment. Such an approach would be vulnerable to the criticism that it could make inroads into the presumption of innocence.

In similar vein Scott JA, writing a minority opinion in *Pillay v S*,[126] made the following remark while assessing the "importance of the evidence to secure a conviction":[127]

122 *S v Shongwe* 1998 9 BCLR 1170 (T).
123 *Pillay v S* 2004 2 BCLR 158 (SCA).
124 *S v Shongwe* 1998 2 SACR 321 (T) 334.
125 *S v Shongwe* 1998 2 SACR 321 (T) 345. Loosely translated, this means that "it would be counter-productive for the advancement of a culture of human rights if a *guilty person* were to be acquitted in these circumstances ..." (Own translation). See also *S v Muravha* 1998 JOL 3994 (V) 16, where Preller AJ reasoned that the failure by the presiding magistrate to inform an accused of his right to remain silent, when there was a causal link between his confessional statement and the magistrate's failure to inform the accused about his rights, constitutes a "breach of a less serious nature". The judge reasoned that such a breach does not justify "the acquittal of a person who, in a hypothetical case, is clearly guilty of a serious offence". Compare Stuart 2010 *Sw L Int'l L* 318, where he reasons that: "Ignorance of Charter standards must not be rewarded or encouraged and negligence and wilful [sic] blindness cannot be equated with good faith". In other words, the *Muravha* court over-emphasised the seriousness of the charge and the importance of the evidence, thus failing to attach sufficient importance to the seriousness of the infringement.
126 *Pillay v S* 2004 2 BCLR 158 (SCA).
127 *Pillay v S* 2004 2 BCLR 158 (SCA) para 133.

> Whether the *admission* of the evidence and the resultant *conviction* of accused 10 would be detrimental to the administration of justice involves, I think, an inquiry whether an *acquittal* would be likely to bring about a loss of respect for the judicial process in the eyes of reasonable and dispassionate members of society and, conversely, whether a *conviction* would be likely to result in a loss of respect for the Bill of Rights (emphasis added).

This factor has been construed to entail that our courts must consider what effect either the admission or exclusion of the disputed evidence would have on the integrity of the criminal justice system. The concern with such an analysis is that, in order to give effect to this inquiry, our courts must consider what impact their admissibility rulings (either admission or exclusion) would have on the outcomes (a conviction or an acquittal) in the cases before them. Such an assessment links admissibility to criminal culpability. Thus, if the issue of admissibility is closely tied to the criminal culpability of the accused, such an approach might be frowned upon by fundamental rights protagonists, since it implicitly promotes the erosion of the presumption of innocence.[128] Such an approach implies that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty. Taken to its logical conclusion, evidence should regularly be excluded when the accused is likely to be acquitted.[129] Surely, this could not have been the purpose sought to be advanced by section 35(5). If this were the case, the rationale for the existence of the constitutional provision would be defeated.

It is not suggested that the blame for this approach lay at the doorstep of the judge in the *Shongwe* decision and that of the minority opinion in *Pillay*. On the contrary, I would offer the opinion that this difficulty is intrinsically linked to the nature of the inquiry, which prompted the relevant courts to consider what impact an acquittal would have on the integrity of the criminal justice system (when the accused is factually guilty). The nature of the inquiry called upon the *Shongwe* court and the minority decision in *Pillay* to link the admissibility assessment to criminal culpability and, in so doing, possibly encroached upon the presumption of innocence. In my

128 Compare the approach followed in *S v Melani* 1996 2 BCLR 174 (EC) 353. See also *Ntzweli v S* 2001 2 All SA 184 (C), where it was held that the "question of the factual guilt of the accused should not be considered in a trial-within-a-trial".

129 Sopinka J adopted a similar approach in *R v Grant* 1994 84 CCC (3d) 173 203a-b.

view the nature of the inquiry inevitably leads to such a linkage,[130] because an analysis taking into account "the importance of the evidence for a conviction" necessarily concerns itself with the outcome of the case, in the sense that the exclusion of the disputed evidence, crucial for a conviction on a serious charge, will more often than not have an adverse effect on the integrity of the criminal justice system if the accused is factually guilty.

Conversely, the majority opinion (written by Mpati DP and Motata AJA) in *Pillay v S*,[131] whilst acknowledging the concerns of Scott JA, placed great emphasis on the duty of the courts to protect the integrity of the criminal justice system.[132] On this basis the majority opinion concluded that the disputed evidence should be excluded so as to prevent judicial contamination.[133] The majority judgment in *Pillay v S*[134] placed a high premium on their function as protectors of constitutional rights, even though the social costs of exclusion in this case were great.[135] In my view society paid a significantly high premium in *Pillay v S*,[136] given that the accused was factually guilty[137] of a serious offence,[138] and the evidence that could in all probability have secured a conviction[139] was excluded.[140] Heeding the rationale of section

130 This link is effectively avoided in Canadian admissibility assessments, because admissibility challenges are dealt with during pre-trial motions before criminal culpability is assessed.
131 *Pillay v S* 2004 2 BCLR 158 (SCA).
132 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97.
133 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97, where the judges reasoned as follows: "The police, in behaving as they did, ie charging accused 10 in spite of the undertaking, and the courts sanctioning such behaviour, the objective referred to will in future be well nigh impossible to achieve".
134 *Pillay v S* 2004 2 BCLR 158 (SCA).
135 See also the following decisions where the social costs were high. In *S v Tandwa* 2007 SCA 34 (RSA); *S v Naidoo* 1998 1 SACR 479 (D); *S v Hena* 2006 2 SACR 33 (SE); *S v Motloutsi* 1996 1 SACR 78 (C) and *S v Mphala* 1998 1 SACR 388 (W), the accused were factually guilty of serious offences. Even so, the respective courts held that the unconstitutionally obtained evidence that firmly linked the individual accused persons to the crimes should be excluded. However, in *S v Melani* 1996 2 BCLR 174 (EC), the accused was convicted regardless of the fact that the unconstitutionally obtained confession, obtained following a violation of the right to legal representation, had been excluded. The remainder of the admissible evidence persuaded the court of the criminal culpability of the accused. It can for this reason be argued that the social costs of exclusion were not high in the *Melani* decision, since the exclusion did not result in the acquittal of an accused who was factually guilty.
136 *Pillay v S* 2004 2 BCLR 158 (SCA).
137 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97.
138 *Pillay v S* 2004 2 BCLR 158 (SCA) para 71.
139 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97.
140 *Pillay v S* 2004 2 BCLR 158 (SCA) para 98. For an analogous approach by the Supreme Court of Appeal, see *S v Matlou* 2010 2 SACR 342 (SCA) para 31. The accused in *Matlou* was assaulted by the police with the aim of obtaining self-incriminating evidence against him. Additionally, his

35(5), the majority opinion asserted its dissociation with the unwarranted police conduct as the ground for excluding reliable real evidence essential to securing the conviction of the accused.[141] The accused was consequently acquitted.[142] This approach by the majority opinion is supported.

The inherent weakness of an approach that adds factual guilt into the equation during the admissibility assessment is pertinently demonstrated by the comments made by the full bench in *S v Mkhize*,[143] where Willis J wrote a unanimous judgment to the effect that the provisions of the *Criminal Procedure Act* regarding the obtainment of search warrants are not intended for:[144]

> … the purpose of ensuring the fairness of a trial of an accused person but *to protect the ordinary law-abiding citizens* of our land from an abuse of the formidable powers which the police necessarily have.

The court in *S v Mkhize*[145] conveyed an inapt message to those accused of having allegedly committed criminal offences: that they may not rely on the presumption of innocence. It also sent an improper message to law enforcement agencies, to the effect that the goals of crime control justify unwarranted interference with constitutional rights, that the end justifies the means, a sentiment reminiscent of the rationale of the common law inclusionary rule. The *Mkhize* judgment further implies that when the unconstitutional police conduct leads to the discovery of real evidence that confirms the factual guilt of the accused, such evidence could be admitted, regardless of the manner in which it had been obtained. Some might understandably argue that the court practically vindicated the unconstitutional search after the fact. The danger inherent in such an approach is that it might create the perception that our courts do not have a high regard for the constitutional rights guaranteed in the

right to legal representation and his right to remain silent were infringed. After a discoverability analysis the court held that the admission of the disputed evidence would not only render his trial unfair, but its admission would also be detrimental to the administration of justice. As a result, real evidence, essential for convictions on serious charges (and which linked the accused to such charges) was excluded. Compare *S v Lachman* 2010 2 SACR 52 (SCA), where a discoverability analysis resulted in the admission of the disputed evidence.

141 *Pillay v S* 2004 2 BCLR 158 (SCA) para 97.

142 *Pillay v S* 2004 2 BCLR 158 (SCA) para 98.

143 *S v Mkhize* 1999 2 SACR 632 (W); compare *S v Melani* 1996 2 BCLR 174 (EC) 353, where the presumption of innocence was duly considered.

144 *S v Mkhize* 1999 2 SACR 632 (W) 637. (Emphasis added).

145 *S v Mkhize* 1999 2 SACR 632 (W) 637.

Bill of Rights. The *Mkhize* judgment seemingly failed to take into account that an admissibility ruling should be focussed not only on that particular case, but that courts should also consider what effect the regular admission of evidence obtained in such a manner would have on the integrity of the criminal justice system.[146]

To summarise, the majority judgment in *Pillay v S*[147] appropriately conveys the message that the costs of exclusion should not be determinative of the outcome of the admissibility assessment. The opposing approach implies that reliable real evidence essential for a conviction on serious charges would be more readily admitted. The admission of the disputed evidence under these circumstances would evidently find public support, especially when South Africans are enduring high levels of serious crime.[148] Such an approach is also strongly associated with the common law inclusionary rule. It is submitted that section 35(5) implicitly overrules this common law practice.[149]

3 Conclusion

The high rate of serious crime in South Africa should not be considered as a factor that unduly tilts the scales in favour of the admission of the disputed evidence. South African courts should be wary not to convey the message to society that the ends of crime control justify the use of unconstitutional means. Such an approach would be tantamount to informing members of society at large that their rights guaranteed in the Bill of Rights are not of any value for the reason that the high rate of serious crime in South Africa does not show any signs of decline.[150] This implies that South Africans should accept that what the Constitution guarantees should not be taken seriously.

The "current mood" of society does matter in the section 35(5) assessment. This is common cause between both due process protagonists and those in favour of crime

146 *R v Traverse* 2003 Carswell Nfld 119 paras 34-36.
147 *Pillay v S* 2004 2 BCLR 158 (SCA).
148 See the reasoning of Scott JA in *Pillay v S* 2004 2 BCLR 158 (SCA) para 133.
149 Stuart 2010 *Sw J Int'l Law* 318, citing *R v Grant* 2009 66 CR (6th) 1 (SCC) para 84.
150 See the approach of the minority opinion in *Pillay v S* 2004 2 BCLR 158 (SCA) para 97, and the reasoning in *S v Shongwe* 1998 9 BCLR 1170 (T).

control values. The differences emerge when one has to determine the weight that should be attached to the "current mood" of society.[151] Those in favour of crime control would suggest that the "current mood" of society should feature prominently during the second phase of the admissibility inquiry. South African scholarly writers, like their Canadian counterparts,[152] are divided on this issue.[153] Likewise, South African decisions are incompatible with regard to the weight that should be attached to public opinion.[154] The guidance of the Constitutional Court on this important issue is awaited.

Section 35(5) enjoins South African courts not to be swayed by the pressures of public opinion but to assure all South Africans – regardless of the fact that they are accused of having committed the most heinous crimes and no matter if the likelihood is great that they actually committed such crimes – that the goals of crime control do not justify unconstitutional police conduct. Instead, the goal of preserving the integrity of the criminal justice system is of paramount importance in section 35(5) challenges.[155] It is submitted that, while the "current public mood" of society may be a relevant consideration in the admissibility assessment, it should not replace the fundamental duty of South African courts 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 Constitution and the law".[156]

The presumption of innocence deserves particular protection in a constitutional democracy based on human dignity, freedom and equality, even when the evidence is essential to convict an accused facing serious charges. For this reason the admissibility inquiry must be isolated from the assessment of factual guilt.

151 De Villiers 1997 *TSAR* 622; Schutte 2000 *SACJ* 67.

152 Paciocco 1989 *CLQ* 340-345 argues that the courts should seek public popularity. Compare Roach *Remedies* 10-83 to 10-84, who is opposed to this view.

153 Van der Merwe "Unconstitutionally Obtained Evidence" (2002) 234; De Villiers 2008 *TSAR* 37; compare Steytler *Constitutional Criminal Procedure* 40, who is of the opinion that the long-term values of the *Constitution* should be a dominant feature.

154 See for example *S v Shongwe* 1998 9 BCLR 1170 (T); *S v Mkhize* 1999 2 SACR 632 (W); *S v Ncgobo* 1998 10 BCLR 1248 (W); compare *S v Melani* 1996 2 BCLR 174 (EC); *S v Nomwebu* 1996 2 SACR 396 (E); *S v Soci* 1998 2 SACR 275 (E).

155 *S v Mthembu* 2008 ZASCA 51 para 33, where Cachalia JA, writing for a unanimous Supreme Court of Appeal, confirmed this contention in the following terms: "… the purpose of the exclusionary rule is to uphold the integrity of the administration of justice".

156 The oath taken by judges when they take office, contained in item 6 of Schedule 2 of the *Constitution*.

Furthermore, the fact that the accused is factually guilty should not be determinative of the admissibility assessment. Contrary to the approach followed by the minority opinion in *Pillay v S*,[157] it is suggested that the admissibility issue should not, in order to protect the presumption of innocence, be closely linked to criminal culpability.[158] In my view the nature of the assessment seems to be the reason why this approach was followed by the minority opinion in the *Pillay* decision.

In the light hereof it is suggested that our courts should rather focus on the "reliability of the evidence" (or the nature of the evidence) and the seriousness of the charge faced by the accused when assessing the third group of factors. This does not mean that the factor of the "importance of the evidence to secure a conviction" should be totally disregarded. The reliability of the evidence is a key factor when determining the importance of the evidence for a successful prosecution. Cromwell J explained why this is the case, in *R v Côté*, when he reasoned that when a conviction is based on unreliable evidence, the admission of such evidence would bring the administration of justice into disrepute; by contrast, the exclusion of reliable evidence may impact negatively on the truth-seeking role of the criminal justice system when such an exclusion destroys the prosecution's case.[159] From this point of view, the assessment of the importance of the evidence for the prosecution hinges on the reliability of the evidence.

It is further suggested that the reliability of the evidence should be a key consideration (among others) under the third group of factors for the following reasons.[160] First, the assessment of the suggested factor will overcome the difficulty (as argued above) experienced by our courts when they assess the "importance of the evidence for a conviction". In other words, the implicit erosion of the presumption of innocence will be avoided. Secondly, the suggested refocusing on the reliability of the evidence is not at odds with an assessment of the public interest in crime control

157 *Pillay v S* 2004 2 BCLR 158 (SCA) para 133.
158 See *Ntzweli v S* 2001 2 All SA 184 (C) 188.
159 *R v Côté* 2011 SCC 46 para 47.
160 While bearing in mind the observation by Stuart 2010 *Sw J Int'l L* 326, that, although the reliability of evidence and whether or not it is essential for a successful prosecution are relevant considerations, they should not inevitably prevail during the balancing exercise that must be performed during admissibility assessments under s 35(5).

and the integrity of the criminal justice system. In contrast, such interests are placed within their proper context when the reliability of the evidence is considered a key factor. Thirdly, the suggested focus on the reliability of the evidence will, from a purely pragmatic point of view, markedly decrease the difficulty experienced by the prosecution when presenting evidence about the costs of exclusion. Finally, an assessment of the reliability of the evidence is strongly aligned to the values which section 35(5) seeks to enhance, since the admission of unreliable evidence in order to secure a conviction on a serious charge would unquestionably be detrimental to the administration of justice[161] and would also impact negatively on the societal interest in ensuring that an accused should not be subjected to an unfair trial.[162]

The seriousness of the charge faced by an accused is one of the important factors that must be considered in admissibility challenges, but it should not be allowed to overshadow the other factors that a court has to weigh and balance in admissibility challenges. It cannot be denied that society has a heightened interest in ensuring that those who face serious charges (and who are factually guilty) be convicted. Likewise, it cannot be disputed that society has a corresponding concern in safeguarding the constitutional rights of those accused of having allegedly committed the most atrocious crimes. In the light hereof it would be appropriate to assess the seriousness of the charges faced by the accused while having due regard to the duty of the courts to defend the integrity of the justice system.[163]

So, should factual guilt tip the scales in favour of the admission of unconstitutionally obtained evidence when such evidence is crucial for a conviction on a serious charge? The review of our section 35(5) jurisprudence has revealed that, by and large, the courts of South Africa have demonstrated firm resistance against the philosophy that suggests that the costs of exclusion should have an effect on their

161 Hogg *Constitutional Law* 937 expresses a similar opinion when he explores the first leg of the admissibility assessment.

162 *R v Côté* 2011 SCC 46 para 47, where Cromwell J reasoned as follows: "Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth."

163 *S v Melani* 1996 2 BCLR 174 (EC) 353; *S v Naidoo* 1998 1 SACR 479 (N) 529; *R v Côté* 2011 SCC 46 para 53.

admissibility rulings.[164] Evidence crucial for successful prosecutions on serious charges has in a number of cases been excluded in order to achieve the goal of preventing judicial contamination, while also complying with the directive of section 35(5), that is, the prevention of disrepute befalling the administration of criminal justice.[165] This seems to be the correct approach, since the regular excuse of unconstitutional police conduct because the evidence is essential for a conviction on serious charges would only revive the public perception (which existed before 1994)[166] that the police are above the law.[167]

Such public perceptions may be detrimental to the integrity of the criminal justice system. To be sure, the regular admission of evidence obtained in blatant disregard of constitutional rights, which evidence is important for a conviction on serious charges, runs counter to two important principles: first, the "never again" principle, which was endorsed by the Constitutional Court as one of the fundamental tools that should be employed to interpret the provisions of the Bill of Rights;[168] and secondly, the directive of section 35(5) that in challenges under section 35(5) our courts must defend the integrity of the criminal justice system.

164 See for example *S v Motloutsi* 1996 1 SACR 78 (C) and *S v Mphala* 1998 1 SACR 388 (W); *S v Naidoo* 1998 1 SACR 479 (D); *S v Hena* 2006 2 SACR 33 (SE); the majority opinion in *Pillay v S* 2004 2 BCLR 158 (SCA); *S v Tandwa* 2007 SCA 34 (RSA); *S v Mthembu* 2008 ZASCA 51; *S v Matlou* 2010 2 SACR 342.

165 See the cases cited in the note immediately above.

166 See the comments by McCall J in *S v Naidoo* 1998 1 SACR 479 (D) 531.

167 See De Villiers (ed) *TRC Report* 31.

168 *Ferreira v Levine; Vryenhoek v Powell* 1996 1 SA 984 (CC) para 257, fn 22 of the separate but concurring judgment delivered by Sachs J.

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List of abbreviations

CILSA	Comparative and International Law Journal of South Africa
CLQ	Criminal Law Quarterly
McGill LJ	McGill Law Journal
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPR/PL	Suid-Afrikaanse Publiek Reg / South African Public Law
Sw J Int'l L	Southwestern Journal of International Law 313-332
TRC	Truth and Reconciliation Commission
TSAR	Tydskrif vir die Suid-Afrikaanse Reg