COMMENTS

Judicial discretion to exclude evidence in terms of s 35(5) of the Constitution: *S v Hena* 2006 (2) SACR 33 (SE)

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1 Introduction

In this case the court was called upon to exclude certain evidence against one of the accused in terms of s 35(5) of the Constitution of the Republic of South Africa, 1996. This section 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.'

It will be apposite, before discussing the present case, to do a brief analysis of s 35(5) and to refer to s 24(2) of the Canadian Charter of Rights and Freedoms, upon which the former section appears to be modelled (Steytler *Constitutional Criminal Procedure* (1998) 34; *S v Naidoo* 1998 1 SACR 479 (N) at 527g).

2 Analysis of s 35(5) of the Constitution

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 judgement 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.' (*Principles of Evidence* 3 ed (2009) 215)

3 Section 24(2) of the Canadian Charter

Section 24(2) of the Canadian 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.' (cited in *Principles of Evidence* 201).

It seems clear from the wording of this 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 *Regina v Collins* it was stated that '[s]ection 24(2) does not confer a discretion on the judge but a duty to admit or exclude as a result of his finding' (1987 28 CRR (SCC) 122 130). However, it is clear that, in coming to its finding in this regard, the court is also called upon to make a value judgment, having taken all the circumstances into account. In this process the court employs the test of the reasonable person:

> 'Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?' (at 136).

In determining this issue the judge is directed by s 24(2) to have regard to 'all the circumstances'. This means that the court must consider and balance a range of factors. In *Regina v Collins* the court grouped these factors under three headings, *viz*;

(i) Factors that are 'relevant in determining the effect of the admission of the evidence on the fairness of the trial';
(ii) Factors that 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) Factors that 'relate to the effect of excluding the evidence. The question … is whether the system's repute will be better served

by the admission or the exclusion of the evidence …' (at 137-9; see also *R v Burlingham* 1995 28 CRR (SCC) 244; and *Principles of Evidence* 201-5).

In deciding the issues listed above and determining whether admission of the tainted evidence would bring the administration of justice into disrepute, the court is required to make a value judgment, which clearly means that it exercises discretion.

4 Comparison of s 35(5) of the Constitution and s 24(2) of the Charter

The similarities between s 24(2) of the Canadian Charter and s 35(5) of the Constitution are evident. Both sections place a duty on the court to exclude the tainted evidence, if its admission would have the stated effect, and both use the administration of justice as the broad criterion. However, there are also differences between these sections which are worthy of note. Schwikkard and Van der Merwe give the following summary of the main differences:

'[S] 35(5) makes specific reference to a fair trial, whereas s 24(2) does not (and [it] had to be read into s 24(2) by the Supreme Court of Canada…); s 35(5) uses the criterion 'detrimental to the administration of justice', whereas s 24(2) created the criterion 'bringing the administration of justice into disrepute' which, it is submitted, is a broader test than 'detrimental to the administration of justice' …; the words 'if it is established that' in s 24(2) do not appear in s 35(5) …' the words 'having regard to all the circumstances' appear in s 24(2) but not in s 35(5) — a difference which is of no consequence as a court which interprets and applies s 35(5) must of necessity take into account all the circumstances.' (*Principles of Evidence* 214 n231; see also *S v Pillay* 2004 2 SACR 419 (SCA) at para 93).

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 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 (see Schwikkard & Van der Merwe *Principles of Evidence* 215-216; *S v Tandwa* (2008) 1 SACR 613 (SCA) at para 116).

Against this background the facts and reasoning of the court in *Hena*'s case can now be considered.

5 *Hena*'s case — facts and reasoning of the court

5.1 Facts

Two men out of a gang of three were charged with two counts of rape and one of robbery with aggravating circumstances. Both pleaded not guilty. Accused 2 was linked to the rape of each complainant by means of DNA evidence, but such evidence was lacking in the case of accused 1. The case against accused 1 was based on the 'doctrine of recent possession' (at 37g). The state alleged that accused 1 was in possession of the cell phone that was stolen from one of the complainants shortly after the crimes had been committed. According to the state the only inference that could be drawn from such possession was that accused 1 was one of the three men who had stolen the cell phone and thus also one of the three men who had raped the complainants.

In order to prove its case the state presented the following evidence. The complainant in one of the rape counts testified that she had received information about a cell phone having been sold by a person who lived at a certain address. In accordance with advice received from the investigating officer she had passed on this information to one Somya, a member of the local anti-crime committee. Thereafter both complainants had accompanied Somya and other members of the anti-crime committee to the said address. There they had found accused 1. Against his will he was put in the boot of their vehicle and taken to the rudimentary 'office' of the anti-crime committee. Because accused 1 'did not want to tell the truth', according to the complainant, he was held there for a long time, during which he was interrogated and assaulted by members of this committee. As a result of the information eventually supplied by accused 1, the members of the anti-crime committee, the complainants and accused 1 (again in the boot of the car) went to a certain place where accused 1 pointed out one Lucas. The latter then handed over a purple cell phone to the complainant, who identified it as her property. Thereafter accused 1 was handed over to the police. Lucas confirmed the complainant's evidence regarding the handing over of the cell phone to her. He further testified that accused 1, 2 and a third man had approached him a while ago with the said cell phone with the view to selling it. Lucas said that he had taken it and kept it, without paying any money. He suspected that it had been stolen and wanted to keep it for its owner. The investigating officer also testified and explained to the court that there was a working relationship between the police and the anti-crime committee, in terms

of which the latter assisted the police with the investigating of crime. Accused 1 did not testify in his own defence.

The defence objected to the admission of Lucas' evidence on the basis that it was derived from evidence that had been obtained in an unconstitutional manner. The court decided this issue without holding a trial-within-a-trial because the parties agreed that it could be dealt with in argument and also because the facts in this regard were common cause.

5.2 Reasoning of the court

Plasket J stated at the outset that the issue before him raised 'most important questions of how courts should maintain the balance between "on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale"' (at 39g, referring to *Key v Attorney-General, Cape Provincial Division* 1996 (2) SACR 113 (CC)). The judge proceeded to remark that it was clear that the information supplied by accused 1, as a result of his abduction, interrogation and assault by the anti-crime committee, constituted evidence obtained in violation of his constitutional 'right to freedom and security as a person' (s 12 of the Constitution). The police had also acted in an unconstitutional manner by delegating part of their investigating duty to the anti-crime committee, thereby allowing it 'to assume policing functions' (at 40). Plasket J further stated that there was a clear link between the tainted evidence obtained from accused 1 and the evidence of Lucas. According to the judge the evidence established that, 'but for the violation of the fundamental rights of accused 1, the existence of Lucas would have been unknown to the State' (at 40d).

In view of the aforegoing considerations Plasket J concluded that the evidence of Lucas, which was clearly derived from evidence obtained in violation of accused 1's constitutional rights, was also unconstitutionally obtained. In the words of the Judge, '[i]t was the fruit of a poisoned tree' (at 40i). After referring to a passage in Schwikkard and Van der Merwe (*Principles of Evidence* para 12 8 4), dealing with unconstitutionally obtained evidence by private individuals, the judge made the following statement:

> 'I take the view on the facts before me that, *subject to my discretion to nonetheless admit the evidence of Lucas*, to which I shall return, the admission of his unconstitutionally obtained evidence is detrimental to the administration of justice. I turn now to consider whether, *notwithstanding this conclusion*, I should *nonetheless* admit that evidence in my discretion.' (at 41b-c; my emphasis).

Before commenting on the italicised phrases, it will be convenient to mention the factors that the court took into account in deciding this issue.

(i) A factor that weighed heavily against the admission of the tainted evidence was the unlawful conduct of the anti-crime committee. This was clearly evidence of bad faith on their part. In 'sub-contracting' their investigative functions to this committee, the police also acted in violation of their constitutional duties. In the words of Plasket J, it was an 'abdication of responsibility' (at 42).
(ii) The violation of accused 1's constitutional rights was serious in this case. It was not a mere 'technical infringement or the omission of a procedural step, but [was a] deliberate infliction of physical violence and pain on him in order to force him to implicate himself against his will …' (at 42d-e).
(ii) There were lawful means available to the police to obtain the evidence of Lucas. They just had to investigate the case themselves in a lawful manner.
(iv) There was no evidence showing that the evidence of Lucas would inevitably have been discovered.

According to Plasket J these factors all weigh against admissibility of the tainted evidence. He, therefore, concluded as follows:

> 'I accordingly find that the admission of the evidence of Lucas would be detrimental to the administration of justice *and that no basis exists for admitting it nonetheless*. I thus hold that the evidence is inadmissible.' (at 42i; my emphasis).

The result was that, since there was no admissible evidence linking accused 1 with the crimes, he was acquitted.

5.3 Critical analysis

Against this background it will now be apposite to consider the reasoning of Plasket J, as reflected in the italicised phrases above. It is submitted, with respect, that the judge misconstrued the discretion conferred upon the court by s 35(5) of the Constitution. The judge's line of reasoning appears to be that since the evidence of Lucas was derived from evidence that was unconstitutionally obtained from accused 1, it (Lucas' evidence) was also unconstitutionally obtained. This led Plasket J, without further ado, to the finding that admission of Lucas' evidence would be detrimental to the administration of justice. However, the judge made this finding *subject to his discretion to nonetheless admit the evidence of Lucas*. Thereafter Plasket J considered the relevant factors mentioned above and held that admission of Lucas'

evidence would be detrimental to the administration of justice *and that there was no basis to admit it nonetheless*.

It seems clear from the italicised phrases that Plasket J was of the view that once he had made a finding that admission of the tainted evidence would be detrimental to the administration of justice, he still had discretion, taking into account the said factors, to admit the evidence. This reasoning is, with respect, clearly wrong. The wording of s 35(5) makes it abundantly clear that once the court has made a finding that admission of the unconstitutionally obtained evidence would render the trial unfair or otherwise be detrimental to the administration of justice, there is no further room for discretion. There is then a duty on the court to exclude the evidence. Plasket J, therefore, erred in first making a finding that admission of the tainted evidence would be detrimental to the administration of justice and thereafter taking the stated factors into account to determine if he should exercise his discretion in favour of admitting the evidence. He should have taken these factors into account first in order to determine if admission of the evidence would have been detrimental to the administration of justice. In this context he would have exercised discretion. Once he answered this question in the affirmative, he was duty-bound to exclude the evidence.

It is submitted that the reasoning of Plasket J does not only fly in the face of the wording of s 35(5), but is also in conflict with the clear exposition in Schwikkard and Van der Merwe's authoritative work (*Principles of Evidence* 215; see para 2 above) and with case law on this subject. In *S v Tandwa* (2008) 1 SACR 613 at paras 116-7 the court explained as follows:

> '[116] The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence *must* be excluded only if it *(a)* renders the trial unfair; or *(b)* is otherwise detrimental to the administration of justice …
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> [117] In determining whether the trial is rendered unfair, courts must take into a 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 …
>
> [118] … [T]hough admitting evidence that renders the trial unfair will always be detrimental to the administration of justice, there may be cases when the trial will not be rendered unfair, but admitting the impugned evidence will nevertheless damage the administration of justice. Central in this inquiry is the public interest …' (my emphasis).

It is evident from this passage that the court exercised discretion in weighing the different factors so as to determine whether admission of

the tainted evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. It is equally clear that once the court has determined that one of the stated consequences would ensue, it is obliged to exclude the evidence. In this event there is no discretion — only a duty.

6 Conclusion

Although Plasket J's interpretation of the interaction of the different elements of s 35(5) was, with respect, clearly wrong, his conclusion regarding the admissibility of Lucas' evidence is supported. In view of the severity of the infringement of accused 1's constitutional rights by the anti-crime committee and the abdication of their constitutional responsibility by the police, admission of the tainted evidence of Lucas would undoubtedly have been detrimental to the administration of justice.