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# Professional incompetence, voluntariness and the right to a fair trial

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## 1 Introduction

It is obvious that the right to legal representation, guaranteed in s 35 of the Constitution of the Republic of South Africa must include competent legal representation. The right to legal representation is traditionally viewed as a pre-requisite for the protection of the privilege against self-incrimination.<sup>1</sup> If this line of reasoning is pursued it follows that *competent* legal representation is required to uphold the privilege against self-incrimination. But the following questions arise: how does a court determine incompetence and when will incompetence render a trial unfair?

In each jurisdiction the contours of rights are constrained and shaped by social, economic, historical and political contexts. For example, in South Africa the right to legal representation is not a substantive right unless substantive injustice would result if there was no legal representation. The South African constitution embodies an express rejection of the abuse of state powers that characterised the apartheid regime and consequently the privilege against self-incrimination is not a right to be taken lightly. However, historical context would also indicate that coercion is the primary wrong to be guarded against. In the absence of coercion it is not clear that the privilege against self-incrimination is infringed when an incriminating statement is made voluntarily in the mistaken belief that it is not incriminating nor that a fair trial is breached in the absence of competent legal representation.

The case of *S v Saloman*<sup>2</sup> provides an interesting factual matrix in which to explore these questions.

The appellant was contacted by a policeman (whom he knew) who said he wanted to speak to the appellant in connection with a robbery. The appellant took himself to the police station to discuss the matter with the investigating officer. At the police station the appellant was

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<sup>1</sup> See PJ Schwikkard and SE Van der Merwe *Principles of Evidence* 3ed (2009) 121 et seq.

<sup>2</sup> 2014 (1) SACR 93 (WCC).

placed under arrest and advised of his rights. He then phoned Mr J, an attorney and asked him to come to the police station and act as his legal representative. Mr J went to the police station but was kept waiting by the appellant for 45 minutes as the appellant wished to carry on his conversation with the investigating officer. When Mr J had the opportunity to interview the appellant, his client, the appellant advised him that he had not been involved in the robbery and that he had transported the 'robbers' merely as part of his ordinary taxi activities. The appellant was then advised of his rights by Mr J and it was agreed that he would make an exculpatory statement to the police. When brought before a peace officer to make his statement, the appellant was further interrogated as to whether he was making his statement voluntarily. The appellant then proceeded to make an incriminating statement somewhat different to the one that he discussed with his legal representative. His representative did not intervene, the matter went to trial and the appellant was convicted on the basis of the statement he made to the police. He then appealed against his conviction on the basis that if he had been granted competent legal representation he would never have made the incriminating statement. The appeal court, endorsing the approach taken by the United States Supreme Court that effective legal representation was essential to trial fairness in an adversarial system, held that Mr J's failure to intervene once he realised that this client was making an incriminating statement, amounted to ineffective legal representation which resulted in an infringement of the accused's right not to incriminate himself and consequently he was denied the right to a fair trial.

## 2 Adversarialism and legal ethics

Proponents of the adversarial system claim that the pursuit of truth and the protection of rights are 'best achieved through partisan presentations of competing interest'.<sup>3</sup> In America, adversarialism also gives expression to a strong commitment to capitalism and individualism.<sup>4</sup> It is in this context that competent legal representation is a pre-requisite for a fair trial and in which a legal representative is required to put his or her client's interests above all other interests. Should this be the same in South Africa, where the commitment to capitalism ostensibly is not as strong and individualism is tempered by the values of *ubuntu*?

<sup>3</sup> DL Rhodes *Ethics in Practice* (2000) 8.

<sup>4</sup> See C Menkel-Meadow 'The limits of adversarial ethics' in Rhodes op cit (n3) 25. Generally, see also GC Hazard and A Dondi *Legal Ethics* (2004) and C Banks *Criminal Justice Ethics* 3ed (2013).

These values were explained by Mokgoro J as follows. Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises a respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our *rainbow* heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that (s 39(1)(a)) requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.<sup>5</sup>

The court in *Port Elizabeth Municipality v Various Occupiers*<sup>6</sup> expanded as follows:

'The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

It is useful to explore this question as to whether ubuntu might influence the application of professional ethics by focusing on the privilege against self-incrimination as this is viewed as fundamental to the right to a fair trial. Recognising that the criminal justice system is coercive there can be no doubt that protecting the privilege against self-incrimination is an important protection for all persons. But does this require a defence lawyer to put his client's interests above all else?<sup>7</sup>

The argument that the client's interest trumps all, has the potential to turn a trial into an irrational battle where truth-finding becomes

<sup>5</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para [308].

<sup>6</sup> 2005 (1) SA 217 (CC) at para [37]. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at para [38].

<sup>7</sup> R Wasserstrom 'Lawyers as professionals: some moral issues' in M Davis and F Elliston *Ethics and the Legal Profession* (1986) 114-122, believes so. See also S Pepper 'The lawyers amoral ethical role: a defense, a problem, and some possibilities' in D Luban (ed) *The Ethics of Lawyers* (1994) 57.

irrelevant.<sup>8</sup> If the truth-seeking function of the criminal process is overlooked there is an increased risk of the criminal justice system losing the requisite levels of legitimacy for it to function. In certain circumstances placing the clients' interests above all else could be said to undermine the dignity of a legal representative, particularly when it requires him or her to be complicit with the clients mendacity. For example, the court in *Saloman* dismissed Mr J's explanation for his failure to intervene and did not address Mr J's ethical concerns about putting words into his client's mouth. The court did not recognise the existence of any ethical dilemma in its finding that Mr J, if competent, would have protected his client from voluntarily telling the truth.

The counter-argument is that because of the complexities and inequality in positions of power an accused can only exercise his autonomy with the assistance of a legal representative.<sup>9</sup> Consequently, the legal representative's dignity must be sacrificed for the greater good. Following this line of reasoning an incompetent legal representative will diminish an accused's autonomy.

If a client misleads his legal representative he breaks the trust which is at the core of the relationship between lawyer and client and it is this which makes the *Saloman* case so different from the examples cited by the court and the hypothetical examples found in ethics texts. The standard ethical issue arises when the legal representative becomes aware that his or her client is lying to the court or police, not when it appears that the client has lied to him or her and is now telling the truth to the police or the court. Current standards of legal ethics do not allow a legal representative to expose his or her client's lies (whether this should be the case is an argument for a different day). It is not clear that professional ethics require a legal representative to actively discourage his or her client from telling the truth when the client has voluntarily embarked on that journey and where the client has been advised of his or her rights.

Clearly, if a legal representative advises a client not to make a statement and the client chooses to do so the link between the legal representatives' skill and the client's autonomy is at least temporarily broken. However, it will not permanently sever the skill-autonomy link as the lawyer remains the instrument of the client, however the client runs the risk that his or her legal representative will no longer be able to assist in optimising his or her decision making. The client having assumed this risk, surely must bear the consequences of it – unless there is some policy reason to transfer the risk to the prosecution. *Ubuntu*

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<sup>8</sup> See Banks op cit (n4); WS Simon 'The ideology of advocacy: procedural justice and professional ethics' in D Luban op cit (n7) 179.

<sup>9</sup> See Pepper op cit (n7).

insofar as it encourages respect between citizens and communitarian values would seem incompatible with the suppression of knowledge that might assist in the resolution of a dispute. *Ubuntu* does not trump the privilege against self-incrimination, however it is something that should be taken into account when determining the breadth of the privilege.

Whether a breach of the constitutional right to competent legal representation on its own provides sufficient reason to place the risk of exclusion of evidence onto the prosecution is explored further below.

### **3 Incompetence**

The court in *Saloman* drew on American jurisprudence in determining what constituted incompetence.<sup>10</sup> Although there is little that turns on it in the present argument it should be noted that the right to legal representation in America is a substantive right, whereas it only becomes a substantive right in terms of the South African Constitution if 'substantive injustice would otherwise result'.<sup>11</sup> The adversarial nature of proceedings in America is also not tempered by the inquisitorial elements present in the South African system. The facts of the American cases referred to by the court in *Saloman* were somewhat different to those that the court was dealing with, nevertheless, it is clear that the American courts have taken a robust approach to the right to competent legal representation. Similarly, the South African courts have held that an accused's right to a fair trial will be infringed '[i]f the unwanted or inept advice of counsel improperly or unfairly thwarted his exercise of that right'.<sup>12</sup> As there are many instances in which a legal representative is required to act, an omission in certain circumstances could certainly amount to incompetence. The Supreme Court of Appeal has also held that in each instance incompetence will be a question of fact – however, where the act complained of is one which would ordinarily fall within counsel's discretion then 'the scope for complaint is limited'.<sup>13</sup> If a legal representative acts in a manner that results in an accused's constitutional right being infringed then that too must amount to incompetence.

### **4 Within counsel's discretion**

An 'act' will fall within counsel's discretion if there is a choice of more than one rational act in the circumstances. 'Act' here is shorthand for

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<sup>10</sup> See *Strickland v Washington* 466 US 668 (1984); *Wiggins v Smith* 539 US 510 (2003); *Rompilla v Beard* 545 US 374 (2005).

<sup>11</sup> Section 35(2)(c) and s 35(3)(g).

<sup>12</sup> *S v Tandwa* 2008 (1) SACR 613 (SCA) at para [8].

<sup>13</sup> *S v Halgryn* 2002 (2) SACR 211 (SCA) at para [14].

the legal strategies a legal representative may employ in representing his or her client. The rationality of an act will be determined by whether it promotes the client's interest.

In the *Saloman* case the appellant had been advised of his rights, he knew he need not make a statement and that if he did make a statement, whatever he said could be used against him. There was no evidence of police coercion and the judgment does not indicate that the appellant felt intimidated by the situation he found himself in. He simply chose to tell the truth perhaps not knowing that the conduct he was admitting to, constituted a crime. His honesty, at this stage, might well have been his best defence, knowledge of unlawfulness being an essential element of criminal liability. This does not appear to have been his legal representative's reason for not intervening, the reason for not intervening being a combination of surprise and a particular understanding of legal ethics. Intervention would also not have prevented the first admissions being tendered in evidence at trial ie those made before Mr J could feasibly have intervened (whether or not there was a delay in translation). That these factors were not in the mind of Mr J does not detract from the possibility that a legal representative could have made a strategic decision not to intervene. The dictum of the Supreme Court of Appeal in *Halgryn*<sup>14</sup> suggests that a court should be very wary of making a finding of incompetence in such circumstances.

Unbeknown to Mr J the best way of protecting his client was to do nothing – as it rendered his client's statement inadmissible. In trying to be consistent with his understanding of his ethical obligations he inadvertently ensured the acquittal of his factually guilty client. Looked at from a certain perspective his passive choice could be viewed as a masterstroke in reconciling the best interests of his clients and his ethical obligations. Of course this is mere sophistry – but it does bring to the fore an uneasiness about the approach of the court in *Saloman*.

## 5 Infringement of a constitutional right

However, both the court and counsel's duty to uphold the constitution excludes any act that might infringe an accused's constitutional right from falling within counsel's discretion. Does the failure to actively discourage an accused from co-operating with the police infringe an accused's privilege against self-incrimination? If the privilege against self-incrimination is negated when an accused voluntarily and inadvertently makes an incriminating statement it follows that the police should never take an incriminating statement from an unrepresented

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<sup>14</sup> Ibid.

accused, because if the accused was competently represented he would surely, on the court's reasoning in *Saloman*, not have made the statement. The waiver of the right to legal representation must also be invalid as it would only have been made in the absence of competent legal representation. It also follows that the police should not take down an incriminating statement made by a person who has legal representation, as the fact that they are making an incriminating statement is an indication that they have not been competently represented. A competent representative may well encourage his or her client to make an incriminating statement thus providing a fool proof ground for appeal. There can be no doubt that disallowing all extra-curial admissions would be a very strong bulwark against the infringement of the privilege against self-incrimination. However, it is likely that this policy choice would further erode an already low conviction rate and we need to ask whether such a stringent approach is required by the constitutional right not to incriminate oneself and whether it is in the public interest.

The privilege against self-incrimination in many instances will enhance both the truth seeking function of the court and legitimacy. It does so by reducing the risk of coercion producing unreliable evidence and protecting accused persons from the indignity of being subjected to coercive measures. In this way it also enhances procedural fairness. The privilege against self-incrimination does not prohibit an accused from making a statement. The making of an incriminating statement cannot be viewed as undignified, as across cultures people are encouraged to confess and to 'own' up is seen as a good thing. However, the privilege against self-incrimination will clearly be infringed if a statement is not made voluntarily.

Voluntariness was given a very restricted meaning at common law,<sup>15</sup> however, the Constitution requires a broader interpretation and voluntariness must be viewed as excluding any influence that might extinguish the accused's free will.<sup>16</sup> Can it be argued that the mere invocation of the criminal justice system on its own is sufficient to negate any claim of voluntariness when a person makes an incriminating statement? In an ideal world, where crime rates are not flamed by gross inequality, where the police force is well-resourced and well trained excluding all admissions might indeed be an effective way of enhancing the truth seeking function of the court as well as minimising incidences of abuse of state power. It also would not be a novel approach (until the end of the 19th century the accused was not a competent witness because he was viewed as an unreliable source of

<sup>15</sup> *R v Barlin* 1926 AD 459.

<sup>16</sup> *S v Agnew* 1996 (2) SACR 535 (C).

evidence).<sup>17</sup> However, we do not live in that world and voluntariness (in the broadest sense – so as to encompass the absence of undue influence) has not been viewed by the courts as being extinguished by the mere invocation of the criminal process.

If an important purpose of legal representation is to uphold the privilege against self-incrimination then in determining whether incompetent legal representation has undermined this right – the question that should be asked is whether the accused's freedom of will was extinguished. In *Saloman's* case there is nothing in the judgment that indicates that the appellant was subject to any form of coercion that might have compromised the exercise of his free will. But, did his possible absence of knowledge of the unlawfulness of his conduct constrain the exercise of his free will?

Intention to make an incriminating statement was not considered a requirement for admissibility by the Appellate Division.<sup>18</sup> It is worth considering whether the recognition of the privilege against self-incrimination as a constitutional right requires the maker of an incriminating statement to know that the contents of his or her statement are incriminating before the statement can be admitted into evidence.

In interpreting 'free will' in the context of an accused who makes a voluntary but inadvertently incriminating statement, a purposive approach requires us to look at the rationale underlying the privilege against self-incrimination which is 3-pronged: (a) concern for reliability (by deterring improper investigation) which relates directly to the truth-seeking function of the court; (b) a belief that individuals have a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (c) the privilege is necessary to give effect to the presumption of innocence. Clearly, in *Saloman's* case neither (a) nor (b) are applicable, (c) however, merits some discussion.

The presumption of innocence places a burden on the prosecution to prove guilt beyond a reasonable doubt. The accused has no obligation to assist the prosecution, however, the prosecution is not barred from using the accused as a source of evidence provided the assistance is given voluntarily. In other words the privilege against self-incrimination promotes the presumption of innocence by reducing unreliability and protecting the rights to privacy and dignity. If free will is interpreted in this context, absence of knowledge of unlawfulness, does not extinguish the accused's exercise of his or her free will.

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<sup>17</sup> CK Allen *Legal Duties and Other Essays in Jurisprudence* (1931) 269.

<sup>18</sup> *R v Barlin* supra; *S v Grove-Mitchell* 1975 (3) SA 417 (A). Cf *S v Buda* 2004 (1) SACR 9 (T).

## **6 Section 35(5) of the Constitution**

*Saloman* requires us to ask another question. When a voluntary but inadvertently incriminating statement could have been curtailed by the intervention of a legal representative could the trial nevertheless be unfair on the basis that the accused was denied the right to a competent legal representative? In other words, if incompetent legal representation does not result in an infringement of the privilege against self-incrimination, will it nevertheless render the trial unfair simply by virtue of the fact that the right to legal representation is included as fair trial requirement in s 35 of the Constitution.

Section 35 of the Constitution protects the rights of arrested, detained and accused persons. Section 35(3) specifically protects the right to a fair trial and contains a detailed but not a closed list of the factors that form part of the right to a fair trial. Section 35(5) of the Constitution requires that evidence must be excluded if (i) it was obtained in violation of the right to a fair trial and (ii) its admission would render the trial unfair or otherwise be detrimental to the administration of justice. Once it has been established that evidence was obtained in breach of a constitutional right then the court must determine whether the admission of that evidence would render the trial unfair. It is required to make a value judgment.<sup>19</sup>

The meaning of trial fairness was eloquently set out by the Constitutional Court in *S v Zuma*<sup>20</sup> and *S v Dzukuda, S v Tshilo*.<sup>21</sup> As was said by the court in *Zuma's* case, an accused's right to a fair trial under s 35(3) of the Constitution is a comprehensive right and 'embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force'. Elements of this comprehensive right are specified in paragraphs (a) to (o) of subsec (3). The words 'which include the right' preceding this listing indicate that such specification is not exhaustive of what the right to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which will be established, on a case by case basis, as our constitutional jurisprudence on s 35(3) develops. It is preferable, in this author's view, that in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those

<sup>19</sup> See SE van der Merwe in Schwikkard & Van der Merwe op cit (n1) 226.

<sup>20</sup> 1995 (1) SACR 568 (CC).

<sup>21</sup> 2000 (2) SACR 443 (CC).

detailed in subsec (3). It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. In what follows, no more is intended to be said about this particular right than is necessary to decide the case at hand.

At the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom and equality are the foundational values of our constitution. An important aim of the right to a fair criminal trial is to adequately ensure that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.<sup>22</sup>

The broad formulation of the right to a fair trial in *S v Zuma*<sup>23</sup> and *S v Dzukuda*<sup>24</sup> provides grounds for arguing that even if one of the discrete sub-rights enumerated in s 35(3) as a component of the right to a fair trial is infringed, the admission of the evidence procured as a result of such an infringement will not necessarily render the trial unfair. Although it can be argued that this approach requires a degree of agility in separating two inquiries – namely (a) has a requirement for a fair trial been breached and (b) will admission of the evidence obtained as a result of the fair trial breach render the trial unfair – the courts have clearly shown themselves capable of meeting this challenge.<sup>25</sup>

In determining whether the admission of evidence will render a trial unfair, the court will take into account a complex matrix of competing and complementary factors including competing societal interests. In *Laurie v Muir*, Lord Cooper expressed the conflict as follows:

‘From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into

<sup>22</sup> *S v Dzukuda*; *S v Tshilo* 2000 (2) SACR 443 (CC) at paras [9] and [11].

<sup>23</sup> 1995 (1) SACR 568 (CC).

<sup>24</sup> *Supra*.

<sup>25</sup> See *S v Lottering* 1999 (12) BCLR 1478 (N); *S v Madiba* 1998 (1) BCLR 38 (D); *Key v Attorney-General, Cape Provincial Division* 1996 (4) SACR 113 (CC); *S v M* 2002 (2) SACR 411 (SCA); *S v Ngcobo* 1998 (10) BCLR 1248 (N).

conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from the Courts of law on merely formal or technical grounds.<sup>26</sup>

Others factors that the court will take into account include: the type and degree of breach<sup>27</sup>; the type and degree of prejudice to the accused – if any;<sup>28</sup> and public policy.<sup>29</sup> Much has been written on section 35(5) in the last twenty years<sup>30</sup> and this article will not be canvassing this jurisprudence. The summary so far, provides a sufficient backdrop for considering whether incompetent legal representation on its own negates the right to a fair trial.

The rationale for legal representation in a criminal trial is that it is necessary in order for the accused to assert his or her constitutional rights. In the absence of a constitutional right being infringed as a consequence of incompetent legal representation there is a need to consider what other prejudice the accused might suffer. If the accused is prejudiced, the absence of competent representation will be sufficient to render the trial unfair. Again using the facts in *Saloman*, where the impact of a legal representative's incompetence appears to have been restricted to the making of a voluntary but inadvertently incriminating statement by the appellant, how would this prejudice the accused? The forbidden prejudice is procedural prejudice, the accused cannot be said to be prejudiced because he or she is found guilty or solely on the basis that he or she makes an incriminating statement. If this were the case, as argued above, the police would not be able to introduce any incriminating statements made by the accused into evidence, nor could the courts accept a plea of guilty, in the absence of coercion or trickery it is difficult to identify the existence of any procedural prejudice. The appellant knew that he need not make a statement, and if he did so that what he said would be used against him. He chose to tell an exculpatory version to his legal representative and an inculpatory version to the police – the only grounds for transferring the risk of this peculiar behaviour on the part of the accused to the prosecution is if unfairness ensued from not properly understanding the legal consequences of his actions. However, he found himself in that position as a consequence of his own mendacity not as a consequence

<sup>26</sup> 1950 SC (J) 16, 26-27. See eg *S v Soci* 1998 (2) SACR 275 (E).

<sup>27</sup> *S v Seseane* 2000 (2) SACR 225 (O); *S v Mphala* 1998 (1) SACR 388 (W); *S v Lottering* supra.

<sup>28</sup> *S v Soci* supra; *S v Lottering* supra.

<sup>29</sup> Ibid.

<sup>30</sup> See for example, SE van der Merwe in Schwikkard & Van der Merwe Ch 12; and DT Zeffertt and AP Paizes *The South African Law of Evidence* 2ed (2009) Ch 18.

of any coercion or trickery on the part of the state. Having made it impossible for his legal representative to give appropriate legal advice in the first place, it is difficult to find a policy reason for not requiring him to carry the risk of his own mendacity. In the absence of such a policy reason there could be no unfairness in requiring the accused to accept the risk he had taken.

Would it have made any difference if the appellant had given an inculpatory account of his behaviour to his legal representative and his legal representative had explained to the appellant his rights and the consequences of making a statement but did not actively discourage his client from making a statement? The *Saloman* judgment indicates that this would be a *prima facie* indication of incompetence, and a legal representative would then have to explain to the court why he or she had taken this route, for example in the hope that his or her client would get a lesser sentence or be more credible when they raised a defence of the absence of knowledge of unlawfulness. It also suggests that professional ethics requires legal representatives to discourage their clients from co-operating with the police – if this is so – it is difficult to identify the constitutional right that supports such an approach to professional ethics. The presumption of innocence places no obligation on the accused to assist the prosecution (including the police) however, it does not require the absence of co-operation and there may be both utilitarian and ethical reasons for an accused to assist in the truth-seeking function of the court.

## 7 Another scenario

If all of the above arguments to the effect that the privilege against self-incrimination is not infringed when an accused makes a voluntary but inadvertently inculpatory statement are fallacious then there is a need to consider whether this was sufficient to justify the exclusion of the accused's statement in terms of s 35(5) of the Constitution. A breach of the privilege against self-incrimination is generally considered a serious breach as it is undoubtedly the corner stone of the right to a fair trial. However, the arguments set out above can also be used to support the contention that in the absence of coercion or trickery any prejudiced suffered by the accused is so minimal as to be insufficient to render the trial unfair. Would such a breach nevertheless be sufficient to make the admission of the voluntary statement detrimental to the administration of justice? It is unlikely that a conviction would cause public distress whereas an acquittal might – however, the potential public response correctly carries very little weight as court decisions should serve an educational purpose. The educational message from *Saloman* is directed at lawyers and appears to be that you have a duty

to zealously place your client's interests above all else and if you do not they will be acquitted and your reputation tarnished. Of course this author is not overlooking the more serious message namely, that a court's duty is to uphold an accused's constitutional rights and it is irrelevant if they are guilty. That is an important message – however, if constitutional rights are not upheld with reference to their underlying rationale the criminal process will be viewed as irrational with the concomitant risk that the rights protected by the Bill of Rights will lose the critical legitimacy that they require.

## **8 Conclusion**

Applying *Halgryn*, where a course of action lies within the discretion of a legal representative, a court should be cautious before making a finding of incompetence. In making an assessment of what professional ethics demands of a legal practitioner the court should bear in mind that it is required to promote the spirit, purport and objects of the Bill of Rights which in turn are underpinned by the values of *ubuntu* as discussed earlier. These values may well require the courts to place more emphasis on the general public interest than would be the case in a jurisdiction where a high value is placed on individualism in contrast to communitarian principles. However, where incompetence results in the substantive infringement of a constitutional right the accused should be entitled to an appropriate remedy which depending on the circumstances might be the exclusion of evidence. Individual rights will always be important, however, their reach should not be extended beyond their rationale.