SECTION 35(5): ARE THE SUPERIOR COURTS CONSISTENT IN THEIR APPLICATION OF THE FACTORS TO BE TAKEN INTO ACCOUNT IN EXCLUDING UNCONSTITUTIONALLY OBTAINED EVIDENCE WHERE ADMISSION WOULD BE DETRIMENTAL TO THE ADMINISTRATION OF JUSTICE?

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I. INTRODUCTION

This dissertation deals with the application and expounding of s 35(5) of the Constitution of the Republic of South Africa, 1996. More specifically, the research question asks whether the courts are consistent in their application of the factors to be taken into account in the exercise of their discretion, with regards to s 35(5) of the Constitution, to exclude evidence when admission would be otherwise detrimental to the administration of justice?

Section 35(5) deals with the exclusion of illegally or unconstitutionally acquired evidence during a criminal trial. Section 35(5) is conceptually indistinguishable to art 24 of the Canadian Charter of Human Rights and Freedoms (the Charter), which states:

> '(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances;
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by 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'.[1]

South African courts have frequently mentioned art 24(2) of the Canadian Charter in analysing the exclusionary rule accommodated by s 35(5) of the South African Constitution.

Section 35(5) of the Constitution reads:

> '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.'[2]

This provision allows for the exemption of evidence which has been acquired through the infringement of the perpetrator's fundamental constitutional rights, which if admitted into evidence may lead to an unfair trial or undermine the proper functioning of the criminal justice

[1] Article 24 of the Canadian Charter of Human Rights and Freedoms, 1982.
[2] Section 35(5) of the Constitution of the Republic of South Africa, 1996.

system. The section seeks to balance the community's concerns in guaranteeing that individual constitutional rights are upheld and additionally ensuring that those who are factually guilty are prosecuted and sentenced.[3]

Section 35(5) requires the court to first determine whether evidence has been acquired as a result of a infringement of a legal entitlement.[4] Secondly, whether admittance of the evidence would encourage trial unfairness.[5] If allowing the admission of evidence leads to an unfair trial, it will also harm the proper execution of justice. Although, even if admitting evidence does not make the trial unfair, the court remains dutiable in assessing whether it would harm the administration of justice. If allowing admission would have either of these effects, the judiciary is obligated to exclude the evidence obtained unconstitutionally..[6] In *Shamduth Singh & Others v The State*[7] the court held:

> 'Section 35(5) of the Constitution 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'.[8]

The courts seek an assessment through a various amount of factors to establish whether the accepting of unconstitutionally acquired evidence will result in trial unfairness or will be detrimental to the administration of justice. The focus of this is paper is on the second leg of the inquiry namely, the factors taken into account in determining whether acceptance will be harmful to the interests of justice. Factors pertaining to trial fairness will be identified and distinguished from those applicable to the second leg, however, an inquiry into consistency of application will be restricted to those factors applicable to determining whether admission will be detrimental to the administration of justice.

[3] Dane Ally 'The need for clarity on whether 'suspects' may rely on section 35 of the Constitution of the Republic of South Africa, 1996: a comparative law analysis' (2010) 43 2 *Comparitive and International Law Journal of Southern Africa* 240.
[4] Dane Ally 'Constitutional exclusion under s 35(5) of the Constitution: should an accused bear a 'threshold burden' of proving that his or her constitutional right has been infringed?' (2010) 1 *SACJ* 22.
[5] Ibid 23.
[6] Ibid 23.
[7] 826/2015 [2016] ZASCA 37 para [16].
[8] Supra at [16].

(a) Methodology

This research has been conducted in the form of a desktop review. The older and newer relevant reported South African Superior Court cases where the second leg of s 35(5) is expressly dealt with have been analysed. This is to question whether the Superior Courts have applied the second leg of s 35(5) consistently in light of the various factors attached to its application. Analysis of these cases has been supplemented by a review of relevant articles and other texts dealing with unconstitutionally obtained evidence. I have referred to international jurisdictions where this is pertinent to the court's interpretation of s 35(5). In particular, reference is made to art 24 of the Canadian Charter which significantly influenced the drafting of s 35(5) which is similar but not identical to art 24.

(b) Chapter synopsis

This introduction which sets out the research question and methodology is followed by an analysis of the structure of s 35(5) in chapter 2, placing s 35(5) in its historical context. While chapter 3 deals with an analysis of s 35(5) and art 24 of the Canadian Charter.

Chapter 4 provides an in depth analysis of the selected superior court judgements dealing with s 35(5) of the Constitution. Thereafter, chapter 5 will serve as a comparative chapter in which the chapter 4 case law judgements will be compared to one another, including their use of Canadian jurisprudence. Chapter 6 will draw on the preceding chapters and identified case law to identify the factors applied by the courts in determining whether the admission of evidence would be detrimental to the administration of justice. The concluding chapter - being chapter 7 - will consider whether these factors have been consistently applied.

II. HISTORICAL CONTEXT

A developing consciousness of the necessity to better protect the essential rights of humans was stirring in the 20th century.[9] It was a difficult affair to navigate the balancing of interests of those involved in the criminal sphere, such as the accused and the public.[10] The Interim Constitution of South Africa did not explicitly incorporate a provision for the exclusion of evidence obtained unconstitutionally.[11] However, throughout the limited existence of the Interim Constitution's application, South African courts began to develop an exclusionary rule. Despite occasional disagreements regarding the criteria or tests to be employed, the courts took steps towards establishing guidelines for prohibiting the inclusion of evidence acquired in breach of constitutional rights.[12] These guidelines were applied in the Final Constitution through the model of art 24(2) of the Charter.[13] The introduction of s 35(5) advanced the rights of an accused person by adopting an approach which excluded evidence which had been acquired in a method which violated a right in the Bill of Rights.

The debate about whether or not evidence obtained in an unconstitutional or unlawful method should be included arose after the introduction of the new constitutional dispensation 1994.[14] South Africa has a hybrid legal system dating back to the historical developments at the Cape of Good Hope when settled by the Dutch.[15] Roman-Dutch law was introduced in the Cape as it was the law of Holland. This was during the time when the Dutch East Indian company had developed a refreshment station at the Cape of Good Hope in the 17th century.[16] Thereafter, the British came into power and English procedural law had been introduced, with substantive law still intact. In South African law today, Roman-Dutch law remains a large part of the foundation of the legal system. While it is important to emphasise that Roman-Dutch law had a magnified influence throughout the South African legal framework, there have been

[9] Van der Merwe Stell LR (1992)
[10] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 208.
[11] B Naude 'The exclusion of evidence and section 35(5) of the constitution: should South African courts follow the Canadian example' 1998 31 3 *The Comparative and International Law Journal of Southern Africa* 316.
[12] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 208.
[13] *Ibid* 208.
[14] Wouter De Vos 'Illegally or unconstitutionally obtained evidence: a South African perspective' (2011) 2 *Journal of South African Law* 268.
[15] Wouter De Vos 'Judicial discretion to exclude evidence in terms of s 35(5) of the constitution: *S v Hena* 2006 (2) SACR 33 (SE)' (2009) 22 3 *South African Journal of Criminal Justice* 268.
[16] Wouter De Vos 'Illegally or unconstitutionally obtained evidence: a South African perspective' (2011) 2 *Journal of South African Law* 269.

multiple advancements over time. South Africa post-apartheid has pushed efforts to transform and modernise the framework of human rights.[17]

Section 252 of the Criminal Procedure Act 51 of 1977 (the CPA) provides: 'The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.'[18]

Any matter not dealt with by this said law reverts in effect to the English common law of 1861[19] will be applicable on the 30 May 1961, which embodied an inclusionary approach. This approach is as follows by Crompton J : "it matters not how you get it; if you steal it even, it would be admissible".[20] This meant that evidence which was considered relevant although obtained illegally or improperly could be admitted.[21] Although, the court had the authority to prohibit the evidence where its admittance would result in an inequitable bias of the accused.[22] The South African courts, more specifically after the case of *Ex Parte Minister of Justice in re R v Matemba*[23], were not solely occupied with the method in which evidence was acquired. The courts rather focused on whether the evidence obtained was relevant.[24] Before the constitutional era, South African courts adhered to the English common law's inclusive approach. In terms of which, the regulatory assessment in determining whether evidence should be admissible was whether such evidence was relevant. The way in which evidence was obtained was of no importance to the courts. *Kuruma, Son of Kaniu v Reginam* [25] noted that previously a court would take evidence into account if it was relative to secure a conviction. This matter was around the time of the Mau-Mau State of Emergency which was a British initiated war, which sparked an uprising until the early 1960's in Kenya.[26] An appeal was lodged against the sentencing to death of a native Kenyan who had been searched during a roadblock and was found to be in possession of ammunition and a pocket knife. The appeal

[17] Ibid 269.
[18] Section 252 of the Criminal Procedure Act 51 of 1977.
[19] *R v Leatham* 1861 Cox 498 501 at [501].
[20] Supra at [501].
[21] PJ Schwikkard and TB Mosaka *Principles of Evidence* (2023) 220.
[22] *Kuruma, Son of Kaniu v R* 1955 AC 197 at [203].
[23] *Ex Parte Minister of Justice in re R v Matemba* 1941 AD 75.
[24] Dane Ally '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?' (2012) 15 5 *PELJ* 479.
[25] 1955 1 All SA ER 236; 1955 AC 197.
[26] John Newsinger 'Revolt and Repression in Kenya: The "Mau Mau" Rebellion, 1952-1960' (1981) 45 2 JSTOR 159.

was made on the basis that the police search was illegal due to the police going beyond the scope of their permitted powers.[27] Later, the case of *Dubal Aluminium Company Ltd v Al Alawi*[28] an employer brought an action against a previous employee for fraudulent behaviour, which resulted in an order to freeze the employer's assets. The employee attempted at reversing the effects of his behaviour by accusing the employer's investigators of illegally obtaining evidence against him.[29] The presiding officer ruled that the case had substantial merit against the employee confirming his defrauding of his employer and that the investigators did not obtain evidence illegally.[30] Although, the court noted that there had been confrontation between the publics interests of maintaining legal order and the right to privacy.

In *S v Nombewu*[31], Justice Erasmus acknowledged that 'public opinion is at most peripheral' to the definition of a fair trial.[32] However, he noted that public opinion could be influenced by factors such as the nature and seriousness of the violation; the type of crime; the gravity of the offence; and the prevailing state of lawlessness in the country.[33] Furthermore, it was acknowledged by Justice Erasmus with reference to *S v Makwanyane*[34], that while a court should not permit public sentiment to influence its judgements, it has a duty to educate the public.[35] He highlighted that the court should convey the message that a fair trial aligns with constitutional principles.[36] The judiciary must clarify that the Constitution serves as a safeguard for all citizens against official abuse and is not a tool to protect criminals from just consequences. Justice Erasmus stressed the importance of courts actively shaping public understanding of constitutional norms using plain language that is accessible to everyone. This is to encourage a better understanding of the balancing of rights of the accused and the concerns of the public in seeking justice in the criminal system.

[27] CMS Law Now 'Admissibility of illegally-obtained evidence' available at *https://cms-lawnow.com/en/ealerts/2004/09/admissibility-of-illegally-obtained-evidence?format=pdf&v=6* accessed 4 January 2024.
[28] [1999] 1 All ER (Comm) 1.
[29] George Barrie 'Recent English Cases' (1999) *De Rebus* 68.
[30] Ibid 68.
[31] 1996 (2) SACR 396 (E).
[32] *S v Nombewu* 1996 (2) SACR 396 (E) at [422 F – 423 B].
[33] Supra [296*b* – *d*]
[34] 1995 (3) SA 391 (CC).
[35] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at [431C-F].
[36] Dane Ally '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?' (2012) 15 5 *PELJ* 479.

The fundamental principle enshrined in s 35(5) — the exclusion of evidence acquired unconstitutionally, irrespective of its importance and admissibility under regular circumstances — is not exclusive to South Africa.[37] The exclusionary rule, in a more inflexible structure, has its roots in the legal principles of the Supreme Court of the United States of America.[38] As per the case of *Weeks v United States*[39], in which Justice Day, writing for an undivided Supreme Court articulated the sentiment that if private documents and letters could be confiscated and utilised as evidence presented against a person charged with an offense, the security afforded by the Fourth Amendment would be rendered meaningless.[40]

This distinguished the inception of the American exclusionary rule and was used by various international jurisdictions and the criminal evidence tribunals.[41] While this rule has influenced the evidential systems of various national jurisdictions, its application often varies, with many jurisdictions adopting a discretionary approach rather than a rigid rule.[42] The core of the exclusionary rule has also found acceptance in 'continental jurisdictions', and its impact extends to 'supra-national regional jurisdictions' and the 'evidential systems of international criminal tribunals'.[43]

Section 35(5) of the South African Constitution specifically handles evidence acquired in a method which infringes upon the Bill of Rights. This provision is concerned with evidence that is unconstitutionally obtained. However, evidence obtained improperly or illegally is subject to discretionary powers of the common law.[44] The courts have adapted their common law discretion to conform with the constitutional framework, ensuring that accused individuals are afforded the right to a fair trial as enshrined in the Constitution.[45] Indeed, when breaking down the elements of s 35(5) of the South African Constitution, it establishes a duty for the court to exclude evidence that has been obtained in a manner violating any constitutional right. The language 'evidence ... must be excluded' indicates a mandatory obligation on the part of the court. However, the provision grants the court discretion to ascertain the consequences of

[37] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 207.
[38] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 207.
[39] 232 US 383 (1914) at 393.
[40] *Weeks v United States* 232 US 383 (1914) at 393.
[41] Skorupka 'The rule of admissibility of evidence in the criminal process of continental Europe' (2021) 7 *Rev Brasileira Direito Processual Penal* 93.
[42] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 207.
[43] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 208.
[44] B Naude 'The inclusion of inevitably discoverable evidence' (2005) 21 2 *South African Journal of Criminal Justice* 170.
[45] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 209.

admitting such evidence, which can allow the court to assess whether the admission of the evidence would render the trial unfair or be otherwise detrimental to the administration of justice.

The duty to omit arises if the admission of evidence leads to one of the ramifications specified in the section. In this aspect, there is no room for prudence; it constitutes an unyielding constitutional rule of exclusion.[46] Nevertheless, when assessing whether admission results in one of the two specified ramifications, the court is obliged to engage in a significance judgment. In this context, discretion becomes relevant, and it should be employed while considering all the particular facts of the case, principles of a fair trial, and, if applicable, considerations of public policy.[47] After confirming that the contested evidence was acquired in breach of any of the accused's constitutional rights, the court is obligated to conduct a fair trial inquiry. This involves a comprehensive assessment of all the case-specific facts and certain factors. These factors encompass considerations such as:-

> 'the nature and the extent of the constitutional breach, the presence or absence of prejudice to the accused, the need to ensure that exclusion of evidence does not tilt the balance too far in favour of due process against crime control, the interests of society and, furthermore, public policy'.[48]

In the case of *Nel*[49] which had been decided using the common law, evidence acquired in a manner which breached the accused's s 14 right to privacy by admitting private tapped telephone recordings was admitted.[50] The presiding judge founded his decision on the basis that there can only be two scenarios where evidence must be excluded. First, where the accused had self-incriminated himself under compulsion, or secondly where the accused had been put under duress.[51] The difference between the judicial precedent and the Interim

Constitution can be seen in the case of *S v Hammer and Others*[52], where the court stated that evidence which is obtained illegally or improperly should be excluded in order to advance fairness. In this case, Justice Farlam references Skeen's article in the case of *Hammer and Others* in the affirmative that wherein factors for determining whether to exclude evidence

[46] *S v Makhala* 2022 (1) SACR 485 (SCA) at [22].
[47] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 215.
[48] PJ Schwikkard and TB Mosaka 227 - 228 with reference to case law; *S v Tandwa* (n 48) at [117].
[49] *S v Nel* 1987 (4) SA 950 (W).
[50] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 220.
[51] *S v Nel* 1987 (4) SA 950 (W).
[52] *S v Hammer and Others* 1994 (2) SACR 496 (C).

under common law are outlined.[53] Skeen emphasises the absence of a supposition in agreement of admittance or prohibition and cautions against introducing questions of onus into the equation.[54] The community's right to demand that those in authority, such as those in police service respect the law is crucial to preserving an individual's right to protection from capricious and illegal invasion into their everyday affairs of private life.[55]

The perpetrator's entitlement to a fair trial, as enshrined in s 35(3) of the constitution, encompasses numerous particular rights. Among these, the rights of particular significance in the current environment includes the right to legal representation with notification of this right, the right to refrain from creating statement which could self-incriminate himself, the right to be free from being coerced into providing self-incriminating evidence, and, preceding the trial, the right to be free from being obliged to admit any declaration or admission that might be utilised as proof of a crime against the accused.[56]

III. ANALYSIS OF S 35(5) IN LIGHT OF ART 24 OF THE CANADIAN CHARTER

The legitimacy structure adopted by the Supreme Court of Canada in assessing the acceptability of unconstitutionally acquired evidence has been considered in the case of *R v Grant.*[57] – Rather, it has been suggested that the admissibility assessment should consist of two separate tests, each serving to augment various societal interests, which is in comparison to the ideas of Naudé indicating that the test should rather consider the administration of justice which references to trial unfairness aspects.[58] While the Canadian test examines one aspect, which is whether the permittance of the challenged evidence would go against the administration of justice.[59] The Canadian test was emphasised in *R v Collins*[60] through the goal standard of a reasonable person's understanding of balancing rights of the accused and the public's. interests. The test questioned whether the admission of evidence obtained illegally discourages the goal of maintaining the administration of justice.[61] It can be noted that this question should be

[53] *S v Hammer* supra 466.
[54] Supra at [466].
[55] Supra at [466].
[56] Section 35 of the Constitution of the Republic of South Africa, 1996.
[57] [2009] 2 SCR 353.
[58] Bobby Naudé "The revised Canadian test for the exclusion of unconstitutionally obtained evidence" 2009 *Obiter* 608.
[59] Bobby Naudé "The revised Canadian test for the exclusion of unconstitutionally obtained evidence" 2009 *Obiter* 607
[59] *R v Grant* [2009] 2 SCR 353 at [101].
[60] 1987 28 CRR 122.
[61] *R v Collins* 1987 28 CRR 122 at [4].

included in a judge's discretion of decision making which is accepted by the public, striking a balance.

(a) First leg

For the purposes of this dissertation, a brief overview of the first leg is discussed while the main focus will remain on the second leg. The first aspect of s 35(5) suggests that evidence obtained through a breach of the accused's constitutional rights could negatively impact the fairness of the trial.[62] This aspect encompasses the concept of trial fairness, taking into consideration both the perpetrator's rights and the broader interests of society.[63] This embodies an idea that s 35(5) is flexible to allow the court to gain the discretion in ascertaining whether or not such evidence will be admitted or prohibit its admission. There are factors in which a court will take into consideration in determining whether there is trial fairness, namely the nature of the constitutional right breach; the need to exclude evidence without affecting the control of crime; ensuring the accused remains protected from prejudice; society's interests; and public policy.'[64]

As per *S v Tandwa and Others*[65], it was established that one of the main features of the exclusionary provision is that there is 'no automatic exclusion of illegally obtained evidence', but rather allows for exclusion if it can be proven that the infringement of the accused's rights is greater than admission.[66] Section 24 of the Canadian Charter of Rights and Freedoms has been characterised as a compromise between the prior strict 'Anglo-Canadian inclusionary rule' whereby evidence is permitted if it has relative value in securing a conviction and the perceived American strict exclusionary rule.[67]

In the Canadian case of *Burlingham*[68], the accused underwent an intensive and manipulative interrogation during a murder investigation, lasting several days. Despite expressing his 'right to remain silent' until consulting with legal representation, the police persistently questioned the accused and proposed an arrangement– stating that the accused

[62] Dane Ally '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?' (2012) 15 5 *PELJ* 479.
[63] *S v Pillay and Others* 2004 (2) SACR 419 (SCA) at [88].
[64] *S v Madlala* 2015 (2) SACR 247 (GJ).
[65] *S v Tandwa and Others* 2008 (1) SACR 613 (SCA).
[66] Ibid.
[67] *R v Wray* 1970 11 DLR (3d) 673.
[68] *R v Burlingham* 1995 28 CRR (2d) 244 (SCC).

would only face 'second-degree murder' charges if he disclosed the location of the firearm and additional relevant details.[69] Without giving the accused the opportunity to liaise with a legal representative, the accused provided a self-incrimination admission, led the authorities to where the murder took place, and revealed where he had discarded of the firearm.[70] The Court, in that case, emphasised that even in serious charges where the evidence is crucial to the state's case, accepting such evidence could remain as the stepping stone in bringing the administration of justice into disrepute.[71] The legal theory of the Supreme Court of Canada on art 24(2), faced criticism for remaining ambiguous and complicated. The Court indicated its intention to clarify the law in this domain by ordering 'a re-hearing of the case before all nine members of the Court' and allowing interveners to furnish entries, as seen in their decision in *R v Stillman*.[72]

Mr. Stillman faced charges of 'raping and murdering a teenage girl under a bridge'. The basis on which his arrest was founded was on the fact that he had been the last person to be seen with the victim when she was alive. Later that night, he had arrived home with physical evidence suggesting involvement. Despite having obtained an attorney who had cautioned the police officials that the accused would not consent to DNA submissions or incriminating statements, the police threatened and used coercion to force DNA submission out of the accused. These submissions took the form of 'hair, buccal swab, and teeth impressions'.[73] Additionally, the police had retrieved a tissue which had been discarded by the accused in a trashcan nearby. The presiding officer deemed that the DNA samples had been acquired in a manner that infringed upon the accused's rights in art 8 of the Charter, but admitted the items regardless. In terms of the discarded tissue paper, the presiding officer continued that the seizure from a public source, such as the trashcan, did not violate art 8, which makes it admissible without inquiry. The accused had been sentenced for the rape and murder of the victim, and the Supreme Court of Appeal upheld the conviction. The court's majority stated that the evidence had been acquired in a manner that infringed upon the accused's rights and therefore should exclude the evidence acquired.

[69] Supra at [3].
[70] Supra at [5].
[71] Supra at [9].
[72] Adam Parachin describes that it was in the early part of the twentieth century when this general discretion was developed in common law as discussed in Adam Parachin *"Compromising on the Compromise: The Supreme Court and Section 24(2) of the Charter"* (2000) 10 *Windsor Review of Legal and Social Issues* 40.
[73] Ibid at [43].

It was established, that when trial fairness is to be evaluated, there is a crucial comparison between the relationship of mandatorily and non-mandatorily obtained evidence. Conscriptive evidence involves compelling the perpetrator to implicate himself in violation of their rights and encompasses admissions, the use of the body, and bodily samples.[74] For instance, forcing the accused, against their rights, to be a part of a line-up falls under using the body as evidence. If the accused was not coerced to participate in creating or discovering the evidence, it is considered non-conscriptive.[75] Admitting such evidence does not render the trial unfair, and the court proceeds to examine other factors like the gravity of the breach and the impact of exclusion on the administration of justice's reputation.

Illegally obtained evidence poses a threat to trial justice and shall be omitted. Only when the evidence is not mandatorily obtained through the free will of the accused, or if mandatory evidence could have been obtained through subsequent nonmandatory means, should other factors be assessed.[76] The Court emphasised that the main objective of examining trial fairness in an art 24(2) interpretation is to safeguard a charged individual, whose Charter rights have been violated, from being compelled or conscripted to provide evidence in the form of a admission, or bodily specimen for the benefit of the State.

In *Stillman's* case, the biological specimens, although considered 'real' evidence, were deemed conscriptive because the police had coerced the accused to furnish evidence in the form of DNA samples.[77] This classification meant that this would render the trial unfair, and such evidence must be omitted. The Court highlighted additional factors supporting this decision: the earnest essence of the violation, the police's use of threats and intrusive methods to obtain the samples, and their disregard for the legal representative's correspondence and the accused's essential rights, particularly considering he was a youth.[78] The Court concluded that permitting such evidence would 'shock the conscience of fair-minded' community members, bringing the administration of justice into disrepute. In contrast, the toilet paper tissue was not conscriptive evidence since the police authorities had not pressure the accused to furnish it. Given the absence of a serious breach, lack of police force, and the discoverable nature of the tissue, admitting evidence derived from it would not bring the administration of justice into disrepute.

[74] *R v Stillman* 1997 42 CRR (2d) 189 (SCC); 1997 1 SCR 219 at 607.
[75] Supra at [608].
[76] Supra at [607].
[77] Eileen Skinnider 'Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada' (2005) *International Centre for Criminal Law Reform and Criminal Justice Policy* 16.
[78] Ibid 14.

The factor of real evidence can be identified in the South African case of *S v Mkhizer*[79], where the principles of *R v Collins*[80] were followed. The most important principle was that if the unconstitutionally obtained evidence was real evidence, rather than communicational evidence, the admission was unlikely to breach the accused's 'right to a fair trial'.[81] The majority presiding officer, Willis J found that regardless of whether the evidence was obtained through a valid search warrant, there were other ways in which that the evidence would have inevitably been found.[82]

The RCMP Drug Squad, in the case of *R v Collins*[83] had been monitoring Ruby Collins.[84] While conducting surveillance, one of the police officials entered the bar, revealed his identity as a police officer, physically grabbed her throat, and forcibly pulled her to the floor. During this encounter, the official observed Ms Collins gripping something, which later was found to be a 'balloon containing heroin'. Ms. Collins was subsequently apprehended on the charges of possession of drugs. During the trial, the defence contended that the investigation occurred devoid of a warrant and lacked justifiable cause, thereby violating Ms Collins' rights to be liberated from irrational inspection and confiscation as per art 8 of the Charter.[85]

While the presiding officer had acknowledged that there had been a breach of the accused's Charter rights, he continued to admit the evidence on investigation and confiscation after considering all the appropriate conditions, resulting in her conviction. However, the Supreme Court of Canada overturned the decision of the court *a quo*. The Court outlined various factors to be taken into account and proportionated the 'all circumstances' assessment. These components included the type of evidence acquired, the specific Charter right violated, the severity of the Charter violation (whether it was serious or solely technical), the type of breach (intentional, wilful, obvious, or unwitting), the presence of urgency or necessity, availability of other investigative techniques, whether the evidence would have been acquired

[79] 2012 (2) SACR 90 (KZD).
[80] 1987 28 CRR 122.
[81] *S v Mkhize* supra at [637 g – h].
[82] Supra at [637 i].
[83] 1987 28 CRR 122 (SCC)
[84] Ibid at [265].
[85] Eileen Skinnider 'Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada' (2005) *International Centre for Criminal Law Reform and Criminal Justice Policy* 11.

regardless, the severity of the offense, the essentiality of the evidence to substantiate the charge, and the availability of other remedies.[86]

In the South African case of *S v Tandwa and Others*[87], two accused individuals facing robbery charges were subjected to severe police assault, leading them to make compromising admissions. One of them 'pointed out' a portion of the misappropriated cash, while the other identified a portion of the misappropriated cash and a firearm being an AK-47 rifle. The court *a quo* employed the *Collins*[88] test, concentrating on the type of the evidence and omitted the admissions made during the 'pointing out'.[89] Although, it permitted the acceptance of the real evidence uncovered during this method. The Supreme Court of Appeal disputed this approach, citing *R v Stillman*[90] and asserting that the distinction amidst tangible and oral evidence in this context 'is misleading since the question should be whether the accused was compelled to provide the evidence'.[91]

The Supreme Court of Appeal in *S v Tandwa and Others*[92] expanded on the components that a court should consider in ascertaining whether the admitting of questioned evidence would provide that the trial be unjust:-

> 'relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature.'[93]

Given this context, the court arrived at a decision that the evidence of the discovered misappropriated cash and firearm ought to be omitted, and it advanced to address the appeal on that foundation.[94] In my opinion, the court may have merged the two distinct principles manifested in s 35(5): 'whether admission would render the trial unfair and whether it would

[86] *R v Collins* 1987 28 CRR 122 (SCC)
[87] 2008 1 SACR 613 (SCA).
[88] 1987 28 CRR 122.
[89] Supra at [110].
[90] 1997 42 CRR.
[91] *R v Collins* 1987 28 CRR 122 at [129].
[92] Supra.
[93] Ibid at [117].
[94] Ibid at [138].

be detrimental to the administration of justice'.[95] Some factors considered by the court in determining the impartiality of the trial, such as 'public policy' and 'basic civilised injunctions', could have been more appropriately considered under the second manifestation of s 35(5).[96] Furthermore, the court could have determined that the real evidence did not meet the criteria for a fair trial and subsequently excluded it on the foundation that admittance would have been harmful to the administration of justice.

justice.

(b) Second leg

There is a relationship between the first and second manifestation of s 35(5). This is the final step in ascertaining whether or not the admissibility of evidence in a case may stand, because if evidence does not render the trial unfair, it may still be detrimental to the administration of justice. In the case of *S v Mphala and Another*[97], the presiding officer Justice Cloete made the following statement in terms of the second manifestation of s 35(5):-

> 'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated'.[98]

There are various components which the courts may consider when interpretating the second leg of the enquiry. These factors include *bona fide* actions and the reasonable behaviour of the police officials.[99] In the case of *S v Naidoo and Another*[100], it can be seen that it is a leading case exclusion of unconstitutionally obtained evidence if there is *bona fide* police conduct. In this case, the prosecution laced reliance on telephone recordings which were intercepted obtained which incriminated the accused. Throughout the trial, the court found that the basis on which the interception of these telephone conversations were gained under false pretences

[95] S 35(5) of the Constitution of the Republic of South Africa, 1996.
[96] Ibid at [120].
[97] 1998 1 SACR 654 (W).
[98] *S v Mphala* 1998 1 SACR 654 (W) at [657g-h].
[99] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 251-256.
[100] 1998 (1) SACR 479 (N).

by the police.[101] *S v Hena and Another*[102] dealt with the bad faith on part of the policemen's obstructive behaviour. The said policemen had kidnapped the 1st accused and tortured him to gain a confession as to his participation in the offence and the location of the other accused persons. The court determined that the conduct of the police was considered to have been done so deceitfully and that they had violated their statutory obligation to investigate crime, not to encourage it.[103] Furthermore, South African courts may also consider in the situational ascpects of this enquiry whether the unavoidable revelation of tangible evidence or the uncovering of the said evidence on the foundation of an autonomous origin. The latter follows suit of the American and Canadian jurisprudence in terms of the second leg.[104]

The two prominent cases which focus of evidence and whether it is detrimental to the administration of justice would be the cases of *S v Pillay*[105] and *Mthembu*[106]. This leg focuses on where such evidence may render a negative effect on the administration of justice.[107] This can be seen in the case of *Pillay*, whereby it was stated that the second leg of the section is focused on 'societal interests in crime control'.[108] During the test of the second leg, the court noted that an 'analysis' was mandatory which should be followed by an 'inquiry'.[109] The Supreme Court of Appeal (SCA) in its majority judgement determined that the tangible evidence in question was permitted to be admitted regardless whether it had been acquired in a method which breached the accused's rights. This founding was based on that the evidence would have inevitably been brought to the courts attention.[110]

In the case of *S v Mthembu*[111], a state witness and the co-conspirator to the crime had sowre under oath after being cautioned about s 204 of the Criminal Procedure Act[112]. They were tortured by the police 4 years before their testimonies which had led to the induced statement which incriminated the accused. The concurring judgement by Cachalia J found that

[101] S v Naidoo supra at [530 g].
[102] 2006 (2) SACR 33 (SE).
[103] *S v Hena* supra at [42 a – b].
[104] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 258-259.
[105] 2004 (2) SACR 419 (SCA).
[106] 2008 (2) SACR 407 (SCA).
[107] Dane Ally '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?' (2012) 15 5 *PELJ* 480.
[108] *S v Pillay and Others* 2004 SACR 419 (SCA) at [87-97].
[109] Supra at [90].
[110] Supra at [90].
[111] *S v Mthembu* 2008 (2) SACR 407 (SCA)
[112] 51 of 1977.

the evidence could be subjected to the admissibility test with regard to the casual connection between the 'torture and the testimony'.[113] In other words, the torture affected the testimony even after the 4 year gap between the 2 events and therefore, the testimony was considered to be tainted.[114] The court omitted the evidence under the test of the second leg. The court additionally took into account the factors of the type and severity of the constitutional rights breach on part of the police. The basis of determining the seriousness of a violation as per the court, is whether the result of the violation was for a particular purpose or if it was 'deliberate policy'.[115]

This is in comparison to that of the case of *S v Mark and Another*[116], whereby 4 eyewitnesses were assaulted by prison warders with the goal of identifying the person who had murdered the deceased. Davis J identified that there needed to be a link between the eyewitness's testimonies and the breach of their constitutional rights to dignity and integrity. Davis J went on to say that the statements made in open court by the eyewitnesses were made voluntarily and therefore created in a break in the link.[117]

As per the case of *S v Ndlovu* [118], the issue raised in the appeal court was determining whether the court *a quo* had correctly admitted an unlawful search of the accused premises into evidence. The perpetrator was indicted with 10 (ten) counts of rhino poaching throughout a period of 3 (three) years. He was found guilty on many of the counts and condemned to a lengthily prison penalty of 25 (twenty-five) years in prison. The first issue before the court was the legitimacy of the investigation conducted by police officers. The police had seized a number of illegal items from the accused's premises, devoid of a search warrant.[119]

The appeal court had determined that such a search was a breach of the accused's fundamental constitutional rights to a 'fair trial and privacy', but was subject to justifiable limitation as per s 36.[120] For emphasis, a limitation created by s 36 is considered a 'law of general application'.[121] Which validates limiting one of the sections in the Bill of rights.[122] The

[113] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 258-259.
[114] *S v Mthembu* 2008 (2) SACR 407 (SCA) at [34].
[115] *S v Mark and Another* 2001 (1) SACR 572 (C) at [578 c – d]. Also see the case of *S v Seseane* 2000 (2) SACR 225 (O).
[116] 2001 (1) SACR 572 (C).
[117] Supra at [577g].
[118] 2017 (2) SACR 305 (CC).
[119] Supra.
[120] Supra
[121] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) 221.
[122] *S v Naidoo and Another* 1998 (1) SACR 479 (N) at [499 I – 500 a].

unlawfulness is grounded on that the officers neglected to adhere to the Criminal Procedure Act procedures in a legal search and seize. The judge then interpreted s 35(5) taking account the acceptance of such evidence.[123] The presiding officer concluded that the admissibility of the evidence had not affected the impartiality of the trial and 'not be detrimental to the administration of justice'.[124] The court of appeal decided that the evidence admitted did in fact violate the defendant's right 'to a fair trial' and the upkeep of the administration of justice. The court further noted that a two-fold process of the application of s 35(5) in that first, the evidence to be excluded must have been acquired using a method which breached the rights of the perpetrator.[125] Should this be addressed in the positive, the second step is to be determined. The subsequent stage is to ascertain whether the evidence interrupts the fairness of the trial or is alternatively detrimental to the administration of justice.

Within this evolving provision, three elements come into play. First, the courts bear the responsibility of distinguishing whether the presented evidence comprises a breach of the accused's constitutional rights.[126] Secondly, if it indeed constitutes a violation, does the evidence of this violation pose an impediment to the concept of a fair trial?[127] Lastly, if either of the above factors is affirmed, the judiciary has a duty to exclude such evidence. The primary focus is to analyse the courts' application of this section in criminal cases to identify instances where the courts may have failed to uphold their duty in applying legislation when the fundamental human rights of the accused are potentially violated and in determining thereof.

The infringement upon an accused's rights as per the case of *S v Pillay*[128] envisions that admitting unconstitutionally obtained evidence which first infringes on the accused's right to a fair trial, it will also lead to the detriment of the administration of justice. In other words, there should be a flow in determining whether there is a violation. Firstly, has there been a violation? If the question is answered in the affirmative, the test can be moved to the next step in determining whether the administration of justice is in detriment. Furthermore, the court emphasised that when ascertaining whether the trial has been presented unfairly, the court must consider the social interests involved. The court's prudence shall be implemented through the weighing of such social interests to enable a fair conviction of an accused while considering

[123] Supra at [21].
[124] *S v Ndlovu* 2017 (2) SACR 305 (CC).
[125] Supra at [27].
[126] Dane Ally 'Constitutional exclusion under s 35(5) of the Constitution: should an accused bear a 'threshold burden' of proving that his or her constitutional right has been infringed?' (2010) 1 *SACJ* 22.
[127] Ibid 23.
[128] 2004 (2) SACR 419 (SCA).

the protection of constitutional rights.[129] It is evident that public societal interests and the protection of constitutional rights may conflict with one another. In considering the exclusionary rule and the competing interests stated, a comparison is dealt with in the case of *Lawrie v Muir*, where Lord Cooper stated:

> 'the protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action in damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law'.[130]

While in the case of *S v Makwanyane*[131] the Constitutional Court was tasked with determining the relevance and weight of public opinion in the interpretation of the Bill of Rights[132]. Chief Justice Chaskalson asserted that society's perspective in fact has a role in the analysis of the Constitution. However, he emphasised that the courts should not be subservient to public opinion.[133] This implies that Chief Justice Chaskalson's statement about the role of public opinion in constitutional interpretation should be equally applicable to the understanding of s 35(5).

Scott JA, addressing the court with a dissenting minority opinion in *S v Pillay*[134]:-

> 'It seems to me, however, that the very nature of the second leg of the inquiry postulated in s 35(5) of the Constitution contemplates a reference to public opinion. It must, at least, therefore constitute an important element of the inquiry'.[135]

The courts should evaluate whether admitting or excluding the contested evidence shall be 'detrimental to the administration of justice'.[136] To ensure consistency and legal assurance, it is important to maintain a uniform approach in interpreting the provisions of the Bill of Rights. Within this framework, when South African courts decide whether to omit or permit the admission of unconstitutionally obtained evidence through the scope of s 35(5), they should

[129] *S v Tandwa and others* 2008(1) SACR 618 (SCA).
[130] *Lawrie v Muir* 1950 SC (J) 19 26-7
[131] 1995 2 SACR 1 (CC).
[132] *S v Makwanyane supra*.
[133] *S v Makwanyane* supra at [88].
[134] 2004 2 SACR 419 (SCA).
[135] *S v Pillay* supra at [126].
[136] *S v Pillay* supra at [128].

heed the prompt provided by Justice Chaskalson in *S v Makwanyane*.[137]. Hence, it's proposed that South African courts should take public perspective into account when applying s 35(5), but without pursuing public favour. This approach is favoured by Justice Erasmus, as articulated in the decisions of *S v Nomwebu*[138] *and S v Soci*[139]. Justice Erasmus in *Soci* observes that societal perspective is shaped by the gravity of the breach and the severity of the offences committed by the accused, particularly in consideration of the prevailing 'lawlessness' in South Africa.[140] Public view of the criminal justice system might be negatively influenced if it appears that a dangerous criminal is acquitted due to a transgression that may be deemed an inconsequential nuance.[141] The court should make efforts to enlighten the community, emphasising that a fair trial aligns with constitutional principles, and conversely. Furthermore, Erasmus J stated that the court maintains the discernment to omit evidence regardless of whether or not a casual relationship between a constitutional breach and self-incriminating statements by the accused exists. [142] The trial court noted that the defendant had made a statement which incriminated himself after being subjected to a 'pointing out' without the police having read the accused his rights to counsel, therefore rendering the evidence of the 'pointing out' inadmissible.[143] This is in contract with the findings of Erasmus J, whereby he stated that the magistrate had read the accused his rights after the 'pointing out' and was therefore aware of the consequences of making an incriminating statement. It was therefore found that the evidence of the 'pointing out' was to be included as it did not render the trial unjust, or in the alternative, become detrimental to the administration of justice.

Chaskalson P stated in *S v Makwanyane* 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 marginalised people of

[137] *S v Makwanyane* 1995 2 SACR 1 (CC).
[138] *S v Nomwebu* 1996 2 SACR 396 (E).
[139] *S v Soci* 1998 2 SACR 275 (E).
[140] S *v Nomwebu* 1996 2 SACR 396 (E) at [648a-c]; S *v Soci* 1998 2 SACR 275 (E) at [295].
[141] Supra at [648a-c].
[142] *S v Soci* 1998 2 SACR 275 (E) at [293 h – 294 d].
[143] *S v Soci supra* at [297a].

> 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'.[144]

In my interpretation of Justice Chaskalson's reasoning, the stipulations of s 35(5) were proposed in the Bill of Rights to safeguard individuals charged with committing an offense from the impact of the predominated. In respect of this, the security afforded by s 35(5) should not be subjectively pushed on the majority, against which the accused requires safeguarding.[145] The court maintains that placing excessive emphasis on public interests could potentially undermine the essence of the discretion granted by s 35(5). Relying too heavily on society's perspective in the analysis of the third set of components being the type of evidence could indeed introduce subjectivity into the decision-making process. This may compromise the objective standards set forth by s 35(5) and potentially hinder the intended purposes of the provision. A careful balance must be struck to ensure that while societal considerations are acknowledged, the core principles of fairness and justice remain paramount.

Naudé asserts the perspective that it is superfluous to treat the two manifestations as distinct assessments. In accordance to him, the primary criterion should be if the admittance of specific evidence would be create a detriment of the administration of justice.[146] Furthermore, to solidify his argument, he gains endorsement for his concept in the modified interpretation adopted in *R v Grant*.[147] Nevertheless, it is essential to indicate that the language of art 24(2) of the Canadian Charter potentially varies considerably from that of s 35(5) of the Constitution. While the Canadian provision validates a singular comprehensive test, s 35(5) unambiguously outlines two tests.

Importantly, the similarities in the language between art 24(2) of the Canadian Charter and s 35(5) of the South African Constitution are notable. This similarity has led to comparisons and analyses by both legal scholars and the courts in South Africa. The case of *R v Collins*[148], has been influential in shaping the jurisprudence around exclusionary rules in both jurisdictions. The exploration of these parallels underscores the shared concerns for protecting individual rights in the face of evidence obtained through constitutional violations.[149]

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[144] S *v Makwanyane* 1995 2 SACR 1 (CC) at [88].
[145] Supra at [88].
[146] Naudé "The revised Canadian test for the exclusion of unconstitutionally obtained evidence" 2009 *Obiter* 607
[147] *R v Grant* [2009] 2 SCR 353 at [101]; 2009 SLC 32.
[148] 1987 28 CRR 122 (SCC).
[149] *R v Collins* supra.

Therefore, it is deferentially suggested that Naudé's perspective may misalign with the language of s 35(5) of the Constitution, and the author's dependence on *R v Grant*[150] in this context might be misguided.[151] The case law surrounding the exclusionary rule has sparked considerable debate, criticism, and calls for reform. The controversy arises from differing perspectives on whether the solution of omitting evidence upholds or undermines the rule of law. Public concerns often revolve around the potential release of guilty individuals into the community, but there is also an interest in promoting the rule of law which impacts whether the route to achieving justice is one which is acceptable in the public's eye.

The Supreme Court of Canada has considered and, to differing extents, endorsed several intention of art 24(2). These objectives encompass compensating victims of infringements, discouraging constitutional violations, and preventing judicial tolerance of police misconduct. One identified intentions is that the omittance of evidence can position the perpetrator as they would have been 'but for' the violation.[152] A critic argues that there exists a solely meaningful speculative justification for excluding evidence under art 24(2) is to discourage constitutional infringements.[153] This perspective seeks to balance the perceived contradictory intention of art 24(2), aiming to encourage constitutional adherence while still prosecuting those who are factually guilty.[154] The third purpose of excluding evidence under art 24(2) is to uphold the dignity of the justice system and prevent the judiciary's approval of an act of police misconduct.[155]

Regarding public concern, the Canadian Courts in *Collins*[156] established that society's perspective of the administration of justice should not be the norm taken by which the court judges its decisions. Instead, the norm should be that of a 'reasonable person', unbiased and thoroughly informed about the specifics of the case, much like the judges themselves..[157] The Court indicated the repercussions of relying on 'opinion polls or surveys to reflect the community's view and felt that the determination of the community's interest

[150] [2009] 2 SCR 353.
[151] B Naudé "The revised Canadian test for the exclusion of unconstitutionally obtained evidence" 2009 *Obiter* 608.
[152] Steven Penney "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under s 24(2) of the Charter" (2004) 49 *McGill Law Journal* 105.
[153] Ibid 106.
[154] Richard Fraser and Jennifer Addison "What's Truth Got to Do with It? The Supreme Court of Canada and s 24(2)" (2004) 29 *Queen's Law Journal* 823.
[155] Steven Penney "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence under s 24(2) of the Charter" (2004) 49 *McGill Law Journal* 106.
[156] *R v Collin*s (1987 28 CRR 122 (SCC).
[157] *Supra* at [33].

should be left to the courts'.[158] The Court determined that: 'the *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority'. Although,, the Court must take into account the enduring morals of the local district and the impact that the routine admittance of such evidence may have on the reputation of the administration of justice.[159]

However, the after the case of *Collins*[160], an era commenced with the case of *Herbert*[161], wherein the Court ruled that if it is established that admitting the evidence would compromise judicial impartiality, there is no requirement to assess the other factors outlined in *Collins*. These factors considered in *R v Collins* consist of firstly, the nature of evidence acquired.[162] The second factor is the severity of the breach of the Charter.[163] The third factor is the effect on excluding evidence even though it may secure a conviction.[164] In this instance in the case of *Herbert*[165], Mr. Hebert was detained for an offence of robbery and was cautioned of his right to legal representation. Despite consulting with a lawyer, he declined to make a statement to the police. Later, he provided an incriminating admission to an covert police official who entered the accused's holding cell. The presiding officer determined that the perpetrator's right to legal representation and right to 'remain silent' had been breached and consequently omitted the accused's admissions, leading to his exoneration. The Supreme Court of Canada concurred with the omittance of the admissions of the accused. As can be seen in the case of *R v Bartle*[166], the admission of unconstitutionally acquired evidence which infringes upon the accused's right to counsel would impact trial fairness, inevitably being detrimental to the administration of justice.[167].

A breach of the right to counsel has repercussions on the perpetrator's right of security against self-incrimination, a fundamental aspect of a fair trial and a right that could have been safeguarded if the perpetrator had been adequately cautioned of the right to legal representation. Regardless, the stance that the other factors of *Collins*[168] need not be considered, the unanimous judgement presiding officers in *Hebert* did acknowledge that the

[158] Eileen Skinnider 'Improperly or Illegally Obtained Evidence: The Exclusionary Evidence Rule in Canada' (2005) *International Centre for Criminal Law Reform and Criminal Justice Policy* 112
[159] *R v Collin*s 1987 28 CRR 122 (SCC) at [34].
[160] Supra.
[161] *R v Hebert* [1990] 2 S.C.R. 151.
[162] *R v Collin*s 1987 28 CRR 122 (SCC) at [36].
[163] Supra at [38].
[164] Supra at [39].
[165] *R v Hebert* [1990] 2 S.C.R. 151.
[166] *R v Bartle* [1994] 3 S.C.R. 173.
[167] *R v Bartle* [1994] 3 S.C.R. 173.
[168] *R v Collin*s 1987 28 CRR 122 (SCC)

Charter breach was severe, given the wilful and deliberate breach, and that admitting the evidence would tarnish the administration of justice.

Several notable cases have addressed the omittance of evidence since the clarification in the *Stillman* case. In instances where the court determines that accepting the evidence will not compromise judicial impartiality, these cases emphasise the equal significance of the second and third groups of factors as discussed above, which highlights the discrepancies between art 24(2) of the Charter and s 35(5) of the Constitution. This is because it requires trial judges to balance factors associated to the gravity of the infringement with those concerning the influence on the administration of justice if the evidence is excluded. Furthermore, art 24(2) may be seen as more stringent than s 35(5) due to its higher threshold for exclusion.[169]

The Criminal Procedure Act deals with the ascertainment of bodily samples throughout the various s 36's. These samples may be extracted from a person who is under suspicion of committing a crime, or 'has been arrested, charged or convicted'.[170] It is further stated that police may only take buccal samples and a medical practitioner may do other bodily samples from the accused. Yet, this goes in contradiction with s 35(1)(*c*) of the Constitution, whereby it states that nobody should be compelled to make admissions which would incriminate themselves.[171] The case of *Ex Parte Minister of Justice: In Re Rex v Mtamba*[172] whereby it was concerned with the permissibility of a 'palm-print' which had been acquired through compulsion. Surprisingly, the court found that the right not to self-implicate was only applicable to cases where testimonial evidence was in dispute. The court stated that:

> 'now, where a palm print is being taken from an accused person, he is, as pointed out by Innes CJ in the case of *Rex v Camane and others*[173], entirely passive. He has not been compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in court. In my judgment, therefore, neither of the maxim *nemo tenetur se ispum prodere* nor the confession rule make it inadmissible palm prints compulsorily taken'

[169] *S v Naidoo and Another* 1998 (1) SACR 479 (N) at [522 g]
[170] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) at 147.
[171] Section 35(1)(*c*) of the Constitution of the Republic of South Africa, 1996.
[172] 1941 AD 75.
[173] 1925 AD 570 at [575].

The case of *R v Feeney*[174] provides an illustration of the Court's assessment of the second and third group of factors in a scenario when the accused has aimed to omit non-conscriptive evidence. In this instance, the police entered Mr. Feeney's residence without permission as part of a murder investigation. The police initially knocked on Mr. Feeney's door, and upon receiving no response, they entered and discovered him asleep. Upon waking him, they observed that his shirt had blood spatters. Subsequently, the accused was detained, and his rights were read, though the immediate right to legal representation was not explicitly conveyed. The police proceeded to question him and confiscated his shirt.

While at the police station, Mr. Feeney, while acknowledging the need for a lawyer, provided a statement to the police confessing to assaulting and robbing the victim. Subsequently, the police secured a search warrant to investigate the accused's residence, to which the police confiscated the accused's 'shoes, cigarettes, and cash'. Forensic analysis revealed that his fingerprints matched those discovered in the victim's residence, the accused's 'shoe print' was identified that on the victim's wallet, and the blood found on the accused's shirt was identified to belong to the victim.

During the trial, the accused was found guilty of murder. However, the Supreme Court of Canada, in a slim unanimous decision, indicated a new trial would be required and specified that the tangible evidence obtained through the search and seizure without a warrant during their initial visit to the accused's residence should be omitted. The Court determined that the police had violated several principles, including conducting an unreasonable search and seizure by entering his home without proper grounds and failing to guarantee his effective right to counsel. Due to these violations, the police obtained information about the cash, cigarettes, and shoes, and they wouldn't have had grounds for a warrant without this knowledge. Consequently, the Court deemed the warrant also breached art 8. Additionally, the Court concluded that 'fingerprinting', when detained in a manner which is illegal, constitutes an unreasonable search and seizure of a person's body.

In line with *Stillman's* categorisation of evidence obtained under compulsory measures and evidence acquired under non-compulsory measures, the Court determined that the admissions and fingerprints were compulsorily obtained, rendering them prohibited due to their impact on trial fairness. On the other hand, the 'bloody shirt, shoes, cigarettes, and cash' were considered non-compulsorily evidence. After assessing the seriousness of the violation and its

[174] *R v Feeney* [1997] 2 S.C.R. 13.

influence on the administration of justice, the Court concluded that these pieces of evidence should be excluded.

One major criticism of the evolution of the Supreme Court of Canada's reasoning is that the case law establishes a 'quasi-automatic rule of exclusion'.[175] This advancement is seen as capricious with both the wording and the spirit of art 24(2). The case of Hebert is often cited as the point where the Court seemed to suggest that if admitting the evidence would sabotage judicial impartiality, there is no necessity to take into account the other factors listed in *Collins*. In essence, if the evidence is obtained under compulsory circumstanced and obtained in breach of the accused's rights, it contributes to trial unfairness and should be instinctively omitted. A few debate that this approach essentially treats the trial fairness test as a mechanism for automatic exclusion.[176] This principle is reiterated more explicitly in *R v Mellenthin*[177], the Court asserted that once a determination is made regarding trial fairness, that conclusion concludes the case, and there is no necessity to delve into the other components.[178] Although, the courts did not specify the specific components to be considered in assessing trial fairness.

Some debate that the evolution of the 'quasi-automatic exclusionary rule' has led to a criminal justice system being more focused on police conduct than on exploration and uncovering of the truth.[179] Some critics debate that the Court's interpretation of art 24(2), when evaluating if the permitting the admission of evidence would bring the administration of justice into dispute, will not adequately consider the community interest.[180] The case of *Feeney* as discussed above, clearly takes into account the manner of obtaining evidence against the accused and whether it can be obtained in a legal manner. The majority of the Canadian court importantly noted that if there were other methods available for securing evidence against the accused, it will in most cases be found that the person obtaining the evidence has done so in bad faith and through unreasonable conduct.[181]

As can be seen in the case of *Collins,* it was emphasised that there is an importance placed on the understanding of a 'reasonable person's' standard in determining the detriment on the

[175] Adam Parachin describes that it was in the early part of the twentieth century when this general discretion was developed in common law as discussed in Adam Parachin *"Compromising on the Compromise: The Supreme Court and s 24(2) of the Charter"* (2000) 10 *Windsor Review of Legal and Social Issues* 35-36.
[176] Ibid 35-36.
[177] *R v Mellenthin* [1992] 3 SCR 615.
[178] *R v Mellenthin* [1992] 3 S.C.R. 615.
[179] Julianne Parfett *"A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence"* (2002) 40 Alberta Law Review 299.
[180] Richard Fraser and Jennifer Addison "What's Truth Got to Do with It? The Supreme Court of Canada and s 24(2)" (2004) 29 *Queen's Law Journal* 823.
[181] R v Feeney 1997 44 CRR 2d 1 (SCC) at [37].

administration of justice, rather than placing full reliance on the public perceptions when it comes to the evaluation of the administration of justice. The Herbert case introduced a change which allowed the exclusion of evidence if admission would be detrimental to trial fairness and justice. This was demonstrated by the exclusion of documents which had been used illegally and inevitably infringed on the accused's right to remain silent. Additionally, in *Bartle,* the administration of justice went into disrepute due to constitutional breaches. This case dealt with the appellant having been detained for driving his motor vehicle under the influence and was not properly read his Charter rights, leading to his admission of a self-incriminating statement.[182] The appellant was not informed that a call to legal aid would be toll free and he therefore declined. Once the Appeal Court were informed that the appellant had not been informed of the aforesaid information, the court ruled that the appeal is upheld. It can therefore be seen that through comparative cases, it is similar to national case law such as in *S v Pillay*[183].

IV. SUPERIOR COURT JUDGEMENTS DEALING WITH S 35(5) OF THE CONSTITUTION

Several cases will be discussed in this current chapter. The reason for the choice of these cases is based on its relevance and contribution to the question of whether Superior Courts are consistent in their application of s 35(5) in respect of the inquiry whether admission of the evidence would be detrimental to the interests of justice. In some instances the analysis builds on earlier discussion of the cases and in other instances new cases are introduced so test the consistency of previously developed principles.

a. S v Pillay 2004 (2) SACR 419 (SCA).

i. Facts

There were 4 out of 19 accused persons who appeared before 3 judges in the SCA on charges of aggravated robbery. These four appellants were accused 7, 9, 10, and 14. Accused 7 had been condemned to 20 years imprisonment, while the 9th and 10th accused were sentenced to 5 years incarceration, accused 14 was sentenced to 4 years for being accessories after the fact.

The appellants had stolen R31 million from the SBV premises in Durban on the 6th of August 1996. Accused 7 had worked for this company and therefore knew the operations. He left SBV after an incident with one of the money trucks occurred and become an employee of

[182] *R v Bartle* [1994] 3 S.C.R. 173 at [1].
[183] 2004 (2) SACR 419 (SCA).

a local shooting range where he later buried black bags filled with R100 and R50 notes to the sum of R7.4 million. Accused 9 was a legal practitioner who had purchased a nightclub paid in cash in excess of R1 million, which the courts stated had been a manner in which to launder the money that had been gained through his participation in the robbery. A state witness by the name of Mayadevan who had been working with accused 9 had queried whether accused 9 had been participating in the SBV robbery, which he (accused 9) confirmed.

Accused 10 was a tenant at her house in Sea Cow Lake. The accused persons had been charged on the grounds that appellants' constitutional right to privacy had been violated due to her telephone conversations being illegally monitored. These telephone conversations had informed police that the money which had been stolen was being kept in the storage space of one of the appellants ceiling. Furthermore, the appellants had been prompted to made a self-incriminating confessions as to the whereabouts of the money after police had entered her home (with her co-operation) without a warrant. The admission of real evidence fell into dispute on the foundation that while it may be prejudicial to the appellant's constitutional rights, it was necessary for the Court to determine whether permitting the said evidence will be a violation of the administration of justice.

Accused 14 was a Captain in the police force whose financial status had been questions by a chartered accountant. This was after accused 14 had been making large deposits of money into her banking accounts when her nett salary was only R2,500-00 a month. This is after accused 13 had given money from his participation in the robbery to accused 14. The court induced from the multiple transactions that accused 14 must have realised at some stage the money in question had come from an unlawful venture, but is incorrectly accused of being an 'accessory after the fact'

ii. Judgement

The court took into consideration art 24(2) of the Canadian Charter to determine if the acceptance of the evidence would require a 'value judgement' to assess whether the administration of justice was in breach. Additionally, the society's interest was taken into account, but it was noted that it may only be important in some aspects. The court also took into consideration the type of evidence being real in nature; which constitutional right to privacy had been infringed upon; whether the said infringement was serious in nature, and it as determined to be serious in nature; and whether the evidence would have been obtained had it been done in a legal manner. The court went on to say that in considering whether to accept or omit evidence, should the evidence be admitted, there may be detriment to the administration

of justice. A trial within a trial had taken place whereby it was determined that: firstly, the telephone conversations were illegally monitored and therefore the evidence obtained through this route was inadmissible. Secondly, the search done by the police in the 10th accused's residence was done devoid of a warrant. Thirdly, the confession made by accused 10 should not be admitted as it was induced.

The court made the order that accused 7 is granted a condonation. Accused 7, 10 and 14 were granted leave to appeal, while accused 9's appeal had been dismissed.

b. S v Magwaza 2016 (1) SACR 53 (SCA).

i. Facts

In 2000, 13 April, a group of men had infiltrated a pensioners dispensary payment point in KwaZulu-Natal and stole R460,00-00. During the robbery, a security guard had been shot and robbed of his gun allegedly by Mr Magwaza as per the information given by a police informer. Two months after the incident took place being 8 June 2000, Mr Magwaza was subjected to a pointing out parade, to which he was identified and persuaded to make a confession before being read his rights.

ii. Judgement

The SCA ordered that Mr Magwaza's appeal had to be upheld against his convictions of murder and robbery. The basis of this order was founded on the fact that Mr Magwaza was not cautioned about his constitutional rights such as his 'right to remain silent' and legal representation which was proven to be prejudicial against him.

The SCA made reference to *S v Pillay*[184], whereby it was stated that if an accused's constitutional rights are violated rending the trial unfair, admission will be detrimental to the administration of justice. Furthermore, while art 24 of the Canadian Charter directs a court to take into consideration all the relevant circumstances which could violate the administration of justice, s 35(5) does not. It became apparent that the accused had only been read his rights after making a confession to the robbery. This therefore meant that there has been a close relationship between the infringement and the conscripted evidence. Furthermore, the police had failed in using other investigative skills which would have linked the appellant to the crime.

[184] 2004 (2) SACR 419 (SCA) at [433h].

Therefore, the Judge of Appeal concluded that the evidence obtained against Mr Magwaza was excluded as a result of the application s 35(5) to uphold the administration of justice and trial fairness.

c. S v Tandwa and Others 2008 (1) SACR 613 (SCA).

i. Facts

In this case, a robbery had taken place in the amount of R9.6 million at Standard Bank in 1998 during the morning of 18 November 1998. On the day of the robbery, the police arrived on the scene and found three of the bank employees had been tied up and had been under guard by the accused. The accused persons claimed to have been under compulsion when committing the act of robbery, but the police suspected that they were lying and two of the three accused persons had been arrested, namely Mr Tandwa (accused 1) and Mr Aubrey Godolozi (accused 2). The previous night the accused persons had approached the three bank employees at their homes and taken them to the home of accused 2, where they were questioned about the measures of the security of the bank and alarm systems. After gaining the information required, the two accused persons and one of the three bank employees, namely Mr Mtutuzeli Sibindlana, proceeded to rob the bank in the early hours of the morning.

The accused persons stood before the Mthatha High Court on the basis that they had committed the robbery which contravened s 155(1) and (2) of the Transkei Penal Code.[185] The accused persons pleaded not guilty on the instance of the trial and maintained their alleged innocence. They were sentenced to imprisonment of 17 – 20 years, which was taken on appeal by those who were convicted.

The plans which were executed by the appellants in the robbery were established firmly by the court and were not considered to be disputed. This was on the basis that the states case was reliant on 3 foundations, namely: '(1) direct evidence against the appellants; (2) inferential evidence arising from the possession of the money against one of the accused persons; and (3) inferential evidence which indicated the two employees informed the appellants of the banking systems'. In terms of number 1, the evidence was obtained from a witness who had given their testemony in court through the identification of the appellants having been those who robbed the bank. The identification of the appellants was supported by a confession and an admission relating to the cash stolen by various of the appellants. The aforesaid accused 2 had made a confession incriminating the other accused persons.

[185] Act 9 of 1983.

ii. Judgement

One of the accused's had employed an advocate to represent him and charged him (the advocate) with failure to uphold his legal duties due to misconduct due to the accused being refused the opportunity to testify in court. Furthermore, the advocate had neglected to ensure the perpetrator understood the repercussions of not testifying in court.

The court accepted that the evidence acquired infringed upon the perpetrator's rights, but accepting such evidence would not render the trial unfair and therefore the second analysis would be that it was not detrimental to the administration of justice. Furthermore, at para 114, the judge noted (as per *S v Magwaza*) that the evidence obtained was in existence regardless of the accused's constitutional rights violation. It is also emphasised similarly to the case above that the publics interests are of major concern in weighing against the security of constitutional rights of the perpetrator. The struggle of maintaining law and order in South Africa is one of great difficulty, but it must be emphasised that police methods must be restricted from an illusion that police have the authority to offend basic rights of the accused.

The court stated that it would therefore be immoral to accept the evidence of the firearm and the cash recovered. The court expressed the concept that excluding evidence obtained in an unconstitutional manner is to firstly provide the accused with a remedy to protect his constitutional rights, and secondly to enable a court of law to uphold their constitutional responsibility to uphold the principles of the criminal justice system. Furthermore, including unconstitutionally obtained evidence could potentially be harmful the administration of justice while trial fairness would be present.

Therefore, the evidence was excluded as it was not moral in the scope of a civilised proceeding and the appeals of the appellants were upheld.

d. *S v Murphy and Others* 2024 (1) SACR 138 (WCC)

i. Facts

This case pertains to the lawfulness of four investigation and confiscation processes carried out by the SAPS in accordance with s 22 of the Criminal Procedure Act 51 of 1977 ("the CPA"), and the eligibility of the evidence acquired through these searches. The accused faced charges related to 'racketeering activities, money laundering, and drug dealing', in violation of the

Prevention of Organised Crime Act 121 of 1998 ("POCA") and the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act").

Throughout the trial, the State aimed to present evidence concerning:

1. ‘drugs and money seized in a search conducted at 1[...] R[...] Close, Lotus River, on 18 September 2015 (“the first search”);
2. money seized in a search conducted at [...]1 T[...] Street, Lentegeur, on 23 December 2014 (“the second search”);
3. drugs and money seized in a search conducted at 1[...] T[...] Street on 17 October 2017 (“the third search”); and
4. drugs seized in a search conducted at 1[...] T[...] Street on 7 November 2017 (“the fourth search”)’.

The lawfulness of four investigations was contested, and the resulting evidence was challenged for exclusion. Four separate trials within the main trial were conducted to determine the lawfulness of these searches and, if found unlawful, to decide if the evidence obtained may be accepted or omitted.

The initial search comprised an urgent and warrantless inspection of the residence at ‘1[...] R[...] Close’. This search was prompted by information received by the police suggesting suspicious activities related to drug dealing at the location. Following the court’s ruling, it was determined that the first search was lawful, resolving any concerns regarding the acceptability of the evidence obtained during this search.

The second investigation pertained to a warrantless examination of ‘[...]1 T[...] Street’, prompted by data from an whistle blower suggesting that ‘drug money belonging to the first accused was kept at the residence of the 5th accused’. The State argued that the search was conducted with the alleged consent of the occupants. However, the presiding officer determined that the second search was without justifiable cause because the purported agreement did not meet the standards of a consensual decision and did not reach the threshold for waiving a constitutional right.

Furthermore, it found that all evidence confiscated throughout this investigation was prohibited. This decision was based on the basis that admitting such evidence would be

detrimental to the administration of justice, especially considering that the necessity for a search warrant had been blatantly disregarded.

The third search raised the question of whether it was legal to confiscate narcotics and cash incidentally uncovered during an investigation authorised by a warrant focused on firearms. The key issue was whether the evidence uncovered should be permitted for admission if the investigation was deemed unlawful. The court determined that, under the circumstances, the confiscation of narcotics and cash was lawful, and there were no concerns about the acceptability of the evidence.

In the fourth search, a valid warrant authorized the search for narcotics at '1[...] T[...] Street', listing the names of five police officers authorised to conduct the investigation. Although, the narcotics were uncovered and confiscated by a police official not named in the search warrant, who was considered as part of a 'support team'. The court found that the investigation and confiscation were without lawful cause as they were not carried out in adherence with the requirements of the search warrant.

The court made a ruling stating that despite the unlawful nature of the seizure in the fourth search, the evidence obtained was admissible. The decision was based on the belief that excluding the evidence would be harmful to the administration of justice. Furthermore, the court considered the violation of the constitutional right to be technical rather than serious, and in a situation where the evidence would unavoidably have been uncovered by one of the police officials authorised to conduct the investigation under the warrant.

ii. Judgement

The 'right to privacy' is not unconditional and may be restricted by a 'law of general application' that complies with the prerequisites of s 36 of the Constitution. Furthermore, s 20 to 22 of the Criminal Procedure Act (CPA), empowers the police with search and seizure authority, constitute 'laws of general application' that present rational and warranted restrictions on the 'right to privacy', with due regard to the consideration of the necessities and purpose of law enforcement. Section 20 of the CPA enables the State to confiscate items linked to the omission of offenses. Section 21 addresses the issuance of search warrants authorising the search for and seizure of such items, while s 22 permits for warrantless searches in specific situations. The court in its foundation for its judgement noted that in order to justify a

warrantless search, the state had to prove that the police had valuable information pertaining to the search at the time the search was conducted, which could prove that an offence had been committed. Additionally, a delay in the search due to a warrant being required would defeat the purpose of the search.

When assessing whether the acceptability of evidence would have an outcome of either of these two repercussions (prejudice to the accused or harm to the administration of justice), the court exercises discretion involving a value judgment. This judgment must be made considering the specific facts of the case, adhering to fair trial principles, and taking into account considerations of public policy.

In terms of the second enquiry of the administration of justice, Justice Cachalia in *S v Mthembu*[186], in this context, 'public policy' is not solely attentive with guaranteeing the accountability of the factually guilty but also with assessing the appropriateness of the actions of 'investigating and prosecutorial agencies' in obtaining evidence securing the guilt of the accused person. It embodies an evaluation of the type of the breach and the potential influence that evidence acquired through such violation may have, not just on a specific case, but also on the overall morality of the administration of justice over the a longer period of time. Consequently, 'public policy' strongly opposes the admission of evidence acquired through intentional or blatant violations of the Constitution. Conversely, if the behaviour of the police is deemed fair and just, there is a lower likelihood of excluding the evidence, even if obtained through a constitutional infringement.[187]

In the cases of *S v Pillay and Others*[188] and *S v Magwaza*[189], the Supreme Court of Appeal endorsed the factors outlined in the Canadian decision of *R v Collins*[190] for determining whether the acceptance of evidence may bring the administration of justice into dispute. These factors include: '(a) the nature of the evidence obtained; (b) the specific constitutional right that was violated, (c) the severity of the infringement, whether it was serious or merely technical; (d) whether the evidence would have been obtained regardless of the infringement; (e) the availability of alternative investigatory techniques'.[191] These factors are considered in the current assessment of *Murphy* and whether admitting the evidence would sabotage the integrity of the administration of justice.[192]

[186] 2008 (2) SACR 407 (SCA).
[187] Ibid at [26].
[188] 2004 (2) SACR 419 (SCA).
[189] 2016 (1) SACR 53 (SCA).
[190] Ibid.
[191] 2016 (1) SACR 53 (SCA).
[192] *S v Pillay* (supra) at [93]; *S v Magwaza* (supra) at [15].

The court found that the admission of evidence is not permitted as it brings the administration into disrepute in terms of the first and second search. This is on the basis that the majority stated that the evidence could be admitted without a valid search warrant as it would have inevitably been found, while the policemen's conduct was a minor infraction and was committed with a purpose, leaving no systematical error. Furthermore, the violation of the accused's right to a fair trial was technical in nature and not considered serious, therefore worthy of limitation.

e. *S v Makhala* 2022 (1) SACR 485 (SCA)

i. Facts

The first and second appellants were charged in the High Court on charges of murder, possession of an 'unlicensed firearm', and unlawful possession of ammunition. Each appellant received a life sentence for the murder and 5 years for the residual charges, to simultaneously with the sentence of 25 years. The appellants were awarded endorsement to appeal to the Supreme Court of Appeal.

In July 23, 2018, Mr. Molosi, who served as the chair of the school governing body at Concordia High School and was also a councillor of the Knysna Municipal Council, attended a meeting for the governing body. Following the meeting, he accepted a ride and was subsequently dropped off close to his residence, where he was fatally shot while walking the rest of the distance home.

A police team was tasked with investigating the murder, and they acquired information suggesting that the first appellant, Mr. Mawanda Makhala, was observed at the 'Pop Inn Tavern' in Concordia over Saturday and Sunday preceding the murder. He was reportedly accompanied by two individuals, one of whom was identified as his brother, Mr. Luzuko Makhala. On August 1, 2018, Sergeant Wilson located Luzuko Makhala, who acknowledged being in the vicinity during the weekend of the murder. However, Luzuko Makhala asserted that he had provided a ride to an unidentified individual in the Eastern Cape and subsequently traveled to Knysna over the mentioned weekend. After scrutinizing 'camera footage of the N2 highway', Sergeant Wilson confirmed that Luzuko Makhala's vehicle was indeed traveling from Cape Town to Knysna on July 22, 2018.

Faced with this information, as per Sergeant Wilson, Luzuko Makhala expressed a desire to recant his involvement in Mr Molosi's murder. The accused's rights were expressed to him, and was cautioned that, under s 204 of the Criminal Procedure Act 51 of 1977 (CPA),

he could be treated as a witness for the prosecution. Section 204 allows a witness to furnish evidence for the prosecution which may potentially be incriminating, and in return, the court has the authority to exempt the witness from prosecution if they provide truthful and candid testimony.

Luzuko Makhala provided his first admission to Colonel Ngxaki during the day of August 13, 2018. Colonel Ngxaki, an experienced police officer, testified during the trial, stating that Luzuko Makhala was cautioned of his constitutional rights, including the right to counsel, the 'right to remain silent', and the 'right not to incriminate himself'. Furhtermore, s 204 of the CPA was cautioned to the accused. According to Colonel Ngxaki, Luzuko Makhala voluntarily and freely gave a detailed statement, which Colonel Ngxaki recorded. This statement, referred to as the first statement, contained information implicating the second appellant, Mr Velile Waxa, as well as the first appellant, Mawanda Makhala, and the third accused, Mr Vela Dumile, in the murder of Mr Molosi.

The first statement detailed Mr Waxa's alleged involvement in hiring a hitman, Mr Dumile, to murder Mr Molosi, an alderman advocating the African National Congress (ANC). Luzuko Makhala, acting as an intermediary, facilitated the meeting between Mr Waxa and Mr Dumile, and he contributed as a role in the organising and execution of the murder.

Luzuko Makhala provided a second admission to Sergeant Mdokwana while being transported from Knysna to Cape Town. In this statement, he detailed receiving a call from Mr Waxa on July 18, 2018, who informed him of sending R1000 to buy petrol for transporting Mr Dumile to Knysna. Luzuko Makhala withdrew the money on July 20, 2018, confirmed the receipt with Mr Waxa, and agreed to make a statement about it at the request of Sergeant Mdokwana. This statement, referred to as the second admission, was accompanied by Luzuko Makhala handing over his 'Nokia cell phone'.

Both the first and second admissions implicated 'Mawanda Makhala, Mr Waxa, Mr Dumile, and Luzuko Makhala in the killing of Mr Molosi'. The court *a quo* accepted these statements as evidence and relied on them to charge the accused with killing another and affiliated charges. The core issue in this appeal is if the court *a quo* decision to admit these statements was correct, as the appellants argue that without this evidence, their convictions cannot be sustained.

During the trial, Luzuko Makhala renounced the admissions he had previously made, which had implicated himself and the co-accused in the killing. Without prior notification to the prosecution, Luzuko Makhala altered his testimony, alleging that the implicating portions of the admissions were concocted under duress from the police. He claimed that he had been

harassed and subjected to threats of violence by the police, prompting him to provide statements that he believed the police desired.

The court *a quo* conducted a two-fold analysis regarding Luzuko Makhala's statements. Firstly, it examined whether Luzuko Makhala made the statements voluntarily or if he was coerced by the police. The court deemed the testimony of Colonel Ngxaki and Sergeant Mdokwana, supported by corroborative evidence from Sergeant Wilson, to be highly compelling and persuasive. Luzuko Makhala was determined to be the primary source and originator of the two admissions.

Secondly, the trial court assessed the admissibility of the first and second statements under s 3(1) of the Law of Evidence Amendment Act 45 of 1988, commonly known as the Hearsay Act. After considering the components outlined in s 3(1)(c), the trial court permitted both admissions into evidence.

The trial court's ultimate judgement confirming the guilt of the accused on all three charges heavily relied on the admission of these statements, highlighting their significance in reaching the verdict.

ii. Judgement

The appellants contested the court *a quo's* acceptance and utilisation of the first and second admissions. If these admissions were improperly accepted into evidence or if the utilisation of this evidence was otherwise omitted, the appellants' convictions, given the pivotal importance of the admissions, become unreliable. This was an agreed-upon point between the parties, and there is no doubt about this position.

Secondly, the appellants argued that the court *a quo* should not have allowed the admission of the admissions. The admissibility of the statements goes beyond a mere application of s 3(1)(c) of the Hearsay Act; additional considerations are necessary. In this instance, factors such as 'voluntariness, reliability, accuracy', and an understanding of the background surrounding the admissions are essential considerations. The appellants argue that the statements fall short of the standards required for the trial court to rely on them. Additionally, the appellants contend that the court *a quo* should have assessed if justice is sought and secured by relying on hearsay evidence, especially since it constitutes the primary evidence leading to the appellants' convictions. However, the trial court failed to conduct such an evaluation. Consequently, the convictions cannot be sustained for these reasons as well. This challenge is denoted as the hearsay challenge.

Under judicial precedent, the general principle was that necessary evidence was accepted, even if unlawfully obtained. However, this principle was subjected to the acknowledgment that judiciary retained the authority to omit evidence, which, although acceptable, could unjustly prejudice the perpetrator. The judicial precedent's handling of unlawfully acquired evidence has been altered by s 35(5) of the Constitution.

As clarified in *S v Tandwa and Others*[193], s 35(5) permits the admission of evidence that breahces a right in the Bill of Rights, as long as its inclusion does not render the trial unfair. Although, should the evidence push the trial to be unfair, it must be omitted. Additionally, even if the evidence does not compromise the fairness of the trial, if its admission would be detrimental to the administration of justice, it must also be excluded.

The formulation of s 35(5) stands out within the framework of Section 35 as it is not explicitly designed to govern the rights of 'arrested, detained, or accused individuals', as seen in s 35(1)–(3). In the case of *S v Mthembu*[194], the court noted that s 35(5) mandates the omittance of evidence unlawfully acquired from any civilian, not solely from a perpetrator. This requirement exists to enable the just and reasonableness of the trial and to safeguard the administration of justice from any harm. While the fairness of a trial predominantly revolves around the rights of the accused, the administration of justice has a flexible purpose, aiming to preserve the morality of our justice institutions. Consequently, if evidence is obtained from any person, regardless of whether that individual is a charged person, in a way that contravenes the Bill of Rights, s 35(5) becomes applicable to assess whether such evidence should be omitted. Therefore, s 35(5) shall be relevant to the two admissions obtained from Luzuko Makhala if these admissions were acquired in a way that breached the accused's fundamental rights under the Bill of Rights.

The appellants argued that the two admissions obtained from Luzuko Makhala infringed his rights. They claimed that these rights were breached as the admissions were not done so with informed consent, i.e., of his own free will. Instead, the accuseds were allegedly prompted by false pretences that he indicated under security from being convicted by the prosecution. Luzuko Makhala was also purportedly denied his right to legal representation, and he was not informed of his right against self-implication.

The court proceeded, without making a final decision, to assume that a suspect was entitled to be cautioned of their 'right to silence and their right to consult a legal practitioner

[193] *2008 (1) SACR 613 (SCA).*
[194] *S v Mthembu* and Others 1998 (1) SA 145 (A).

before taking a step that may have significant implications'. Additionally, the court assumed, without concluding, that beyond the scope of s 35(5) of the Constitution, the common law rule excluding unlawfully acquired evidence still applies in situations where s 35(5) is not applicable as the infringed right is not one under the Bill of Rights.[195]

Based on these premises, the question arises as to whether there is a basis to configure that Luzuko Makhala's rights as a 'suspect' were violated, and if so, whether admitting the two statements into evidence at the appellants' trial would render it unfair or end up being in detriment to the administration of justice. The appellants, however, failed to establish such a case. Luzuko Makhala provided testimony during the court case and had been subject to cross-examination on every element of the admissions and the background surrounding their making. Moreover, during his renunciation on the stand, Luzuko Makhala actively contributed to supporting the appellants' case. Given these elements, it is challenging to discertain how the case was rendered unjust.

There is no evidence of unjust actions directed towards the appellants. Just as the court *a quo* admitted the testimony of the policemen explaining how the statements were obtained from Luzuko Makhala, the court similarly concluded that there was no compultion involved; the accused did so of his own free will, motivated by a mirage of an 'apology and self-interest'. Therefore, it was determined that there was no detriment to the administration of justice.

In summary, regardless of whether s 35(5) of the Constitution or at judicial precedent, the two confessions had not been acquired in breach of Luzuko Makhala's rights. The acceptance of the statements did not render the trial unfair, and there was no action in obtaining the statements that resulted in any substantial detriment to the administration of justice. Therefore, the legality challenge must fail.[196]

Having considered the obstacles indicated by the appellants, the court found that they all fail. The confessions made by Luzuko Makhala to the police officials had not been illegally acquired, and the admission of these confessions into evidence was appropriate. This evidence provided proof of the appellants' involvement in the killing of Mr. Molosi and the additional convictions related to his murder.[197]

As a result, the appeal is dismissed.

[195] Supra at [31].
[196] Supra at [39].
[197] Supra at [109].

f. *Ndlovu v S* (A14/2013) [2014] ZAGPPHC 1009 (4 December 2014)

i. Facts

This appeal addresses 2 primary concerns: (1) whether the court *a quo*, in accordance with s 35(5) of the Constitution, appropriately permitted tangible evidence obtained from an unlawful search of premises to be included in the evidence presented by the prosecution; and (2) whether the cumulative impact of the convictions imposed by the court *a quo* rendered them shockingly disproportionate. The appellants faced charges in the Grahamstown High Court related to 10 allegations of 'rhino poaching' that happened throughout a three-year timeline at numerous farms and nature reserves in the local town of 'Albany, Jansenville, Graaff Reinet, and Cradock in the Eastern Cape'.

Of the 10 occasions, there were 5 counts, leading to a total of fifty charges. The trial took place before Justice Pickering, who sentenced the appellants on nearly all the charges. Subsequently, they received substantial prison sentences, ensuing in an successful prison term of a life sentence. The appellants sought leave to appeal in dispute of their sentences, but their application was unsuccessful. However, they were 'granted leave on petition' solely on the 2 specific and restrictively defined grounds mentioned earlier.

The first concern pertains to a investigation implemented by the police officials in the presence of the appellants in the evening of June 17, 2016, at chalet number 8 in the 'Makana Resort and Caravan Park in the town of Makhanda'. This investigation led to the confiscation of several items.

The significance and importance of the items seized during the search in determining the concerns addressed in the case regarding the guilt or innocence of the appellants are indisputable. The prosecution presented evidence, through forensic analysis, establishing that tranquilizer darts found at certain 'rhino poaching' scenes were shot from the 'tranquiliser gun' uncovered in the chalet. The necessity of the 'yellow bow' saw is supported by evidence that a forensic field officer collected a flake of yellow paint at the incident of a 'rhino poaching' incident in Cradock. Forensic analysis found that the 'flake of paint' was tangibly and chemically identical to the yellow paint on the saw handle, and it was found that the flake of paint matched a paint chip on the saw handle. This evidence is crucial in establishing connections between the seized items and the rhino poaching incidents.

Additionally, the poaching incident involving the 'white rhinoceros' named 'Campbell in the Albany District on the Bucklands farm' occurred simultaneously with the investigation and discovery of the articles in the chalet. The rhino was tranquilised by a dart, and its 'horn was removed'. The wounds inflicted during the horn removal were so severe that they led to

the death of the rhino. During the trial, the appellants admitted that the ‘horn of this animal was removed with a saw’, and DNA evidence from the rhino was identified as a match to the DNA evidence found on the ‘yellow bow saw’ which was in the possession of the accused. This admission further strengthens the connection between the seized items and the criminal activities.

The pieces of evidence discovered in the chalet were also in line with the method of operation employed in all the instances of ‘rhino poaching’ for which the appellants faced charges. The uncontested evidence indicated that in all these occasions, not one of the rhinos were killed with a gun; instead, they had been tranquilised. In addition to the tranquiliser gun, several unutilised tranquiliser darts and multiple bottles of liquid which was tranquiliser serum were located in the chalet. The aforesaid evidence was prescribed tranquiliser serum which only veterinarians with the necessary authority are authorised to be in possession of. This consistency supports the prosecution's case regarding the appellants' involvement in the rhino poaching incidents.

The acknowledged evidence also indicated that the knives found in the chalet were intended for cleaning the ‘grooves of harvested horns’ to stem ‘bleeding following their removal from the animals’. Details retrieved in the cell phones and ‘SIM cards’ discovered in the chalet revealed that various of the cell phone digits were utilised in the surrounding areas and where the incidents took place and, at times, coincided with the occurrences of rhino poaching. During the trial, the appellants admitted to using these cell phones and SIM cards. This additional evidence strengthens the link between the seized items, the modus operandi of rhino poaching, and the appellants' involvement in the criminal activities

At the beginning of the case, the appellants contested the acceptability of the proof related to the confiscation of the aforementioned items found in the chalet. The rational of the objection was rooted in the assertion that the investigation of the chalet was illegal and violated the constitutional rights of the appellants.

The learned judge then proceeded, as per s 35(5) of the Constitution, to evaluate the acceptance of the evidence concerning the discovery of the evidence while taking into account the unlawful method in which the evidence was acquired. The court determined that the acceptance of the evidence would not compromise the reasonableness of the case and may not be detrimental to the administration of justice. This determination by the court *a quo* is the focal point of the initial basis of appeal. In this court, the appellants' representatives argued that the trial court erroneously accepted the evidence. This argument is fundamentally based on the following grounds:

'(a) that the evidence of the state witnesses was of a poor quality and contradictory, and that the trial court failed to properly consider this in its finding that the police officials acted in good faith;

(b) that insufficient weight was given to fact that the search conducted constituted a violation of the constitutional rights of the appellants;

(c) that the ruling of the trial court did not afford the appellants adequate protection of their rights; and

(d) that the court, in considering the impact which the admission of the evidence would have on the administration of justice, on the one hand overemphasised the nature of the evidence as a relevant factor, and on the other, erred in failing to find that the search amounted to a conscious violation of the constitutional rights of the appellants'.[198]

The structure of s 35(5) indicates a two-step assessment. First, the evidence which was sought to be omitted must have been acquired in a way that breaches a right assured by the Bill of Rights. If it is established that the questioned evidence was acquired in such a way, the second assessment is to assess whether the acceptance of the evidence would render judicial impartiality unfair or bring the administration of justice into disrepute. Section 35(5) does not mandate the autonomous omittance of evidence obtained in violation of a protected right. In essence, the evidence is initially considered 'prima facie' acceptable. It is only omitted if the court, exercising its authority, determines that its admission would lead to one of the consequences identified in the section.

Section 35(5) has an intention to create a harmony between contesting interests. It aims to uphold the dominance of the 'Constitution and the entrenched rights of accused persons', while on the other side, it considers the societal interest in preserving the reputation of the administration of justice. Section 35(5) obliges the court to assess the automatic impact of admitting the evidence on the fairness of the trial and, in the long term, on the reputation of the criminal justice system.

[198] Supra at [25].

The court referred to *S v Tandwa*[199], where the Supreme Court of Appeal characterised the equilibrium of contesting interests as follows:

> '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'.[200]

Additionally, in *Key v Attorney-General, Cape Provincial Division and Another*[201], the Constitutional Court provided the following explanation:

> 'in any democratic criminal justice system there is a tension 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'.[202]

Fairness in the trial process is inherently connected to the second part of the inquiry, as articulated in *S v Tandwa*[203]:

> 'Where admitting the evidence renders the trial unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair'.[204]

The exclusion of evidence leading to an unfair trial is justified because an unjust trial is harmful to the administration of justice. This aligns with the inclusion of the phrase 'or otherwise' in s 35(5), suggesting that the initial part of the inquiry is essentially a particular expression of the second part, namely the reputation of the administration of justice.

When assessing the type of the contested proof, the sole fact that the proof acquired implicates the perpetrator in the alleged offense does not automatically imply unfairness in the actual trial. It is crucial to acknowledge that the admission of evidence 'may operate

[199] (2008 (1) SACR 613 (SCA).
[200] Supra at [17].
[201] 1996 (2) SACR 113 (CC).
[202] Supra at [13].
[203] 2008 (1) SACR 613 (SCA).
[204] Supra at [11].

unfortunately for the accused but not unfairly'[205]. Furthermore, the prevailing strategy is that tangible evidence, which presents itself independently of the breach of a secured right, maintains an factual trustworthiness, and its evidential weight remains unconstrued by the way in which it was acquired. In *S v M*[206], the Supreme Court of Appeal addressed the reliability of such evidence as follows:

> 'Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say-so of a witness (see, for example, *R v Jacoy* (1988) 38 CRR 290 at 298) the reason being that is usually possesses an objective reliability. It does not 'conscript the accused against himself' in the manner of a confessional statement (*R v Holford* [2001] 1 NZLR 385 (CA) at 390)'.[207]

Conversely, there is a general consensus that when the infringement leads to the forced production of evidence, meaning the perpetrator is coerced to implicate himself at the state's demand, the acceptance of such evidence shall impact the justice of the trial.[208] This is for two main reasons: Firstly, the reliability of compelled evidence is dubious; and secondly, compelling an accused person to implicate himself constitutes a blatant and intentional breach of several of their trial rights and other secured rights, including the 'right to be free from all forms of violence'.[209] Admitting mandatorily sought evidence may additionally erode the morality of and strength in the criminal justice system, as envisioned in the second part of the inquiry.

After thoroughly examining the evidence and relevant judicial precedent, the court *a quo* arrived at a well-justified resolution that the admission of the evidence would not be harmful to the administration of justice; on the contrary, its exclusion would have a negative impact. In reaching this decision, the court considered the following components: '(a) the good faith of the police officials involved; (b) the absence of a settled or deliberate policy to violate the rights of the appellants; (c) the circumstances surrounding the decision to enter the chalet; (d) Viljoen's reasonable grounds to believe the motor vehicle contained evidence related to rhino poaching; and (e) the nature of the offenses' charged against the appellants and the

[205] *Ndlovu and Others v S* 2021 (1) SACR 299 (ECG) at [35].
[206] 2002 (2) SACR 411 (SCA).
[207] *S v M* 2002 (2) SACR 411 (SCA) at para [30]
[208] See the minority judgment of Scott JA in *S v Pillay and Others* (2004) at [7] and [9].
[209] *S v Tandwa and Others* 2008 (1) SACR 613 (SCA) at [127].

societal outcry over the ongoing rhino killing for their ivory horns. Ascertaining if the admittance of the information gained would be detrimental to the administration of justice involves an assessment, with the focus on the society's concerns:

> 'public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.'[210]

The test of the severity of the rights infringement involves considering two aspects. First, it requires evaluating the influence on the secured interest of the perpetrator and the severity of the behaviour that led to the breach. In this case, the search of the chalet represented a significant intrusion into the 'privacy of the three appellants', given that it was 'rented accommodation where they reasonably expected their privacy to be respected.' This must be reasoned with the factors necessary to the severity of the behaviour that resulted in the rights infringement, which can vary. On the other hand, admitting evidence acquired through an intentional or negligent ignorance for the rights of the perpetrator will undoubtably erode society's reliance in the 'rule of law and risk bringing the administration of justice into disrepute'. Additionally, evidence obtained through a minor or technical infringement of the protected right may have a negligible effect on public confidence in the rule of law.

The court *a quo* determined that the policemen had acted *bona fide* and did not intentionally infringe upon the appellants' rights. In reaching this conclusion, the presiding officer made crucial important reasons and factual determinations. Emphasising the reliablity of Viljoen's and McLaren's testimonies, the judge considered them to be truthful witnesses. And acknowledging McLaren's potential memory impairment due to illness, he regarded Viljoen as an excellent witness whose evidence aligned with probabilities, offering a coherent account of the events and surveillance. The judge also found that Viljoen instructed Vos to search the motor vehicle but not to enter the chalet. Based on the entire evidence, he came to the conclusion that there was no previous agreement by the policemen to intentionally violate the appellants' rights by entering the premises and that their behaviour was not part of an

[210] *Cachalia JA in S v Mthembu* 2008 (2) SACR 407 (SCA) at para [26]. See also *S v Tandwa and Others* at [116] and [118]; *S v Singh* at [16]; *S v Magwaza* 2016 (1) SACR 53 (SCA) at [15]; and *Gumede* at [25].

intentional policy to violate suspects' rights. Instead, Viljoen's and McLaren's actions were a response to the unexpected behaviour of Vos.

The court *a quo's* interpretation of the evidence appears sound, and it conscientiously considered the limitations in the evidence, addressing the raised criticisms during arguments. Despite these limitations, the court was convinced of the reliability of Viljoen and McLaren's testimony and determined no premeditated plan for a lawlessness investigation of the chalet. The mere presence of descripent information in witness testimony does not automatically lead to the proposed conclusion. As argued by the State, these alleged contradictions may even suggest a lack of intention of the policemen to provide misleading evidence, contrary to the appellants' assertions.

The trial court demonstrated a comprehensive approach to evidence evaluation by considering the overall context and wider probabilities rather than focusing solely on individual witness testimonies. It appropriately took into account the absence of any alternative version presented by the appellants, as they chose not to testify, relying solely on the prosecution's evidence. The court's conclusion that the chalet search was unexpected and prompted by the unplanned opening of the door aligns with the broader permutations suggested by uncontested evidence. The police investigation centred on the appellants' vehicle movements, leading to a hurried and somewhat disorganised response, consistent with unfolding events and information about the vehicle's whereabouts. Viljoen's belief in finding rhino poaching evidence in the vehicle was deemed reasonable by the court, and the actions of the police were driven by a fear of losing track of the vehicle before a search could be conducted. The court accepted Viljoen's testimony that his primary purpose was to investigate the car and that entering the chalet in the manner it happened was not foreseen.

The presiding officer is content that based on the acknowledged evidence, the *court a quo* appropriately concluded that the policemen acted *bona fide*, and that the infringement of the appellants' rights was not premeditated or inclusive of a calculated scheme by the police to ignore those rights recklessly during the investigation.[211]

The court *a quo* did not limit its finding on the non-detrimental impact of admitting the evidence solely to the subjective purposes of the though process of the police officials. It also

[211] Supra at [49].

took into account the two additional elements that might mitigate the severity of the violation. The court correctly determined that Viljoen had enough data in that moment to establish justifiable bases supporting either a 'warrant or a warrantless search'. Viljoen and McLaren came into the chalet almost instantly or shortly after Vos. If Vos hadn't reached the chalet before them, the search would have been lawful. The second component is that the behaviour of the policemen should be evaluated in light of the specific circumstances. Police officials are sometimes required to make spontaneous decisions that may affect a person's constitutional rights. In this case, the decision to enter the chalet was compelled by the unexpected action of the third appellant opening the chalet door. Prior decisions and actions were taken in the field as part of an ongoing investigation into crimes that were not readily discernible.

Another critical factor that contributes to the subjective assessment required by s 35(5) and needs to be taken into account is the societal concern in evaluating and effectively pursuing the end of crime. This consideration reflects society's 'collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law'.[212] Therefore, when exercising its discretion, a court conducting an inquiry under s 35(5) should take into account not only the potential adverse influence of admitting evidence on the reputation of the administration of justice but additionally the consequences of not admitting the evidence.

ii. Judgement

In light of this, several factors must be considered based on the circumstances of this case. The initial factor is the type and reliability of the evidence. Admitting unreliable evidence does not serve the perpetrator's interest in a just trial or the societal concern in uncovering the reality. In comparison, excluding necessary and consistent evidence could potentially make the trial unfair from society's perspective, potentially bringing the administration of justice into disrepute. A related consideration is the significance of the evidence to the state's case. Additionally, the severity of the convictions against the accused is a crucial factor, assessed in terms of the impact these charges have on the community.

Based on the circumstances of the case, the evidence discovered in the chalet is crucial for the effective accountability of the appellants. This evidence is incredibly necessary and applicable, playing an important role in substantiating the allegations. As mentioned

[212] *R v Askov* [1990] 2 SCR 1199 at [1219 – 1220].

previously, the evidence comprises tangible evidence discovered without the appellants' adherence, proving their direct involvement in the ‘rhino poaching’ incident within the Makhanda district and vicariously in occasions in other places within the province. It is evident that the offences for which the appellants were convicted are undeniably serious, significantly impacting community interests.

After considering these factors individually and collectively, the court was convinced that the court *a quo* appropriately determined that the evidence should be permitted, and its prohibition may be detrimental to the administration of justice. The judge's interpretation is free from legal or factual errors applicable to this resolution. Therefore, there is no basis to intervene in his evaluation of the numerous components in the practicing of his authority.

The ‘personal circumstances of the appellants’ and the immediate repercussions of the prison convictions given to the accuseds cannot surpass the gravity of the offenses and their influence on the protected concerns. A lengthy period of prison time is, in my opinion, justified. Even if there may be some discrepancy between a sentence that this court might have implemented and the one handed down by the court *a quo*, it is not so significant that it can be deemed an improper or unreasonable exercise of discretion.

For these reasons, the appeal is dismissed.

g. *S v Malherbe* 2020 (1) SACR 277 (SCA)
    i. Facts

The appellant, Neil Malherbe, was charged in the Regional Court of Nelspruit, Mpumalanga, with seven charges of contravening section 24B(1)(a) and one count of contravening section 24B(1)(c) of the Films and Publication Act 65 of 1996 (the Act). The charges included possession of films, importation of another film, possession of a book, possession of seventeen images on his laptop, and possession of 5 pictures on his notebook. All the materials in question were alleged to depict child pornography, a term that is generally defined in section 1 of the Act. These pieces of evidence were confiscated during an investigation of Mr. Malherbe's residence, which was conducted based on a search warrant issued by Magistrate Mr. Oosthuizen. Mr. Malherbe pleaded innocent on all charges.

The trial initiated with a 'trial within a trial', during which the appellant contested the legitimacy of the authorised search warrant. The court *a quo* ordered against the appellant, affirming the validity of the search warrant. Subsequently, the appellant made admissions under s 220 of the Criminal Procedure Act (CPA), acknowledging being caught owning three pictures of child pornography in counts 3, 7, and 8. One of these images originated from the movie 'Barnens Ö: Children's Island,' which was bought from Amazon.

The appellant, Neil Malherbe, was convicted on counts 3, 7, and 8, resulting in a three-month imprisonment sentence for each count. However, the convictions were fully suspended for a three-year timeline, contingent upon the appellant avoiding conviction under s 24B(1)(a) of the Films and Publication Act throughout the suspension time. The court, in compliance with s 120(4) of the Children's Act 38 of 2005, declared the 'appellant unsuitable to work with children', and his name was inserted into Part B of 'The National Child Protection Register'. Pursuant to s 34 of the Criminal Procedure Act, the photos were surrendered to the prosecution for destruction. The appellant's request for leave to appeal was initially denied but later granted upon petition. The appeal, directed at both the conviction and sentence, failed in the Gauteng Division of the High Court, prompting a remittal of the case to the regional court for reassessment of the suspended sentence. The appellant now appeals against conviction, as well as the sentence imposed by the trial court with special leave from the Supreme Court.

The core question at hand is if the court *a quo* was pleased in determining the validity of the search warrant issued under s 20 and 211 of the Criminal Procedure Act (CPA). Referring to the precedent set in *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others*[213], the Constitutional Court established that specific elements must also be satisfied in such cases:-

> 'first, that there is a reasonable suspicion that an offence, which might be a specified offence in terms of the CPA, has been committed; and secondly, that there are reasonable grounds to believe that an item that has a bearing or might have a bearing on the investigation is on or is suspected to be on the premises to be searched. Finally, the judicial officer must consider whether it is appropriate to issue a search warrant'.[214]

[213] 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC).
[214] Supra at [85].

Rigid obedience to the prerequisites of s 21(1)(a) of the Criminal Procedure Act (CPA) is mandated by law. Those in power make it unequivocally clear that a search warrant distributed based on an unsupported statement is deemed incorrect. The magistrate ought to have acknowledged that the search warrant was unlawfully distributed and, consequently, incorrect. Had the trial court declared the warrant invalid, none of the materials confiscated would have been permitted. The neglect to make such a declaration led the appellant to admit to the charges under s 220 of the CPA. Additionally, these statements were deemed deficient for justifying a legal guilt. They merely admitted to the existence of 3 pictures, with 1 derived from the movie 'Barnens Ö: Children's Island' and the other 2 downloaded from the web onto the appellant's laptop. The admissions lacked reference to the Act or its definition of child pornography and cannot establish the required intention, including acknowledgement of ownership and the lawlessness thereof.

ii. Judgement

Section 35(5) of the Constitution stipulates that evidence acquired in a way violating the Bill of Rights should be omitted if its acceptance 'would render the trial unfair or be detrimental to the administration of justice'. In this instance, the determination that the search warrant was valid and the evidence confiscated were lawfully obtained, compelled the appellant to make admissions. Consequently, the evidence acquired through the incorrect search warrant rendered the 'trial unfair and should have been excluded'. As a result, the appeal succeeds, and the convictions, sentence, and the order under s 120(4) of the Children's Act 38 of 2005 are set aside.

V. CASE COMPARISON

In this section a comparison on the factors taken into account in earlier cases as well as recent cases shall be looked upon. This is to analyse whether the courts consistently take into account the factors which needs to be present when applying s 35(5) in determining whether admission of evidence will be detrimental to the administration of justice. Case law enables legal professionals to understand how the courts have interpreted and applied law when it comes to the administration of justice. It enables legal professionals to identify trends and inconsistencies in judicial decisions.

The court exercises discretion in ascertaining whether admission of unlawfully acquired evidence will be detrimental to the administration of justice by, considering fair trial principles and public policy, to assess potential prejudice or harm to the administration of justice when admitting evidence. 'Public policy' strongly opposes evidence acquired through intentional infringements of the Constitution, while reasonable and justifiable police conduct may lower the likelihood of excluding evidence. Factors from *S v Pillay* and *S v Magwaza*, endorsed by the SCA, help assess whether admitting evidence would sabotage the morality of the administration of justice. These factors include but are not restricted to: the type and seriousness of the violation; the kind of crime; the severity of the offence; and the prevailing state of crime in the South Africa.

Section 35(5) of the Constitution, unique in its application, encourages omittance of evidence inappropriately acquired from any person, not limited to the perpetrator. In the case of *Makhala & Another v The State*, Luzuko Makhala, who claimed rights violations in the obtaining of two statements, the court assumed considerations beyond s 35(5), exploring common law rules on illegally obtained evidence. Despite these assumptions, the court found no established case of rights infringement for Luzuko Makhala, as he testified and actively contributed to the trial. The court concluded that the statements were not unfairly obtained, and their admission did not detrimentally impact the administration of justice. This is comparably similar once again to that of *S v Pillay* whereby it states that when a constitutional right is violated, rendering the trial unfair, there will always be detriment to the administration of justice. All challenges by the appellants were deemed unsuccessful, leading to the dismissal of the appeal based on the admissibility of the statements in proving the appellants' involvement in a murder case.

The trial judge in *Rodrigues v The National Director of Public Prosecutions and Others*, responsible for ensuring fairness once the appellant enters a plea, acknowledges challenges due to the passage of many years since Mr. Timol's death. Recognising the impact

on evidence availability, the court notes the burden on the state to prove guilt beyond a reasonable doubt, especially in cases of inordinate delay. Despite this, the appellant fails to present legal or factual grounds for reasonable prospects of success in an appeal and lacks compelling reasons for the court to consider his appeal. Consequently, the application for leave to appeal was rejected on the grounds that the constitutional challenge by the appellant, which was based on section 35(5), was deemed an abuse of the provision.

Several factors are considered in *Ndlovu and Others v S*[215], including the nature and reliability of evidence, its importance to the state's case, and the severity of charges faced by the appellants. The evidence discovered in the chalet is deemed crucial, reliable, and relevant, substantiating serious charges related to rhino poaching. The court, after thorough consideration, agrees with the trial court's decision to admit the evidence, stating that its omittance would be detrimental to the administration of justice. The gravity of the offenses justifies a lengthy term of imprisonment. This shows an upholding of the publics interests in securing a conviction for those who are found guilty based on the factors taken identified.

In *S v Malherbe*[216] the appellant was compelled to make admissions based on a determination that the search warrant was correct and evidence confiscated were lawfully obtained. As a result, the evidence acquired through the warrantless search was deemed to render the trial unfair. This is similar to that of *S v Pillay*[217] and *Ndlovu and Others v S*[218], whereby police behaviour was taken into account and had become the determining factor on whether or not to exclude evidence.

[215] (541/2019) [2020].
[216] 2020 (1) SACR 227 (SCA).
[217] 2004 (2) SACR 419 (SCA)
[218] (A41/2013) [2014] ZAGPPHC 1009.

VI. FACTORS APPLIED BY THE COURTS IN DETERMINING DETRIMENT TO THE ADMINISTRATION OF JUSTICE

Justice Cloete has casually observed that the standard of 'bringing the administration of justice into disrepute' found in art 24(2) of the Canadian Charter may be a criterion with a greater degree for omittance compared to that in s 35(5) of the Constitution.[219] In *S v Mphala and Another* [220], Cloete J made an observation regarding the second manifestation of the assessment in s 35(5) that in terms of the administration of justice, there needs to be a relationship between, on one hand, the acknowledgment of the Bill of Rights, and on the other hand, the recognition of the judicial process. Giving too much weight to the former could result in acquittals based on what the public sees as technicalities, while an excessive focus on the latter could, at best, dilute the effectiveness of the Bill of Rights and, at worst, undermine its clauses.[221]

An argument revolves around the idea that the second manifestation of the assessment in s 35(5) of the Constitution provides a broad prudence that can consider prevailing public opinion as a significant factor. This perspective, it is suggested, does not contradict the statements made by the Constitutional Court in *S v Makwanyane and Another*[222] 'it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour'.[223] As can be seen in the cases discussed above, there are various commons factors which each court took into account in determining whether to include or exclude evidence based on an infringement of the accused's rights.

First, the existence or absence of *bona fide* (and reasonable) police behaviour. The consideration of whether the good faith of the police should factor into the omittance of unlawfully acquired evidence raises questions about the role of police conduct in the application of the 'exclusionary rule'. The exclusionary rule serves to deter unconstitutional police behaviour, functioning as both a deterrent and an educational measure, ultimately aiming to prevent such conduct in the future.[224] The primary argument supporting a 'good faith' exception to exclusionary sanctions is that it allows the use of evidence when exclusion would not serve a significant preventive function. Police officials who have practiced justifiable and reasonable diligence in understanding and applying the law may have fulfilled their obligations, and excluding evidence in such cases might not contribute to the intended deterrent effect. The

[219] *S v Mphala and Another* 1998 (1) SACR 654 (W) at [659i-j].
[220] Supra at [118].
[221] *S v Nombewu* 1996 (2) SACR 396 (E) at [422h-i].
[222] 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC).
[223] *S v Makwanyane and Another*1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC) at [88].
[224] *S v Mphala* 1998 1 SACR 654 (W).

rationale is that the exclusionary rule should focus on cases where officers have not acted properly or failed to exercise reasonable care in ensuring compliance with legal requirements. On the contrary, opponents argue that even when officers act in good faith but the evidence is obtained impermissibly, exclusion can still contribute to the preventive function of the rule by incentivising officers to better educate themselves about legal requirements.

Conduct characterised by 'good faith', which is rational considering the particular merits of a case, may, in essence, strongly support the admission of evidence.[225] This approach aims to prevent a scenario where individual law enforcement officials or the South African Police Service are incentivised to remain uninformed to secure evidence admission. However, 'good faith' alone is insufficient; it must also be reasonable, subject to an 'objective test'. Ignoring 'good faith' reasonable police conduct in an exclusionary rule would be inconsistent with the realities of a constitutionalised criminal justice system. There are situations where legal practitioners and scholars might find it challenging to definitively determine, even after careful reflection, what a police officer could or should 'have done, given specific facts and considering constitutional requirements and statutory rules governing police investigative powers'.

Secondly, the type and severity of the infringement. This was addressed in the case of *S v Mark and Another*[226], whereby the infringement of a constitutional right can differ between being technical or major in nature. The type and severity of a infringement are closely tied to whether the unconstitutional conduct was an '*ad hoc* decision' or part of a intentional policy to behave with ignorance for constitutional rights. In cases where it is part of a settled or intentional policy, the evidence should generally be excluded. This determination revolves around assessing the existence or absence of *bona fide* on the part of the officials and taking disciplinary measures where necessary.

Thirdly, the accessibility of legal methods of securing the evidence. The majority of the Supreme Court of Canada, in *R v Feeney*[227], affirmed this approach and emphasised that if other techniques were available, the choice to violate the appellant's rights is indicative of bad faith and is specifically severe. In South Africa, the determination appears to hinge on the assessment of *bona fide* faith and justifiable behaviour, which can be seen in the case of *S v Mkhize*[228] discussed above.

[225] *R v Collins* [1987] 1 S.C.R. 265.
[226] 2001 (1) SACR 572 (C).
[227] [1997] 2 S.C.R. 13.
[228] 2012 (2) SACR 90 (KZD).

Fourthly, whether the evidence in question was in fact real evidence. This point was discussed in the cases of *S v Mkhize*[229] and *R v Collins*[230]. The admission of tangible evidence obtained unconstitutionally, in comparison to testimonial evidence, is unlikely to render the an unfair trial. The admissibility of such evidence shall generally be determined with acknowledgement to the second manifestation of the assessment. In this situation, the court may consider aspects such as whether the breach occurred unintentionally, in good faith, or if it was purely technical in nature. [231] Similarly, the case of *Ndlovu*[232] ascertained that regardless of the severe infringement on the accused's right to privacy, the conscriptive evidence was not obtained in a manner of bad faith and was therefore considered not to be flagrant to the accused's constitutional rights.[233]

As the fifth point, the case of *S v Mkhize*[234] there's the notion of unavoidable discovery or discovery arising from an autonomous source. It is argued that, for the second manifestation of the assessment in s 35(5), our courts may consider that the 'inevitable discovery of real evidence is a factor favouring admissibility'. If the real evidence would have been uncovered by legal means, excluding such evidence due to unconstitutional conduct would generally be detrimental to the administration of justice. It can be similar to that of the 'but-for test' in criminal law. This means, would the evidence have been uncovered in a lawful manner *but for* the unlawful behaviour of its source.[235]

[229] Supra.
[230] 1987 28 CRR 122 (SCC).
[231] 2012 (2) SACR 90 (KZD) at 137.
[232] 2017 (2) SACR 305 (CC).
[233] Supra at [42] – [53].
[234] 2012 (2) SACR 90 (KZD) at [637 j – 638 a].
[235] PJ Schwikkard and TB Mosaka *Principles of Evidence* 5 ed (2023) at 271.

VII. CONCLUSION

In the assessment of s 35(5), the 'current mood' of society is a relevant factor. Although the section emphasises that courts should not be completely influenced by public perspectives and shall prioritise preserving the morality of the criminal justice system, there is a common understanding that societal sentiment plays a role in the evaluation. The main distinction arises in determining the weight assigned to this factor. It underscores that even in cases where individuals are accused of severe crimes, the preservation of constitutional values and protection against unconstitutional police conduct is crucial. The admissibility test shall not be solely associated to the factual guilt of the accused, as it aims to uphold the presumption of innocence which is a constitutional right of the accused. This means that regardless of whether the evidence obtained unconstitutionally may secure the conviction of the accused, if it violates the constitutional rights of the accused the exclusionary rule should apply. Therefore, the factors identified throughout this paper should serve as a guidance tool in ascertaining the admissibility status of unconstitutionally obtained evidence. It is largely dependent on the way in which evidence is obtained to secure a conviction.

The examination of South Africa's s 35(5) jurisprudence reveals a consistent resistance to the notion that the risks of excluding evidence should influence admissibility rulings. Courts in South Africa have, in several instances, chosen to exclude evidence crucial for serious charges to prevent judicial contamination and uphold the directive of s 35(5), which purports to halt the disrepute to the administration of criminal justice.

In interpreting s 35(5), as well as art 24(2) of the Charter, a purposive and contextual approach is recommended. Courts should be mindful that s 35(5) aims to halt detriment to the justice system and promote truthfulness. The need to secure constitutional rights and due process are crucial when judicial discretion is applied. Although, a balance must be struck between the results of s 35(5). For example, an overemphasis on this section may create a rigid exclusionary approach, while an overemphasis on public opinion may create a weighty inclusionary approach.

The implementation of the exclusionary rule in art 24(2) of the Charter, which allows for the omittance of unlawfully or improperly acquired evidence, has led to significant litigation and varying interpretations. The underlying basis for this rule has been explained through different theories, including assuming remuneration to victims of violations, discouraging constitutional infringements, and deterring judicial condonation of police behavioural comissions. Scholars have expressed concerns about the quasi-automatic purpose of the exclusionary rule, the perceived hierarchy of rights, the insufficient recognition of

community interests and victims' rights, and the lack of protection for third parties against police misconduct. Some academics advocate for a return to the founding purpose of the fers of the Charter, emphasising a comprehensive review of all circumstances and a balanced approach. The wording of art 24(2) calls for a reconsideration of the current application, taking into account the broader context and ensuring a just relationship between the protection of accused's rights and the interests of justice.

The discussion highlights common factors considered in determining the admissibility of evidence based on an infringement of the perpetrator's rights. These factors include: 'the presence or absence of good faith and reasonable police conduct, the nature and seriousness of the violation, the availability of lawful means to secure evidence, whether the evidence is real or testimonial, and the concept of inevitable discovery'. The argument is made for a *bona fide* exception to the exclusionary rule, suggesting that evidence obtained with reasonable police conduct should be admissible to prevent the rule from deterring officers who act in compliance with the law. Opponents argue that even with good faith, exclusion can contribute to the deterrent effect, encouraging officers to better educate themselves about legal requirements. The nature and seriousness of the violation are considered in connection with whether the unconstitutional conduct is part of a deliberate policy. The availability of lawful means to secure evidence is also a factor, with a focus on good faith and reasonable conduct. Additionally, the admissibility of real evidence obtained unconstitutionally is discussed, considering factors such as good faith, inadvertence, or technical nature. Lastly, the concept of inevitable discovery is raised as a factor favouring admissibility. The argument is that if real evidence would have been discovered lawfully, excluding it due to unconstitutional conduct would be detrimental to the administration of justice.

It has come to my knowledge that the South African courts do in fact apply the necessary factors in determining when a trial may be considered unfair or detrimental to the administration of justice. Each case discussed above has a unique reference to the aforesaid factors, whereby judicial process has been implemented and concern has been equally distributed to convicting criminals and maintaining public safety. Importantly, each South African case cross-references one another and using the previous judicial authority, as well as taking into consideration continental jurisdictions. In some cases such as *S v Malherbe*, which stood out the most for me, was that regardless of the acquisition of a sensitive set of items including child porn, the appeal had been dismissed due to the nature of the search warrant violating the accused's right to a fair trial. In other words, the public may have been angered

by this approach of the courts, but the necessity of protecting the accused's constitutional rights was beyond severe. Rendering the trial unfair and the appeal dismissed.

The courts were upholding their constitutional duty, regardless of the controversiality of the each case, the courts have consistently remained impartial.

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