

**THE ADMISSIBILITY IN THE MAIN TRIAL OF EVIDENCE ADDUCED
DURING A TRIAL WITHIN A TRIAL**

by

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Submitted in part fulfilment of the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF S S TERBLANCHE

NOVEMBER 2004

PREFACE AND ACKNOWLEDGEMENTS

I am grateful for having been under the supervision of a vigilant and natural perfectionist, Professor SS Terblance who made it possible to eliminate apparent literacy inelegancies that can be associated with a student undertaking a complex legal research for the first time.

His careful reading, suggestions for revision and rewording, gave birth to substantial improvements through the entire thesis. Prior to commencement of this study, I always believed perfection is art until my supervisor convinced me indirectly that it can also be born with. That vigilant supervision made the gestation period terribly long and hectic day by day, and I almost decided to commit academic abortion, which is dropping the study half-way.

I was equally assisted in my research by the law librarian, Ms. Keron Breckon, who did the administrative part of my research, including Library orientation and its related issues.

I appreciate the time and dedication shown by the secretarial staff at RVA Attorneys (my employers at Mutale) who typed under enormous office pressure and miraculously managed to have the manuscript ready on due dates.

The encouragement and unreserved permission that I was given by my family, to spend substantial time away from home is second to none.

Whichever way, like most authors, I wish I could blame someone else, but the inaccuracies in context and structure, and the responsibility for such errors rests with me.

All efforts has been made to state the law as at 31st May 2004.

T. R. VHULAHANI

01/07/2004

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7. **The interim Constitution**: The Constitution of the Republic of South Africa, Act 200 of 1993
8. **The Charter**: Canadian Charter of Rights and Freedoms 1982

2. List of abbreviations:

1. UK: United Kingdom
2. US: United States of America
3. WLD: Witwatersrand Local Division
4. INTL Comp. LR: International and Comparative Law Review
5. SALJ: South African Law Journal
6. SACJ: South African Journal of Criminal Justice
7. SACR: South African Criminal Law Reports
8. TLR: Texas Law Review

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PART “A”

1. INTRODUCTION

Over and above the general principles governing admissibility of evidence in criminal trials,¹ certain categories of evidence are subject to further requirements before they can be admitted as evidence. The two most important categories that are subject to these further requirements are admissions and confessions. When an occurrence arises, as they frequently do, in which the defence challenges the admissibility of evidence on the ground that one or more requirements of admissibility was not met, procedural laws make provision for the creation of a forum in which such issues of admissibility can be decided upon. Such a forum takes the nature of a trial, and it is consequently referred to as a “trial within a trial”.

Before a court can arrive at a finding whether such disputed evidence is admissible in terms of applicable criteria of admissibility, it is logical, and to a greater extent unavoidable that both sides to the case would lead evidence to ensure that the ruling at the end of the inquiry into admissibility be in their favour. In this context, the prosecution would lead evidence to show that applicable requirements of admissibility were complied with and the disputed evidence should therefore be admitted. The defence would, predominantly because a trial within a trial is a result of a dispute on admissibility, have to lead evidence to the converse and this can be through the accused himself or through independent witnesses or both.

Irrespective of the finding made by the court at the end of a trial within a trial, it becomes imperative to have in procedural law guidelines or rules governing

1. See a detailed discussion of “relevance” as a requirement for admissibility in McGinley and Waye *Evidence handbook* (1994) at 8 and Schiff, *Evidence in the litigation process* (1993) at 21.

the admissibility of such evidence in the main trial. Thus far, one can state that a trial within a trial occurs as an evidentiary procedure during the course of a criminal trial to determine admissibility of evidence which eventually lead to the core of this study: “the admissibility of evidence adduced in a trial within a trial in the main trial”. Put differently, the study is aimed at looking deeply into this complex issue of whether evidence obtained in a trial within a trial is admissible or not. If the answer is in the affirmative, the extent of its admissibility and applicable exceptions shall be analysed as well. Whilst the study is undertaken from a South African perspective and during a constitutional era, it became unavoidable to include a number of cross-references to other foreign judgments and authorities, specifically those that explained or expanded upon issues or legal principles which are also applicable in our South African context.

This being an academic study limited to a specific form and volume, I had an option of either discussing the principle that governs the admissibility of evidence in a trial within a trial in the main trial alone, or of first giving a detailed analysis of the nature and principles governing admissions and confessions. Either of the two options had its own complications. If I had chosen the first option, I could be accused, justifiably so, of discussing a principle in a vacuum. The second option is associated with structural nightmares of doing a wide research limited to a few pages, with the result that some issues would not be given a detailed analysis, either in an effort to avoid deviation from the core of the study or because of length restrictions. Faced with this dilemma, which eventually made the study interesting, I opted for the latter option since through my study I concluded that to discuss principles governing admissibility of evidence from a trial within a trial in the main trial, without frequent reference to the concepts of admissions and confessions, would be a complex endeavour.

In consequence of the above scenario, the study covered the following three

major parts. Firstly, an informative but brief analysis of the principles that deals with admissibility of both admissions and confessions is done. Secondly, these principles are discussed bearing in mind the stages of development concerning each affected principle, such as the position prior and after the adoption of the interim Constitution. This part also include a detailed analysis of the most important sections of the new Constitution which was not included in the interim Constitution, which have a bearing on admissibility of admissions and confessions.

The third part is actually the main focus of my study. In this part, a detailed study of case law is undertaken, and most cases are discussed contextually and brief facts of each are included with the aim of extracting a set of principles that deals with the admissibility of such evidence. The effect of evidence by state witnesses in a trial within a trial and its admissibility in the main trail is discussed separately, and the same format is used in respect of the accused. This part, it is hoped, shall make the following three issues clear:

The general principles that deals with admissibility of such evidence is discussed first, followed by a detailed analysis of applicable exceptions, and lastly, an analysis of how courts applied these principles prior and after the adoption of the Constitution.

A number of distinguishing features are included in this study, aimed at making this study informative, practical and up-to-date. Amongst these features, as it will be noticed, is that each major heading or sub-heading is preceded by its own preamble or background, aimed at giving the basis of including such issue in this study and its relevance thereto. Another feature noticeable is that most important collateral issues, which do not form the core of my study are constructively included in footnotes, and consequently only major headings and sub-headings are reflected in the table of contents.

2. A BIRD'S EYE VIEW ON ADMISSIONS AND CONFESSIONS

In every criminal trial in which a trial within a trial is eventually held, the compliance with requirements of admissibility applicable to admissions and confessions become the main focus. Consequently, it becomes inevitable to give an informative outline of these concepts and the requirements of admissibility that are expected in each case. It is my view that with this backbone, complex features of a trial within a trial can easily be explained.

2.1 ADMISSIONS

2.1.1 Introduction

An admission is a statement or conduct which is adverse at present or in future against the person who made it.² It is not necessary that the party making an admission should have known that the statement is against his interests.³ This rule is based on an understanding that one cannot prevent anything he says from being used against him; especially since reliability is enhanced by the unlikelihood of anyone telling lies against his own interest.⁴ My preliminary

2. Du Toit et al *Commentary* at 24 – 73.

3. See Heydon *Cases and materials on evidence* (1991) at 375. See also Mueller and Kirkpatrick *Evidence* (2003) at 767-768 when the authors suggest that an admission is a logical expression of the philosophy of the adversary system and is closely connected with the personal freedom and responsibility that are part of life in a free society.

4. See Heydon *Cases and materials on evidence* (1991) at 375, where the author argues that a litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. It is equally-

outline is selective and the emphasis is based predominantly on the fact that formal admissions, such as those made in civil pleadings and those made by the accused during the course of a criminal trial, are seldom disputed during the course of a trial. Informal admissions on the other hand, are binding on its maker only after they had passed a scale placed upon them by the requirements of admissibility. It is in this context that informal admissions could be treated as an item of evidence which can be contradicted or explained away by the accused.⁵ The principles and requirements of admissibility of an admission are generally the same in all kinds of admissions, except that in cases of confessions the requirements of admissibility are more stringent than in other forms of admissions.⁶

It is also important to distinguish informal admissions from statements made against a party's interest during the course of a trial. Such a statement is treated as an ordinary piece of evidence and not an admission.⁷ There are reasons of policy why informal admissions are generally admissible in evidence. One fundamental reason is that there is a popular feeling that a person should not be in a position to question the veracity of his own assertions regardless of the motives with which they were made.⁸ Another reason is believed to be based on an understanding that a person is unlikely to make an admission adverse to his interest if the contents of that admission are false.⁹

irrelevant that he did not speak under oath or that he never had an opportunity to cross-examine himself.

5. Schwikkard et al *Principles of evidence* at 183. See also Emson, *Evidence* (1999) at 183.

6. The two kinds of admissions that are discussed in detail in this preliminary outline are confessions and pointings out.

7. Schwikkard et al *Principles of evidence* at 185.

8. See Younger and Goldsmith *Principles of evidence* (1984) at 490.

9. Schwikkard et al *Principles of evidence* at 184.

Admissions are received in evidence in accordance with the orthodox view of treating admissions as an exception to the general rule against hearsay.¹⁰ This view, however, does create some difficulties because admissions do not share with other exceptions to the hearsay rule the normal attributes, necessity and circumstantial guarantees of trustworthiness possessed by the others; more particularly because an admission is a mere statement made by a party tendered by the opposing party.¹¹ The difficulties mentioned above are compounded by the fact there is no uniformity on the main principles justifying the reception of admissions.

Morgan¹² believes that

[t]he admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of note."¹³

Regardless of how academics may explain the reasoning behind the reception of admissions, it is clear that what is said by a party or a person closely linked with him in respect of a transaction at issue is considered of such special value that the usual rules are simply disregarded. This approach is easier to grasp when we remember that a trial is not an abstract search for truth, but an attempt

10. See in this regard Du Toit et al *Commentary* at 24 –73 where the authors conclude that “[i]nformal admissions and confessions were traditionally viewed as constituting an exception to the rule against hearsay in that they constituted extracurial statements or conduct which were admissible to prove the truth of what they asserted.” See also Stone *Evidence: its history and policies* (1991) at 329.

11. See Delisle and Stuart *Evidence: principles and problems* (2001) at 559.

12. Morgan *Basic problems of evidence* (1962).

13. Op cit at 266.

to settle controversy between two persons without physical conflict.¹⁴

The regulatory framework within which a decision should be made as to whether an admission can be admitted in evidence is clearly spelt out in section 219A of the Act which provides as follows:

Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence.

It should be emphasised that the admissibility of an admission indirectly places a duty on an accused to take the witness stand and testify about the circumstances in which such admission was made in order to reduce its prejudicial effect.¹⁵

2.1.2 Pointing out

2.1.2.1 Background

Section 218(2) of the Act provides as follows:

(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

14. See in this regard Chafee J “Preview of Wigmore on evidence” (1924) 37 *Harvard Law Review* 513-520 at 519.

15. Cannon and Neligan *Evidence* (2002) at 320.

This section and its implications should be looked at bearing in mind that the Legislature's aim was to provide for a mechanism to deal with any piece of evidence derived from inadmissible evidence. When evidence is ruled inadmissible, two consequences follow: firstly, the inadmissible evidence may show something about the accused's way of expressing himself, or familiarity with a particular language or state of mind at that particular time. Secondly, information contained in such inadmissible evidence may have enabled police to discover something or a particular place relevant to the charge.¹⁶ It is the first scenario that the Legislature had in mind in enacting section 218(2).

A pointing out is defined as: ...“an overt act by an accused person in which the presence or location of a physical thing is pointed out.”¹⁷ The complex issue regarding this definition is whether the resultant discovery of a thing pointed out completes a pointing out or whether it would still be a pointing out even if nothing is discovered nor seen.

In *R v Tebetha*¹⁸ the majority of judges favoured the view that irrespective of whether anything was discovered, a pointing out was complete upon the mere physical pointing. The dissenting judgment of Schreiner JA elucidates a clearer view and one that is preferable. He concluded:

The element of discovery, though it provides no absolute guarantee of the truthfulness of the inadmissible confession, reduces some of the risk that evidence may be manufactured by compelling the accused to perform self-incriminatory acts.¹⁹

It would generally be much easier to compel or induce the accused to point out

16. See Heydon *Cases and materials on evidence* (1991) at 194.

17. See in this regard *S v Nkwanyana* 1978 (3) SA 404 (N) at 405.

18. 1959 (2) SA 337 (A).

19. Op cit at 343A-B.

something connected with the crime where the thing has already been discovered and is in his presence, than it would be to get him to disclose the unknown whereabouts of such a thing.

2.1.2.2 Position prior to 1977

Prior to the coming into operation of section 218(2) of the Act, the approach of the courts in dealing with the admissibility of evidence of a pointing out was based on the landmark decision in *R v Samhando*,²⁰ which had been held to be an unquestionable authority for the proposition that evidence that something has actually been discovered as a result of an involuntary pointing out is admissible in our law on grounds discussed hereunder.²¹ In *Samhando's* case, the appellant had during his trial at the court a quo been linked to the commission of the offence by evidence to the effect that he had pointed out a tree where the blankets of the deceased were concealed and had told a witness where to find a certain axe, which was allegedly used in the murder. The basis of the appeal was whether such evidence of pointing out was admissible. It was contended by appellant's counsel that since such admission was obtained from the accused violently it was inadmissible in evidence.²²

The Appeal Court concluded that the fundamental reason for disallowing induced admissions is that they are untrustworthy as evidence. If such

20. 1943 AD 608.

21. See in this regard section 274 of the Criminal Procedure Act 37 of 1917, which was still applicable at that time.

22. This position yielded to the introduction of section 245(2) of Act 56 of 1955 from which the current section 218(2) was based, with the exception of the discretion conferred by the insertion of "may be admitted" in current legislation. See footnote "23" below for discussion of other grounds referred to in *Samhando's* case.

admission can be proved by other evidence, then the reason for its exclusion vanishes; and it therefore becomes admissible. In this case, such reasoning effectively meant that although violence on the accused was proved, the fact that clothing and the axe were eventually found effectively destroyed the reason for exclusion and the evidence then became admissible. The acting Chief Justice then concluded that ... "because the reason being to guard against the possibility of an innocent person being convicted... that reason is done away if such confession be substantiated by an actual finding of the goods accordingly in the place described..."²³

2.1.2.3 Post 1977 dispensation

Although the Act came into operation in 1977, it was only in 1991 in *S v Sheehama*²⁴ that the admissibility of evidence of a pointing out was decisively pronounced upon by the Appellate Division. In this case the court pronounced unambiguously that a pointing out was in itself an admission by conduct and that its admissibility was to be governed by those provisions of the Act that governs admissibility of other admissions.²⁵ It is in this context that it becomes immaterial whether the decision in *Samhando's* case was correct or not, specifically since it was decided before the present section 219A of the Act was enacted.

2.1.2.4 The admissibility and relevance of evidence from a pointing out

The essence of section 218(2) of the Act is that the prosecution is allowed to lead such evidence irrespective of whether it would form part of an inadmissible

23. *R v Samhando* 1943 AD 608 at 614.

24. 1991 (2) SA 860 (A).

25. Section 219A governs the criteria of admissibility in regard to admissions and section 217 governs confessions.

confession.²⁶ Put differently, the admissibility of evidence of a pointing out is not affected by the fact that it forms part of an inadmissible confession. Since it is now a settled legal position to recognise a pointing out as an admission by conduct, it thus amounts to an extra-curial admission and is subject to the same criteria of admissibility as any other admission.²⁷

One of the features of section 218(2) of the Act that differentiates it from its predecessor²⁸ is that section 218(2) states that "...evidence may be admitted..." whereas section 245(2) of the 1955 Act stated that "...it shall be lawful to admit evidence..." which clearly shows that the present enabling section gives the court some discretion to admit or not to admit. It is this aspect of discretion that has been interpreted differently by the judiciary.

In *S v Magwaza*²⁹ the Appellate Division, through Hoexter JA, concluded that the discretion conferred by this section is to the effect that evidence of a pointing out should not be admitted if the court has knowledge that the pointing out forms part of an inadmissible confession; and more so if the court has knowledge of what the inadmissible confession contained. However, the complexity of section 218(2) was compounded again when the same court interpreted the question of

26. This difficulty of admitting evidence which forms part of an inadmissible confession was the backbone around the debate whether a court should be allowed to consume the fruits of the poisoned tree. For a detailed analysis of this debate see Rait *Evidence* (2001) at 333-334.

27. See a detailed analysis of the concept of reliability, self-incrimination and policy issues as the major factors affecting admissibility of evidence of a pointing out in Schwikkard, PJ "Pointing out and inadmissible confessions" (1991) 4 SACJ 318-328 at 321 and 323.

28. Section 245(2) of the Criminal Procedure Act 56 of 1955.

29. 1985 (3) SA 29 (A).

discretion in a different way in *S v Masilela*.³⁰ Grosskopf JA concluded that the fact that a pointing out forms part of an inadmissible confession is in itself irrelevant to the admissibility as evidence of such pointing out. This interpretation of the discretion, although not intended to overrule *Magwaza's* judgment, is clearly different. The correct interpretation regarding the discretion conferred in section 218(2) is a question of looking at numerous considerations that can influence the court in its determination of the admissibility of such evidence. One of the main considerations could be the inadmissibility of the confession itself. This is primarily because although the enabling section confers the discretion, to admit evidence of a pointing out which forms part of a confession that has already been ruled inadmissible can easily afford the state an opportunity to manipulate through the provisions of section 218(2) to get the same evidence that failed the test under section 217 of the same Act.

It is my submission that notwithstanding that section 218(2) gives the court the discretion to admit such evidence forming part of an inadmissible confession, it is advisable that such evidence be excluded if it is potentially unreliable, or if to admit such evidence would infringe the accused's common law right against self-incrimination; or where the pointing out is merely used as a device to introduce an inadmissible confession into evidence.³¹

It therefore means that one of the most important considerations that the court can and should preferably resort to in its application of the discretion conferred by section 218(2) is the reliability of evidence of such pointing out. This is based on the fact that the fundamental reason for excluding evidence of inadmissible confessions is, apart from policy consideration, that they are likely to be unreliable. Since this danger does not exist when something is pointed out, such

30.1987 (4) SA 1 (A).

31.Schwikkard, PJ "Pointing out and inadmissible confessions" (1991) 4 SACJ 318-328 at 328.

evidence may be admitted.³² In consequence of this consideration of reliability, courts have shown reluctance to admit evidence of a pointing out when nothing was eventually discovered.³³ The second consideration which relates to the privilege against self-incrimination is interpreted to mean that the common law right against self-incrimination (which the accused enjoys) is limited to oral evidence and does not cover passive bodily action such as a pointing out. There is, unfortunately, a very thin line of distinction between the two as shown by the decision in *S v Zimmerie*.³⁴ In this matter, Friedman J rejected evidence of a demonstration by the accused and concluded that such amounted to an inadmissible confession disguised under section 218(2). This uncertainty was the result of an earlier erroneous interpretation of the discretion conferred by section 218(2) by Rabie CJ in *S v Tsotsobe*³⁵ when he held as follows:

Evidence of a pointing out is not admitted in evidence on the ground that it is, or amounts to, an extra-curial admission, but on the basis that it shows that the accused has knowledge of the place or thing pointed out, or of some fact connected with it, from which knowledge it may be possible, depending on the facts of the case concerned, to draw an inference pointing to an accused's guilt.³⁶

32. *S v Tebetha* 1959 (2) SA 337 (A), which confirms the approach adopted earlier by Watermeyer CJ in *R v Samhando* 1943 AD 608, which is based on the theory of confirmation by subsequently discovered facts. In terms of this approach or theory, if the contents of an admission can be proved to be true by other evidence, the problem of unreliability falls away. In this context, when incriminating evidence is discovered as a result of a pointing out induced by violence, such pointing out should be admitted into evidence.

33. See *S v Mbele* 1981 (2) SA 738 (A).

34. 1989 (3) SA 484 (C).

35. 1983 (1) SA 856 (A).

36. Op cit at 864C-E. See also in this regard Schwikard, PJ "Pointing out and inadmissible confessions" (1991) 4 SACJ 318-328 at 325, which confirms that the interpretation by Rabie CJ was erroneous.

It was only in *Sheehama*³⁷ that this inconsistency was cleared and the court concluded that

[a] pointing out is essentially a communication by conduct and, as such, is a statement by the person pointing out. If it is a relevant pointing out unaccompanied by any exculpatory explanation by the accused, it amounts to a statement by the accused that he has knowledge of relevant facts which prima facie operates to his disadvantage and it can thus in an appropriate case constitute an extra-judicial admission. As such the common law, as confirmed by the provisions of section 219A of the Criminal Procedure Act 51 of 1977, requires that it be made freely and voluntarily.³⁸

The third consideration, which may influence the court in deciding whether to admit evidence of a pointing out is a consideration of public policy. It essentially means that evidence which is otherwise reliable but improperly obtained may still be excluded on grounds of policy.³⁹ For these reasons the appeal court remarked in *Mushimba*⁴⁰ that the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.

37. 1991 (2) SA 860 (A).

38. Op cit at 860 (headnote).

39. See also how consideration of public policy as a ground of excluding evidence of a pointing out, notwithstanding that it may be reliable, was considered in the ancient decision of *R v Maleleke* 1925 TPD 491 at 536. The court expressed the view that it is imperative that the administration of justice is not regarded with suspicion and that consequently courts should show disapproval of improper behaviour on the part of the police. To condone improper conduct would destroy the confidence of the community in the judicial system.

40. 1977 (2) SA 829 (A).

These considerations were extensively explained in the appeal judgment of *S v January*.⁴¹ In casu, the appellant was extensively tortured upon arrest and he eventually pointed out a manhole in which two decomposed bodies were found. In consequence of the challenge to the admissibility of such pointing out and a statement that was subsequently made, a trial within a trial was held.

The trial judge ruled at the end of the trial within a trial that the statement was inadmissible because of the state's failure to discharge the onus that the statement was made freely and voluntarily, but nevertheless ruled that the pointing out was admissible. It eventually convicted the appellant. The appeal court was then faced with a determination of whether proof of an involuntary pointing out was admissible if something relevant to the charge was subsequently discovered.

The appeal court noted the reasoning in *Samhandó's*⁴² case and found that it could not be relied upon since it was based on common law. The court upheld the two conclusions reached by the same court earlier in *S v Sheehama*.⁴³ The first conclusion was that it was clearly wrong that a pointing out did not constitute an extra-curial admission, and the second conclusion was that it was equally wrong to hold that evidence of an involuntary pointing out was admissible under section 218(2) of the Act.

The court then concluded that since it is now firmly accepted that a pointing out is an admission by conduct, its admission should first pass the criteria of 'freely and voluntarily' as laid down in section 219A of the Act. Secondly the court

41. 1994 (2) SACR 801 (A).

42. 1943 AD 608, which was decided solely on the strength of common law and no opinion was expressed in relation to section 214 of Act 31 of 1917 (the predecessor of section 245 of the Act 56 of 1955).

43. 1991 (2) SA 860 (A).

concluded that the exceptions in *Samhandó's* case are not preserved by section 219A because the section renders inadmissible all evidence of involuntary admissions. The court ruled that the admission by the court a quo of evidence of the pointing out proved to be involuntary was erroneous and consequently the appeal was upheld.

2.1.3 The requirements for admissibility of an admission

2.1.3.1 The element of voluntariness at common law

The comment by Innes CJ, in *R v Barlin*,⁴⁴ is to date regarded as the foundation of the requirement of voluntariness at common law, when he said:

The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made – in the sense that it has not been induced by any threat or promise proceeding from a person in authority.⁴⁵

This requirement of voluntariness is based on considerations of fairness and justice which in the context of the above reasoning means that no statement by an accused person can be given in evidence against such an accused unless it is proved by the prosecution, beyond reasonable doubt, that it was obtained freely and voluntarily.⁴⁶ It is thus undoubtedly clear that the inclusion of the

44. 1926 AD 459. See further in this regard an outline of some of the policies underlying exclusions of involuntary statements in Paizes, A “The policy underlying the exclusion of involuntary admissions and confessions” (1989) 2 SACJ 127-129 at 128, in which he discusses the decision in *S v De Vries* 1989 (1) SA 228 (A) in detail.

45. *R v Barlin* 1926 AD 459 at 462.

46. See a further discussion of the requirement of voluntariness in Schwikkard, PJ “Admissions and the requirement of voluntariness” (1992) 3 SACJ 351-353 at 351.

requirement of voluntariness by the legislature in section 219A was heavily influenced by the common-law position. The requirements of voluntariness applies to all extra-judicial statements by the accused, irrespective of whether they were intended to be incriminating or exculpatory.⁴⁷ The requirement of voluntariness at common law contains two vital components, namely the referral to “threat” and “a person in authority.”

2.1.3.2 Threat

It is settled law that words or conduct directed at the accused that preceded the making of a statement may have a direct bearing on the admissibility of such statement. It is not important whether the words carried a negative connotation such as a threat or a positive connotation such as a promise; statements induced by such words becomes inadmissible in evidence. It is in this context that words or conduct which suggest to the accused that he may be dealt with leniently will render any statement they induce inadmissible because such statement will be involuntary. The test to be used to determine whether the threat or promise actually affected the accused’s freedom of volition is subjective. It therefore becomes difficult to determine what will constitute a threat or a promise. A determination of whether such a threat or promise was ever made will depend on the circumstances of each case.

This becomes even clearer when one reads the judgment of *R v Mogoetie*⁴⁸ which concluded that whether a promise or threat did indeed influence the accused should be looked at subjectively. What is of importance is the actual effect which the alleged improper inducement or threat had on that

47. Hoffmann and Zeffertt *Law of evidence* at 206. See also the evolution of the general principles of admissibility in Wigmore *Evidence in trials at common law*(2002) at 7.

48. 1959 (2) SA 322 (A) at 325.

particular accused. A classical example of how the subjective test is applied in practice is the case of *S v Segone*⁴⁹ in which the accused was under an impression that a magistrate who was to take down his statement was working hand in hand with the police who had already assaulted him. Subjectively, it is clear that such person was influenced (albeit by his incorrect beliefs) and such statement was ruled to be inadmissible.

As indicated in *R v Masinyana*,⁵⁰ it is immaterial whether the threat used induced a confession or an admission; neither of the two would be admissible if induced by a threat. The court may in deciding whether or not such conduct did in fact induce a response take into consideration the time that actually lapsed between the making of the threat and the time the alleged induced statement is made.⁵¹ If a lengthy period has lapsed to an extent that the threat may no longer be deemed to be the direct source of the statement, such statement may be held to be admissible, as was the position in *R v Mulke*.⁵²

2.1.3.3 Authority

When the threat or promise which subsequently induced a statement or a response that is incriminating comes from a person in authority of the accused, the courts have refused to admit such evidence. In *S v Robertson*,⁵³ the court approved, correctly so, the subjective test in determining who may be deemed to have been in authority of the accused. The term should be given a wider interpretation to include any person whom the accused believed, rightly or

49. 1981 (1) SA 410 (T).

50. 1958 (1) SA 616 (A) at 621.

51. See *R v Sungayi* 1964 (3) SA 761 (SRA).

52. 1932 WLD 16.

53. 1981 (1) SA 460 (C); see also the discussion in Du Toit et al *Commentary* at 24-78.

wrongly, to be able to bring about or influence the threatened disadvantage or promised advantage.

It should be noted that the Act does not have a list of persons who should be treated as a person in authority. It is my opinion that an exhaustive list of persons in authority would be impossible to produce. Consequently each given set of facts is the decisive aspect in determining whether the person who made the threat was in authority or not.

In *S v Robertson*⁵⁴ the court gave examples of these classes of persons, which include: "...enigiemand, of hy amptelike posisie beklee aldan nie, wat mate van outoritiet, bv. dié van vader teenoor seun, of oom teenoor neef of werkgewer teenoor werknemer..."⁵⁵

2.1.3.4 Requirement of voluntariness in section 219A of the Act

It has been held that the approach in section 219A, when it requires that an admission should be proved to have been "voluntarily made" is an actual codification of the common-law position.⁵⁶

In *Peter's* case the accused had, prior to the commencement of the criminal case, written a letter to one of the state witnesses which included an admission. The defence objected to the admissibility of this letter on the ground that it was made involuntarily after the accused was coerced by other prison gang members to write the letter. The court a quo, through Jones J, restricted the meaning of freely and voluntarily to mean that even though the accused proved that he was influenced; such influence was nonetheless not coming from a

54. 1981 (1) SA 460 (C).

55. Op cit at 467B.

56. See *S v Peters* 1992 (1) SACR 292 (E).

person in authority and the alleged admission was admitted into evidence. Undoubtedly, this interpretation by the court of what is meant by freely and voluntarily is in my view erroneous and opened the court's judgment to some criticism.⁵⁷ There are two issues that clearly suggest that the reasoning in *Peters's* case was wrong. Firstly, it deviated substantially from the Appellate Division's approach as stated in *S v Yolello*⁵⁸ to the effect that a person in authority is anyone whom the person might reasonably suppose to be capable of influencing the course of the prosecution; and in this context, the influence exerted by prison gang members, some of whom were prison warders, could justifiably be treated as influence from a person in authority. Secondly, the requirement of voluntariness does not differ in its application to admissions and confessions, except that in the latter category, there is an additional requirement of absence of undue influence.

2.2 CONFESSIONS

2.2.1 Background

A confession can be referred to as an extra-judicial admission because it is a statement made by a person against his own interest outside a court of law.⁵⁹ Its importance in a criminal trial depends largely on the accused's decision to testify or not to testify during the course of his trial. If the accused testifies, it becomes relevant to his credibility as a witness if he contradicts the contents of the confession with the oral evidence. If the accused does not testify, then the admission in evidence of the confession can be regarded as an exception to the

57. See Schwikkard, PJ "Admissions and the requirement of voluntariness" (1992) 3 SACJ 351-353.

58. 1981 (3) SA 1102 (A).

59. This fortuitous occurrence is sometimes described as "eavesdropping" and discussed in full by Raitt *Evidence* (2001) at 304.

rule against hearsay.⁶⁰

The first clear definition of a confession was offered by De Villiers ACJ in *R v Becker*,⁶¹ in which he defined a confession as “an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law.”⁶² This definition include a number of aspects that warrants comment. Firstly, as the judge himself remarked, any concession made by the accused in relation to the offence he is facing, which if made before a court of law would not amount to a plea of guilty should not be treated as a confession.⁶³ Secondly, the definition implies

60. Above footnote 59 at 305.

61. 1929 AD 167. See also the evolution of this concept of confessions in Wolchover *The exclusion of improperly obtained evidence* (1986) at 24-25. See the definition and meaning of a confession in Heydon *Cases and materials on evidence* (1975) at 168 in which he describes a confession as “a statement by the accused in which he admits committing an offence, or admits some fact that goes to show he committed an offence.”

62. *R v Becker* 1929 AD 167 at 171. See also a full explanation of why confessions are believed to rank highest in the scale of evidence in Kassin and Wrightsman *The psychology of evidence and trial procedure* (1985) at 67 where the authors explain the two fundamental reasons why confession evidence rank high in the scale. The first is the astonishing frequency in which they are used in courts and secondly the impact it can single-handedly exert on the defendant’s fate. See also a definition of a confession in Heydon *Cases and materials on evidence* (1975) at 168.

63. See the finding by De Villiers ACJ in *R v Becker* 1929 AD 167 at 171 when he said: “The admission by an accused of facts which, when carefully scutinised and may be laboriously pieced together, may lead to an inference of guilt on the part of the accused, however, consonant that may be with the meaning of the term “confession” in the abstract, is not a confession within the meaning of the Act.”

that a statement by the accused admitting towards having committed on offence, but which does not exclude the possibility of a legal defence can not qualify as a confession. This aspect was decisively explained in *S v Yende*,⁶⁴ in which the court emphasised the need to determine whether a statement is indeed a confession before the question of admissibility is looked at.

The court emphasised the need to adopt an objective approach to determine whether a statement is indeed a confession. Put differently, what is of importance is not what the declarant had intended in his statement, but whether the alleged statement unequivocally admits guilt. However, the subjective factors may only assist to ascertain the meaning of a statement.⁶⁵ Thirdly, the definition of a confession implies that if there is doubt as to whether all elements of the offence are admitted, such statement cannot and should not be used as a confession.⁶⁶

The objective approach means that if a person is charged with an offence that, for example, requires intention, the making of a statement which does not include intention, even if the actual act is admitted, shall disqualify the statement from being treated as a confession. This situation was explained in *S v Mofokeng*.⁶⁷ The court was faced with evidence emanating from a witness to the effect that the appellant had indicated where the alleged snatched bag was.

64. 1987 (3) SA 367 (A).

65. See in this regard *R v Duetsimi* 1950 (3) SA 674 (A) at 678H-679A, which is authority for the proposition that surrounding circumstances which put the statement in its proper setting and which help to ascertain the true meaning of the words used should be looked at as a tool of determining whether the statement would amount to a confession or not.

66. See in this regard Du Toit et al *Commentary* at 24-51 where the authors concluded that a confession "...is therefore an extracurial admission of all elements of the offence charged."

67. 1982 (4) SA 147 (T).

The question to be determined was whether the statement made was indeed a confession. The court stated that even if the alleged statement was made, the circumstances surrounding the confrontation at appellant's house were such that, in the view of the court, it did not amount to an unequivocal admission of guilt, and could consequently not be regarded as a confession. One of the main reasons why it is of vital importance to determine whether an alleged statement would amount to a confession or an admission is surely to avoid ambiguous concessions by an accused leading the courts to order unnecessary trials within a trial to determine the admissibility of a statement which would not even amount to an admission or a confession.⁶⁸

In my opinion, people rarely make false confessions in ordinary circumstances. However, most confessions are not made in ordinary circumstances, but in the face of hostile and intolerable questioning by agents of the state in a potentially hostile environment. It is this understanding that causes them to be checked against rigid requirements of admissibility and once they pass those assessment criteria, they become the best possible evidence for the prosecution and frequently result in convictions. Perhaps one needs to highlight some of the reasons advanced why involuntary statements should be excluded from the reading of the common law engraved in the statement by Innes CJ in *R v Barlin*,⁶⁹ which effectively gives the first reason for exclusion to be the danger of them being untrue. The second reason is that even if the statement is true, it is unjust to convict an accused on a statement that has been unfairly obtained.⁷⁰

One feature of a confession which makes it an interesting piece of evidence is the provisions of section 219 of the Act which stipulates that "...[n]o confession made by any person shall be admissible as evidence against another person."

68. See Uglow *Evidence: text and materials* (1997) at 44-45.

69. 1926 AD 459 at 462.

70. Hoffmann & Zeffertt *Law of evidence* at 216.

The importance of this feature was emphasised by Mthiyane JA in *S v Makeba*⁷¹ in which the trial court had used a confession by one accused as corroboration to convict the other accused. Mthiyane JA rejected the approach followed by the trial court and emphasised that “[t]he use of Mbongqi’s confession as corroboration for Skhumbuzo’s evidence was a fatal flaw in the assessment of his evidence.”⁷² The Supreme Court of Appeal found that even an indirect use of a confession for purposes of corroboration is procedurally unacceptable.⁷³ Because it was found that the trial court had relied on a confession by another accused and used it as corroboration against another accused, the conviction and sentence were set aside.

2.2.2 Features that differentiate confessions from other forms of admissions

The effect of an admission in evidence and the effect of a confession is different. Whilst it is clear through the explanation given above that since a confession is a specie of an admission, some of its features may be identical, but this part of my study is aimed at highlighting those features that make a confession different from other forms of admissions. The first and arguably the most important difference is that a confession may, by virtue of the provisions of section 209 of the Act, lead to a conviction.

The relevant section provides:

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if

71. 2003 (2) SACR 128 (SCA).

72. Op cit at 133c-d.

73. This ruling endorsed an earlier ruling by the same court in *R v Baartman* 1960 (3) SA 534 (A) at 543B-D in which it was stated that the use of a confession which directly or indirectly implicates the other accused as a form of corroboration is a gross irregularity.

such confession is confirmed in a material respect or where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.⁷⁴

However, an admission can also lead to a conviction if the fact admitted was the only fact to be proved by the state in order to obtain a conviction. It is still the right of an accused who has made an admission to explain it away and to convince the trial court why it should not be relied upon. This is made clear by the provisions of section 220 of the Act which explain the procedural effect of an admission. In essence, if an admission is made, it merely relieves the State from the duty of proving such admitted fact through other evidence. It becomes sufficient proof in respect of such admitted fact only. The section is clear and does not need clarification, and it reads: "An accused or his legal adviser may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact."⁷⁵ The second feature that differentiate a confession from other forms of admissions is the requirement of admissibility in respect of each. Apart from constitutional requirements of admissibility, which are similar for all admissions, including confessions, statutory requirements for admissibility are more stringent in case of confessions than they are in case of other admissions.

It is in this context that one understands why confessions are always referred to as a specie of admission, albeit unique, which conform to certain rigidly defined

74. This section concentrates on the end result or effect of a confession in a criminal trial. Other foreign legislations include a definition of a confession; for instance, section 82(1) of the English Police and Criminal Evidence Act of 1982 defines a confession as: "any statement wholly or partly adverse to the person in authority or not and whether made in words or otherwise."

75. This aspect is explained in full in item 2.1.1 above.

requirements.⁷⁶

2.2.3 Statutory requirements of admissibility

2.2.3.1 Introduction

Section 217 of the Act makes provision for three major requirements to be complied with before a confession can be admitted into evidence. In addition to these requirements, there is provision for a fourth requirement which is only applicable in certain circumstances. The relevant part of section 217(1) provides as follows:

Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.

These requirements are now briefly discussed separately hereunder.

2.2.3.2 Sound and sober senses

This requirement creates little problem in practice since its meaning is self-explanatory. What is of importance is not that the accused had no pain, but is whether his state of mind was of such a nature that he was in sufficient possession of his own understanding so as to know what he was talking about.⁷⁷

76. See a discussion of the importance of a confession and why its requirements for admissibility are quite stringent in Kassin and Wrightsman *The psychology of evidence and trial procedure* (1985) at 188, and also Stone *Evidence: its history and policies* (1991) at 329.

77. *R v Ramsammy* 1954 (2) SA 491 (A).

The mere fact that an accused person made an alleged confession when he was drunk does not in itself mean that he was not in his sound and sober senses, save in situations wherein he was too drunk to appreciate what he was saying.

In *R v Mtabela*,⁷⁸ the appellant made a confession wherein he alleged that he had hallucination regarding termites. The court a quo concluded that although such position might have been present, he answered all questions in a manner that suggested he was in his sound and sober senses and accordingly accepted the confession, based on an understanding that the signed text of the Act is in Afrikaans and uses the words: “by sy volle verstand.”

2.2.3.3 Freely and voluntarily

There is no statutory definition of what is meant by “freely and voluntarily” as specified in section 217 of the Act and Du Toit et al⁷⁹ hold the view that the inclusion of the words, freely and voluntarily was a codification of the common law in terms of which a statement is free and voluntary if it has not been induced by any promise or threat from a person in authority.⁸⁰

A voluntary statement was defined by Lord Justice-general Thompson in *Chalmers v H.M Advocate*⁸¹ in which he stated as follows:

A voluntary statement is one which is given freely, not in response to pressure and inducement and not elicited by cross-examination. This does not mean that if a person elects to give a statement, it becomes

78. 1958 (1) SA 264 (A).

79. Du Toit et al *Commentary* at 24-55. See also the American approach to what is meant by involuntary confessions in Reynolds *The theory of the law of evidence as established in the United States* (1983) at 32.

80. See the discussion under 2.1.3 above.

81. 1954 J.C. 66.

inadmissible because he is asked some questions to clear his account of the matter up, but such questions must not go beyond elucidation.⁸²

In *S v Mkhwanazi*⁸³ the court concluded that confessions extracted from accused persons after persistent interrogation should be viewed suspiciously. If such questioning led to the impairment of accused's exercise of free will, the resultant confession is inadmissible in evidence. The fundamental reason why involuntary confessions should not be admitted in evidence was stated by Lord Hailsham in *Wong Kam-ming v The Queen*⁸⁴ in which he concluded as follows:

Any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of potential unreliability of such statements, but also and perhaps mainly because in a civilised society it is vital that a person in custody or charged with offences should not be subjected to treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the Court should continue to insist that before extra-judicial statements can be admitted into evidence, the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary. For this reason it is necessary that the defendant should be able and feel free either by his own testimony or by other means to challenge the voluntary character of the tendered statement. If, as happened in the instant appeal, the prosecution were to be permitted to introduce into the trial, the evidence of the defendant given in the course of the voir dire, when the statement to which it relates has been excluded whether in order to supplement the evidence otherwise available as part of the defendant's case, the important principles of public policy to which I have referred

82. Op cit at 87.

83. 1966 (1) SA 736 (A).

84. 1980 AC 247.

would certainly become eroded possibly even to vanishing point.⁸⁵

In this context one is able to see that this requirement of voluntariness is the same as the one applicable in other admissions.⁸⁶ In situation where the accused's guilt is to be based only on the confession, courts of law are cautioned to be particularly careful in assessing the question whether the confession was made freely and voluntarily. This is illustrated by the reasoning of the Supreme Court of Appeal in *S v Zulu*.⁸⁷ In casu, appellants were convicted of murder and attempted murder. The first appellant had, prior to commencement of the main trial made a confession after an intensive three session interrogation, which was reduced to writing by a magistrate. During the main trial, the admissibility of the confession was challenged by the defence on the basis of it having been involuntarily obtained. A trial within a trial ensued and the confession was eventually admitted. On appeal, the defence maintained that such interrogation had unduly influenced the accused to make a statement.

The Appeal Court relied heavily on the analysis of the effect of lengthy interrogation by Williamson JA in *S v Mkhwanazi*,⁸⁸ and quoted his reasoning with approval when he stated that

[t]he mentality and make up of the person being examined, the manner and personality of the interrogator and the methods adopted by him can

85. Op cit at 261. See a full discussion of the rationale for excluding involuntary confessions in Tapper *Cross on evidence* (1985) at 336-339, and the earlier Australian decision at *Bunning v Cross* 1978 19 ALR 641 at 659 in which the court stated that "...[i]t is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it."

86. See the discussion under item 2.1.3.1 above.

87. 1998 (1) SACR 7 (SCA).

88. 1996 (1) SA 736 (A).

each have a bearing or any possible influence flowing from the interrogation. Obviously a Court called upon to decide whether or not a statement made consequent upon such an interrogation was unduly influenced thereby would consider all such aspects if it appears possible that some influence or persuasion might have been present.⁸⁹

The court emphasised the need to look into surrounding circumstances and concluded that in casu, the intervals between those sessions of interrogation enabled the first appellant to reflect upon himself and was therefore making a statement freely and voluntarily. However, it is important to note that in appropriate circumstances, lengthy interrogations can be a decisive factor leading to a conclusion that a statement was not made freely and voluntarily. Secondly, the court then emphasised the need to be particularly careful in assessing a confession if it is the only evidence against the suspect, specifically because in *Zulu's* case, there was no evidence implicating the first appellant other than the alleged confession.

Thirdly, the court of appeal emphasized the effect of the admissibility of such a statement and went on to remark that "...[t]he admission of a statement does not however imply that the statement is necessarily reliable..."⁹⁰ In other words it is still the duty of the court to decide what weight should be attached to such statement. For one to understand this reasoning clearly, it is important to note that although the appeal court made the ruling after the ruling in *S v Zuma*,⁹¹ the court had to apply the law as it stood prior to the coming into operation of the interim Constitution.⁹²

89. Op cit at 746H-747A. See also in this regard Cowsill and Clegg *Evidence: law and practice* (1985) at 149-151.

90. Above footnote 87 at 13g-h.

91. 1995 (1) SACR 568 (CC), which effectively declared the provisions of section 217(1)(b)(ii) to be inconsistent with the Constitution and therefore invalid.

92. The interim Constitution came into operation on 27th April 1994.

This concept of voluntariness should be looked at bearing in mind the differences between a situation in which an accused falls into a trap of his own making and a situation of entrapment. The first scenario occurs fortuitously whereas the latter is deliberate. Because of this difference, a confession made by an accused person to a co-accused which is overheard by a police officer can still be regarded as a “voluntary confession” and admissible in evidence.⁹³

2.2.3.4 Absence of undue influence

When determining whether or not the decision by the accused was unduly influenced, such a determination is one of objective in nature and pre-dominantly factual. The aim is to assess if there might have been external impulses which swayed the confessor’s will and the resultant confession bears upon it or them. In *S v Ananias*⁹⁴ the court stated that although the test formulated appears objective, the determination whether the accused who made a statement was unduly influenced is easier when approached subjectively, because “...it is the actual effect of the external impulses on the will of the accused’s and not the calculated effect which the Court has to decide.”⁹⁵ The focus of the determination is whether or not the confessor’s will was swayed by external impulses improperly brought to bear upon it which negative his freedom of volition.⁹⁶

93. Raitt *Evidence* (2001) at 316-318.

94. 1963 (3) SA 486 (SR).

95. Op cit at 487F. See a further explanation of what is meant by absence of undue influence in Reynolds *The theory of the law of evidence as established in the United States, and of the conduct of the examination of witnesses* (1983) at 30-31.

96. See in this regard a similar approach adopted by Winn LJ in *R v Richards* (1967) 1 All ER 829 CA at 833 in which he stated that whatever the nature of the inducement so made and however trivial it may seem to the average man to have been, such an inducement will be at least capable of rendering the-

However, in *S v Mpetla*,⁹⁷ Williamson J held the view that the test should be subjective and stated that "...[i]t is his will as it actually operated and was affected by outside influences that is the concern..." thereby holding the view of the subjective test in contrast to the view adopted earlier by Van den Heever JA in *R v Kuzwayo*.⁹⁸

In *S v Nyembe*⁹⁹ the court however rejected the argument by the defence that the promise offered by the investigating officer to give the accused benefits which included bail did amount to undue influence. The court stated that what is of importance in determining whether or not there was undue influence is to read the statement as a whole and, in casu, the document never suggested any undue influence that may have been exercised on the accused. It is in this context that both the objective and subjective tests can yield the same result, but when an objective test is used, it becomes even more difficult for the prosecution to convince the court that there is no reasonable possibility that external forces did in fact play a role in obtaining the resultant confession.

The Supreme Court of Appeal, in its recent judgment in *S v Ndika*,¹⁰⁰ clearly explained what is meant by undue influence in section 217(1) of the Act and Marais JA explained it as follows:

A self-induced expectation of a benefit which expectation is persisted in even in the face of both refusal by the State or its functionaries to commit itself to extending it and an admonition by a magistrate that the prospect

statement made inadmissible. It will have that effect unless in a given case it becomes clear beyond a reasonable doubt that it did not operate at all on the mind of the person to whom it was made.

97. 1983 (1) SA 576 (C) at 585B.

98. 1949 (3) SA 761 (A) at 768.

99. 1982 (1) SA 835 (A).

100. 2002 (1) SACR 250 (A).

of any benefit should be eliminated from one's mind, cannot qualify as an influence which is undue within the meaning of section 217(1) of the Criminal Procedure Act 51 of 1977. Nor is it one which renders the admission of a statement made as a consequence of it unfair and therefore unconstitutional.¹⁰¹

Whilst each case depends largely on its own facts, some of the circumstances that courts have regarded as having an undue influence on the accused are briefly discussed hereunder.

2.2.3.5 Non-compliance with judges' rules

These are rules which were drafted in 1931 as an aid to police officers as to the standards expected of them when dealing with suspects. These rules are purely administrative in nature but a flagrant disobedience of such rules may render a statement inadmissible.¹⁰²

2.2.3.5.1 Youth

Procedural laws expect juveniles to be treated in a manner befitting their ages. This include providing a guardian or a parent before incriminating statements are taken. This is particularly important when deciding whether accused of a particular age group could have understood the explanation of rights given to them; because if there is no indication through evidence that they were mentally sufficiently developed to understand the explanation, the courts would view the situation as if no rights were explained at all.¹⁰³

2.2.3.5.2 Detention¹⁰⁴

101. Op cit at 255e-g.

102. See *S v Mphetha* 1983 (1) SA 576 (C) at 591A.

103. Du Toit et al *Commentary* at 24-60.

104. See a further discussion of these factual situations and how the courts

As stated in *S v Christie*¹⁰⁵ the court would subjectively assess the effect of a particular detention on a specific accused to determine if it had an influence on the resultant making of an incriminating statement.

2.2.3.6 Additional requirement for confession made before a peace officer

Over and above the three requirements discussed above, there is an additional requirement which is only applicable to those confessions made before a peace officer. Section 217(1)(a) requires such confessions to be confirmed and reduced to writing in the presence of a magistrate or justice. To place this additional requirement in proper perspective, the requirement incorporates a number of issues that require extensive comment.¹⁰⁶ Firstly, the requirement only comes into picture once the confession is made to a peace officer. Since some police officers are justices of the peace,¹⁰⁷ they are entitled to take confessions. As stated in *S v Latha*¹⁰⁸ the practice of taking an accused person to confess before a senior police officer who is also a justice of peace should be discouraged because it may open the process of taking confessions to abuse. Although the only genuine purpose of inclusion of this additional requirement appears to have been the protection of the accused, it is less effective because of its broadness.

2.3 Constitutional requirements

deal with them in Du Toit et al *Commentary* at 24-59 until 24-64.

105. 1982 (1) SA 464 (A).

106. For a detailed explanation regarding the persons who are regarded as peace officers or justices and the procedure how a confession is taken, see Du Toit et al *Commentary* at 24-91.

107. Section 4 of the Justices of the Peace and Commissioners of Oath Act 16 of 1963 includes commissioned members of the South African Police Service in the category of justices of the peace.

108. 1994 (1) SACR 447 (A).

2.3.1 Background

The statutory requirements for admissibility of confessions and admissions has been given an added protection by the inclusion in our Constitution of another ground upon which evidence may be excluded which was obtained in compliance with these statutory requirements. Section 35(5) of the Constitution provides: “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.”

The fundamental principle embodied in section 35(5), which is to exclude evidence unconstitutionally obtained despite its relevance, has been observed in other criminal justice systems¹⁰⁹ before our Constitution was adopted. Our Constitution however resembles the Canadian Charter more than any other country. The major principle contained in section 35(5) of the Constitution is materially similar to the grounds of exclusion contained in section 24(2) of the Charter which provides that

[w]here... a court concludes that evidence was obtained in a manner that infringed or denied any rights 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.

Both these sections show constitutional attempts to provide broad guidelines to balance conflicting interests which come into play when the admissibility of evidence is challenged on the basis that it was obtained in breach of

109. See in this regard the explanation by Oaks “Studying the exclusionary rule in search and seizure” (1970) 37 *University of Chicago Law Review* 665-760 at 756, which clearly reflects the American judicial approach in the protection of the American Bill of Rights.

constitutional rights.¹¹⁰ There are a number of important issues in support of both the inclusionary and exclusionary approach, which makes the balance even more complex to deal with.¹¹¹

2.3.2 South Africa's constitutional position prior to introduction of section 35(5) of the Constitution

2.3.2.1 Introduction

The period after the adoption of the interim Constitution presented its own unique challenges in as far as the admissibility of unconstitutionally obtained evidence is concerned. This was primarily because there was no specific inclusion of a specific exclusion guideline in the interim Constitution. This was only introduced by section 35(5) of the Constitution.¹¹²

110. Schwikkard et al *Principles of evidence* at 171. See also in this regard an explanation of these conflicting rights by Zuckermann *The principles of criminal evidence* (1989) at 345-6, when he stated that if court always admits illegally obtained evidence, it will be seen as confirming the malpractice of law-enforcing agencies; and if it always excludes it, it will be seen as an abandonment of its duty to protect society from crime, and also *S v Shonge* 1998 (2) SACR 321 (T) at 340a-d.

111. Schwikkard et al *Principles of evidence* at 173-178.

112. The period after adoption of the interim Constitution differs materially from the period prior to the adoption of the interim Constitution because there had been no bill of rights, which led courts to prefer an inclusionary approach, as shown by Gardiner JP in *R v Masunya* 1927 CPD 181 at 182, when he stated that ... “[b]ut one must bear in mind the sanctity which the Americans attach to their Constitution. We have not that Constitution here, and that authority is not applicable.”

2.3.2.2 Principles followed by courts in deciding admissibility of unconstitutionally obtained evidence.

The fundamental principle which the courts used in excluding evidence which met all the requirements of admissibility as set by section 217 of the Act, or where applicable, section 219A of the Act, had been the commitment to protect an accused's right to a fair trial, which was embodied in section 25(3) of the interim Constitution. The importance of this right to a fair trial became the basis of the decision by the constitutional court in *S v Zuma*.¹¹³ In casu the constitutional court had to decide whether the provisions of section 217(1)(b)(ii)¹¹⁴ of the Act were in breach of the accused's right to a fair trial. The constitutional court found that principles of common law required that a confession be admissible in evidence only if it had been given by the accused voluntarily. This element of "voluntariness" forms an integral part of the right to a fair trial, which includes the right to remain silent. Upon analysing the provisions of section 217(1)(b)(ii), which included a reverse onus provisions, the court

113. 1995 (1) SACR 568 (CC). See also *S v Agnew* 1996 (2) SACR 535 (C) specifically at 541 e-f where Foxcroft J stated that "[i]t would be farcical to insist on a high standard of fairness in the courts while at the same time tolerating a low standard of fairness in the judicial process prior to an accused reaching the court. What courts are ultimately concerned with is justice and the right of an accused person to a fair trial."

114. The section contained a reverse onus and provided that a confession would "...be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. If it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

concluded that the provisions of this section were irreconcilable with the presumption of innocence and therefore was in breach of the accused's right to a fair trial. Consequently the section was declared invalid.

The importance of upholding this right to a fair trial is even acknowledged by the majority of international human rights instruments.¹¹⁵ Because the concept of a fair trial is indeed wide, it eventually led to different approaches.¹¹⁶

This commitment to protect an accused's right to a fair trial was evident even prior to the adoption of the interim Constitution; to an extent that one can conclude that the endorsement in section 25(3) of the interim Constitution of an accused's right to a fair trial was an extension, albeit a necessary one, of the common law discretion which courts had to exclude evidence if its admission

115. For example, section 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; section 10 of the Universal Declaration of Human Rights and section 7(1) of the African Charter of Human and People's Rights. See also in this regard Cachalia et al *Fundamental rights in the new Constitution* (1994) at 83-84.

116. In *S v Gasa* 1998 (1) SACR 446 (D) Howard JP rejected evidence of a pointing out and other admissions emanating from such pointing out after it was found that the accused were not informed of their right to have legal representatives appointed even at state expense. By contrast, Strydom J, in almost an identical situation in *S v Malefo* 1998 (1) SACR 127 (W), concluded that although there was no evidence to the effect that the accused were informed of their right to legal representation, he nevertheless admitted such evidence. See also a discussion of trial fairness by Wood-Bodley, MC "Unconstitutionally obtained evidence-A study of entrapment" (1997) 114 SACJ 108-133 at 133.

would result in an unfair trial. The Canadian decision in *R v Collins*¹¹⁷ and the subsequent decision in *R v Stillman*¹¹⁸ give a picture of factors that are always looked at to determine whether an accused's right to a fair trial has been violated or not. Firstly, it is important to determine whether such evidence would be obtainable from an alternative source. Secondly it should be determined whether such evidence would inevitably have been discovered. If it is established that disputed evidence could have been obtained from an alternative source or that the evidence would inevitably have been discovered, the admission of such evidence obtained in breach of a constitutional right becomes likely. Similarly, our courts have during the operation of the interim Constitution provided a number of important guidelines to explain this right to a fair trial and circumstances under which its breach would result in exclusion of evidence.¹¹⁹

2.3.3 The South African law after the introduction of section 35(5) of the Constitution

2.3.3.1 Introduction

In essence, section 35 is a qualified exclusionary rule which gives a clear directive to our courts to exclude any evidence that has been obtained in a manner that violates the Bill of Rights. The section provides that

[e]vidence 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.

117. 1987 28 CRR 122 (SCC), which explains the Canadian approach to a determination whether a particular violation indeed affected an accused's right to a fair trial.

118. 1997 42 CRR 189 (SCC).

119. *S v Motloutsi* 1996 (1) SACR 78 (C) and *S v Mayekiso* 1996 (2) SACR 298 (C).

The purpose of the constitutional directive contained in this section is to ensure that evidence obtained in a manner that violates the Bill of Rights are excluded. Within this directive, a duty and a discretion is immediately cast upon a court of law. The duty is to ensure that once either of the conditions spelt in the section is present, then the court should exclude such evidence. The discretion relates to the actual determination of whether these conditions are present.¹²⁰ Therefore, the peremptory nature of the directive contained in section 35(5) is suspensive in nature. The directive becomes operational once either of the two consequences spelt in the section would result.¹²¹ Although the two consequences referred to in the section may overlap, what is important is that it is not necessary before evidence is excluded that both consequences should be present.¹²² The use of the word “or” instead of “and” confirms this view.

A proper interpretation of section 35(5) should not rely heavily on a strict causal link between the violation of a constitutional right and the resultant unfair trial. In this context, the emphasis of a causal link in *S v Soci* is according to my view, erroneous. In casu, Erasmus J emphasised that the determination of whether the admissibility of evidence would render the trial unfair or otherwise be detrimental to the administration of justice should be dependent on the causal link. In this

120. *S v Soci* 1998 (2) SACR 275 (E) at 294c-e in which it was stated that the provisions of section 35(5) becomes operational once any of the two consequences identified in this section would result.

121. Schwikkard et al *Principles of evidence* at 201.

122. This overlapping is acknowledged by Steytler *Constitutional criminal procedure* at 378 when he says: “The test relating to the fairness of the trial is a specific manifestation of this broader enquiry; to have an unfair trial is demonstrably detrimental to the administration of justice. Having said this, it should be emphasised that section 35(5) has created two tests which should be kept separate: rules applicable to one another are not necessarily applicable to the other.”

regard, Erasmus J concluded that: "...In our view, the issue must therefore be decided on the basis that there was a causal or link between the infraction of the right and the accused's pointing out."¹²³

2.3.3.2 The first test provided by section 35(5): Rendering trial unfair

The inclusion of this consequence of an "unfair trial" in section 35(5) presents a need to explain what an unfair trial in this context is and how courts have determined this issue after the coming into operation of section 35(5). It is still important to keep in mind what I discussed on the approach of the courts in dealing with this complex issue during the operation of the interim Constitution.¹²⁴

The concept of a fair trial is indeed wide and needs a careful interpretation, as stated in *S v Dzukuda*¹²⁵ by Ackerman J as follows:

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

123. *S v Soci* 1998 (2) SACR 275 (E) at 279a. See in this regard the Canadian approach in disregarding a strict causal link in *R v I* 1993 19 CRR (2d) 156 (SCC).

124. See item 2.3.2.2 above.

125. 2000 (2) SACR 443 (CC).

considerations of dignity and equality.¹²⁶

It is clear that the specified components of the right to a fair trial mentioned in section 35(3)(a)-(o) are not exhaustive. This view is confirmed by the preamble to this subsection which uses the phrase...“which includes the right...”¹²⁷ Because the list is not exhaustive and the fact that the section does not spell out whether the fairness or otherwise is aimed at the accused or includes the prosecution, it is my view that fairness referred to herein refers to both parties to a criminal trial. There are a number of issues that are relevant and are used as a guide to the court in its determination of whether the admission of evidence would render a trial unfair. Amongst these issues are the questions of the courts’ discretion, the nature of the evidence and the nature of the violation.

2.3.3.2.1 Fairness and discretion

The broadness of the right to a fair trial shows that the court still has a discretion to decide whether the admission of impugned evidence would render the trial unfair. This is a discretion to be exercised based on the prevailing facts of each case.¹²⁸ The fact that there might have been a violation of an accused’s constitutional right does not automatically render the evidence inadmissible. The court still has a discretion to look into the facts of each case and make an

126. Op cit at 456*b-d*.

127. See *S v Mthwana* 1992 (1) SA 343 (A) at 387A, which confirms the view that even before the adoption of both the interim and final Constitutions, it was always accepted that a fair trial is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires.

128. *Key v Attorney-General, Cape Provincial Division* 1996 (2) SACR 113 (CC).

appropriate judgment. In *S v Lottering*¹²⁹ a suspect charged murder was arrested at a nightclub and immediately pointed out a person who had the knife used in the murder. The admissibility of this evidence was challenged at the court a quo on the basis that accused was not informed of his right to legal representation prior to making such pointing out; and a trial within a trial was eventually held.

The trial court admitted such evidence and the same argument was repeated on appeal. Levinsohn J upheld the notion of retention of the court's discretion and stated that

[t]o sum up then, circumstances surrounding the pointing-out by the appellant coupled with considerations of public policy show that it is not detrimental to the interests of justice to admit the disputed evidence. It follows, therefore, that the regional Magistrate exercised his discretion correctly. I hasten to say that each case must be judged on its own facts and the decision in this one must not be construed as a licence to police officers to ignore or overlook the constitutional protection afforded to accused persons.¹³⁰

The same criteria of determining whether the admission of evidence would render the trial unfair applies equally to situations in which the disputed evidence was obtained from a person who has not yet been formally charged or detained.¹³¹

129. *S v Lottering* 1999 (2) BCLR 1478 N.

130. Op cit at 1483e-h. See also *S v Soci* 1998 (2) SACR 275 (E) at 289, where Erasmus J concluded that each case depends on its own facts, including the personality and characteristics of the accused.

131. In this regard, Satchwell J in *S v Sebejan* 1997 (1) SACR 626 (W) at 635g-536a stated that “[p]olicy must surely require that investigating authorities are not encouraged or tempted to retain potential accused persons in the category of suspects while collecting and taking statements from the unwary, unsilent, unrepresented, unwarned and unenlightened-

2.3.3.2.2 Fairness and nature of violation

The circumstances surrounding the decision in *S v Naidoo*¹³² shows the extent to which specific violations can result in the exclusion of evidence. In casu the accused were arrested and released due to lack of evidence; and they remained under police suspicion. During this period of their release, police then tapped their telecommunications which included the details of the commission of the offence. After the admission of this evidence was challenged, McCall J concluded that the unauthorised inversion into telephonic conversation breached the accused's right to a fair trial, and remarked as follows:

With respect, I am of the view that since section 35(5) of the new Constitution came into effect, it is no longer open to the Courts to approach the question of admissibility of evidence unlawfully obtained in violation of any right in the Bill of Rights on the basis of the wide discretion referred to by Farlam J in *Motloutsi's* case *supra* based on the majority judgment in *O' Brien's* case, evidence obtained by the State as a result of a deliberate and conscious violation of constitutional (as opposed to the common-law) rights of an accused person should be excluded 'save where there are "extraordinary excusing circumstances."'¹³³

The decision in Naidoo's case incorporates three vital components, all of which are important guidelines to a proper interpretation of section 35(5). Firstly the

suspects and only thereafter, once the damage has been done as it were, to inform them that they are now to be arrested ... No less than an accused is the suspect entitled to fair pre-trial procedures." Although this decision was made in accordance with the interim Constitution, it nevertheless remains important because the present section 35(5) also requires the trial to be fair.

132. *S v Naidoo* 1998 (1) SACR 479 (N).

133. *Op cit* at 499*h-j*.

court drew a distinction between situations in which undue influence led to a confession or an admission and situations in which a telephonic tapping infringed upon an accused's right of privacy. In the latter category, the element of compulsion is minimal. Secondly, the court went further and explained that even if the right to a fair trial was not infringed, the unauthorised tapping would otherwise have been detrimental to the administration of justice.¹³⁴ Thirdly, the judgment confirms my earlier discussion¹³⁵ showing that the two legs contained in section 35(5) of the Constitution are at times overlapping. In *Naidoo's* case, McCall J found that both prohibited consequences contained in section 35(5) was negatively affected by the unauthorised tapping.¹³⁶ The above considerations in *Naidoo's* case should be understood within the context that an individual may waive any of his constitutional rights, and any subsequent violation, even if it led to incriminating evidence, can not affect the admissibility of evidence after the individual has waived a specific right.¹³⁷

134. In this regard, see a discussion in Schwikkard et al *Principles of evidence* at 221, where the author explains that the conclusion of McCall J to the effect that unauthorised telephonic tapping would render the trial unfair can not be supported. The conclusion that such conduct would otherwise be detrimental to the administration of justice appears to be the correct conclusion.

135. See above footnote 122.

136. I shall revisit this aspect of overlapping when discussing the second leg of section 35(5) at item 2.3.3.3 below.

137. The approach adopted by McCall J in *Naidoo's* case was approved and followed in the recent decision of *S v Siyotula* 2003 (1) SACR 154 (E) at 157j-158a in which Jones J concluded that "[t]he question is always: did the irregularity produce a miscarriage of justice? In some cases, the very nature of the irregularity compels the answer yes, in other cases, as in *Naidoo's* case, the answer will depend on the facts." See also De Waal et al *The bill of rights handbook* at 613-614 and-

2.3.3.2.3 Fairness and nature of evidence.

One important factor which indeed plays a role in deciding the first test contained in section 35(5) is to look into the nature of the evidence to be tendered. This classification of evidence approach is rooted in the formulation of the principle by Lamer J in *R v Collins*¹³⁸ in which he concluded that

[r]eal evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession of other evidence emanating from him.¹³⁹

As Schwikkard points out,¹⁴⁰ the formulation of this test in *R v Collins* does not completely cover our South African context because section 35(5) has gone a step further and included a provision directing exclusion even where there is no indication that a trial shall be unfair, provided admission of the evidence would otherwise be detrimental to the administration of justice.¹⁴¹

2.3.3.3 The second test provided by section 35(5): If admission of evidence is detrimental to the administration of justice

2.3.3.3.1 Introduction

S v Mphala 1998 (1) SACR 388 (W) at 399d in which Cloete J concluded that the waiver of rights by an accused should be an informed one.

138. 1987 28 CRR 122 (SCC).

139. Op cit at 137.

140. Schwikkard et al *Principles of evidence* at 226.

141. See *S v Mkhize* 1999 (2) SACR 632 (W), which shows the effect of the *Collins* formulation in our courts.

The second test incorporated in section 35(5) is closely related to the first test, but only comes into picture once the admission of evidence have passed the first test. Put differently, even if the court finds that the admission of evidence would not render the trial unfair, it is still obligatory for the court to determine if the admission of such evidence would otherwise be detrimental to the administration of justice.¹⁴² In this context, the discretion conferred to a court of law in terms of the second test under section 35(5) to exclude evidence that would be detrimental to the administration of justice is discretionary,¹⁴³ and is dependant upon a number of factors, some of which are discussed hereunder.

2.3.3.3.2 Motives of law-enforcing agencies

Assessing motives and actions by law-enforcing agencies that preceded the violation of a constitutional right can assist to determine whether the admission of such evidence would render the trial unfair or not. In *S v Naidoo*¹⁴⁴ McCall J rejected the evidence of an invasion by the police of a telephone conversation between the accused because the police deliberately breached the fundamental right of privacy. In situations where there was a breach of a constitutional right by law-enforcing agencies who were under an honest belief that they were acting within the law, such breach may be condoned and evidence obtained in breach of constitutional right may be admitted.¹⁴⁵

142. Du Toit et al *Commentary* at 24-98B. See also Schwikkard et al *Principles of evidence* at 234 in which the author discusses a number of factors which the court can take into consideration in determining the second test.

143. See *S v Lottering* 1999 (1) BCLR 1478 (N) in which Levinsohn J concluded that there are a number of factors that can influence a court in its assessment of the second test and that each case should depend on its own set of factors.

144. 1998 SACR 479 (N).

145. McCormick, *McCormick on Evidence* (1984) at 507.

There are no rigid principles regarding this and each case would depend on its own set of facts. The acceptance of evidence which was obtained in breach of a constitutional right should not be allowed to an extent of indirectly encouraging police officers to remain ignorant of their legal duties.¹⁴⁶ The admission of evidence obtained in good faith but in breach of a constitutional right was the subject matter in the recent decision of *S v Mansoor*.¹⁴⁷

In casu, a letter written by the first accused was given to the mother of the second accused to be handed to the writer's mother. The mother of the second accused then opened it and eventually gave it to the legal representative of second accused who then applied to hand in it to court as evidence. Legal representatives of first the accused objected on the ground that the letter was obtained in breach of the first accused's constitutional right to privacy. Although Blieden J did not base his decision on section 35(5) of the Constitution, his formulation of the test is actually what section 35(5) requires. He formulated the test as follows: "...Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully appraised of the circumstances of the case?"¹⁴⁸ In this decision, the court concluded that the rejection of the letter would in fact bring the administration of justice into disrepute.¹⁴⁹ Cloete J also emphasised the importance of checking

146. See *S v Motloutsi* 1996 (1) SACR 78 (C) at 87*i*.

147. 2002 (1) SACR 629 (W).

148. Op cit at 631*d*.

149. The interpretation further promotes the purpose of section 39(2) of the Constitution which provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights." See also the Canadian case of *R v Duguay* 1989 1 SCR 93, which confirmed the Canadian approach to the effect that where the police deliberately violated a Charter right in order to obtain incriminating-

the motives of law enforcing agencies in *S v Mphala*.¹⁵⁰

According to the decision in *S v Mphala* the operation of section 35(5) in excluding evidence becomes operational only after there is a constitutional violation. In *Mphala's* case, the investigating officer had obtained a confession from the accused person in breach of the accused's constitutional right to legal representation. The investigating officer proceeded to have the confession taken well knowing that the attorney was on his way to consult with the accused and that the attorney indicated that he would not like any statement to be taken before he consulted with the accused. Because of these bad motives on the part of the investigating officer, Cloete J concluded that: "...I can not accept that the conduct of the investigating officer was anything but intentional. In such a case the emphasis falls on the 'detrimental to the administration of justice' portion of section 35(5)."¹⁵¹

If motives are proved to have been genuine and acceptable in a democratic society, then a court might eventually admit the evidence obtained in a breach of a constitutional right.¹⁵² It should further be noted that good faith itself can be outweighed by other factors to an extent that evidence, obtained in good faith but in breach of a constitutional right, may be excluded. An example of this situation happened in *S v Soci*,¹⁵³ in which the investigating officer used a pro-forma drafted by the South African Police Service as a means to explain the accused's

evidence, the admission of such evidence would tend to bring the administration of justice into disrepute.

150. 1998 1 SACR 388 (W).

151. Op cit at 400*b*.

152. See *S v Madisa* 1998 (1) BCLR 38 (D) at 44*i*-44*c*, in which the court accepted evidence of fire-arms discovered after their knock on the door was disregarded.

153. 1998 (2) SACR 275 (E).

constitutional rights. This form had already been criticised in the earlier judgment of *S v Marx*.¹⁵⁴ Under these circumstances, Erasmus J found that in the interest of system deterrence, the evidence should not be admitted.

2.3.3.3.3 Safety of community

This issue presents little difficulty in practice because in essence, it effectively means that when there are urgent security concerns of the community connected to a particular case, and the evidence at hand appears to have been obtained in breach of a constitutional right, then the fact that there was an urgent security concern would weigh in favour of the admission of evidence.¹⁵⁵

2.3.3.3.4 Seriousness of violation and nature of evidence

Undoubtedly, when the violation is of a less serious nature, the court would not strictly order exclusion, unlike in situations where the violation is gross or deliberate. Closely related to the question of the nature of the violation is the nature of the evidence itself. If the court finds that the same evidence would have been discovered through alternative lawful means, then the exclusion may become academic and unnecessary.¹⁵⁶

2.3.3.3.5 Availability of alternative means

This aspect has been explained by Lamer J in *R v Collins*¹⁵⁷ in a manner that needs no further detailed explanation. He explained it thus:

I should add that the availability of other investigatory techniques and the

154. 1996 (2) SACR 140 (W).

155. *S v Mark* 2001 (1) SACR 572 (C) at 578e.

156. Schwikkard et al *Principles of evidence* at 242.

157. 1987 28 CRR 152 (SCC).

fact that the evidence could have been obtained without the violation of the Charter tend to render the Charter violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of evidence.¹⁵⁸

Our judiciary had on similar occasions adopted the same approach as the Canadian judiciary.¹⁵⁹

158. Above footnote 157 at 158.

159. *S v Mkhize* 1999 (2) SACR 332 (W). Because of the reliance on presence or absence of good faith by the South African judiciary, the determination of admissibility is hardly based on this aspect of the availability of alternative methods alone.

Part "B"

3. TRIAL WITHIN A TRIAL

3.1 Introduction

To explain clearly and concisely the admissibility of evidence adduced in trial within a trial in the main trial, a number of features of a trial within a trial are included. Inter alia, a proper definition of the terminology of a trial within a trial; an assessment of whether the court has a discretion to hold a trial within a trial when a dispute regarding admissibility arises; an assessment of the aim or purpose of a trial within a trial; an assessment of the procedure to be followed in a trial within a trial and finally the features of a trial within a trial that are analogous to a main trial and those that differentiate it from a main trial. The main reason for following this route is because most of these issues are closely linked to the question of admissibility of evidence adduced in a trial within a trial in the main trial and some of the authorities on admissibility were based on these issues.

The term 'trial within a trial' is self-explanatory, referring to an interlocutory trial which occurs during the course of a criminal trial to determine the admissibility of evidence, in accordance with established procedure, in the main trial.

In practice, criminal trials are faced with admissibility of evidence frequently, and in most of these situations, the result is the holding of a trial within a trial. It is always a result of a dispute between the prosecution and the defence regarding the admissibility of evidence that the prosecution intends to use during the course of a criminal trial.

The procedure of holding a trial within a trial developed from ancient times when

the terminology of 'voir dire' evolved.¹ The terminology itself was at its inception used to refer to a special administering of oath which was administered to a witness testifying on issues incidental to the main trial. Although the actual procedure of administering the special oath has since fallen into disuse, the terminology was retained and forms the basic foundation of a trial within a trial.

3.2 The Court's discretion of holding or refusing to hold a trial within a trial

The preliminary background above does not show the circumstances under which a dispute on admissibility of evidence would lead to the holding of a trial within a trial. Put differently, does a trial court have a discretion to decide whether to hold a trial within a trial after a dispute on admissibility of evidence is raised or does the actual dispute on admissibility automatically bind the court to hold a trial within a trial?

In *S v Vilakazi*² the discretion which the trial court has to hold a trial within a trial was shown clearly. In casu, the defence applied for the holding of a trial within a trial to determine the admissibility of evidence from an identification parade. The application was refused by the trial court. The refusal itself carried three important considerations which a trial court has to look at before deciding to hold a trial within a trial.

Firstly, the availability of the forum or mechanism of a trial within a trial does not mean that in each allegation or insinuation of irregularities, even in respect of peripheral pre-trial procedures, a trial within a trial should be held. Secondly, even if the trial court does not hold a trial within a trial, it is still a principle of our law to attach little or no weight to such evidence if it becomes clear during the

1. Bishop *Criminal procedure* (1998) at 55, and see also Wolchover D *The exclusion of improperly obtained evidence* (1986) at 112.

2. 1996 (1) SACR 425 (T).

course of the main trial that irregularities did in fact occur. Thirdly, the principle of ensuring that criminal trials are finalised as soon as possible should not be sacrificed completely by the holding of unnecessary trials within a trial. Taking these considerations in mind, it is my view that the trial court exercised its discretion correctly by refusing to hold a trial within a trial.

The recent decision of *S v Ntzwel*³ further explains this issue of discretion and makes it clearer. In *casu*, an accused who was charged with possession of dagga challenged the admissibility of such evidence on the ground that the search during which the dagga was discovered was illegal. Defence counsel then applied to have the issue of admissibility decided in a trial within a trial. The court *a quo* refused the defence's application to hold a trial within a trial and consequently an appeal was lodged. The Cape Provincial Division ruled that the refusal by the trial court to hold a trial within a trial was a gross irregularity for a variety of reasons.⁴ Firstly, it actually meant that the court *a quo* had accepted or admitted the evidence before the question of its admissibility was decided upon. Secondly, to challenge such evidence the defence attorney would have been obliged to put the accused in the witness box and thus expose himself to general cross-examination on the issue of his guilt. Thirdly, the court *a quo* failed to recognise that the holding of a trial within a trial would have enabled it to establish whether the police had the necessary warrant and whether the

3. 2001 (2) SACR 361 (C).

4. *Op cit* at 364f-365d, wherein Jali J rejected the state's submission to the effect that the decision by the accused not to testify can mitigate in favour of the irregularity of refusing to hold a trial within a trial, and concluded that one cannot condone unfairness or an injustice because of the accused person's choice to exercise his rights enshrined in the Constitution. If the court condoned such irregularity, it would be tantamount to saying an accused person is only entitled to a quota of his rights, and once such quota is reached, the rest can be ignored.

appellant gave permission or not. Fourthly, the failure by the court to hold a trial within a trial encouraged the very mischief which the rule as enunciated in *S v De Vries*⁵ seeks to avoid. In this regard, the trial court exercised its discretion incorrectly, and its refusal to hold a trial within a trial amounted to an infringement of the accused's constitutional right to a fair trial.

The appeal court further indicated that since there was no evidence that could possibly have led to a conviction than the alleged search, this factor alone should have convinced the trial court to hold a trial within a trial to determine in a separate compartment if such evidence was indeed admissible.

As stated in *S v Mofokeng*,⁶ it is incumbent upon the presiding magistrate to cause the trial within a trial to be held if the accused disputes admission of a confession. Put differently, irrespective of whether the accused has specifically requested the holding of a trial within a trial, the presiding magistrate should direct that one be held if issues of admissibility are raised, specifically when the accused is unrepresented. The ruling in *Mofokeng's* case shows that this duty weighs upon both the prosecution and the presiding officer when assisting unrepresented accused. The court relied on the remarks made by Friedman J, in *S v Nieuwoudt*,⁷ wherein the learned Judge remarked as follows:

Dit staan beskuldigde, na my mening, nie vry om keuse uit te oefen ten opsigte van die vraag of verhoor binne verhoor gehou moet word nie. Hierdie is kwessie van prosedure wat in die hande van die Hof berus en nié in dié van beskuldigde nie. Die Hof het plig om toe te sien dat reg en geregtigheid geskied en dat daar nie onreëlmatigheid plaasvind nie, ongeag die houding wat beskuldigde mag inneem. Dit is gevestigde praktyk in ons Howe dat geskilpunte ten opsigte van

5. 1989 (1) SA 228 (A). A detailed discussion of this judgment is dealt below under item 3.3

6. 1992 (2) SACR 261 (O).

7. 1985 (4) SA 510 (C) at 517E-G.

toelaatbaarheid van verklarings wat deur beskuldigde gemaak is, afsonderlik van die skuld van die beskuldigde beslis word.

The essence of the reasoning by Friedman J is that irrespective of whether the accused had asked for a trial within a trial or not, it is a question of procedure which is entirely in the hands of the court. The court further emphasised that trial courts have a duty to ensure that determination of admissibility of pre-trial statements by accused are dealt with in a separate forum not dealing with a determination of guilt. Put differently, if a dispute of admissibility arises, the courts should favour holding a trial within a trial rather than not holding it.

The other consideration which should be looked at before the discretion is exercised is that a trial court should avoid making a detailed preliminary assessment of issues that relates to admissibility of evidence during the course of the main trial. Once the court's attention is drawn to the dispute on admissibility, the court should hold one or refuse to hold one instead of entertaining issues of admissibility in the main trial. This concern was the main reason why the court on appeal eventually set aside conviction and sentence by the court a quo in *S v Ntuli*.⁸

In casu, the appellants were asked by the court a quo whether or not they were forced or influenced to make a statement by any person. One of the appellants replied by saying that when he was taken from his work place by the police, they told him that if he did not speak the whole truth they would hit him. The other appellant however unequivocally said he disputed the statement which the state sought to hand over to the court. The trial court then invoked an unprocedural approach and continued to ascertain from appellants their basis of objecting to the statements in detail during the course of the main trial; thus jointly dealing

8. 1993 (2) SACR 599 (W).

with the question of admissibility in the same forum as a determination of the guilt of the accused. The trial court eventually ruled that those statements which the accused challenged were admissible without holding a trial within a trial and proceeded to convict the accused, from which an appeal was noted against both conviction and sentence.

On appeal, Stratford J concluded that this was a gross irregularity. He stressed that the trial magistrate was in the circumstances bound to hold a trial within a trial, and the mere fact that the accused maintained that the statement is a fake and had been made up by the police did not mean that a trial within a trial need not have been held. In this context, the trial court exercised its discretion incorrectly. It is also of importance to differentiate this decision with the decision by the Namibian Supreme Court of Appeal in *Shikunga's* case.⁹ Whilst both decisions arrived at the conclusions that confessions in each one of them was inadmissible since the procedure that was used to obtain statements were flawed, in *Shikunga's* case, the conviction was upheld on the basis that there was reliable evidence other than the confession which justified the conviction. In *Ntuli's* case, the evidence was presented together in one platform, including evidence on admissibility and evidence regarding determination of guilt, and as a result, the court could not uphold the conviction.

The reasoning in *S v Ntuli* was subsequently followed by the Transvaal Provincial Division in *S v Malope*,¹⁰ where it was held that it is clearly in the court's discretion to decide whether or not to hold a trial within a trial, and each set of facts should be looked at individually. In casu, the accused was charged with unlawful possession of a firearm and ammunition and the state's only evidence against the accused was the confession allegedly made by the accused. The

9. 1997 (2) SACR 470 (NmS).

10. 1999 (3) SA 95 (T).

defence objected in general terms to the admissibility of the evidence and the trial proceeded without the defence formally applying to have the issue of admissibility decided in a trial within a trial. At the end of the state's case it became apparent that evidence of the pointing out was disputable and the defence applied to have a trial within a trial held. The court relied on the Cape Provincial Division's ruling in *Nieuwoudt's case*¹¹ and came to a conclusion that it is still an established principle of civilized criminal procedure to decide issues of admissibility in a trial within a trial.

Of importance is that the court stated that there had to be good reason to deny holding a trial within a trial especially where the state's case rested on the alleged disputed statement or pointing out, which was the factual position in this matter. The court ruled that, in casu, the failure to hold a trial within a trial was a gross irregularity, thus setting aside both conviction and sentence.

This approach effectively endorsed the circumstances in which it may be advisable to hold a trial within a trial as outlined in *S v Mokoena*.¹² The question to be determined in this matter was whether a failure to notify the accused of his rights to legal representation before the holding of an identification parade, amounted to an irregularity which could justify the holding of a trial within a trial. The court ruled that a clear distinction should be made between circumstances wherein the accused is communicating orally or by conduct, as is the case with making admissions, confessions or pointing out and an identification parade. It is because in the latter category, an accused is merely observed, either with or without his knowledge, and there is therefore no danger that evidence emanating from an identification parade may infringe his constitutional rights. Accordingly, the court came to the conclusion that the accused's constitutional right to remain silent and his right against self-incrimination were not infringed by evidence of an

11. 1985 (4) SA 507 (C).

12. 1998 (2) SACR 642 (W).

identification parade. Of importance, the court upheld the notion that although evidence emanating from an identification parade in which the accused is not informed of his constitutional right is admissible, its weight is adversely affected. In consequence of this reasoning, the court refused to hold a trial within a trial.

3.3 Purpose of a trial within a trial

The purpose of a trial within a trial is to determine the question of admissibility of evidence only, and not to determine what value or weight should be attached to such evidence.¹³ This purpose is the cornerstone of the whole process of a trial within a trial. All principles that govern the procedure to be followed in a trial within a trial, including the effect of admissibility of evidence led in the trial within a trial, can only be understood once this foundation is preserved. The purpose was summarised as follows by Nicholas AJA in *S v De Vries*:¹⁴

It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial ... where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt.¹⁵

This explanation of the purpose by Nicholas AJA is to date regarded as the benchmark of a trial within a trial. The explanation itself warrants a number of comments. Firstly, it upholds in itself the accused's right to remain silent in the main trial and, consequently, if a determination of admissibility was done in the

13. See Du Toit et al *Commentary* at 24-66E.

14. 1989 (1) SA 228 (A).

15. Op cit at 233H-J.

main trial, the accused would be faced with difficult choices. The accused would either have to abandon his right to remain silent in order to effectively challenge admissibility of evidence or risk inadmissible evidence being admitted into evidence.

This difficulty was realised in the earlier decision of *Wong Kam-Ming v The Queen*¹⁶ where Lord Hailsham emphasised the purpose of a trial within a trial and said:

To regard evidence given by him on the question of admissibility as evidence in the trial itself would mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a statement or that, to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him.¹⁷

It is not the duty of the court in a trial within a trial to assess whether or not such confession was made at all or whether if it has indeed been made, whether it was made in the terms alleged by the prosecution. Such determination only happens at the end of the actual trial when the evidence as a whole is looked at.

However, before a trial within a trial is held, a determination should be made to decide prima facie whether the alleged evidence would indeed amount to what it is alleged to be, if admitted. In *S v Mokoena*¹⁸ the court indicated that whether particular utterances by an accused person amounts to an admission of guilt (confession) or whether they were intended as such should only be looked at against the background of surrounding circumstances. In varying circumstances, a statement made by an accused person, specifically prior to trial, may be such that on its face value it does not indicate an admission of guilt, whereas taken

16. (1980) AC 247 (PC).

17. Op cit at 257F.

18. 1998 (2) SACR 342 (O).

with the surrounding circumstances, it may be interpreted as an admission of guilt. Secondly it shows that the purpose of a trial within a trial may be sacrificed if a trial within a trial is held to determine the admissibility of a statement and it were to transpire later that the disputed statement does not even satisfy the basic requirement of what it claims to be, such as the requirements of section 217 of the Act in the case of confessions. The relevance of this determination is therefore to ensure that a trial within a trial is held only in regard to those statements which would, if admitted, be what they are claimed to be by the prosecution.

As correctly pointed out by Hoffmann & Zeffertt¹⁹ a trial within a trial is aimed only at a decision whether the alleged statement was made voluntarily, with the accused being in his sound and sober senses, and without having been unduly influenced to make it. It is aimed at insulating the enquiry relating to voluntariness in a compartment separate from the main trial, since it is essential that the issue of voluntariness be decided separately from the issue of guilt. An accused has no right to choose to have the admissibility of a statement tried either at a trial within a trial or at the end of the hearing. Once an accused person challenges the admissibility of evidence, a trial within a trial should preferably be held.²⁰

This helps to prevent a collision or attenuation of two important rights of a criminal accused. The right to elect not to give evidence at the close of the prosecution's case and the right to prevent inadmissible statements from being led in evidence against him. In *S v Ngcobo*²¹ the court ruled that it is now

19. Hoffmann & Zeffertt *Law of evidence* at 200.

20. This is a general rule. In the discussion of discretion under item 3.2 above, I have shown that it is possible for a court to refuse to hold a trial within a trial under the circumstances discussed therein.

21. 1985 (2) SA 319 (W).

permissible for assessors to sit in a trial within a trial.²²

Whilst it is clear that the protection of individual rights of the accused during pre-trial proceedings may differ from one country to another,²³ the overall purpose of a trial within a trial, as will be seen below, is to ensure that none of the accused's fundamental rights are sacrificed by the admission of evidence or part of it which was obtained in breach of any of the accused's rights. Until a fundamental right is waived by the accused, self-incriminating evidence which was obtained in breach of accused's fundamental rights is not admissible. This purpose accords with the long held principle which is also recognised in English law which was summarised in *R v Sparks*²⁴ and quoted with approval by Spencer²⁵ as follows: "...it is better that ten (10) guilty people should be wrongly acquitted than that a single innocent person should be convicted..."

The view that the enquiry at this stage is not on the statement's reliability or its truthfulness, but only on its admissibility in evidence, is also echoed by Elliot.²⁶

22. The amendment was introduced by the Criminal Procedure Amendment Act 64 of 1982. Section 145(4)(b) provides:

If the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone.

23. Hermann, J "The Anglo American as opposed to the Continental approach to criminal law" (1981) *De Jure* at 59.

24. 1964 AC 964.

25. Spencer *Criminal procedure in England: A summary of its merits and defects: the outline of the system* (1995) at 74.

26. Elliot *Elliot & Phipson: Manual of the law of evidence* (1987) at 196. The author relies on the principles laid down in-

3.4 The procedure to be followed in a trial within a trial

3.4.1 Background

To understand the procedure that is followed in a trial within a trial, it is important to take cognizance of the fact that the whole trial within a trial procedure was born out of the jury system, and was explained by court judgments related thereto. For this reason, the procedure in a trial within a trial has to date not yet been legislated, making it arguably the most complex aspect of a trial within a trial, and to a greater extent, the main focus of criticism levelled against the practice of a trial within a trial. In view of the fact that England is the first country to adopt the jury system, a number of features which characterise the procedure in a trial within a trial would resemble the English judicial system.

To put the cases discussed below in proper perspective, it is always important to take a glimpse at the earlier position. As stated by Taylor,²⁷ although it was not a rule of law, it was always practically desirable that a jury be excluded during a trial within a trial.²⁸ This practical desirability was aimed at a complete insulation of the trial within a trial from the main trial, which in this context would mean an attempt to ensure that whatever was heard during a trial within a trial was

Wong Kam-Ming v The Queen (1980) AC 247 (PC) and concludes that although “reliability” is relevant to admissibility, and although the truth of the statement might be thought to have a bearing on its reliability, the accused may not be asked directly whether the statement is true or not.

27. Taylor *Principles of evidence* (2000) at 269.

28. The reasoning behind excluding the jury from participating in a trial within a trial had always been the fear that whilst insulation was aimed at, it could be difficult for any lay person not to transmit what they heard from a trial within a trial to the main trial; albeit unconsciously. This view is also supported by *Mirfield Silence, confessions and improperly obtained evidence* (1997) at 35.

banished from the minds of the jury, specifically in situations where the finding at the end of a trial within a trial is that the disputed evidence is inadmissible.

3.4.2 General principles of procedure to be followed in trial within a trial

As a general rule, questions which relate to the issue of guilt should not be permitted and relevance itself is not enough to justify permission to cross-examine on the contents of a disputed confession. The policy behind excluding confessions which are not made freely and voluntarily cannot be properly served if the offer of an insulated enquiry at the same time presents the accused with the dilemma as to whether to take advantage of the enquiry or not. As a backbone of general principles of procedural to be followed in a trial within a trial, the basic rule (and I submit the most important procedure rule) is that the accused may not be cross-examined during a trial within a trial on the merits of the main charges he is facing.²⁹

Another important principle, which if breached would result in the whole purpose of trial falling into a useless procedural step, is that the contents of a disputed statement should not be placed before the court before the issue of its admissibility is decided upon. If this principle is breached, the trial court commits a gross irregularity which can cause the whole conviction and sentence to be set aside.

The appeal judgment of *S v Gaba*³⁰ clearly shows this principle. In the court a quo a trial within a trial was held to determine the admissibility of a statement made by the appellant. During the trial within a trial the prosecution informed the court that the contents of the statement would, at that stage, not be read out. The trial judge ruled that the statement should be read out and this led to the appeal,

29. A detailed discussion of exceptions to the general rules follows at item 3.4.3.

30. 1985 (4) SA 734 (A).

which challenged primarily the correctness of the procedure adopted by the trial court at the trial within a trial of allowing the statement to be read out before a ruling on its admissibility was made. The appeal court upheld the principle explained above to the effect that the contents of a disputed statement should be withheld until the question of admissibility is decided upon.

The court approved this principle and its application on the earlier case of *S v Mahlala*³¹ and concluded as follows:

The practice followed by some courts... not to have regard to the contents of the confession before the issue referred to has been decided, seems, therefore, to be a salutary one because there is always a danger that if this is not done, the accused may be prejudiced in some way or another...³²

The principles of procedure in a trial within a trial are made complex by decisions which interpreted the same principles differently. The decision in *S v Muchindu*³³ was a clear deviation from this general principle and, justifiably, subsequent decisions of the same court refused to follow it.³⁴

In *Muchindu*, Schutz J allowed the state to lead evidence of pointings out including photographs taken before the question of admissibility was decided upon. In his (Schutz J) opinion, this approach did not contradict any established principle of procedure to be followed in a trial within a trial.³⁵

31. 1967 (2) SA 401 (W).

32. *S v Gaba* 1985 (4) SA 734 (A) at 749H-J.

33. 1994 (2) SACR 467 (W).

34. See *S v Maake* 2001 (2) SACR 228 (W).

35. This approach would only have been procedurally correct if the exceptional circumstances as discussed in *S v Lebone* 1965 (2) SA 837 (A) were applicable. These circumstances are discussed under item 3.4.3 below.

The subsequent detailed analysis by Borchers J in *S v Monyane*³⁶ made it clear that the approach adopted by Schutz J in *Muchindu's* case was erroneous. In *Monyane's* case, the accused contested the admissibility of certain evidence which the state wanted to lead and a trial within a trial was eventually held.³⁷ During the trial within a trial, a witness who was present when three accused made pointings out insisted on telling the court what each accused had pointed out and what each accused had allegedly said on each occasion. The witness persisted in doing so notwithstanding that the judge had requested her not to divulge such details before admissibility was decided upon.

This witness persisted in disclosing the details aided by the state, which submitted that in order to discharge the onus that the pointings out were made freely and voluntarily, the state should be allowed to lead evidence of what was pointed out by each accused, and the state relied on the ruling by Schutz J in *S v Muchindu*. Borchers J rejected this submission and remarked that "...[s]he could not give evidence, firstly, of what each accused had said and secondly, of what they had pointed out on the scene."³⁸ This finding is of crucial importance because of two considerations. Firstly, it upholds the general principle to the effect that the contents of a disputed statement should not be divulged to the court during a trial within a trial before a ruling on its admissibility is made. Secondly, it cleared the uncertainties created by the judgment in *S v Muchindu*.

Borchers J concluded by finding as follows:

It is in my view incorrect to admit the gesture at the trial-within-a-trial while, at that stage at least, excluding the words spoken. By admitting

36.2001 (1) SACR 115 (T).

37.The grounds upon which admissibility was disputed is narrated by Borchers J at 117*g-j* and are not relevant for the purpose of the subject matter of procedure.

38.Above footnote 36 at 123*i-j*.

evidence of gestures made (in other words, the pointing out), the Court would be permitting parts of a confession or an admission to be received as evidence before deciding whether the whole confession or admission was freely and voluntarily made or was inadmissible.³⁹

This general principle draws its backbone from the decision in *S v De Vries*.⁴⁰ During the trial at the court a quo, the accused's confession was challenged on the ground that it was made under threats and a trial within a trial ensued. The accused was cross-examined at length and the record on cross-examination, which covered nearly one hundred pages, only had six pages regarding voluntariness which led to the trial within a trial. The rest of the cross-examination was related to surrounding issues like work, occupation and activities. The defence's objection to the cross-examination on the basis that accused was being cross-examined on the merits was overruled on the acceptance that the accused's credibility had to be tested (which was the contention by the state). It is important that the state did not base its cross-examination on *Lebone's* case.⁴¹ The Appellate Division correctly concluded that such cross-examination was procedurally irregular and went on to say:

It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial...

39. Above footnote 36 at 124*h-i*.

40. 1989 (1) SA 228 (A). Although *De Vries* dealt primarily with the purpose of a trial within a trial, this procedural principle was nevertheless confirmed and the court clearly criticised the deviation from this principle.

41. 1965 (2) SA 837 (A) which is authority for the proposition that if the accused says in a trial within a trial that the contents of his confession was false and that it was told to him by police, then the prosecution could be allowed to cross-examine the accused on the contents of the confession to show that the accused was indeed the source of the information.

Where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt.⁴²

Irrespective of the fact that there was overwhelming evidence against the accused which resulted in the Appeal Court confirming the conviction, the importance of this decision is that it clearly criticised, as an irregular procedure, the attitude of cross-examining the accused during the course of the trial within a trial on issues surrounding merits.

The Court remarked in its finding regarding that practice and concluded as follows:

In the present case the prosecutor in his cross-examination of De Vries in the trial within a trial, crossed the boundaries of an enquiry into admissibility and entered upon an investigation of the merits... [I]t might have been relevant, but the cross-examination was improper and irregular.⁴³

The Court further stated that because of such irregularity, none of the answers given by the accused during such cross-examination was admissible in deciding the question of guilt.

This general principle of not allowing the contents of a disputed statement to be laid before the court before the question of admissibility is decided upon was also followed in *S v Maake*.⁴⁴ In casu the state had, during a trial within a trial

42. Above footnote 40 at 233H-J. See also the same principle in the earlier decision by the same court in *R v Dunga* 1934 AD 233 at 266.

43. *S v De Vries* 1989 (1) SA 218 (A) at 234B-C.

44. 2001 (2) SACR 288 (W).

sought permission to lead evidence of the scenes that were allegedly pointed out before a decision on admissibility was made. The court stated correctly that “[i]f this course is permitted, the court will have evidence placed before it of what the accused pointed out before it has ruled whether that evidence is admissible or not.”⁴⁵ The court approved the general rule confirmed earlier in *Gaba’s case*⁴⁶ to the effect that the contents of a disputed confession or admission may not be placed before the court until the admissibility thereof has been adjudicated upon. Only if ruled admissible may the contents of a document in which a confession or an admission is recorded be placed before the court.

The court further found that the exceptions⁴⁷ to the general rule are only activated when the accused himself takes the stand in a trial within a trial. In *casu*, the court did not even know whether the accused was going to testify in the trial within a trial or not. Put differently, the credibility of an accused person only becomes an issue at a trial within a trial at the stage when an accused himself takes the stand. In this context, it becomes evident why the court went on to remark that there is such repugnance to the admission of incriminating statements which are not freely and voluntarily made, that compliance with applicable procedures, which are peremptory, have to be checked strictly before their contents can be disclosed to the court.

For these reasons, the court refused to follow the reasoning of Schutz J in *S v Muchindu*⁴⁸ of the same court. In *Muchindu’s case*, the court allowed photographs to be shown before admissibility was decided upon, and such approach, as Borchers J found, was incorrect and a gross irregularity in itself. In *Maake’s case*, Borchers J was thus justified in deviating from an earlier decision

45. Op cit at 289g.

46. 1985 (4) SA 734 (A).

47. These exceptions are discussed under item 3.4.3 below.

48. 1994 (2) SACR 407 (W).

of the same court:

As a result of that concession, Schutz J confined himself to the question of why, if a verbal description of the scenes pointed out was admissible, photographs thereof were not ... If no part of the disputed self-incriminatory evidence may be received at this point of the proceedings, photographs thereof may likewise not be received. In my view the *Muchindu* matter, based as it was on the incorrect concession by counsel, was incorrectly decided.⁴⁹

The other principle governing procedure in a trial within a trial is that it is procedurally permissible to have regard to evidence already led in the main trial when the trial within a trial is being dealt with.⁵⁰ There are three considerations which form the basis of this principle. Firstly, a trial within a trial is a one-way glass which permits one to look at the main trial from the trial within a trial but preventing the converse. The second consideration is that a trial within a trial is an evidentiary process within a trial and can not be entirely separated from the main trial. These consideration are shown in the conclusion by Schutz J in *Muchindu's* case to the effect that:

...[o]ne should be prevented from peering into the trial within the trial from the main trial. There are reasons of policy for that. But there are no reasons of policy that I can espy, and none have been advanced, why one, whilst engaged in the trial-within-the-trial, should not have the main trial fully in prospect. After all, the trial-within-the-trial is but an evidentiary moment, if sometimes a long moment, in a trial.⁵¹

49. Above footnote 44 at 294*h*-295*a*.

50. See in this regard *S v Muchindu* 2000 (2) SACR 313 (W) which was interestingly decided by the same Schutz J. Perhaps the period between the first ruling and this one helped him to have a reflection on the first erroneous reasoning.

51. Op cit at 315*h-i*.

According to the judge, if regard could not be had to the evidence already given or admitted in the main trial, the trial within a trial would hang in the air and that would be a creation of a rigid ring-fencing and application of dogmas of segregation. The third consideration is that if indeed a rigid ring-fencing was permitted, one would remain with a substantial exclusion in as far as evidence of state witnesses is concerned but a mere ceremonial exclusion in relation to evidence by the accused.⁵²

The procedural principle that allows parties to have regard to evidence already led at the main trial is subject to one qualification; to the effect that if evidence already led at the main trial include evidence on the merits by the accused, he cannot be taken to task on such evidence because the accused cannot be cross-examined on merits during the course of a trial within a trial.⁵³

3.4.3 The exceptions to the general principles

The general principles regarding the procedure to be followed in a trial within a trial are subject to the exceptions discussed hereunder. The first Appellate Division case in which the court endorsed the first exception was in *S v Lebone*.⁵⁴ In casu, the appellant alleged that the contents of the statement were false and were given to him by the police. Under such circumstances, the state should be allowed to cross-examine the accused on the contents of the confession to show that the accused was indeed the source of that information and not the police as alleged. It is important that the object of allowing such cross-examination on the contents of a confession is not to show that the contents are true but rather to attack credibility. This objective is clearly spelt out by the reasoning of Rumpff JA, when he said:

52. Above footnote 50 at 317 e.

53. *S v De Vries* 1989 (1) SA 228 (A) at 234B-C.

54. 1965 (2) SA 837 (A) and see also *S v Mafuya* 1992 (2) SACR 381 (W).

In so geval moet die aanklaer die reg hê om die beskuldigde onder kruisverhoor te neem oor die inhoud van die bekentenis om aan te toon dat die beskuldigde self die bron van die inhoud is en nie die Polisie nie, ... soos deur die beskuldigde beweer. Die kruisverhoor word dan gedoen met die doel om die geloofwaardigheid van die beskuldigde aan te tas, relevante onderwerp, en nie om te bewys dat die inhoud waar is nie.⁵⁵

This approach of allowing cross-examination on the contents of the confession creates an exception to the general principle discussed above to the effect that the contents of the disputed statement may not be divulged to the court before a decision on its admissibility is arrived at.

Subsequent to the decision in *Lebone's* case, the Appellate Division had to reconsider this exception in the matter of *S v Talane*.⁵⁶ The importance of *Talane's* decision is threefold. Firstly, the court upheld that as a general principle of procedure, the contents of a disputed statement may not be divulged to the court before the question of their admissibility is decided upon.⁵⁷ Secondly, the Appellate Division in *Talane's* case was faced with more or less the same facts as in *Lebone's* case.⁵⁸ Thirdly, the court emphasised that before the exception can be triggered, there should be a condition as stated in *Lebone's* case to the effect that the accused should have alleged that the contents of the disputed statement are false and that they were given to him by authorities.

55. *S v Lebone* 1965 (2) SA 837 (A) at 842A-B.

56. 1986 (3) SA 196 (A).

57. The court approved the general principle and quoted with approval its earlier decision in *S v Gaba* 1985 (4) SA 734 (A), which regarded the general rule of procedure as a "salutary one." See also *S v Potwana* 1994 (1) SACR 159 (A).

58. This becomes clear by the endorsement at 205*i* to the effect that "...[s]oos uit die feite blyk, het ons in die onderhawige saak juis die geval waar die appellant beweer dat die verklaring vals is en dat hy deur die polisie gedwing was om wat hulle aan hom voorgesê het aan Kaptein Visser te vertel."

The formulation and application of this exception was approved by the same court later in *S v Khuzwayo*.⁵⁹ It is important to note that in *Khuzwayo*, the court also concluded that the earlier English decision of *R v Hammand*⁶⁰ was wrongly decided specifically on the fact that it created an impression that the cross-examination on the contents of the statement prior to its admissibility could be allowed to show that it is true. Put differently, the decision of *Hammand* widened the exception so much that it appeared like a general principle.⁶¹ In this context, it is understandable why the decision in *Hammand* was not followed in the subsequent decision of *Wong Kam-Ming v The Queen*,⁶² which emphatically ruled that *Hammand* was wrongly decided on that point.

The second exception against the general principle of not allowing cross-examination on the contents of a statement before its admissibility is pronounced upon is shown by the facts and decision in *S v Gxokwe*.⁶³ In casu, the accused gave evidence during the course of a trial within a trial to the effect that during the interview conducted with him by the police, the police mentioned names of other persons in his presence, and that he was told by the policeman in charge that such persons were involved in the commission of the offence. According to the accused he decided to confirm the involvement of the persons whose name were mentioned to avoid being assaulted further and he invented other

59. 1990 (1) SACR 365 (A).

60. (1941) 3 All ER 318 (CCA).

61. See in this regard the relevant part at 321D-G, in which the court stated in *Hammand* that "...[i]n other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he come to make and therefore, the questions which were put were properly put."

62. (1980) AC 247 (PC), see also *S v Matlabakwe* 1985 (3) 188 (NC).

63. 1992 (2) SACR 355 (C).

allegations regarding the offence itself and he did all that whilst he had no knowledge that those persons were indeed involved in the offence.

One would note that these facts are completely different from the first exception discussed in *Lebone's* case because in the first exception, the allegation is to the effect that the statement is false and was told to the accused by the police. In *Gxokwe's* case, however, the accused admitted to having given the statement except that he did that to avoid being assaulted and he invented the contents of such statement. Until the stage when this allegation was made the statement itself was withheld from the court. Then the prosecution applied for permission to cross-examine on the contents of the statement. Counsel for the accused opposed the application on the ground that this set of facts were not covered by the first exception. The court ruled that such cross-examination had to be allowed, and this decision has three important issues related to the procedure in a trial within a trial and its exceptions.

Firstly, I submit that this was the endorsement of the second exception under which cross-examination may be allowed on the contents of a statement before admissibility is decided upon. Secondly, the court upheld the general rule of procedure discussed above and gave the rationale for such rule as being the following:

The contents of a statement, and the truth of the statement are not ordinarily considered to be relevant to the issue of its admissibility, and the finding in a trial within a trial as to whether the statement is the accused's own and is true may, in a given case, be pre-empting the very decision which the court is required to make at the conclusion of the trial.⁶⁴

Thirdly, the court came to the conclusion that rigid adherence to the general principle would in many cases deprive the court of relevant and important evidence which would assist in the determination of admissibility of such

64. Above footnote 63 at 357g-h.

statements. The court spelt out the rationale for these exceptions. At the core of this rationale is an understanding that an allegation by the accused is so much part and parcel of his attack upon the admissibility of his statement, and indeed relevant to the question of whether or not the accused was coerced or unduly influenced to make a statement, consequently the prosecution must be permitted to explore by means of appropriate cross-examination the truth or untruth of that allegation. The judgment in *Gxokwe's* case further included a pre-condition which should be satisfied before the second exception can be used to justify cross-examination on the contents of the statement, namely: "...a close logical correlation between the accused's allegation and the issues which are being considered in the trial within a trial...".⁶⁵

The second exception and its application was followed by the Appellate Division in *S v Latha*,⁶⁶ in which case the second appellant alleged that the contents of his statement were all lies made up by himself. The Court concluded that the rationale used in the first exception discussed above is applicable even in this second exception and concluded as follows:

In my opinion the same principle applies in the present case, where the second appellant alleged that the contents of his statement were false in as much it was all lies made up by him. As was pointed out in *Lebone's* case supra at 842B-C, the cross-examination of an accused is allowed in such a case not to prove that the contents of the statement are true, but in order to test credibility of the accused in respect of the issues raised by him in the trial within a trial.⁶⁷

These exceptions are by themselves not hard and fast rules and recent trends show that they have to be taken as guidelines which had to be looked at in view of the circumstances of each case, and the trial court can then decide to apply

65. Above footnote 63 at 358*d*.

66. 1994 (1) SACR 447 (A).

67. Op cit at 452*h-i*.

the exception or not. This trends were made clear by Visser AJ in *S v Tsotetsi*.⁶⁸ In *Tsotetsi's* case, Visser AJ explained these trends as follows:

In my view, the rule in our law which places the burden of proof upon the State to prove the guilt of an accused person coupled with the notion that an accused is deemed innocent until proven guilty, are considerations which have to be borne in mind when considering the question at hand. It also appears to me that the Court in *Lebone's* case did not profess to lay down a law of the Medes and Persians when it held that the State is entitled to cross-examine on the contents of a statement, which the accused alleged was dictated to him, in order to consider credibility.⁶⁹

3.5 Trial within a trial: from the eyes of critics

3.5.1 Introduction

To understand why the procedure of a trial within a trial has been and still is a source of criticism, it is vital to look into there criticisms in the context of the fundamental purpose of holding a trial within a trial.⁷⁰ The protection of the accused's constitutional right to remain silent forms an intergral part of the concept of a trial within a trial. Over and above the fact that this constitutional

68.2003 (2) SACR 623 (W).

69.Op cit at 628e-g. Visser AJ based his analysis on the fact that Rumpff JA used the words that clearly shows discretion in *Lebone's* case 1965 (2) SA 837 (A) at 842A-B when he concluded as follows: "Die inhoud van bekentenis *kan* dus relevant word, *in sekere omstandighede*, in verband met die vraag of die verklaring vrywillig afgelê is en dan sal kruisverhoor oor die inhoud toegelaat word vir *sover dit deur die omstandighede geregverdig is*" (italics added).

70. See a detailed discussion of the fundamental purpose in item 3.3 above, specifically the emphasis on the protection of the accused's right to remain silent at a criminal trial.

right is the most important one related to the concept of a trial within a trial, it nevertheless remains the most complex. The criticism and arguments should further be looked at in the context of the present legal position in South Africa,⁷¹ and not in the context of the potential future South African position. I deliberately phrased the sub-heading from the view of another person so that I can outline fully, from an objective point of view, if indeed there is a viable alternative to the process of holding a trial within a trial.

3.5.2 Background of right to silence

The constitutional right to remain silent draws its roots from both the common law,⁷² and statute,⁷³ and has been given constitutional protection by its inclusion in the Constitution.⁷⁴ The main aims of the right to remain silent are to guard against wrongful and/or unfair convictions, together with affording an accused person a fair trial.⁷⁵

71. See section 35(1)(a) and 35(1)(b) of the Constitution.

72. Van Dijkhorst, K “The right to remain silent: is the game worth the candle?” (2001) 118 *SALJ* 26-58 at 27, where the author explains that the common-law principle is that no one can be compelled to give evidence incriminating himself, either before or during trial.

73. Section 196(1)(a) of the Act provides that “an accused shall not be called as a witness except upon his own application.”

74. Section 35(1)(a) of the Constitution.

75. See a discussion of the historical background of this right to silent by Nugent, RW “Self incrimination in perspective” (1999) 116 *SALJ* 501-520 at 502 where he explains that the right to silence was a result of the difficult choice that the accused was faced with during the course of a criminal trial. It is a choice of disclosing evidence of guilt or a choice of suffering undesirable consequences through saying nothing at all.

3.5.3 What do critics say?

According to Van Dijkhorst⁷⁶ the emphasis on the right to remain silent, which is used as the main foundation for the retention of the procedure of a trial within a trial, is based on an emotional reliance on “fairness” towards the accused only, whilst the other aspects of criminal justice system are overlooked. He maintains the view that the antecedents of this view are outdated and the reason for its existence has fallen away.⁷⁷ The author proposes a number of alternatives, which if adhered to could result in a trial being fair to both the state, the defence and the general public. If these proposals were adhered to by the legislature, it would effectively render the process of a trial within a trial obsolete because issues of admissibility would be very limited and similarly, the right to remain silent would be limited too. The court would be able to pronounce on the admissibility of evidence during the course of the main trial.⁷⁸ Amongst the proposals which if implemented would reduce the need of frequently holding trials within a trial is that, firstly, it is suggested that prior to admissibility of evidence during the course of the main commencement of a trial, the accused should be obliged to answer all legitimate questions by an examining magistrate. Secondly, if a plea of not guilty is entered, an accused should state fully and clearly which facts are in dispute. Thirdly, it should be possible to draw an

76. Above footnote 72 at 27-28.

77. See in this regard the unsatisfactory results that adherence to the strict interpretation of the right to remain silent may yield to in a discussion of cases by Terblanche, SS ‘Privilegie teen selfinkriminasie: tyd om weer te dink’ (1994) 7 SACJ 177.

78. Above footnote 72 at 58, where the author interestingly admits that his proposals need objective consideration since it is not adaptable to current South African judicial system which have the right to remain silent enshrined in the Constitution. I shall raise my own views in full regarding these proposals at conclusion of this part.

inference of guilt from an accused if he refuses to answer legitimate questions.⁷⁹

According to Nugent⁸⁰ the concept of a “right to remain silent” should be understood as an inevitable consequence of the concept of a burden of proof. Put differently, each criminal justice system which still adopts the principle that the state should prove the case against the accused beyond reasonable doubt should, as a natural and inevitable consequence, accept that the right to remain silent by the accused cannot be dispensed with. Even if the view adopted by McConville⁸¹ is a true reflection of the burden of proof, the clear position appears to be that you cannot retain the burden of proof and do away with the right to remain silent. According to Nugent the right to remain silent is not closely connected to the burden of proof because a burden of proof is not dependent on the party who contributed to its discharge. So long as the totality of the evidence is sufficiently persuasive to establish the accused’s guilt, that burden is discharged.⁸² The author concluded that the right to remain silent is a right that is not worth protecting. The views expressed by Nugent are materially supportive of the criticism against the procedure of a trial within a trial by Hugo.⁸³ Hugo’s main criticism against the retention of the practice of holding a trial within a trial are threefold. Firstly, the author is of the view that in consequence of the

79. For a full discussion of these proposals and how they would apply in practice, see page 54-58 of the article by Van Dilkhorst (above footnote 72).

80. Nugent, RW “Self-incrimination in perspective” (1999) 116 *SALJ* 501-520 at 512.

81. McConville, M “Silence in court” (1987) 137 *New LJ* 1168-1170 at 1169, in which he states that “...[t]he burden of proof on the prosecution is not simply a burden to introduce evidence to establish guilt beyond reasonable doubt: it is a burden to do so, without the defendant.”

82. *Op cit* at 1168.

83. Hugo, JH “A tale of two cases” (1999) 12 *SACJ* 204-213.

permissibility⁸⁴ for the full court (with its assessors) to take part in the trial within a trial, then the whole process of a trial within a trial becomes a mere exercise in formalism which leads to a great wastage of time and energy without providing any notable benefits.⁸⁵

Secondly, the author maintains that since the state has the burden of proving a case beyond reasonable doubt, the admissibility question can also be decided during the course of a main trial. Thirdly, the author maintains that the process of a trial within a trial effectively leads to duplication of the same piece of evidence because of the principle of the retention of a dividing wall.⁸⁶ This criticism follows logically from the view of the author that the right to remain silent protects the accused too far. The retention of the right to remain silent does not level the ground between the state and the defence because "...[t]he defence is, therefore, forewarned and forearmed with the case for the prosecution. The prosecutor goes into court blind as to the nature of the defence. Surely no-one can pretend that this is equitable."⁸⁷ The need for change is because, as Hugo maintains, there are already efforts in England⁸⁸ to limit this right to remain silent.

84. Section 145 of the Act.

85. Above footnote 83 at 207.

86. *R v Dunga* 1934 AD 723.

87. Above footnote 83 at 211.

88. Our right to remain silent originates from English law and, according to Hugo, the South African legislature and judiciary should follow trends by their English counterparts as shown by the decision in *R v Friend* (1997) 1 WLR 1433 at 1434 in which Otton LJ stated: "The Criminal Justice and Public Order Act 1994 repealed section 1(b) of the Act of 1898. Section 35(2) requires the court to satisfy itself that the defendant is aware that the stage has been reached at which evidence can be given for the defence, that he can, if he wishes, give evidence and that, if he chooses not to give evidence or, having been sworn, without good cause refuse to answer any question, it-

The contentions which the author used to pass the above remark are premised on the view that extracurial statements can be dealt with like any other issue raised in a criminal trial without resorting to a trial within a trial. The author bases this contention on the present judicial system which allows assessors to participate in a trial within a trial if the presiding judge finds it appropriate.⁸⁹

The first part of his criticism is, in itself, an over-simplification of trial procedures, because for policy reasons, inconvenience cannot and should never be allowed to cloud fundamental rights. The backbone of resorting to a trial within a trial is not a question of convenience, but one of policy, which outweighs by far the contentious criticism.

The second contention by the author effectively means that all issues that border on admissibility can be decided when the issue of merits are decided, which literally means that irrespective of whether the confession was or was not properly obtained, the trial court would hear its contents and then decide to reject it at the end. This contention unfortunately undermines the origin and purpose of a trial within a trial. I submit that if this contention is upheld, it would lead to practical nightmares for a person (sitting as an assessor) to ignore what he has heard just because rule so and so says it is inadmissible and should be erased from the mind.

These contentions or criticism against the procedure in a trial within a trial should be understood in the context that the author himself does not think it is necessary to have the right to remain silent during the course of a criminal trial. In this context, it would mean that he indirectly concedes that for so long as an accused

will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence or his refusal without good cause, to answer any question.”

89. Section 145 of the Act.

person has a constitutional right to remain silent, his contentions become superfluous and therefore impractical. If there was no inclusion in our Constitution of the right to remain silent, the criticism would have carried more weight.

The author's opposition regarding the right to remain silent becomes clear when he says:

In this country, as in most others, a witness to a crime is compelled to give evidence under pain of criminal sanction. He is so compelled even if his life is thereby endangered (hence the so-called witness protection programmes). So for example, the victim of a rape may be compelled to relate what happened to her and to endure cross-examination regardless of the extra trauma this entails; while the (alleged) perpetrator can sit back, remain silent, avoid cross-examination; all without fear of adverse consequences."⁹⁰

Hugo even went on to declare that this fundamental right is nakedness. A closer look at the last part of the contention portrays the criticism itself as nudity because, if considered, the criminal procedural laws shall have to be re-written and the now sacrosanct principle of calling upon the state to prove the guilt of the accused beyond reasonable doubt shall have been eroded beyond vanishing point.

After reading the judgment⁹¹ which the author relied upon and applicable legislation,⁹² there is nothing in those authorities to suggest that the English

90. Above footnote 83 at 209-210.

91. *R v Friend* 1997 (1) WLR 1433 at 1436.

92. See in this regard section 44 of the Criminal Procedure and Investigations Act, 1996 which effectively amended section 34 of the Criminal Justice and Public Order Act, 1944, from which it can be seen that the emphasis of the amending section is on the discretion given to the trial court to draw adverse inferences from remaining silent and not to abolish the right to remain silent.

courts are now en route to abolishing the right to remain silent, since drawing adverse inferences against a party who elects not to testify when a prima facie case has been made cannot be compared to abolishing the right to remain silent.

When one groups the above criticisms together, it is my view that the critics are not mindful of the following considerations that makes the retention of the right indispensable, with the result that the process of a trial within a trial cannot be removed from our criminal justice system in the present set-up. Firstly, the accused's right to remain silent is not always operational in favour of the accused. If a prima facie case has been established which, unless explained away, may lead to a conviction, the exercise of the accused's right to remain silent works against the accused himself.

The correct and, I submit, better way of looking at this right is spelt out in *S v Brown*⁹³ where Buys J concluded that the Constitution has brought no change on the existing law regarding the right to remain silent, except that it has added an emphasis. Moreover, the fact that the accused's decision not to give evidence could result in prejudicial consequences for him did not have its origin in a rule of law: it was merely a logical conclusion which can be made in specific circumstances in a court of law. Secondly there can never be an enquiry into admissibility of evidence during the main trial without the accused being forced by circumstances to forsake his constitutional right to remain silent in order to explain why evidence should not be admitted. Thirdly, the considerations of time and money which may be wasted through the holding of a trial within a trial are completely outweighed by the massive dangers that may accompany an idea to abolish completely the procedure of a trial within a trial. These dangers include indirect limitation of accused's constitutional rights protected by the procedure of a trial within a trial. Fourthly there is no feasible alternative suggested by any of the critics which can replace a trial within a trial without compromising the

93. 1996 (2) SACR 49 (NC).

fundamental rights of the accused.⁹⁴

3.6 Similarities and differences between trial within a trial and main trial

3.6.1 Similarities

It is important to note that by virtue of the fact that this interlocutory proceedings are conducted like an ordinary trial, it is undoubtedly correct that most of the provisions of chapter 22⁹⁵ of the Act finds application.

3.6.1.1 Hearing in open court

As provided for in section 152 of the Act, criminal proceedings shall take place in an open court except where otherwise provided for by the Act or any other law. I therefore submit that “criminal proceedings” in this instance is wide enough to cover a trial within a trial and the exceptions that cause any criminal proceedings to take place in camera also apply to a trial within a trial. As stated *in S v Swanepoel*⁹⁶ criminal proceedings includes a preparatory examinations provided for in section 20 of the Act. The commencement of criminal proceedings consequently does not refer to the stage at which a charge is put to the accused. It is now of common understanding that the main purpose of ensuring that a criminal prosecution takes place in open court is to give credence to the view

94. My opinion is that if the process of a trial within a trial is procedurally an “evil,” then it appears a lesser evil than all the suggested alternatives and for that reason, opting for a lesser “evil” is the best option.

95. Sections 150-178 of the Act, which deals with the conduct of the proceedings, generally apply subject to the differences in item 3.6.2 below.

96. 1979 (1) SA 478 (A) at 489E-G. Proceedings instituted in terms of the Inquest Act 85 of 1959 are not criminal proceedings as defined in the Act.

expressed by Lord Hewart in *R v Sussex Justices; Ex- parte McCarthy*,⁹⁷ when he said that “justice must not only be done but manifestly be seen to be done.”⁹⁸

3.6.1.2 Testimony to be oral

The general principle that a witness should, except where the Act or other legislation provides, testify orally also applies to a trial within a trial. The taking of the oath, its administering and the alternatives of affirmation or admonition also apply to a trial within a trial.⁹⁹

3.6.1.3 Evidence in chief and cross-examination

The analogy of a trial within a trial and the main trial in as far as evidence is concerned has been fully incorporated in the procedure in a trial within a trial. In *S v Ramgobin*¹⁰⁰ the court ruled that the principles governing the granting of leave to re-open the state’s case in a trial within a trial are the same as those in an actual trial. In casu, the state omitted to lead evidence on the accuracy of certain tape recordings and after the defence had introduced its case the state then applied for leave to re-open its case, which application was opposed by the defence but granted notwithstanding. The court based its ruling on the fact that the trial in question covered complex issues, in respect of which the state could not reasonably be expected to anticipate the relevance of each piece of evidence.

3.6.2 Differences

97. 1924 (1) KB 256.

98. Op cit at 259.

99. See sections 161–165 of the Act.

100. 1986 (4) SA 117 (N).

The most important difference between a trial within a trial and a main trial relates to the aim and purpose of each.

3.6.2.1 Verdict

Whilst the main trial is concerned with whether or not the state has proved the guilt of the accused beyond reasonable doubt, the court in a trial within a trial is only concerned with whether the evidence that the state intends to present in the main trial is admissible or not. It is in this context that the verdict anticipated is one of guilty or not guilty in a main trial, whilst the verdict expected in a trial within a trial is one of admissibility or inadmissibility.

3.6.2.2 Evidence

In an attempt to avoid prejudice, a trial judge presiding in a trial within a trial is expected to make a ruling on the admissibility of a statement, the contents of which has not been made known to him. Whereas in a main trial, no finding or verdict can be arrived at without the contents of each witness's testimony fully narrated to court.

3.7 The admissibility of evidence adduced in a trial within a trial in the main trial

3.7.1 Introduction

The right to silence¹⁰¹ which the accused has in a criminal trial also applies in a trial within a trial. This right to remain silent is practically seldom used in a trial within a trial for one main reason. A trial within a trial is a forum in which an

101. Section 35(1)(a) and (b) of the Constitution guarantees an accused the right to silence and to be informed of this right promptly.

accused is given an opportunity to explain the circumstances that cause him to challenge the admissibility of evidence, and this onus can hardly be discharged if the accused does not testify in the trial within a trial.

In practice and for reasons stated above,¹⁰² the accused would invariably give evidence in a trial within a trial, and such situations are the main focus of this study, particularly on whether evidence adduced in a trial within a trial is admissible in the main trial, and if so, the principles that govern such admissibility, and if not, the exceptions, if any, that may be applicable.

The study is not limited to evidence of the accused in a trial within a trial but also covers evidence from state witnesses. It is perhaps partly influenced by a personal approach that the emphasis of the study shall be on the evidence of the accused, and partly because there is less complexity regarding evidence given by state witnesses in a trial within a trial. The effect of evidence by state witnesses who testified in a trial within a trial in the main trial shall be considered separately.

3.7.2 Effect of accused's testimony in a trial within a trial in the main trial

As a general rule of wide acceptance, evidence by an accused person in a trial within a trial is inadmissible in the main trial, and it is only under few exceptional circumstances (discussed hereunder) that any reference to evidence adduced in a trial within a trial may be permitted in the main trial. This general principle flows logically from the fundamental purpose of holding a trial within a trial.¹⁰³

102. See in this regard item 3.4 above dealing with procedure in a trial within a trial.

103. This purpose was explained by the House of Lords in *R v Brophy* 1981 (2) All ER 705 at 709 in which the court stated: "...If such evidence, being relevant, were admissible at the substantive trial, an accused person-

The general principle includes in itself a variety of considerations that weighs heavily in favour of excluding evidence given by the accused in a trial within a trial (voir dire). The first consideration is that the evidence is not excluded because it is not relevant, but merely for policy reasons.¹⁰⁴ This general principle and the considerations that influence it were the main focus in the landmark decision of *S v De Vries*.¹⁰⁵ In casu, the defence challenged the admissibility of a statement by the accused on the ground that the statement was made as a result of threats made to the accused and his wife. The trial court referred the issue of admissibility for adjudication in a trial within a trial. During the trial within a trial, the accused was cross-examined at length by the prosecutor even on aspects concerning the merits of the case.

At the close of a trial within a trial, the magistrate found that the statement was

would not enjoy the complete freedom that he ought to have at the voir dire to contest the admissibility of his previous statements. It is one of the first considerations for the administration of justice that an accused person should feel completely free to give evidence at the voir dire of any improper methods by which a confession or an admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the voir dire, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called right to silence at the trial.” See also a discussion of various considerations of policy in favour of such exclusion in Tapper, *Cross and Tapper on evidence* (1995) at 185.

104. *R v Dunga* 1934 AD 223 at 226 and *S v W* 1963 (3) SA 516 (A) at 521A-C in which the appeal court discouraged the failure by the trial court to uphold the cardinal rule and purpose of a trial within a trial on which the general principle of exclusion is based.

105. 1989 (1) SA 228 (A).

made freely and voluntarily and he admitted the statement in evidence. When the main trial resumed, the accused only gave evidence on a few peripheral issues. On appeal to the Appellant Division, counsel for the appellant submitted that the conviction was erroneous because evidence given in a trial within a trial was considered in the determination of the merits. Regardless of the fact that the conviction itself was confirmed, the decision in this case is of vital importance because it then made clear the general principle and the policy underlying this principle of admissibility of evidence from a trial within a trial in the main trial.

In *De Vries's* case Nicholas AJA concluded as follows:

At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt ...The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within a trial.¹⁰⁶

The reasoning and approach adopted by Nicholas AJA uphold the first consideration of public policy in favour of excluding evidence given by the accused in a trial within a trial in the main trial. The second consideration which support the exclusion from the main trial of evidence given by the accused at a trial within a trial is the protection of the constitutional right to remain silent. The right to remain silent which has now been given constitutional protection by virtue of section 35(1)(b) of the Constitution has long been protected by the judiciary because of its importance. The protection of this right as a consideration in favour of the general principle discussed herein was emphasised in *R v Chitambala*¹⁰⁷ in which Clayden ACJ remarked as follows:

In any criminal trial, the accused has the right to elect not to give evidence at the conclusion of the crown case. To regard evidence given by him on the question of admissibility as evidence in the trial itself would

106. Above footnote 105 at 233J-234A.

107. 1961 R & N 166 (FC).

mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a statement, or that to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statements being led in evidence against him.¹⁰⁸

The reasoning and considerations applied in the *De Vries* case was subsequently followed and applied by the same court in *S v Sithebe*.¹⁰⁹ On a strict interpretation of the judgment in *De Vries*, the state decided in casu to repeat the testimony of a witness who testified during the trial within a trial afresh.

108. Op cit at 169-170. This reasoning was quoted with approval in *Wong Kam-Ming v The Queen* (1980) AC 247 (PC) at 257F. See also Cooper et al *Cases and Materials* at 586.

109. 1992 (1) SACR 347 (A). This reasoning was later followed by the same court in *S v Mlomo* 1993 (2) SACR 123 (A) in which the court refused to take into consideration the evidence given by the accused at a trial within a trial unless it was repeated during the trial on the merits. In this context the court rejected the argument that the decision in *S v Mjikwa* 1993 (1) SACR 507 (A) created a deviation from the existing principle. This was after counsel for the appellant relied on the remarks of Van Heerden JA in *S v Mjikwa* at 510 to 511b to the effect that: "...[i]n sy betoogshoofde het die respondent se advokaat aangevoer dat die getuienis van die appellant in die tussenverhoor buite rekening gelaat moet word by beoordeling van die 'meriete' van die saak, en bepaaldelik die al of nie vrywilligheid van die aanwysings. Voor ons het hy nie met hierdie argument volhard nie. En tereg so. Al wat ek hoef te sê, is dat die kwessie van die toelaatbaarheid van aanwysing net so min as dié van die toelaatbaarheid van bekentenis op die meriete van saak betrekking het. Getuienis wat tydens tussenverhoor gegee is, kan dus in aanmerking geneem word by beslegting van die vraag of bekentenis of buiteregterlike erkenning vrywilliglik gemaak was."

The appellant himself did not testify and the trial court convicted him. On appeal, counsel for the appellant submitted that the trial court erred in equating appellant's election not to testify in the main trial with silence proper because some of the issues that concerned merits were discussed at the trial within a trial.

The appeal court however upheld the trial court's decision to disregard the evidence led in the trial within a trial in its determination of guilt and concluded that its approach was in line with the earlier decision in *De Vries*. Nienaber JA reinforced this general principle of inadmissibility of evidence led by an accused person in trial within a trial in the main trial and concluded as follows:

Unless the trial within the trial is treated as a watertight compartment, with no spill-over into the main trial, that danger will always exist: for if an accused person's evidence in the trial within the trial can legitimately be held against him in the main trial, he might be obliged to testify again in order to regain lost ground; and if the evidence of a State witness, where the merits are at stake, can simply be transplanted into the main trial, the accused might be obliged not only to cross-examine fully on all such issues (lest he lose the opportunity of doing so later) but to testify himself in order to neutralise its effect.¹¹⁰

The reasoning by Nienaber JA reinforced the view expressed in *De Vries* by Nicholas AJA who concluded that unless the parties stipulate to that effect, neither the evidence of the accused nor of state witnesses given during the trial within a trial, ought therefore to be injected into the main trial.¹¹¹

110. *S v Sithebe* 1992 (1) SACR 347 (A). at 351 *b-d*.

111. This approach of rigid ring-fencing has been relaxed in subsequent decisions such as *S v Nglengethwa* 1996 (1) SACR 737 (A) specifically on the issue of evidence by state witnesses. However, the general principle was upheld and followed in numerous subsequent decisions by the same court and other courts, evidenced by the remarks of Eksteen JA in *S v Malinga* 1992 (1) SACR 138 (A) at 141i-j where he stated that ... "[s]o-

This general principle explained above is subject to one exception. This exception comes into operation in circumstances similar to those in *S v Sabisa*.¹¹² In casu, after a trial within a trial was completed, the accused testified during the main trial on issues that he had already testified about during the trial within a trial. The prosecutor then cross-examined the accused with reference to his earlier testimony which he gave during the trial within a trial, and the trial court allowed such cross-examination. The appeal court concurred with the reasoning of the trial court in allowing such cross-examination and concluded that once the defence brings admissibility issues into the main trial, there must be an opportunity given to the state to meet the issues raised.

In this context, the ruling created an exception to the general rule discussed above but does not at all alter the general principle.¹¹³ According to Poswa¹¹⁴ the approach adopted by Dumbutshena JA in *S v Sabisa* is erroneous. His reasoning

ook kan appellant se getuienis wat hy in die tussenverhoor afgelê het, nie teen hom gebruik word by die oorweging van sy skuld op die meriete nie. Die tussenverhoor is uitsluitlik daartoe gerig om te bepaal of die bekentenis waarop die Staat wil steun vrywillig en ongedwonge afgelê is, en waar die appellant die toelaatbaarheid van die verklaring in afsonderlike ondersoek betwis, is dit onbillik en onregverdig om sy pogings in dié verband later teen hom op te haal by die oorweging van die meriete van die saak.”

112. 1993 (2) SACR 525 (Tka).

113. The approach adopted by Dumbutshena JA in *S v Sabisa* was followed by the Appellate Division in *S v Mkwanazi* 1996 (1) SA 736 (A) at 743G in which Williamson JA adopted the same route of allowing prosecution to cross-examine the accused on what he said earlier in the trial within a trial, and that this is only permissible in a situation in which the defence decides to repeat issues on admissibility during the main trial.

114. Poswa, J “ Comment on State vs Sabisa” (1994) 51 ALR 17-18.

is based on the fact that although the appeal court approved the principle as laid down in *R v Dunga*,¹¹⁵ its application of the principle however showed a different approach to this general principle. Poswa asks: "...why must the accused now run the risk of being cross-examined on the merits as well, contrary to the *Dunga* principle?"¹¹⁶

Poswa maintains that "...[i]f however when the issue of admissibility is revisited, it is further dealt with at a trial within a trial, it seems quite appropriate that the state should be in a position to cross-examine the accused on what she/he had initially said in the earlier trial within a trial on the same issue."¹¹⁷ If during a subsequent trial within a trial, the accused were to say something different from what he said in an earlier trial within a trial, the cross-examination therein is similar to a situation in which a contradiction occurs during one single trial within a trial. This reasoning however creates a possibility of a trial that never ends in which after a ruling on admissibility is made at the end of a trial within a trial, the accused would again raise issues that effect admissibility, and then another trial within a trial should be held.¹¹⁸

3.7.3 Effect of state witness' testimony in a trial within a trial in the main trial

115. 1934 AD 223. This is the foundation of the principle that there should be a dividing wall between the compartment of the main trial and of a trial within a trial.

116. Above footnote 114 at 18.

117. Above footnote 114 at 18.

118. Because of what I discussed under item 3.9 below, I do not see a need to have repeated trials within a trial because the ruling made at the end of a trial within a trial is interlocutory.

Over and above the exception discussed above,¹¹⁹ the principle that governs the admissibility of evidence in the main trial of state witnesses given during a trial within a trial can be referred to as the second exception to the general principle. The Appellate Division showed a degree of reluctance in *S v Nglengethwa*¹²⁰ to follow the rigid ring-fencing endorsed by the earlier decisions of the same court in *S v De Vries*¹²¹ and *S v Sithebe*.¹²² In *S v Nglengethwa*, Harms JA found that it is unnecessary to have the evidence of state witnesses relevant to be issue of guilt repeated in the main trial, specifically in situations in which a trial within a trial took place before a full court with its assessors.

He came to the following conclusion:

Soos reeds aangedui, is in *S v De Vries* beslis dat *beskuldigde* se getuienis tydens die binneverhoor gelewer, nie teen hom in ag geneem mag word by bepaling van sy skuld nie. Dit beteken egter nie dat daardie gedeeltes van die *staat* se getuienis wat relevant is ten opsigte van skuld en wat daartydens voor die volledig saamgestelde hof aangebied is, ook nie in ag geneem mag word nie. Indien verhoor deur óf slegs Regter óf landdros behartig word, is dit sinneloos en verkwisting van koste, tyd en energie om getuienis wat tydens binneverhoor aangebied is, te herhaal na afsluiting van die binner verhoor. Dieselfde geld vir verhore voor Regter en assessore waar die assessore deel het aan die binneverhoor.¹²³

As the judge himself stated, this approach was indeed a deviation from existing

119. See pages 92-93 above.

120. 1996 (1) SACR 437 (A).

121. 1989 (1) SA 228 (A).

122. 1992 (1) SACR 347 (A), which confirmed the decision in *De Vries* to the effect that evidence regarding admissibility should not be allowed during the trial on merits.

123. *S v Nglengethwa* 1996 (1) SACR 737 (A) at 740h-741a.

practice.¹²⁴ In this context, the position and the ruling in this matter endorsed the existence of the second exception to the general rule.

3.8 A summary of the principles that govern admissibility of evidence adduced in a trial within a trial in the main trial

The first and arguably the most important principle that governs the evidence adduced in a trial within a trial is that it is and should always be held to be a one-way glass, only permitting one to see the main trial from a trial within a trial, but prohibiting the converse. This implies that as a general rule, evidence adduced in a trial within a trial is not admissible in the main trial subject to the few exceptions that has been mentioned herein.

Secondly, the accused may give evidence to show absence of voluntariness without being exposed to the general risk of being cross-examined on his guilt. Thirdly, it is procedurally correct for the state to recall witnesses who have already testified in a trial within a trial in the main trial to repeat evidence on merits.

Fourthly, when evidence in a trial within a trial is being led, it is procedurally correct to have in sight evidence already led in the main trial, since a trial within a trial does not happen in a vacuum, but is the equivalent of interlocutory applications in civil matters which cannot be entirely separated from the main trial.¹²⁵

The fifth principle is that it is grossly irregular for the prosecution to lead evidence

124. Above footnote 123 at 741*b-c*.

125. For example, applications pendente lite as allowed in section 32 of the Magistrates' Courts Act 32 of 1944 and rule 43 applications promulgated under the Supreme Court Act 59 of 1959.

in the main trial based on the evidence which the accused has led in a trial within a trial.¹²⁶

The sixth principle is that if a full bench is sitting, including the assessors, during a trial within a trial, then it is no longer necessary to have evidence by state witnesses which was led during a trial within a trial repeated, for it may, as stated in *S v Nglengethwa*,¹²⁷ be a wastage of time and resources to repeat such evidence.

The seventh principle is that case law suggest that the only situation in which the state may be allowed to cross-examine on the contents of the accused's statement before a decision on admissibility is arrived at is when the accused alleged that the statement was prescribed to him and that the statement was false.¹²⁸

The eighth principle is that it is irregular for a judicial officer to rule that the confession be handed in before it becomes clear that its contents would become admissible.

A secondary principle to the above one, which in this context is referred to as the ninth principle, is that it is equally irregular for a presiding officer to make an assumption that the admissibility of a statement will be proved at the end of the defence's case and thus to allow cross-examination on a disputed statement.¹²⁹

The tenth principle, which forms a seal of protection to a finding in a trial within a trial is that the finding of admissibility is interlocutory or provisional, which may

126. See *S v Malinga* 1992 (1) SACR 138 (A) at 140a.

127. 1996 (1) SACR 737 (A).

128. *S v Lebone* 1965 (2) SA 837 (A); *S v Talane* 1986 (3) SA 196 (A).

129. *S v Mphala* 1998 (1) SACR 388 (W) at 406.

be altered by the court during the course of the main trial if other evidence is adduced bearing on the admissibility of such confession, and the court is empowered to reconcile and overrule its own decision.¹³⁰

3.9 The effect of a ruling on admissibility at the end of a trial within a trial

My discussion thus far created a close link between a main trial and a trial within a trial, so much so that it is virtually impossible to disregard completely the one platform whilst one is engaged in the other. This close link causes a complex scenario when issues that relate to admissibility are again raised during the main trial after a trial within a trial is completed. The question is: can a court alter a ruling made at the end of a trial within a trial to the effect that the disputed evidence is admissible and then decides that it is inadmissible if subsequent evidence presented during the main trial leads the court to such conclusion? Similarly, can a court alter a ruling to the effect that evidence is inadmissible if later evidence points to a conclusion that evidence appears to be admissible? This situation can be illustrated by the decision of the Appellate Division in *S v Mkhwanazi*.¹³¹ In casu, a trial within a trial was held at the court a quo to determine the admissibility of a statement that the accused had made to the magistrate. At the end of the said trial within a trial, the statement was ruled admissible and the court indicated that such ruling was interlocutory; its reliability and the admissibility of the statement was to be determined later by the full court with assessors.¹³²

This ruling of the court a quo contained two vital aspects. Firstly, the ruling was

130. *S v Tjiho* 1992 (1) SACR 639 (Nm).

131. 1966 (1) SA 736 (A).

132. This matter was decided before the introduction of the current section 145 of the Act which makes it possible for assessors to sit in a trial within a trial.

completely wrong as to the fact that the “admissibility and reliability” would be decided by the full court with assessors. In this regard, Williamson, JA held as follows:

That is clearly not the position; the question of admissibility, as stated by the learned Judge himself in the main judgment, must be decided by, and remains throughout, the sole responsibility of, the presiding Judge. If other factors touching upon the question of admissibility appear later in the trial, he can and should reconsider any earlier decision, as he rightly did in the present case.¹³³

Secondly, the ruling was correct in as far as it endorsed an important principle governing the ruling at the end of a trial within a trial. A ruling is interlocutory only in the context that evidence ruled admissible may, if new facts showing otherwise emerge, be ruled inadmissible.

This approach of treating a ruling on admissibility as provisional was endorsed and followed in *S v Tjiho*¹³⁴ in which the court upheld the application of the principle in *S v Mkhwanazi*. In this regard the court held:

Nadat hierdie getuienis aan die lig gekom het en na die getuie se getuienis voltooi was, het die Hof die advokate versoek om ons weer eens toe te spreek oor die toelaatbaarheid van die verklaring. Hierdie prosedure is gevolg aangesien die beslissing ten opsigte van die toelaatbaarheid van getuienis interlokutoor is en indien daarna ander feite aan die lig sou kom wat hierop slaan, dit die plig van die Hof is om sodanige aangeleentheid opnuut weer te oorweeg.¹³⁵

The provisional nature of the ruling does not give powers to the court to admit a confession or an admission which is proved inadmissible or doubtful on the basis

133. Above footnote 131 at 742H-743A.

134. 1992 (1) SACR 639 (NM).

135. Op cit at 644e-f.

that evidence may later emerge to justify its admission. This route was declared a gross irregularity in *S v Ntuli*.¹³⁶ In casu, the appellant objected to the admissibility of the confession on the grounds that it had not been freely and voluntarily made. At the end of a trial within a trial, the magistrate admitted the confession without giving reasons. The evidence which the magistrate relied upon in convicting the accused and in concluding that the confession was freely and voluntarily made was given after the confession was admitted in evidence and the appellant's version of the confession was not even disputed through cross-examination during a trial within a trial. In so doing, the magistrate therefore admitted the confession on the basis that evidence justifying its admission may later emerge, which evidence eventually emerged.

Nugent AJ dismissed this approach and held:

The admission of a confession on the basis that evidence may later emerge to justify its admission would in my view constitute a gross irregularity, and reduce the procedure for determining whether a confession is admissible to nothing more than a charade. The admissibility or otherwise of a confession falls to be determined on the evidence placed before a court in a trial within a trial, together with admissible evidence which had gone before it. If at the end of the trial within a trial the requisites for admissibility have not been proved, the confession must be excluded. It cannot be admitted on the basis that other evidence may emerge during the course of the trial to justify its admission. Once a confession is admitted, its admission is 'provisional' only in the sense that evidence may thereafter emerge which requires it to be excluded.¹³⁷

Because of the provisional nature of the ruling at the end of a trial within a trial, it is my view that if a ruling is made at the end of a trial within a trial which is adverse to the accused and issues that borders on admissibility are raised again

136. 1993 (3) SACR 599 (W).

137. Op cit at 602g-i.

during the trial on merits, the court can, and should preferably take such new facts in account in reconsidering its earlier ruling.

In so doing, the holding of a second trial within a trial would be eliminated considerably. This however would not apply in a situation in which the accused challenges the admissibility of various pieces of evidence. Under such circumstances, holding a second or more trials within a trial is unavoidable.

4. Conclusion

When putting together a study of this nature, where there is no prescribed Act of Parliament regulating either the substantive law or procedural aspects of a trial within a trial, I was saddened by the academic fear of doing a cosmetic transcription of case law. If there is any substance in the claim that the law of evidence is well-known for its power to fascinate and to tease,¹³⁸ then the principles governing admissibility of evidence adduced in a trial within a trial stand out for its extraordinary ability to tantalize the legal mind. A trial within a trial, being a procedural device that has no source in legislation, consequently rallies with itself principles that are complex, and the aim of the study would have been achieved if they are made less complex, because the simpler the rules and principles are, the better they will serve their purpose fully.

Regardless of the fact that some aspect of a trial within a trial are undergoing reforms, specifically procedure to be followed during a trial within a trial, the reasons and considerations in favour of the retention of the practice are so overwhelming that the practice will be part of the South African law for a considerable period, if not indefinitely.

138. Paizes, A "Chasing shadows: exploring the meaning, function and incidence of the onus proof in the South African law" (1999) *SACJ* 116 531-585 at 531.

The present position of the South African law regarding the admissibility of evidence from a trial within a trial in the main trial is that such evidence is, as a general rule, to be excluded from the main trial, subject to exceptions that have been discussed in detail in this study.

However this general rule reflects the position of evidence by an accused person in the trial within a trial. Concerning the evidence by state witnesses, precedents leads me to make a different conclusion: that evidence by state witness in a trial within a trial is admissible in the main trial if those criteria discussed in this study are met. However, our courts often encourage the state to repeat any such evidence during the main trial if it intends to rely on such evidence.
