

**THE ASCERTAINMENT OF BODILY FEATURES OF THE ACCUSED PERSON IN TERMS OF THE
CRIMINAL PROCEDURE ACT 51 OF 1977 AND RELATED ENACTMENTS AND PROBLEMS
ENCOUNTERED BY THE POLICE IN THE APPLICATION OF THE ACT**

by

PITSO PETRUS RAMATSOELE

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SUPERVISOR: PROFESSOR JP SWANEPOEL

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DECLARATION

Student number 0-766-167-3

I Pitso Petrus Ramatsoele declare that

THE ASCERTAINMENT OF BODILY FEATURES OF THE ACCUSED PERSON IN TERMS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 AND RELATED ENACTMENTS AND PROBLEMS ENCOUNTERED BY POLICE IN THE APPLICATION OF THE ACT

is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

SIGNATURE _____

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PP RAMATSOELE

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Legislation and case law discussed in this dissertation reflect the law as at the end of November 2013.

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ABSTRACT

The State as the representative of the victims of crime is expected to protect those vulnerable group of people with due regard to the rights of the perpetrators's of crime. It is imperative that the law of general application which is aimed at protecting victims of crime, be sufficiently effective to protect the victims. The Criminal Procedure Act 51 of 1977 is aimed at assisting the police to conduct pre-trial criminal procedure in order to bring perpetrators of crime to book. Sections 36A, 36B, 36C and 37 (both previous and as amended) of the Criminal Procedure Act including chapter 5A of the South African Police Act, 1995 are explored in this dissertation.

This dissertation examines the areas in the Criminal Procedure Act that make it problematic for the police to conduct efficient and effective crime detection through the ascertainment of bodily features of the suspected or accused person. The law in three foreign jurisdictions relating to this topic are investigated and compared in order to make recommendations and suggest possible solutions.

KEY WORDS

Ascertainment

Bodily features

Accused person

Criminal Procedure Act 51 of 1977

Related enactments

Problems

Police

Application of the Act

ACRONYMS USED

PACE (Police and Criminal Evidence Act 1984)

AFIS (Automated Fingerprint Identification System)

EWHC High Court of England and Wales

ECHR European Court of Human Rights

NAFIS (National Fingerprint Identification System)

NFDD (National Forensic DNA Database of South Africa)

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CHAPTER 1

Introduction

1.1 PURPOSE

The purpose of studying the topic of the ascertainment of bodily features of the accused person in terms of the Criminal Procedure Act 51 of 1977 and related enactments was to investigate the problems and obstacles encountered by the police in the application of the Act. These problems concern the period prior to criminal proceedings taking place and during the process of criminal proceedings.

The investigation was aimed at identifying the problems experienced by the police and also looking at how different foreign jurisdictions deal with the ascertainment of bodily features. The aim was to establish the differences and best practices that could assist in improving the Act that deals with the ascertainment of bodily features of the accused person.¹ The recommended improvements to the Act that deals with the ascertainment of bodily features of an accused person can be of great importance in crime detection and the improvement of services to the victims of crime. The improvements can also assist in excluding innocent persons from wrongful arrest and unjust prosecution.

1.2 GENERAL BACKGROUND

The Universal Declaration of Human Rights² is the cornerstone of human rights law created over the decades since the end of World War II. Articles 1 and 2 state that “all human beings are born equal in dignity and rights” and are entitled to all rights and freedoms mentioned in the declaration “without distinction of any kind”.³ The South African Constitution is based on the fundamental values such as the value of equality (section 9), human dignity (section 10) and freedom (section 12). The other important rights that are guaranteed by the Constitution are the right to life (section 11) and the right to privacy (section 14).

Every person who resides in any country expects the criminal justice system of the country to protect him or her. If the system fails the community, the community loses confidence in the state and takes the law into its own hands. It is thus of the utmost importance that a

¹ Criminal Procedure Act 51 of 1977, section 36B, 36C and 37. Further changes envisaged by Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

² United Nations Department of Public Information (2011) *Basic facts about the United Nations* (New York) 209. According to Universal Declaration of Human Rights, both the accused and the victim of crime have equal rights. The law must thus give victims and perpetrators of crime equal protection.

criminal justice system must be highly effective and be seen to be effective. This will discourage the community from taking the law into its own hands.

Criminal law is a social mechanism that is used to coerce members of society, through the threat of pain and suffering or other sanction, to abstain from conduct that is harmful to the various interests of society. Its objects are to promote individual autonomy, the welfare of society and its members by establishing and maintaining peace and order and furthering fundamental human rights. It is thus necessary that a mechanism for the detection and apprehension of persons who contravene the criminal law exists so that they may be brought to punishment⁴. The Law of Evidence, which is part of the Law of Criminal Procedure, regulates the proof of facts.⁵

Measures are necessary to enforce the rules of substantive criminal law. These measures are provided by the adjective law. The rules of criminal procedure form part of adjective law, which assists in making substantive criminal law dynamic.⁶

In this dissertation the focus will be on the adjectival law relating to some methods in the investigative process, to wit section 37 of the Criminal Procedure Act.⁷ The researcher will be looking at non-invasive and invasive investigative methods of ascertaining bodily features of an accused person. Both methods are defined and explained infra. Section 37 of the Criminal Procedure Act relates to pre-trial criminal procedures. The aim or purpose of this section is to assist the police⁸ to perform some investigation⁹ in relation to the crime committed prior to a criminal trial taking place.

This study will be focussing on investigating the ascertainment of all bodily features of an accused person in terms of the Criminal Procedure Act 51 of 1977 and related enactments and problems encountered by the police in the application of the Act. The investigation will also look at the new Chapter 3 and its sections 36B, 36C and 37 of the Criminal Procedure Act as amended by the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010. The Act came into operation on 18 January 2013.¹⁰ The researcher will refer to these sections as the “new” and “amended” section 37 interchangeably. The position relating to section 37

⁴ Burchell and Milton *Principles of Criminal Law* 9-10.

⁵ Schwikkard et al *Principles of Evidence* 1.

⁶ Joubert JJ (ed) *Criminal Procedure Handbook* 6.

⁷ Investigation means gathering evidence on reported crime, tracing the offender and bringing the offender before court. Detection means solving of crime and is part of investigation.

⁸ “Police official” means a member of the South African Police Service or municipal police service established in terms of the South African Police Service Act, 1995 (Act 68 of 1995).

⁹ Section 205 (3) of the Constitution (Act 108 of 1996) and Section 13 of the South African Police Service Act 1995 (Act 68 of 1995) give police powers to investigate.

¹⁰ Government Gazette NO 36080 Vol. 571 dated 18 January 2013.

prior to the present changes will also be referred in order to understand the impact and need for the changes and specifically how the previous position affected police investigations.

The investigation will also include a research on the reliability of methods of ascertaining bodily features and the approach of the courts in relation to these methods. It will also consider the problems encountered by police officials in the application of the Act when ascertaining bodily features. Foreign jurisdictions are also examined and compared with South African jurisdiction to detect similarities and differences. The foreign jurisdictions that are investigated are those of the United Kingdom (UK), the United States of America (USA) and Canada.

The investigation will examine the databases of both foreign and local jurisdictions. Databases are used for storing data on bodily features and the reliability of these data bases will be investigated. The investigation will examine whether the methods and data used to ascertain bodily features are supported by unquestionable evidence. In the method of fingerprinting, latent fingerprints that are found by the crime scene investigator at the crime scene are compared with the original fingerprints taken from the suspect or accused after he or she has been arrested. Blood samples, saliva or hair that are found by the crime scene investigator are been verified through comparison with the deoxyribonucleic acid (DNA) profile of the suspect. This DNA profile is obtained from a blood sample or other intimate sample of the suspect after his or her arrest or before arrest on his consent.

1.3 METHODOLOGY AND FRAMEWORK

This topic is divided into two parts. Part I deals with non-invasive police methods in ascertaining the bodily features of the accused person (non-intrusive methods). Part II deals with invasive police methods in ascertaining the bodily features of the accused person (intrusive methods). The researcher has also classified bodily features in groups according to the severity of the invasiveness of the methods used and style used. In group 1, all the body-prints have been classified and in group 2 all the visual and audio identifications of bodily features. In group 3 in chapter 3, the more invasive methods of inner or intimate samples are grouped.

Chapter 1 is an introduction to the topic. It introduces the reader to the expectations of the victims of crime and their rights in terms of the Universal Declaration of Human Rights and the Constitution of the Republic of South Africa. It also explains the role of criminal law as a social mechanism that coerces members of society, through the threat of pain and suffering

or other sanction, to abstain from conduct that is harmful to the various interests of society. The object of criminal law is to promote individual autonomy, the welfare of society and its members. The chapter further explains the role of criminal procedure during the ascertainment of the bodily features of an accused person, provides some definitions and explains the relevant concepts.

Chapter 2 investigates the methods of ascertaining the bodily features of an accused person (non-intrusive methods).

The following methods investigated that are used to ascertain bodily features of an accused person are: Fingerprints, body-prints, footprints, palm-prints and identification parades (line-ups), as well as voice and photographic identification parades. The ascertainment of these bodily features were governed by section 37(1)(a),(b) and (d) of the Criminal Procedure Act before amendment of the Criminal Procedure Act ¹¹ and sections 36A (relating to definitions¹²); 36B (dealing with fingerprints), 36C (relating to fingerprints and body-prints for investigation purposes) and 37 (1) (a),(b) and (d) (powers in respect of body-prints and bodily appearances) of the Criminal Procedure Act¹³ as amended by Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.¹⁴

All these methods or procedures of ascertaining bodily features have an element of identification of some kind. These different methods of identification were compared with the methods applied by foreign jurisdictions such as the USA, Canada and the UK.

The investigation further examines the different kinds of databases for storing information used during the ascertainment of bodily features. That includes evidential material relating to ascertainment of bodily features.

¹¹ Act 51 of 1977.

¹² The Criminal Law (Forensic Procedures Amendment Bill)[B9-2013] was amended and section 36A (as initially inserted into the Criminal Procedure Act by the Criminal Law (Forensic Procedures Amendment Act 6 of 2010 and reflected in this dissertation, is amended by the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 and not incorporated into this dissertation; sections 36D and 36E was approved by Parliament in late 2013, signed by the President on 27 January 2014 as the Criminal Law (Forensic Procedures) Amendment Act (Act 37 of 2013), (published in Gazette 37268, Govt. Notice 52) providing inter alia for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis. This Act (Act 37 of 2013) or any section thereof is not in operation at the time of submission of this dissertation and is not included or referred to or discussed in this dissertation.

¹³ Act 51 of 1977.

¹⁴ Act 6 of 2010 was signed by the president on 1 October, published in the Government Gazette 33607 on 5 October 2010 and came into operation on 18 January 2013.

Chapter 3 investigates intrusive methods of ascertaining the bodily features of an accused person. In this chapter, DNA as a method of ascertaining the bodily features of an accused person is investigated. Although DNA can be obtained from hair, saliva, body fluids and bone, the main focus is on DNA obtained from blood samples. The investigation will be looking at the position in South Africa and the Criminal Law (Forensic Procedures Amendment Bill) (B9-2013) that at the time of writing and submission of this dissertation, has not been passed by the National Assembly of Parliament as an Act.¹⁵ The foreign jurisdictions of the USA, Canada and the UK will be research in respect of their legal position regarding the ascertainment of bodily features and DNA sampling. These jurisdictions provided valuable information for future development and supporting my conclusions and recommendations.

Chapter 4 presents the conclusion and recommendations. As far as style of referencing is concerned, the full detail of books and articles are not cited in the footnotes, but are reflected in the bibliography.

1.4 DEFINITIONS¹⁶

The following definitions are relevant to this topic.

“Body-prints” refer to prints other than fingerprints, which are taken from a person and are related to a crime scene, but exclude prints of the genitalia, buttocks or breasts of a person.¹⁷

“Constitution” means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

¹⁵ The Criminal Law (Forensic Procedures Amendment Bill)[B9-2013] was amended and section 36A (as initially inserted into the Criminal Procedure Act by the Criminal Law (Forensic Procedures Amendment Act 6 of 2010 and reflected in this dissertation), is amended by the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 and not incorporated into this dissertation; sections 36D and 36E was approved by Parliament in late 2013, signed by the President on 27 January 2014 as the Criminal Law (Forensic Procedures) Amendment Act (Act 37 of 2013), (published in Gazette 37268, Govt. Notice 52) providing inter alia for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis. This Act (Act 37 of 2013) or any section thereof is not in operation at the time of submission of this dissertation and is not included or referred to in this dissertation.

¹⁶ Section 1 and inclusive of the definitions set out in Chapter 3 of the Criminal Procedure Act.

¹⁷ Section 36A(1)(c) of the Criminal Procedure Act as inserted by the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010, Interpretation of Chapter 3.

“Comparative search” means the comparison of fingerprints, body-prints or photographic images, taken under any power conferred by Chapter 3 of the Criminal Procedure Act by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act, 1995 (Act 68 of 1995).¹⁸

“Fingerprint identification” (sometimes referred to as dactyloscopy) or palmprint identification is the process of comparing questioned and known friction skin ridge impressions from fingers or palms to determine if the impressions are from the same finger or palm. Fingerprint identification (also referred to as individualisation) occurs when an expert (or an expert computer system operating under threshold scoring rules) determines that two friction ridge impressions originated from the same finger or palm (or toe or sole) to the exclusion of others.¹⁹

“Footprint” means a toe and sole friction ridge skin impression.²⁰

“Latent prints” are hidden or invisible prints; in modern usage in forensic science the term “latent prints” means a chance or accidental impression left by friction ridge skin on a surface regardless of whether it is visible or invisible at the time of deposition.²¹

“Police official” means a member of the South African Police Service (SAPS) or municipal police service established in terms of the South African Police Service Act, 1995 (Act 68 of 1995).²²

1.5 CONCEPTS

The following concepts are discussed in this dissertation and they are relevant for defining and conceptualising the powers of the police in respect of the ascertainment of bodily features as they may only be ascertained by the police in respect of a specific group of people.

1.5.1 Bodily features

“Bodily feature” is not defined in the Criminal Procedure Act but according to the ordinary dictionary meaning, “body” means a person’s or animal’s physical structure.²³ “Bodily”

¹⁸ Section 36A(1)(f) of the Criminal Procedure Act as inserted by Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

¹⁹ Define fingerprint: <http://fingerprint.askdefine.com/> (accessed 2013/05/02) 3 of 11.

²⁰ Fingerprint - encyclopedia, article about fingerprinting at <http://encyclopedia.thefreedictionary.com/fingerprint> (accessed 2013/05/02) 3 of 12.

²¹ Fingerprint-encyclopedia article about Fingerprint. <http://encyclopedia.thefreedictionary.com/fingerprint> (accessed 2013/05/02) 2 of 12.

²² South African Police Service Act 68 of 1995.

²³ Little Oxford English Dictionary (2006) 9th edition (Oxford University Press) 67

means relating to the body.²⁴ “Feature” means a distinctive element or aspect.²⁵ “Distinctive” means characteristic of a person or thing distinguishing them from others.²⁶ From the definition above, one can deduce that “bodily feature” means a distinctive element or aspect relating to the body. It is a characteristic of the body that distinguishes one aspect of the body from the other. A fingerprint of a human being is unique and can never be the same as that of any other person, even if they are identical twins. One person’s fingerprints are distinct from the fingerprints of any other person. It is thus a bodily feature. The voice of one person is usually different from the voice of another person. The face and build of one person is usually not the same as that of another person. DNA profiles of persons who are not related by blood will never be the same and distinguish one person from another. DNA is thus a feature relating to the body or a feature of the body.

1.5.2 Ascertainment

The concept “ascertainment” is not defined in the Criminal Procedure Act. There is no legal definition of the concept “ascertainment”, but in the ordinary use of words, ascertainment means “to find out something for certain”.²⁷

The focus of this dissertation is to look at the ascertainment of body features of a person as part of an investigation by the police. The concept “person”, will mean the suspected person and the accused person. According to section 37(1) (a) of the Criminal Procedure Act before the amendment and substitution thereof,²⁸ the requirement was that before a police official may ascertain the body features of a person, the person must have been under arrest or have been released on bail or on warning, or after being arrested in respect of any matter referred to in sub-paragraph (n),(o) or (p) of section 40(1), served with a summons or been convicted. This includes a person who is involved in pending court proceedings. The persons who are referred to in section 40(1) are: (i) a person who is reasonably suspected of having failed to observe any condition in postponing the passing of sentence or suspending the operation of any sentence under the Criminal Procedure Act²⁹, (ii) a person who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under the Criminal Procedure Act³⁰, or (iii) a person who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is

²⁴ *Ibid*, 67.

²⁵ *Ibid*, 251.

²⁶ *Ibid*, 199.

²⁷ *Ibid*, 35.

²⁸ As substituted by section 3 of the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

²⁹ Section 40(n).

³⁰ Section 40 (o).

required to do so under an order of court or any law relating to prisons.³¹ Presently, section 37(1)(a) provides that body-prints and bodily appearances may be obtained from all those mentioned above except from a person released on warning. All these prerequisites must exist or be in place before a police official may ascertain the body features of a person.

1.5.3 Suspect

According to section 49 of the Criminal Procedure Act, “Suspect” means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.³² The requirements of reasonable grounds “to suspect” carry a lower threshold than the requirements of being satisfied that there are reasonable grounds “to believe”. There is a difference between “I suspect” and “I believe”.³³ The reasonableness of the suspicion must be approached objectively³⁴.

1.5.3.1 Non-arrested suspect

A non-arrested suspect is a person who has not been arrested, but is suspected of having committed an offence and this person may or may not be aware that he or she may be implicated in the commission of an offence and is at risk of being arrested or charged.³⁵

Sometimes it happens that a person knows that he or she is being suspected of having committed an offence but the police have no grounds to arrest him or her.³⁶ This type of person is also a non-arrested suspect.

1.5.3.2 Arrested suspect

“Arrested suspect” means a suspect who has been arrested in terms of the requirements set out in section 39(1) to (3).³⁷ This means that the suspected person must have been arrested with or without a warrant. The suspected person must have been informed of the reason for

³¹ Section 40(1)(p).

³² Section 49 (1) (b).

³³ *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) at par [95].

³⁴ *Minister of Safety and Security v Swart* 2012 (2) SACR 226(SCA).

³⁵ Viljoen <http://gnumptelexis.saps.gov.za/nxt/gateway.dll/2b/zcwna/goa> (accessed 2012/09/21). “Charge” includes an indictment, summons or charge sheet.

³⁶ Consider an incident where an intruder attacks a person in a house with the intention to commit robbery. It is night and it is dark. The owner of the house manages to shoot at the intruder. The intruder flees but leaves blood stains on the crime scene. The crime scene experts collect the blood sample left by the intruder. Later an informer who wants to remain anonymous informs the investigator of the name and whereabouts of the suspect, but does not want to give a statement under oath to confirm his information. This information is not given under oath and is not sufficient to allow the police to arrest and take a control blood sample from the suspect and compare it with the blood sample found on the crime scene. This person remains a non-arrested suspect.

³⁷ Criminal Procedure Act 51 of 1977.

the arrest. The suspected person must have been placed in custody through detention in terms of section 50 of the Criminal Procedure Act. When dealing with children who are suspects, police officials must comply with the provisions of the Child Justice Act.³⁸

1.5.4 Accused person

“Accused person” is a person who is claimed to have done something wrong or illegal.³⁹ At the inception of a trial, the person accused of having committed a crime is traditionally referred to as the accused.⁴⁰ Before a person is formally charged at the police station, the person is regarded as a suspect in a crime. Once a charge sheet has been drafted and a person is formally charged to appear in court, that person becomes an accused.

1.5.5 Arrest⁴¹

“Arrest” means to seize someone and take him or her into custody.⁴²

An arrest is effected with or without a warrant and unless the person to be arrested submits to custody, by actually touching his or her body or, if the circumstances so require, by forcibly confining his or her body.⁴³ Arrest actually means the placing of a person under police control and ultimately in a police cell⁴⁴ or lock-up⁴⁵ facility. This means that the act of arrest limits the rights of the arrested person, eg the right to freedom of movement.⁴⁶ The act of arrest by a police official may be justified by section 36 (1) of the Constitution.

Before a police official may arrest a person, the act of the police official must comply with particular requirements. The arrest with or without a warrant of arrest must have been

³⁸ Child Justice Act, 2008 (Act 75 of 2008).

³⁹ Little Oxford English Dictionary (2006) 9th edition (Oxford University Press) 6.

⁴⁰ Terblanche *Sentencing in South Africa* 7.

⁴¹ The United Nations in its *Body of Principles for the protection of all persons under any form of detention or imprisonment (adopted by the General Assembly on 9 December 1998 and applicable to all signatories to the UN)* defines arrest as “the act of apprehending a person for the alleged commission of an offence on authority”. “Authority” refers to the prescripts of the law and the authority of certain people to execute that law, such as police officials, correctional officers and in some instances private persons as authorised officials or persons.

⁴² Little Oxford English Dictionary (2006) 9th edition (Oxford University Press) 33.

⁴³ Section 39 (1) of the Criminal Procedure Act.

⁴⁴ “Police cell or lock-up” means any place that is used for the reception, detention or confinement of a person who is in custody of the South African Police Service or who is being detained by the South African Police Service, and includes all land, buildings and premises adjacent to any such place and used in connection therewith.

⁴⁵ Section 39 (3) of the Criminal Procedure Act.

⁴⁶ Section 12 (1) (a) of the Constitution provides that “everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”

authorised by statute or common law. The person who is arrested must be informed of the reason for the arrest.⁴⁷ If the above-mentioned requirements are not complied with, the act of arrest by the police official will be unlawful.

In *Minister of Safety and Security and another v Mhlana*,⁴⁸ the court held that for a police official to rely on arrest without warrant in terms of section 40 (1) (a), it is sufficient that a police official observes behaviour that appears to be prima facie criminal. It is not necessary that a crime in fact be committed, or that the arrested person later be charged and convicted of the suspected offence. This case indicates that a police official may arrest a person without a warrant if there is reasonable belief that a crime is being committed in his or her presence.

1.5.6 When is a person regarded as being arrested?

In terms of the provisions of section 39 of the Criminal Procedure Act, once a person's freedom of movement is limited by police action, that person is under arrest. This means that once the police official has complied with the requirements of section 39 (1) to (3), the person is under arrest even if that person has not yet been detained in a police cell or lock-up facility. If the person escapes before he or she is placed in a police cell or lock-up facility, that is regarded as escape from lawful custody.⁴⁹ If a police official phones a suspect and requests the suspect to come to the police station for questioning and the suspect comes to the police station voluntarily, that is not arrest.

1.5.7 Convicted and un-convicted person

After the trial in a competent court, the court can find the accused guilty and convict him or her if there is sufficient evidence to prove the case. If the prosecution or the police official feels that the case does not justify arrest, a written notice to appear in court can be issued to the accused in which he is given the option of appearing in court or paying the admission of guilt fine that has been determined. If the accused pays the admission of guilt fine, he is regarded as having being convicted.⁵⁰ An un-convicted person means any person not being convicted by a court of law.

1.5.8 Search

⁴⁷ Section 39 (2) of the Criminal Procedure Act.

⁴⁸ 2011 (1) SACR 63 (WCC) at p 64A-E.

⁴⁹ Section 51 (1) of the Criminal Procedure Act.

⁵⁰ Section 56 (1) of the Criminal Procedure Act.

One has to look as to whether ascertainment includes “search”. The concept of “search” is not defined in the Criminal Procedure Act. As a result, the ordinary meaning of the word has to be applied:

“Search” means to try to find something by looking carefully and thoroughly or examining something thoroughly in order to find something or someone.⁵¹ A police official may under the authority granted by a search warrant issued by a magistrate or justice or issued by a judge or judicial officer presiding in criminal proceedings seize an article mentioned in article 20 of the Criminal Procedure Act. However, this authority does not expressly extend to ascertaining bodily features.⁵² It appears as if a police official cannot use this section to apply for an order from a court ordering the surgical removal of an object that can serve as physical evidence from the body of the suspect, arrested person or accused. A police official may without warrant search any person or container or premises for the purpose of seizing any article referred to in section 20.⁵³ A police official may search any arrested person and seize an article mentioned in section 20 of the Criminal Procedure Act.⁵⁴ A police official may use the necessary force to search a person or premises.⁵⁵ All the sections mentioned supra do not extend the authority to the “ascertainment of bodily features” of the suspect, arrested person or accused in terms of section 37 of the Criminal Procedure Act.

In *Minister of Safety and Security v Xaba*,⁵⁶ Southwood held that sections 27 and 37 of the Criminal Procedure Act cannot be used to remove an object from the body of an arrested or accused person forcefully, as that does not fall under the word “search”. Section 27 deals with searching and not the ascertainment of bodily features. In a contrary decision Desai in *Minister of Safety and Security and another v Gaqa*⁵⁷ held that the Criminal Procedure Act, section 27, which provides for the use of force in order to search a person, permits the granting of an order to remove an object from the body of the arrested or accused person. He further held that the Criminal Procedure Act, section 37 (1) (c), which permits a police official to take such steps as he deems necessary to “ascertain bodily features” of an accused person “permits the police to apply for such order.” These decisions are in conflict. What the decision in *Minister of Safety and Security v Xaba* indicates is that “search” and “ascertaining bodily features” do not mean the same thing. Any intimate searches, which entail physical examination of a person’s body such as the vagina and rectum, are according

⁵¹ Little Oxford English Dictionary (2006) 9th edition (Oxford University Press) 625.

⁵² Section 21(1) (a) and (b) of the Criminal Procedure Act requires that the article be seized under search warrant if the article is in the possession or under the control of such a person.

⁵³ Section 22 of the Criminal Procedure Act.

⁵⁴ Section 23.

⁵⁵ Section 27 of the Criminal Procedure Act.

⁵⁶ 2004 (1) SACR 149 (D), p150-151.

⁵⁷ 2002 (1) SACR 654 (C), p 654.

to the ruling in the above case not allowed, but in the UK such searches are allowed under section 65 of the Police and Criminal Evidence Act, 1984 (PACE)⁵⁸ as amended by section 59(1) of the Criminal Justice and Public Order Act⁵⁹ of 1994, but only by medical practitioners and under certain conditions.

1.5.9 Released on bail or warning

An accused who is in custody in respect of an offence is, subject to the provisions of section 50 (6), entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.⁶⁰ A police official or court may release an arrested person on warning instead of bail if the offence is not an offence referred to in Part II or Part III of Schedule 2.⁶¹ The court is not limited with regard to the releasing of a person on warning in respect of offences that do not appear in Part II or III of Schedule 2. According to section 36B(1) (a) of the Criminal Procedure Act, a police official must take the fingerprints of a person arrested on a Schedule 1 offence and if released on bail without being fingerprinted, but it is not mandatory for a police official to take body-prints or fingerprints when releasing a person on warning without such a person being arrested or suspected of committing a Schedule 1 offence.

1.5.10 Served with summons

It is not always necessary to arrest an accused in order to secure his or her attendance in the magistrate's court. The same purpose can be achieved by serving the accused with a summons authorised by the prosecution and issued by the clerk of the court and served by an authorised person such as a police official. In this summons, an accused is given the option of either appearing in court or alternatively paying a specific fine.⁶² According to section 37 (1) (a) (iv) read with section 37(1)(a)(ii) and section 36B(1)(c) of the Criminal Procedure Act, a police official is authorised to ascertain the bodily features of such persons but ostensibly not of a person served with a notice to appear as was provided in the previous section 37 before its amendment by Act 6 of 2010. It appears as though the legislature in the new section 37, specifically excluded un-convicted offenders released on warning and released on written notice to appear in respect of lesser offences from ascertaining their bodily features.

1.5.11 Pending criminal proceedings

⁵⁸ Police and Criminal Evidence Act 1984.
⁵⁹ Criminal Justice and Public Order Act 1994.
⁶⁰ Section 60 (1) (a) of the Criminal Procedure Act.
⁶¹ Section 72 (1) of the Criminal Procedure Act.
⁶² Section 54 (1) of the Criminal Procedure Act.

Pending criminal proceedings are criminal proceedings⁶³ that have not yet been finalised. This means that the criminal process is still continuing. This usually happens after the arraignment of the accused. Arraignment means “the calling upon of the accused to appear before court, the informing of the accused of the charge against him and the request that he plead to the charge”. When the criminal proceedings are at this level, the police official is authorised to ascertain the bodily features of the accused in terms of section 37 (1) (a) of the Criminal Procedure Act.

1.5.12 Identification parade

“Identification parade” is described as a police line-up (in American English parlance) or identity parade (in British English idiom). It is a process by which a crime victim or witness’s putative identification of a suspect is confirmed to a level that can count as evidence at a trial. It will be discussed in paragraph 2.3.1.

1.5.13 Voice identification

“Voice identification” is defined as a combination of both aural (listening) and spectographic (instrumental) comparison of one or more known voices with an unknown voice for the purpose of identification or elimination.⁶⁴ It will be discussed in paragraph 2.3.2.

1.5.14 Non-invasive and invasive investigative methods of ascertaining bodily features of the accused

“Non-invasive methods” are techniques of investigation or treatment that do not involve penetration of the skin by needles or knives.⁶⁵ In *S v Huma and another*, the matter was in relation to an order granted by the court authorising the taking of the fingerprints of the accused for comparison with the crime scene fingerprints. The accused objected, holding that the court order was infringing his right to physical integrity. The court held that:

The taking of the fingerprints was not inhuman nor degrading. The practise was accepted worldwide as a proper form of individual identification. The taking of fingerprints in private could not lower a persons’s self-esteem. It did not constitute an intrusion (invasion) into a person’s physical integrity if taken in terms of section 37 of the previous Criminal Procedure Act, 51 of 1977.

⁶³ “Criminal proceedings” include a preparatory examination under Chapter 20 of the Criminal Procedure Act.

⁶⁴ Cain and Wilson [http://expert pages.com/news/voiceprint-identification.htm...](http://expertpages.com/news/voiceprint-identification.htm...) ,(accessed 2013/04/30).

⁶⁵ Non-invasive - Dictionary definition of non-invasive/Encyclopedia.com:FREE... online 1 of 2. <http://www.encyclopedia.com/doc/1062- noninvasive.html...> (Accessed 2013/05/09.)

This case indicates a non-invasive method of ascertaining the bodily features of an accused person.

“Invasive methods” refer to methods involving puncture of the skin or insertion of an instrument or foreign material into the body.⁶⁶ In *S v R and Others*⁶⁷ the court held that:

DNA testing of accused’s blood for comparison is an invasion of a person’s right to privacy in terms of section 14 of the Constitution, 1996 and an invasion of the person’s right to bodily integrity in terms of section 12 (2) of the Constitution, 1996.

In *S v Orrie and Another*⁶⁸ the matter related to involuntary taking of a blood sample for DNA profiling and the court held that:

There can be little doubt that the involuntary taking of a blood sample for the purposes of DNA profiling is both an invasion of the subject’s right to privacy and an infringement of the right to bodily security and integrity. The court however held that the right can be limited by section 36 of the Constitution of the Republic of South Africa Act 108 of 1996 through [the] medium of [the] Criminal Procedure Act, section 37.⁶⁹

These cases indicate that obtaining a blood sample from a person without consent constitutes an invasion of the body of that person because the body of that person is penetrated with a foreign object such as a needle. That will be unconstitutional in South Africa if the person does not give consent.

In *Minister of Safety and Security and another v Xaba*⁷⁰ the police applied to the court for an order allowing forced surgical removal of a bullet required as evidence in a criminal case against the person in whom it was lodged. The police applied section 27 of the Criminal Procedure Act, which provides for the use of force to effect a search, as well as the former section 37 (1) (c) of the Criminal Procedure Act, which permits a police official to take such steps as he may deem necessary in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature. The court held that a police official was not entitled to search a suspect by operating on his leg. He could not use the reasonable force authorised by section 27. The court held that the Criminal Procedure Act in section 37 (1) (c) was not intended to grant a police official the power to empower a medical practitioner to perform an operation of that kind. The court held that the applicants (police) were not entitled

⁶⁶ Invasive - Definition of invasive in the medical dictionary- by Free Online Medical Dictionary... 1 of 3 at <http://medicla-dictionary.thefreedictionary.com/invasive...>, (accessed 2013/05/09).

⁶⁷ 2000(1) SACR 33(W) 33.

⁶⁸ 2004 (1) SACR 162 (C) 162 E-G.

⁶⁹ Criminal Procedure Act 51 of 1977 section 37.

⁷⁰ 2004 (1) SACR 149 (D) 149.

to the relief claimed. An order contradicting this was granted by the court in *Minister of Safety and Security and another v Gaqa*.⁷¹

⁷¹ 2002 (1) SACR 654 (C).

PART I

NON-INVASIVE INVESTIGATIVE METHODS IN ASCERTAINING BODILY FEATURES OF THE ACCUSED PERSON

“Autoptic evidence” - evidence derived from an accused’s own bodily features does not infringe the right not to be compelled to give evidence - *Levack and others v Regional Magistrate, Wynberg* 2003 (1) SACR 187 (SCA) at [par 19]

CHAPTER 2

Investigative methods in ascertaining bodily features of the accused person

2.1 INTRODUCTION

In part 1 of this dissertation, the researcher will be looking at non-invasive methods that are used in the ascertainment of bodily features of the accused person. Non-invasive methods are methods that do not involve the introduction of instruments or other objects into the body of a person. The purpose of these methods of investigation is mainly to establish a connection between physical evidence, the victim, the suspect and the crime scene.

Two methods (identified and grouped in group 1 and group 2 of part 1 respectively) that are used to ascertain bodily features of the accused person are investigated. In group 1 the interrogation focusses on fingerprints, body-prints, footprints and palmprints. In group 2 of part 1 the examination focusses on identification parades (line-ups), voice identification parades and photographic (photo) identification parades.

The ascertainment of these bodily features were governed by the previous Criminal Procedure Act in sections 37 (1) (a),(b) and (d) and are now governed by section 36B, 36C and 37 (1) (a),(b) and (d) of the current Criminal Procedure Act as amended by Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.⁷²

2.2 GROUP 1 OF PART 1

The following methods of ascertaining bodily features of the accused person, to wit, fingerprints, body-prints, footprints and palm-prints, are regarded as non-intrusive, as they are not intimate searches as indicated in case law. Du Toit *et al* argue that ascertainment of bodily features such as the above that are described in section 37 are not applicable to the common law principle of self-incrimination, which is confined to communications.⁷³ They do not infringe on the privacy of a person.

2.2.1 Fingerprints and fingerprinting: The position in South Africa

The Criminal Procedure Act before amendment provided for the following:

⁷² The Act was published in Government Gazette 33607 dated 5 October 2010.

⁷³ See also Osterburg and Ward *Criminal Investigation: A Method for Reconstructing the Past* 23.

Any police official may take finger-prints, palm-prints or foot-prints or may cause any such prints to be taken of any arrested person, person released on bail or warning under section 72, any person served with summons and any person who is convicted under section 57 (6)⁷⁴

Section 36C of the Criminal Law (Forensic Procedures) Amendment Act has now been implemented.⁷⁵ Section 36B makes it compulsory for a police official to take fingerprints of any arrested person, person released on bail, person upon whom a summons has been served and convicted person. This Section 36B is different from the previous Section 37 in the sense that it talks only about fingerprints and not body-prints.⁷⁶ This section does not give a police official any discretion, as it orders a police official to take fingerprints.⁷⁷ The aim is to assist the investigator in investigation or in crime detection.

2.2.1.1 *Structure of fingerprints*⁷⁸

The surface of the human hands and feet are covered with a unique ridge pattern that remains unchanged throughout the human life cycle. Of all the human body components, the ridge patterns on the hands and feet are the only components whereby a person can be individualised because it can be said with a fair degree of certainty that no two persons' fingerprints are the same. Apart from this, fingerprints possess all the components of an effective identification medium, namely uniqueness, invariability, universality, reproducibility and classifiability. Because of the uniqueness of each person's fingerprints, it is generally accepted as evidence by South African courts.⁷⁹

Fingerprinting is believed to be one of the most accurate and scientific methods of ascertaining the bodily features of a person. During the comparison of a suspect's fingerprints with the fingerprints that exist in the database, fingerprints can confirm the presence or absence of a perpetrator of a crime on a crime scene.⁸⁰ In *S v Legote en*

⁷⁴ Section 37 (1) (a) par (i) to (v) of the Criminal Procedure Act before amendment by Act 6 of 2010.

⁷⁵ Act 6 of 2010.

⁷⁶ 'Bodyprint' means a prints other than a fingerprint, taken from a person and related to a crime scene, but excludes prints of the genitalia, buttocks or breast of a person.

⁷⁷ Section 36B(1) provides that "A police official must take the fingerprints or must cause such fingerprints to be taken." The previous section 37 provided that .."Any police official may take ..."

⁷⁸ 'Fingerprint' is an impression of the friction ridges of all or any part of the finger. A friction ridge is a raised portion of the epidermis on the palmar (palm and fingers) or plantar (sole and toes) skin, consisting of one or more connected ridge units of friction ridge skin. The term fingerprint normally refers to impressions transferred from the pad on the last joint of fingers and thumbs.

⁷⁹ Marais *Physical Evidence in Crime Investigation* 169.

⁸⁰ The South African Police Service Criminal Record Centre has a database for convicted persons and a database for unknown suspects. The latter database is the one consisting of

*ander*⁸¹ fingerprint evidence that was found at the back of false number plates of two stolen motor vehicles that were used during the commission of a robbery placed one of the accused at the crime scene.

As in South Africa, the ascertainment of bodily features in the USA is not regarded as violating the common law privilege against self-incrimination. This was confirmed in *Seethal v Pravitha*⁸²; the United States Supreme Court ruling in *Schmerber v California*⁸³ was cited with apparent approval by Didcott J. In *Seethal* it was remarked that section 37 should not be interpreted in the light of common law privilege against self-incrimination. In order to avoid confusion, the court highlighted that this type of privilege is confined to oral communications.⁸⁴ The police must, however, comply with the requirements of the Criminal Procedure Act as prescribed in section 37 (1) of the Criminal Procedure Act.

2.2.1.2 *The position of a suspect*

The following procedure is followed by the police in ascertaining the bodily features of a suspected person by means of fingerprints before the arrest of such a suspected person: If the crime committed falls within Schedule I of the Criminal Procedure Act, such as murder, housebreaking, robbery at a house or theft of a motor vehicle, the police will conduct an investigation of the crime scene in an effort to identify the owner of fingerprints found at a crime scene, i.e. a possible suspect or suspects who are unknown at that time.

Crime scene experts such as photographers, fingerprints experts, pathologists, ballistic experts and explosives experts will visit the crime scene and lift any physical evidence, including fingerprints. Fingerprints will not always be found at the crime scene. If fingerprints are indeed found at the crime scene, those fingerprints will be used in an attempt to determine the identity of the suspect. This is done by comparing them with the fingerprints of previously known convicted persons that are available on the database. Such fingerprints that are found at the crime scene are called “positive fingerprints” (or from latent⁸⁵ fingerprints

latent fingerprints (crime scene fingerprints) that were found at the crime scene but the ownership of those fingerprints is still unknown. The first database mentioned is the one containing the fingerprints of known convicted persons.

⁸¹ 2001 (2) SACR 179 (SCA) 180 G.

⁸² 1983 (3) SA 827 (D) 830H and 846H-847C.

⁸³ 384 US 757 (1966)

⁸⁴ Du Toit *et al. Commentary on Criminal Procedure Act, Service 44-3-2.*

⁸⁵ ‘Latent prints’ are chance friction ridge impressions that are obvious to the human eye and that have been caused by the transfer of foreign material from a finger onto a surface. Latent prints means any chance or accidental impression left by friction ridge skin on a surface, regardless of whether it is visible or invisible at the time of deposition. Electronic, chemical and physical processing techniques permit visualisation of invisible latent print residues

or patent or plastic ⁸⁶ prints) because after development they can be used to ascertain or identify who the owner of the fingerprints is that were found at the crime scene.

If the fingerprints that were found at the crime scene cannot identify any person as the owner of the fingerprints, these fingerprints will be stored in the database of unknown suspected persons. However, if the fingerprints that were found at the crime scene can identify the person to whom the fingerprints belong, the fingerprint expert who identified the suspected person will issue a statement under section 212 (4) of the Criminal Procedure Act 51 of 1977 indicating who the person is who has been identified.

The statement will then be handed over to the investigating officer in the case. The investigating officer in the case or any other authorised police officer will apply to the public prosecutor for a warrant of arrest for the person who has been identified by the fingerprint expert⁸⁷. Once the warrant of arrest has been issued, the suspected person will be arrested. In *S v Arendse* ⁸⁸ the only evidence that linked the accused to the crime was a fingerprint. The accused was found guilty in that case because he could not give evidence that could rebut the presence of his fingerprint at the crime scene. The bodily feature of the accused was ascertained through the fingerprint and was conclusive evidence of the presence of the accused at the crime scene.

The amended Section 37 (1) of the Criminal Procedure Act allowed the police discretion in the taking of fingerprints, palm-prints and footprints and did not restrict the time of taking it.

whether they are from natural sweat on the skin or from a contaminant such as motor oil, blood, ink, paint or some other form of dirt. (Fingerprint - encyclopedia article about fingerprinting. <http://encyclopedia.thefreedictionary.com/fingerprint> ,(accessed 2013/05/02) 2 of 12.

⁸⁶ 'Patent prints' are chance friction ridge impressions which are obvious to the human eye and which have been caused by the transfer of foreign material from a finger onto a surface. Some obvious examples would be impressions from flour and wet clay. Because they are already visible and have no need of enhancement they are generally photographed rather than being lifted in the way that latent prints are. Patent prints can be left on a surface by materials such as ink, dirt, or blood. A "plastic print" is a friction ridge impression left in a material that retains the shape of the ridge detail. Although very few criminals would be careless enough to leave their prints in a lump of wet clay, this would make a perfect plastic print. Commonly encountered examples are melted candle wax, putty removed from the window panes or grease deposits on car parts. Such prints are already visible and need no enhancement, but investigators must not overlook the potential that invisible latent prints deposited by accomplices may also be on such surfaces. After photographically recording such prints, attempts should be made to develop other non-plastic impressions deposited from sweat or other contaminants (<http://en.wikipedia.org/wiki/Fingerprint#Patent>, accessed 2013/05/02).

⁸⁷ Criminal Procedure Act 51 of 1977, section 43.

⁸⁸ 1970 (2) SA 367 (C).

This discretionary power was supported by the courts, as the court in *Nkosi v Barlow NO en Andere*⁸⁹ held as follows:

The powers conferred on a police official in terms of section 37 (1) (a) of the Criminal Procedure Act, 51 of 1977 to take an accused's finger-prints, palm-prints or foot-prints can be exercised by such official irrespective of whether the trial has commenced or not. The word "can" also indicates a discretion on the part of the police.

2.2.1.3 *The position of arrested, detained and accused person*

The following procedure is followed by the police in confirming the ascertainment of bodily features of an arrested person who has been identified by means of fingerprints for court purposes. It is a method used in order to provide proof to the court of how the fingerprint expert arrived at the conclusion that the person in front of the court is actually the right person.

Schwikkard⁹⁰ has the following to say in this regard:

Evidence that fingerprints were found at the scene of crime or on a particular object is often of strong probative value in linking the accused with the commission of the crime. The usual manner in which fingerprint evidence is obtained is as follows: a policeman will lift a print by means of folien from the object and then send off the folien and fingerprint taken from the suspect to a police expert stationed at the main centre, the expert will then compare the fingerprints of the suspects with those found at the crime scene, the expert will mount enlarged photographs of the two sets of prints side by side and mark the points of similarity.

If the expert attends the court proceedings, he will often retake the accused's fingerprints and compare them with the prints found at the scene. Seven points of similarity are sufficient to prove beyond reasonable doubt that the prints were made by one and the same person. The evidence of comparison may be given orally or by affidavit (section 212 (4) and (6) of the Criminal Procedure Act. Once the court accepts that the witness is an expert, it will as a rule accept his evidence.

⁸⁹ 1984 (3) SA 148 (T) 148.

⁹⁰ Schwikkard *et al Principles of Evidence* 399.

2.2.1.4 Evidential issues: Fingerprints

The reliability and validity of the methods and techniques of identification by means of fingerprinting are assessed by the courts before opinion evidence on fingerprints is admitted. In *S v Gumede and the other*⁹¹ Van Reenen remarked as follows:

“The duties of a trial court in assessing the evidence of a fingerprint expert may be stated as follows: firstly, the court must be satisfied that the witness is competent to give evidence. In other words, that he is properly trained and has sufficient experience.

Secondly, it must be satisfied as to the origin of the sets of fingerprints which are being compared, that is that the one set was found at the scene of the crime and that the other is that of the accused. Thirdly, it must be satisfied that the expert indeed conducted a proper enquiry in comparing the two sets and that he is capable of referring to sufficient points of similarity. The court accepted that seven points of similarity in the fingerprints are sufficient for identification⁹²”

Evidence is admissible if it is relevant. The following cases indicate how the court investigated the evidence of the fingerprint expert to determine relevance and reliability.

In *S v Nala*⁹³ the court held as follows:

Where the trial Court investigates the evidence of a fingerprint expert regarding points of identity it does so, not in order to satisfy itself that there are the requisite number of points of identity, but so as to satisfy itself that the expert’s opinion as to the identity of the disputed finger-points may safely be relied upon.

If the court is itself able to discern all the points of identity relied upon by the expert, it will no doubt more readily hold that the opinion of the expert may safely be relied upon than in the case where, for example, it is quite unable to discern any of the points of identity relied upon⁹⁴.

In *S v Nyathe*⁹⁵ the only evidence linking the accused with the crime was evidence concerning fingerprints. Fingerprints at the scene of crime had been lifted with folien and

⁹¹ 1982 (4) SA 561 (T) 562 (C).

⁹² At 565 C.

⁹³ 1965 (4) SA 360 (A) 360.

⁹⁴ Criminal Procedure –Evidence- prints – Investigation by courts of expert’s evidence -Purpose (Juta e publications)
<http://juta.saps.org.za/NXT/gateway.dll/SA%20Police%Services/ccpa/2182/2183/4...>
(accessed 2010/04/12).

⁹⁵ 1988 (2) SA 211 (O) 213 C.

compared by a fingerprint expert with a set of fingerprints bearing the accused's name. A court exhibit card with enlargements of the fingerprints found at the crime scene and of a fingerprint of the accused was handed in and the expert testified that they were identical. He had found ten points of similarity; the courts required at least seven points to be sufficient to prove identity beyond reasonable doubt. The court accepted the evidence.

In *S v Malindi*⁹⁶ Le Roux accepted that seven points of similarity are sufficient for identification. After observing the evidence he remarked as follows: "this seems, in my view, to bear the wisdom of the South African Police Policy of requiring at least seven points of similarity."

In *S v Kimimbi*⁹⁷ Watermeyer said "seven points of identity are enough to establish identity beyond reasonable doubt", and this is the figure that is nowadays generally accepted in the SAPS. The judge accepted the seven-point identification rule of South Africa. In *S v Blom*⁹⁸, the court rejected the fingerprint evidence because there were only five points of similarity, not seven.

The above-mentioned cases indicate clearly that evidence about the bodily features of an accused can be relied on if it involves fingerprints. These cases indicate that ascertaining the bodily features of an accused is very important to prove or disprove a fact.

2.2.2 Fingerprints and fingerprinting in foreign jurisdictions

2.2.2.1 The position in the United States of America

Newton⁹⁹ argues that the use of fingerprints for the purpose of identification rests on two assumptions. First, a person's fingerprint pattern begins to develop very early in life, well before birth, and it remains unchanged even after death until decomposition of the body begins. Efforts to change one's prints by chemical, physical or any other means are universally unsuccessful. Secondly, no two people in the world (including identical twins) have exactly the same pattern of fingerprints.

In its most basic form, the use of fingerprints for individualisation involves the comparison of two sets of prints, point by point, for example one from a crime scene and one obtained from a suspect. An examiner looks for very specific points of identity between the two sets, such

⁹⁶ 1983 (4) SA 99 (T) 106 B to E.

⁹⁷ 1963 (3) SA 250 (C) 251 F-H.

⁹⁸ 1992 (1) SACR 649 (E) 650 G.

⁹⁹ Newton *DNA Evidence and Forensic Science* 16.

as a double loop or whorl¹⁰⁰ at exactly the same position on the left thumb print in both sets of prints. A match between two sets of prints is obtained when a particular number of minutiae¹⁰¹ matches are obtained. That number varies from country to country and from state to state in the United States. For example, 16 Galton matching points are required in the UK and 12 in Australia. Different states in the United States use different numbers although the Federal Bureau of Investigations (FBI) requires 12 matching points.¹⁰² Canada has no minimum matching requirements.

In the USA, the method of ascertaining the bodily features of a person through fingerprinting is similar to the one used in South Africa. The method is called ACE-V. It stands for analysis, comparison, evaluation and verification. It was admitted in court for the first time in 1911. These principles have generally been accepted by the US courts as offering a sound method of making reliable identifications.¹⁰³

By implementing these principles, law enforcement officers may make identifications where suspects have generated print impressions.¹⁰⁴ The police officer or evidence technician must testify concerning the process that was used to obtain the visible impression or latent print from a crime scene, but the analysis and interpretation of the results must generally be introduced in court by an expert. As required in other fields of expertise, the expert must establish an evidentiary foundation to show that by study, training and experience he or she has attained sufficient expertise to offer opinion testimony.¹⁰⁵

In the case of *Hasson v Commonwealth*,¹⁰⁶ a police official lifted a fingerprint by using a mixture of equal parts of water, black fingerprint powder and clear ivory dish soap and applied it to the reverse side of a vehicle identification strip to reveal a defendant's fingerprints. The judge allowed the evidence to be introduced by a fingerprint analyst who testified that the specially revealed fingerprint matched the defendant's prints.

¹⁰⁰ A double loop or whorl is a pattern of ridges on a fingerprint.

¹⁰¹ Minutiae are the characteristics of a ridge found within the fingerprint pattern and assist in classifying or analysing the print.

¹⁰² Newton *DNA Evidence and Forensic Science* 17.

¹⁰³ *Illinois v Jennings*, 252 Ill.534, 96 N.E 1077 (1911). More recently, the Court of Appeals upheld the validity of fingerprint identification in *United States v Crisp*, 324 F.3d 261, 2003 US App. Lexis 6021 (4th Circ. 2003) noted in Ingram *Criminal Evidence* 11th edition (Anderson Publishing USA 2012) 460.

¹⁰⁴ A print impression is the mark left by the ridge of the fingerprint.

¹⁰⁵ Ingram *Criminal Evidence* 460.

¹⁰⁶ *Hasson v Commonwealth*, 2006 Va. App. Lexis (2006).

To assist the jury in understanding fingerprint testimony, the expert will normally use enlarged photographs, power point presentations or other means to show the points of similarity in the ridges and lines on which the expert has based his or her conclusion.¹⁰⁷

As to constitutional implications, it was held in *United States v Wade*¹⁰⁸ that the prohibition against self-incrimination is aimed at oral and written communications and not at real evidence,¹⁰⁹ such as fingerprints, body-prints and palm-prints. On the basis of these cases, it is clear that obtaining the fingerprints of a person does not infringe on the right to privacy if this is not done in a public place. It also does not infringe on the right to dignity.

2.2.2.2 *The position in Canada*

Similar to South Africa, Canada also recognises basic human rights in section 8 of the Canadian Charter of Rights and Freedoms¹¹⁰. In *Hunter v Southam*¹¹¹ the court of Canada noted that the question was “whether in a particular situation the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance its goals. Notably the goals of law enforcement.” The court noted that priority was to be given to the individual’s interest. The Canadian Criminal Code makes provision for impression warrants. These warrants may be issued by a justice of the peace in respect of any offence, based on reasonable grounds to believe that the print will provide information concerning the offence. This wording does not seem to require that the person from whom the impression is taken be a suspect.¹¹² The impression warrants grant the Canadian police powers to take impressions of feet, hands, teeth and other parts of the body.¹¹³

In *Canadian Oxy Chemicals Ltd*¹¹⁴ the Court held that the purpose of section 487(1) of the Canada Criminal Code is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly, they should be able to locate, examine and preserve all the evidence relevant to events that may have given rise to criminal liability. The aim of the Act is to empower the police to do investigation and crime detection.

¹⁰⁷ Ingram *Criminal Evidence* 461.

¹⁰⁸ 388 US 218 (1967) 222.

¹⁰⁹ Real evidence is evidence in which one can produce an exhibit such as a knife or fingerprint.

¹¹⁰ Coughlan *Criminal Procedure Essentials of Canadian Law* 75.

¹¹¹ [1984] 2 S.C.R 145 159.

¹¹² Coughlan *Criminal Procedure Essentials of Canadian Law* 75.

¹¹³ Section 487.092.

¹¹⁴ *Canadian Oxy Chemicals Ltd v Canada* [1999] 1 S.C.R 743 22.

2.2.2.3 *The position in the United Kingdom*

Fingerprinting in the UK is governed by the PACE 1984¹¹⁵ and the Criminal Justice and Public Order Act, 1994. The provisions of PACE and its Code D relating to the identification of the suspected person are designed to make sure fingerprints, samples, impressions¹¹⁶ and photographs are taken, used and retained, and identification procedures carried out only when justified and necessary for preventing, detecting or investigating crime. If these provisions are not observed, the application of the relevant procedures in particular cases may be open to question or be declared invalid.¹¹⁷

According to PACE, fingerprints may be taken for investigation under the following circumstances:

- (1) From a person detained at a police station in consequence of being arrested for a recordable offence.¹¹⁸
- (2) From a person detained at a police station who has been charged with a recordable offence.¹¹⁹
- (3) From a person who has been bailed to appear in court or police station.¹²⁰
- (4) From a person who has been arrested for a recordable offence and released if the person (i) is on bail and has not had his or her fingerprints taken in the course of the investigation of the offence, or (ii) has had his or her fingerprints taken in the course of the investigation of the offence, but these do not constitute a complete set or some, or all, of the fingerprints are not of sufficient quality to allow satisfactory analysis, comparing or matching.¹²¹
- (5) From a person who has been (i) convicted of a recordable offence, (ii) given a caution in respect of a recordable offence, (iii) warned or reprimanded under the Crime and Disorder Act 1998 in section 65 thereof.¹²²
- (6) From a person a constable reasonably suspects is committing or attempting to commit, or has committed or attempted to commit, any offence if either the person's name is

¹¹⁵ Police and Criminal Evidence Act, 1984.

¹¹⁶ An impression is not the same as a fingerprint but it is an impression such as shoe or skin impressions.

¹¹⁷ Police and Criminal Evidence Act 1984 (PACE) section 1.7.

¹¹⁸ Section 61(3).

¹¹⁹ Section 61 (4).

¹²⁰ Section 61 (4A).

¹²¹ Section 61 (5A).

¹²² Section 61 (6).

unknown and cannot be readily ascertained by the constable or the constable has reasonable ground for doubting whether a name given by the person is his or her real name.¹²³ A police officer of the rank of inspector or above can take or authorise the taking of fingerprints of a person if satisfied that the taking of the fingerprints is necessary to assist in the prevention or detection of crime.¹²⁴

In each police force in England and Wales, the comparison and identifications of fingerprints are carried out by highly trained fingerprint experts within the Fingerprint Bureau. In the past, fingerprint information was held on a series of card indexes that had to be filed, searched and retrieved by hand, involving a laborious process. Each individual police force maintained its own locally based fingerprint collection, while a national collection was kept at New Scotland Yard. However this situation was revolutionised by the development of the Automated Fingerprint Recognition System (AFR), a computerised system introduced in 1992 that was taken up by most of the forces in England.

This AFR technology was then incorporated into its successor, the National Fingerprint Identification System (NAFIS), which by 2001 had become available to all police forces in England and Wales. The national fingerprint collection held on NAFIS is the only definite database that allows the identification of individuals. Every person who has been arrested and charged, reported or summonsed for a recordable offence has his or her fingerprints taken. In some cases, these fingerprints may be electronically scanned using the live scan system and the captured images transmitted to NAFIS. If not already on file to confirm the identity of the individual concerned, these fingerprints are added to the national database. It is worth noting that in the past only fingerprints taken from individuals who were subsequently convicted were kept on the database as a permanent record of identity. However, following the implementation of the Criminal Justice and Police Act (CJPA) 2001, fingerprints from arrested individuals who are not subsequently cautioned for a criminal offence or convicted of a criminal offence need not be eliminated from the NAFIS system although they are held separately within it.¹²⁵ The comparison of fingerprints recovered from a crime scene with those held on the national database may lead to the identification of an individual present at that scene. Persons who have a legitimate reason to be at a particular

¹²³ Section 61 (6A).

¹²⁴ Section 61 (6D) (ii).

¹²⁵ This means that prior to 2001 only fingerprints of convicted persons were kept in the database, but after 2001 fingerprints of arrested persons who were not subsequently convicted were not destroyed but kept in a separate database.

crime scene, such as a householder, may provide the police with their fingerprints for elimination purposes.¹²⁶

2.2.3 Body-prints, footprints and palm-prints: The position in South Africa

2.2.3.1 Body-prints¹²⁷

Section 36C relates to the taking of fingerprints and body-prints of a person or group of persons who on reasonable grounds are suspected of having committed an offence falling under Schedule 1 of the Criminal Procedure Act.¹²⁸ Section 36C allows police officials discretion, as it says a police official “may” take fingerprints or body-prints of a person without a warrant. This section relates to a “suspect” and not to an arrested person, person released on bail, person upon whom a summons has been served or person who has been convicted. The section authorises the police to conduct an investigation irrespective of whether the person has been arrested or not, as long as there are reasonable grounds to suspect that the person has committed an offence falling under Schedule 1 of the Criminal Procedure Act. Similar provisions did not exist in the previous section 37 and this is a new development in the Criminal Procedure Act. Although the section confers wide powers, the researcher submits that the section will not be abused as long as police officials comply with the requirement of reasonableness. The words “reasonable suspicion” do not imply that there must be a prima facie case against the suspect. The section requires only reasonable suspicion and not certainty. The suspicion must, however, have a factual basis.¹²⁹ The suspicion must be that of a peace officer. A peace officer cannot merely rely on the suspicion of another person. A peace officer must form his or her own opinion.¹³⁰ It is not a requirement that the arrest be made for purposes of bringing a person to court. The arrest can also be made for the purposes of further investigation as long as there is a reasonable suspicion that the person or the group of persons has committed a serious crime.¹³¹ The new section 37 of the Criminal Procedure Act,¹³² after being amended by the Criminal Law (Forensic Procedures) Amendment Act,¹³³ reads as follows:

¹²⁶ Jackson and Jackson *Forensic Science* 91-92.

¹²⁷ “Body-prints” mean prints other than fingerprints, taken from a person and related to a crime scene, but exclude prints of the genitalia, buttocks or breasts of a person. Section 36A (1)(c) of the Criminal Procedure Act 51 of 1977 after amendment by the Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

¹²⁸ 51 of 1977.

¹²⁹ *Mabona v Minister of Law and Order* 1988 (2) SA 654 SE.

¹³⁰ *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T).

¹³¹ *Mabona v Minister of Law and Order* 1988 (2) SA 654 SE. Joubert (ed) *Criminal Procedure Handbook* (11ed.) 103 to 104.

¹³² 51 of 1977.

¹³³ Act 6 of 2010.

- (1) Any police official may-
- (a) take the body-prints or may cause such prints to be taken-
- (i) of any arrested person upon any charge,
- (ii) of any such person released on bail,
- (iii) of any person arrested in respect of any matter referred to in paragraph (n),(o) or (p) of section 40 (1),
- (iv) of any person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed, or
- (v) of any person convicted by a court or deemed under section 57 (6) to have been convicted in respect of any offence which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph,
- (vi) of any person deemed under section 57 (6) to have been convicted in respect of any offence which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subparagraph.

In the previous section 37 the taking of fingerprints was grouped with palm-prints and footprints, but section 36B now deals exclusively with the taking of fingerprints.

2.2.3.2 *Footprints*

Friction ridge skin on the soles of the feet and toes of a person is as unique in its ridge detail as are the fingerprints and palm-prints when recovered at the crime scene. In terms of evidence, sole and toe impressions can be used in the same manner as fingerprints and palm-prints to effect identifications. Footprints (toe and sole friction ridge skin) evidence has been admitted in courts in the USA since 1934.¹³⁴ The making of a plaster cast is highly desirable¹³⁵ and precautions should be taken in regard to detailed characteristics to avoid the probability of a mistake.¹³⁶

2.2.3.3 *Palm-prints*

Palm-prints are also regarded as body prints and do not fall in the same category as fingerprints, according to the new section 36 of the Criminal Procedure Act. In *S v Legote en*

¹³⁴ *People v Les*, 267 Michigan 648,255 NW 407.

¹³⁵ *R v Nkele* 1933 TPD 36.

¹³⁶ *Mafujane and another v R* 1949 (1) PHH95 (O).

*ander*¹³⁷ a palm-print that was found in one of the stolen motor vehicles used during a robbery placed another accused at the crime scene. The importance of palm-prints in the investigation and detection of criminal behaviour and the identification of a person through the ascertainment of bodily features is unquestionable. In *Rex v Matemba*,¹³⁸ the court held that a palmprint is a “mark, characteristic or distinguishing feature” within the meaning of section 2 (1) of Act 39 of 1926 and a peace officer is therefore entitled to take the palm-prints of an arrested person.

2.2.3.4 *Evidential issues: palm-prints*

The value and accuracy of palm-prints as real evidence was confirmed in *S v Nzimande*.¹³⁹ In this case the issue was whether palm-prints that were found in a house where the deceased was found dead were sufficient without other evidence to obtain a conviction. The palm-prints were found on the wall just above the place where the body of the deceased had been found. The judge remarked that when looking at fingerprint evidence the court will look at the location of the fingerprints and whether there is any other evidence that rebuts the fingerprints. The court remarked¹⁴⁰ as follows: “the print was proof of his presence on the scene of crime and his failure to account thereof was indicative of his inability to give an innocent explanation.” At the close of the case the court found that palm-prints were the only evidence that placed the accused at the crime scene and convicted the accused of murder.

2.2.3.5 *Body-prints, footprints and palm-prints in foreign jurisdictions*

In respect of body-prints and palm-prints in foreign jurisdiction, the position is as follows:

2.2.3.5.1 The position in the United States of America

In the United States of America, Federal rules outline the procedure for conducting federal criminal trials. Each state each has its own code of criminal procedure, many of which closely resemble Federal rules.¹⁴¹

In the State of Iowa, fingerprints, palm prints and body marks are governed by Criminal Code 690.2. The said Criminal Code states as follows:

¹³⁷ *S v Legote en ander* 2001 (2) SACR 179 (SCA) 179.

¹³⁸ 1941 AD 75.

¹³⁹ 2003 (1) SACR 280 (O).

¹⁴⁰ 282A.

¹⁴¹ Criminal Procedure Legal Information Institute. <http://www.law.cornell.edu/wex/criminal-procedure> (accessed 2013/05/22).

The sheriff and chief of police of each city regardless of the form of government thereof, shall take the fingerprints of all unidentified dead bodies in their respective jurisdictions and all persons who are taken into custody for the commission of a serious misdemeanour, aggravated misdemeanour, or felony and shall forward such fingerprint records on such forms and in such manner as may be prescribed by the commissioner of public safety. In addition to the fingerprints as herein provided, any such officer may also take the photographs and palm prints of any such person and forward them to the department of public safety. The finger print record card makes provision for the capturing of photograph, finger prints, palm prints and body marks. The card also includes the profile of the arrested person, age, height, weight and residential address.¹⁴²

Footprint evidence (toe and sole ridge skin) has been admitted in courts in the USA since 1934.¹⁴³

2.2.3.5.2 The position in Canada

In respect of the taking of palm-prints, footprints, and teeth impressions or other body prints, Section 487.092 of the *Criminal Code of Canada* empowers the police to apply for a warrant that entitles the police to obtain impressions of the feet, hands and other parts of the body.¹⁴⁴ The search and seize warrant's conditions must be reasonable in the circumstances.

Section 487.092 provides as follows:

- (1) A justice may issue a warrant in writing authorising a peace officer to do anything, or cause anything to be done under the direction of the peace officer, described in the warrant in order to obtain any handprint, fingerprint, footprint, foot impression, teeth impression or other print or impression of the body or any part of the body in respect of a person if the justice is satisfied:
 - (a) by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been committed and that information concerning the offence will be obtained by the print or impression and
 - (b) that it is in the best interest of the administration of Justice to issue the warrant.

¹⁴² IA Code 690.2. Finger and palm prints - photographs - duty of sheriff and chief of police. <http://law.justicia.com/codes/iowa/2011/title1/chapter690/690-2/> (accessed 2013/05/22).

¹⁴³ *People v Les*, 267 Michigan 648, 255 NW 407.

¹⁴⁴ In South Africa, marks made by other parts of the body are referred to as "body-prints". In Canada they are called "impressions of the body."

- (2) A warrant issued under subsection (1) shall contain such terms and conditions as the justice considers advisable to ensure that any search or seizure authorised by the warrant is reasonable in the circumstances¹⁴⁵.

Section 487.092 of the Criminal Code of Canada empowers the police to apply for a warrant that entitles them to obtain impressions of the feet (footprints).¹⁴⁶

The International Fingerprint Research Group, which meets twice per year, consists of members of the leading fingerprint research group from Europe, the USA, Canada, Australia and Israel. This group leads the way in the development, assessment and implementation of new techniques for operational fingerprint detection.

2.2.3.5.3 The position in the United Kingdom¹⁴⁷

In the UK, identification of bodily features of a person by body-prints is governed by Code D, paragraph 1.6 of the PACE 1984.

Identification of the bodily features of a person by means of footprints is governed by Code D paragraph 4 of PACE in the UK. Footprints of an arrested and convicted person may be obtained for identification purposes.¹⁴⁸

Identification of the bodily features of a person by means of palm-prints is governed by Code D paragraph 4 of PACE in the UK. In this case, palm-prints and footprints are included. Paragraph 4.1 of Code D provides for the following:

“Reference to finger prints means any record, produced by any method, of the skin pattern and other physical characteristics or features of a person’s:

- (i) Fingers or
- (ii) Palms.”

This reference is broad enough to include body-prints, e.g. prints of the elbow or knee.

¹⁴⁵ 487.092. Information for impression warrant/Criminal Code of Canada. <http://your.laws.ca/criminal-code-canada/487092-information-impression-warrant> (accessed 2013/05/20).

¹⁴⁶ Coughlan *Criminal Procedure, Essentials of Canadian Law* 60-61.

¹⁴⁷ Police and Criminal Evidence Act 1984 CODE D, Code of Practice for Identification of Persons by Police Officers. http://www.gov.uk/government/uploads/attachment_data/file/117600/pace-code-d-2011.pdf accessed (2013/05/18).

¹⁴⁸ Code D of PACE 61.

2.3 Group 2 of Part I

In group 2 of Part 1, the researcher will be looking at identification parades or visual identification (commonly known as line-ups), identification by means of voice (commonly known as voice identification) and identification by means of photographs (commonly known as photo identification). These methods are also regarded as being non-intrusive and non-testimonial, although the suspect is involved in this type of investigation.

2.3.1 Identification parades: The position in South Africa

2.3.1.1 *Enabling act*

The Criminal Procedure Act deals with police powers regarding the identification of a suspect or accused for the purposes of ascertaining the bodily features of a person.

The previous section 37 of the Criminal Procedure Act stated the following in respect of the police's powers regarding identification parades:

(1) Any police official may –

(a).....

(b) make a person referred to in paragraph (a) (i) or (ii) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine.

Paragraph 37(a)(i) and (ii) referred to any person arrested on any charge and to any arrested person released on bail or warning under section 72. The amended new section 37 refers only to persons arrested on any charge or such person released on bail.

The new section 37 gives the police the same discretionary powers regarding the taking of body-prints and ascertaining of the bodily appearance of accused and convicted persons as the previous section 37, *provided that a police official may not in terms of section 37(1)(c)-*

(i) take a blood sample of any person; or

(ii) examine the body of a person who is of a different gender to the police official.

Section 37(1)(b)-(d) provide that:

(1) Any police official may-

- (a) ...
- (b) make a person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine;
- (c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.
- (d) take a photographic image or may cause a photographic image to be taken of a person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1).

The previous section 37 dealt with all prints (fingerprints, palm-prints and footprints), including bodily appearance. The amended section 37 deals with body prints and body appearance, but section 36B limits the mandatory taking of fingerprints to a person arrested or on summons in respect of the more serious offences mentioned in Schedule 1 of the Criminal Procedure Act, or convicted persons.

2.3.1.2 *The position of a suspect*

The Criminal Procedure Act in section 37 (1) (b) is currently silent about the position of persons who are suspected only of the commission of an offence and who have not yet been arrested. The Act regulates the position of arrested persons, persons who are released on bail or warning, convicted persons and persons involved in pending criminal proceedings. The Constitution is also silent about this fact.¹⁴⁹

Satchwell pointed out in *S v Sebejan and others*¹⁵⁰ that the requirements as to what constitutes “arrest” must not be approached too formalistically. The danger lurks that an unsuspecting person may be deceived into, for instance, self-incrimination, without having benefited from the rights of an “accused” person. A suspect may be defined as either someone who does not know that he or she is at risk of being charged, or as Satchwell puts it, someone “about whom there is some apprehension that she may be implicated in the

¹⁴⁹ *S v Sebejan and others* 1997 (1) SACR 626(W) 2 of 11.

¹⁵⁰ 1997 8 BCLR 1086, 1997 (1) SACR 625 (W).

offence under investigation¹⁵¹. A person is arrested when “questioned, apprehended or otherwise detained”. A person is detained when he or she is kept in confinement or in custody.¹⁵²

2.3.1.3 *The position of arrested, detained and accused persons*

The position of an arrested, detained and accused person is regulated by Section 37(1)(b) of the Criminal Procedure Act.¹⁵³

2.3.1.4 *Urgency of holding parade*

The courts encourage the holding of identification parades as soon as possible after the commission of a crime where possible. This will be after the case has been investigated and eye witnesses have been found that will possibly be able to identify the suspect at an identification parade. In *S v Dhlamini*¹⁵⁴ Goldstein noted that “the dependability and indeed the probability of identification at the ... parade diminish with each passing day.”

2.3.1.5 *Directives relating to procedures for identification parades*¹⁵⁵

The identification parade procedure (process) in South Africa is governed by directives issued by police, which are not necessarily rules of law. These are contained in Police National Instruction 1 of 2007¹⁵⁶ and National Instruction 2 of 2010.¹⁵⁷ In *S v Monyane and others*¹⁵⁸ it was said that the police rules are not law. They are:

¹⁵¹ 1091I par 35. Viljoen <http://gnumptalexis.saps.gov.za/nxt/gateway>. dll/2b/zc/wna/goa (accessed 2012/09/21)1-2.

¹⁵² *Ibid*, 1-2.

¹⁵³ Act 51 of 1977.

¹⁵⁴ 1997 (1) SACR 54 (W) 61b.

¹⁵⁵ Mokonyama, M.W. (2010) A critical analysis of the procedures followed to conduct identification parades. A case study in Mpumalanga, South Africa. (Unpublished M Tech dissertation) University of South Africa.

¹⁵⁶ Nyuswa, CM.(2009) The identification parade as a technique for the identification of suspects: A case study in KwaZulu-Natal. (Unpublished M. Tech dissertation) University of South Africa. The rules relating to identification parades originate from South African Police Service rules of practice. Initially these rules were contained in the SA Police Handbook called “Hints on the Investigation of Crime Chapter vii par 5 and Identification of accused and suspected persons 1983”. Rules are now contained in National Instruction 1 of 2007 issued on 2007-04-17 by Consolidation Notice 6/2007.

¹⁵⁷ Par 23 of National Instruction 2 of 2010 deals with identification parades involving children. This instruction was issued by the Minister of Police in terms of section 97 (5) of the Child Justice Act 75 of 2008 and published for general information under GN 759 in GG 33508 of 2 September 2010.

¹⁵⁸ 2001 (1) SACR 115 (T) 132 f.

... merely guidelines to the Police on the procedures to be followed in the holding of identification parades. The rules do not create rights and ... non-compliance with one or another of them will not necessarily result in a ruling that the parade is inadmissible.

In South Africa, rules relating to procedure in conducting an identification parade are stipulated in the said National Instruction. These rules are compiled to ensure that the police official who conducts the identification parade complies with section 35 of the Constitution, which deals with the rights of arrested, detained and accused persons. These are in essence the following:

1. The proceedings at the parade should at the time of the parade be recorded on form SAPS 329¹⁵⁹ by the police official who has been appointed to be in charge of the parade. The defence of the arrested person is entitled to be available at the identification parade but only as an observer and he or she is entitled to see the form but may not write on it. The completed form is neither a privileged document nor a witness statement.

In *S v Jija and others*¹⁶⁰ Erasmus concluded that: "a completed identification parade form (SAPS 329) does not fall within the ambit of the 'witness statement' privilege."

The court opined that it is difficult to see how privilege can attach to a document completed in the presence of the accused person and his legal representative who may in any case be present and who are entitled to question the correctness of the information set out in the document.

A conflicting decision was made in *S v Mphala and others*,¹⁶¹ where the court held, without giving reasons that notes on the form are privileged. The researcher submits that the reasoned judgement in *Jija* is preferred.

2. The police official in charge of the parade should not be the investigating official. The purpose of this rule is to ensure that a neutral person conducts the identification parade.

¹⁵⁹ SAPS 329 is a prescribed police form that has been drafted by the subsection dealing with policy, procedures and standards in the Division Detective Service of the South African Police Service.

¹⁶⁰ 1991 (2) SA 52 (E) 64 G-65C.

¹⁶¹ 1982 (2) SA 253 (C) 260 B.

3. Suspected or arrested persons should be informed of the purpose of the parade and the allegations against them and should further be given an opportunity to obtain a legal representative to be present at the parade.
4. A suspect or arrested person should be informed by the police official who is conducting the parade that his refusal to take part in an identification parade can at a possible later criminal trial be adduced as evidence against him or her and, further, that the court might at some stage draw an adverse inference from such refusal or non-compliance.
5. The accepted principle is that the identification parade should consist of at least eight to 10 persons, but a greater number is desirable.
6. It is generally undesirable that there should be more than one suspect on the parade, and if a second is placed on the parade, the two suspects should be more or less similar in general appearance and the persons on the parade should be increased to at least 12 to 16.
7. If the same identifying witnesses are involved in two parades, then the suspect should not be the only person appearing in both, nor should a suspect be added to a parade, already inspected by the identifying witness, for the purpose of a second parade.
8. The suspect and persons in the parade should be more or less of the same build, height, age and appearance and should have more or less the same occupation and be more or less similarly dressed. In *S v Mlati*¹⁶² the accused was the only person who was clad in a particular item of everyday clothing on the parade. This item was specifically described to the police by the identifying witness during the investigative stage and prior to the parade. As a result of this situation, the court held that the evidence of the result of the identification parade concerned had no real persuasive value.
9. It is a requirement that at least one photograph of the parade be taken of all the persons (including the suspect), depicting them as they appeared in the line-up and standing next to one another.
10. The police official in charge of the parade should inform the suspect that he may initially take up any position and change his position before any other identifying witness is called.

¹⁶² 1984 (4) SA 629 (A) 635.

11. A suspect should without fail be asked whether he or she is satisfied with the identification parade and further, whether he or she has any requests. This will prevent the suspect later saying he or she wanted to change position but was not given the opportunity to do so.

12. The police official who is responsible for conducting the identification parade must comply with any reasonable request of the suspect. In *S v Sibanda*¹⁶³ Viljoen (as he then was) remarked as follows regarding this rule:

It may be necessary, in the interests of justice, under certain circumstances to refuse a suspect permission to change his clothing, for example, where the change would have the effect of completely or partially disguising the suspect and altering his appearance radically, which may have the effect of rendering the parade nugatory, but it must always be kept in mind that the easier it is made for a potential witness to point out a person by some external phenomenon which may be common to more than one person, the more danger there is that the wrong person may be pointed out and the more conspicuous the phenomenon the greater the likelihood that the wrong person will be pointed out, or that the real person will be pointed out but for this very reason and not for the reason that he was independently observed or identified on the identification parade as the person who is sought to be pointed out. (Emphasis added)

13. Identifying witnesses must be kept separately, should not be allowed to discuss the case while waiting to be called upon to attend the parade, should not be allowed to see the parade being formed or re-formed and should be kept under the supervision of a police official who is neither the one in charge of the parade nor the investigating official.

In *R v Nara Sammy*¹⁶⁴ Dowling strongly disapproved of the circumstances where all witnesses were kept together in a room without supervision or control, without being warned not to discuss the case, and in circumstances where the witnesses had every opportunity of exchanging notes as to the appearance of the accused.

14. It is important that identifying witnesses be prevented from seeing any member of the parade before they are brought in for the purpose of making an identification. In particular

¹⁶³ 1969 (2) SA 345 (T) 349 A-C.

¹⁶⁴ 1956 (4) SA 629 (T) 631 C-D.

identifying witnesses should not be allowed any opportunity of seeing the suspect in circumstances indicating that he or she is the suspect.

15. It is a requirement that a police official who is neither the investigating official nor the official in charge of conducting the identification parade nor the official charged with supervising the identifying witness be used to escort one identifying witness at a time from the place or office where the witness is kept to the parade, and after such identifying witness's inspection of the parade, such official should escort the witness to an office or place where the witness can have no contact with witnesses who are still waiting to inspect the parade. The police official who escorts the identifying witness may not discuss the case with him.

16. The supervising official referred to in rule 13 above and the escorting official referred to in rule 15 above, should not know who the suspect is, and the line-up should be formed and re-formed in their absence. In *R v Nara Sammy*¹⁶⁵ a constable who was charged with the duty of escorting the witnesses one by one was admitted into the room when the parade was initially formed and later re-formed for the purpose of a further inspection by another identifying witness. This procedure was regarded as an irregularity. According to Dowling this procedure introduced an opportunity of abuse. This case of *Nara Sammy* indicates that the courts want the identification parade to be as fair as possible.

17. During the process of identification, just before the identification commences, the official in charge of conducting the identification parade should inform each identifying witness that the person whom the witness saw may or may not be on the parade and further, that if he cannot make a positive identification, he should say so. This rule was confirmed in *R v Nara Sammy*,¹⁶⁶ where Dowling made the following remark in relation to identification:

in my opinion it is important that officers holding an identification parade should add the important words "if such person is present on the parade", otherwise a witness, particularly an illiterate one, might think it is his duty to point out somebody, and an act of disrespect to or criticism of the Police if he is not able to do so.

18. The police official in charge of conducting the identification parade may request the witness who is doing the identification to make his identification by touching the shoulder of

¹⁶⁵ 1956 (4) SA 629 (T) 631 D-E and 631 F.

¹⁶⁶ 1956 (4) SA 629 (T) 631H-632A.

the suspected person and, in the case of any identification being made in this manner, it is desirable that a photograph be taken of the actual act of identification. The main purpose of the identification parade is to ensure that the right suspected person is identified through bodily features and is brought before the court. This is a pre-trial criminal process that can later be confirmed by dock identification during the trial.

2.3.1.6 *Evidential issues: Physical identification (line-ups/identification parades)*

Identification parades have been used as a form of ascertaining bodily features for many years. In *R v Shekelele*¹⁶⁷ Dowling said, "Evidence of identification requires to be closely scrutinized, witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognize."

Questions relating to height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and un-investigated, leaves the door wide open for possibilities of mistake".¹⁶⁸

Schwikkard and Van Der Merwe¹⁶⁹ have the following to say in respect of *S v Mthethwa*¹⁷⁰:

Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, eyesight, the proximity of the witness, the opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress, the result of identification parades if any and of course the evidence by or on behalf of the accused.

In relation to identification parades, the court relies on the correctness of the process that was followed during the holding of the identification parade and the rules of the identification parade, e.g. a minimum of eight persons must appear or be placed on the identification parade. If the correct procedures were not followed, the courts would be reluctant to declare the identification parade reliable. The weight of the identification parade is then affected. In *R*

¹⁶⁷ 1953 (1) SA 636 (T) 638.

¹⁶⁸ Hoffmann and Zeffert *The South African Law of Evidence* 612.

¹⁶⁹ Schwikkard et al *Principles of Evidence* 515.

¹⁷⁰ 1972 (3) SA 766 (A) 768.

*v Nara Sammy*¹⁷¹ it was considered an irregularity and unfair procedure that “a Constable who was charged with the duty of escorting the witnesses one by one was admitted into the room when the parade was initially formed and later re-formed for purposes of a further inspection by another identifying witness.”

2.3.2 Guidelines in respect of identification parades in foreign jurisdictions

Other countries are also using identification parades to ascertain the bodily features of arrested, accused or convicted persons.

2.3.2.1 The position in the United States of America

The USA has guidelines for identification parades (visual identification). These identification parades are called “live line-ups”. The guidelines were issued on 18 April 2001 by Attorney General John J. Farmer, Jr.¹⁷² The purpose of the guidelines is to enhance the accuracy and reliability of eyewitness identification and to strengthen prosecutions in cases that rely heavily or solely on eyewitness evidence. The guidelines are divided into simultaneous live line-ups¹⁷³ and sequential live line-ups. These occur as described below and must be conducted as soon as the suspect has been arrested.

In respect of simultaneous live line-ups, the guidelines are as follows:

Simultaneous line-ups

When presenting a simultaneous live line-up,¹⁷⁴ the line-up administrator or investigator should:

1. Provide viewing instructions to the witness, e.g. the witnesses should be instructed prior to the identification procedure that the perpetrator may not be among those in the live line-up and therefore they should not feel compelled to make an identification;

¹⁷¹ 1956 (4) SA 629 (T) 631 D-E and 631 F.

¹⁷² Attorney General Guidelines for Preparing and Conducting Photo and Live Line-up. <http://www.state.nj/lps/agguide/photoid.pdf> ... (accessed 2013/05/13)1-7.

¹⁷³ Simultaneous live line-up is the showing of the suspect simultaneously with other persons to a witness on an identification parade.

¹⁷⁴ Attorney General Guidelines for Preparing and Conducting Photo and Live Line-up. <http://www.state.nj/lps/agguide/photoid.pdf> ... (accessed 2013/05/13) 3.

2. Instruct all those present in the line-up not to suggest in any way the position or identity of the suspect in the line-up;
3. Ensure that any identification actions (e.g., speaking, moving etc.) are performed by all members of the line-up;
4. Avoid saying anything to the witness that may influence the witness's selection;
5. If identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness's statement of certainty;
6. Record any identification results and the witness's statement of certainty;
7. Document in writing the line-up procedure, including:
 - a. Identification information of line-up participants;
 - b. Names of all persons present at the line-up;
 - c. Date and time of the identification procedure;
8. Document the line-up by photo or video; and
9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

In respect of sequential live line-ups, the guidelines are as follows:

*Sequential live line-up*¹⁷⁵

This is another form of live line-up and is conducted as described below.¹⁷⁶

When presenting a sequential live line-up, the line-up administrator or investigator should:

¹⁷⁵ Sequential live line-up is the showing of one person at a time to a witness and not simultaneously at the identification parade.

¹⁷⁶ Attorney General Guidelines for Preparing and Conducting Photo and Live Line-up. <http://www.state.nj/lps/agguide/photoid.pdf> (accessed 2013/05/13) 6.

1. Provide viewing instructions to the witness, e.g. the witness should be instructed prior to the identification procedure that the perpetrator may not be among those in the live line-up and therefore he or she should not feel compelled to make an identification;
2. Provide the following additional viewing instructions to the witnesses;
 - a. Individuals will be viewed one by one;
 - b. The individuals will be presented in random order;
 - c. Take as much time as needed in making a decision about each individual before moving to the next one;
 - d. If the person who committed the crime is present, identify him or her;
 - e. All individuals will be presented, even if identification is made prior to viewing all the individuals;
3. Begin with all line-up participants out of the view of the witness;
4. Instruct all those present at the line-up not to suggest in any way the position or identity of the suspect in the line-up;
5. Present each individual to the witness separately, in a previously determined order, removing those previously shown;
6. Ensure that any identification actions (e.g., speaking, moving etc.) are performed by all members of the line-up;
7. Avoid saying anything to the witness that may influence the witness's selection;
8. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness's statement of certainty;
9. Record any identification results and the witness's statement of certainty;
10. Document in writing the line-up procedure, including:
 - a. Identification information of line-up participants;

- b. Names of all persons present at the line-up;
 - c. Date and time of the identification procedure;
11. Document the line-up by photo or video recording; and
 12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

In *US v Wade*¹⁷⁷ and also *Kirby v Illinois*¹⁷⁸ the accused appeared at a post-indictment identification parade without the assistance of his counsel. The Supreme Court of the USA held that the post-indictment identification parade without the assistance of counsel had deprived the accused of his Sixth Amendment right to counsel at a critical stage of the process. The majority held as follows:

The first line of defence must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the line-up itself. The trial which might determine the accused's fate may well not be that in the courtroom but at the pre-trial confrontation, with the state aligned against the accused, the witness the sole jury, and the accused unprotected against overreaching, intentional or unintentional, and with little or no effective appeal from the judgment rendered by the witness, "that [is] the man"... Since it appears that there is grave potential for prejudice, intentional or not, in the pre-trial line-up, which may not be capable of reconstruction at the trial, and since presence of council itself can often avert prejudice and assure a meaningful confrontation at the trial, there can be little doubt that for Wade the post-indictment line-up was a critical stage of the prosecution at which he was "as much entitled to such aid (of counsel) as at the trial itself.

In *Gilbert v California*,¹⁷⁹ which also involved a post-indictment line-up in the absence of counsel, the majority held that:

The exclusion of the evidence as a deterrent for the lawfully obtained evidence during the line-up is the most desirable. The court held that only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical line-up ... the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence ...

¹⁷⁷ 388 US 218 (1967) at 236.

¹⁷⁸ 406 U.S 682,689 (1972).

¹⁷⁹ 388 US 263 (1967) 273.

These cases indicate that in the USA, the accused has a right to counsel during the holding of the identification parade. The difference in these cases is that the parade was held after the accused had already been formally charged and not merely arrested and detained as a suspect. The above two cases do not necessarily apply to identification at investigatory line-ups held prior to indictment,¹⁸⁰ but it depends on whether a state wishes to exceed the constitutional requirements set in *Wade*.

2.3.2.2 *The position in Canada*

The identification parade procedure that is applied in the USA is also applied in Canada. This procedure is contained in *The Canadian Journal of Police and Security Services*, 1, 5-18 and is called the “Best Practice Recommendations for Eyewitness Evidence Procedures”.¹⁸¹ In composing line-ups, the prescribed procedure is as follows:

1. Include only one suspect in each identification procedure. In cases involving multiple perpetrators and multiple suspects, construct separate line-ups for each suspect.
2. Include an appropriate number¹⁸² of fillers (non-suspects) per identification procedure.
3. Select fillers that generally fit the witness’ description of the perpetrator.
4. Consider that complete uniformity of features is not required.
5. Create a complete appearance between the suspect and fillers with respect to any unique or unusual feature (e.g. scars, tattoos) used to describe the perpetrator, by adding or concealing that feature.
6. Place suspects in different positions in each line-up, both across cases and with multiple witnesses in the same case. Alternatively, the suspect or his or her representative could be allowed to choose his or her position.

¹⁸⁰ Du Toit *et al Commentary on Criminal Procedure Act Service 44*, 3-16.

¹⁸¹ Best practice recommendations for eyewitness evidence procedures: New ideas for the oldest way to solve a case : <http://www.ryerson.ca/jturtle/cjps.html> (accessed 2013/04/30) 4-9. The journal was issued in 1999 by Turtle J, Lindsay RCL and Wells GL.

¹⁸² The appropriate number is not explained. In South Africa the minimum number is eight people, including the suspect.

7. Ensure that no information concerning previous arrest(s) will be visible to the witness.
8. View the line-up to ensure that the suspect does not unduly stand out, either because of a highly distinctive feature absent from other line-up members, or as a better fit to the description than other line-up members.
9. Preserve the presentation order of the line-up. The photos of the line-up should be preserved in their original condition.

Instructions to a witness prior to viewing the line-up.¹⁸³

The following are the instructions:

1. Instruct the witness that he or she will be asked to view the line-up.
2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
3. Instruct the witness that individuals depicted in the line-up may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
4. Inform the witness that the person who committed the crime may or may not be in the line-up.
5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his or her own words, how certain he or she is of any identification.

In *R v Ross*¹⁸⁴ the argument presented by counsel for the Crown was that an arrested person's right to legal representation as contained in section 10 (b) of the Canadian Charter

¹⁸³ "Best practice recommendations for eyewitness evidence procedures: New ideas for the oldest way to solve a case" sourced at <http://www.ryerson.ca/jturtle/cjps.html> (accessed 2013/04/30) 8.

¹⁸⁴ (1987) 37 CRR 369 at 377-8.

of Rights and Freedoms of 1982 did not encompass the right to legal representation at the identification parade. Lamer, writing for the majority, held that the suspect has the right to be informed that he or she has the right to have a legal representative during the identification parade. The judge also held that the suspect has the right to refuse to participate in an identification parade. There is no statutory obligation that forces a suspect to participate in a line-up (identification parade). The judge held that the suspects were denied the right to be advised by their legal representative during the identification parade and thus their rights were violated. The court concluded that evidence of the identification parade was obtained in violation of section 10 (b) of the Canadian Charter of Rights and Freedoms. The evidence of the identification parade was then excluded.

R v Ross (supra) was referred to but not followed in *S v Monyane and others*,¹⁸⁵ where Bochers held:

I gather that in Canada an accused person has the right to refuse to participate in identification parades, that being so, it would follow that in Canada he has a right to consult a legal representative on the advisability of participating ... Section 37 of Act 51 of 1977 confers no such right in South African law, so the Canadian cases are of little assistance in this matter.

This means that in South Africa the suspect is required by law to participate in an identification parade. In South Africa the suspect is also informed of his or her right to counsel during the identification parade. The position in South Africa is different from the position in Canada in the sense that the suspect is required by section 37 (1) (b) to participate in the identification parade. If he refuses to participate, he cannot be forced. *In S v Hlalikaya and others*¹⁸⁶ the police resorted to “photographic identification” because the accused had refused to co-operate when he was supposed to be part of the (line-up) normal identification parade. In this case Van Rensburg noted that “without the co-operation of the accused ... it would be extremely difficult, if not entirely impossible, to hold the normal parade”. This case indicates that a suspect cannot be forced to co-operate in the normal identification parade or line-up. The position of an accused person is different since the court can order that the accused participate in an identification parade.¹⁸⁷

¹⁸⁵ 2001 (1) SACR 115 (T) 134i-135b.

¹⁸⁶ 1997 (1) SACR 613 (SE) 613D-F.

¹⁸⁷ Criminal Procedure Act 51 of 1977, section 37 (3) (a).

2.3.2.3 *The position in the United Kingdom*

In the UK rules of identification are contained in Code D of the PACE.¹⁸⁸ The rules in Code D serve the same purpose as the South African identification parade rules. The rules in Code D came into operation on 18 April 2003.

In the UK the suspect must be informed of his right to have a solicitor or friend at the parade¹⁸⁹. A suspect must in terms of Code D of the Codes of Practice of the PACE be informed that his refusal to participate in the identification parade may be given as evidence at any subsequent prosecution.¹⁹⁰ In *R v Forbes*¹⁹¹ the appellant was identified to the police in a street as the perpetrator of an attempted robbery by the victim shortly after the offence had been committed. He was charged with the offence, which he denied. Three times before his trial he asked for an identification parade to be held, but no such parade was held. At the trial an objection was raised as to the admissibility of the street identification. The appellant contended that failure to hold an identification parade constituted a breach of the Code of Practice for the Identification of Persons by Police Officers (Code D) of PACE. Paragraph 2.3 of this code provides that, with certain exceptions, an identification parade had to be held whenever a suspect disputed identification, if the suspect consented. Code D 3.12 also provides that where it is unpractical to prove or to disprove whether the suspect was involved in the crime, an identification parade would be “impractical” to hold for identification.

The court held in *Forbes* (above) that paragraph 2.3 of Code D applied even where there had previously been a fully satisfactory or actual and complete or unequivocal identification of the suspect by the relevant witness. The court further held that the police had breached Code D, of the rules for an identification practice.

The rules or code of practice for the identification of suspects in PACE 1984 (in paragraph 3-18).¹⁹² The code of practice or rules stipulates the following:

1. A suspect must be given a reasonable opportunity to have a solicitor or friend present at the parade.

¹⁸⁸ Police and Criminal Evidence Act 1984.

¹⁸⁹ Dennis *The Law of Evidence* 269.

¹⁹⁰ Bradley *Criminal Procedure: A Worldwide Study* 164.

¹⁹¹ [2001] 1 ALL ER 686 at 687.

¹⁹² On page 11 to page 17 of code D as well as Annexure B(c) of the code page 51 to 54.

2. An identification parade may take place either in a normal room or one equipped with a screen permitting witnesses to see members of the identification parade without being seen.
3. Before the identification parade takes place, the suspect or his or her solicitor must be provided with details of the first description of the suspect by any witness who is attending the identification parade.
4. If prison inmates are required for identification, and there are no security problems about them leaving the establishment, they may be asked to participate in an identification parade or video identification.
5. An identification parade may be held in a Prison Department establishment but must be conducted, as far as practicable, under normal identification parade rules.
6. Immediately before the identification parade, the suspect must be reminded of the procedures governing its conduct and cautioned in terms of Code C, paragraphs 10.5 and 10.6 as appropriate.¹⁹³
7. All unauthorised people must be excluded from the place where the identification parade is held.
8. Once the identification parade has been formed, everything afterwards in respect of it, must take place in the presence and hearing of the suspect and any interpreter, solicitor, friend or appropriate adult who is present (unless the identification parade involves a screen, in which case everything said to, or by any witness at the place where the identification parade is held, must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video).
9. The identification parade must consist of at least eight people in addition to the suspect who, as far as possible, resemble the suspect in age, height, general appearance and position in life. Only one suspect may be included in the identification parade unless there are two suspects of roughly similar appearance, in

¹⁹³ Code C of PACE deals with requirements for detention, treatment and questioning of suspects not related to terrorism who are held in police custody by police officers.

which case they may be paraded together with at least 12 other people.

10. If the suspect has an unusual physical feature, e.g. a facial scar, tattoo or distinctive hairstyle or hair colour that cannot be replicated on other members of the identification parade, steps may be taken to conceal the location of that feature on the suspect and other members of the identification parade if the suspect and his or her solicitor, or appropriate adult agree.
11. When all members of a similar group are possible suspects, separate identification parades must be held for each unless there are two suspects of similar appearance, when they may appear on the same identification parade with at least 12 other members of the group who are not suspects. When police officials in uniform form an identification parade, any numerals or other identifying badges must be concealed.
12. When suspects are brought to a place where the identification parade is to be held, they have to be asked if they have any objections to the arrangements for the identification parade or to any other participants in it and to state the reasons for the objection.
13. Suspects may select their own position in the line, but may not otherwise interfere with the order of the people forming the line. When there is more than one witness, suspects must be told, after each witness has left the room, that they may, if they wish, change position in the line. Each position in the line must be clearly numbered.
14. Appropriate arrangements must be made to make sure, before witnesses attend the identification parade, they are not able to:
 - (i) communicate with each other about the case or overhear a witness who has already seen the identification parade;
 - (ii) see any member of the identification parade;
 - (iii) see, or be reminded of any photograph or description of the suspect or be given any other indication as to the suspect's identity; or
 - (iv) see the suspect before or after the identification parade.

15. The person conducting a witness to an identification parade must not discuss with him or her the composition of the identification parade and, in particular, must not disclose whether a previous witness has made any identification.
16. Witnesses must be brought in one at a time. Immediately before witnesses inspect the identification parade, they must be told that the person they saw on a specified earlier occasion may, or may not, be present and if they cannot make a positive identification, they should say so.
17. When the officer or police staff conducting the identification procedure is satisfied the witness has properly looked at each member of the identification parade, they must ask the witness whether the person he or she saw on a specified earlier occasion is on the identification parade and, if so, to indicate the number of the person concerned.
18. If witnesses wish to hear any identification parade member speak, adopt any specified posture or move, they must first be asked whether they can identify any person(s) on the identification parade on the basis of appearance only. When the request is to hear members of the identification parade speak, the witness has to be reminded that the participants in the identification parade have been chosen on the basis of physical appearance only. Members of the identification parade may then be asked to comply with the witness' request to hear them speak, see them move or adopt any specified posture.
19. If the witness requests that the person he or she has indicated remove anything used for the purpose of paragraph 10 to conceal the location of an unusual physical feature, that person may be asked to remove it.
20. If the witness makes identification after the identification parade has ended, the suspect and, if present, his or her solicitor, interpreter or friend, must be informed. When this occurs, it should be considered to allow the witness a second opportunity to identify the suspect.
21. After the procedure, each witness must be asked whether he or she has seen any broadcast or published films or photographs or any descriptions of suspects relating to the offence and the reply must be recorded.

22. When the last witness has left, the suspect must be asked whether he or she wishes to make any comments on the conducting of the identification parade.
23. A video recording must normally be taken of the identification parade. If that is impracticable, a colour photograph must be taken. A copy of the video recording or photograph must be supplied, on request, to the suspect or his or her solicitor within a reasonable time¹⁹⁴.

*Circumstances in which an eyewitness identification procedure must be held.*¹⁹⁵

Whenever:

- (i) an eye witness has identified a suspect or purported to have identified one prior to any identification procedure having been held; or
- (ii) there is a witness available who claims to be able to identify the suspect, who has not been given an opportunity to identify the suspect in any of the procedures set out above and the suspect disputes being the person the witness claims to have seen, an identification procedure must be held unless it is not practicable or it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, for example:
 - (a) where the suspect admits being at the scene of the crime and gives an account of what took place and the eyewitness has not seen anything which contradicts that,
 - (b) when it is not disputed that the suspect is already known to the witness who claims to have seen and recognised him or her committing the crime.

¹⁹⁴ Police and Criminal Evidence Act 1984 Code D. United Kingdom.

¹⁹⁵ *Ibid*, 3.12.

2.3.3 Voice identification as a method of ascertaining bodily features: The position in South Africa

2.3.3.1 Introduction

Unlike handwriting, voice is regarded as a bodily feature. Voice identification is very important in order to identify an arrested, accused or convicted person. In most cases voice is contained on tape recordings or other electronic media recording devices such as compact disc, video tape recorders or cell phones. In *Motata v Nair No and another*¹⁹⁶ the accused was arrested for driving under the influence of liquor and his voice was recorded on a cell phone video tape. During the trial the court held that in order to determine the authenticity and originality of the video recordings and hence their admissibility, the State was entitled and indeed obliged, to listen to the recording. The tape itself might be real evidence but the contents of the tape recording might be challenged as not being original if tampered with. If it had not been tampered with, the recording may be admissible as evidence¹⁹⁷. It is a requirement that the recording has to be original, that no interference has taken place, that the tape relates to the incident in question, that the recording was faithful, that the identity of the speakers was identified, and that the recording was sufficiently intelligible.¹⁹⁸

2.3.3.2 The position of a suspect in respect of voice identification

As stated in respect of previously discussed bodily features, the position of the non-arrested suspect is not addressed by Chapter 3 of the Criminal Procedure Act. The current position is that neither the amended nor the new section 37 (1) (c) of the Criminal Procedure Act 51 of 1977 covers the position of a person who is a suspect but has not yet been arrested or released on bail. The amended Criminal Procedure Act provided for the following:

Any police official may take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance, provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.

¹⁹⁶ [2008]JOL 22291 (T) at 40.

¹⁹⁷ *S v Baleka and others* (1) 1986 (4) SA 192 (T) at 192G.

¹⁹⁸ *S v Ramgobin and others* 1986 (4) SA 117 (N) at 118D.

2.3.3.3 *The position of arrested, detained and accused persons*

Voice identification parades, which are very rare and on which case law is limited, may be held in respect of arrested persons or persons who have been released on bail. This includes persons who have been released on warning in terms Section 72 of the Criminal Procedure Act¹⁹⁹ The purpose of such a parade is to establish a “distinguishing feature” as envisaged by the previous section 37 (1) (c).²⁰⁰ It is a requirement that the principles of justice and fairness, which are usually applied in respect of ordinary visual identification parades, be applied in respect of voice identification parades as well, for example:

- (a) The voice of one person at a time should be tested against others.²⁰¹
- (b) It is very important that the voices of other persons who participate in the parade be similar to that of the suspect.²⁰²
- (c) The reliability of voice identification will remain untested if the test itself was conducted in an improper manner.²⁰³
- (d) The witnesses who are doing identification should not be able to talk or communicate with one another.²⁰⁴
- (e) It is preferable that a voice identification parade be conducted as soon as practically possible after the alleged offence.²⁰⁵
- (f) In circumstances where the witness heard the suspect talking prior to the relevant voice identification parade and the witness at that stage knew that the suspect had been arrested in respect of the alleged offence, conducting a voice identification parade will have no value, as the suspect has already been exposed.²⁰⁶

In *Levack and Others v Regional Magistrate, Wynberg and Another*²⁰⁷ Cameron held that the order by the court in terms of the previous section 37 of the Criminal Procedure Act 51 of 1977 that accused or arrested persons supply voice samples was competent.

¹⁹⁹ 51 of 1977.

²⁰⁰ 51 of 1977.

²⁰¹ *S v M* 1972 (4) SA 361 (T) 365A.

²⁰² *R v Chitate* 1966 (2) SA (RA) 692H.

²⁰³ *R v Chitate*, supra.

²⁰⁴ *S v M* 1972 (4) SA 361 (T) 364.

²⁰⁵ *R v Chitate*, supra.

²⁰⁶ *R v Chitate*, supra, referred to in Du Toit et al *Commentary on Criminal Procedure Act* Service issue 46 3-28B to 3-28C.

²⁰⁷ (2002) ZASCA 146, [2003] 1 All SA 22 (SCA),2003 (1) SACR 187 (SCA) 2-3.

The court reasoned that the Criminal Procedure Act 51 of 1977 gives wide powers to police officials, doctors and courts to ascertain bodily features of arrested, accused and convicted persons.

Section 37 empowers police and other officials, and courts before which criminal proceedings are pending, to take steps, or to order that steps be taken “to ascertain whether the body” of an arrested or accused person has any mark, characteristic or distinguishing feature or shows any condition or appearance”. The question is whether this provision covers the human voice. In casu five accused were charged with dagga-related offences in the Regional Court at the end of March 1998. The magistrate granted an order under section 37 (3) that the accused in the presence of their legal representatives give the State voice samples as specified by a named ‘voice expert’. The object was to compare the samples with tape recordings of telephone conversations in the State’s possession, for possible later use during the trial.

The five suspects then challenged the order in the High Court. This court dismissed their review application and later refused leave to appeal to the High Court. However, with leave from the Supreme Court of Appeal, they appealed to the High Court. It is necessary to state the grounds of review upon which the appellants relied in their founding papers, as the grounds they raised reflect pertinent questions in this regard:

1. The voice samples the state required did not fall within the stipulations of section 37.
2. An order that voice samples be provided under compulsion would effectively breach the appellants’ privilege against self-incrimination and result in an unfair trial.
3. The magistrate had no power to grant the order under section 37 (1) (c), nor had the State laid a basis for bringing the application within section 37 (3) (a), (section 37 provision before the amendment in 2010).

The Supreme Court of Appeal considered the grounds in turn and addressed the question whether a voice is a ‘characteristic or distinguishing feature’ of the body. In considering this ground, the court held that the ordinary meaning of ‘voice’ is defined as the “sound formed in larynx and uttered by mouth, especially human utterance in speaking, singing, etc. use of voice, utterance. Phonetic, sound uttered with resonance of vocal chords, not with mere breath.” The voice is thus a sound formed in the larynx and uttered by the mouth. It emanates from and is formed by the body. The court held that there can therefore be no

doubt that it is a ‘characteristic’ (in the sense of a distinctive trait or quality) of the human body.²⁰⁸

The court emphasised that each voice is distinctive (although by no means always capable of assured discernment). Consequently the voice is also a “distinguishing feature” of the body.²⁰⁹

In *S v M* 1963 (3) SA 183 T 184E-F Bresler thought it ‘perfectly plain’ that a voice cannot fail but to be included within this category of “a mark, characteristic or distinguishing feature”.

In *M* above on the issue of whether voice identification infringes the right against self-incrimination and the appellants’ fair trial rights, the court remarked as follows:

There is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated.²¹⁰

With reference to the *Corpus Juris Secundum* vol 22A paragraph 652 the court found that:

The privilege against self-incrimination is not violated by compelled participation in identification procedures, and the compelled display of identifiable physical characteristics infringes no interest protected by such privilege, since ... the privilege against self-incrimination protects only against evidence of testimonial or communicative nature”, and compulsion to speak does not violate it.²¹¹

The court rejected the argument that an incipient and inevitable breach of fair trial rights had occurred as untenable.²¹² In *Levack* supra, the court also discussed the inter-relationship between the previous section 37(1) and section 37(3).²¹³ In rejecting the appellants’ grounds the court looked into the issue of whether the magistrate had the power to grant the order under section 37(1) (c), and the allegation that the state had laid no basis for bringing the application within section 37 (3)(a). The court held as follows:

[T]he court has the power to issue an order requiring an arrested person (or any other person contemplated in sections (1) and (2) to comply with a request from any of the officials named to

²⁰⁸

Par 8.

²⁰⁹

Par 9.

²¹⁰

Par 21.

²¹¹

Section 12 of the Constitution.

²¹²

Par 23.

²¹³

Par 24.

supply the autopsy evidence sought. In the present case, therefore, the police retained the power to request the appellants to supply the voice samples, and the regional court had the power to order that they do so. The precise source of the court's power is therefore best located as deriving from s 37 (1) (c).

In conclusion, based on the discussion of the cases of *Levack* and *M*, it is clear that:

- (1) a person's voice is included in the category of "a mark, characteristic or distinguishing feature";
- (2) the police have the power to request the court for an order to force arrested persons to supply voice samples for comparison in terms of section 37 (1) (c); and
- (3) a High Court has the power to order an accused to provide voice samples in terms of section 37 (3) (a) to the police for comparison purposes.

2.3.3.4 *Evidential issues relating to voice identification*

In *Motata v Nair No and another*²¹⁴ the accused was arrested for driving under the influence of liquor and his voice was recorded on a cell phone video tape. During the trial the court held that in order to determine the authenticity and originality of the video recordings and hence their admissibility, the State is entitled and indeed obliged, to listen to the recording. The tape itself might be real evidence, but the contents of the tape recording might be challenged as not being original if tampered with. If it had not been tampered with, the recording may be admissible as evidence.²¹⁵

2.3.3.5 *Voice identification as a method of ascertaining bodily features in foreign jurisdictions*

2.3.3.5.1 The position in the United States of America

Voiceprint identification can be defined as a combination of both aural (listening) and spectrographic (instrumental) comparison of one or more known voices with an unknown voice for the purpose of identification or elimination.²¹⁶

²¹⁴ [2008]JOL 22291 (T) at 40.

²¹⁵ *S v Baleka and others* (1) 1986 (4) SA 192 (T) 192G.

²¹⁶ CainSmrkovski and Wilson, sourced at <http://expertpages.com/news/voiceprint-identification.htm> (accessed 2013/04/08)1.

In *United States of America v Garry Patton*²¹⁷ one party, Bumgarner, was tried and convicted in August 1981 in the Western District of Tennessee in connection with the possession of firearms and drugs. Josephine Harvey, Bumgarner's sister-in-law, testified as a government witness (state witness) in Bumgarner's trial. On 23 August 1981 Bumgarner telephoned Harvey on several occasions and attempted to persuade her to retract her trial testimony by threatening her with physical harm. Several days after the telephone calls from Bumgarner, Harvey received a call from a man who identified himself as Toby Smith and threatened to kill her if she failed to retract her testimony in Bumgarner's trial. A similar call was received the following day. Thereafter Harvey contacted the Bureau of Alcohol, Tobacco and Firearms and was provided with a tape recorder. Two additional threatening phone calls were received from the male caller and Harvey recorded these calls.

Patton was arrested on 10 September 1981 in Arkansas on a complaint filed by the United States Attorney for Tennessee. On 15 September 1981 Patton, under the direction of ATF agents, permitted a voice exemplar to be recorded. The exemplar was accomplished by again connecting Harvey's telephone to a recorder and having Patton dial Harvey's telephone number and recite the threats that Harvey had received.

By agreement between the Assistant United States Attorney and Patton's counsel, Harvey was not to listen to the exemplar as it was being recorded. However, the agent who was operating the recording equipment at Harvey's home permitted Harvey to listen as Patton was reciting the threats for the exemplar. Harvey immediately recognised the voice as that of the threatening caller. She became frightened and threw the receiver to the floor.

On 16 September 1981 the grand jury in Tennessee issued an indictment charging Patton with one count of conspiracy to obstruct justice and two counts of endeavouring to influence a witness by the use of threats. At the jury trial Harvey identified the voice on Patton's exemplar as that of her threatening caller. The jury returned a verdict of guilty on all three counts in December 1981. Patton appealed the verdict. On appeal Patton argued that the voice identification made by Harvey violated his Sixth Amendment right to effective assistance by counsel and his Fifth Amendment right to due process. He further argued that at the time of the alleged threats, Harvey was not a witness. In support of his Sixth Amendment argument, Patton asserted that, because Harvey was permitted to listen to his voice as he was recording the voice exemplar, the pre-trial voice identification was analogous to a pre-trial line-up. He referred to *United States v Wade*, where voice

²¹⁷ 721F.2d159(Sixth Circuit 1983) 13-25.

identification also played a role and the Supreme Court held that a pre-trial line-up conducted after the advent of adversary criminal proceedings is a critical stage of the prosecution and that it is a violation of the accused's Sixth Amendment right to counsel to conduct such a line-up without notice to and in the absence of counsel.²¹⁸ Patton argued that his right to counsel was abridged because his attorney was not informed that Harvey would be listening to the recording of his voice exemplar and therefore Harvey should not have been permitted to make an in-court identification of his voice.²¹⁹

The Appeal Court held that the in-court identification was wholly independent of the pre-trial line-up. The Appeal Court held that Patton's Sixth Amendment rights were not violated by the introduction of the identification testimony. The Appeal Court also held that Patton's due process argument was without merit. The Appeal Court affirmed the judgment of conviction.

2.3.3.5.2 The position in Canada

In *Regina v Ng, Cai, Chan, Chow, Gan, Ho, Kwan, Leung, Li, Lin, Liu, Lou, Pan and Wu*²²⁰ a substantial part of a drug investigation involved judicially authorised intercepted communications in the form of wiretaps of suspects. When the accused were arrested, the police interviewed them in the guise of collecting routine information not related to the investigation of the charges, in order to compare their voices with the voices on the wiretapped conversations.

The suspects were not informed of the purpose of the interviews, nor were they advised at this point of their right to silence. Full information about the immediate availability of duty counsel was not provided. Because of this, the suspects applied that the court exclude the voice identification evidence on the ground that it was obtained in violation of their rights under sections 7, 8 and 10 (b) of the Canadian Charter of Rights and Freedoms. The court held that in view of the way in which the right to counsel was recited and the absence of express information about the legal aid number and the immediate availability of duty counsel, the information given was neither complete nor clear with respect to the right to immediate contact with duty counsel. The court held that this was particularly important, as

²¹⁸ *United States v Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L Ed. 1149 (1967).

²¹⁹ Although the Supreme Court in *Wade* was primarily concerned with the visual line-up, it may be noted that *Wade* and the other persons in the line-up were directed to repeat words allegedly used by the criminal. Thus, an element of voice identification was also present in *Wade*.

²²⁰ [1996] 38 CRR (2d) at 340.

the next step in the investigation was to be a seemingly non-incriminating routine interview, which the accused did not know was for the purpose of matching their voices on the wiretaps.

The court held that the right of the accused to be informed of the right to counsel without delay had been violated. The court went further and held that if the police had properly informed the accused of the right to consult with counsel and if the accused had either done so or waived the right to do so, there would have been nothing objectionable about the interview for the purpose of making voice identification.

It would have been up to the accused with the assistance of counsel to decide for themselves whether to engage in the interview. The court held that the voice identification was obtained as evidence in circumstances that constituted a violation of section 10 (b) of the Charter.

This case indicates that in Canada it is a requirement to warn the accused of his rights to consult before obtaining voice samples from him/her. If that is not done, the evidence of voice identification might be excluded by the court.

In *R v Chan*²²¹ the case was in relation to the proposed testimony of a police officer who had monitored some of the wiretap conversations and who had had conversations with the various accused several times after arrest and at the preliminary hearing.

On the issue of the right to remain silent and unlawful search, Corbett held that there was no breach of either by reason of the failure to advise the accused that the witness was speaking to them to establish voice identification. Corbett said the following: "There is a distinction between causing an accused person to speak in order to facilitate his *identification* and in compelling an accused to speak in order to create evidence of a testimonial nature." The court held that the accused's right to silence, as guaranteed by section 7, protects an accused from being forced or tricked into making inculpatory statements. On the issue of search and seizure, Corbett held that a person's voice has a public aspect and is personal in the same sense as physical appearance. It is not tangible and is not seized. "The accused's voices were not recorded but merely observed ... and even if a recording were made of a person's voice, it would be more akin to the taking of a picture."

²²¹ June 30, 1994 (Ont. Gen. Div. unreported). This case was decided by Corbett and was cited in *Regina v Ng, Cai, Chan, Chow, Gan, Ho, Kwan, Leung, Li, Lin, Liu, Lou, Pan and Wu* [1996] 38 CRR (2d) 340.

According to this judgment, observing the voice of an accused without warning him of his rights and later testifying about the similarity of the voices is not in conflict with the rights of the accused, as the observation is not similar to forcing the accused to incriminate himself by giving testimonial evidence that implicates him. According to this case, observation is similar to taking a photo of a person. The case confirms that voice is a distinguishing feature and can be used to ascertain bodily features.

2.3.3.5.3 The position in the United Kingdom

The UK tried hard to regulate the methods of identification or the ascertainment of bodily features through legislation called the PACE 1984. Further consideration has been given to the scope for developing voice identification procedures for use by police forces in England and Wales. Currently, Code D paragraph 1.2 of the Codes of Practice under PACE allows such procedures to be used, but does not specify which procedures must be followed for voice identification. Voice identification is not included in Code D, which clearly stipulates procedures for fingerprinting and identification parades (line-ups).

A voice identification procedure may be sought where a witness professes to recognise the offender by his or her speech or later expresses an ability to identify the voice. The procedures set out below for establishing a voice identification parade and generating admissible evidence were devised by Detective Sergeant Mc Farlane (Metropolitan Police) in December 2002²²². They are directives and not legal requirements²²³. These guidelines are:

Preparation of material.

1. The identification officer in charge of the voice parade should obtain a detailed statement from the witness. This should contain as much detail and description of the voice as possible. The statement and any first description of the suspect's voice should also be the subject of disclosure to the suspect or solicitor prior to any identification procedure.

²²² Home Office circular 057/2003. "Advice on the use of voice identification parades". Issue date 5 December 2003. From Crime Detection and Community Safety Group. Police Leadership and Powers Unit. <https://www.gov.uk/government/publications/advice-on-the-use-of-voice-identification> (accessed 2013/04/08)1-3.

²²³ *Ibid.*, 2-7.

2. Under no circumstances should an attempt be made to conduct a live voice identification procedure, using live suspect and foils.
3. The identification officer should obtain a representative sample of the suspect's voice. A suitable source may be the interview tapes recorded by the police, during which the suspect is speaking naturally, responding to questions. The suspect should be informed at the beginning of the interview that a sample of the recorded interview may be used for identification purposes and asked to give his or her consent.
4. The identification officer should obtain no fewer than 20 samples of speech, from persons of similar age and ethnic, regional and social background as the suspect. A suitable source for such a material may be other interview tapes recorded by the police from unconnected cases, either in the same force or from other appropriate forces, e.g. where there is a strong regional accent.
5. The identification officer should ensure that all work can be undertaken and completed within a reasonable time.
6. The identification officer should request the services of a force-approved expert witness in phonetics or linguistics, for example, a member of the International Association of Forensic Phonetics. This is to ensure the final selection and compilation of sample voices and to ensure that a match with the suspect's voice is as accurate and balanced as possible.

Conducting of audio/voice procedure.

1. The suspect's solicitor must be given the opportunity to be present when the voice identification procedure is conducted. The seal on the bag of the tapes must only be broken in the presence of the solicitor, if present, the witness and the identification officer.
2. The identification procedure should be videotaped and the suspect must be given the opportunity of review at a suitable time after the procedure has taken place.

3. The solicitor should be given the opportunity to select the sample to be played (i.e. A, B or C). Throughout the process only the clearly marked identification letter will be used to refer to the samples.
4. The witness must be instructed by the identification officer that the voice of the suspect may, or may not be on one of the samples played during the procedure. The witness must be instructed to listen to each tape at least once before he/she makes a selection. Witnesses must be allowed to listen to any or all the samples as many times as they wish.
5. The identification officer must make a complete record of any comments or selections made by the witness.
6. Following the procedure, a statement must be taken from the witness recording the events and their selection. Once the witness has left the room in which the procedures had been conducted, the videotape should be left in the running video camera recording machine. The identification officer should only then open the sealed bag and envelope, containing the index relating to the tapes and allow the solicitor the opportunity to record the details shown.
7. All materials relating to the procedure should be retained by the identification officer for use in court²²⁴.

In *R v Robb*,²²⁵ a wealthy businessman was kidnapped and it was alleged that demands for ransom had been made by telephone to his wife, some of which were recorded. There were circumstantial links involving R with the kidnapping and co-conspirators. The Crown sought to adduce evidence from a lecturer in phonetics that the voice of the person making the demands by telephone and the voice of R as recorded on videotape found at his home (on the control tape) were distinguishable and were of the same person. The Crown also sought to adduce evidence from police officers who recognised R's voice on the ransom tapes from his voice when he had been speaking to them during the investigation of the offence. At the trial counsel objected to the admissibility of the evidence of the expert, alternatively submitting that it should have been excluded under section 78 of PACE. The judge ruled it

²²⁴ These procedures are based upon procedures conceived originally by Detective Sergeant John Farlane of the Metropolitan Police Service that were extended to all forces in England and Wales as an example of good practice. The procedures were tested and commended in the Central Criminal Court in December 2002 in the case *R v Khan and Bains*.

²²⁵ (1991) 93 Cr App R 161.CA.

was admissible. R did not give evidence. He was convicted. He appealed, submitting that the judge had erred in admitting the evidence. The appeal was dismissed with the ruling that it was common ground (trite law) that voice identification was a field where expert opinion was admissible.

2.3.4 Photo identification parade as a method of ascertaining bodily features: The position in South Africa

2.3.4.1 Introduction

Just as in fingerprinting, identification parade and voice parade, a person can also be identified by means of a photographic identification parade²²⁶. A photographic identification parade is mostly used where the suspect does not co-operate in participating in a normal identification parade (line-up).²²⁷ The reason for conducting a photographic identification parade is that a suspect or arrested person cannot be placed on an identification parade by force if he or she does not co-operate. The previous Section 37 (1) (d) of the Criminal Procedure Act ²²⁸ makes the following provision: “Any Police official may take a photograph or may cause a photograph to be taken of a person referred to in paragraph (a) (i) or (ii).” This refers to a person who has been arrested or has been released on bail or on a warning.

The following are the contents of the new section 37 (1) (d) of the Criminal Procedure Act²²⁹ after being amended by the Criminal Law (Forensic Procedures Amendment) Act .²³⁰

Any police official may-

- (d) take a photographic image or may cause a photographic image to be taken of a person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B(1).

Section 36B makes the following provision:

- (1) A police official must take the fingerprints or may cause such prints to be taken of any -

²²⁶ Section 37 (1) (d) of the old Criminal Procedure Act 51 of 1977 and Section 37 (1) (d) of the new Criminal Procedure Act.

²²⁷ *S v Hlalikaya* 1997 (1) SACR 613 (SE) at 613D-F: In Joubert (ed) *Applied Law for Police Officials* (2001) 278, it is suggested that where a suspect refuses to co-operate, an alternative to the ordinary parade can be used, such as a photographic identification parade.

²²⁸ 51 of 1977.

²²⁹ *Ibid.*

²³⁰ 6 of 2010.

- (a) person arrested upon any charge related to an offence referred to in Schedule 1,
- (b) person released on bail if such person's fingerprints were not taken upon arrest,
- (c) person upon whom a summons has been served in respect of any offence referred to in Schedule 1,
- (d) person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest,
- (e) person convicted by a court in respect of any offence, which the Minister has by notice in the Gazette declared to be an offence for the purposes of this subsection.

2.3.4.2 *The position of a suspect in respect of photo identification*

The current position is that neither the amended nor the new section 37 (1) (d) covers the position of a person who is a suspect during photographic identification, that is, a person who has not been arrested but is suspected of having committed an offence.

In the SAPS, a database is kept for photographic identification. This database is called the National Photo Image System (NPIS). The photographs kept in this database are those of all persons who were arrested and convicted of a crime. If a person is acquitted his or her photo is removed from the system. The NPIS is able to give one photographs of persons who committed a specific crime using a specific modus operandi. A group of at least eight of these photographs can be collected and a photographic identification parade can then be conducted. The advantage of this system is that the victims are able to identify even suspects who have not been arrested yet. In that way the investigator is able to know who he or she is looking for. After the suspect has been arrested, other witnesses besides the person who identified the suspect on the photo parade are then used to identify the suspect on a formal identification parade, the so-called line-up.

In *S v Moti*²³¹ the deceased was robbed of a large amount of money and was killed during the robbery. A month after the incident of robbery, two witnesses were summoned to a police station. Each of the two witnesses was separately shown six loose photographs and was requested to identify the murderer. Both of the witnesses identified photograph number 3 as the photograph of the person who had robbed and killed the deceased. The two witnesses further identified the second participant in the murder and robbery as photograph

²³¹ 1998 (2) SACR 245 (SCA) 248A-G.

number 6. The second suspect was the person who had been killed by the police during the police operation.

After the trial, the court, per Nienaber, held that it was not necessarily wrong to show eyewitnesses photographs of suspects who were still at large. That could be done in order to find clues or to confirm existing suspicions. The primary object was not to gather evidence for later production in a court trial, but to promote the investigation of the crime. For precisely that reason it would be inappropriate to impose upon such photo identification the strict requirements postulated for a regular identification parade. Evidence of what occurred during such a photo identification was thus in principle admissible.

The court further held that such evidence must be carefully and sceptically approached because external guarantees postulated for a regular identification parade would sometimes be absent. The case of *Moti* supra indicates that a photographic identification parade is applicable to suspects who have not been arrested yet.

2.3.4.3 *Position of arrested, detained or accused person in respect of the use of video footage and photographs for identification purposes*

In *S v Mdlongwa*²³² the appellant, Mr Mlungisi Mdlongwa, and four other persons were charged in the Regional Court Dundee with robbery with aggravating circumstances, unlawful possession of firearms and ammunition. The appellant and other accused were convicted of robbery with aggravating circumstances and acquitted on other charges. The appellant was sentenced to 20 years' imprisonment. His appeal against both the conviction and sentence was dismissed by the KwaZulu-Natal High Court.

The court granted him leave to appeal to the Supreme Court of Appeal against both the conviction and sentence.²³³ The sole issue for determination on appeal was whether the appellant had been properly identified as one of the robbers.²³⁴ The appellant challenged the state's case on three legs:

First, it was submitted that the evidence of the security officer, Sikhumbuzo Mbatha, who had been on duty at the NBS Building Society where the robbery took place, was unsatisfactory and contradictory, and that no reliance could be placed on his dock

²³² 2010 (2) SACR 419 (SCA).

²³³ Par [1].

²³⁴ Par [5].

identification, especially since no prior identification parade had been held. The court held that the evidence was in line with the video footage.

Secondly, it was argued that the expert called by the state as a facial comparison expert, Inspector Naude, was no “expert”, as she lacked academic qualifications and that her findings were thus unacceptable because they were not of a generally accepted standard. The court held that there was no reason to doubt the accuracy of the findings of Inspector Naude.

Thirdly, the appellant contended that the video footage of the robbery was not the original and should not have been admitted in evidence. The court held that the video footage was original and constituted real evidence.

In *S v Ramgobin and others* 1986 4 SA 117 (N) it was held that for video tape recordings to be admissible in evidence it had to be proved that the exhibits were original recordings and that there was no reasonable possibility of ‘some interference’ with the recordings. In this case there could be no question that the aforesaid video evidence was admissible. The judge further noted that in his view no tampering took place with the video footage. Consequently, there appeared to be no reason to reject the authenticity of the footage downloaded by Viljoen from the surveillance cameras installed at the bank. The judge continued and remarked as follows²³⁵:

“In any event it need[ed] to be established that the original footage was used because the purpose of introducing the video footage into evidence was to identify the scene where the robbery took place, to enable the witness to identify the robbers and for Inspector Naude to make facial comparisons.

The court accepted that the appellant had been properly identified by the video footage.²³⁶

The court pointed out that photographs were taken by Inspector Khoza of the appellant and accused 5, ex post facto, two weeks after the incident and handed over to Inspector Ahmed, who handed over the two photographs and the video footage to Inspector Naude to do a facial comparison. Inspector Naude found in her facial comparison analysis of both the appellant and accused 5, that there were 13 points of similarity between the photograph of the appellant (exhibit K) and the person appearing in the video footage and the photograph of accused 5 and the video footage. Based on her findings of points of similarity, she

²³⁵ Par [24].

²³⁶ Par [25].

concluded that the persons appearing in the video footage were the appellant and accused
5. The court accepted this form of identification.²³⁷

In reply to the argument that Inspector Naude was “no expert”, the judge opined that:

In this case there appears to be every reason to accept Inspector Naude as an expert. A lack of academic qualifications may sometimes be regarded as indicative of a lack of sufficient training, but this is not the case here, taking into account the vast experience that Inspector Naude accumulated over 30 years of which Inspector Naude testified that she was a police officer for 30 years. She has been stationed at the Facial Identification Unit for 18 years. The work at the Unit involved developing facial reconstruction from skulls, facial comparisons and facial compilations. Nationally she was involved in the training of all facial identification units. She had done over 500 facial comparisons. She has testified in court in a number of cases and this was her twentieth case²³⁸.

The court accepted her conclusions in that regard.²³⁹

The case of *Mdlongwa* indicates that the court accepts ascertainment of bodily features of a person even if an expert identifies the person from video footage using a photo of that person. This means that identification of a person can be conducted from video footage and a photograph using a method called facial comparison. This is another development in photo identification.

Van Heerden,²⁴⁰ suggests that the value of a preliminary photo identification parade can be improved if, in conjunction with the general principles governing identification parades, the following conditions are met:

- (a) The album must contain at least 10 photographs of people in ordinary civilian clothes.
- (b) The photographs must bear no names or identifying signs.
- (c) The album must later be an exhibit in court.
- (d) The identified photograph must be compared carefully with the description given before the preliminary identification.

²³⁷ Par [17].

²³⁸ Par [18].

²³⁹ Par [18 and 19].

²⁴⁰ *'n Kriminalistieke Ondersoek van Falsiteit met Verwysing na die Probleem in Johannesburg* (Unpublished DLitt et Phil thesis)(1967) Pretoria 312.

- (e) If more than one witness is available, only one must be used for the preliminary investigation and the others must make their identifications at an identification parade.

Most of the proposals made by Van Heerden are already being applied by the police and the courts.²⁴¹ In *Mdlongwa* the identification was done by using a photograph and video footage images.

In *S v Ndika and Others*²⁴² the appellant contended that a policeman who had observed him as one of the multiple robbers who had burst into the police charge office had not had sufficient opportunity to observe and subsequently identify him. The court held that while it was true that the opportunity for observation of the physical features of the person whom the policeman professed to be able to identify was relatively short, there was certainly enough time for a person such as the policeman under personal threat of harm from the other robber to register the facial and other physical characteristics of that person. The policeman managed to identify the appellant from a set of eight photographs.

The court ruled on the use of such evidence in general that there was justified criticism of such photographic identification parades but if such a method was used, it was not axiomatic that the results were to be ignored. The court held that the evidence of the policeman as a witness was honestly given and it excluded any possibility of foul play in the sense that the police contrived to steer him in the direction of identifying the particular photograph rather than some other photograph. Marais, however, noted that a larger spread of photographs than eight would give greater assurance on the reliability of the identification.²⁴³

The rules of a photographic identification parade are similar to the normal identification parade except for the fact that at the photographic identification parade the arrested person or the accused is not at the parade in person and the person consequently does not have the right to legal representation.²⁴⁴

2.3.4.4 *Evidential Issues: Photo identification*

²⁴¹ *Mdlongwa* supra footnote 232.

²⁴² 2002 (1) SACR 250 (SCA) 250G-251F.

²⁴³ At 350G-251F.

²⁴⁴ *S v Hlalikaya and Others* 1977 (1) SACR 613 (SE) 613D-H.

In *S v Moti*²⁴⁵ the deceased was robbed of a large amount of money and was killed during the robbery. A month after the incident of robbery two witnesses were summoned to a police station. Each of the two witnesses was separately shown six loose photographs and was requested to identify the murderer. Both of the witnesses identified photograph number 3 as the photograph of the person who had robbed and killed the deceased. The two witnesses further identified the second participant in the murder and robbery as the one in photograph number 6. The second suspect was the person who had been killed by the police during the police operation. After the trial, the court, per Nienaber, held that it was not necessarily wrong to show eyewitnesses photographs of suspects who were still at large. Evidence of what occurred during such a photo identification was thus in principle admissible.

2.3.4.5 *Photo identification parade as a method of ascertaining bodily features in foreign jurisdictions*

2.3.4.5.1 The position in the United States of America

The USA also recognises photo identification but calls it photo line-up.²⁴⁶ The purpose of the US guidelines is to ensure uniformity in identification parades. In a circular, the Attorney General highlighted that the issuance of the guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error.²⁴⁷

The preamble of the guidelines reads as follows:

While it is clear that eyewitness identification procedure fully comport with federal and state constitutional requirements that does not mean that these procedures cannot be improved upon. Both case law and recent studies have called into question the accuracy of some eyewitness identifications. The Attorney General, recognizing that his primary duty is to ensure that justice is done and the criminal justice system is fairly administered, is therefore promulgating these guidelines as “best practises” to ensure that identification procedures in this state minimize the chance of misidentification of a suspect.

The guidelines state the following:

²⁴⁵ 1998 (2) SACR 245 (SCA) 248A-G.

²⁴⁶ The USA Attorney General John J Farmer in 2001 issued guidelines that were circulated to “All Country Prosecutors” on 18 April 2001. The first state to use these guidelines was the State of New Jersey. “Attorney General Guidelines for Preparing and Conducting Photo and Live Line up Identification Procedures” (State of New Jersey, Department of Law and Public Safety. Office of the Attorney General) sourced at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (accessed on 2013/05/18)7.(Highlighting added.)

²⁴⁷ Page 3 of the guidelines.

"I COMPOSING THE PHOTO LINE-UP"²⁴⁸

In composing a photo line-up, the line-up administrator or investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers (non-suspects) who generally fit the witness' description of the perpetrator.
3. Select a photo that resembles the suspect's description or appearance at the time of the incident if multiple photos of the suspect are reasonably available to the investigator.
4. Include a minimum of five fillers (non-suspect) per identification procedure.
5. Consider placing the suspect in different positions in each line-up when conducting more than one line-up for a case due to multiple witnesses.
6. Avoid re-using fillers in line-ups shown to the same witness when showing a new suspect.
7. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.
8. View the array, once completed, to ensure that the suspect does not unduly stand out.
9. Preserve the presentation order of the photo line-up. In addition, the photos themselves should be preserved in their original condition.

II CONDUCTING THE PHOTO IDENTIFICATION PROCEDURE.

A. Simultaneous photo line-up

When presenting a simultaneous photo line-up, the line-up administrator or investigator should:

1. provide viewing instructions to the witness, e.g. the witness should be instructed prior to the photo identification procedure that the perpetrator may not be among those in the photo array and therefore they should not feel compelled to make an identification.
2. confirm that the witness understands the nature of the line-up procedure.
3. avoid saying anything to the witness that may influence the witness' selection.
4. if an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
5. record any identification results and witness' statement of certainty.
6. document in writing the line-up procedure, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo line-up.
 - c. Date and time of the identification procedure.

²⁴⁸ Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures. State of New Jersey. Department of Law and Public Safety. Office of the Attorney General. <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (accessed on 2013/05/18)1.

7. instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

B. Sequential photo line-up

When presenting a sequential photo line-up, the line-up administrator or investigator should:

1. provide viewing instructions to the witness, e.g. the witness should be instructed prior to the photo identification procedure that the perpetrator may not be among those in the photo array and therefore they should not feel compelled to make an identification.
2. provide the following additional viewing instructions to the witness:
 - a. Individual photographs will be viewed one at a time.
 - b. The photos are in random order.
 - c. Take as much time as needed in making a decision about each photo before moving to the next.
 - d. All photos will be shown, even if identification is made prior to viewing all photos.
3. confirm that the witness understands the nature of the sequential procedure.
4. present each photo to the witness separately, in a previously determined order, removing those previously shown.
5. avoid saying anything to the witness that may influence the witness' selection.
6. if an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
7. record any identification results and witness' statement of certainty.
8. document in writing the line-up procedure, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo line-up.
 - c. Date and time of the identification procedure.
9. instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media."

An accused has a Sixth Amendment right to have counsel present at any corporeal identification procedure conducted after the commencement of an adversary judicial criminal proceeding against him. The Sixth Amendment does not apply where the police present photographs including a photograph of the accused to an eye witness for possible identification of the perpetrator. Such a display is not a critical stage of the prosecution.²⁴⁹ The right to counsel does not apply to pre-indictment eyewitness identification"²⁵⁰

2.3.4.5.2 The position in Canada

²⁴⁹ *United States v Ash*, 413 U.S. 300 (1973).

²⁵⁰ *Kirby v Illinois*, 406 U.S. 682 (1972).

In Canada photo identification is known as photo line-up. The approach to photo identification was clearly set out in the case *R v MacKenzie*²⁵¹. In this case, Williams set out line-up. The following approach as adapted in a guide and reference point by John L Gibson in *Criminal law evidence, practice and procedure*,²⁵² would be a proper and acceptable way to lead such evidence:

1. A group of twelve photographs of the same sex, similar age, appearance and race are prepared for a line-up, including the suspect and each photograph is numbered.
2. The witness (or witnesses) is given an Instruction to Photographic Line-up sheet that would inform them in terms that explain that the suspect's photograph may not be included, the witness (or witnesses) are not compelled to select a photograph but if they do, that they should note their selection, with any comments, on the sheet, sign it and return it to the officer.
3. The officer who arranged the line-up, the officer who dealt with the witness (or witnesses) and the witness (or witnesses) who identified the accused should be called to take the stand.
4. At the trial, the officer who prepared the line-up should establish in testimony that:
 - (i) he or she placed the suspect's photograph, based upon a description of the perpetrator of the crime given by an eye witness, with a number, in a line-up selection on a particular date.
 - (ii) he or she identified the accused, by name, as the same person whose photograph was placed in the line-up.
 - (iii) he or she placed in the line-up photographs of other persons who had similarities as to sex, age, hair colour, race and weight.
 - (iv) he or she enters the photographs as exhibits.
5. The officer who dealt with the witness (or witnesses) should establish in testimony the following:
 - (i) the date, time and place where he showed the photographs to the witness.
 - (ii) the reason why the photographs were shown to the witness.
 - (iii) that the witness was given an Instruction to Photographic Line-up sheet that informed the witness in terms as set out in (2) above, and that he did not in any manner influence the selection by the witness.
 - (iv) that the witness selected a photograph and wrote the number of the photograph selected and any comments made, on the Instruction to Photographic Line-up sheet.
 - (v) that the officer received, signed or initialled the Instruction sheet and kept it until brought to court.
 - (vi) point out the photograph selected by the witness and identify the accused, by name, as the same person whose photograph was selected, from the line-up by the witness.
 - (vii) enter the Instruction sheet as an exhibit.

²⁵¹ 2003 NSPC 51 (Can LII) at (13).

²⁵² (2003) Corporation (c) West Group.

6. The witness (or witnesses) who were asked to view the photographic line-up should, in testimony establish:
- (i) that the witness attended to view or the police attended to show the photographs.
 - (ii) the date, time and place that the witness saw the line-up and that the line-up was for the purpose of identifying a perpetrator of the crime whom the witness had seen at a prior time and had given a description to the police, and that the case was presently before the court.
 - (iii) that the witness received an Instruction sheet, as in (2) above, which terms he or she understood or were explained to them by the police.
 - (iv) the number of photographs viewed in the line-up, whether each photograph had a number, and the manner in which the police showed the photographs.
 - (v) that the witness recognized a person from the photographs shown and wrote the number of that photograph on the Instruction sheet with any comments.
 - (vi) the involvement of the person recognized in the incident (e.g., "he is the man I saw in my apartment".)
 - (vii) whether the person whose photograph was selected is in court today.
 - (viii) That the person in court was the same person in the selected and was also the same person recognized, at an earlier time at the crime scene.
 - (ix) That the witness gave the instruction sheet to the attending officer and now recognized the Instruction sheet (Exhibit) and also can identify, recognize and confirm the witness's signature and handwriting on it.

These rules are, however, not legally binding and failure to follow them will not necessarily be fatal to the identification evidence.²⁵³

In *R v MacKenzie* supra, the photographic identification parade did not stand in court because the victims did not connect the accused to the photographic line-up and they did not identify him as the person previously identified by them in a particular photograph in the line-up.²⁵⁴

2.3.4.5.3 The position in the United Kingdom

Photo identification in the UK is governed by Code D Annexure E of the PACE 1984. The photo identification procedure in the UK is according to Code D stated as the following:

1. An officer of the rank of sergeant or above shall be responsible for supervising and directing the showing of photographs.
2. The supervising officer must confirm the first description of the suspect given by the witness has been recorded before they are shown the photographs.

²⁵³ *R v Doyle*, 2007 BCCA 587 at 10-15.

²⁵⁴ At (21) page 8 of 9.

3. Only the witness shall be shown photographs at any one time. Each witness shall be given as much privacy as practicable and shall not be allowed to communicate with any other witness in the case.
4. The witness shall be shown not less than twelve photographs at a time, which shall, as far as possible, all be a similar type.
5. When the witness is shown photographs, they shall be told the photographs of the person they saw may, or may not, be amongst them and if they cannot make a positive identification, they should say so. The witness shall also be told they should not make a decision until they have viewed at least twelve photographs. The witness shall not be prompted or guided in any way but shall be left to make any selection without help.
6. If a witness makes a positive identification from photographs, unless the person identified is otherwise eliminated from enquiries or is not available, other witnesses shall not be shown photographs. Both they and the witness who has made the identification, shall be asked to attend a video identification, an identification parade or group identification unless there is no dispute about the suspect's identification.
7. If the witness makes a selection but is unable to confirm the identification, the person showing the photograph shall ask them how sure they are that the photograph they have indicated is the person they saw on the specified earlier occasion.
8. When the use of a computerised or artist's composite or similar likeness has led to there being a known suspect who can be asked to participate in a video identification, appear on an identification parade or participate in a group identification, that likeness shall not be shown to other potential witnesses.
9. When a witness attending a video identification, identification parade or group identification has previously been shown photographs or computerised or an artist's composite or similar likeness, the suspect and the solicitor must be informed of this fact before the identification procedure takes place.
10. None of the photographs shown shall be destroyed, whether or not identification is made, since they may be required for production in court. The photographs shall be numbered and a separate photograph taken of the frame or part of the album from which the witness made identification as an aid to reconstituting it.
11. Whether or not identification is made, a record shall be kept of the showing of photographs on forms provided for the purpose. This shall include anything said by the witness about any identification or the conduct of the procedure, any reasons it was not practicable to comply with any of the provisions of the code governing the showing of photographs and the name and rank of the supervising officer.
12. The supervising officer shall inspect and sign the record as soon as possible.

The principles that are applied by England are similar to the photo identification parade principles of South Africa. The difference is that in England, twelve photographs are required while in South Africa eight photographs are required.²⁵⁵

²⁵⁵

S v Zwayi 1997 (2) SACR 772 (CK) 775 E-H.

2.3.5 Retention use and destruction of fingerprints and body-prints

Fingerprints or body prints that may in terms of the Criminal Procedure Act be retained and only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution. The fingerprints or body prints referred to must be stored in the database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act. In any case where a decision was made (i) not to prosecute a person; (ii) if the person was found not guilty; (iii) if his or her conviction was set aside by a superior court; (iv) if he or she was discharged at a preparatory examination; (v) if no criminal proceedings with reference to such fingerprints or body prints were instituted against the person concerned in any court; or (vi) or if the prosecution declined to prosecute, the prints must be destroyed within 30 days after the commanding officer of the division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act, 1995 has been notified.²⁵⁶

The European Court of Human Rights in the case of *S. and Marper v the United Kingdom*²⁵⁷ held that fingerprints or samples taken from a person in connection with the investigation of an offence could be retained after they had fulfilled the purposes for which they were taken. The retention of the applicants' fingerprint, biological samples and DNA profiles thus had a clear basis in the domestic law, however, the retention in UK law under section 64 of the PACE was far less precise as to the conditions attached to and arrangements for the storing and use of this personal information. The Court warned that it was essential to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards when retaining fingerprints and data. Court did not find it necessary to decide whether the wording of section 64 met the "quality of law" requirements within the meaning of Article 8 § 2 of the European Convention of Human Rights. Nevertheless, the Court found that the UK blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, failed to strike a fair balance between the competing public and private interests, and that the UK State had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants' right to

²⁵⁶ Section 36C (3) (a), (b), (c),(d) and (e) and Section 37 (6) (a), (b) and (c) of the Criminal Procedure Act 51 of 1977.
²⁵⁷ *S. and Marper v the United Kingdom*, delivered on 4.12.2008 application nos. 30562/04 and 30566/04.

respect for private life and could not be regarded as necessary in a democratic society. The Court concluded unanimously that there had been a violation of Article 8 in this case.²⁵⁸

2.3.6 Constitutional impact with regard to the ascertainment of non-invasive bodily features

2.3.6.1 Fingerprints, palm prints, footprints, body-prints and the Constitution

Du Toit et al²⁵⁹ commented that “[s]ection 37 makes serious inroads upon the bodily integrity of an accused.” However, these inroads should be seen in the light of the fact that the ascertainment of bodily features and “prints” of an accused often forms an essential component of the investigation of crime and is in many respects a prerequisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial”. This viewpoint embraces a balanced approach in line with the limitation clause in the Constitution.

In the case where a person was arrested but later found not guilty, or the prosecutor declines to prosecute, the fingerprints of that person will not be kept in the police database and will be destroyed. Only fingerprints of convicted persons are kept in the police database for future comparison with crime scene fingerprints.²⁶⁰

In terms of section 37 (1),²⁶¹ police officials have wide powers to infringe on a person’s privacy in the execution of their duties. These powers must be exercised responsibly and with great caution. If police officials apply their powers beyond this section, they will be acting beyond their scope of power and their acts will be unlawful and unjustifiable. In *Ex parte Minister of Justice: In re R v Matemba*²⁶² the judge remarked:

Now where a palm print is being taken from a person he is entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in court. In my judgment, therefore, neither the *maxim nemo tenetur se ipsum prodere* nor the confession rule make inadmissible palm prints compulsory taken.

²⁵⁸ Press release, sourced at <http://hudoc.echr.coe.int/sites/eng-press/> (accessed July 2014).

²⁵⁹ Du Toit *et al Commentary on Criminal Procedure Act*. Service issue 44-3-1.

²⁶⁰ Section 37 (5) of the Criminal Procedure Act.

²⁶¹ Criminal Procedure Act 51 of 1977.

²⁶² 1941 AD 75 at (82-3).

In *S v Binta*²⁶³ Ackerman remarked:

The common law principle *nemo tenetur se ipsum accusare (prodere)* does not apply to the ascertaining of bodily features or the taking of blood samples in general, and in particular not to such acts as are performed in terms of s 37 (1) or (2) of the Criminal Procedure Act. A distinction is drawn between being obliged or forced to make a statement against interest and furnishing “real” evidence.

If one accepts that the ascertaining of bodily features does not impact on the presumption of innocence as it is regarded as real evidence and not some admission obtained under obligation, the statement quoted above must be interpreted that Ackermann J meant nothing more than distinguishing between real evidence obtained by physical force²⁶⁴ and real evidence obtained under legislative obligation.²⁶⁵ Real evidence is not evidence of a communicative nature and is thus not privileged against self-incrimination. A person may refuse to submit himself or herself to examination under section 37 (1) but could be forced by an order of the court. This is supported by the decision in *Levack v Regional magistrate, Wynberg*²⁶⁶ where Cameron JA referred with approval to the *Binta* case, and held “[i]t is of course true that to take a palm- or fingerprint, or to draw blood from an accused, or to require him to supply a voice sample, goes further than merely observing his features or complexion when he appears in court. Our legal system recognises the distinction.... The additional means of compulsion that the provision licenses may have to be employed.”

²⁶³ 1993 (2) SACR 553 (C) 562 d-e.

²⁶⁴ *Minister of Safety and Security and Another v Xaba* 2004 (1) SACR 149 (D) is a typical example where the procurement of evidence by forced surgical intervention on instruction by the police is not allowed by s 37 and an infringement of s12 of the Constitution.

²⁶⁵ In *Ex parte Minister of Justice; in re R v Matemba* 1941 AD 75 it was held that the principle *nemo tenetur se ipsum accusare* (no man should be an accused against himself) is not applicable. At 82 – 83 the following was said in respect of palm prints:

“Now where a palm print is being taken from an accused person he is, as pointed out by Innes CJ in *R v Camane* 1925 AD 570 at 575, entirely passive. He is not being compelled to give evidence or to confess, any more than he is being compelled to give evidence or confess when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in Court. In my judgment, therefore, neither the maxim *nemo tenetur se ipsum prodere* nor the confession rule makes inadmissible, palm prints compulsorily taken”.

²⁶⁶ *Levack and Others v Regional magistrate, Wynberg, and Another* 2003 (1) SACR 187 (SCA) at par [20]. The court held that the rule against self-incrimination forbids compelling person to give evidence which incriminates herself or himself. However, it is not *merely compulsion* that is the heart of the privilege, but *testimonial compulsion*. Person's features may be of importance, such as complexion, stature, mutilations, or marks on body may be relevant points, and the accused may be compelled to show them to court but ‘autopic’ evidence, that is material evidence derived from accused's own bodily features, doesn't infringe the right to silence nor right not to be compelled to give evidence.

Section 225 of the Criminal Procedure Act ²⁶⁷ also supports the powers contained in section 37 of the Criminal Procedure Act allowing the admissibility of evidence on bodily features. This section stipulates the following:

(1) Whenever it is relevant at criminal proceedings to ascertain whether any fingerprint or body-print of an accused at such proceedings corresponds to any other fingerprint or body-print or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing features or shows or showed any condition or appearance, including evidence of the result of any blood test of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprints or body-prints in question were not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36B, 36C or 37, or that it was taken or ascertained against the wish or the will of the accused concerned.²⁶⁸

This section has not yet been tested in the Constitutional Court and there is a possibility that it may be tested against section 35 (5) of the Constitution in the future.

Section 35 (5)²⁶⁹ of the Constitution states:

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.

Government authority empowers organs of the State to act coercively. To act coercively means to be in a position to compel others to do something against their will. Although it should always be an important premise that the individual is not without rights vis-à-vis the State and that the individual should be able to take action against the State, the public law relationship between the state and the individual is, by definition, an unequal relationship in which the State is the stronger party²⁷⁰.

²⁶⁷ 51 of 1977.

²⁶⁸ Criminal Procedure Act 51 of 1977.

²⁶⁹ The Constitution of the Republic of South Africa, 1996.

²⁷⁰ Rautenbach and Malherbe *Constitutional Law* 279.

An accused is not guilty of contempt of court when he refused that his fingerprints be taken in public in an open court. Even before our present Constitutional era the courts recognised the right to privacy and human dignity in respect of ascertaining bodily features²⁷¹.

According to the Constitution, “Everyone who is arrested for allegedly committing an offence has the right to remain silent²⁷².” The question is whether the taking of fingerprints of an arrested person in terms of section 37 (1) (a) of the Criminal Procedure Act²⁷³ amounts to infringement of the person’s constitutional right to human dignity²⁷⁴ and right to silence²⁷⁵. The Constitutional implications are as follows:

In *S v Huma and another*²⁷⁶, the accused alleged that the taking of his fingerprints for comparison purposes was infringing on his constitutional right to dignity and the right to remain silent. Classen held as follows²⁷⁷:

The taking of fingerprints was not inhuman or degrading. The practice was accepted worldwide as a proper form of individual identification. The taking of fingerprints in private could not lower a person’s self- esteem. It did not constitute an intrusion into a person’s physical integrity if taken in terms of s 37 of the Criminal Procedure Act 51 of 1977. They would be destroyed if the person was acquitted, and the taking of fingerprints could be a useful method for ensuring the acquittal of an accused.²⁷⁸

The court held that the taking of fingerprints did not amount to an infringement of the accused’s dignity but even if it did, section 33 (1) (now section 36 (1)) of the Constitution allowed such infringement as a permissible limitation, as it was a reasonable and necessary limitation for the administration of justice.

The court further held that:

The privilege against self-incrimination did not apply to procedures relating to the ascertainment of bodily features such as those involved in the identification parades, the taking of finger and footprints and showing of bodily scars. The reasoning is that in that process there would be no communicative act or admission by the accused, either orally

²⁷¹ *S v Mkize* 1962 (2) SA 457 (N) 460.
²⁷² Section 35 (1) (a) of the Constitution.
²⁷³ 51 of 1977.
²⁷⁴ Section 10 of the Constitution.
²⁷⁵ Section 35 (1) (a) of the Constitution.
²⁷⁶ *S v Huma* (2) 1995 (2) SACR 411 (W)
²⁷⁷ *Ibid*, 411.
²⁷⁸ *Ibid*, 412.

or in writing. The Court held accordingly that the taking of an accused[’s] fingerprints was not in conflict with his right to remain silent in terms of the then s 25(3) (c) or (d) of the Constitution 200 of 1993” [now section 35(1) (a) of the Constitution Act 108 of 1996].

In *S v Maphumulo*²⁷⁹ the court held that:

The taking of fingerprints of an accused, whether voluntarily given by the accused or taken under compulsion in terms of s 37 (1) of the Criminal Procedure Act 51 of 1977, does not constitute evidence given by the accused in the form of testimony emanating from the accused and such does not violate the accused’s rights as contained in s 25 (3) (c) or 25 (3) (d) of the Constitution Act 200 of 1993 [now s 35 (1) of the Constitution] nor does it appear to be a violation of accused’s rights as contained in s 10 of the Constitution.

The above cases indicate that the rights of the arrested, detained or accused person can be limited by the law of general application²⁸⁰ and the limitation clause.²⁸¹ The cases also indicate that ascertainment of bodily features is constitutional if it is conducted within the prescripts of the previous section 37 of the Criminal Procedure Act²⁸² and the new sections 36B, section 36C and section 37 inserted into the Criminal Procedure Act.

In *S v Mokoena and another*²⁸³ Claassen referred to Wigmore,²⁸⁴ where it is explained that

an inspection or ascertainment of bodily features does not violate the privilege against self incrimination ... because it does not call on the accused as a witness - i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action - as when he is required to take off his shoes or roll up his sleeve - is immaterial, unless all bodily action were synonymous with testimonial utterance ... not compulsion alone is the component of privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself ... unless some attempt is made to secure a communication - written, oral or otherwise ... the demand upon him is not a testimonial one.²⁸⁵

²⁷⁹ 1996 (2) SACR 84 (N) 84.

²⁸⁰ Section 37 of the Criminal Procedure Act.

²⁸¹ Section 36 of the Constitution.

²⁸² Act 51 of 1977 section 37

²⁸³ 1998 (2) SACR 642 (W) 648 h-i.

²⁸⁴ *A Treatise on the Anglo-America Systems of Evidence in Trials at Common Law* (1940, as revised in 1961) paragraph 2265.

²⁸⁵ Du Toit *et al Commentary on Criminal Procedure Act Service 44, 3-1.*

This case supports the researcher's view that the ascertainment of bodily features in terms of section 37 of the Criminal Procedure Act, as amended by the Criminal Law (Forensic Procedures) amendment Act does not violate the privilege against self-incrimination nor the right to privacy or the right to dignity or section 35 of the Constitution, as long as the police act within the prescripts of section 37 of the Criminal Procedure Act. Once the police act beyond the prescripts of section 37 of the Criminal Procedure Act, they will be acting beyond the scope of power and may be charged for assault and the defence of acting on authority might not stand. The exception will only be where the person gives consent and that consent must comply with the requirements of valid consent.

2.3.6.2 *Identification parades and the Constitution*

Section 35 of the Constitution 1996 is silent about the pre-trial rights of arrested, detained or accused persons to specifically legal representation during the identification parade or ascertainment of bodily features. Section 35(3) of the Constitution gives every accused person the right to a fair trial. This, however, is the right enjoyed by the accused during the trial but not during pre-trial criminal proceedings, which include holding an identification parade. In *S v Ngwenya and others*²⁸⁶ it was held that section 25 (3) (e)²⁸⁷ of the 1993 Interim Constitution did not require an accused to be informed of the right to legal representation at an identification parade. The court took the view that section 25(3) did not apply to the pre-trial procedure of an identification parade, and that the objection to the admissibility of the identification evidence had to be dismissed.

In *S v Mphala and another*²⁸⁸ it was held that:

an accused does not have the right, whether or not he has received legal representation, not to participate in an identification parade held in accordance with the provisions of section 37 (1) (b) of the Criminal Procedure Act, and to require an accused to participate in an identification parade, is not a violation of his constitutional rights ...

Section 35(3) of the Constitution stipulates that 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.

In *S v Monyane and others*²⁸⁹ Bochers observed: "The decision to make a confession or pointing out is a voluntary decision to be made by the accused himself with where he

²⁸⁶ 1998 (2) SACR 503 (W).

²⁸⁷ Now section 35 (2) (c) and 35 (3) (g) of the 1996 Constitution.

²⁸⁸ 1998 (1) SACR 654 (W) at 660 f.

desires, the assistance and advice of a legal representative.” However, in the case of an identification parade, the accused has no choice as to whether he will participate or not. Section 37 (1) (b) of the Criminal Procedure Act empowers any police official to make an arrested person “available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine.” Consequently the court has ruled that rules for an identification parade are “merely guidelines to the Police on the procedures to be followed in the holding of identification parades. The rules do not create rights and ... non-compliance with one or another of them will not necessarily result in a ruling that the parade is inadmissible.”

In *S v Mhlakaza and another*²⁹⁰ (which was decided under the Interim Constitution) Van Deventer excluded evidence of an identification parade because the accused had not been given a reasonable opportunity or sufficient time to obtain legal representation. It was held that the accused were constitutionally entitled to have their legal representatives at the parade. In this case the defence disputed the fairness of the parade and Van Deventer specifically pointed out that it could not ex post facto be said “hoe die parade sou verloop het as daar wel regsverteenwoordiging was nie.”

These cases indicate that an accused has no right to refuse to participate in an identification parade. The cases also indicate that the courts are divided in finding expressly that the identification parade may continue even if the accused does not have a legal representative as long as he has been given a reasonable opportunity to obtain one. An identification parade conducted under section 37 (1) (b) of the Criminal Procedure Act does not contravene the rights of an arrested, detained or convicted person as long as the identification parade was properly constituted as prescribed by the rules of identification, e.g. the parade will be improper if one white person is placed among seven black persons. Evidence obtained under section 37 (1) (b) is thus not unconstitutional. In conclusion, the researcher finds that it is a requirement that the suspect be represented at an identification parade in foreign jurisdictions, e.g. the USA, *Us v Wade*, Canada, *R v Ross* and UK, *R v Forbes*. In South Africa there have been conflicting decisions on legal representation at identification parades, e.g. *S v Monyane* and *S v Mhlakaza*.

²⁸⁹ 2001 (1) SACR 115 (T) 131 b-c.

²⁹⁰ 1996 (2) SACR 187(C) 199 e-f.

2.3.6.3 *Voice identification parade and the Constitution*²⁹¹

Everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed.

In *Levack and Others v Regional Magistrate, Wynberg and Another*²⁹² the Supreme Court of Appeal held that obtaining voice samples from appellants is not an infringement of privilege against self-incrimination, the right to silence or an infringement of the right to a fair trial.

2.3.6.4 *Photo (photographic) identification parades and the Constitution*

2.3.6.4.1 The rights of arrested, detained and accused persons in South Africa

The Constitution stipulates that:

Everyone who is arrested for allegedly committing an offence has the right to remain silent.²⁹³

Everyone who is detained, including every sentenced prisoner, has the right – to have a legal practitioner assigned to him or her by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.²⁹⁴

In *S v Melani*²⁹⁵ Froneman explained the reason for the right to legal representation in the following terms:

The purpose of the right to counsel and its corollary to be informed of that right, embodied in s 25 (1) (c) of the Interim Constitution is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections (25) (2) and 25 (3) of the Interim Constitution makes it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial. It has everything to do with the need to ensure that an accused is treated fairly in the entire criminal process.

²⁹¹ Section 14 of the Constitution.

²⁹² 2003 (1) All SA 22 (SCA) 12.

²⁹³ Section 35 (1) (a) of the Constitution.

²⁹⁴ Section 35 (2) (c) of the Constitution.

²⁹⁵ 1996 (1) SACR 335 (E).

This case indicates that the right to legal representation commences during the arrest of a person. In the case of photographic identification, the person is not arrested and is not physically on the parade. There is thus no right to protect.

In foreign law Canada took a similar approach regarding the constitutionality of the photographs of accused persons taken for investigation and prosecution purposes. It is not seen as infringing on the right to privacy of an accused or arrested person.²⁹⁶

2.3.6.4.2 Equality and photographic identification

The equality clause provides that everyone is equal before the law and has the right to equal protection and benefit of the law.²⁹⁷ The question is whether a person has the right to legal representation during the holding of a photographic identification parade even though such a person is not at the parade in person.

Everyone who is detained, including every sentenced prisoner, has the right to choose and consult with a legal practitioner and to be informed of this right promptly.²⁹⁸ Section 35, which deals with the rights of arrested, detained and accused persons is silent about the rights of a person who has not yet been arrested but is under investigation by the police. If the police have photos of that person in their possession while he is not yet under arrest, can they use those photos to hold a photographic identification parade? Does this person have the right to legal representation during the holding of the photographic identification parade? These questions were answered negatively in *S v Hlalikaya and others*.²⁹⁹

In *S v Hlalikaya* supra, during the course of a criminal trial in a High Court, counsel for one of the accused objected to evidence led by the State identifying the accused at an identification parade which had been conducted by showing the witnesses a series of photographs. It was contended that the accused had not been properly advised of his constitutional right to have his lawyer (legal representative) present at the photographic identification parade.

It appeared from the trial within the trial held to determine the admissibility of this evidence, that as the accused had failed to co-operate in the holding of an identification parade it was decided instead to hold a photographic identification parade at which witnesses would be presented with a set of photographs, including photographs of suspects and others, and

²⁹⁶ *R v Parsons* (1993), 17 C.R.R (2nd) 104, 84 C.C.C (Ont. C.A).

²⁹⁷ Section 9 of the Constitution.

²⁹⁸ *Ibid*, 35 (2) (b).

²⁹⁹ 1997 (1) SACR 613 (SE) 613 D-H.

asked whether they were in a position to identify any of the persons involved in the alleged offence. It was contended on behalf of the State that a photographic identification parade was not a procedure at which an accused person had the right to be legally represented. The court held that the accused's right to be legally represented did not extend to every investigative procedure upon which the State embarked. The right extended only to pre-trial procedures where the accused was present and where the State sought the co-operation of the accused in order to protect the accused against the infringement of his rights. The court held that a photographic identification parade was not such a procedure at which the accused was entitled to be legally represented.

However, the court emphasised that sections 25 (2), (3) of the Interim Constitution made it abundantly clear that protection in terms of the right to legal representation applies from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself.³⁰⁰

It is submitted, based on this case, that if a photographic identification parade is conducted before the arrest of the suspect, for investigative purposes, during a pre-trial criminal procedure, the suspect has no right to legal representation as he/she has not yet been arrested. The right only sets in after an arrest. This means that the Constitution does not protect a person who is under investigation by the police but has not been arrested yet. In a case where the person fails to co-operate when an identification parade is to be conducted, the police usually resort to a photographic identification parade as the next option.

Even in the case where the investigation is continuing and the suspect has not been arrested yet, the police use a photographic identification parade if they have a photo of the suspect in order to ascertain the correctness of the features of the suspect (description) as supplied by the victim or witness in his/her statement.

In *S v Zwayi*³⁰¹ the accused was charged with 11 counts of murder, kidnapping and robbery, which stemmed from different incidents. The accused was identified and linked to the crimes by means of photographic identification. During the process of identification, the accused's photograph was mounted among other photographs on a chart and the witnesses were requested to identify the accused from the photos that were mounted on the chart (a photographic identification parade). The witnesses managed to identify the accused.

³⁰⁰ At 616A.

³⁰¹ 1977 (2) SACR 772 (Ck) at 772E- 773B.

During the trial, defence counsel did not object to the reception of evidence of photographic identification, or suggested that the accused's right to legal representation had been infringed during any of the relevant pre-trial procedures. After the close of the State's case, the accused was granted an opportunity to testify. For the first time the accused raised the allegation that he had been denied the right to legal representation during the identification parade. The ruling of the court was that an accused was not entitled, in terms of section 25 (3) (e)³⁰² of the Interim Constitution, to legal representation at a photographic identification parade. The court was satisfied that the use of a photo of the accused person in the course of a photographic identification parade as part of a criminal investigation was not an infringement of the accused's constitutional right to privacy.

It was confirmed by the court in *S v Maphumulo*³⁰³ that the taking of a photograph does not infringe the common law and constitutional privilege against self-incrimination. The reason is that evidence of this nature is not of a communicative or testimonial nature.

2.3.7 Database of South African and foreign jurisdictions

The SAPS is entitled to maintain a database of the fingerprints of convicted persons.³⁰⁴ The SAPS keeps two different databases for fingerprints. One database is the one in which fingerprints of convicted persons are stored. The second database is the one consisting of fingerprints that were found at crime scenes, but the ownership of these fingerprints is unknown (meaning that the person had not been identified yet). This type of fingerprints is called latent fingerprints or crime scene fingerprints. These fingerprints are usually compared with the existing fingerprints of convicted persons in an attempt to ascertain ownership of the fingerprints.

If the owner of these fingerprints is not identified, the fingerprints will stay in the database of suspects until the owner has been identified. This means that there is a fingerprint database for convicted persons and a fingerprint database for suspected persons (fingerprints of unknown persons found at the crime scene). In police language, this database is called the AFIS.

³⁰² Interim Constitution Act 200 of 1993.

³⁰³ 1996 (2) SACR 84 (N).

³⁰⁴ Chapter 5A of the South African Police Service Act 68 of 1995.

During the process of identification, the fingerprints are scanned on the database of convicted persons and if the system (AFIS) ³⁰⁵ picks up the owner of the fingerprint, this is called a hit, meaning the owner of the fingerprint has been identified. Identification can also be done manually by an expert. A hit must be confirmed by manual identification.

In South Africa, the fingerprint database is at the Local Criminal Record Centre and National Criminal Record Centre. Fingerprints are identified manually by an expert and an automated search is done by the AFIS system. Fingerprints that are stored in the database are fingerprints of convicted persons only. If the person has been arrested and released without conviction, the fingerprints of that person are destroyed. The courts in South Africa use the seven-point reliability system. This means that the fingerprint must have seven clear identifiable points to be admissible as evidence. In *S v Kimimbi* ³⁰⁶ the court accepted seven points of identification as reliable.

In England fingerprints are stored in the NAFIS.³⁰⁷ These fingerprints are taken from every person who has been arrested and charged or summonsed for a recordable offence. In some cases, these fingerprints may be electronically scanned using a live scan and captured images transmitted to NAFIS. If not already on file to confirm the identity of the individual concerned, these fingerprints are added to the national database. It is worth noting that in the past only fingerprints taken from individuals who were subsequently convicted were kept on the database as a permanent record of identity. However, following the implementation of the CJPA 2001, fingerprints from arrested individuals who are not subsequently cautioned for, or convicted of a criminal offence need not be eliminated from the NAFIS system although they are held separately within it. The comparison of fingerprints recovered from a crime scene with those held on the national database may lead to the identification of an individual present at that scene. The NAFIS system is used to do the automated search and is allegedly reliable. NAFIS can be used to establish the identity of an individual unequivocally by comparing a set of ten fingerprints taken from the suspect with any held for that person on the database.³⁰⁸

In the USA, fingerprints of arrested and convicted persons are stored in the Integrated Automated Fingerprint Identification System (IAFIS). IAFIS contains fingerprints and corresponding criminal history information for nearly 50 million subjects or 500 million

³⁰⁵ Automated Fingerprint Identification System.

³⁰⁶ 1963 (3) SA 250 (C) 251 F-H.

³⁰⁷ National Fingerprint Identification System.

³⁰⁸ Jackson and Jackson *Forensic Science* 92.

images, which are submitted to the FBI by state, local and federal law enforcement agencies. A crime scene or latent fingerprint is a dramatic find for the criminal investigator. Once the quality of the print has been deemed suitable for an IAFIS search, the latent print examiner creates a digital image of the print with either a digital camera or scanner. Next the examiner, with the aid of the coder, marks points on the print to guide the computerised search. The print is then electronically submitted to IAFIS, and within minutes the search is completed against all fingerprint images in IAFIS. The examiner may receive a list of potential candidates and their corresponding fingerprints for comparison and verification.

In 1975, police found Gerald Wallace's body on his living room couch. He had been savagely beaten and his hands were bound with an electric cord. Detectives searched his ransacked house, cataloguing every piece of evidence they could find. None of it led to the murderer. They had no witnesses. Sixteen years after the fact, a lone fingerprint, lifted from a cigarette pack found in Wallace's house and kept for 16 years in the police files, was entered into the Pennsylvania State Police IAFIS database. Within minutes, it hit a match. The police said that print gave investigators the identity of a man who had been at the house on the night of the murder. Police talked to him. He led them to other witnesses, who led them to the man the police ultimately charged with the murder of Gerald Wallace.³⁰⁹

2.3.8 Problems encountered by the police

2.3.8.1 Fingerprinting

Fingerprints of first offenders convicted of crime are not on the SAPS database. Fingerprints of persons who are under the age of 16 are not on the database of the Department of Home Affairs, as the fingerprints are only taken when persons apply for identity documents at the age of 16. Fingerprints of illegal foreigners are not in the fingerprints database of the SAPS or the database of the Department of Home Affairs.

The police are therefore not in a position to identify perpetrators of crime in the category of the above-mentioned persons because of the absence of their fingerprints in the fingerprint databases.

The problem encountered by the police prior to 18 January 2013 was that sometimes reliable information was received from an informer that a particular person was responsible for the commission of a particular crime, e.g. housebreaking or robbery. Because there was

³⁰⁹ Saferstein *Forensic Science: An Introduction* 94-95.

nothing linking the suspect to a crime at that particular moment, it was not legally possible for a police official to approach the person to eliminate fingerprints to confirm or rebut the information given by the informer, unless the person consented to his or her fingerprints being taken for elimination or investigation purposes. This problem is now addressed by section 36C of the Criminal Procedure Act. However, the problem still exists in relation to foreigners from neighbouring countries who enter the country illegally, commit crime and return to their countries immediately through land borders. To address this problem, the South African government will have to reach international agreements with African countries in order to get permission to do comparative searches on their fingerprint databases as well.

2.3.8.2 *Identification parades/visual identifications (line-ups)*

One of the main problems encountered by police officials is that there are conflicting court decisions³¹⁰ when it comes to the rights of suspected persons to have legal representation at an identification parade.

Rule 8 of the SAPS rules of identification stipulates that the suspect should be given an opportunity to obtain a legal representative to be present at the identification parade³¹¹. Although this is just a rule contained in an instruction and not a legal obligation, it has an impact of compliance on the investigator, as it is a national instruction. Police officials are obliged to comply with national instructions and standing orders. This situation creates a problem when investigators hold identification parades.

2.3.8.3 *Voice identification parade*

The problem encountered by police officials is that section 37 (1) (c) of the Criminal Procedure Act³¹² deals with persons who have been arrested and persons who have been released on bail or warning. The section is silent about a person who is suspected but has not been arrested. The other problem is that suspects try to change their voices when they are placed on voice identification parade, except if voice identification is done on a voice recording. This then confuses witnesses as to the identification of the voice.

³¹⁰ *S v Mhlakaza and another* (1996) (2) SACR 187(T) 199f-g and *S v Monyane and others* 2001(1) SACR 115 (T) 132f. These cases are discussed under identification parades paragraph 2.3.1.5 above.

³¹¹ South African Police Service National Instruction 1 of 2007.

³¹² Act 51 of 1977.

Kruger in *Hiemstra's Criminal Procedure*³¹³ agrees and makes the following valid remarks:

[a] voice parade can do an identification parade more harm than good, because if the suspect changes his voice at the parade, he will probably not be identified. This can create unnecessary doubt about identification based on other grounds. It is better therefore that the witness listen to the suspect's voice in circumstances where the suspect does not know that his voice is being tested.³¹⁴

2.3.8.4 Photo identification (photograph identification)

No problems have been encountered by SAPS officials in the process of ascertaining bodily features through photographic identification. This form of parade is, however, very rare.

In *S v Mdlongwa* 2010 (2) SACR 419 (SCA) the photographs taken of the suspect and video footage of the crime scene successfully assisted in the identification of the suspects through facial recognition. This is also a form of photo identification. This case is a good development in criminal procedure. It will contribute significantly to crime detection and prosecution. It strengthens section 37 (1) (d) of the Criminal Procedure Act³¹⁵ and it authorises the application of section 37 (1) (d) by the police and the courts.

2.4 CONCLUSION

2.4.1 Fingerprinting

Although South Africa has a human rights culture that respects human rights, it also at the same time recognises that those rights may be limited by the law of general application. The case of *Huma* and other cases mentioned above are indications that ascertaining the bodily features of an accused person is not unconstitutional as long as the person has been arrested or convicted or served with a summons to appear in court.

Section 37 of the Criminal Procedure Act, however, limits the police's powers of ascertaining bodily features to persons mentioned in section 37 (1) (a) (i) to (v).

³¹³ (2008) 3-10.

³¹⁴ Du Toit *et al Commentary on Criminal Procedure Act Service* 46 3-28B.

³¹⁵ Act 51 of 1977.

When one compares foreign law such as that applied in Canada, which also recognises basic human rights, it is found that the Canadian Criminal Code in section 487.092 empowers the Canadian police to obtain fingerprints of persons through a warrant called an “impression warrant”, irrespective of whether that person is a suspect or not, as long as there are reasonable grounds to believe that the person’s fingerprints will assist in the solving of crime and it is in the best interests of the administration of justice that the “impression warrant” be issued.

In South Africa, fingerprints of arrested persons who have been released without being convicted are not kept in the police database for future use or comparison. However, in England, following the implementation of the CIPA 2001, fingerprints from arrested individuals who are not subsequently cautioned for or convicted of a criminal offence need not be eliminated from the NAFIS although they are held separately within it. This means that these fingerprints can be used in future for comparison purposes.

Ascertaining bodily features through fingerprints is a valuable tool in crime detection. The new section 36C (fingerprints and body-prints for investigation purposes), which was implemented on 13 January 2013, has given police further powers to ascertain the bodily features of suspected persons. However, this section limits these powers to Schedule 1 offences with the exclusion of the illicit possession, conveyance or supply of drugs and precious stones. This section managed on the face of it to address the previous problem experienced by the police, i.e. that police were not entitled to obtain fingerprints of persons who had not been arrested, convicted or sentenced, for investigation purposes.³¹⁶

2.4.2 Identification parades

The most pressing problem encountered in the legal procedure of line-ups is that of counsel. The two cases *Mhlakaza* and *Mphala* supra are conflicting when it comes to legal representation of the suspect at the identification parade. The cases create operational problems for police officials. Both cases were decided by the High Court and the problem will only be solved once the Supreme Court of Appeal or the Constitutional Court makes a decision in this regard. To avoid this problem, the researcher would suggest that the rules of identification contained in the Police National Instruction be incorporated as part of section 37 (1) (b) of the Criminal Procedure Act³¹⁷.

³¹⁶ Act 6 of 2010.

³¹⁷ Act 51 of 1977.

In Canada a suspect has a right to legal representation at the identification parade. In the USA, the suspect has a right to legal representation at the identification parade. In England the suspect must be informed of his right to have a solicitor or friend at the parade. This means that the suspect in those jurisdictions may have a representative at the parade. The consequences of not having legal counsel at an identification parade or being denied legal representation at the line-up (identification parade) are the infringement of the constitutional rights of a suspect.

2.4.3 Voice identification

From the case of *Regina v Ng* [1996] 38 CRR (2d) 340, discussed in paragraph 2.2.5.4.2, it may be concluded that if the police during the process of investigation should obtain voice samples from the accused with the purpose of doing voice comparison (voice identification), and the accused are not warned of their right to counsel, the evidence of voice identification obtained by the police for comparison purposes may be inadmissible in court. This case is in line with section 35 of the South African Constitution.

Regina v Ng (supra) may be applied by the South African courts because these courts may consider foreign law according to section 39 (c) of the South African Constitution Act 1996.

From the case of *Levack and Others v Regional Magistrate, Wynberg and Another*³¹⁸, it may be concluded that the police could be allowed to obtain voice samples for voice comparison in terms of section 37 (1)(c) and section 37 (3) (a). These two sections cover the area where the person is already an accused but does not address the area where the person is still a suspect. Unfortunately, it still does not address the problem of a situation where police are still investigating the matter. The said two sections do not empower the police sufficiently to do crime detection during the process of pre-trial criminal procedure. The sections cover the ascertainment of the bodily features of a person who is already in detention, but do not cover the person who is still under investigation as a suspect and has not been arrested yet.

It would be helpful if “voice samples” and other body samples could be included in section 36C of the Criminal Procedure Act 51 of 1977 so that the police can be specifically empowered to deal with crime detection. The section should read as follows: “Fingerprints, body-prints and voice samples for investigation purposes prior to arrest, holding and release of suspect.”

³¹⁸ (2002) ZASCA 146: [2003] 1 All SA 22 (SCA).

It would also be of much help for more effective crime detection to amend section 252A³¹⁹ in such a way that the trap includes obtaining voice samples of suspects for comparison purposes for crime detection purposes. Although this might infringe the right to privacy, the right may be limited by section 36 of the Constitution. Section 252A should be amended to allow the Director of Public Prosecutions to authorise the police to obtain a voice sample of a suspect on tape in circumstances where the suspect is not aware of the recording, if the suspect has been warned and has refused to give consent that his or her voice be recorded for investigation purposes. The witnesses should then be requested to identify the voice of the suspect from the tape recording. In that way there is no risk of the suspect changing his or her voice. This can even be limited to a specific schedule of cases only in order to avoid misuse.

2.4.4 Photo identification (photograph identification)

2.4.4.1 From the above discussion, it can be concluded that in South Africa, a photographic identification parade is not unconstitutional.³²⁰ The situation is similar to the situation in Canada where photographic identification is also regarded as constitutional.

2.4.4.2 It can be concluded that the UK, the USA and Canada also recognise the process of ascertaining bodily features through photo identification parades.

2.4.4.3 The researcher concludes that the case of *Mdlongwa* supra indicates that the law in relation to 'the ascertainment of bodily features of the accused' is developing, especially the ascertainment of bodily features by means of photographs and video footage. What was done by Inspector Naude is similar to photographic identification because the original photo of the accused was compared with the video footage and points of similarity were found and on the basis of that evidence the accused was convicted. The position in South Africa is that photographic identification and facial comparison are admissible as a method of ascertaining bodily features. It is also admissible as evidence in court.

³¹⁹ Criminal Procedure Act 51 of 1977.

³²⁰ *S v Hlalikaya* 1997(1) SACR 613 (SE) at 613d-f and *S v Zwayi* 1977 (2) SACR 772 (Ck) 772-773.

2.4.4.4 The major development in the Law of Criminal Procedure and Evidence in this regard is that an expert witness can now identify an accused from video footage, using the photo of the accused to do facial comparison, as long as the video footage is original.

PART II

INVASIVE INVESTIGATIVE METHODS IN ASCERTAINING BODILY FEATURES OF THE ACCUSED PERSON

“There can be no doubt that blood tests entail an invasion of a person’s right to privacy ... I do not require much persuasion to accept that a blood test entails some invasion to a person’s bodily integrity and security, although such an invasion is slight indeed - *S v R and others* 2000(1)SACR 33 (WLD) 39*h-i* and 40*a*”.

CHAPTER 3

Investigative methods in the ascertainment of any mark, characteristic, distinguishing feature, condition or appearance

3.1. GROUP 3 AND INTRODUCTION

The police have the power to obtain blood samples in terms of section 37 (1) (c) of the Criminal Procedure Act. An involuntary blood test unquestionably constitutes an invasion of privacy.³²¹ However, the right to privacy is not absolute and may yield to other considerations of legal policy.³²²

(a) Before the amendment the enabling Act provided in section 37 (1) (c) of the Criminal Procedure Act that:

Any police official may –

take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.³²³

(b) The new section 37 (1) (c) of the amended Criminal Procedure Act³²⁴ provides as follows:

Any police official may-

take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that a police official may not -

- i. take a blood sample of any person,³²⁵ or

³²¹ *Seethal v Pravita and another* NO 1983 (3) SA 837 (D).

³²² *Ibid.*

³²³ Section 37 (1) (c) of the previous Criminal Procedure Act before amendment in 2010.

³²⁴ Act 51 of 1977.

³²⁵ The Criminal Law (Forensic Procedures) Amendment Bill (B9-2013) has amended the section to read as follows: (i) take an intimate sample of any person. At the time of writing the Bill had not been passed and was not in operation yet.

- ii. examine the body of a person who is of a different gender to the police official³²⁶.

The difference between the amended section 37(1) (c) and the new section 37 (1) (c) is that the amended section 37 (1) (c) does not refer to section 36B and the new section 37 (1) (c) refer to section 36B. Section 37 (1) allows the police official discretion to take or not to take body-prints and bodily appearance, while section 36B (1) compels the police official to take fingerprints of persons who committed Schedule 1 offences. The term “body-prints” in terms of definitions in Section 36A excludes “fingerprints”. It is suggested that body-prints include any number of prints, such as a person’s “DNA prints” lifted from a number of samples, including blood samples.

3.1.1 Collection and analysis of DNA³²⁷

Just like fingerprints and identification parades, DNA can also be used to ascertain the bodily features of a person. DNA is a scientific method of ascertaining bodily features and is extremely accurate. Scientific and technological advances in the past 25 years have made identification of suspects easier and more definite with the application of DNA typing. DNA contains the pattern or unique hereditary “roadmap” for all human beings and determines how humans develop, grow and mature throughout life. The theory that everyone has unique DNA, except identical twins, has reached scientific certainty and the ability to translate the science from the laboratory to the court room has become routine. Suspects who have left samples of their DNA at the crime scene or on a victim may have their own DNA sample compared to recovered specimens. Where a person would never have had the opportunity to have lawfully been in a specific location to have left DNA evidence or would never have normally occupied a position to leave DNA evidence on or in a victim, the match that can be made may prove decisive in proving guilt. Similarly, wrongly convicted individuals may be able to prove that someone else was the criminal, and in so doing, free themselves from illegal incarceration³²⁸.

The method of ascertaining bodily features through DNA is regarded as intrusive or invasive, as it is “intimate”.³²⁹ A “non-intimate” sample means a buccal sample³³⁰ a sample taken

³²⁶ Section 37 (1) (c) of the new Criminal Procedure Act after amendment by Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

³²⁷ “DNA” means deoxyribonucleic acid, which is a biochemical molecule found in the cells that makes each species unique.

³²⁸ Ingram *Criminal Evidence* 458.

³²⁹ “intimate sample” means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area from the body of a person, excluding a buccal sample. Criminal Law (Forensic Procedures) Amendment Bill. (B9-2013) Introduced in the National Assembly on 26 April 2013. Page 3 at 50. In section 62 of Code D of PACE, United Kingdom intimate sample

from a nail or from under the nail of a person. Bodily samples³³¹ are usually taken for DNA analysis³³² and are obtained from the crime scene. The crime scene can be a place (premises or piece of land) or even the body of a person. The samples found at the crime scene are called “crime scene samples”³³³. DNA is usually collected from hair, buccal swabs, bodily fluids, blood or teeth. The normal procedure that is followed in obtaining bodily samples for DNA analysis is described below.

The police are usually called to the crime scene. The first police official who arrives at the crime scene (in most cases uniformed police officers) will cordon off the crime scene and call the experts if the crime scene needs expert investigation. The experts will then investigate the crime scene for possible evidence. For the purposes of DNA, the police will search for blood, semen, skin cells, tissue, organs, muscle, brain cells, bone, teeth, saliva, mucus and perspiration. In order to avoid contamination of the crime scene, during the evidence collection process the investigator will wear gloves, change gloves between exhibits, avoid touching the area where he or she believes DNA may exist and avoid talking, sneezing and coughing on exhibits.³³⁴

After the exhibits have been collected, they will be sealed according to prescripts and forwarded to the Forensic Science Laboratory for analysis. The DNA results will give a DNA profile³³⁵. Once the suspect has been arrested, a control sample (blood sample) will be obtained from the suspect or arrested person by a medical practitioner. The control blood sample will be sent to the Forensic Science Laboratory for analysis. The DNA profile from

means blood, semen or other tissue sample, urine, pubic hair, dental impression and swab from other places than the mouth. Saliva is not an intimate sample.

330 “Buccal sample” means a sample of cellular material taken from the inside of a person’s mouth. Criminal Law (Forensic Procedures) Amendment Bill. (B9-2013) Introduced in the National Assembly on 26 April 2013. Page 3 at 20.

331 “Bodily sample” means any type of sample taken from a person and includes intimate and non-intimate samples. Criminal Law (Forensic Procedures) Amendment Bill. (B9-2013) Introduced in the National Assembly on 26 April 2013. Page 3 at 10.

332 ‘Forensic DNA analysis’ means the analysis of sections of the DNA of a bodily sample to determine the forensic DNA profile, provided that this does not relate to any analysis pertaining to medical tests or for health purposes or the mental characteristic of a person or to determine any physical information of the person other than the gender.

333 “Crime scene sample’ means physical evidence retrieved from the crime scene or any other place where evidence of the crime may be found, and may include physical evidence collected from the body of a person. Criminal Law (Forensic Procedures) Amendment Bill. (B9-2013) Introduced in the National Assembly on 26 April 2013. Page 3 at 40.

334 SAPS Forensic Science Laboratory, Forensic Fact file no 6 of 2011, page 2 of 5.

335 “Forensic DNA profile” means the results obtained from forensic DNA analysis of bodily samples taken from a person or from a crime scene, providing a unique string of alpha-numeric characters to provide identity reference: Provided that this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the gender. Criminal Law (Forensic Procedures) Amendment Bill. (B9-2013) Introduced in the National Assembly on 26 April 2013. Page 3 at 45.

the control blood sample obtained from the suspect or arrested person will be compared to the DNA profile obtained from the crime scene sample to establish a match. If the two match, it is regarded as a hit, meaning it is positive identification. In special circumstances, an official who has been authorised and trained by a medical practitioner in terms of the National Health Act, 2003³³⁶ may also be permitted to take a non-intimate DNA samples (buccal sample inside the cheek).

Any authorised person³³⁷ who in terms of any other law takes a buccal sample from any person must do so in a designated area deemed suitable for such purposes as determined by the Departmental Head of Police, Justice and Constitutional Development or Correctional Services in their area of responsibility.³³⁸ An authorised person must take a buccal sample or cause the taking of any other bodily sample by a registered medical practitioner or registered nurse of any person arrested, released on bail, served with a summons or convicted in respect of any offence referred to in Schedule 1.³³⁹

An authorised person may take a buccal sample of a person or a group of persons, if there are reasonable grounds to –

- (a) suspect that the person or one or more of the persons in that group has committed an offence referred to in Schedule 1; and
- (b) believe that the sample or the results of an examination thereof will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.³⁴⁰ These samples are for investigation purposes.

Comparative DNA search is also permissible.³⁴¹ The authorised officer must perform comparative searches on forensic DNA profiles that are entered onto the NFDD for purposes

³³⁶ Act 61 of 2003.

³³⁷ “Authorised person” means (i) with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate referred to in the Independent Police Investigative Directorate Act, 2011 (Act No 1 of 2011), in the performance of his or her official duties, and (ii) with reference to buccal samples, means any police official or member of the Independent Police Investigative Directorate , referred to in the Independent Police Directorate Act, 2011 (Act No 1 of 2011), who is not a crime scene examiner, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, 2003(Act 61 of 2003), in respect of the taking of a buccal sample, (iii) any registered medical practitioner or registered nurse as contemplated in the National Health Act, 2003(Act No 61 of 2003), providing services to the Department of Correctional Services.

³³⁸ Section 36A (5) Criminal Law (Forensic Procedures) Amendment Bill (B9-2013) Page 4 at 15.

³³⁹ Section 36D.(1) Criminal Law (Forensic Procedures) Amendment Bill (B9-2013). Page 4 at 35.

³⁴⁰ Section 36E (1) Criminal Law (Forensic Procedures) Amendment Bill (B9-2013). Page 5 at 50.

related to the detection of crime, the investigation of an offence, the conducting of a prosecution, identification of missing persons or the identification of unidentified human remains, and communicate the outcome of the comparative search. The authorised officer may, subject to the provisions of this Act and any other applicable law, upon receipt of a forensic DNA profile from a foreign state or a recognised international organisation, tribunal or entity, compare the forensic DNA profile with those in the NFDD,³⁴² for the detection of crime, the investigation of an offence, the conducting of a prosecution, the identification of unidentified human remains or the identification of missing person and may then communicate the outcome of the comparative search to the requester.³⁴³

3.2 DNA AS A METHOD OF ASCERTAINING BODILY FEATURES OF A PERSON: THE POSITION IN SOUTH AFRICA

3.2.1 The position of a suspect

As indicated on numerous occasions previously, the ascertaining of bodily features of a suspect is not addressed in the previous or amended Criminal Procedure Act. It only mentions an arrested person or person released on bail.

3.2.2 The position of arrested, detained or convicted person

At present section 37 (1) (c) authorises the taking of blood and other body samples. The section refers to body samples of arrested persons or persons who were arrested and released on bail or warning only. The section does not include a suspect. However, in the case where a person gives consent, the body sample of that person may be taken, but this consent must meet the requirements of valid informed consent.

3.2.2.1 The taking of blood samples: The requirements

Section 37 (2) of the Criminal Procedure Act as amended by Criminal Law (Forensic Amendment Act)³⁴⁴ provides as follows:

³⁴¹ Section 15M of the South African Police Service Act; Criminal Law (Forensic Procedures) Amendment Bill (B9-2013). Page 10 at 20 to 40.

³⁴² National Forensic DNA Database of South Africa.

³⁴³ Section 15N of the South African Police Service Act; Criminal Law (Forensic Procedures) Amendment Bill (B9-2013). Page 10 at 45.

³⁴⁴ 6 of 2010.

(a) Any medical officer of any prison or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) of subsection (1) or paragraph (a) or (b) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.³⁴⁵

(b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken³⁴⁶.

The courts³⁴⁷ are by law authorised to order the ascertaining of the bodily features of an accused person. This is done to assist the police to do their investigations during the pre-trial phase³⁴⁸. Section 37 (3) of the Criminal Procedure Act 51 of 1977, both amended and new, is silent about the position of the suspect. The section only refers to an accused and a convicted person. This means that the section is either not applicable to a suspect or the legislature has expressly excluded non-arrested suspects who refuse to allow a blood sample to be taken.

Section 37 (3) of the amended Criminal Procedure Act before amendment provided as follows:

“Any Court before which criminal proceedings are pending may:

- (a) In any case in which a police official is not empowered under subsection (2) to take fingerprints, palm-prints or foot-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance,
- (b) Order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings”.

The amended section 37(4) of the Criminal Procedure Act provided that:

³⁴⁵ Section 37(2) (a) of the new Criminal Procedure Act as amended.

³⁴⁶ Section 37 (2) (b) of the new Criminal Procedure Act as amended.

³⁴⁷ Any court before which criminal proceedings are pending.

³⁴⁸ Section 37 (3) (a) and (b) of the previous Criminal Procedure Act.

Any Court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any charge, or any magistrate³⁴⁹, may order that the fingerprints, palm-prints or footprints, or a photograph, of the person concerned be taken.”

The new section 37 (3) of the Criminal Procedure Act provides as follows:

Any Court before which criminal proceedings are pending may –

- (a) in any case in which a police official is not empowered under subsection (1) or section 36B (1) to take fingerprints or body-prints or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance,
- (b) order that the steps, including the taking of a blood sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

The new section 37 (4) of the Criminal Procedure Act provides that:

Any Court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any offence, or any magistrate, may order that the fingerprints, body prints or a photographic image of the person concerned be taken.

The requirements are thus the following: (1) criminal proceedings must be pending before the court, (2) the police official must not be empowered under section 37 (2) to establish bodily features, (3) the court must deem it necessary to order that steps be taken and (4) the steps to be taken must be necessary to ascertain bodily features. This act does not include the seizure of bodily samples.

*3.2.2.2 Surgical removal of articles for comparative searching*³⁵⁰

³⁴⁹ “Magistrate” includes an additional magistrate and an assistant magistrate but does not relate to a regional magistrate.

³⁵⁰ “Comparative search” means in terms of section 36A of the Criminal Procedure Act, the comparing of fingerprints, body-prints or photographic images, taken under any power

In *Minister of Safety and Security and another v Gaqa*³⁵¹ the applicants applied for an order compelling the respondent to submit himself to an operation for the removal of a bullet from his leg. The applicants alleged that they had reason to believe that the respondent had been shot and injured in the course of an attempted robbery in which two people were killed. The respondent opposed the application.

The court, taking the purposive approach, held that section 27 of the Criminal Procedure Act 51 of 1977, which provided for the use of force in order to search a person, permitted the granting of the order. The court held furthermore that section 37 (1) (c) of the Act, which permitted an official to take such steps as he deemed necessary to ascertain whether the body of any person had any mark, characteristic or distinguishing feature, also permitted the order even though the bullet was clearly not such a mark, characteristic or distinguishing feature. The court held that the police would be hamstrung in fulfilling their constitutional duty if the order was not granted. The application was accordingly granted.

This case indicates that the courts have authority to grant orders for the purpose of ascertaining bodily features of the accused person. Unfortunately this case did not cover the position of a person who is a suspect but who has not been arrested yet. Many suspects are confronted during robberies, but manage to flee. Only after a long time information is received from a reliable informer that a bullet projectile is stuck in the body of the suspect. If there is no other evidence to link the suspect to the offence, the police find it difficult to arrest the suspect and apply to the court for the removal of the bullet projectile.

In *Minister of Safety and Security and another v Xaba*³⁵² the applicants applied for the confirmation of a *rule nisi* that would declare the second applicant, a police officer, to be entitled to use reasonable force, including any necessary surgical procedure performed by medical doctors to remove a bullet lodged in the respondent's thigh. They applied to the court for an order directing the respondent to subject himself to the procedure, failing which the sheriff was to furnish the necessary consent on his behalf. The respondent was a suspect in a motor-vehicle hijacking case and the police believed the bullet would connect him with the crime. The respondent refused to undergo the procedure. The applicants relied on section 27 of the Criminal Procedure Act 51 of 1977, which deals with the legitimate use

³⁵¹ conferred by Chapter 3, by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act.
2002 (1) SACR 654 (C).

³⁵² 2004 (1) SACR 149 (D).

of force in the event of resistance against search or seizure, and section 37, which deals with police powers in respect of prints and bodily features of the accused.

The court held that section 12³⁵³ of the Constitution would clearly be infringed if the proposed surgery were to take place without the respondent's consent. The court further held that, as for the search and seizure provisions of the Criminal Procedure Act³⁵⁴, these give powers of search only to "police officials" and "peace officers" and gave them no power to delegate such powers of search.³⁵⁵ The court held that the decision in *Minister of Safety and Security v Gaqa*³⁵⁶ in which the court concluded that sections 27 and 37(1) (c) allowed a police official to use necessary violence to obtain an object through the surgical removal of a bullet in circumstances similar to those in the instant case, was wrong and should not be followed³⁵⁷. The court held that the legislature should deal with the issue of striking a balance between the interests of the individual and those of the community in the resolution of crimes by surgical intervention in cases such as the present³⁵⁸.

The cases clearly indicate the divisions in rulings of the High Court in respect of removal of an exhibit from a suspect or accused. The procedure does not fall within the powers granted by section 37 (3), as it is not a method of ascertaining bodily features, and such legal uncertainty and conflicting decisions have a negative impact on effective policing.

In *Winston v Lee*³⁵⁹ an order was sought for the removal of a bullet that could provide evidence of the suspect's guilt or innocence in an armed robbery. A bullet was lodged in the suspect's chest and there was some dispute with regard to the medical risks involved. There was also no compelling need for the removal of the bullet, as there was other evidence against the suspect. The court concluded that the search was unreasonable. In concluding that the search was unreasonable in the circumstances, Brenna commented:

The reasonableness of surgical intrusions beneath the skin depends on a case by case approach in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case the question whether the community's needs for evidence outweigh the substantial privacy interests at stake is delicate one, admitting of few categorical answers.

³⁵³ Section 12 of the Constitution.

³⁵⁴ Sections 20-23 and 26 and 27 of the 51 of 1977.

³⁵⁵ At 158 a-b.

³⁵⁶ 2002 (1) SACR 654 (C).

³⁵⁷ At 161g-h.

³⁵⁸ At 161h-i.

³⁵⁹ 470 US 753 1985.

The court did not cite these categorical answers.

In *S v Binta*³⁶⁰ Ackerman said: "I have already referred to the provisions of s 37 (2) (a) of the Criminal Procedure Act empowering a district surgeon or (in the appropriate circumstances any other registered medical practitioner) to take a blood sample from another person. This power is formulated in terms that the district surgeon or medical practitioner may take such steps, including the taking of a blood sample."

These provisions also apply where the person refuses to submit to the obtaining of required samples. The Act does not require a person to give consent before the samples can be obtained.

In summary, the current situation is that section 37 (2) (a) does not cover a person who is a suspect. The section only covers persons mentioned in section 37 (1) (a) (i) and (ii). Section 37 (2) (b) gives a registered medical practitioner who is attached to a hospital the authority to obtain a blood sample or cause such blood sample to be obtained from any person who is admitted to a hospital for medical attention or treatment if the medical practitioner on reasonable grounds believes that such blood sample will be relevant at any later criminal proceedings. This section is broad and thus includes any person, meaning that the suspect can be any person. The test is whether the person is admitted to the hospital for medical attention or treatment. The section does not say the person must fall within the ambit of section 37 (1) (a) (i) and (ii) and thus includes a suspect.

3.2.2.3 The value of blood samples and DNA testing in the investigation of crime

The cases below indicate the value of the ascertainment of the bodily features of an arrested, detained or accused person through blood samples and DNA.

The amended section 225 of the Criminal Procedure Act provides for the following:

(1) Whenever it is relevant at criminal proceedings to ascertain whether – (a) any finger print, body-print or bodily sample, as defined under Chapter 3, or the information derived from such prints or samples, of an accused at such proceedings correspond to any other fingerprint or bodily sample, or the information derived from such samples, or (b) the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the fingerprints or body-prints of the accused or that the body of the accused has or had

³⁶⁰ 1993 (2) SACR 553 (C) 561j-562d.

any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any test on a bodily sample, of the accused, shall be admissible at such proceedings. (2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint, body-print or bodily sample as defined in Chapter 3, in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36A, 36B, 36C, 36D, 36E or 37, or that it was taken or ascertained against the wish or the will of the accused concerned.³⁶¹

In *S v Nkuna*³⁶² the bodily features that were ascertained were the bodily features of the victim and not those of the accused. In casu the accused was charged with murder after he had been the last person to be seen with his ex-girlfriend after meeting her at a salon. That was the last time the girlfriend was seen. After a week blood was found on a mat found in the boot of the vehicle of the accused. Blood samples of the parents of the girlfriend of the accused were obtained and compared with blood samples that were found on the mat found in the boot of the vehicle of the accused.³⁶³ The DNA results indicated that the probability of parentage was 99,9999%, confirming that the victim was the child of the parents³⁶⁴. In February 2012, the body of a woman, presumably the girlfriend of the accused, was found buried below the foundation of the house of the accused. The teeth of the body were used for DNA analysis and compared to the profile of the blood sample (crime scene sample) that was found on the mat of the vehicle of the accused. The profile was the same, confirming that the body that had been found in the house of the accused was that of the same person whose blood was found in the vehicle of the accused.

The case of *Nkuna* supra indicates that bodily features of a person, such as teeth, can be ascertained through body samples and DNA. A person can be identified by using body samples and DNA.

In *S v R and others*³⁶⁵ counsel for the defence objected to the admission of evidence of DNA testing that had been done on the accused's blood sample and compared with tissue found in the vagina of a raped victim. The argument was that the evidence had to be excluded.³⁶⁶ The section provides as follows:

³⁶¹ Criminal law (Forensic Procedures) Amendment Bill (B9-2013) 6 at 20-40.

³⁶² 2012 (1) SACR 167 (B) at 168 H-169 H, 173 B.

³⁶³ Par [2].

³⁶⁴ Par [5].

³⁶⁵ 2000 (1) SACR 33 (W) 33.

³⁶⁶ Section 35 (5) of the Constitution.

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 court held that the fundamental test for the admissibility of evidence was its relevance. In this regard, there were substantial benefits to be derived from harnessing the advances in modern science to the law. When it came to rape, DNA testing could be especially helpful. It could go a long way towards liberating men from their fear of being falsely accused of rape and it could also go a long way towards liberating women from the humiliating questions to which they were so often subjected when complaining and testifying in rape cases.

This decision clearly indicates the importance of DNA in crime detection. The decision also indicates how DNA can assist the courts in reaching an informed decision. The decision indicates that not all evidence that has been obtained in an unconstitutional manner is inadmissible. The test is whether it will result in the trial being unfair or will be detrimental to the administration of justice.

In *S v Binta*³⁶⁷ the court stated that a person who refuses a request to submit to the taking of a blood sample as envisaged by section 37 of the Criminal Procedure³⁶⁸ cannot be found guilty of obstructing the course of justice or attempting to defeat the ends of justice, even though such offence can be committed by a mere omission where there is a legal duty on the part of the accused to act. The case was cited with approval in *Levack and others v Regional Magistrate, Wynberg and Another*³⁶⁹ wherein Cameron JA referred to *Binta* at par (20) and held that 'It is of course true that to take a palm or fingerprint, or draw blood from an accused, or to require him to supply a voice sample, goes further than merely observing his features or complexion when he appears in court. Our legal system recognises the distinction. It is for this reason that Ackerman J held in *S v Binta* that a person who refuses a request to submit to the taking of a blood sample under section 37 cannot, by mere refusal, be guilty of obstructing the course of justice or of attempting to defeat the end of justice. The additional means of compulsion that the provision licenses may have to be employed. In the present case, it was no doubt awareness of *Binta* that induced the Director of Public Prosecutions to seek an order. Eventual defiance of it would found contempt of court'.

Although the case of *Binta* makes the position clear, as far as whether a refusal to have blood taken may constitute an offence, the court can order that a blood sample of the

³⁶⁷ 1993 (2) SACR 553 (C) 553.

³⁶⁸ Act 51 of 1977.

³⁶⁹ 2003(1) SACR 187 (SCA) p198.

accused be obtained for DNA purposes.³⁷⁰ If the accused still refuses after an order has been given, he may be guilty of contempt of court.

3.3 DNA AS A METHOD OF ASCERTAINING BODILY FEATURES OF A PERSON: FOREIGN JURISDICTIONS

3.3.1 The position in the United States of America

According to a two-year study by the United States Congressional Office of Technology Assessment biological applications programme, molecular and genetic principles underlying DNA techniques are solid and can be successfully applied to forensic case work. Forensic use of DNA tests is valid. It has been suggested by some researchers that under ideal conditions the probability of two tissue samples matching by chance is less than one in 30 billion, or six times the present population of the earth³⁷¹.

During 1994, the Congress authorised the FBI to establish and oversee the National DNA Index System (NDIS). When the NDIS was launched in 1998, only nine states participated. Currently, laboratories in all 50 states, the District of Columbia, the federal government, Puerto Rico, and the US Army Criminal Investigation Laboratory participate in the NDIS. The NDIS contains the DNA profiles provided by federal, state and participating local crime laboratories. Since January 2011, there have been 198 laboratories in the USA participating in the NDIS.

The DNA profiles generated by laboratories operated by law enforcement agencies are stored in Local DNA Index Systems (LDIS). The DNA profiles generated by state laboratories, along with authorised profiles stored in participating LDIS, are uploaded into the State DNA Index Systems (SDIS). Each state has its own laws specifying which profiles may be included or stored in the SDIS. The DNA profiles generated by federal laboratories, along with authorised DNA profiles in participating SDIS, are uploaded into the NDIS. The NDIS allows participating laboratories to compare DNA on national level while the SDIS permits each state to compare profiles stored at state level. The Federal, state and local laboratories upload and compare DNA profiles using the Combined DNA Index System (CODIS) software that was produced and distributed by the FBI.

³⁷⁰ Section 37 (2) (a) of the Criminal Procedure Act 51 of 1977.

³⁷¹ Federico. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/clwqrty33&div=22&id=&page> accessed (accessed 11/02/2014).

CODIS does its searches from three indexes (convicted offenders, arrested persons and the forensic index) in order to generate investigative leads. The convicted offender index contains DNA profiles developed from the samples collected from convicted persons. The arrested persons index contains DNA profiles developed from samples collected from arrested, but not yet convicted, individuals. The forensic index contains DNA profiles developed from samples collected at crime scenes. CODIS searches across these indexes to look for potential matches (also referred to as “hits”). The matches can occur between either the convicted offender or arrested person indexes and the forensic index, thereby providing law enforcement with the identity of one or more suspects. Matches can also occur between DNA profiles in the forensic index, thereby linking crime scenes to one another and identifying serial offenders. Matches between multiple samples in the forensic index can allow law enforcement agencies in different jurisdictions to co-ordinate their efforts and share leads. No names or other personal identifiers for offender and arrested persons’ DNA profiles are stored in NDIS, so when a match is made in CODIS, laboratories that submitted the DNA profiles to the NDIS are notified of the match and they contact each other in order to verify the match and co-ordinate their efforts ³⁷².

Under current Criminal Law and Procedure in the USA, as defined in section 16 of the Criminal Procedure ³⁷³, the Attorney General is allowed to collect DNA samples from individuals who have been arrested, are facing charges, or have been convicted of a crime or from non-USA citizens who are detained under the authority of the USA States. In addition, the Bureau of Prisons is required to collect a DNA sample from each federal prisoner who is, or has been, convicted of a felony as defined at 18 USC §16 or any attempt or conspiracy to commit any of these crimes. The Federal probation officers responsible for the supervision of individuals on probation, parole or supervised release are required to collect DNA samples from individuals who are, or have been, convicted of any of the crimes outlined above. It is required that collected samples be submitted to the FBI for analysis and their resulting DNA profiles are included in the NDIS³⁷⁴.

The Justice for All Act of 2004 ³⁷⁵ establishes the process to be followed for post-conviction DNA testing in federal courts³⁷⁶. Under current law,³⁷⁷ upon a written motion from an

³⁷² James N. Analyst in Crime Policy. December 6 2012: Congressional Research Service DNA Testing in Criminal Justice, Current Laws, Grants and Issues: Page 2-4. Case Law on DNA test. www.fas.org/sqp/crs/misc/R41800.pdf (accessed 2013/07/20).

³⁷³ 42 U.S.C. §15135a(a)(1)(A).

³⁷⁴ James N. Analyst in Crime Policy. December 6 2012: Congressional Research Service DNA Testing in Criminal Justice, Current Laws, Grants and Issues: Page 20. Case law on DNA test. www.fas.org/sqp/crs/misc/R41800.pdf (accessed 2013/07/20).

³⁷⁵ (P.L. 108-405).

individual who has been sentenced for a federal offence (hereafter “applicant”), the court must order DNA testing of evidence if all of the following requirements apply:

- (i) Where the applicant asserts, under penalty of perjury, that he is actually innocent of the federal crime for which he was sentenced or another federal or state offence, if (1) the evidence was entered during a federal death sentence hearing and exoneration for the offence would entitle the him or her to a reduced sentence or a new sentencing hearing, or in the case of a state offence he or she demonstrates that there is no adequate remedy under state law to permit DNA testing of the evidence and to the extent available, he or she has exhausted all remedies available under state law for requesting DNA testing of evidence.
- (ii) Where the specified evidence that needs to be tested was secured in relation to the investigation or prosecution of the federal or state crime of which he or she (the applicant) claims to be innocent.
- (iii) Where the evidence that needs to be tested (1) was not previously subjected to DNA testing, and that he or she did not knowingly and voluntarily waive the right to request DNA testing of the evidence in a court proceeding after the date of enactment of “Justice for All Act”³⁷⁸ or did not knowingly fail to request DNA testing of the evidence in a prior motion for post-conviction DNA testing or (2) was previously subjected to DNA testing and he or she requests DNA testing using a new method or technology that is substantially more probative than prior testing³⁷⁹. This indicates that in the USA a convicted person is given an opportunity to contest DNA testing after his or her conviction.

In the USA, in recognising the accuracy of DNA evidence, the Congress passed the DNA Analysis Backlog Elimination Act of 2000, which requires individuals who have been convicted of a qualifying federal offence, and who are in prison, on parole or probation, or other supervised release, to provide DNA samples so that the federal government will be able to add the sample to the national DNA database of convicted felons. One purpose of the database of DNA samples is to help clear older cases in which DNA evidence exists, but

³⁷⁶ James N. Analyst in Crime Policy. December 6 2012: Congressional Research Service DNA Testing in Criminal Justice, Current Laws, Grants and Issues: Page 21-22. Case law on DNA test. www.fas.org/sgp/crs/misc/R41800.pdf (accessed 2013/07/20).

³⁷⁷ (18 U.S.C § 1565 (b)).

³⁷⁸ Justice for All Act of 2004 30 October 2004.

³⁷⁹ *Ibid.*

has not yet been compared to known DNA samples, such as older rape cases in which rape kits have never been analysed³⁸⁰.

In *Maryland v King*³⁸¹ the facts were as follows:

Maryland's DNA collection Act authorises law enforcement officials to collect DNA samples from individuals charged with but not yet convicted of certain crimes, mainly violent crimes and first degree burglary.

In 2009, police arrested Alonzo Jay King for first-degree assault. Police used a cheek swab to take a DNA sample pursuant to the Maryland DNA collection Act. The swab was matched to an unsolved 2003 rape case and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment. The circuit court judge found the law constitutional. King was convicted of rape. This case indicates that DNA samples can be obtained from a suspect by means of a swab³⁸².

The USA passed the Enhanced DNA Collection Act of 2012 in January 2012. The purpose of the Act is the following³⁸³:

To authorise the Attorney General to award grants to states to implement a DNA arrestee collection process. The term DNA arrestee collection process means, with respect to a state, a process by which the state provides for the collection, for purposes of inclusion in the index described in section 201304(a) of the DNA Identification Act of 1994 (42 U.S.C 14132 (a) (in this Act referred to as the National DNA Index System), of DNA profiles or DNA data from the following individuals who are at least 18 years of age:

- (a) Individuals who are arrested for or charged with a criminal offence under state law that consists of homicide.
- (b) Individuals who are arrested for or charged with a criminal offence under state law that has an element of involving a sexual act or sexual contact with another and the act or conduct is punishable by imprisonment for a period exceeding one year.

³⁸⁰ DNA Analysis Backlog Elimination Act 2000, codified, as amended, at 18 U.S.C 3563 and 42 U.S.C 14132a, 14135e. Ingram JL (2012) *Criminal Evidence* 11th edition (Anderson Publishing USA) page 458. http://en.wikipedia.org/wiki/DNA_Analysis_Backlog_Elimination_Act_of_2000 (accessed 2013/06/06).

³⁸¹ 567 US (2012) at 1-4.

³⁸² Liptak <http://www.nytimes.com/2013/06/04/us/supreme-court-says-police-can-take-dna-sample> (accessed 2013/07/18).

³⁸³ Sepich <http://www.govtrack.us/congress/bills/112/hr6014/> (accessed....2013/07/04) 1-4.

- (c) Individuals who are arrested for or charged with a criminal offence under state law that has an element of kidnapping or abduction and that act or conduct is punishable by imprisonment for a period exceeding one year.
- (d) Individuals who are arrested for or charged with a criminal offence under state law that consists of burglary, which is punishable by imprisonment for a period exceeding one year.
- (e) Individuals who are arrested for or charged with a criminal offence under state law that consists of aggravated assault, which is punishable by imprisonment for a period exceeding one year.

3.3.2 The position in Canada

In *Regina v Fisher*³⁸⁴ the accused attacked the constitutional validity of section 487.04 of the *Canadian Criminal Code*³⁸⁵, which provides for a legislative scheme for obtaining a search warrant to seize a bodily substance for purposes of DNA analysis. Section 487.05 authorises a peace officer to submit a statement under oath to the judge of a provincial court in the form of an ex parte application indicating in detail the reasons why he or she is of the opinion that there is a need for a search warrant to be issued that will enable him or her to search for or obtain a sample from the suspect or a person associated or party to the offence for purposes of DNA analysis for investigation purposes. The judge must be satisfied that there are reasonable grounds for granting the search warrant on specific grounds only.³⁸⁶ In considering whether to issue the warrant, the provincial court judge shall have regard to all relevant matters, including the nature of the designated offence and the circumstances of its commission, and whether there is a peace officer who is able by virtue of training or

³⁸⁴ [2000] 68 CRR (2d) at 361-367.

³⁸⁵ R.S.C 1985, c.C-46.

³⁸⁶ Section 487.05 of the Criminal code provides as follows:

- (1) A Provincial Court Judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe:
 - (a) that a designated offence has been committed,
 - (b) that a bodily substance has been found,
 - (i) at the place where the offence has been committed,
 - (ii) on or within the body of the victim of the offence,
 - (iii) on anything worn or carried by the victim at the time when the offence was committed or
 - (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
 - (c) that a person was party to the offence, and
 - (d) forensic DNA analysis of a body substance from the person will provide evidence about whether the body substance referred to in paragraph (b) was from that person and who is satisfied that it is in the best interest of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06 (1), for the purposes of forensic DNA analysis.

experience, to obtain a bodily substance from the person by means of an investigative procedure described in subsection 487.06 (1) or another person who is able, by virtue of training or experience to obtain under the direction of a peace officer a body substance from the person, by means of such an investigative procedure.

In the said case of *Regina v Fisher* the accused submitted that the impugned provisions violate sections 7, 8 and 11(c) of the *Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* stipulates: “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except with the principles of fundamental justice”. Section 8 of the *Charter* stipulates; “everyone has the right to be secure against unreasonable search or seizure”. Section 11 (c) of the *Charter* stipulates: “any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.”

The court held that testimonial compulsion cannot be equated with conscribed body samples. A sample of a bodily fluid taken pursuant to the impugned legislative scheme is not a confession, rather, the information it yields is relevant only to identity. Further, sections 487.04 to 487.09 of the code mandatorily require judicial scrutiny of every state request for a DNA warrant before the warrant can be issued. Strict limitations are placed by the impugned provisions on the use and retention of a DNA forensic profile. These limitations provide a meaningful barrier to the improper use of information from a DNA forensic profile secured through the provisions. The impugned provisions are not constitutionally deficient because necessity is not a pre-condition to issuing a warrant under section 487.05. The application was dismissed.

In *Her Majesty the Queen v Robert Newell*³⁸⁷ the accused was convicted of robbery. A DNA order was made and the national DNA data bank received a DNA sample from the accused. The robbery conviction was ultimately overturned on appeal and the DNA order was set aside. While the appeal was pending, biological evidence from subsequent crime scenes was found to match the accused’s DNA profile. Police used the information about the DNA match to ground an application for a DNA warrant to obtain blood samples from the accused for comparison with biological evidence found at the crime scenes. When they applied for a warrant, the police knew that the accused had appealed his robbery conviction but were unaware that a decision had already been rendered and that the DNA order had been set aside. At the accused’s trial on charges of breaking and entering, the trial judge found that

³⁸⁷ [2009] 192 CRR (2d) at 195.

the accused's rights under section 8 of the *Charter* had been infringed when the police used the information about the match of his DNA profile to obtain the warrant after the DNA order had been set aside. Evidence obtained pursuant to the warrant was excluded and the accused was acquitted. The Crown appealed and the appeal was allowed. The Appeal Court held that section 487.056 (1) of the *Criminal Code*, RSC of 1985³⁸⁸, authorises taking a DNA sample even though an appeal is pending. The court held that this does not undermine the dignity, integrity or autonomy of individuals. The court held that the action of the police was not unconstitutional³⁸⁹.

In summary: According to *Fisher* and *Newell* supra, (1) a police official can make an ex-parte application to a judge for the issue of a DNA warrant. (2) A judge can issue the DNA warrant after considering certain facts. (3) The warrant is also applicable to persons who are suspects, not only arrested persons. (4) This case empowers the courts and the police to ascertain bodily features of a person. (5) The decision in this case supports and improves crime detection and crime prosecutions.

The Newell case supra supports the conclusion that the police can apply for a DNA warrant in order to obtain samples from the suspect or an accused person in order to compare these for purposes of DNA. However, in South Africa there is no process for obtaining a DNA warrant. One cannot obtain a sample from a suspect unless the suspect gives consent. This problem will be addressed by section 36D and section 36E, which are contained in the Criminal Law (Forensic Procedures) Amendment Bill once it becomes an Act³⁹⁰.

On the other end of the spectrum the Canadian courts do not allow violations of rights without consent or judicial scrutiny. In *R v Tomaso*³⁹¹ the suspect was involved in an accident. He was taken to hospital, as he was injured and unconscious. His ear was bleeding. While lying unconscious at the hospital, the police put a container on his bleeding ear and seized his blood sample for forensic testing. He did not give any consent to the taking of his blood sample, as he was unconscious.

The accused challenged the action of the police and alleged that it was a violation of his rights in terms of section 8 of the *Canadian Charter of Rights and Freedoms*. The Court held that the seizure of the blood sample by the police officer without the appellant's consent was

³⁸⁸ c.C-46.

³⁸⁹ At page 212 par [60].

³⁹⁰ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013).

³⁹¹ (1989), 70 C.R. (3d) 152, 30 O.A.C. 106.14 M.V.R. (2d) 10 (C.A) at 54.

unlawful, and that it was unreasonable because it seriously violated his privacy and the sanctity of his body. Evidence obtained unfairly or in breach of a right guaranteed by the *Canadian Charter of Rights and Freedoms* is excluded if the admission of that evidence would bring the administration of justice into disrepute³⁹². This section is similar to section 35 (5) of the Constitution of the Republic of South Africa Act.³⁹³

In *Pohoretsky v R*³⁹⁴ the Supreme Court of Canada held that evidence obtained without consent was inadmissible. Notwithstanding the fact that the police had “ample reasonable and probable grounds” to believe that the appellant had committed the offence and that DNA evidence would assist in proving this, the effect of police conduct was to conscript the appellant against himself.

In Canada in *R v Terceira*³⁹⁵ the accused, John Carlos Terceira, was convicted in 1993 of the murder of a six-year-old, whose body was found in the boiler room of the apartment building where he worked. Semen stains found on the floor near the victim’s body and on her clothing matched the accused’s DNA profile, and five expert witnesses were called to testify at trial as to the significance of these matches. At the trial DNA was the star witness, providing a strong corroborative link between other circumstantial evidence that would not have stood on its own³⁹⁶.

In *R v Dymont*³⁹⁷ a doctor treating the accused after a motor accident took a blood sample without his knowledge or consent. The police, again without the accused’s consent, sought to use the analysis of that blood sample as evidence in charging the accused with being in the care and control of a motor vehicle while having an excess blood alcohol level. In the Supreme Court of Canada, Justices Dickson and La Forest held that the use of a person’s body without consent to obtain information invaded an area of privacy that was essential to human dignity. The seizure infringed upon all spheres of privacy and constituted an unreasonable search and seizure, thus violating section 8 of the *Charter*.

³⁹² *Canadian Charter of Rights and Freedoms*, Constitution Act 1982, Part I, section 24 (2), Horton Greg (1992-1995) *DNA Fingerprinting: Informed Consent and Admissibility of Evidence*: (7) Auckland UL. Rev 165 183.

³⁹³ Act 108 of 1996.

³⁹⁴ (1987) 1 SCR 945.

³⁹⁵ (1998) 123 C.C.C.(3d)1(ont. C.A).

³⁹⁶ Mc Donald TR “Genetic Justice DNA Evidence and the Criminal Law in Canada”: *Manitoba Law Journal*. 6 of 1-24.

³⁹⁷ [1988] 2 SCR 417.

Thus it is clear that evidence produced from blood samples taken without a suspect's consent will be excluded in Canada on the basis of a breach of privacy, making the trial unfair to the accused and bringing the administration of justice in disrepute.

3.3.3 The position in the United Kingdom

In the UK, the taking and use of DNA samples are governed by the PACE 1984 as amended by the CIPA 2001³⁹⁸ and the Criminal Justice Act 2003.

A non-intimate sample may be taken from a person without the appropriate consent in the following circumstances: (1) Under section 63(2A) from a person who is in police detention as a consequence of being arrested for a recordable offence and who has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police or has had such a sample taken but it proved insufficient. (2) Under section 63(3) from a person who is being held in custody by the police on the authority of a court if an officer of the rank of at least inspector authorises it to be taken. (3) Section 63 A (4) and schedule 2 of PACE provide powers for the taking of intimate samples³⁹⁹.

In *R v Richards Bates*⁴⁰⁰ the facts were as follows: On 2 October 2001 at about 17:45 someone rang the doorbell of the house of Mrs Rawle, the mother of Mrs Marilyn Garside. Mrs Garside went to answer it. As she opened the door, she was stabbed several times and fell to the ground. Mrs Rawle, who had gone to her assistance, saw a man walking slowly away from the house towards the garden gate. She was afraid that he might return, so she shut and locked the front door. She did not see the man reach the gate but when she looked again he had left and closed the gate behind him. Mrs Rawle summoned an ambulance, but her daughter died soon after the attack. As a result of the attack there were bloodstains in various places on and around the door. Bloodstains were also found on top of the wooden gatepost and on the gate latch. Marilyn Garside was the estranged wife of James Garside. James Garside and Richard Base were later charged with this murder. Richard Base was linked to the crime scene through DNA. The prosecution alleged that James Garside hired Bates to murder Marilyn Garside. On 19 June 2003 Base was convicted of the murder of Marilyn Garside based on DNA evidence. Mr Garside was also convicted but not on DNA evidence.

³⁹⁸ Criminal Justice and Police Act, 2001.

³⁹⁹ Police and Criminal Evidence Act 1984 (PACE) Codes of practice: <http://www.gov.uk/police-and-criminal-evidence-act-pace-codes-of-practice> (accessed 2013/04/02) 39-40.

⁴⁰⁰ [2006] EWCA Crim 1395 at page 1-2.

Base lodged an appeal, citing, “that DNA evidence on which he was convicted was not admissible.” During the appeal, the appeal court found that samples of material had been obtained from seven locations in the vicinity of the murder. Most were found on or near the front door, but one was found on the wooden gatepost at the end of the garden. All were tested in accordance with the prescribed procedure and produced a series of mixed partial profiles. The profiles from the crime scene were compared with the full DNA profile of Richard Bates and Marilyn Garside. All the samples tested contained the male sex indicator (XY), showing that one of the contributors was a male. The samples taken from the front door handle and the samples taken from the gatepost each contained eight alleles⁴⁰¹ matching those of Richards Bates (appellant). The court held that the evidence was admissible and that it could safely be put before the jury who could evaluate it. The court further held that there was no reason why partial profile DNA evidence should not be admissible, provided that the jury were made aware of its inherent limitations and were given sufficient explanation to enable them to evaluate it. The court held that the judge was right in admitting the evidence and that the conviction was safe.

In *R v Reed, Reed and Garmston*⁴⁰² Peter Hough was dropped at his house at about 21:00 on the evening of 12 October 2006. His body was found at 13:00 on 13 October 2006. He had been stabbed many times. Two pieces of plastic, which the Crown contended were parts of two separate knives, were found near Peter Hough’s body. Evidence revealed that cellular material matched the DNA profile of Terence Reed and other cellular material matched the DNA profile of David Reed and Peter Hough. The matched probabilities were such that it was accepted to be their DNA. The Adidas tracksuit top that Terence Reed had worn had blood stains on it and he disposed of it. Both David Reed and Terence Reed were convicted on the basis of DNA evidence. This case indicates the reliability and accuracy of DNA evidence.

In *S and Marper v United Kingdom*⁴⁰³, the applicants complained that the authorities (police) had continued to retain their cellular samples and DNA profiles after the criminal proceedings against them had ended. S, the first appellant, was arrested for attempted

⁴⁰¹ Some elements contained in DNA profile.

⁴⁰² [2009] EWCA Crim 2698.

⁴⁰³ (2008) ECHR 30562/04. Meintjies-Van der Walt L “*Human Rights and the Retention of DNA Samples, Profiles and Fingerprints*” 2010 SACJ 107, University of Fort Hare.
<http://juta.saps.org.za/nxt/gateway.dll/SA%20Services/jnls/1045/1046/104> ... (accessed 2010/11/27) 1-14.

robbery on 19 January 2001. DNA samples were taken from him. He was acquitted on 14 June 2001. The second applicant, Mr Marper, was arrested on 13 March 2001 for harassment of his partner. DNA samples were taken from him. Before a pre-trial review took place, he and his partner reconciled and the charge was not pressed. On 11 June 2001 the Crown Prosecution Service served a notice of discontinuance on the applicant's solicitors and on 14 June 2001 the case was formally discontinued. Both applicants asked for their DNA samples to be destroyed, but the police refused. The applicants applied for judicial review of police decisions not to destroy the DNA samples. On 22 March 2002 the Administrative Court rejected the application.

At issue in this case were the amendments made to PACE by the CJPA 2001, especially the consequences of section 82. Until the enactment of the CJPA in 2001, an innocent individual who had given the police a DNA sample or fingerprints in connection with the investigation of a criminal offence and who had been cleared of involvement in that offence or had no criminal charges against him or her, was entitled to have that material, any accompanying DNA profile generated from his or her submitted DNA sample and any copies of his or her fingerprints destroyed. He or she was also entitled to witness the destruction of such material, to have access to any computer data relating to the fingerprints or DNA and to have a certificate issued to him or her within three months guaranteeing that the police had complied with these statutory obligations.

In other words, the innocent individual who had been wrongly suspected of involvement in an offence was entitled to be returned to the position in which he or she had been before his or her involvement with the police. No biological material of the person was to be retained by the State, no bodily impressions (such as fingerprints) were to be retained by the State, and no police records outlining the unfounded suspicion were to be accessible.

Before the amendment of the PACE by the CJPA 2001, Section 64 of PACE in its earlier form had included a requirement that if the person from whom the fingerprints had been taken in connection with the investigation was acquitted of that offence, the fingerprints and samples, subject to certain exceptions, were to be destroyed as soon as practicable after the conclusion of the proceedings. Since the CJPA 2001 amendments to PACE, innocent individuals such as the applicants were no longer returned to the position they were in vis-à-vis the police prior to their mistaken arrests, withdrawal of charges or being found not guilty.

Section 82 of the CJPA 2001 in amending section 64 of PACE, provides for the following:⁴⁰⁴

(1) Section 64 of the 1984 Act (destruction of fingerprints and samples) shall be amended as follows:

(2) For subsection (1) and (2) (obligation to destroy finger-prints and samples of persons who are not prosecuted or who are cleared) there shall be substituted –

(1A) Where - (a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution...

(3) In subsection (3), for subsection (3A) below “there shall be substituted” the following provisions of this section–

(3AA) Samples and fingerprints are not required to be destroyed under subsection (3) if (a) they were taken for the purposes of the investigation of an offence of which a person has been convicted, and (b) a sample or, as the case may be, fingerprint taken from the convicted person for purposes of that investigation.

The amendment effected to PACE by the CJPA 2001 has the following results: First, samples and fingerprints could be retained even though charges may have been withdrawn or the individual has been cleared of the offence. Secondly, authorisation by a superintendent of police was no longer required for the taking of samples, and permission given by an inspector was deemed to be enough⁴⁰⁵.

The applicants in *Marper* complained under Article 8 of the European Convention of Human Rights (ECHR) about the retention of their fingerprints, cellular samples and DNA profiles by the police pursuant to section 64 (1A) of the Police and Criminal Evidence Act 1984.

⁴⁰⁴ Section 82 of the Criminal Justice and Police Act of 2001. <http://legislation.data.gov.uk/ukpga/2001/16/part/3/data.htm?wrap=true> (accessed 2013/12/30) 10-11.

⁴⁰⁵ Section 80 of CJPA 2001, which amends sections 62 and 63 of PACE 1984.

The relevant aspects of Article 8 of the ECHR are as follows:

- 8.1 Everyone has the right to respect for his private life.
- 8.2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ...

In *S and Marper v United Kingdom supra* ⁴⁰⁶ the applicants initially resorted to the Divisional Court to review the decision of the police. The case was heard in March 2002, but the court was not convinced that the retention of samples and DNA profiles engaged Article 8 at all and came to the conclusion that, if it did, it was in accordance with the law and necessary within article 8 (2). The applicants' claim was therefore dismissed. This court did not protect the right to privacy of the applicants and felt that the action of the police of retaining the DNA samples and profiles was justified. It seemed, according to the court, crime detection and crime prevention was more important or outweighed the "right to privacy" of the applicants.

Marper and others subsequently appealed to the Court of Appeal⁴⁰⁷. On appeal, the Court of Appeal found unanimously that the retention of samples did engage Article 8(1). The court held that there had been interference with the right to privacy, which, though not substantial, was nevertheless real. It was, however, held that the interference was justified. Its purpose was obviously lawful. It was also proportionate. The adverse consequences to the individual were not out of proportion to the benefit of the public. On 12 September 2002 the Court of Appeal upheld the decision of the Administrative Court by a majority of two to one.

The Appeal Court also supported the retention of DNA samples. That is why it upheld the decision of the Administrative Court. From the reasoning of the Appeal Court, it is clear that the Appeal Court also regarded the purpose of crime detection and crime prevention as being more important than the right to privacy of the appellants. Public benefit was given priority in this decision.

In delivering the leading judgment, Lord Wolf ⁴⁰⁸ said the following:

So far as the prevention and detection of crime is concerned, it is obvious the larger the Databank of fingerprints and DNA samples available to the Police, the greater the value of the databank will be in

⁴⁰⁶ (2002) EWHC 478 (ADMIN).

⁴⁰⁷ [2002] EWCA Civ 1275.

⁴⁰⁸ At 17.

preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example, the great majority of rapists who are not known already to their victim would be able to be identified.

The appellants then appealed to the House of Lords,⁴⁰⁹ who dismissed the appeal. The House of Lords agreed that any interference with the applicant's rights under article 8 (1) of the ECHR by retention of fingerprints and DNA samples was modest, and was objectively justified under Article 8 (2) as being necessary for the prevention and protection of the rights of others. They accepted that there was a difference in treatment between those who had to provide samples pursuant to a criminal investigation compared with the rest of the public who had not. However, they held that the difference in treatment was not analogous to any of the expressly proscribed grounds such as sex, race, gender or religion, as set out in Article 14. The holding of their lawfully taken samples did not give rise to a "status" within the meaning of Article 14.⁴¹⁰ Even if it did, the difference was objectively justified. According to the House of Lords, there was a legitimate aim and a proportionate response. The court did not consider the chief constable's blanket policy of retaining samples taken as being disproportionate.

Lord Steyn was of the view that the mere retention of DNA samples did not constitute interference with the right to respect for privacy but stated that, if he were wrong in that view, he regarded any interference as very modest.

Clearly, the decision of the House of Lords leaned towards support to crime detection and viewed public interest as having more weight than the right to privacy. This approach can be more relevant to South Africa, which has a serious problem with violent crime, and which needs DNA as a tool for crime detection. However, the appellants in the *Marper* case subsequently appealed to the ECHR.⁴¹¹

This court, in making its decision, considered the following:

- (i) whether the retention by the authorities of the applicants' DNA profiles and cellular samples constituted interference in their private lives, and
- (ii) if so, whether the interference was: (a) in accordance with the law, (b) in pursuit of a legitimate aim, and (c) necessary in a democratic society.

⁴⁰⁹ *Marper v The Chief Constable of South Yorkshire Police* (2004) UKHL 3.9.

⁴¹⁰ Article 14 of the ECHR deals with the prohibition of discrimination.

⁴¹¹ *S and Marper v The United Kingdom* [2009] 48 ECHR 50.

The Grand Chamber decided that the retention of both cellular samples and DNA profiles constituted interference with the right to respect the private lives of the applicants within the meaning of Article 8 of the ECHR. The mere storing of data relating to the private life of an individual amounts to interference. Further, the Grand Chamber found that the interference was not justified. In this regard the Grand Chamber stated “that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, fails to strike a fair balance between the competing public and private interests. Accordingly, the retention constituted a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary in a democratic society’.”⁴¹²

In the context of Article 8, the Grand Chamber’s judgment first examined whether retention by the authorities of the applicants’ DNA profiles and cellular samples constituted interference in their private lives.⁴¹³ The court held that the retention of both cellular samples and DNA profiles constituted interference with the applicants’ right to respect for their private lives, within the meaning of Article 8(1) of the European Convention on Human Rights. The court dismissed all arguments brought by the UK government.

3.3.3.1 Reform by the United Kingdom Government

Following the judgment in *S and Marper*, the government passed the Crime and Security Act 2010. This Act introduced a new DNA retention regime, but after the 2010 general election the coalition government announced that the provisions of the Act relating to DNA retention would not be brought into force. Instead a new Act, the Protection of Freedoms Act of 2012, was introduced. This Act set out new time limits for the retention of DNA taken from suspects on arrest, e.g. an adult or child arrested or charged with a minor offence but not convicted. DNA cannot be retained after the conclusion of the investigation or proceedings where an adult or child is charged with, but not convicted of a serious sexual or violent offence. The retention will be for three years with the possibility of a two-year extension if the police can make a successful application to a judge. In the case of an adult convicted or cautioned for a recordable offence, the retention will be indefinite.⁴¹⁴ Section 63D of PACE now deals with the destruction of fingerprints and DNA profiles.

⁴¹² Par 125.

⁴¹³ Par 70-76.

⁴¹⁴ “Your DNA What the law says” at <http://www.liberty-human-rights.org.uk> (accessed 2013/06/10).

3.3.3.1.1 Case law following *S and Marper*

At the end of January 2011, the UK's Supreme Court also heard *R (GC) v Commissioner of Police for the Metropolis*⁴¹⁵ concerning the continued retention of DNA and fingerprints taken from people who had been arrested but not convicted. The appellants requested that their DNA and fingerprints be destroyed. The police refused. *GC and C* sought to challenge the retention of their DNA and fingerprints on an application for judicial review. The primary issue before the Divisional Court was whether that court was bound by the House of Lords' judgment or the ECHR's judgment. The Supreme Court ruled that current law permitting the blanket and indefinite retention of non-convicted persons' DNA profiles was unlawful and had to be changed in order to comply with a ruling of the ECHR. The court, by a majority of five to two, rejected the submissions of the police and Secretary of State that it should simply declare the current law incompatible with ECHR and article 8 of the European Convention on Human Rights and leave Parliament to amend the laws as it saw fit. Instead the court ruled that new Association of Chief Police Officers ACPO guidelines on retention had to be drawn up within a reasonable time to ensure timely compatible human rights law.⁴¹⁶

From the above cases it is clear that in the UK it is now unconstitutional to retain samples of a suspected person or a person who has not been convicted of a crime. The UK government has to come up with guidelines that comply with human rights law. It is the researcher's submission that South Africa, which is a constitutional democracy, will have to follow suit.

⁴¹⁵ *R (GC) v The Commissioner of Police of the Metropolis; R(C) v The Commissioner of Police of the Metropolis* [2011]UKSC 21. The case concerned the extent of the police's power to indefinitely retain biometric data associated with individuals who are no longer suspected of a criminal offence. In the case, a majority of the Supreme Court reversed an earlier ruling of the High Court of Justice and found that the police force's policy of retaining DNA evidence in the absence of 'exceptional circumstances' was unlawful and a violation of Article 8 of the European Convention on Human Rights. The court declined to offer any specific relief, recognising that the policy is expected to be subject to legislative scrutiny and which is now Part 1 of the newly introduced Protection of Freedoms Act 2012.

⁴¹⁶ *R (GC) v The Commissioner of Police of the Metropolis; R(C) v The Commissioner of Police of the Metropolis* [2011]UKSC 21 at <http://uksblog.com/new-judgment-r-gc-v-the-commissioner-of-police-of-the-metropo...> (accessed 2013/06/10).

3.4 RETENTION, STORAGE AND EXPUNGEMENT OF FORENSIC DNA PROFILES IN SOUTH AFRICA

The retention and storage of DNA profiles in South Africa is at present not governed by any law. Chapter 5B⁴¹⁷ has been inserted in the South African Police Service Act 68 of 1995 and is aimed at authorising retention and storage of forensic DNA profiles; however, it is not at time of writing put into operation yet.⁴¹⁸ The authorised officer must ensure the safe storage of crime scene samples.⁴¹⁹ This means that once the new section 15F and section 15G are put into operation, the SAPS will by law be authorised to store crime scene samples and DNA profiles for purposes of comparative search.

The forensic DNA profiles from persons, with the exception of crime scene samples, shall be according to sections 15I and 15G be stored on and expunged from the NFDD⁴²⁰ as follows:⁴²¹

(1) The Arrestee Index must contain forensic DNA profiles, derived by means of forensic DNA analysis,⁴²² from bodily sample taken under any power conferred by Chapter 3 of the Criminal Procedure Act where an arrestee's forensic DNA does not form part of any Index. (2) The forensic DNA profile in the Arrestee Index must be removed by the authorised officer immediately upon application, in the prescribed manner, when a -

(a) child is diverted in accordance with Chapter 8 of Child Justice Act,2008(Act No 75 of 2008);

(b) decision was taken not to prosecute a person; (c) person is discharged at preparatory examination; or (d) person is acquitted at his or her trial provided there is no other outstanding criminal investigations against the person. (3) The application referred to in subsection (2) must be submitted to the authorised officer and a copy thereof provided to the Board. (4) If no application for removal of DNA profile, contemplated in subsection (2) is received, the profile of the relevant person must be removed immediately after the authorised officer has been notified in accordance with subsection (5) or (6), but may not be retained for longer than – (a) three years, in the case of an adult; or (b) twelve months, in the case of a child. (5) The Clerk of the Court or Registrar of the High Court must notify the authorised officer of an acquittal, conviction,

⁴¹⁷ Entitled: "Storage and Use of Fingerprints, Body-Prints and Photographic Images of Persons" (Ss 15A-15D). Chapter 5A had been inserted by section 6 of Act 6 of 2010 and is in operation. Chapter 5B (ss 15E-15AD) is envisioned to be inserted into the Police Service Act dealing with databases storage as set out in the Criminal Law (Forensic Procedures) Amendment Bill [B 9B-2013], and once the Bill is passed by Parliament, signed by the President and put into operation, only then will it become law. The discussion of these sections (15E, 15F, 15G, 15I and 15L) must be read as provisional depending whether they are passed un-amended or again amended and provided they are put into operation.

⁴¹⁸ Section 15F of the South African Police Service Act once put into operation.

⁴¹⁹ *Ibid.*

⁴²⁰ "NFDD" means the National Forensic DNA Database of South Africa, established in terms of the newly inserted section 15G of the South African Police Service Act once it becomes law.

⁴²¹ Section 15I of the South African Police Service Act.

⁴²² Section 15I Chapter 5B of the South African Police Service Act.

setting aside or finding of a preliminary investigation within 60 days from the date of the verdict or outcome of the matter. (6) In respect of a decision not to prosecute or the diversion of the child in accordance with Chapter 8 of the Child Justice Act, the prosecutor who made the decision must notify the authorised officer within 60 days from the date of the decision. (7) If an application contemplated in subsection (2) is received by the authorised officer before a notification referred to in subsection (5) or (6) has been received, the authorised officer must enquire from the relevant authority in that regard. (8) The authorised officer must notify the relevant person referred to in subsection (2) of the removal of his or her forensic DNA profile from the Arrestee Index. (9) the authorised officer must inform the Board quarterly of any removal of a forensic DNA profile from the Arrestee Index in terms of subsection (2) and (4).

3.5 CONSTITUTIONAL IMPACT AND THE TAKING OF BLOOD SAMPLES

3.5.1 Constitutional rights involved

Suspects and arrested persons have the constitutional guarantees embodied in sections 10 (human dignity),⁴²³ to have their dignity respected and protected; have the right to freedom and security of his person, to be free from arbitrary treatment; has the right to bodily and psychological integrity (section 12), and specifically section 12(2) (c) of the Constitution not to be part of any medical or other experiments without his consent.⁴²⁴ Section 14 the Constitution specifically addresses the issue of intrusive body samples. It reads that:

Everyone has the right to privacy, which includes the right not to have –

(a) Their person or home searched.

Ackerman⁴²⁵ defines “human dignity” as human worth. He explains human dignity as the capacity for and the right to respect as a human being. He mentions that human dignity arises from all those aspects of human personality that flow from human intellectual and moral capacity, which in turn separates humans from the impersonality of nature and enables them to exercise their own judgements, to have self-awareness and a sense of worth, to exercise self-determination, to shape themselves and their nature, to develop their personalities and to strive for self-fulfilment in their lives.⁴²⁶

⁴²³ The Constitution.

⁴²⁴ Section 12(2) of the Constitution, entitled ‘Freedom and security of a person’ provides that “Everyone has the right to bodily and psychological integrity, which includes the right - (c) not to be subjected to medical or scientific experiments without their informed consent.”

⁴²⁵ Ackerman *Human Dignity: Lodestar for Equality in South Africa*.

⁴²⁶ *Ibid*, 23-24.

3.5.2 Constitutionality of taking of blood samples for DNA profiling : The position in South Africa

Section 37 (2) authorise the police, registered medical practitioners and registered nurses to obtain blood samples from any person. This obtaining of blood samples has constitutional implications. In *S v Orrie*⁴²⁷ the court held that involuntary taking of a blood sample for purposes of DNA profiling is both an invasion of a subject's right to privacy and an infringement of the right to bodily security and integrity. The court, however, held that the infringement is limited by section 36 of the Constitution through the medium of section 37 of the Criminal Procedure Act. This means that section 37 of the Criminal Procedure Act is law of general application within the provision, which can be used to limit the right of the arrested or accused person for the purpose of ascertaining the bodily features of a person.

In *S v Orrie and another*,⁴²⁸ an application was made during a criminal trial for authorisation to take blood samples from the accused. The constitutionality of the involuntary taking of a blood sample from the accused for the purpose of compiling a DNA profile for use in criminal proceedings was addressed. It was alleged that it infringed the right to privacy, dignity and bodily integrity.

The court held that the limitation clause in section 36 of the Constitution of the Republic of South Africa⁴²⁹ permits limitation through the medium of section 37 of the Criminal Procedure Act 51 of 1977. The taking of blood samples for DNA testing for the purpose of criminal investigation is a reasonable and necessary step to ensure that justice is done and is reasonable and necessary in balancing interests of justice against those of individual dignity.⁴³⁰

S v Orrie supra confirms that the rights of individuals can be limited by "section 36 of the Constitution of the Republic of South Africa"⁴³¹ for the purpose of obtaining a blood sample from an accused during a criminal trial in order to investigate and compile a DNA profile to ensure that justice is done. The main aim is to balance the interests of justice against those of the individual.

⁴²⁷ 2004 (1) SACR 162 (C) at 162B.

⁴²⁸ 2004 (1) SCAR 162(C) p 162.

⁴²⁹ Act 108 of 1996.

⁴³⁰ Paragraph [20] 169j – 169c.

⁴³¹ Act 108 of 1996.

This decision confirms the authority that section 37 of the Criminal Procedure Act 51 of 1977 gives the courts in ascertaining the bodily features of an accused. The decision also indicates the importance of DNA in ascertaining bodily features. There is no legislation or case law in South Africa that authorises the taking of a blood sample for DNA purposes from a suspect who has not been arrested. That can only be done if a person has been arrested, released on bail, released on warning or convicted. This means that police cannot take blood or bodily samples from a suspect who has not been arrested for investigation purposes unless the suspect gives the blood sample or bodily sample voluntarily or with consent. However, this problem might be solved by section 36D and section 36E of the Criminal Law (Forensic Procedures) Amendment Bill once it becomes an Act.⁴³²

In *Msoni v Attorney General of Natal*⁴³³ it was held that where an accused submits to printing under compulsion, he does not thereby proffer testimonial evidence against himself. All he is being required to do is to make available specimens of a bodily feature. In this entire process there is no communicative act by the accused, either orally or in writing. In other words, the mere giving of a fingerprint specimen does not in itself amount to the accused making himself a compellable witness against himself.

The viewpoint of the researcher is that when the court orders the accused to submit to the taking of bodily samples from him or her, the situation is the same.

3.6 DATABASE FOR DNA PROFILES

3.6.1 The position in South Africa

There is currently no convicted offender database in South Africa. In other words, the South African National DNA Database currently only consists of DNA profiles collected from crime scenes (crime scene samples) and DNA samples of persons suspected of a crime/arrestees. The existing DNA database in South Africa has evolved under the governance of the Criminal Procedure Act 1977. South Africa has no specific legislation that regulates the existing DNA database. Currently the Criminal Procedure Act⁴³⁴ is the only statutory provision that deals with the ascertainment of bodily features of an accused. Section 37 makes no mention of the collection of DNA evidence.⁴³⁵ This problem will, however, be

⁴³² Criminal Law (Forensic Procedures) Amendment Bill (B9-2013) 4 at 35 and page 5 at 50.

⁴³³ 1996 (8) BCLR 1109 (W) 1120B.

⁴³⁴ 51 of 1977, section 37.

⁴³⁵ 'South Africa: The current situation/DNA Project-South Africa' [http://dnaproject.co.za/legislation-homepage/legislation/south-africa-the-current-situat ...](http://dnaproject.co.za/legislation-homepage/legislation/south-africa-the-current-situat...) (accessed

addressed by the current Criminal Law (Forensic Procedures) Amendment Bill⁴³⁶ once it becomes law, and if put into operation by Parliament. Chapter 5B as inserted by the Criminal Law (Forensic Procedures) Amendment Bill above⁴³⁷, in the South African Police Service Act 1995⁴³⁸ will authorise the establishment of the National Forensic DNA Database of South Africa once this amendment comes law and put into operation. The purpose of the National Forensic DNA Database is to keep forensic data for comparative searches -

- (1) to serve as a criminal investigative tool in the fight against crime,
- (2) where applicable identify persons that might have been involved in the commission of offences, including those committed before the coming into operation of this chapter (Chapter 5B),
- (3) where applicable prove the innocence or guilt of accused persons, or
- (4) where applicable assist with the identification of missing or unidentified human remains⁴³⁹. Section 15G of the South African Police Service Act provides for the establishment of a National Forensic DNA Database of South Africa (NFDD) that is to be administered and maintained by the authorised officer. The NFDD consists of the following indices, which contain forensic DNA profiles: (a) A crime scene index, (b) an arrestee index, (c) an offenders index, (d) a volunteer index and (e) an elimination index. (4) Section 15G of the Police Service Act allows and authorises the use of such forensic DNA profiles derived from samples taken in accordance with the Police Service Act for comparative searches against forensic DNA profiles derived prior to the coming into operation of the Police Service Act in 1995.

3.6.2 The position in foreign jurisdictions

3.6.2.1 *The position in the United States of America*

In the USA the DNA database that is used is CODIS, which was formed in 1998 by the FBI. CODIS enables federal, state and local laboratories to exchange and compare profiles electronically, thereby linking crimes to one another and to convicted offenders. All 50 states have enacted legislation to establish a data bank containing DNA profiles of individuals convicted of felony sexual offences and other crimes, depending on each state's statutes. CODIS creates investigative leads from two sources, the *Forensic Index* and the *Offender*

2013/07/04) which will become part of the new Act 37 of 2013 once signed and put into operation.

⁴³⁶ (B9-2013).

⁴³⁷ As sections 15E to 15AD.

⁴³⁸ (Act 68 of 1995).

⁴³⁹ Section 15F of the South African Police Service Act which is not in operation yet.

Index. The Forensic Index currently contains 110 000 profiles from unsolved crime scene evidence. Based on a match, police in multiple jurisdictions can identify serial crimes, allowing co-ordination of investigations and sharing of leads developed independently. The Offender Index contains the profiles of nearly seven million convicted or arrested individuals. The FBI has joined 15 states that collect DNA samples from those awaiting trial and detained immigrants. This information will be entered into an Arrestee Index database. Unfortunately, hundreds of thousands of samples are backlogged, still awaiting DNA analysis and entry into CODIS. Law enforcement agencies search this index against DNA profiles recovered from biological evidence found at unsolved crime scenes. This approach has been tremendously successful in identifying perpetrators because most crimes involving biological evidence are committed by repeat offenders.⁴⁴⁰

In a notorious rape case (The Centre City Rapist case), which occurred in Philadelphia, the facts are as follows:

Fort Collins, Colorado, Philadelphia and Pennsylvania are separated by nearly 1 800 miles. In 2001 they were tragically linked through DNA. Troy Graves left the Philadelphia area in 1999, joined the Air Force, and settled down with his wife in Colorado. A frenzied string of eight sexual assaults around the Colorado University campus set off a manhunt that ultimately resulted in the arrest of Graves. However, his DNA profile inextricably identified him as Philadelphia's notorious "City Centre rapist". This assailant attacked four women in 1977 and brutally murdered Shanon Schieber, a Wharton School graduate student, in 1998. His last known attack in Philadelphia was the rape of an 18-year-old student in August 1999, shortly before he left the city. In 2002 Graves was returned to Philadelphia, where he was sentenced to life in prison without parole, based on DNA evidence.⁴⁴¹

In *United States v Green*, 548 F.2d 261 (6th Circ., Ohio 1977) it was held that novel scientific evidence is admissible if the proponent establishes that it conforms to a generally accepted explanatory theory that has received at least some exposure and general acceptance in the scientific community to which it belongs and has received peer evaluation to determine its validity and reliability. Under this test it is not the court's function to adjudicate the merits of the underlying scientific disputes, as these are issues of weight for the jury to consider.⁴⁴²

⁴⁴⁰ Saferstein *Forensic Science an Introduction* 96-97.

⁴⁴¹ *Ibid.*

⁴⁴² Brodsky G.G Q.C: DNA: *The Technology of the Future is Here*: HEINONLINE 36 Crim. L.Q 1993-1994 page 13.

3.6.2.2 *The position in Canada*

The National DNA database in Canada ⁴⁴³ was established by section 5 (1) of the DNA Identification Act.⁴⁴⁴ The section provides as follows:

The Minister of Public Safety and Emergency Preparedness shall, for criminal identification purposes, establish a national DNA data bank, consisting of a crime scene index and a convicted offenders index, to be maintained by the Commissioner. The Commissioner's duties under this Act may be performed on behalf of the Commissioner by any person authorised by the Commissioner to perform those duties⁴⁴⁵. The crime scene index shall contain DNA profiles derived from bodily substances that are found (a) at any place where a designated offence was committed, (b) on or within the body of the victim of a designated offence, (c) on anything worn or carried by the victim at the time when a designated offence was committed or on or within the body of any person or thing or at any place associated with the commission of a designated offence.⁴⁴⁶ The convicted offenders index shall contain DNA profiles derived from bodily substances that are taken under orders and authorisations⁴⁴⁷. In addition to the DNA profiles referred to in subsection (3) and (4), the DNA data bank shall contain, in relation to each of the profiles, information from which can be established (a) in the case of a profile in the crime scene index, the case number of the investigation associated with the bodily substance from which the profile was derived, and (b) in the case of a profile in the convicted offenders index, the identity of the person from whose bodily substance the profile was derived.⁴⁴⁸

3.6.2.3 *The position in the United Kingdom*

In England, the National DNA Database (NDNAD) was established in April 1995 following a recommendation from the Royal Commission on Criminal Justice in 1993. Scotland and Northern Ireland have their own databases but export the profiles of all persons they arrest to the NDNAD. The NDNAD is governed by a combination of the Home Office, the Association of Chief Police Officers and the Association of Police Authorities, together with invited representatives from the Human Genetics Commission. It was the first national DNA database to be established in the world and in 2007 it contained over 4 million profiles. The Forensic Science Services, under contract from Home Affairs, is the main organisation that

⁴⁴³ DNA Identification Act S.C. 1998, c.37 <http://laws-lois.justice.gc.ca/eng/acts/d-3.8/page-2.html> (accessed 2013/06/18).

⁴⁴⁴ (S.C 1998, c 37).

⁴⁴⁵ Section (2).

⁴⁴⁶ Section (3).

⁴⁴⁷ Section (4).

⁴⁴⁸ Section (5).

loads profiles onto the database, undertakes profile searches and matches, and reports back to the police authorities.

Who should be recorded on the NDNAD?

In England and Wales the police routinely take samples from anyone arrested on suspicion of having committed a recordable offence. Recordable offences are those for which a custodial sentence could be imposed if the suspect is found guilty.⁴⁴⁹

3.7 PROBLEMS ENCOUNTERED BY THE POLICE

The problems encountered by police officials in South Africa are that police officials cannot obtain body samples from a person who is a suspect, unless that person is arrested, detained or convicted. The suspect cannot be arrested unless there are reasonable grounds for the arrest. In most cases the police only have information that the person is suspected of having committed an offence but have no statements under oath to confirm the commission of an offence and as a result the police cannot arrest the suspect. The following case indicates that the courts also acknowledge that the police experience problems in the execution of their functions. In *Minister of Police v Du Plessis*⁴⁵⁰ the court highlighted pressures under which the police and prosecutors operate during the execution of their functions. This is a case where the accused was lawfully arrested but unlawfully detained. Navsa, JDP remarked as follows:

I am not unmindful of the pressures under which the police operate. They are more often than not called upon to deal with emergency situations such as the one encountered here. In the present case a number of people were arrested and several witnesses had to be interviewed before a full picture could emerge. That notwithstanding, the police, if they had properly considered all the information they had by 09:30 on the Sunday morning, could only have come to one conclusion, namely that Du Plessis had played no part in the robbery. A prosecutor exercises discretion on the basis of the information before him or her. In *S v Lubaxa* 2001 (2) SACR (SCA) par 19 this court said the following: ‘Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be “reasonable and probable” cause to believe that the accused is guilty of an offence before a prosecution is initiated.

⁴⁴⁹ Gunn *Essential Forensic Biology* 116 -117.

⁴⁵⁰ [2013] ZASCA 119 (SCA).

The constitutional protection afforded to dignity and personal freedom (s 10 and 12) seems to reinforce it.⁴⁵¹

In South Africa, a police official cannot apply for a DNA warrant in order to obtain samples of a person who is a suspect, as South Africa does not have the procedure of DNA warrants applicable in Canada. In practice, the Criminal Procedure Act⁴⁵² gives police officials the authority to obtain samples from persons who have been arrested, detained or convicted only. This problem might be solved by section 36D and section 36E of the Criminal Law (Forensic Procedures Amendment Bill), once becoming law and placed into operation.⁴⁵³

The other problem encountered by officials of the SAPS is that it often happens that a suspect is shot while he or she is committing a violent offence and the spent projectile of the bullet, which is an exhibit, stays in the body of the suspect or accused. The decisions of the courts which have to authorise the removal of the spent bullet or projectile and authorise samples to be taken, are conflicting in this regard and the Act does not state clearly that the police may apply to the courts for the removal of that spent bullet during pre-trial proceedings. In relation to a person who is a suspect who has not been arrested, the Act is completely silent. The Cape High Court⁴⁵⁴ regards this as search and seizure, while the Durban High Court⁴⁵⁵ does not regard this as search and seizure.

3.8 CONCLUSIONS

In conclusion and on the basis of the above discussion, the researcher submits that the UK, the USA and Canada use samples to ascertain bodily features of accused persons. DNA is the most common method of ascertaining bodily features in those jurisdictions. This is similar to the approach of South Africa and especially in respect of cases concerning sexual offences and murder charges.

The difference is that in Canada there is provision for a warrant issued by a judge to obtain DNA samples, which the police can use to obtain samples from a suspect or accused person for comparison purposes for DNA. In the UK the CJPA 2001 gives the police authority to obtain samples from a suspect for investigation purposes.

⁴⁵¹ At par 30.

⁴⁵² Act 51 of 1977, section 37 (1) (c).

⁴⁵³ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013). Page 4 at 35 and page 5 at 50.

⁴⁵⁴ *Minister of Safety and Security v Gaxa* 2002 (1) SACR 654 (C).

⁴⁵⁵ *Minister of Safety and Security and another v Xaba* 2004 (1) SACR 149 (D).

In Canada, it is not unconstitutional to obtain samples from a suspect to ascertain bodily features, as is the position in the USA. In the USA, ascertainment of bodily features of a person through samples is not regarded as unconstitutional. Both Canada and the UK authorise samples to be obtained from a suspect for investigation purposes.

In Canada, if there is reasonable suspicion that the DNA of a person is the same as the DNA found at a crime scene, the police can file an ex-parte application to a judge and request that a DNA warrant be issued by the court to enable the police to obtain blood samples from that person for comparison and compilation of a DNA profile.

The position of the suspect in Canada is the same as the position of the suspect in South Africa in the sense that the police cannot obtain “body samples” from the suspect for forensic investigation and testing without prior consent of the suspect. However, in South Africa that can only be done if the person is arrested, detained or convicted. However, blood samples cannot be taken by the police itself but only by a medical officer or registered nurse. Furthermore, in South Africa, a medical practitioner can obtain a blood sample of any person who is being treated by him or her if on reasonable grounds he or she is of the opinion that the contents of the blood of any person admitted to a hospital for medical attention or treatment may be relevant at any later criminal proceedings (section 37 (2) (b), while in Canada, the doctor cannot obtain a blood sample of such a person without the person’s consent. The researcher therefore concludes that doctors in South Africa are sufficiently authorised to obtain samples from a suspected and arrested person, while the situation is different in Canada.

The current situation is that Section 37 (1) (c) of the Criminal Procedure Act⁴⁵⁶ does not authorise South African police officials to obtain samples from a person who is a suspect, unless that person is arrested, detained or convicted.

It is suggested that, based on the decision of *Regina v Fisher*⁴⁵⁷ and the *Canadian Criminal Code*, such comparable solutions could be of assistance in South Africa. It is suggested that law must be enacted to authorise a “DNA warrant”, similar to the law in Canada, so that police will be able to order medical practitioners to obtain samples from “suspects” as well, not only from arrested, detained and accused persons. This problem might, however, be solved by section 36D and section 36E of the Criminal Law (Forensic Procedures

⁴⁵⁶ Act 51 of 1977.

⁴⁵⁷ [2000] 68 CRR (2d) 360.

Amendment Bill), which was passed by Parliament in 2012 but has not yet been signed by the President to become law.⁴⁵⁸

Furthermore, on the basis of the conflicting decisions between the cases of *Gaqa* and *Xaba* supra, the researcher submits that there is no certainty in relation to whether an exhibit (real evidence) such as a bullet projectile may be removed from the body of a suspect or accused person by means of surgery by a doctor on request of a police official in terms of section 37 (2) (a) or section 37 (3) (a) or (b) or section 37 (4). The researcher concludes that this uncertainty needs intervention by the legislature or Constitutional Court.

⁴⁵⁸ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013) 4 at 35 and 5 at 50.

CHAPTER 4

Conclusions, findings and recommendations

4.1 NON-INVASIVE METHODS: CONCLUSIONS ON ASCERTAINMENT OF BODILY FEATURES

4.1.1 Fingerprints and fingerprinting

Ascertaining bodily features through fingerprints is a valuable tool in crime detection. The new section 36C (fingerprints and body-prints for investigation purposes), which was implemented on 13 January 2013, has given the police further powers to ascertain bodily features of suspected persons. This section managed to address the problem previously experienced by the police, namely that the police were not entitled to obtain fingerprints of persons who had not been arrested, convicted or sentenced, for investigation purposes.⁴⁵⁹ This is a positive development.

Section 36C empowers police officials sufficiently to take fingerprints and body-prints of a suspected person or group of persons if there are reasonable grounds to suspect that the taking of such fingerprints or body-prints of a person or group of persons will assist the police official in the investigation by excluding or including one or more of the suspected persons. These must be persons or group of persons who are suspected of having committed offences referred to in Schedule 1. The gap that used to exist in relation to the taking of fingerprints of suspected persons who are not under arrest or convicted is now closed by section 36C. This is a good development for investigation and crime detection. The problem that was facing the police has been solved by this section.

The new section 37(1) (a) gives a police official discretion to take body prints or to record the bodily appearance of an accused or convicted person, whether out on bail or not, but the criminal proceedings need to have commenced either through arrest or through summons. This can be deduced from the words “any police official may”, which is discretionary in nature. This section refers to instances where a person has been arrested upon any charge, released on bail, arrested in respect of any matter referred to in paragraph (n),(o) or (p) of section 40(1) or to any person upon whom a summons was served in respect of a charge referred to in Schedule 1, any person convicted by a court and any person deemed under section 57(6) to have been convicted in respect of any offence which the Minister has by

⁴⁵⁹ Act 6 of 2010.

notice in the gazette declared to be an offence for the purpose of this paragraph. This means that in fingerprinting there are two sections that give a police official discretion to take fingerprints, namely section 36C and section 37 (1) (a) of the previous Criminal Procedure Act.⁴⁶⁰ Section 36 B compels a police official to take fingerprints.

From a constitutional perspective the taking of fingerprints is not regarded as unconstitutional, subject to the requirements of the law in the Criminal Procedure Act. No warrants to take fingerprints are required; in fact a policeman is obliged to take the fingerprints of an arrested person.

The Canadian Criminal Code, section 487.092, empowers the Canadian police to obtain the fingerprints of persons through a warrant called an “impression warrant”, irrespective of whether that person is a suspect or not, as long as there are reasonable grounds to believe that the person’s fingerprints will assist in the solving of crime and it is in the best interests of the administration of justice that the “impression warrant” be issued. This section of Canadian law is similar to section 36C of the Criminal law (Forensic Procedures) amendment Act 6 of 2010.

In South Africa, fingerprints of arrested persons who have been released without being convicted are not kept in the police database for future use or comparison. However, in England, following the implementation of the CJPA 2001, fingerprints from arrested individuals who are not subsequently cautioned for or convicted of a criminal offence need not be eliminated from the NAFIS, but these fingerprints are held separately within it. This means that these fingerprints can be used in future for comparison purposes.

4.1.2 Identification parades

With regard to identification parades (line-ups), section 37 (1) (b) allowed for a person to be placed on an identification parade if such a person had been arrested upon any charge, released on bail or arrested upon any charge related to an offence referred to in Schedule 1.⁴⁶¹ Again the non-arrested suspect is excluded in this provision. From a constitutional perspective the thorny issue here is whether the arrestee must have the assistance of legal counsel during a line-up.

There are two conflicting judgements on the right to legal representation of an arrested person at an identification parade (line-ups), namely *S v Mhlakaza* and *S v Mphala*.

⁴⁶⁰ 51 of 1977.

⁴⁶¹ Section 36B (1) (a) or (b).

In *S v Mhlakaza and another*⁴⁶² (which was decided under the Interim Constitution) Van Deventer excluded evidence of an identification parade because the accused had not been given a reasonable opportunity or sufficient time to obtain legal representation. It was held that the accused were constitutionally entitled to have their legal representatives at the identification parade.

In *S v Mphala and another*,⁴⁶³ on the other hand, it was held that:

an accused does not have the right, whether or not he has received legal representation, not to participate in an identification parade held in accordance with the provisions of section 37 (1) (b) of the Criminal Procedure Act, and to require an accused to participate in an identification parade, is not a violation of his constitutional rights.

The researcher concludes that the case of *Mhlakaza* is preferred, as it is in line with the Constitution, which is the supreme law of the country.

However, the two conflicting decisions create operational problems and legal uncertainty for police officials. Both cases were decided by the High Court and the problem will only be solved once the Supreme Court of Appeal or the Constitutional Court makes a decision in this regard. The *Mhlakaza* decision finds support in the foreign jurisprudence of Canada, the USA and the UK.

In Canada and the USA the arrested person has a right to legal representation at an identification parade. In England the arrested person must be informed of his right to have a solicitor or friend at the parade. This means that the arrested person in those jurisdictions may have a representative at the parade. The consequences of not having legal counsel at an identification parade or being denied legal representation at the identification parade are the infringement of the constitutional rights of the arrested person. The researcher therefore concludes that an arrested person has a right to legal representation at an identification parade.

⁴⁶² 1996 (2) SACR 187(C) 199 e-f.

⁴⁶³ 1998 (1) SACR 654 (W) 660 f.

4.1.3 Voice identification

Section 37 (1) (c) of the amended Criminal Procedure Act and section 37 (1) (c) of the new Criminal Procedure Act gives the police official discretion to obtain voice samples. Section 37 (3)(a) of the amended and new Criminal Procedure Act gives the court authority to order a person referred to in section 37 (1) (c) of the amended Criminal Procedure Act and the new Criminal Procedure Act, as well as section 36B(1), to provide a police official with a voice sample for ascertaining bodily features.

From the case of *Levack and Others v Regional Magistrate, Wynberg and Another*⁴⁶⁴ it may be concluded that the police could be allowed to obtain voice samples for voice comparison in terms of section 37 (1)(c) and section 37 (3) (a). These two sections cover the area where the person is already an accused but does not address the area where the person is still a suspect. Unfortunately, it still does not address the problem where police are still investigating the matter. The said two sections do not empower the police sufficiently to do crime detection during the process of pre-trial criminal procedure. The sections cover the ascertainment of bodily features of a person who is already in detention and does not cover a person who is still under investigation as a suspect and not yet arrested.⁴⁶⁵

It would be helpful if “voice samples” could be included in section 36C of the Criminal Procedure Act 51 of 1977 so that the police can be specifically empowered to deal with crime detection. The section should read as follows: “Fingerprints, body-prints and voice samples for investigation purposes prior to arrest, detention and release of suspect.”

It would also be beneficial to amend section 252A⁴⁶⁶ in such a way that the trap includes obtaining voice samples of suspects for comparison purposes for crime detection purposes. Although this infringes the right to privacy, the right can be limited by section 36 of the Constitution. Section 252A should be amended to allow the Director of Public Prosecutions to authorise the police to obtain a voice sample of a suspect on tape in circumstances where the suspect is not aware of his or her voice being recorded, rather than warning the suspect, who could refuse to consent to his or her voice being recorded for investigation purposes. The witnesses should then be requested to identify the voice of the suspect from the tape recording. In that way there is no risk of the suspect changing his or her voice. This can even be limited to a specific schedule of cases only in order to avoid misuse. Alternatively, section

⁴⁶⁴ (2002) ZASCA 146: [2003] 1 All SA 22 (SCA).

⁴⁶⁵ Section 37 (1) (c) Criminal Procedure Act 51 of 1977.

⁴⁶⁶ Criminal Procedure Act 51 of 1977.

37 (3) (a) should be amended to authorise a police official to make an ex parte application to a judge in chambers, requesting that the judge issue an order that will compel the suspect to supply a voice sample for investigation purposes if reasonable grounds exist for that application.

From a constitutional perspective it is clear that the law in Canada is that if the police, in the process of investigation, should obtain voice samples from the accused with the purpose of doing voice comparison (voice identification), without the accused being warned of their rights to counsel, the evidence of voice identification obtained by the police for comparison purposes may be inadmissible in Court. In the USA it is a requirement that the suspect be assisted by counsel during the conducting of voice identification. In the UK it is required that a suspect's solicitor be given an opportunity to be present during the conducting of voice identification.

4.1.4 Photo identification (photograph identification)

The finding in *S v Mdlongwa*⁴⁶⁷ indicates that the law in relation to 'the ascertainment of bodily features of the accused' is developing, especially the ascertainment of bodily features by means of photographs, video footage and facial comparison. The reform in Section 37(1)(d) of the Criminal Procedure Act implies that an expert witness can now identify an accused from video footage using a photo of the accused to do facial comparison, as long as the video footage is original.

From a constitutional perspective, with regard to photo identification parades it can be concluded that in South Africa, a photographic identification parade is not per se unconstitutional⁴⁶⁸. The situation is similar to the situation in Canada. In that jurisdiction photographic identification is also regarded as constitutional. It can be concluded that the UK, the USA and Canada also recognise the process of ascertaining bodily features through identification parades by means of photos. The problematic issue of legal counsel does not play a role here, as the arrested person is not physically present.

⁴⁶⁷ Supra.

⁴⁶⁸ *S v Hlalikaya* and *S v Zwayi* supra.

4.2 THE INVASIVE METHOD: CONCLUSION ON ASCERTAINMENT OF BODILY FEATURES

4.2.1 DNA and blood samples

The police have the power to obtain blood samples in terms of section 37 (1) (c) of the Criminal Procedure Act. The enabling Act previously provided in section 37 (1) (c) of the Criminal Procedure Act before the amendment that:

Any police official may –

- (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female.⁴⁶⁹

Section 37 (1) (c) of the amended Criminal Procedure Act ⁴⁷⁰ now provides:

Any police official may-

- (c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) or paragraph (a) or (b) of section 36B (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that a police official may not-
 - (i) take a blood sample of any person,⁴⁷¹ or
 - (ii) examine the body of a person who is of a different gender to the police official.⁴⁷²

Section 37 (1) (c) is silent on or does not prescribe any procedure in relation to the taking of the following samples for analysis for DNA purposes: hair, teeth, bones, body fluid, saliva and body tissue. This is a gap that needs to be addressed by the legislature.

⁴⁶⁹ Section 37 (1) (c), Act 51 of 1977.

⁴⁷⁰ 51 of 1977.

⁴⁷¹ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013) is amending the section to read as follow : (i) take an intimate sample of any person.

⁴⁷² Section 37 (1) (c) of the new Criminal Procedure Act after amendment by Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

From a constitutional perspective the taking of blood samples or other samples to extract DNA profiles is not unconstitutional. DNA is the most common method of ascertaining bodily features in foreign jurisdictions. This is similar to the approach of South Africa, especially in sexual offences and murder cases.

The difference is that in Canada a warrant is issued by a judge for DNA samples, which the police can use to obtain samples from a suspect or accused person for comparison purposes for DNA. In the UK the CIPA 2001 gives the police authority to obtain samples from a suspect for investigation purposes.

In Canada, it is not unconstitutional to obtain samples from a suspect to ascertain bodily features, as is the position in the USA. In the USA, ascertainment of bodily features of a person through samples is not regarded as unconstitutional. Canada and the UK authorise samples to be obtained from a suspect for investigation purposes.

In Canada, if there is reasonable suspicion that the DNA of a person is the same as the DNA found at a crime scene, the police can file an ex-parte application to a judge and request that a DNA warrant be issued by the court to enable the police to obtain blood samples from that person for comparison and compilation of a DNA profile.

The position of the suspect in Canada is the same as the position of the suspect in South Africa in the sense that the police cannot obtain "body samples" from the suspect for forensic investigation and testing without the prior consent of the suspect. In South Africa that can only be done if the person is arrested, detained or convicted.

The other difference is that in South Africa, a doctor can obtain a blood sample of any person who is being treated by him or her (section 37 (2) (b)), while in Canada the doctor cannot obtain the blood sample of a person without that person's consent. The researcher therefore concludes that doctors in South Africa are sufficiently authorised to obtain samples from a suspect and arrested person, while the situation is different in Canada.

Currently section 37 (1) (c) of the Criminal Procedure Act ⁴⁷³ does not authorise South African police officials to obtain samples from a person who is a suspect, unless that person has been arrested, detained or convicted or that person gives informed consent.

⁴⁷³ Act 51 of 1977.

In conclusion and based on the decision of *Regina v Fisher*,⁴⁷⁴ and the Canadian Criminal Code, comparable solutions could be of assistance in South Africa. It is suggested that a law must be enacted authorising a “DNA warrant” similar to the one in Canada so that police will be able to order medical practitioners to obtain samples from “suspects” as well, not only from arrested detained and accused persons. This problem might, however, be solved by section 36D and section 36E of the Criminal Law (Forensic Procedures Amendment Bill) if these can be approved to become law (an Act).⁴⁷⁵

Furthermore, on the basis of the conflicting decisions between the cases of *Gaqa* and *Xaba* supra, the researcher submits that there is no certainty in relation to whether an exhibit (real evidence) such as a bullet projectile can be removed from the body of the suspect or accused person by means of surgery by a medical practitioner on request of a police official in terms of section 37 (2) (a) or section 37 (3) (a) or (b) or section 37 (4). The researcher concludes that this uncertainty needs intervention by the legislature or Constitutional Court.

4.3 FINDINGS ON PROBLEMS ENCOUNTERED BY THE POLICE AND RECOMMENDATIONS

4.3.1 Fingerprints and fingerprinting

The problem experienced by the police in ascertaining bodily features of suspected persons was addressed by Act 6 of 2010 when it came into operation on 13 January 2013. The new section 36C (fingerprints and body prints for investigation purposes), which was implemented on 13 January 2013, gave police further powers to ascertain bodily features of suspected persons. This section managed to address the previous problem experienced by the police, namely that the police were not entitled to obtain fingerprints of persons who had not been arrested, convicted or sentenced, for investigation purposes.⁴⁷⁶ This is a positive development. However, this is restricted to Schedule 1 offences.

4.3.1.1 Recommendations: Fingerprints and fingerprinting

No recommendations are made on this aspect, as the main concern has been addressed by section 36C.⁴⁷⁷

⁴⁷⁴ [2000] 68 CRR (2d) 360.

⁴⁷⁵ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013).Page 4 at 35 and page 5 at 50.

⁴⁷⁶ Act 6 of 2010.

⁴⁷⁷ Criminal Law (Forensic Procedures) Amendment Act 6 of 2010.

4.3.2 Identification parades

Rules on identification parades in South Africa are but directives or guidelines and are not contained in law as rules of law, as in the UK. In the UK the rules on identification parades are contained in a code of practice called Code D. This Code D is an annexure to PACE. This means that the rules of identification are binding in UK law. Furthermore, in South Africa the issue of legal representation during a line-up is confused by two conflicting cases. The two conflicting decisions create operational problems and uncertainty for police officials, because the police do not know which case to follow.

4.3.2.1 Recommendations: Identification parades

To make the rules of identification binding, the researcher recommends that the rules on identification parades contained in the Police National Instruction be incorporated as part of section 37 (1) (b) of the Criminal Procedure Act ⁴⁷⁸ as an annexure. The researcher also recommends legislative intervention in the conflicting decisions of *S v Mhlakaza* and *S v Mphala*. This intervention can be incorporated in section 37 (1) (b) of the Criminal Procedure Act.

4.3.3 Voice identification

On the basis of the research conducted, the researcher established that voice identification is problematic in respect of obtaining a voice sample from a person who is not in detention (un-arrested suspect).

4.3.3.1 Recommendations: Voice identification

To avoid the problem of obtaining voice samples from suspects, the researcher recommends that section 37 (3) (a) of the Criminal Procedure Act be amended to authorise a police official to make an ex parte application to a judge in chambers requesting that the judge issue an order that will compel the suspect to supply a voice sample for investigation purposes if reasonable grounds exist. This should not apply to all offences but only to specific priority crimes. This intervention can be inserted in section 36C of the Criminal Law (Forensic

⁴⁷⁸ 51 of 1977.

Procedures) Amendment Act.⁴⁷⁹ Currently a judge can only be approached in pending criminal cases when a person has already been arrested.

4.3.4 Photo identification (photograph identification)

In the UK the rules on photo identification parades are contained in a code of practice called Code D, which is an annexure to PACE. This means that the rules of identification are legislated. However, in South Africa, the law relating to identification by means of photographs has developed through police directives and not in case law or a statute. Police directives are not legally binding.

4.3.4.1 Recommendations: Photo identification (photograph identification)

The researcher recommends rules relating to identification by means of photographs be included in section 37 (1) (b) of the Criminal Procedure Act so that they can be legislated, as in the UK. The UK rules of identification are clearly legislated and provide legal certainty.

4.3.5 DNA as a method of ascertaining bodily features

Section 37 (1) (c) is silent on or does not prescribe any procedure in relation to the taking of the following samples for analysis for DNA purposes: hair, teeth, bones, body fluids, saliva and body tissue. This is a lacuna in the law that needs to be addressed by the legislature.

4.3.5.1 Recommendations: DNA as a method of ascertaining bodily features

The researcher recommends that legislation be put in place that will specifically authorise police officials to obtain the following samples for DNA analysis: hair, teeth, bones, body fluid, saliva and body tissue. This gap needs legislative intervention. The researcher recommends that a law be enacted authorising a “DNA warrant”, such as the one applicable in Canada, so that the police will be able to order medical practitioners to obtain samples from suspects as well, not only from arrested, detained and accused persons. This problem might, however, be solved by section 36D and section 36E of the Criminal Law (Forensic Procedures Amendment Bill), once it is approved by Parliament, signed by the President and put into operation.⁴⁸⁰

⁴⁷⁹ Act 6 of 2010.

⁴⁸⁰ Criminal Law (Forensic Procedures) Amendment Bill (B9-2013).Page 4 at 35 and page 5 at 50.

Furthermore, on the basis of the conflicting decisions between the cases of *Gaqa* and *Xaba* (supra), the researcher recommends that the Department of Justice and Constitutional Development intervene and that Parliament enact legislation to address the uncertainty.

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