

ADMISSIBILITY OF CONFESSIONS IN CRIMINAL TRIALS

BY

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R J MBULI
KWADLANGEZWA

15 November 1993

DEDICATION

This thesis is dedicated to my parents PAULOS and ALICE, my wife BEAUTY and our lovely children NTUTHUKO, NTOKOZO, THABILE, GUGULETHU, SANELE and SIBUSISO. To our children I recommend the following words of wisdom:

"It is not enough to have a good mind; the main thing is to use it well."

- RENE DESCARTES

"Nothing happens unless first a dream."

- CARL SANDBURG

"We are what we repeatedly do. Excellence, then, is not an act, but a habit."

- ARISTOTLE

"Climb high; Climb far.

Your goal the sky; Your aim the star."

- INSCRIPTION AT WILLIAM COLLEGE

"Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are."

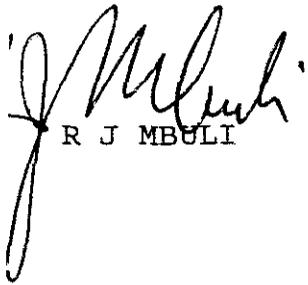
- JOHN WOODEN

"Man's mind stretched to a new idea never goes back to its original dimensions."

- OLIVER WENDEL HOLMES

DECLARATION

It is hereby declared that this thesis entitled Admissibility of Confessions in Criminal Trials is my own original work, both in conception and execution and other works, sources and quotations have been fully acknowledged in the text, foot-notes and bibliography.


R J MBULI

SUMMARY

A confession may be defined as an out-of-court statement by a suspect in which he or she voluntarily, knowingly and intelligently acknowledges that he or she committed or participated in the commission of a crime and which makes it clear that there is no defence in law that would make his or her conduct lawful. This is what the appeal court meant in the Becker case when it held that a confession must be defined as an unequivocal admission of guilt by an accused person. There is a need that the stringent requirements for the admissibility of confessions should also govern the admissibility of admissions and exculpatory statements. Confessions and admissions remain proper elements in law enforcement and it has been shown in some reported decisions that some criminal cases are capable of solution only by means of confessions and/or admissions.

There are three phases that are important in determining whether a confession is admissible in evidence. The first phase is when a suspect is interrogated by the police. This is a phase of our predominantly accusatorial system of criminal procedure. There is a need to protect a suspect against untoward conduct by the police during his interrogation. Our new constitution has incorporated a Bill of Rights, and our common law also protects most of the interests which are protected by the Bill of Rights (e.g. a suspect is presumed innocent until proved guilty, the privilege against self-incrimination forms part of our law and the right to legal representation is recognised). The second phase is when a confession is recorded either by a magistrate or a justice of the peace. This is a crucial stage because the "YES" and "NO" answers of a suspect on a roneod confession form and additional questions put to him may satisfy a court of law that a confession was made freely and voluntarily by an accused in his sound and sober senses and without having been

unduly influenced thereto. This procedure is unique to our law. The third phase is when the admissibility of a confession is challenged in court in a trial within a trial. If a suspect is undefended, he may not adequately exercise his procedural rights. But, if he or she made a confession to a magistrate, a suspect is presumed to have acted freely and voluntarily etc. and a confession is admitted in evidence on its mere production if his or her name corresponds to the name of the person who has signed the confession and if it appears on the document containing the confession that it was made freely and voluntarily and without his or her having been unduly influenced thereto.

It is recommended that before an unrepresented suspect is cross-examined on the contents of his confession where he or she has made this possible, he or she should be warned. If after explaining to him or her what cross-examination means the suspect does not understand, a legal representative should be appointed to assist him or her. It is recommended that evidence of a psychologist who has been nominated by an accused should be led where the latter is charged with a serious crime; that police interrogation be reformed in such a way that no one, whether suspected of committing high treason or any other serious crime, shall be subjected to mental torture; physical torture, assault or inhuman or degrading treatment; that the warning given to a suspect prior to the recording of his confession be reformed as discussed in this thesis; that the shift of onus from the state to an accused under certain circumstances be abolished; that the list of persons who may record a confession be increased as recommended in this thesis and that fundamental fairness during the interrogation of a suspect and during the recording of his confession be adopted as a new criterium for the admissibility of confessions.

OPSOMMING

'n Bekentenis kan gedefinieer word as 'n "buite-die-hof" verklaring deur 'n beskuldige waarin hy of sy vrywillig, verstandig en intelligent erken dat hy/sy 'n misdryf gepleeg of aan die pleeg daarvan deelgeneem het en wat dit duidelik maak dat daar geen wetlike verweer bestaan wat sy/haar handeling kan wettig nie. Dit is wat die appelhof bedoel het in die Becker saak toe die hof uitgewys het dat 'n bekentenis gedefinieer moet word as 'n ondubbelsinnige erkenning van skuld deur 'n beskuldigde. Daar bestaan 'n behoefte dat die streng vereistes wat vir die toelaatbaarheid van 'n bekentenis geld ook vir die toelaatbaarheid van erkennings en verontskuldigings moet geld. Bekentnisse en erkennings is steeds behoorlike elemente in wetstoepassing en daar is aangetoon dat in sekere gerapporteerde beslissings sommige kriminele sake slegs deur bekentnisse en/of erkennings opgelos kon word.

Daar is drie stadiums wat belangrik is om te bepaal of 'n bekentenis as getuienis aanvaarbaar is. Die eerste stadium kom ter sprake wanneer 'n beskuldige deur die polisie ondervra word. Dit is 'n stadium wat deel is van ons oorwegend beskuldigende kriminele prosedurestelsel. Daar bestaan 'n behoefte om 'n verdagte te beskerm teen onbetaamlike gedrag deur die polisie gedurende ondervraging. Ons nuwe grondwet inkorporeer 'n handves van menseregte en ons gemenerereg beskerm ook grotendeels daardie belange wat beskerm word deur 'n handves van menseregte, (bv. 'n verdagte word geag onskuldig te wees totdat hy skuldig bewys is, die voorreg teen selfinkriminasie vorm deel van ons regstelsel en die reg tot regsverteenvoerdiging word erken). Die tweede stadium kom ter sprake wanneer die bekentenis deur 'n landdros of vrederegter afgeneem word. Dit is 'n kritieke stadium aangesien die "JA" en "NEE" antwoorde van die verdagte op 'n afgerolde bekentenisvorm asook addisionele

vrae aan hom gestel 'n geregshof kan oortuig dat 'n bekentenis vry en vrywillig deur 'n beskuldige afgelê is terwyl hy by sy volle, gesonde verstand was en sonder dat hy onbehoorlik daartoe beïnvloed was. Hierdie prosedure is uniek tot ons regstelsel. Die derde aspek is wanneer die toelaatbaarheid van 'n bekentenis in die hof bevraagteken word gedurende 'n verhoor binne 'n verhoor. Indien 'n verdagte nie verdedig word nie kan hy ook nie sy wetlike regte behoorlik uitoefen nie. Indien hy/sy egter 'n bekentenis voor 'n landdros afgelê het, word dit geag dat die verdagte vry en vrywillig gehandel het en so 'n bekentenis is toelaatbaar as getuienis deur die blote voorlegging daarvan indien die verdagte se naam ooreenstem met die naam, van die persoon wat die bekentenis onderteken het en indien op die dokument wat die bekentenis bevat dit gestel word dat dit vry en vrywillig en sonder onbehoorlike beïnvloeding afgelê is.

Dit word aanbeveel dat 'n onverteënwoordigde verdagte voor kruisondervraging omtrent die inhoud van sy/haar bekentenis, waar hy/sy dit moontlik gemaak het, vooraf gewaarsku word. Indien dit duidelik word, nadat die verdagte ingelig is omtrent die betekenis van kruisondervraging, dat hy/sy nie begryp nie, behoort 'n regsverteënwoordiger aangewys te word om hom/haar by te staan. Dit word aanbeveel dat die getuienis van 'n sielkundige, wat deur 'n beskuldigde genomineer is, gely word waar die beskuldigde van 'n ernstige misdryf aangekla word; dat die polisie ondervraging op so 'n wyse hervorm word dat niemand, of hy nou van hoogverraad verdink word of van enige ander ernstige misdryf, aan sielkundige of fisiese marteling, aanranding of onmenslike en aftakelende behandeling blootgestel word nie; dat die waarskuwing aan 'n verdagte voor die aflegging van sy bekentenis hervorm word soos in hierdie tesis uiteengesit; dat die verskuiwing van die bewyslas vanaf die staat na 'n beskuldigde onder sekere omstandighede, afgeskaf word; dat die lys van persone wat 'n bekentenis mag afneem uitgebrei word soos aanbeveel in

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hierdie tesis en dat die fundamentele regverdigheid gedurende die ondervraging van 'n verdagte en gedurende die afneem van sy bekentenis aanvaar word as 'n nuwe kriterium vir die toelaatbaarheid van bekentnisse.

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SECTION I

INTRODUCTION

CHAPTER ONE

CONFESSIONS INTRODUCED

1.1 Introduction

Throughout history, governments and police departments have acted to protect citizens against crime.¹ It is for this reason that the commission of crimes is usually reported to police departments. One of the functions of the police is to look for clues at the scene of crime. In some cases those clues may lead the police to the identity of a perpetrator. There are cases where clues are entirely absent and where the only approach to a possible solution of a crime is the interrogation of the suspect himself, as well as others, who may possess significant information.² Police interrogation thus becomes another method used in the investigation of crime. The question whether suspects are protected against lengthy interrogation will be dealt with later on.³

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- 1 Caplan "Questioning Miranda" 1985 Vand.L.Rev. 1417 1420-24.
 - 2 Kamisar *et al* Modern Criminal Procedure 7ed (1990) 412.
 - 3 See chapters five, twelve and thirteen *infra*.

1.2 Statement of the problem

During the interrogation of a suspect, the police may obtain incriminating statements from him. Those statements may take the form of admissions, confessions or merely exculpatory statements. This has led to the notion that many criminal cases are capable of solution only by means of an admission or confession by a suspect or upon the basis of information obtained from the questioning of other suspects.⁴ There is also a belief that suspects will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours.⁵

The problem with confessions is that while they may assist the court in convicting an accused where no other direct evidence exists, they provide a conflict. Admittedly if a confession is genuine, it is right that the court should convict the confessor. Confession, however, is a practice that is used by people who are altruistic. It is people who confess because they listen to their conscience and because of a higher law or higher being to which or to whom they owe allegiance. This allegiance may call even for

4 Kamisar et al (1990) 412.

5 Kamisar et al (1990) 412.

sacrifice of self. Perpetrators of crime are seldom such people. It becomes therefore difficult to accept that a person who is so callous as to commit a crime can all of a sudden be so altruistic as to want to confess.

It is generally contrary to human nature for a person to betray himself or to expose himself to punishment except in the interests of a high ideal. No such ideal may appeal to a criminal suspect. The only logical conclusion is that a criminal suspect in the majority of cases confesses because of fear of something evil or painful that he may avoid by confessing or because the way the confession is extracted is being unbearable. That in itself conflicts with fair trial procedures.

Policemen on the other hand have as their duty the investigation and unravelling of crime. It is therefore obvious that their aim is to see to it that suspects are eventually convicted. Human nature dictates to us that the police cannot be happy if the suspects are set free for want of evidence. Moreover, the police may have a strong suspicion that the suspect did commit the crime. Promotion in the police force obviously depends on the detection and revelation of crime and the successful prosecution of offenders.

There is therefore a direct conflict between the role of the police on the one hand and the fact that a criminal suspect has rights and in particular the right to remain silent etc. etc.

There may well be instances where a person confesses honestly. But there may be instances where a person confesses not because he has committed the offence but in order to avoid the way in which he is being interrogated. This is where interrogation is accompanied by torture of one sort or another.

Power and its abuse is the perennial problem. There is no doubt that the police have considerable power over the suspects. They are trained in the art of violence. They also possess weapons. The suspect is entirely in their mercy. They interrogate him in privacy. It is well known that evil thrives in secret places. Police being human being can be irritated and become impatient with a suspect who hides behind technicalities especially if they have a strong suspicion that he is the culprit.

It would be wrong to reject every confession. The only way of providing safeguards is to subject confessions to certain requirements so that confessions can comply with the dictates of a civilized criminal justice system.

1.3 Definition of a confession

The Criminal Procedure Act⁶ does not define a confession. There is no other parliamentary enactment which defines a confession. The courts looked for a definition of this concept in our common law. The decision where a confession was defined is that of Becker.⁷ The facts of that case were briefly as follows: B, the appellant, was convicted of theft of money. At the time of his arrest, B informed the detective who arrested him that he was anxious to meet the complainant with a view to settling the matter. B told the detective that he did not want to go to goal nor to stand trial and that he would take poison before the trial date. Moreover, the appellant wanted to be given a chance to indicate how the theft might have been committed.

At his trial, B argued that the statement he made to the detective during his arrest constituted a confession within the meaning of the Evidence and Criminal Procedure Act,⁸ and that it was therefore inadmissible. It was necessary for the court to define

6 Act 51 of 1977.

7 1929 AD 167.

8 Section 273 of Act 31 of 1917.

a confession within the meaning of that Act.⁹ The court acknowledged that there was much difference of opinion among the courts on what a confession is. De Villiers ACJ concluded that a confession within the meaning of the 1917 Act¹⁰ meant an unequivocal acknowledgement of guilt.¹¹ An extra-judicial confession, in terms of the act,¹² implies that an accused committed or participated in the commission of an offence. A confession made by an accused in a preparatory examination was described as a voluntary admission by him of his guilt, and that was treated as a plea of guilty.¹³ The 1917 act treated a confession and a plea of guilt in the same way.¹⁴ It would appear that this is the reason why in the Becker decision a confession is defined as an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty if made in a court of law.¹⁵ A plea of guilty could not be accepted for murder, rape and treason under the

9 See section 273 of Act 31 of 1917.

10 Becker supra 171.

11 Becker supra 171.

12 See section 273 of Act 31 of 1917.

13 Section 227(1) of Act 31 of 1917.

14 See sections 227(1) and 159(1) of Act 31 of 1917.

15 Becker supra 171.

1917 act.¹⁶ The test to be applied to determine the admissibility of extra-judicial confessions as enunciated in Becker, was useful but could be doubted in crimes of murder, rape and treason. If one carefully analyses the 1917 act, one will find that it was proper to define a confession in terms of the plea of guilt because these two concepts were governed by the same procedure.¹⁷

In later decisions, the phrase "unequivocal acknowledgement of guilt" appears to have been used to test whether an extra-curial statement by an accused constituted a confession or not.

The definition of a confession in Becker has been widely and consistently accepted and is now of unquestionable authority.¹⁸ In Xulu,¹⁹ the accused had been charged with unlawfully possessing dagga for the purpose of sale. The accused admitted responsibility

16 Section 159(1) of Act 31 of 1917.

17 Harcourt Swift's Law of Criminal Procedure 2ed (1969) 450.

18 Harcourt Swift's Law of Criminal Procedure 2ed (1969) 450; Hoffmann and Zeffertt The South African Law of Evidence 4ed (1988) 209; Du Toit et al Commentary on the Criminal Procedure Act (service 4, 1989) 24-52; Schmidt Bewysreg 2 ed (1982) 520; Xulu 1956 2 SA 288 (AA); Ruzwidzo 1963 1 SA 714 (SR); Gumede 1963 2 SA 349 (N); Motara 1963 2 SA 579 (T); Ahmed 1940 AD 333; Kant 1933 WLD 128; Nkwali 1925 AD 578.

19 *Supra*.

for storing the dagga for someone else. That statement was held not to have been a confession because the accused could prove that he had a permit to possess dagga. The case law indicates that the following statements were held not to have been confessions:

- (a) a statement by an accused that he had purchased the dagga from a white man;²⁰
- (b) a claim by an accused on a charge of being found in unlawful possession of a firearm that the pistol belonged to him;²¹ and
- (c) where an accused said "I do not look upon that as theft".²²

It appears from the case law ²³ that before there is a confession, the accused must clearly accept full responsibility for committing a crime and his statement must exclude the possibility of raising a ground of justification. The words "unequivocal acknowledgement of guilt" may be interpreted to mean that the accused knowingly and intelligently admits

20 Blato 1945 AD 469.

21 Kumalo 1948 4 SA 53 (T); Kumalo 1949 1 SA 620 (A).

22 Hanger 1928 AD 459.

23 Becker supra 171; Hans Veren 1918 TPD 218 221; Viljoen 1940 AD 366.

that he committed a crime and that he has no ground of justification or legal excuse. The contents of the statement must be self-explanatory as to the guilt of the accused. If it is possible to interpret the statement in such a way that the guilt of the accused is not admitted, then it is not a confession.

It is common knowledge that no definition is perfect. The definition given in Becker is useful and has to a certain extent cleared up some ambiguities in the case law. That definition has been elevated to a level of a statutory definition. Yet it is necessary, to subject it to critical scrutiny. It is suggested that a confession may also be defined as an out-of-court statement by a suspect in which he knowingly and intelligibly admits that he committed or participated in the commission of a crime and that he had no defence in law that would make his action lawful.

The proposed definition of a confession means that a confession must always be an out-of-court statement. Moreover, it must be made "knowingly" - that means that the suspect must be aware that he is accepting responsibility for committing or participation in the commission of a crime. The adverb "intelligibly" means that he must be in his sound and sober senses when deciding either to make or to refrain from making a

statement; this also means that the suspect must make an informed decision to negative his procedural right to raise a defence or ground of justification at his trial.

Bearing all this in mind, it is clear that the accused's admission in Grove-Mitchell²⁴ that he had shot the deceased "... six times" or "had emptied the gun on her" or that she was "full of holes" was not a confession as defined.²⁵ The probable statement which could constitute a confession under these circumstances would be "I am guilty of murdering her or unlawfully killing her". Similarly, in Motara²⁶ the accused's claim that "I live here" fell short of a confession to the charge under the now repealed Group Areas Act.²⁷ If the accused had said: "I live here illegally" it would have constituted a confession.²⁸

The general principle of our criminal law is that each case is decided on its facts. In the Becker decision, De Villiers ACJ added a cautionary rider that "the

24 1975 3 SA 417 (A) 419.

25 Du Toit 24-51.

26 Motara *Supra*.

27 Act No 77 of 1957.

28 Du Toit 24-52.

admission by the accused of facts which when carefully scrutinized and laboriously pieced together may lead to an inference of guilt on the part of the accused with the term "confession" in the abstract, does not appear to have been followed in later court decisions.²⁹

In applying the test whether an accused's statement constitutes a confession or not, it must be considered as a whole.³⁰ The court may look at the surrounding circumstances to determine whether the admission is an unequivocal admission of guilt; the court is not constrained to look at the statement in a vacuum.³¹

The state of mind of an accused when making the statement is not left out of account in ascertaining whether it is a confession or not.³² A statement may be incriminating even where it is made with exculpatory intent. The reason for this is that unlawfulness refers to a general proscription which is determined objectively. The decisive factor in those circumstances is the question whether the accused has

29 See discussion of Yende 1987 3 SA 367 (A) *infra*.

30 Swart 1937 TPD 168; Harcourt 451; Du Toit 24-53.

31 Du Toit 24-53; Motloung 1970 3 SA 547 (T); January 1975 3 SA 324 (T).

32 Harcourt 450; Scholtz 1935 OPD 28 34.

admitted all the essential elements of the crime. If all the elements are admitted and it is clear that he knowingly and intelligibly admitted guilt, his exculpatory intent is irrelevant. ³³

In Yende³⁴ the court decided that in the adjudication of the question whether a statement is a confession or not, an objective approach is preferable to a subjective approach.³⁵ A confession, being an unequivocal admission of all the elements of the crime preferred against an accused, concerns the facts which an accused states verbally or in writing rather than the intention behind such a statement.³⁶ Having said this, Smalberger JA warned that it would be unrealistic to regard a statement which otherwise amounts to a confession as not amounting to such because the person making the statement does not intend it as a confession.³⁷ But, the application of an objective test does not mean, however, that all subjective factors have to be left out of account.³⁸ For that reason, the

33 Du Toit 24-53; see Scholtz 1935 OPD 28 34.

34 1987 3 SA 367 (A).

35 Yende *supra* 374.

36 Yende *supra* 374.

37 Yende *supra* 374.

38 Yende *supra* 374.

state of mind or intention of the person making the statement will sometimes be taken into account as one of the surrounding circumstances from which the objective meaning of his statement can be ascertained.³⁹ Facts of which the person making the statement had no knowledge at the time of the statement must be left out of account. Similarly, the test used to ascertain whether a statement is a confession is not whether the accused intends to admit that he is guilty, but whether he intends to admit facts which make him guilty, whether he realises that or not.⁴⁰

The court in Yende held that in order to decide whether a statement amounts to a confession, the statement must be taken as a whole. In doing that, regard must be had not only to that which appears in the statement, but also that which is necessarily implied therefrom.⁴¹ If the content of the statement does not expressly admit all the elements of the offence or exclude all grounds of defence, but does so by necessary implication, the statement amounts to a

39 Yende supra 374; Burger 1947 1 SA 560 (D) 565; Msweli 1990 3 SA 1161 (D) 1162.

40 Kant 1933 WLD 128 129-30; see also Kant 1032 EDL 209 210; Pakkies 1956 2 SA 145 (O) 147; Gumede 1963 2 SA 349 (N) 351; Mahlanqu 1972 3 SA 679 (N) 682; Msweli supra 1162.

41 Yende supra 375.

confession.⁴² Whether a statement, either standing alone or in conjunction with such surrounding circumstances as can lawfully be taken into account, is capable of a necessary implication will have to be determined according to the merits of each particular case.⁴³ Where a doubt exists in this connection, the statement does not amount to a confession.

The test enunciated in Yende qualifies the cautionary rider in Becker where the court said:

"The admission by an accused of facts which when carefully scrutinized as may be laboriously pieced together, may lead to the inference of guilt on the part of the accused, however, consonant that may be with the meaning of the term 'confession' in abstract, is not a confession within the meaning of the Act."

The approach in Yende is supported. Generally speaking it strikes a compromise between an objective and a subjective approach. The accused's intention is not lost sight of whereas his motive may be rejected under certain conditions.

42 Yende supra 375.

43 Yende supra 375.

1.4 Aim of the research/thesis

The problem regarding the admissibility of a confession is not new. The views of the Roman Dutch writers on the use of torture in the past in order to extract confessions were divided, but the majority of writers supported it.⁴⁴ Roman-Dutch law was applied in the Cape since 1652 by the Dutch East India Company.⁴⁵ The system of criminal procedure which was used was inquisitorial in character. Where the death penalty was a competent sentence, the accused had to make a confession. Torture was used as a method of extracting a confession.

The use of torture in order to extract a confession created a danger of receiving a false confession into evidence. This in turn created a need for excluding confessions which were not reliable from evidence. The use of torture in order to extract confessions was formally abolished in 1795 when the British took control of the Cape. The admissibility of confessions was governed by the common law until 1917 when the

44 See chapter 2 *infra* for details

45 In terms of the Octrooi.

Criminal Procedure and Evidence Act was enacted by our legislature.*

This inquiry is aimed at reviewing the criteria or prerequisites for the admissibility of a confession as set out in section 217 of the Criminal Procedure Act.⁴⁷ The reason for this is that although the prerequisites for the admissibility of a confession have been interpreted by our courts in many reported and unreported decisions, the reason for retaining the concepts of "voluntariness" and "undue influence" as separate requirements has yet to be spelt out. The concept of voluntariness is defined in terms of undue influence emanating from a person in authority, whereas "undue influence" per se is defined in terms of a practice which if introduced in a court of law would be repugnant to the principles on which the criminal law is based.

An analysis of our case law indicates that in practice, the question whether the requirements of

46 See chapter 2 *infra* for details. The criminal Procedure Act 56 of 1955 repealed the 1917 Criminal Procedure and Evidence Act. In 1977 the new Criminal Procedure Act 51 of 1977 was passed. Section 217 of the 1977 Act governs the admissibility of confessions.

47 Act 51 of 1977 (hereinafter referred to as the criminal code).

section 217 of the Criminal Procedure Act are met is determined by the trial court after having regard to the preliminary questioning by a magistrate or a justice of the peace prior to the minuting of a confession and the replies of the suspect. This procedure will be reviewed in order to ascertain whether it is satisfactory. A confession recorded by a police officer who is a justice of the peace and who is attached to the police unit investigating the crime presents problems in practice.*

The procedure developed by our courts for determining the admissibility of confessions will be reviewed. The problem to be researched in this regard relates to the burden of proof, in general, the shift of onus to the accused in the case of confessions reduced to writing by magistrates, the admissibility of similar fact evidence, cross-examination of an accused in a trial within a trial and other related issues. The reason for all this is to endeavour to point out areas that require legal reform.

48 See chapter 8 *infra* for details.

A confession must relate to the commission of an offence. A crime or an offence may be defined as conduct which the common or statute law prohibits and expressly or impliedly subjects to punishment which is remissible by the state alone and which the offender cannot avoid by his own act once he has been convicted." One may also define a crime as an unlawful human act, which is accompanied by a blameworthy state of mind and which is punishable by the state.⁵⁰ These definitions of a crime indicate that the law does not prohibit a mere act in *abstracto*. A confession must cover all the crime to which it refers. If one or more elements of a crime are not admitted in the confession then section 217 of the Criminal Procedure Act is not applicable. Similarly, a suspect can admit certain elements of a crime and the admissibility of his admission is governed by section 219A of the Criminal Procedure Act.

A confession must always relate to the commission of an offence by a perpetrator either as a perpetrator, co-perpetrator, a *socius criminis* or an accessory

49 Burchell and Hunt South African Criminal Law and Procedure Vol 1 General Principles of Criminal Law (1970) 46 and 55.

50 Hosten et al Introduction to South African Law and Legal Theory (1977) 690.

after the fact. In other words, the confession must connect the confessor with the commission of the crime and this should constitute an unequivocal admission of guilt on his part. In our law, a confession made by X is admissible only against X and not against Y.⁵¹

A trial within a trial is a technical procedure for an unsophisticated accused. Is this procedure satisfactory? Or should the law be reformed to ensure that an accused is apprised of his procedural rights prior to making a confession? An attempt would be made to answer this question in this thesis.

There is no law governing the length of period of interrogation of a suspect by the police. Our constitution does not incorporate a Bill of Rights enforceable by the courts. Such a Bill of Rights would protect fundamental rights of citizens. Yet one of the fundamental rights of citizens is that no person shall be deprived of his liberty, life and property without the due process of law; and that no person shall be obliged to be a witness against himself. This sounds American, but it is basic to our common law.

51 See section 219 of the Criminal Procedure Act 51 of 1977.

Police interrogation is inquisitorial in character and a criminal trial is based on our predominantly accusatorial system of criminal procedure. The apparent contradiction here is that the police use inquisitorial methods prior to the onset of an accusatorial trial. The police have access to the accused and may question him whereas the accused must not interfere with witnesses for the prosecution. Does the law take sides?⁵²

The overall problem to be investigated in this study is whether the criteria for the admissibility of a confession are adequate to ensure the protection of the rights of the accused. Should section 217 of the criminal code be retained or does it need to be amended? An attempt will be made to give an answer to this question.

1.5 Confession and plea of guilty

In Becker,⁵³ a confession was equated to a plea of guilty if made in a court of law. It is necessary, therefore, to compare the two concepts. An accused may plead guilty to a charge preferred against him or to

52 See chapters 3 to 13 for details.

53 *Supra* 171.

any competent verdict thereon.⁵⁴ In terms of section 112(1)(a) of the Criminal Procedure Act⁵⁵ the accused may be convicted without any evidence being led, provided that the death penalty may not be imposed unless the accused's guilt is proved as if he had pleaded not guilty.⁵⁶ This means that in minor cases which do not merit a punishment of a fine exceeding R1500, the accused may be convicted merely on his plea of guilty; while in cases where the offence merits the sentence of imprisonment without an option of a fine or whipping or a fine exceeding R1500, the court must first question the accused in order to be satisfied that he is in fact guilty.

An accused who has been convicted on the evidence of a confession may be sentenced to death or any other appropriate sentence. There is no law limiting the court's discretion to impose the ultimate penalty in this regard. Moreover, when a court considers a plea of guilty, its foremost concern is to establish whether the plea is true both in law and in fact.⁵⁷ A

54 Section 106(1)(a) of Act 51 of 1977.

55 Act 51 of 1977.

56 See sections 112(1)(a) and (b) of Act 51 of 1977.

57 Van der Merwe et al Plea Procedures in Summary Criminal Trials (1983) 26.

confession on the other hand is not admissible on the basis of its truthfulness. It must have been made freely and voluntarily by an accused in his sound and sober senses and without having been unduly influenced thereto.⁵⁸

Both a confession and plea of guilty must be made freely and voluntarily.⁵⁹ One rule of the adversary principle of criminal procedure is that what a party freely and voluntarily admits is proven.⁶⁰ A court is not obliged to convict where the accused has admitted all the allegations contained in a charge because it can hold that they were incorrectly admitted. In terms of Section 113 of the Criminal Procedure Act a plea of not guilty may be noted and all the allegations in the charge placed in dispute.

The overall implication of a plea of guilty is that the accused waives all his fundamental rights to be convicted only upon proof beyond a reasonable doubt that he is guilty, his right to remain silent, and his procedural right to apply for a discharge at the close of the case for the prosecution. Where an accused is

58 Section 217 of Act 51 of 1977.

59 Section 217(1) of Act 51 of 1977.

60 Van der Merwe 31.

represented by counsel at his trial, his decision to plead guilty is likely to have been made with full knowledge of all the consequences thereof. But, it is doubtful that an undefended accused has any knowledge of the consequences of his plea. A guilty plea is made in a court of law open to the public and under the protection of the law of criminal procedure. It is not a setting dominated by members of the police force.

The presiding officer is not involved in the investigation of the crime and is impartial. The court is not a party to the contest in the trial.

The overall implication of a confession, on the other hand, is that it must be made out of court. In some cases, a confession is made before a magistrate. That would offer some protection to an accused. But in most cases, a confession made before a magistrate is often a repetition of a statement made before a police officer after interrogation lasting several hours, if not days. Once a confession complies with the prescription of section 217(1)(b)(ii) of the criminal code,⁶¹ the court has no discretion to exclude it.⁶²

61 Act 51 of 1977.

62 Mphahlele 1982 4 SA 505 (A); Du Toit 24-62A.

A plea of guilt is always made in court,⁶³ whereas a confession may be made to police officers who are commissioned peace officers. The law does not prescribe special protection for the accused's making confessions to such officers.

In terms of section 112(1)(b), an accused may be questioned by the court.⁶⁴ An accused who has pleaded guilty, enjoys the following procedural rights:

- (a) The court does not have a right to cross-examine the accused.⁶⁵ An accused who opposes a confession in a trial within a trial may be cross-examined by the prosecutor.
- (b) The court is not expected to persuade the accused to deny or admit any allegation in the charge.

63 When the charge is put to an accused and requested to indicate his plea.

64 For further details on a plea of guilt see Mkhafu 1978 1 SA 665 (O); Cook 1977 1 SA 653 (A); Nqubane 1985 3 SA 677 (A); Sthoga 1990 1 SA 855 (T); Phundula 1978 4 SA 855 (T); Lebokeng 1978 2 SA 674 (O); Nkosi 1984 3 SA 345 (A); Afrika 1982 3 SA 1066 (C); Fikizolo 1978 2 SA 676 (NC); Ncube 1981 3 SA 511 (T); Baron 1978 2 SA 510 (C); Mboyi 1981 2 SA 494 (V); Tshumi 1978 1 SA 128 (N); Mkhize 1981 3 SA 585 (N); Jacobs 1978 1 SA 1176 (C); De Villiers 1984 1 SA 519 (O); Phikwa 1978 1 SA 397 (E).

65 See Jacobs supra 1177; Ncube supra 515; De Villiers supra; Du Toit 17-6.

The reason for this is that the accused has no onus to prove his guilt nor to justify or substantiate his denial. An accused has an onus, on the other hand, to prove on a balance of probabilities that a confession sought to be admitted into evidence was not freely and voluntarily made before a magistrate in his sound and sober senses.⁶⁶ Under such circumstances, a confession strengthens the case for the prosecution more than a mere plea of guilty. His credibility may be attacked and the court is expected to weigh his evidence carefully.

- (c) The accused may be invited to explain what happened in lieu of the questioning in terms of section 112(1)(b) of the Criminal Procedure Act.⁶⁷ This procedure is out of question where the admissibility of a confession is in issue. It would appear that a confession is "trusted" more than a plea of guilty.
- (d) In deciding whether to record a plea of guilty it is not the function of the court to evaluate the answers of an accused as if it were weighing

66 See section 217(1)(b) of Act 51 of 1977; Somjali 1979 2 SA 274 (E) 276.

67 Du Toit 17-7; Mkhize supra 586.

evidence or to judge the truthfulness of the accused's answers.⁶⁸ During a trial within a trial, (that is, in the case of a confession) evidence is given under oath and the court weighs it in terms of the general rules of the law of evidence. It is clear from this that a plea of guilty is not evidence and that the explanation given by the accused may be adopted by the court as true. Where the court is in doubt, it will not hesitate to enter a plea of not guilty in terms of section 113 of the Criminal Procedure Act.

It is clear from the above that when the court in Becker equated a confession with a plea of guilty it intended to refer to a successful plea of guilty. But in 1929 when the Becker case was decided, a confession could not be accepted in respect of rape, murder and high treason.⁶⁹ It is submitted that the definition of a confession was limited to the phrase "unequivocal acknowledgement of guilt". The so-called "equivalent of a plea of guilt if made before a court of law" is no longer clear as it was at the time.

68 Du Toit 17-7.

69 See n16 supra.

1.6 Admissibility of confessions and admissions compared and distinguished

The distinction between a confession and an admission is that a confession is an unequivocal acknowledgment of guilt, an equivalent of a plea of guilty if made in a court of law, whereas an admission is merely an acknowledgment of some of the facts that tend to prove guilt. An admission does not refer to all the elements of a crime, and a suspect may raise a ground of justification in spite of the fact that he has made some admissions.

Section 219A of the Criminal Procedure Act governs the admissibility of informal admissions.⁷⁰ The requirements for admissibility of an admission are three-fold. The statement must not constitute a confession. It must appear from the document on which it appears that it was made voluntarily. Lastly, an admission made to a magistrate or confirmed and reduced in writing before a magistrate shall be admissible upon mere production at the criminal trial. The question is whether the voluntariness of an

70 Act 51 of 1977.

admission and that of a confession is determined according to the same criterion.⁷¹

It is a requirement of our common law that there must be proof beyond a reasonable doubt that a statement was made freely and voluntarily before it is admitted in evidence.⁷² This requirement applies to all extra-judicial statements by an accused. The purpose of this rule is to ensure that an accused is given a fair trial and that justice is done. In Barlin⁷³ the appellate division summed up the common law rule as follows:

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

The question is whether the phrase "freely and voluntarily" in section 217 of the Criminal Procedure Act and the word "voluntary" in section 219A have the same meaning. In Mpetha (2) Williamson J concluded

71 A detailed analysis of the concept is done in chapter 4 *infra*.

72 Cele 1965 1 SA 82 (A); Hoffmann and Zeffertt 200.

73 1929 AD 459 462.

that these criteria convey essentially the same idea.⁷⁴ The opinion of the court was that the word "free" in the phrase "freely and voluntarily" does not seem to connote anything different from the word "voluntary".

The common law rule is somewhat artificial or technical in that the ordinary ambit of the concept "free and voluntary" is narrowed by the requirement that the threat or promise must proceed from a person in authority. The next question is whether the word "voluntary" in section 219A must be given the narrow common law meaning or whether it should be given its ordinary meaning. Williamson J⁷⁵ held:

"The concept of voluntariness in regard to admissions by an accused has an accepted meaning at common law, and it seems to me that stronger indications than are found in the provisions of sections 217 and 219A are required in order to justify a departure from the accepted common law meaning. I am accordingly of the view that in interpreting section 219A of the Act a court must accord to the word "voluntary" its ordinary common law meaning..."

The approach adopted by the court in Mpetha(2) is supported. The voluntariness of a confession and an admission is determined in terms of the same common

74 1983 1 SA 576 (C) 579.

75 Mpetha(2) *supra* 581.

law criteria. But a confession may be perfectly free and voluntary yet may be inadmissible solely because of undue influence.⁷⁶

1.7 Fair trial procedures

The admissibility of confessions is closely connected with the principle of fair trial procedures.

It is reasonable to conclude that the fundamental aim of a criminal trial could be described as the attainment of "justice" which encompasses the establishment of criminal liability and the determination, where applicable, of an appropriate penalty.⁷⁷ In any criminal dispute between the prosecution and an accused, the protection of the latter is effected firstly through the presumption of his innocence.⁷⁸ That implies that the prosecution must show cause for any interference with an accused's rights.

The factual dispute between the prosecution and an accused should be settled by the truth and the punishment imposed should not be excessive in relation to

76 Pietersen 1987 4 SA 98 (C) 100 per Williamson J.

77 Steytler The Undefended Accused (1988) 1.

78 Steytler 3.

the harm done. Van der Merwe rightly points out that:⁷⁹

"It is reasonable to assume, as a matter of principle, that the procedural and evidential systems of all enlightened countries are honest attempts to discover and protect the truth. They have a common goal. The existence of several different methods of discovering and protecting the truth can be explained in the light of history, because the main principles of procedure and evidence are not the products of scientific observation, but rather embody and represent a system of values shaped by the sometimes curious course of political, sociological and cultural history of a people, country or sub-continent."

It is clear, therefore, that justice is attained when the truth is discovered and acted upon. Ideally justice requires that the truth be attained.⁸⁰ This implies that the guilty must be convicted and the innocent acquitted in a criminal case. It is in this way that the truth is not only discovered but is acted upon. It is however, a fundamental principle of our criminal procedure that the truth should not be attained anyhow including the use of third-degree methods. Our criminal procedure is therefore based on certain values which must be upheld even to the

79 Van der Merwe "Accusatorial and inquisitorial procedures and restricted and free systems of evidence" in Sanders (ed) Southern Africa in Need of Law Reform (1981) 141; see Dlamini The Role of Chiefs in the Administration of Justice in KwaZulu unpublished LLD thesis UP (1988) 82-83.

80 Dlamini 82.

sacrifice of the truth.⁸¹ In this regard Hahlo and Kahn rightly point out that:⁸²

"truth is an elusive goddess, and judges, like other mortals, are not omniscient. An accused person or a party to a civil law suit may fail to avail himself of the opportunity of stating his case or may state it badly; there may have been no witnesses to an occurrence or it may not be possible to find them, or, if witnesses do give evidence, they may be lying or mistaken. Moreover, in the nature of things, on the same evidence one court may convict the accused, another acquit him, one find for the plaintiff in a civil case, another for the defendant."

Although the philosophy behind procedural and evidential rules in various systems is an honest attempt to discover and protect the truth,⁸³ the accusatorial and inquisitorial approaches differ in their way of protecting the truth. The essential characteristic of the accusatorial system of criminal procedure is that the onus is on the parties to advance their cases for a decision to be made by the judicial officer, who remains passive throughout the

81 Compare Steytler 2.

82 Hahlo and Kahn (eds) The South African Legal System and Its Background (1968) 49; see Dlamini 82..

83 Van der Merwe 141; Dlamini 181.

proceedings.⁸⁴ In the inquisitorial system, on the other hand, the judicial officer plays the most active role by conducting the proceedings to their conclusion.⁸⁵

1.8 Rationale for exclusion of coerced/involuntary confessions

The question may be asked as to why involuntary and coerced confessions are excluded from evidence.⁸⁶ The

84 See Zeidel "Evaluation of the adversary system: a comparison, some remarks on the investigatory system of procedure" 1981 Australian L.J. 390 391; Steytler 4.

85 Steytler 4; the following sources were used in describing the two models Hermann "Various models of criminal procedure" 1978 SACC 3 5; Snyman "The accusatorial and inquisitorial approaches to criminal procedure; some points of comparison between the South African and continental systems" 1975 CILSA 100 103; Brouwer "Inquisitorial and adversary procedures - a comparative analysis" 1981 Australian L J 207; Damaska "Evidentiary barriers to conviction and two models of criminal procedure: a comparative study" 1972-73 Univ. of Pennsylvania L.R. 506. For further information on fair trial procedures, refer to Steytler 5-7; Steytler 135-141; Snyman 108; Van der Merwe 143; Dlamini 181-182; Riekert 1954 4 SA 254 (SWA) 261; Gardiner et al South African Criminal Law and Procedure (1957) 16; Filanius 1916 TPD 415 417; Van Rensburg 1963 2 SA 343 (N) 343; Takaendesa 1972 4 SA 72 (RA) 75; M 1982 1 SA 240 (N) 244; Hassim 1971 4 SA 492 (N) 494; Tapera 1964 3 SA 771 (SRA); Masinda 1981 3 SA 1157 (A) 1162; Wigmore Evidence 5ed par 1367; Colman Cross-Examination (1970) 1; Ferreira Strafproses in die Laer Howe (1979) 417.

86 See Kotzé Selfinkriminasie in die Suid-Afrikaanse Strafprosesreg unpublished LLD thesis UP (1988) 10-31.

traditional view is that in the Anglo-American law, there are three theories governing the exclusion of some confessions from evidence, namely the reliability principle; the disciplinary principle and the protective principle. In practice, these principles or theories do not exclude each other.

1.8.1 The reliability principle

Wigmore took the view that the principle upon which a confession may be excluded was that it was, under certain conditions, testimonially untrustworthy.⁸⁷ He formulated the test to determine whether a confession was admissible or not as follows:⁸⁸

"... (was) the inducement such that there was any fair risk of a false confession?"

In our law, De Villiers CJ formulated the reliability principle in Steve⁸⁹ as follows:

"A fair test of undue influence in such a case is: was the influence such as would have induced the prisoner to tell what was not true?"

87 Wigmore 1961 par 822.

88 Wigmore 1961 par 824.

89 1889 7 SC 103 104.

This test has been quoted with approval in several reported decisions.* Similarly, the appellate division in Samhando⁹¹ restated the principle that the fundamental reason why admissions by an accused person made under inducement are not admitted as evidence against him is because they are untrustworthy as testimony. However, in 1968 the appellate division in Radebe⁹² per Ogilvie Thompson JA (as he then was) expressed a doubt in his judgment that it was not clear to him that Wigmore's test could be equally usefully invoked in relation to an enquiry as to whether or not a confession was voluntary. In his view, Wigmore's criterion should not be regarded as affording a comprehensive test which is in itself decisive in all cases. The reason for this holding is that in some cases a judge may think that the contents of a tendered confession are true, but the circumstances whereunder the confession was made compel its exclusion. The overall enquiry was whether the relevant words of section 244(1) of the criminal code⁹³ were satisfied.

90 Dhlamini 1949 3 SA 976 (N) 979; Kearney 1964 2 SA 495 (A) 498; Afrika 1949 3 SA 627 (O) 634; Van As 1941 AD 361; Joone 1973 1 SA 841 (C) 846.

91 1943 AD 608 613.

92 1968 4 SA 410 (A) 418-419.

93 Act 56 of 1955.

It would appear, therefore, that in our law the overall enquiry is whether the provisions of section 217 of the Criminal Procedure Act⁹⁴ are met before a ruling can be made whether a confession is admissible in evidence. In criminal cases where the admissibility of a confession is in issue that is the question which the court must determine.⁹⁵

1.8.2 The disciplinary principle

In terms of the disciplinary principle, involuntary statements of suspects are excluded from evidence as a sign of disapproving police methods used to secure them.⁹⁶ In our law, the disciplinary principle does not constitute a ground on which a confession can be excluded from evidence. However, our courts have repeatedly condemned untoward conduct of the police.⁹⁷

1.8.3 The protective principle

An accused has a right to be protected against violation of his rights, especially the right to

94 Act 51 of 1977.

95 See Radebe *supra* 418-419.

96 Kotze 14.

97 Zulu 1965 3 SA 802 (N) 805; Mushimba 1977 2 SA 829 (A) 845; Pwane 1966 2 SA 433 (A); Mpetha(2) 1983 1 SA 576 (C), 591-594; Pietersen 1987 4 sa 98 (c) 100.

silence.⁹⁸ In Segone,⁹⁹ the court rejected a confession because the police used a tape recorder to tape a confession which was made to a magistrate.

1.8.4 The justice principle

The state has a duty to protect its citizens against unlawful infringements of their rights to personal safety and freedom. No citizen may be subjected to an inhumane conduct. The procedural rights of an accused in a criminal trial are protected and guaranteed by the stringent rules of admissibility of evidence and other rules of procedure. A confession has far reaching consequences for an accused. The state being an authority over citizens tries to minimise the possible abuse of powers by the police. It is submitted that the reason behind that is recognition of the overall purpose of a criminal trial - namely to attain justice. The justice principle is a combination of the three principles discussed above in connection with the admissibility of confessions.

98 Kotze 19.

99 1981 1 SA 410 (T).

1.9 Conclusion

This study will focus on the problem of admissibility of confessions in a criminal trial. Section 217 of the Criminal Procedure Act sets out the criteria for the admissibility of confessions. The Bill of Rights enshrined in our new constitution¹⁰⁰ will have an impact on the admissibility of confessions. For that reason, it will be necessary to refer to a foreign law which has a Bill of Rights. American law will be closely scrutinized in this regard.¹⁰¹

It is within the spirit of our Bill of Rights that foreign case law and public international law should be referred to when interpreting it. Any law which conflicts with the spirit of the Bill of Rights should be interpreted restrictively except where to declare it null and void is the only correct decision that may be handed down by a court of law.

100 See sections 7-35 of the Constitution of South Africa Act of 1993.

101 See chapters 12 and 13 *infra*.

CHAPTER TWO

HISTORY OF CONFESSIONS

2.1 Introduction

Legal rules can be found in text books and parliamentary enactments. A true comprehension of these, however, requires some knowledge of their past. The purpose of this chapter is to give an historical evolution of the law governing confessions. Although this study is not about the right to remain silent, it is possible to regard the law of confessions as one manifestation of that right. Similarly, although this investigation is not about torture, torture as a method used in the past for eliciting a confession will be discussed.

2.2 Torture in general

One commentator¹ remarked that the word "torture" is sufficient to conjure in the minds of many a feeling of revulsion, distaste, discomfort and anger. A dictionary definition of torture includes:

1 Rudolph Security, Terrorism and Torture: Detainees Rights in South Africa and Israel: A Comparative Study (1984) 155.

"the infliction of excruciating pain, as practised by cruel tyrants, savages, brigands [and others] as a means of extortion; spec. judicial torture, inflicted by a judicial or quasi-judicial authority, for the purpose of forcing an accused or suspected person to confess, or an unwilling witness to give evidence or information;...."²

Broadly speaking, torture may be classified into two categories;³ namely "terroristic torture" and "interrogational torture". In the case of "terroristic torture", the purpose of the torture cannot be accomplished and may not even be capable of being influenced by the victim. This type of torture is exercised for no particular reason other than the ultimate death of the victim. It would appear also that terroristic torture may be applied to a hostage in order to persuade interested parties to honour certain demands. This type of torture is not relevant to the law of confessions.

The purpose of "interrogational torture" is to extract information from the tortured person. As soon as the required information is obtained, the "torture" is discontinued - in this way, then, the tortured person

2 The Oxford English Dictionary (Compact ed) 3357; see Rudolph 160.

3 Rudolph 160; see Shue (1977-8) Philosophy and Public Affairs 124-132.

can influence the extent to which he may be subjected to torture.⁴

Holdsworth warned that:

"Once torture has become acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it."⁵

On the other hand, it has been said that terror and brutal investigation of crime are siamese twins that can never be separated.⁶

2.3 Early history of the law of confessions

Interrogation as a method of investigating crime is not new. The bible informs⁷ us that when Adam was asked: "Hast thou eaten of the tree?" his reply was: "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat." A question was also put to Cain. He was asked: "Where is Abel thy brother?" and he replied evasively: "Am I my brother's keeper?"

4 See para 2.4 *infra*.

5 A History of English Law (1924) 194-5.

6 Rudolph 176 where the learned author quoted Danny Rubinstein "On dealing with terrorists" Jerusalem post 15 February 1979.

7 Genesis 3:11 and 4:9-10.

The practice of subjecting an accused to interrogation, which frequently included the use of torture, was familiar to both the Greeks and the Romans.⁸ Among the Greeks and under the Roman Republic torture was almost entirely confined to slaves, and as a rule no free citizen was subjected to it. In Greece, it was thought to be the only way to have the truth from a slave if he had been tortured. The Greek orators shared the view that a slave's evidence given under torture was always true, whereas evidence given freely was often false. The psychology underlying this view was that a man - and more particularly a slave - would tell all sorts of stories in order to avoid being tortured; but if he persisted in his story under torture, it must surely be true.⁹ The other reason for torturing slaves is to be found in the belief that slaves, being absolutely at the mercy of their masters, would naturally testify in accordance with the masters' wishes, unless some strong incentive to speak the truth were brought to bear on them.¹⁰ The law was that evidence of an untortured slave was suspected of falsehood.

8 Cohn "Tortures and confessions" cited in Friedman Admissions and Confessions, Studies in Canadian Criminal Evidence (1972) 98.

9 Cohn 98; see Kaufman The Admissibility of Confessions in Criminal Matters (1974) 2ed 13; Lowell "The judicial use of torture" 1897-98 Harvard L Rev 220.

10 Lowell 22.

Similarly, the Romans did not permit slaves to testify, save in a few cases.¹¹ But when they testified, their evidence was as a result of torture.¹²

In England, the practice of torturing suspects was in existence until the reign of Charles I.¹³ In Scotland the use of torture was not abolished until 1709.¹⁴ Gradually, the practice of torture was discontinued, and the emphasis shifted to threats.

Our law of evidence has its roots in English law. English law of evidence was applied in our courts until 1961 when the Union of South Africa became the Republic of South Africa. Similarly, the American and the Canadian law of evidence was originally based on English law. In English law, a confession was originally regarded as a plea of guilty and as such, it was regarded as "the best and surest answer that can be in law for quieting the conscience of the judge and for making it a good and firm conviction."¹⁵ During

11 Kaufman 13.

12 Buckland A Text book of Roman Law (1950) 657.

13 Charles I was King during the period 1625-1649; see Jardine Use of Torture in the Criminal Law of England (1836).

14 See The Treason Act, 1708 (UK).

15 Kaufman 1; see Stanford Pleas of the Crown (1607) 51; Hawkins Pleas of the Crown (1716) 31.

the eighteenth century this meaning of a plea of guilty (that is, a judicial confession) was expanded to include an extra-judicial confession. The latter is a confession as defined earlier on.¹⁶

The English court remarked in Rudd¹⁷ that a confession made under threats or promises must be excluded in the ensuing trial. Lord Mansfield based his *obiter dictum* on his experience of cases decided before the Rudd decision. As far as it can be established in English case law, the Rudd case is regarded as a beginning to the recognition that a confession is admissible if it is a free and a voluntary statement admitting guilt.

Following the *obiter dictum* in the Rudd case, a meeting of English judges was called upon to decide a question of law reserved in Warickshall.¹⁸ The trial court had to reserve a question of law because at that time an accused had no right to appeal nor a right to testify on his behalf or to employ the assistance of counsel. The facts in the Warickshall case were briefly as follows:

16 See Chapter 1 *supra*.

17 (1775) 168 ER 160.

18 (1783) 168 ER 234.

W had been charged as an accessory after the fact in that she had received stolen property knowing it to have been stolen. W confessed her guilt, and the stolen property was found in W's bed as a result of her confession. The trial court, per Lord Campbell CJ, rejected the confession because it had been made as a result of a promise of favour. The question then was whether the evidence of the property discovered as a result of an inadmissible confession was admissible. Counsel for W argued that both the inadmissible confession and the evidence of the discovered property was inadmissible on the same ground. The court rejected that argument.¹⁹

The reason for such rejection was because counsel's argument had been based on a mistaken notion. The opinion of the court was that confessions were received in evidence or rejected under a consideration whether they were entitled to credit or not. The court held that a free and voluntary confession is deserving the highest credit because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers.²⁰ But, a confession forced from the mind by the flattery

19 Warickshall 234.

20 Warickshall 235.

of hope, by torture or fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it. This principle is not applicable to facts discovered as a result of an inadmissible confession. Such facts must be proved independently without recourse to the inadmissible confession from which they have been derived. The underlying principle here is that facts discovered as a result of an involuntary confession exist invariably in the same manner notwithstanding how they were found. The Warickshall decision was made during the period when the death penalty was a competent sentence for theft. The court rightly held that it would be an exceedingly hard case that a man whose life is at stake, having been lulled into a notion of security by promises of favour, was nevertheless condemned as a result of his confession.

The impact of the Warickshall decision on later cases²¹ was that for a confession to be admissible it had to be satisfactorily proved that it was made freely and voluntarily without an inducement made by a person in authority. This enabled the courts to reject a confession if a slightest inducement was proved to be present during the making thereof. The courts were

21 See Thompson (1783) 1 Leach c.c. 291.

inclined to suppress almost all confessions. This was caused by various factors.

The character of an accused brought to court following a confession elicited sympathy from the courts.²² Those accused came mostly from the lower classes. As such, they were characterised by subordination, half respectful and half stupid towards those in authority over them.²³ Moreover, accused persons could not appeal against their conviction and sentence. For all practical purposes, criminal appeals in English law were not allowed until 1907 when the Court of Criminal Appeal was established.²⁴ The practice before that was the reservation of a question of law by trial judges for subsequent consideration by a meeting of judges. The other option was that a trial judge should discuss doubtful cases with his accessible colleagues. That practice involved delays, and judges preferred to reject doubtful confessions. In this way many confessions were rejected even where there was insufficient reason for doing so. The other reason for a court's sympathy with accused persons was that at

22 Chadbourn Wigmore's Evidence in Trials at Common Law (1970) vol 3 at 298 et seq.

23 Chadbourn 299.

24 The Criminal Appeal Act, 1907 (UK) clause 23.

common law the accused had no right to testify on his behalf or to engage the assistance of counsel in his defence. The right to legal representation was not given until 1836. But as early as 1750 it had become customary to allow counsel to cross-examine for the accused and to do everything except addressing the jury.²⁵ Prior to 1820, two hundred and twenty-two offences were punishable with death. For that reason, a confession was excluded on every available pretext.

The leniency of the courts after the Warickshall decision had to be brought to an end. For that reason, Baldry²⁶ was decided in 1852 (that is seventy-nine years after Warickshall) as a means to put the law of confessions in its proper perspective. The facts of that case were as follows: B was charged with murder in that he had allegedly administered poison to his wife with intent to murder her. A policeman was called to investigate the crime. B was questioned by the policeman in the presence of Dr V and P, another constable. B covered his face with his handkerchief and the interrogator believed that B was crying. B was warned that he need not say anything to incriminate himself, but that what he said would be taken down and

25 Chadbourn 300.

26 (1852) 169 ER 568.

would be used as evidence against him. B made a confession. The question to be decided by the court was the admissibility of that confession.

Counsel for B argued that the confession ought to be rejected because the warning implied that B's case was so bad that if he had told the truth he could not deny it.²⁷ This argument amounted to saying that B had been coerced to confess. Counsel for B argued further that the law was suspicious in the highest degree of confessions, because it suspected that the judge was not getting at the truth as to the way in which the confession was obtained. Counsel's argument was interrupted by Lord Campbell who asked whether the following words imparted a promise or threat:

"You need not say anything to incriminate yourself, but what you do say will be taken down and used in evidence against you."

B's counsel argued that if you show a suspect that you entertain a conviction that he is guilty, that has the effect of disarming him, and that what you say thereafter has the effect of inducing him falsely to incriminate himself. The court did not find this elaborate and able argument of counsel persuasive enough. Pollock C B (that is, Chief Baron) remarked

27 Baldry *supra* 571.

that the reason why an involuntary confession was not admitted in evidence was that it would not be safe to receive a statement made due to any influence or fear.²⁸ There is no presumption of law as to the falsity or unreliability of an involuntary confession.

An involuntary confession is rejected because the court deemed it dangerous to leave it to the jury. The jury is a trier of fact whereas the judge is the trier of law. It was not clear what weight a jury would give to an involuntary confession. That is the reason for its exclusion from the evidence. A caution to the accused had the effect of reminding him that he was not obliged to say anything but if he said anything it had to be true. But this caution had to be distinguished from the situation where the accused had been informed that it was "better" for him to tell the truth because it imparted that it was better for him to say something. That may constitute a promise. *In casu*, Lord Pollock found that the caution was in order and that it had the effect of warning the accused that he did not need to incriminate himself and that what he said would be used as evidence either of his guilt or as evidence in his favour.

Parke B (that is Baron) concurred in the above decision and added that in terms of the common law, a confession was rendered admissible in evidence if there was proof that it was perfectly voluntary, and that any inducement held out by a person in authority, initiated the confession.²⁹ Lord Parke confessed that he looked at previous decisions with some shame as the rules excluding confessions had been extended too far, and in that way justice and common sense had been too frequently sacrificed at the shrine of mercy. Eyre J also concurred and pointed out that when a confession was well proved it was the best evidence that could be produced; and that unless it could be clear that there was no threat or promise to have induced it, it ought not to be excluded. Eyre concurred that justice and common sense had been sacrificed, not at the shrine of mercy, but at the shrine of guilt.

In Thompson³⁰ the court made it abundantly clear that the burden is on the prosecution to prove the voluntariness of a confession beyond a reasonable doubt. If there is no proof, the court must reject the confession.

29 Baldry *supra* 574.

30 (1893) 2 QB 12.

2.4 Views of some Roman-Dutch writers on torture

Our law of confessions has the influence of both English law and Roman-Dutch law. The influence of English law has been discussed above. The purpose of the following account is to give an exposition on the views of some Roman-Dutch writers on torture as a method for extracting confessions in the past. The views of the Roman-Dutch writers on the use of torture in the administration of justice were divided.³¹ Some defended the use of torture; others supported it subject to certain qualifications and there were still others who were opposed to the use of torture very strongly.

Philippe Wielant³² gave an exposition of the manner in which crimes were brought to the attention of the judge, the manner in which an accused was brought to court, the steps which were taken after arrest as well as the examination of the accused under torture.³³ He supported the application of torture in so far as it was applied moderately after taking into account both

31 The exposition that follows is based on Rudolph 161-170.

32 Practijcke Crimenele (referred to by Rudolph 161).

33 See Letts "The administration of criminal law in Flanders, chiefly in the fifteenth century" 1926 SALJ 381 390.

the age and the state of health of the tortured person.³⁴ According to Wielant, a victim could not be tortured more than once for the same offence. A judge, however, could allow a victim to be tortured more than once if in his opinion the crime had been fully established by evidence of other witnesses and the victim was merely recalcitrant.

According to Wielant, a confession made under torture was reduced to writing and the confessor was asked to confirm its voluntariness the following day. If the confessor refused to confirm the volitional aspect of the confession, he was again ushered into the torture chamber.³⁵ There were persons who were exempted from torture. These were pregnant women, idiots, children under fourteen years of age, doctors, soldiers, governors of towns and certain officials. The reasons for such exemptions are unknown.

Dionysius van der Keessel³⁶ supported the use of torture. In his lectures on criminal law, he gave an exposition of the power of interrogation (*quaestio*), which he described as an examination by force into the

34 Rudolph 162.

35 Rudolph 162.

36 Praelectiones ad Jus Criminale (meaning Lectures on Criminal Law) delivered between 1772-1782. (discussed by Rudolph 167-170).

truth; and that was conducted through torture.³⁷ Van der Keessel emphasized that the purpose of the interrogation should be to "uncover the truth, and ... torture must in no case be administered in order to punish."³⁸ He conceded that:

"all administration of pain to one whose crime is not yet proved, is unjust ... Torture must not be permitted if the guilt or innocence of the accused is in doubt. But its injustice is greatly reduced if we apply torture only in the case where a judge has been persuaded that the accused has committed a crime, and, accordingly, we apply it in order to make room for legal certainty through a confession. Then whatever injustice there is in this respect, it is abundantly compensated for by the benefit to the public, indeed also by necessity."³⁹

He also believed that torture should not be considered in the abstract. The views of Van der Keessel on the application of torture may be summed up as follows:

- (a) During the investigation of any crime, the accused must first be interrogated without torture in order to establish the *corpus delicti*

37 Rudolph 167; see Beinart and Warmelo (eds) Lectures on Books 47 and 48 of the Digest setting out the Criminal Law as applied in the Courts of Holland (Based on the Cornelis van Eck and on the New Criminal Code, 1809).

38 Rudolph 167; Beinart and Warmelo 1739.

39 Translated by Beinart and Warmelo 1763-5.

before an accused is tortured.⁴⁰ The reason for this is that torture was not necessary if the accused had not refused to answer the judge's questioning. In Van der Keessel's view, torture should be used sparingly in the sense that it must never be employed if the truth could lawfully be discovered and proved in another way.⁴¹

- (b) As a general rule, public law must indicate circumstances under which the application of torture was not allowed. In other words, it must not be prescribed to the judge when he is obliged to elicit truth by torture. The judge may elicit evidence by torture if he had been persuaded by proper evidence of the crime.⁴²
- (c) Slaves and free persons of lower rank could be tortured. However, persons of high office and their children up to the third degree, soldiers, veterans and their children, sick persons, pregnant women and all children under the age of puberty were exempted from torture.⁴³

40 Beinart and Warmelo 1853; Rudolph 168-169.

41 Beinart and Warmelo 1767.

42 Op cit 1767.

43 Rudolph 168; Beinart and Warmelo 1813 and 1821.

- (d) Torture could be repeated if the accused was implicated by new evidence, but where an accused persisted in his denial after repeated torture, he could be absolved from the crime.⁴⁴

Johannes Voet⁴⁵ was one of the enthusiastic supporters of the application of torture. He took the view that torture was a natural method of obtaining evidence in terms of which a suspect incriminated himself.⁴⁶ He maintained that torture should not be applied unless there was a grave presumption against the accused.⁴⁷ If there was sufficient proof that the accused was guilty, it was not necessary to torture him just for the purpose of extracting a confession from him.⁴⁸

Ulric Huber⁴⁹ supported the use of torture. His main reasons for supporting the use of torture may be summed up as follows:

44 Beinart and Warmelo 1997.

45 His work was Commentarius ad Pandectas (meaning Commentary on the Pandects of Justinian), which was translated by Percival Gane. However, the chapter on torture was merely summarised.

46 Rudolph 164.

47 Rudolph 165; see Gane 48.18.2.

48 Gane 48.18.6; Rudolph 165.

49 Heedendaegse Rechtsgeleertheyt translated by Percival Gane as The Jurisprudence of My Time II (1939).

- (a) He took the view that many guilty persons could not be convicted without it;
- (b) "the law that tends to the common weal must be taken to have been imposed by the general consent of every citizen, though hard in some cases;"⁵⁰ and
- (c) The advantages derived from the use of torture outweighed the evil. For that reason he felt that it must be left to the discretion of the judge as to the degree to which a suspect should be tortured. Simon van Leeuwen also defended the use of torture as he argued that the use of torture should be condoned in the following words:

"Upon such proofs as would almost alone amount to sufficient certainty, only that in such event nothing else is wanting but the confession of the accused, in order to convict him with sufficient certainty of the offence out of his own mouth."⁵¹

According to Van Leeuwen, torture could not be justified upon the basis of a rumour or a report. A

50 See Rudolph 166.

51 Het Roomsche Hollandsche Recht 5.28.1 translated by J G Kotzé Simon van Leeuwen's Commentaries on Roman-Dutch Law II (1886) 559.

testimony of a witness was a prerequisite or evidence of bad character of the accused.⁵²

There were Roman-Dutch writers who were opposed to the use of torture. Willem Schorer⁵³ for instance did not support the argument that the evidence extracted by torture was reliable simply because it had been "voluntarily" confirmed the following day after the application of torture. The reason for this is that the victim knew that if he did not confirm the confession he could be ushered into the torture chamber again.⁵⁴ Jan Samuel Amalry⁵⁵ agreed with Schorer's attitude towards the use of torture and urged that no credit-worthiness could be attached to a confession made under torture or under threat of incarceration. It was impossible for a judge to decide whether the confession was due to the pain emanating

52 Rudolph 165. Other advocates of the use of torture were Henricus Calkoen Verhandeling over het Voorkom en straffen der misdaden (1778) 250; Davius Voorda in his book De Criminele Ordonantion van Koning Philips van Spanje. (Title shorted by author).

53 Vertoog over de ongerymdheid van het samenstel orzer hedendaagsche regsgeleerdheid en praktyk (1777).

54 Schorer 109; Rudolph 163.

55 Rudolph 163; Schorer 23.

from the application of torture or the truth.⁵⁶

The exposition of the views of some Roman-Dutch writers on the use of torture shows that although many supported it, some did oppose it. The use of torture in Holland was abolished in 1798.⁵⁷

2.5 Torture and its impact on confessions in South Africa during the period 1652-1795

The Dutch East India Company was in control of the Cape during the period 1652-1795. In terms of the Octrooi, this company was empowered to administer law and order in the areas under its jurisdiction.⁵⁸

Criminal proceedings were mainly based on the inquisitorial system of criminal procedure.⁵⁹ It was a requirement that the trial be heard in camera and that only the verdict be pronounced in an open court.

56 Other opponents of the use of torture were Johannes Nicolaus Reinar who published Nemesis reitionalis of redenkundig verhoog over het crimineele recht, uit het naturrecht afgeleid en volgens het civile recht voorgesteld in 1778; Antonius Matthaens II who wrote Commentarius de Criminibus (1644).

57 Rudolph 170.

58 See Rudolph 205-206; Groot Placaet-Boeck I 530; Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution (1960) 10-11.

59 Rudolph 205.

However, where a death penalty was to be imposed, the accused had to make a confession. To force him to do this, he was subjected to torture.⁶⁰

Rudolph states that although the methods of torture were not uniform, they did have at least one thing in common, namely that the pain caused by the act of torture must have been excruciating.⁶¹ Rudolph concludes that:

"Other methods apparently employed to extract confessions included the gradual stretching of the accused on the rack in the 'pyn kaemer', and the placing of the accused in a special dark room in the Castle at Cape Town while, at the same time, subjecting him to a minimal diet of bread and water. A period of four to six weeks' incarceration in the dark room usually had such a depressing effect on the accused that he would, in almost all cases, be thereafter prepared to confess his guilt to virtually any charge."⁶²

When the British assumed control of the Cape in 1795, the system of officially sanctioned torture was abolished.⁶³

60 Rudolph 205.

61 See Rudolph 206.

62 Rudolph 206; see Venter Die Geskiedenis van die Suid-Afrikaanse Gevangenisstelsel 1699-1732 (1959) 9.

63 Rudolph 206.

The Roman-Dutch law relating to the extraction of confessions is therefore effectively irrelevant. It is based on the discredited practice of torture. Although torture may have been abolished, the practice may be continued in various ways. The legal abolition of torture, however, implies that if an accused alleges that he had been tortured, the reliability of his "confession" is immediately at issue.

There are procedures surrounding the recording of confessions that have their roots in Roman-Dutch law. The practice of producing a suspect before a judge to confirm the voluntariness of his confession, is one example. Nowadays a suspect is produced before a magistrate or justice of the peace to make a confession. It would have been difficult to think of this procedure had it not been followed in Roman-Dutch law. The other influence of Roman-Dutch law is that a confession made to the police must be repeated before an impartial judge to ensure its voluntariness. By implication, this indicates that Roman-Dutch law was alive to the fact that a suspect's statement to the police may have been made for other reasons than that it was true. Hence the requirement that its voluntariness be repeated before an impartial judge.

What is completely unacceptable in Roman-Dutch law is that a judge could order that a suspect be tortured

for the second time for the same offence. Although the torture was for purposes of extracting information only, it was nevertheless a barbaric method of investigating crime. For a judge to stoop so low as to order that someone be tortured is disquieting, to say the least.

The fact that torture was eventually abolished in Roman-Dutch law implies that the criteria for the admissibility of confessions, admissions and exculpatory statements should be reviewed from time to time to ensure that they are compatible with fair trial procedures. It is clear that when the legislature passed the Criminal Procedure and Evidence Act in 1917, especially section 273(1) of the 1917 Act, it was influenced by the early history of Roman-Dutch law. The arguments of the Roman-Dutch writers who were opposed to torture were so persuasive that torture was abolished.

2.6 The history of legislation governing the admissibility of confessions

In 1917 our legislature passed the Criminal Procedure and Evidence Act.⁶⁴ The requirements for the

64 Act 31 of 1917.

admissibility of a confession were set out in section 273(1) of that Act. The requirements were partly an enactment of the criteria enunciated in the Warickshall and Thompson cases. Their additional requirements were namely that at the time of making the confession the accused must have been in his sound and sober senses; and that there must have been an absence of undue influence.⁶⁵ Moreover, section 273(1) of the 1917 Act contained a *proviso* that if a confession was shown to have been made to a peace officer other than a magistrate or justice of the peace, it was not admissible in evidence unless it was confirmed and reduced to writing in the presence of a magistrate or justice of the peace. This disqualification was absolute. But such an inadmissible confession became admissible against the accused who made it if he or his representative adduced any evidence either directly or in cross-examination, of any statement, verbal or in writing, made by him if in the opinion of the judge or magistrate, the evidence so adduced was favourable to him. This *proviso* was enacted presumably in consequence of the decision of the appellate division in Jenkins⁶⁶ that a confession otherwise

65 Section 273(1) of Act 31 of 1917.

66 1920 AD 307; Lansdown South African Criminal Law and Procedure (1946) 5ed 478.

inadmissible in terms of section 273(1) of the 1917 Criminal Procedure and Evidence Act was admissible where counsel for the accused had referred to it in his cross-examination of witnesses of the prosecution.

In terms of section 275 of the 1917 Act, a confession was admissible as evidence only against the person who made it and not against any other person. Where the admissibility of a confession was to be contested, that had to be done before the evidence of the statement in question has been led. This was done in the absence of the assessors or jury. The accused had a procedural right to have the issue of the admissibility of a confession determined separately from the issue of guilt; and he was entitled to give evidence without thereby subjecting himself to cross-examination on the main issue relating to his legal guilt.⁶⁷ The appellate division enforced this procedural right of the accused.⁶⁸

In 1955 our legislature enacted the Criminal Procedure Act 56 of 1955. The 1955 Act repealed the 1917 Criminal Procedure and Evidence Act. Section 244 of the 1955 Act governed the admissibility of

67 Lansdown 480.

68 Dunga 1934 AD 223 and Cowell 1940 CCA 163 LT 158.

confessions. Its provisions are similar to those of section 273(1) of the 1917 Act. In 1977 the new Criminal Procedure Act was enacted.⁶⁹ Section 217 governs the admissibility of confessions. This section⁷⁰ replaces section 244 of the Criminal Procedure Act of 1955.

2.7 Detentions and police interrogation

The historical development of our law of confessions was considerably influenced by the security laws that governed detentions of persons since 1963. Of importance to this study is the detention of persons for purposes of interrogation because that has a direct bearing on the voluntariness or otherwise of a confession.

There is no doubt that police questioning plays an important role in the investigation of crime. Yet this questioning should be conducted within limits to prevent abuse. Instead of subjecting police questioning to checks and balances, our legislature introduced

69 Act 51 of 1977.

70 A detailed discussion of section 217 of the Criminal Procedure Act of 1977 is in chapters 3 to 11 infra.

measures to force persons to speak.⁷¹ Weisberg⁷² once said:

"To discuss police questioning without knowing what such questioning is really like [is] playing Hamlet without the ghost."

In the case of Miranda v Arizona⁷³ the American supreme court referred to manuals on police interrogation procedures.⁷⁴ There appears to be unanimity amongst American commentators that police questioning or custodial interrogation plays a vital role in confessions in law. In other words, the general rule is that interrogation begets confessions. Where a

71 Section 29 of the Internal Security Act 74 of 1982.

72 "Police interrogation of arrested persons: a sceptical view" in Police Powers and Individual Freedom (1962) 155 (Sowle ed.) quoted in Kamissar "What is an involuntary confession? Some comments on Inbau and Reid's "Criminal Interrogation and Confessions" 1963 Rutgers L. Rev. 728.

73 384 US 437 (1966) 448-56; see chapter 13 *infra* for details.

74 See Inbau and Reid Criminal Interrogation and Confessions (1962); Kid Police Interrogation (1940); LaFave Arrest: The Decision to take a Suspect into Custody (1965); LaFave "Detention for investigation by the police: an analysis of current practices" 1962 Wash. U.L.Q. 331; Barrett "Police practices and the law - from arrest to release or charge" 1962 Calif. L. Rev. 11; Inbau and Reid Lie Detection and Criminal Interrogation 3ed (1953); Sterling "Police interrogation and the psychology of confessions" 1965 J.Pub.L. 25; Potts "The preliminary examination and the 'third degree'" 1950 Baylor L.Rev. 131; Bato and Vorenberg "Arrest, detention, interrogation and the right to counsel" 1966 Col.L.Rev. 62; Hermann "The supreme court and restrictions on police interrogations" 1964 Ohio St.L.J. 449; see chapter 13 *infra* for details.

statement is volunteered, the suspect is nevertheless subjected to "light" interrogation before the statement is recorded.

2.8 Conclusion

From the foregoing it is clear that interrogation as a method of investigating crime is not new. Although this investigation is not about torture, torture as a method used in the past for eliciting incriminating statements and/or confessions has been discussed. This study has shown that in the past the interrogation of a suspect was accompanied by the so-called "interrogational torture". The purpose of this type of torture was to extract information from the tortured person. The use of torture was formally abolished in South Africa in 1795 when the British assumed control of the Cape.

It is also clear from the foregoing that the controversy surrounding the admissibility of pre-trial statements of an accused is not new. Some writers⁷⁵ regarded the application of torture to an accused as an incentive to speak the truth. The accused was asked to confirm the voluntariness of a confession made

⁷⁵ Philippe Wielant; Van der Keessel; Johannes Voet and Ulric Huber.

under torture before the judge the following day. If he failed to confirm the voluntariness, he was ushered in the torture chamber again. Under certain circumstances the judges ordered that a suspect be tortured for the second time. Some writers⁷⁶ did not support the use of torture and did not agree that a suspect who confirms the voluntariness of a confession made under torture does so freely and voluntarily, because he knew that if he did not he would be ushered into the torture chamber again.

In 1917 the Criminal Procedure and Evidence Act was passed, and for the first time the admissibility of confessions was governed by a parliamentary enactment.⁷⁷ In terms of the 1917 Act, a confession made to a policeman who is not a justice of the peace is inadmissible.

This study has also led to the finding that police questioning plays an important role in the investigation of crime.⁷⁸ It is desirable that this questioning should be conducted within limits to prevent abuse.

76 Willen Schorer and Jan Samuel Amalry.

77 The 1917 Act was replaced by the Criminal Procedure Act 56 of 1955; the latter Act was replaced by the Criminal Procedure Act 51 of 1977.

78 See section 29 of the Internal Security Act 74 of 1982.

SECTION II

SOUTH AFRICAN LAW

CHAPTER THREE

VOLUNTARINESS AND SOBRIETY OF THE CONFESSOR

3.1 Introduction

The words "freely and voluntarily made" must be distinguished from the words "without having been unduly influenced".¹ These words appear as a separate requirement and must be given separate meaning.² The words "freely and voluntarily made" or simply referred to as voluntariness must be given its common law meaning.³

Before a statement is given in evidence against an accused, it is a requirement of our common law that the prosecution must prove beyond a reasonable doubt that it was freely and voluntarily made.⁴ This applies

1 See Radebe 1968 4 SA 410 (A) 418-419; Hoffmann and Zeffertt The South African Law of Evidence (1988) 216; Van der Merwe *et al* Evidence (1983) 252; compare Lebone 1965 2 SA 837 (A) 8441; see Du Toit *et al* Commentary on the Criminal Procedure Act (1989) 24-55.

2 Hoffmann and Zeffertt 216.

3 Cele 1965 1 SA 82 (A); Burton 1946 AD 773; Hoffmann and Zeffertt 200.

4 Cele *supra*; Hoffmann and Zeffertt 200.

to all statements made out of court. This requirement is based upon considerations of fairness and justice.

3.2 Voluntariness generally

The use of the term "voluntary" as applied in confessions seems only explicable upon an historical basis. In Gilbert's treatise on the law of evidence the following passage is found:

"The voluntary confession of the party in interest is reckoned the best evidence... but then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."⁵

The origins of the concept of voluntariness is found in Roman-canon-law and in the Germanic code of criminal procedure,⁶ the *Constitutio Criminalis Carolina* of 1532. In both these continental systems, confessions were relied upon in proving the guilt of

5 Gilbert The Law of Evidence (1754) 99.

6 Benner "Requiem for Miranda: The Rehnquist court's voluntariness doctrine in historical perspective" 1989 Wash.U.L.Q. 59 93.

accused, and torture was more often used to obtain them.⁷ This was a cause for concern because a confession obtained by torture might be false.⁸ The *Constitutio Criminalis Carolina* promulgated rules governing the use of torture and provided that a statement of a tortured suspect should not be recorded while he was being tortured.⁹ Instead, any statement made under torture was recorded after the suspect's release from torture.¹⁰ There was a growing distrust of confessions produced by torture and the Carolina provided an additional precaution, namely that two days after such a statement was made, the suspect was brought before a judge. The statement was read in the presence of the judge and the suspect was requested to state whether it was true or false.¹¹ If the suspect's response was negative, he could again be ushered to the torture chamber, and for that reason it was safe for a suspect to admit before the judge that his statement was true in order to save himself from future suffering.¹²

7 Benner 93.

8 Langbein Prosecuting Crime in the Renaissance (1974) 183-184.

9 Langbein 185.

10 Benner 93.

11 Langbein 185; Benner 94.

12 Langbein Torture and the Law of Proof (1977) 12-16.

In English law, the origins of the voluntariness doctrine appear in connection with the court's acceptance of an accused's plea at arraignment. According to Stanford¹³ a confession was regarded as the best and surest answer that can be in law if the confession did not proceed from fear, menace or duress. Where a confession was the product of fear, menace or duress the judge was not expected to receive it nor to record it, and a plea of not guilty was entered.¹⁴ The voluntariness rule, it appears, did not concern itself with the accused's privilege against self-incrimination, but rather with the reliability of a confession.¹⁵

What do the terms "voluntary" or "involuntary" mean in confessions? It is common knowledge that these words, although frequently encountered in ordinary discourse, lack precise definitions.¹⁶ Grano has called them legal words of art, and that their meanings vary as a function of a context.¹⁷ For example, the American

13 Pleas of the Crown (1607) ch 51.

14 Stanford 51.

15 See Benner 94; Langbein (1974) 187.

16 Grano "Voluntariness, free will and the law of confessions" 1979 Va.L.Rev. 859.

17 Grano 860.

supreme court has ruled that a confession resulting from police interrogation is involuntary if obtained by any direct or implied promises, however slight.¹⁸ The root of the problem, therefore, appears to be the voluntariness terminology itself. No wonder that commentators have described it as "useless",¹⁹ "elusive",²⁰ "little more than a fiction",²¹ "a colourful method of expressing ultimate conclusions concerning the trustworthiness of a confession - a bit of harmless legal 'double talk'",²² "a complex of values [that] underlies the structure against use by the state of confessions which, by way of convenient shorthand [is] termed involuntary".²³ Consequently, Kamisar urged the court to abandon altogether the voluntariness terminology and to articulate its real reasons for excluding confessions from evidence.²⁴ On the other hand, the voluntariness terminology may be

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- 18 Bram v United States 168 US 532 542-543 (1897).
- 19 Paulsen "The fourteenth amendment and the third degree" 1954 Stan.L.Rev. 411 430.
- 20 Kamisar "What is an 'involuntary' confession? Some comments on Inbau and Reid's criminal interrogation and confession" 1963 Rutgers L.Rev. 728, 742.
- 21 Kamisar 745-46.
- 22 Beisel Control over Illegal Enforcement of the Criminal Law : Role of the Supreme Court (1955) 48.
- 23 Blackburn v Alabama 361 US 199 (1960) 207.
- 24 Kamisar 759; Grano 864.

defended on the ground that this "shorthand expression" reflects a recognition that the voluntariness rule does not offer protection only against the danger of trustworthiness but advances other values as well.²⁵

The original meaning of the terms "voluntary" and "involuntary" was a substitute for the trustworthiness or reliability of a confession.²⁶ It is correct that the original meaning has changed in order to cover other values. If one identifies these values, one will discover that they differ from country to country. That is the reason why the values protected by the voluntariness terminology in America differ from ours. The American constitution was amended to incorporate a Bill of Rights. No confession may be admitted into evidence if it conflicts with any clauses of the Bill of Rights. Our constitution does not as yet incorporate a Bill of Rights. What would be the impact of the proposed Bill of Rights if it is enacted and incorporated into a constitution of this country?

Any general exposition of the voluntariness doctrine

25 McCormick "The scope of privilege in the law of evidence" 1938 Texas L.Rev. 447, 452-57.

26 Kamisar 742. For further detail on American law of confessions see chapters 12 and 13 and all the accompanying references.

is incomplete if no reference is made to the privilege against self-incrimination. Criminal procedure may be regarded as a reflection of society's system of values. The privilege against self-incrimination regulates the relationship between an individual and the state.²⁷

Originally, the privilege against self-incrimination protected English citizens against any interrogation at all in the absence of a formal charge.²⁸ The complainant supplied the police with a sworn statement on which the suspects could be questioned. The suspect was given formal notice of the accusation. In this way, the ancient privilege shielded one from interrogation unless there was reasonable cause evidenced by oath or indictment. This was a limited protection until a formal charge was preferred against a suspect. The state could compel accused to plead to

27 Benner 61; see also Grano "Miranda's constitutional difficulties: a reply to professor Schulhofer" 1988 U.Chi.L.Rev. 174; Markman "The fifth amendment and custodial questioning: a response to 'Reconsidering Miranda'" 1987 U.Chi.L.Rev. 435; Griswold The Fifth Amendment Today (1955) 7; Morgan "The privilege against self-incrimination" 1949 Minn.L.Rev. 34; Wigmore "The privilege against self-incrimination: its history" 1902 Harv.L.Rev. 610; Grano "Selling the idea to tell the truth: the professional interrogator and modern confessions law" 1986 Mich.L.Rev. 662.

28 Benner 64 et seq.

the charge under oath, and could interrogate the accused upon anything he had said under oath.

During the late seventeenth century, the privilege against self-incrimination underwent a change. An accused was granted a procedural right to be free from compelled self-incrimination at his trial.²⁹ At the same time, the common law rule of evidence known as the voluntariness doctrine became entangled with the privilege against self-incrimination. These concepts underwent parallel development.

Both the privilege against self-incrimination and the voluntariness doctrine served to bar any pre-trial interrogation of an accused. The rationale for this was the underlying concern for fairness towards an individual. Under the voluntariness doctrine, any slightest degree of influence exerted upon the accused to speak gave rise to a presumption of compulsion that rendered a subsequent confession inadmissible.³⁰

The English ancestors struggled over six centuries to preserve certain values embodied in the privilege against self-incrimination. What were these values?

29 Benner 65 et seq.

30 Benner 65.

These were:

- (a) the right to fair notice and justified suspicion before interrogation;³¹
 - (b) the *nemo tenetur prodere seipsum* doctrine (meaning: no one is bound to accuse himself).³²
- The full Latin maxim reads: "*Licet nemo tenetur seipsum prodere, tatem proditus per famam tenetur seipsum onstendere utrum possit suam innocentiam ostendere et seipsum purgare* - translated as: no one is bound to accuse himself, but when exposed by common suspicion, he is held and permitted to show, if he can, his innocence and purge himself."³³

3.3 The requirement of voluntariness at common law

Innes CJ summed up the common law rule of voluntariness in Barlin³⁴ as follows:

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

31 Benner 70-72.

32 Benner 73-79.

33 See Wigmore's translation "*Nemo tenetur seipsum prodere*" 1892 Harv.L.Rev. 7, 83 note 2.

34 Barlin 1929 AD 459 at 462.

A statement is considered to be involuntary if it was induced by a threat or promise proceeding from a person in authority.³⁵ Statements made under statutory obligation to give information are admissible.³⁶ A statement made while the confessor was too drunk to know what he was saying is admissible³⁷ provided he was aware of what he was saying.

At common law there are factors that may render a statement involuntary. If there is proof that a statement is induced by any threat or promise of benefit proceeding from a person in authority, that statement is inadmissible because it is not voluntary in our law.

3.3.1 Threat or promise of benefit

Any words or conduct which suggest to the suspect that he or she may be dealt with leniently if he or she makes a statement, or more severely if he or she does not, will render a statement made under those circumstances involuntary and inadmissible.³⁸ The facts

35 Hoffmann and Zeffertt 201; Barlin *supra* 462.

36 See chapter seven *Infra*; Hoffmann and Zeffertt 201; Van der Merwe *et al* 253.

37 Hoffmann and Zeffertt 201; Rimmer 1954 1 SA 469 (C); Scott 1959 2 SA 786 (C).

38 Hoffmann and Zeffertt 202.

of each case would indicate whether words or conduct amount to a threat or promise and previous decisions are of little assistance.³⁹

A threat or promise cannot render a statement involuntary if it was made when its effect has been dissipated by the time the statement is made. In Mulke⁴⁰ an employer said to a servant whom he suspected of theft:

"If you have done it, you better acknowledge it, and a more lenient view will probably be taken by the directors."

These remarks did not elicit an immediate response. Two weeks later the servant wrote a letter confessing his guilt. The court did not find the confession involuntary as a result of an earlier promise of benefit. The confession was admitted into evidence.

3.3.2 Persons in authority

In Deokinanan⁴¹ the English court (i.e. the privy council) held that undue influence must be held out by a "person in authority", and that this forms part of

39 See Magoetie 1959 2 SA 322 (A) 325; Hoffmann and Zeffertt 202.

40 1932 WLD 16.

41 1968 All ER 146.

the common law. Similarly, In Barlin's case the threat or promise of benefit must not be one coming from a person in authority or it must not be attributable to him.⁴² The definition of a "person in authority" has been given in several cases. In Dhlamini,⁴³ the court expressed the view that the concept of "person in authority" includes the complainant, who investigated an alleged theft by interrogating suspects including the accused. In Robertson⁴⁴ this concept was given a liberal interpretation. The court held that the term refers to:

"enigiemand, of hy 'n amptelike posisie bekleë al dan nie, wat 'n mate van outoriteit (uitoefen), bv. die van 'n vader teenoor 'n seun of 'n oom teenoor 'n neef of 'n werkgewer teenoor 'n werknemer."⁴⁵

The approach of the court in Robertson supra to the term is welcomed.

In American law⁴⁶ the term "person in authority" refers to anyone who is legally entitled to control the

42 Barlin supra 462; Hoffmann and Zeffertt 203.

43 1949 3 SA 976 (N).

44 1981 1 SA 860 (C).

45 Van der Merwe *et al* 238 welcomes the liberal interpretation.

46 Chamberlayne 1933; Tompkins 554-56.

liberty of the accused or to decide what shall be done to him. In other words, it refers to a person who has some authority to direct the course of the criminal proceedings. Since authority may be delegated expressly or by implication, the term "person in authority" may extend to designate anyone who acts in the presence of a person clothed with legal authority. However, the person extending the misleading inducement must actually and legally have been in authority.⁴⁷

In Pietersen,⁴⁸ a detective misled the accused by bluffing them into thinking that the alleged case against them was much stronger than it really was. This he did by playing one accused off against the other and untruthfully representing to each accused that there was incriminating evidence against him when he knew well that such evidence did not exist. Williamson J held that the behaviour of the detective amounted to a practice repugnant to the principles upon which our criminal law is based and that in law it constituted undue influence.⁴⁹ The confession was held inadmissible. The reason for this is that whereas a confession may be perfectly free and voluntary, it

47 Chamberlayne 1934.

48 1987 4 SA 98 (C).

49 Pietersen *supra* 101; see Mpetha(2) *supra* 588.

may be inadmissible solely because of undue influence.⁵⁰

In Kasikosa⁵¹ the Rhodesian appellate division remarked *obiter* that improper influence *in vacuo* does not avail an accused; it must exercise itself upon the mind. In *casu*, the court remarked that should a police officer, having met with no success in obtaining any admission from a suspect, indicate to the suspect that he was prepared to accept a lesser version, for the purpose of securing his admission that he was at the scene of the crime and, thereafter, of reverting to the more serious version of the offence, that would be improper influence brought to bear upon the accused which would render that statement inadmissible.⁵² The reason for this is that that practice amounted to an undue influence by lulling the suspect into a false belief that the prosecution was accepting, as the correct version of the case against him a less blameworthy account and thus improperly inducing the suspect to make a statement.

Jones J has defined a "person in authority" in case of Peters⁵³ as follows:

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- 50 Pietersen *supra* 100.
51 1971 3 SA 251 (RAD) 257.
52 Kasikosa *supra* 226.
53 1992 1 SACR 292 (O) 295.

"'n Persoon in 'n gesagsposisie is enige persoon wat die loop van die vervolging moontlik mag beïnvloed. Dit slaan nie op Staatsgesag alleen nie. Enige persoon wat, afhangende van die omstandighede, die vervolging mag beïnvloed, kan 'n persoon in 'n gesagsposisie wees. Na my oordeel sluit dit onder hierdie omstandighede nie lede van 'n lid van die bende onder die gesag van die leierskap daarvan nie en in iedere geval kon hulle nie die loop van die vervolging beïnvloed nie."

The judgment of Jones J is welcomed because it clearly defines a person in authority. There must be proof that X is in a position to influence the prosecution either way before he is regarded as a person in authority. This means that any person who is unable to influence the course of the prosecution is not a person in authority notwithstanding the pressure he may exercise on the confessor. In Peters supra the accused made admissions as a result of coercion by a prison gang. The accused was not a member of that gang and the gang was unable to influence the course of the prosecution. It was held that the gang members were not in a position of authority *vis-a-vis* the accused. The admission was held admissible in evidence.

The list of persons in authority includes a magistrate, police officer, the complainant and the complainant's employer.⁵⁴

3.3.3. The requirement of voluntariness under section 217 of the Criminal Procedure Act 51 of 1977

One of the first essentials of admissibility of a confession is that it must have been freely and voluntarily made as distinct from its having to have been made without undue influence. The requirement of voluntariness has given a common law meaning to a confession made under section 217 of the Criminal Procedure Act.

The test for voluntariness was summed up by Van den Heever JA in Kuzwayo⁵⁵ as follows:

"... has it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor's will was not swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition?"

There has been different views taken at common law about why involuntary statements are excluded. One view stresses that involuntary statements are excluded because of the danger of their being untrue.⁵⁶ The other view is that there is a need to control the behaviour of officials and the police because, in a

55 1949 3 SA 761 (A) 768.

56 Hoffmann and Zeffertt 216.

civilized country, it is necessary to prevent their misconduct. The other view is that people feel that it is unjust to convict an accused on a statement that has been unfairly obtained.⁵⁷

In our law it is artificial, when discussing the appropriate test, to separate the requirement that a confession must be voluntary from the requirement that it must be made without undue influence.⁵⁸ Ogilvie Thompson JA pointed out in the case of Radebe⁵⁹ that the overall enquiry is whether the words of the section have been satisfied. Van den Heever JA points out that in practice, the difference between the requirements of "freely and voluntarily" and "without undue influence" is of little importance. Although "undue influence" and "voluntariness" have separate meanings, these terms are concepts *ejusdem generis* and relate to factors which are calculated to negative the exercise of free will.⁶⁰ The words "without having been unduly influenced thereto" tend to be widely interpreted to include all cases in which external influences have

57 Hoffmann and Zeffertt 216.

58 Hoffmann and Zeffertt 217.

59 1968 4 SA 410 (A).

60 Kuzwayo supra 768.

operated to negative the accused's freedom of volition.⁶¹

In Pietersen⁶² Williamson J said that a voluntary statement may be excluded if it has been induced by undue influence; and "any practice is undue which if introduced into a court of law would be repugnant". The primary question is whether the confession complies with section 217(1) of the Criminal Procedure Act.⁶³

The meaning of the words "freely and voluntarily" in section 217 of the Criminal Procedure Act, and "voluntarily" section 219A of the Act was considered by the court in Mpetha(2).⁶⁴ The court found that these words convey essentially the same idea and that it was unable to discern any meaningful difference between them.⁶⁵ The meaning of the word "voluntarily" in section 219A was held in Yolelo⁶⁶ as merely a

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- 61 Frans Selepi 1919 TDP 105 110; Gwija 1960 4 SA 435 (C); Hoffmann and Zeffertt 217 fn 22.
- 62 1987 4 SA 98 (C) 100; see Hoffmann and Zeffertt 217.
- 63 Khoza 1984 1 SA 57 (A) 59-60; see Zeffertt "Admissions and confessions" 1987 Annual Survey of S.A. Law 422 423.
- 64 1983 1 SA 576 (C); see Hoffmann and Zeffertt 216.
- 65 Mpetha(2) supra 579.
- 66 1981 1 SA 1002 (A) 1009.

codification of the common law.⁶⁷ A statement is "freely and voluntarily made" if it has not been induced by any promise or threat proceeding from a person in authority.⁶⁸ Williamson J did not agree in Mpetha(2) that the words "voluntarily made" should not be confined to the somewhat artificial construction which they may have assumed at common law, and that they be given their ordinary meaning.⁶⁹ The learned Judge while conceding that such an approach would beneficially extend the ambit of the protection afforded to an accused, found this view irreconcilable with a passage in Barlin's case. In that case Innes CJ clearly regarded the predecessor of section 217 of the Act as an expansion of the common law requirement of voluntariness. The only acceptable expansion of the common law voluntariness rule is the one effected by the addition of the words "without having been unduly influenced thereby" which, in the opinion of the court, rendered the section wider in one respect than the common law voluntariness rule.⁷⁰

67 See Barlin supra 462.

68 Barlin supra 462.

69 See Hoffmann and Zeffertt The South African Law of Evidence (1981) 3ed 175.

70 See Paizes "Admissions and confessions" 1983 Annual Survey of S.A. Law 443.

The concept of undue influence is wider than the notion of involuntariness and operates to enlarge the area of exclusion contained in section 217 of the Criminal Procedure Act.⁷¹ Undue influence can be brought to bear by anyone, involuntariness, in its common law sense, may be induced only by a person in authority.⁷²

The degree of undue influence required to render a confession inadmissible in section 217 of the Act was considered in Mpetha(2) by Williamson J. In analysing the test formulated by Van der Heever JA in Kuzwayo supra,⁷³ Williamson J in Mpetha(2) agreed with the view that it is not right to equate the words "unduly influenced" with such expressions as "negatived", "compelled" or "induced" when this latter word is used in the technical sense which it bears under the English common law.⁷⁴ The use of the verb "negatived" by Van den Heever JA in Kuzwayo's case was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at

71 Paizes 443.

72 Paizes 443; Barlin supra 462.

73 The test reads "Was or was not the confessor's will swayed by external impulses improperly brought to bear upon it which negatives his freedom of volition?".

74 Mpetha (2) 582.

all.⁷⁵ The criterion is the improper bending, influencing or swaying of the will, not its total elimination as a freely operating entity.⁷⁶

An improper influence which is trivial must be ignored; so also an improper influence which, though not trivial in itself is shown in fact not to have had any meaningful influence on the will of the confessor.⁷⁷ The test is essentially a subjective one, as it is the degree to which the accused's freedom of volition was impaired which forms the focus of the enquiry.⁷⁸ Undue influence embraces any practice which, if introduced in a court of law, would be repugnant to the principles upon which the criminal law is based.⁷⁹ The practical problem is how to weigh such undue influence in the scale and evaluate its effects upon the will of the accused.

The subjective nature of the test for voluntariness is clearly shown in Segone⁸⁰ In this case the prosecution relied on a confession which the accused had made to a

75 Mpetha (2) supra 584.

76 Mpetha (2) supra 584.

77 Mpetha (2) supra 585.

78 Paizes 444; Mpetha (2) supra 585.

79 Paizes 444; Mpetha (2) supra 588.

80 1981 1 SA 401 (T).

magistrate. The confession was made after the following events. The accused had been interrogated by the police, threatened and subjected to repeated assaults; he had then been informed that he was to be taken to a magistrate to make a confession, and that a tape recorder would be used to record the confession. The accused then made the confession before a magistrate and a tape recorder was used to tape the confession. The accused did not realise that the magistrate was acting independently from the police and he was under the impression that he was working with the police.

The confession was held inadmissible because:

"The prerequisite of total independence and impartiality on the part of the magistrate might well in the eyes of appellant, have been destroyed."⁸¹

The overall test for voluntariness would appear to be whether an accused realized what he was doing and was in full possession of his understanding.⁸² As stated above, the test is whether the confessor's will "was ... swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the

81 Segone supra 415.

82 Blyth 1940 AD 355 361; Ramsamy 19544 2 SA 491 (A) 495; Peiris and Soysa "The admissibility of confessions in criminal proceedings: a comparative analysis of the law of South Africa and Sri Lanka" 1980 SALJ 432 440.

apparent freedom of volition."⁸³ The voluntariness of a confession must be proved by the prosecution except where the presumption created by section 217(1)(b)(ii) of the Criminal Procedure Act. This section creates a rebuttable presumption in favour of the prosecution that a confession had been made freely and voluntarily if it has been recorded by a magistrate and reduced to writing by him, or if it has been confirmed and reduced to writing in his presence. When a confessor is brought to a magistrate to make a confession, he is warned that he is in the presence of a magistrate who has no connection with the police investigating his alleged crime and that he has nothing to fear and that he can speak freely.⁸⁴ To ensure that the confessor makes his statement freely and voluntarily, he should be asked specifically whether he has been assaulted or threatened or whether any promise of benefit has been made to him if he makes a statement.⁸⁵ During the preliminary enquiries, the confessor must be asked whether he has already made a statement and, if so, he should be asked the nature of the statement and the reasons actuating him to repeat the statement.⁸⁶

83 Kuzwayo *supra* 768 per Van den Heever JA.

84 Ndoyana 1958 2 SA 562 (E).

85 Cabeli 1931 OPD 189; Bantu Zonke 1927 NPD 131; Zide 1931 EDL 276.

86 See Gumede 1942 AD 398 400; see chapters three and five for details.

In Gaba⁸⁷ the admissibility of a confession was challenged on the ground that it had not been made freely and voluntarily. The prosecution bore the onus of proving that the confession was made freely and voluntarily. The magistrate who recorded the confession was called as a witness for the prosecution. Before the issue of voluntariness was finalised, the trial judge had the statement (i.e. the confession) read out to him because he considered its contents to be important. On appeal, the appellate division held that this constituted an irregularity. Viljoen JA said:⁸⁸

"I do not ... read the section as indication that the entire confession must be handed in before the issue whether it was made freely and voluntarily is embarked upon."

The appellate division pointed out that even if the trial judge had not improperly taken into account what had been said in the confession, the practice of not having regard to the content of a confession before it is held to be admissible is salutary.

The general ground on which a confession is challenged is that the police threatened or assaulted the accused

87 1985 4 SA 734 (A).

88 Gaba supra 750.

with the intention of inducing him to confess.⁸⁹ The police usually deny such allegations. If the accused has lacerations or scars then his allegation is strengthened.⁹⁰ In Ngirazi the accused offered to show his injuries, but the court refused. On appeal, the conviction was set aside because the court was not convinced that the confession was made without undue influence. If the contents of a confession is false, that may corroborate the allegation that it was made under duress.

Schmidt expresses the view that:⁹¹

"Daar word aan die hand gedoen dat daar geen rede is om die bepalings van artikel 217 (en, trouens, ook artikel 219A) anders as letterlik uit te lê nie. Die vereiste dat 'n bekentenis vrywillig en ongedwonge afgeleë moet word om toelaatbaar te wees, beteken dat indien 'n persoon gedwing word - hetsy met fisieke krag, hetsy met die dreigement van 'n regmatige strafsanksie - om te beken as hy inderdaad onwillig is om dit te doen, moet sy bekentenis ontoelaatbaar wees. As bevind word dat die bekentenis wel vrywillig afgeleë is, moet die res van artikel 217 natuurlik ook nog in ag geneem word. Daar mag bevind word dat, hoewel dit vrywillig gedoen is, onbehoorlike beïnvloeding toegepas is. In so 'n geval kom laasgenoemde ontoelaatbaarheidsgrond ter sprake."

89 Schmidt Bewysreg (1989) 3ed 505.

90 Schmidt 505; Ngirazi 1975 4 SA 436 (RA).

91 at 507.

This view is supported. Where the voluntariness of a confession is impaired by undue influence it may be challenged on both grounds.⁹²

3.4 Sound and sober senses

The dictionary definition of the phrase "sound and sober senses" is not particularly helpful, but it gives a clue to what is intended. According to The Concise Oxford Dictionary⁹³ the adjective "sound" means healthy; not diseased or injured; and "sober" means not affected by alcohol; moderate; well-balanced; tranquil or sedate. To say that a confession must be made by an accused in his "sound and sober senses" means that the accused must appreciate and know what he says. In other words, the accused must be *compos mentis*.⁹⁴ This means that the accused must have known what he was saying notwithstanding the fact that he might have spoken under the influence of drink or nervous excitement.⁹⁵

92 Du Toit et al 24-55; Pietersen supra.

93 Edited by Allen (1990) 8ed 1162.

94 See Hiemstra 488; Hoffmann and Zeffertt 216; Schmidt 508; Du Toit et al 24-55.

95 Hoffmann and Zeffertt 216; Masia 1962 2 SA 541 (A) 544.

In Blyth⁹⁶ a confession was admitted in evidence despite the fact that the accused had lost his temper when making it. It is clear that the question whether to admit a confession in evidence or not depends on the degree of intoxication.⁹⁷

The criterion of "sound and sober senses" refers to the mental faculties of the confessor. If the mind of the confessor was subjected to pain it cannot be said that his senses were sound, that is healthy, not diseased or injured. The view taken by the author is that pain suggests that something is being injured in the body of the person experiencing it. Consequently, his senses cannot be sound since there is some nervous excitement. The law does not concern itself with trivialities. It is for that reason that some negligible pain could be ignored and thus enabling the court to admit a confession into evidence.

The view taken in this thesis is that any factor which works on the nerves or senses of the accused may play some role when he makes a confession. The extent or degree of the external influence on the senses is a question of fact. The following list of factors,

96 1940 AD 355; Du Toit *et al* 24-55.

97 Ramsamy 1954 2 SA 491 (A); Rimmer 1954 1 SA 469 (C); Mtabela 1958 SA 264 (A).

although by no means exhaustive, may serve as *indiciae* that a confession was not made by an accused in his sound and sober senses:

- (a) drunkenness;
- (b) pain;
- (c) sickness or injury;
- (d) mental illness; and
- (e) exhaustion.

These factors cannot by themselves always serve as a reason for excluding a confession from evidence. It is the degree of drunkenness that may indicate whether a confessor was *compos mentis* or not at the time of confession. Similarly pain may excite a confessor to utter what may amount to a confession. The surrounding circumstances would have to be carefully assessed. Sickness or injury may have the effect of enabling the confessor to talk without really knowing and appreciating what is being said. Similarly, a person suffering from mental illness cannot be said to be confessing in his sound and sober senses.

Extreme exhaustion may disorientate the confessor to the extent of excluding his power to know and appreciate what he says.

3.5 Conclusion

3.5.1 The requirement of voluntariness

It is clear from the foregoing that the voluntariness requirement has received the following interpretations by our courts:

- (a) The meaning of the words "voluntarily" and "freely and voluntarily" used in sections 219A and 217 of the Criminal Procedure Act convey essentially the same idea and that for all practical purposes it is impossible to discern any meaningful difference between them.⁹⁸ Although the legislature used different words, there is in essence no difference in the underlying concept.
- (b) In terms of the common law, no statement made by an accused person may be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made.¹⁰⁰ This means that the statement must not be

98 Mpetha (2) *supra* 579.

99 Skeen "The meaning of 'voluntary' in respect of admissions and confessions in criminal cases" 1983 SALJ 410.

100 See Barlin *supra* 462-3 per Innes CJ.

induced by any promise or threat proceeding from a person in authority.

- (c) A "person in authority" means any person who could possibly influence the course of the prosecution and does not only refer to the authority of the state.¹⁰¹ A person in authority is the only person who could exclude the voluntariness of an admission or confession by making threats or promises to the accused. If a threat or promise is proceeding from any other person, then the admissibility of a confession may be attached or challenged on the ground of "undue influence" which is a wider concept.

3.5.2 Sound and sober senses

The prosecution is not expected to prove the absence of all mental excitement or distress; it is sufficient to prove that the confessor realised what he was doing and was in full possession of his understanding.¹⁰²

Where a confession is made whilst the confessor is affected to some extent by liquor which he had

101 Peters *supra* 295.

102 Blyth 1940 AD 355.

consumed, but whilst he is nevertheless sufficiently *compos mentis* to know and appreciate what he was saying, is deemed to be made "in sound and sober senses" within the meaning of section 217(1) of the Criminal Procedure Act 51 of 1977.¹⁰³

103 Masia 1962 2 SA 541 (A); see Ramsamy 1954 2 SA 491 (AD).

CHAPTER FOUR

UNDUE INFLUENCE AS A CRITERION FOR EXCLUSION OF A CONFESSION

4.1 Introduction

One of the dilemmas of an accused is that from the moment of his arrest he is surrounded by shrewd and sometimes experienced police officials, whose daily business it is to deal with hardened criminals, and whose interest it is, not to secure the acquittal of the innocent, but to bring the guilty to justice.¹ This creates the impression that where a person under arrest is subsequently proved to be innocent or where there is no sufficient proof of his guilt the police who arrested him, failed in their duty. This puts the police under pressure which may lead to a wilful, and sometimes even to an unconscious and involuntary suppression of those facts which indicate that the suspect is innocent and to the exaggeration of those which point to guilt.

A suspect is sometimes a source of incriminating statements. But he must furnish such information

1 Underhill Criminal Evidence (1910) 2ed 278.

freely and voluntarily and without undue influence. One of the prerequisites for the admissibility of a confession is that it must have been made without undue influence.² In other words it must be shown that the confession was made freely and voluntarily in every respect. The purpose of this chapter is to discuss this requirement.

4.2 Undue influence generally³

Generally speaking, when it is said that a confession is "involuntary" it means that the confession has been induced by the hope of receiving some benefit or by the fear of suffering some injury in connection with the pending criminal trial.⁴ The inducement must be made by a person in authority.⁵ Thus any inducement operating on the mind by way of fear or hope, however slight, any promise or threat whatever, if held out by a person in authority over criminal proceedings and relating to some benefit or injury in connection with such proceedings, suffice to exclude a confession so

2 See Section 217 of the Criminal Procedure Act 51 of 1977.

3 i.e. English law and/or American law.

4 Chamberlayne A Treatise on the Modern Law of Evidence Vol. II Procedure (1911) 1801-2.

5 Chamberlayne 1882.

induced in American law.⁶

No particular threat or promise producing a confession can safely be said as matter of law to render the confession inadmissible.⁷ The reason for this is that the effect of a threat or promise may in turn be neutralised by other factors and/or conditions for that reason, the admissibility of a confession largely depends on the special circumstances of each case and it is not desirable to formulate any rule which will embrace all other cases.

In an attempt to substitute the term "involuntary", the phrase "undue influence" is used. The reason for this is that the undue influence acts directly upon the will of the confessor. This phrase is used to cover threats or entreaties which overpower the volition without convincing the judgment.⁸ Thus:

"in the improperly induced confession the judgment is convinced, though improperly, while the will is free."⁹

The objection against the admissibility of a

6 Chamberlayne 1866; McAdory v State 62 Ala 161 (1878); Bartley v People 156 ILL 234 (1885).

7 Underhill 244.

8 Chamberlayne 1880.

9 Chamberlayne 1880.

confession obtained through undue influence is based on the fact that the suspect made it not because it is true, but in order that he may either gain or avoid something which he desires to obtain or escape.¹⁰ In this way the suspect's statement is a deliberate act of the mind. However, his judgment is misled by the desire to benefit himself in some way. That is the reason why a confession so obtained is excluded in evidence. Chamberlayne described such a confession as a pseudo-confession. He continued to state that the confession:

"... is not made *animo confitendi*. It is merely a self-serving statement masquerading in the garb and under the name of a confession. Accordingly, it has not the relevancy of a true confession, a self-deserving statement, and is, in consequence, rationally to be regarded with suspicion"¹¹

The inducements which are held out to a suspect which will invalidate his confession may be of any nature so long as they are material. They may include the following:

- (i) The actual or prospective infliction of pain to the suspect. It may happen that the physical suffering is so direct and overwhelming in its

10 Chamberlayne 1883.

11 Chamberlayne 1884.

operation as to constrain the will of the suspect and amount to duress.¹² Tompkins argues that a confession made under duress is absolutely involuntary, and thus strictly inadmissible in evidence.¹³ The duress may be mental when caused by the use of threats or physical if inflicted by physical pain or by the threat or infliction of injury on a person in the hands of a mob.¹⁴

- (ii) A threat of punishment for the crime unless the suspect agrees to make a confession. It must be borne in mind that the threat should be such as to afford a reasonable presumption that the suspect's decision to make a confession was influenced. Great excitement on the part of the suspect when put under arrest or detention is no ground for excluding a confession.¹⁵
- (iii) A hope of averting or delaying punishment for the crime or the hope of discontinuance of the criminal proceedings against the suspect or the hope of pardon or mitigating punishment is

12 Tompkins Trial Evidence (1930) 2ed 552; see People v Barbato 254 NY 170 (1930)

13 Tompkins 564.

14 Tompkins 565.

15 People v Cokahnour 120 Cal 253 (1898).

another form of undue influence which may make a confession involuntary.

- (iv) Any physical or mental torture of the suspect may constitute undue influence.

4.3 Undue influence in South African Law

4.3.1 Objective test for undue influence

In Kuzwayo,¹⁶ the court observed that there seemed to be considerable confusion as to the meaning of the expression "without having been unduly influenced thereto" in the proviso to section 273 of the Criminal Procedure Act 56 of 1955. Van den Heever JA pointed out that the notions "freely", "voluntarily", "sound and sober senses" and "undue influence" with which the proviso operated were plainly concepts *eiusdem generis* and related to factors which were calculated to negative the exercise of a free will.¹⁷ He formulated the test for undue influence as follows:

"... (H)as it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor's will was not swayed by external impulses, improperly brought to

16 1949 3 SA 761 (A) 767; Hiemstra 488 and 495; Van der Merwe *et al* 253.

17 Kuzwayo *supra*.

bear upon it, which are calculated to negative the apparent freedom of volition?"¹⁸

The judge remarked that in answering this question the circumstances of each individual case will have to be taken into consideration. In other words no hard and fast rule could be formulated. It is to be noted that when the Kuzwayo case was decided there was no presumption that a confession reduced to writing by a magistrate was for that reason freely and voluntarily made by an accused in his sound and sober senses without having been unduly influenced thereto.¹⁹ For that reason, the prosecution was required by law to prove these elements beyond a reasonable doubt. Van den Heever JA held that the very purpose of bringing an accused before a magistrate was to safeguard him against duress or undue influence in making a statement which may be used in evidence against him.²⁰

The test for undue influence enunciated in Kuzwayo supra was formulated objectively.

18 Kuzwayo supra 768.

19 See Section 217 of the Criminal Procedure Act 51 of 1977.

20 Kuzwayo supra 768.

4.3.2 The subjective test for undue influence

In Ananias,²¹ Beadle CJ took the view that a general test is better framed subjectively, as it was the actual effect of the external impulses on the will of the accused and not the calculated effect which the court had to decide. He formulated the test as follows:

"Was or was not the confessor's will swayed by external impulses improperly brought to bear upon it which negatived his freedom of volition?"²²

In the Ananias case, Beadle CJ gave an example of four broad classes where a confession is likely to be held inadmissible as a result of external impulse or undue influence.²³ The examples were the following:

- (a) Cases where the form of the questions put, or the manner of the interrogation, itself indicates that the accused's freedom of volition was negatived;

21 1963 3 SA 486 (RAD); Hoffmann and Zeffertt 219; Van der Merwe et al 235 and 253; Schmidt 507; Hiemstra 485; Du Toit et al 24-57.

22 Ananias supra 487.

23 Ananias supra 487-88; see Masinyana 1958 1 SA 616 (A) where the prosecution failed to prove the absence of undue influence.

- (b) Cases where an illiterate accused may feel that he is subject to the police officer's authority, and thus feels that if he refuses to answer questions it would be regarded as disobedience on his part which might result in unfortunate consequences for himself.
- (c) Cases where persistent and aggressive questioning may so frighten or overawe an accused as to overcome or negative his freedom of volition.
- (d) Cases where fatigue induced by persistent questioning may break down the accused's powers of resistance and induce him to speak where he would not otherwise have done so. The so-called "third degree" method of interrogation is an example of this type of case.

Since each individual case is decided on its own particular circumstances, the above list is not exhaustive. What is abundantly clear in the Ananias decision is that the more an accused is questioned the more likely it is that his freedom of volition will be negatively affected. But persistent questioning *per se* does not constitute a ground on which a confession extracted thereby can be excluded.

The Ananias case is supported for recognising the fact that police questioning of a suspect may constitute an

impulse which may constitute undue influence. The subjective test enunciated to determine the impact of such questioning is to be welcomed.

The test for undue influence appears to be a subjective one. Williamson J²⁴ in Mpetha(2) stated that:

"The whole object of the inquiry is to evaluate the freedom of volition of the accused and this of its very nature is an essentially subjective enquiry. It is his will as it actually operated and was affected by outside influences that is the concern."²⁵

The subject test does not mean that objective factors are to be left out of consideration.²⁶

4.3.3 Wigmore's test for undue influence and its impact on the case law

In Kearney,²⁷ the appellate division held that the onus was on the prosecution to prove, as a condition precedent to admissibility, that the confession was

24 Mpetha(2) supra 585; Mkhwanazi 1966 1 SA 736 (A); Kuzwayo 1949 3 SA 761 (A) 768; Segore 1981 1 SA 410 (T); Du Toit et al 24-56.

25 Mpetha(2) supra 585.

26 Du Toit et al 24-57; Dlamini 1973 1 SA 144 (A); Chenisso 1983 4 SA 912 (T).

27 1964 2 SA 495 (A); Hiemstra 456; Hoffmann and Zeffertt 218; Schmidt 509.

made freely and voluntarily by a person in his sound and sober senses and without having been unduly influenced.²⁸ This meant that the prosecution would have failed to discharge this onus if there was a reasonable possibility that the confession was not made as aforesaid. The trial judge had expressed the view that the test for undue influence should be as follows:

"Was the inducement such that there was any fair risk of a false confession?"

This test was based on the proposition by Wigmore that the principle upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy.³⁰ Accordingly, Wigmore formulated the following test as the fundamental criterion for admissibility of a confession: "Was the inducement such that there was any fair risk of a false confession?"³¹ Wigmore's test was discredited in

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- 28 See Section 244 of the Criminal Procedure Act 56 of 1955; the position is now governed by section 217 of the Criminal Procedure Act 51 of 1977.
29. Kearney *supra* 498; see Lebone 1965 2 SA 837 (A) 842-43.
- 30 Chadbourn and Wigmore Evidence in Trials at Common Law vol III (1976) 536.
- 31 Chadbourn and Wigmore 330; see comments on Wigmore's test by McCormick "The scope of privilege in the law of evidence" 1930 Texas L.Rev. 447 451-457; McCormick "Some problems and developments in the admissibility of confessions" 1949 Texas L.Rev. 239 245; Allen "Due process and State Criminal Procedures : another look" 1953 Nw U.L.Rev. 16 19; Maguire Evidence of Guilt (1959) 109.

America. It would suffice to quote from the following decisions of the American supreme court to illustrate this point:

In Rogers v Richmond³², Frankfurter J said:

"Convictions following the admission into evidence of confessions which are involuntary, i.e. the product to coercion, either physical or psychological, cannot stand. This is not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system - a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth..."

In Blackburn v Alabama,³³ the court remarked:

"It is now inescapably clear that the fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."³⁴

31 Chadbourn and Wigmore 330; see comments on Wigmore's test by McCormick "The scope of privilege in the law of evidence" 1930 Texas L.Rev. 447 451-457; McCormick "Some problems and developments in the admissibility of confessions" 1949 Texas L.Rev. 239 245; Allen "Due process and State Criminal Procedures : another look" 1953 Nw U.L.Rev. 16 19; Maguire Evidence of Guilt (1959) 109.

32 365 US 534 (1961) 540 - 541 my emphasis.

33 361 US 199 (1960).

34 See chapter 3 *infra* for further details on American Law of Confessions.

Reverting to the Kearney's case, it must be pointed out that the test for undue influence reaffirmed therein was also applied in the case of Afrika.³⁵ Homes JA approved that test and applied it in the Kearney's case. Notwithstanding the criticism of the test in American law, in our law it is fully recognised. Moreover, the court held that a confession is not excluded merely on the ground that it was obtained by a promise of secrecy.³⁶ This will have to be considered in the light of the circumstances of each individual case.

In Mahlala,³⁷ Margo AJ (as he then was) conceded that the prosecution had an onus to be discharged beyond a reasonable doubt that a confession was not made by an accused who had been unduly influenced thereto.³⁸ The judge did not agree that the prosecution must also prove that the idea of confession must have occurred spontaneously to the accused. Moreover, even an exhortation to tell the truth was not necessarily undue influence.³⁹ The defence made a submission that

35 1949 3 SA 627 (O).

36 Kearney supra 500.

37 1967 2 SA 401 (W).

38 Mahlala supra 405.

39 see Afrika 1949 3 SA 627 (O) 634-635.

an accused who was in his sound and sober senses but who confessed while he was in a state of pain, or fatigue, or emotional distress, or because he himself hoped to gain some advantage thereby, was not acting freely and voluntarily.⁴⁰ The court did not agree. The view of the court was that there was no principle of law that an accused did not act freely and voluntarily unless he was in a state of serenity, free from illness and pain, and without motive.⁴¹ However, the court conceded that a trial court would no doubt pay due regard to all such circumstances, but would not *ipso jure* exclude the confession merely because there is evidence of pain, fatigue, motive, or the like. The latter view of the judge cannot be supported. Pain, fatigue, distress or hope are incompatible with the requirements for the admissibility of confessions. With respect the court erred when it played down the importance of such external influences.

In determining whether a confession is admissible or not, the pain, distress, motive or the like are relevant factors which are strong enough to warrant the exclusion of a confession. The only instance where this ought not to happen is where such factors played a minor role prior to the making of a confession. In

40 Mahlala *supra* 405-406.

41 Mahlala *supra* 406.

short, the view taken by the court is creating an impression that our law would sanction the admission into evidence of a confession made by an accused who was in serious pain. That is clearly repugnant to the requirements of section 217 of the Criminal Procedure Act 51 of 1977.

The court in Radebe⁴² expressed itself fully on Wigmore's criterion for the admissibility of confessions. In an appeal in that case, the appellants challenged the decision of the trial court on the admissibility of their alleged confessions on the grounds that they were assaulted by the police, which assault later induced them to make statements to the police and that their confessions which were made to a magistrate the next morning were induced by fear of further assault. Ogilvie Thompson JA noted that in the Steve's⁴³ case De Villiers CJ in delivering his judgment of the full court said:

"a fair test of undue influence ... is, was the influence such as would have induced the prisoner to tell what was not true."⁴⁴

42 1968 4 SA 410 (A).

43 7 S.C. 103 (1889).

44 Steve's case *supra* 104; compare with Wigmore's test which reads: "was the inducement such that there was any fair risk of a false confession?"

Both Wigmore's criterion and that enunciated in the Steve's case could be of considerable value in assessing whether any particular "influence" was "undue".⁴⁵ However, Ogilvie Thompson JA in Radebe supra was not sure whether this criterion could be equally usefully invoked in relation to an inquiry as to whether or not a confession was not voluntary.⁴⁶ Be that as it may, the learned judge of appeal held that even when the enquiry was confined to inducement, Wigmore's test should not, in his view, be regarded as affording a comprehensive test which is in itself decisive in all cases.⁴⁷ This is the case where the presiding judge thinks that the contents of a tendered confessions are true, but the circumstances under which the confession was made compels its exclusion.⁴⁸

The approach by Ogilvie Thompson JA to Wigmore's test for the admissibility of a confession is supported. The overall enquiry is to determine whether a confession is admissible in terms of the Criminal

45 See Van As 1941 AD 341 364; Kearney supra 498.

46 Radebe supra 418.

47 Radebe supra 418.

48 Radebe supra 418.

Procedure Act." Other tests cannot *ipso jure* conclusively determine whether a confession is to be admitted into evidence or not. The test remains the enquiry whether the confession was made "freely and voluntarily" by an accused in his "sound and sober senses" and "without having been unduly influenced thereto".⁴⁹ Moreover, the truthfulness or falsity of a confession is not a criterion prescribed by the Criminal Procedure Act as a condition precedent to the admissibility of a confession. Notwithstanding Wigmore's criterion, the court in Radebe held that the prosecution failed to prove in terms of section 244(1) of the Criminal Procedure Act 56 of 1955 that the alleged confessions were made freely and voluntarily and without having been unduly influenced thereto. The decision of the court is in accordance with the correct interpretation of the case law in point.

4.3.4 The expression "without his having been unduly influenced thereto"

In Hackwell⁵¹ the concept of undue influence was once again subjected to judicial scrutiny. McDonald AJA

49 Section 244 of the Criminal Procedure Act 56 of 1955 was applicable when Radebe was decided; the position is now governed section 217 of the Criminal Procedure Act 51 of 1977.

50 Section 217 of Act 51 of 1977; Masinyana 1958 1 SA 616 (A) 621; Lebone 1965 2 SA 837 (A) 843.

51 1965 2 SA 388 (SR.AD).

held that the proviso "without his having been unduly influenced thereto" comes into operation when the "undue influence" brought to bear upon the will of an accused person has not clearly been shown not to be the cause or one of the causes of the making of the confession.⁵² Once this proviso comes into operation, it is not necessary that the accused's freedom of volition should have been negatived.⁵³ Quenet JP concurred in this conclusion that it is not right to equate the words "unduly influenced" with such expressions as "negatived", "compelled" or "induced" when these are used in the content of confessions.

The court in Hackwell pointed out that not every "external impulse"⁵⁴ brought to bear on a suspect is objectionable.⁵⁵ McDonald AJA observed that the spirit of the judges' rules, in both England and South Africa revealed that the judges regarded as "undue" any practice which, if introduced into a court of law, would be repugnant to the principles upon which the

52 Hackwell supra 398.

53 See Hackwell supra 389 when Quenet JP concurred in this view; see further Kuzwayo supra 768; Wigmore Evidence Vol. III para 853 333; Barlin 1926 AD 459 462; Masinyana supra 621.

54 To use the words of Van den Heever JA in Kuzwayo supra 768.

55 Hackwell supra 400.

criminal law is based.⁵⁶ Having said that, his lordship emphasized that the fact that undue influence had been brought to bear on an accused did not *ipso facto* render a subsequent confession made inadmissible. The reason for this is that undue influence is one of the factors to be considered in deciding whether a confession is to be admitted into evidence or not. The confession is likely to be excluded if there is a reasonable possibility that it was made as a result of the undue influence brought to bear on the accused.

The Hackwell decision appears to have been correctly decided, and for that reason the author is in agreement with the approach of the court to the concept of undue influence. This is so because the onus of proof is on the prosecution. Where the onus is on the accused, the picture changes.⁵⁷

The concept of undue influence is wider than the concept of "free and voluntary".⁵⁸ The appellate

56 Hackwell *supra* 400.

57 See discussion *infra* on the onus of proof.

58 Mpetha(2) 1983 1 SA 576 (C) 581; Zwane 1950 3 SA 717 (O) 720.

division in the case of Barlin⁵⁹ stated:

"but section 273 deals specifically with confessions of the commission of an offence in terms wider in one respect than the rule of common law. For the words 'without having been unduly influenced thereby' are elastic and may operate to enlarge in some degree the area of exclusion."⁶⁰

Thus the interpretation of "free and voluntary" in the Barlin case was restricted to the meaning of that phrase in the common law.⁶¹

Hoffmann and Zeffertt⁶² point out that undue influence is not restricted, as at common law, to a threat or a promise proceeding from a person in authority. In their view, undue influence includes statements induced by any violence, threats,⁶³ promises⁶⁴ or subtler inducements that negated freedom of volition. In Mpetha(2), Williamson J took the view that where a statute deals with a specific matter also specifically dealt with by the common law, one does not readily give the same words or concepts different

59 1926 AD 459.

60 Barlin *supra* 462.

61 Mpetha(2) *supra* 581.

62 The South African Law of Evidence (1988) 4ed 217.

63 Tandumzi 1915 EDL 6; Hoffmann and Zeffertt 217.

64 Masinyana 1958 1 SA 616 (A); W 1963 3 SA 516 (A); Joone 1973 1 SA 841 (C).

meanings.⁶⁵ Consequently, he held that the word "voluntary" in sections 219A and 217 of the Criminal Procedure Act must be accorded the common law meaning. The court left open the ambit of the concept "person in authority". But the policemen who took the statements from the accused were obviously persons in authority.⁶⁶

4.4 Assaults or threats of assault

The Kasikosa case reiterated the well-known dictum in Sibanda⁶⁷ that:

"... where an accused does not allege that confrontation or interrogation affected his freedom of volition, the hypothetical argument that it may have done so is not of much force. [Even] an unsophisticated accused must know what really induced him to make the statement. It may well be, and in fact often happens, that he may wish to gild the lily and say in addition that he was assaulted and ill-treated when he was not, but if he makes no reference to the fact that confrontation and interrogation had any bearing on his making the statement, or if he positively says that it had no such bearing, then that must always be a very cogent fact to be taken into account in determining whether or not interrogation and confrontation did, in fact, induce him to make the statement, because, if it did that fact must be in the very forefront of his mind, and one would expect even a simple person to make some mention of it."

65 Mpetha(2) *supra* 581.

66 Mpetha(2) *supra* 581.

67 Sibanda 1968 1 SA 236 (RAD).

Many accused may experience problems with the above remark. It is common knowledge that accused complain of assaults or even threat or assault prior to the making of confession. Since the accused are usually not represented during the making of confessions, they only reveal this fact for the first time in court. The presiding judge considers the evidence of the accused against the evidence of experienced witnesses in the name of police officers. Obviously, the police witnesses would be regarded as reliable and honest witnesses because they are familiar with the witness-box and they are familiar with the court procedures. The accused may be frightened by the very fact of opposing police witnesses. He has no clue about the importance of his demeanour in the witness box. The scales are immediately weighed against an accused.

Moreover, the judges have always found an allegation of assault by the police to be false, and that the accused were horrible witnesses.⁶⁸ The court proceed to look for other reasons for excluding confessions other than the alleged assaults. Maybe this is the correct procedure. But, the crux of the matter is that any absence of assault must be verified by medical evidence. The current practice of disposing of that on the basis of credibility of witnesses is in favour of the prosecution. To illustrate this point, Williamson J made the following remark in Mpetha(2)⁶⁹:

"in my more than 30 years involvement in the practice of law in our courts my experience is that by far the most common ground of complaint by an accused who has made a confession is that he was induced to confess by assault or threats of assault. Very often these complaints are baseless, but yet they form, as virtually every practising lawyer knows, the most frequent of all complaints.

In my opinion therefore any proper questioning should of necessity involve an investigation into the possibility of assaults or threat of assaults. Anything less would be to turn a blind eye to one of the unhappy realities of life."

The procedural problem created by the court's attitude towards allegations of assaults or threats of assault is that the prosecution is rarely required to lead medical evidence. It is difficult to support a statement like the one quoted above where the evidence of assault or threats of assault is rejected on other grounds. The evidence of an unsophisticated accused cannot be reasonably expected to be more cogent than that of experienced policemen. Moreover, it is irregular to approach an allegation of assault as a pack of lies. What if the accused was assaulted? It is necessary to suggest some changes to the law in order to compel the prosecution to rebut any allegation of assault or threats of assault by either medical evidence or evidence of a psychologist.

68 See Kasikosa supra 253; Mpetha(2) supra 412.

69 1982 2 SA 406 (C) 412.

In Chenisso,⁷⁰ Myburgh J took the following factors into account in deciding that the confession was inadmissible: that the accused had been arrested after fleeing 100 kilometres on foot; that in his confession the accused stated that he had not been given water between the place where he had been arrested and the office where he was questioned; that the accused was subjected to 30 hours' continuous questioning by the police; and that despite such lengthy interrogation, the accused had only changed his story once he was before a magistrate. It is clear that the cumulative effect of these factors was such that as to induce the accused to make a confession as he did.

4.5 Critique of the undue influence requirement

The definition of "undue influence" is far from being clear and precise.⁷¹ Our courts have defined "undue influence" as that influence which if it is introduced in a court of law would be repugnant to the general principles on which the criminal law is based.⁷² What does this mean in a simple language? A court of law

70 1983 4 SA 912 (T) 914-16; cf Christie 1982 1 SA 464 (A).

71 See Grano "Voluntariness, free will and the law of confession" 1979 Va.L.Rev. 861.

72 see Hackwell *supra* 400.

operates in terms of rules of both the criminal procedure and the law of evidence as well as the substantive criminal law. Which are the rules which are used in defining "undue influence"? The definition is not clear in this regard. The general principles of criminal law are well known and well documented." But the definition of "undue influence" as enunciated by our courts does not identify specific rules to which an influence must be repugnant in order to be undue. The definition leaves one with a doubt. For that reason it cannot be regarded as satisfactory.

The voluntariness requirement is defined in terms of undue influence. Here one finds a legal term used to define another legal term. For obvious reasons, it would appear that there was not need to retain the two terms as separate requirements of the admissibility of a confession. In terms of the common law, the voluntariness of a confession may be excluded by an undue influence emanating only from a person in authority.

It would appear that in practice it has been recognised that the differences between the terms

73 See Snyman Criminal Law (1989) 2nd 1-300; Milton and Burchell Cases and Materials on Criminal Law (1992) 1 et seq.

"undue influence" and "voluntariness" do not serve any useful purpose." This is an indication that the only concern is whether the requirements of section 217 of the Criminal Procedure Act are met before the confession is admitted into evidence. Consequently, it will be reasonable to recommend that these two requirements be merged into one, namely voluntariness without bringing in the requirement that the source of the improper influence be a person in authority.

4.6 Conclusion

The definition of "undue influence" lacks precise meaning. It is vague. The phrase "undue influence" is also used as a substitute for the terms "involuntary". Our courts have formulated the following tests for "undue influence". These tests include the following:

- (a) Has it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor's will was not swayed by the external impulses, improperly brought to bear upon the suspect,

which are calculated to negative the apparent freedom of volition?⁷⁵

- (b) Was or was not the confessor's will swayed by external impulses improperly brought to bear upon it which negatived his freedom of volition?⁷⁶
- (c) Was the inducement such that there was any fair risk of a false confession?⁷⁷
- (d) A fair test of undue influence is: was the influence such as would have induced the suspect to tell what was not true?⁷⁸

Having stated these tests, it must be borne in mind that improper influence in *vacuo* does not avail an accused; it must exercise itself upon the mind.

The test for undue influence was formulated objectively in Kuzwayo (*supra*); but Williamson J in Mpetha(2)⁷⁹ correctly pointed out that it must be formulated subjectively because the whole object of the inquiry is to evaluate the freedom of volition of the accused and this of its very nature is an

75 Kuzwayo *supra* 768 per Van den Heever JA.

76 Ananias *supra* 487.

77 Ananias *supra* 498.

78 Steve *supra* 103.

79 Mpetha(2) *supra* 585.

essentially subjective inquiry. It is the suspect's will as it actually operated and was affected by outside influences that is the concern.

Lastly, it must be pointed out that the distinction between "voluntariness" and "undue influence" lies in the source of the improper influence that is exerted on the confessor. The only requirement is whether the confession is admissible in terms of section 217 of the Criminal Procedure Act.

CHAPTER FIVE

STATUTORY COMPULSION TO SPEAK

5.1 Introduction

Certain parliamentary enactments place a suspect under a legal duty to speak.¹ This is usually the case where the suspect is detained for questioning. Generally speaking, confessions extracted by persistent interrogation by the police cannot be excluded from the evidence on that ground alone.²

In our law, a commissioned police officer of or above the rank of Lieutenant Colonel may arrest a person without a warrant and detain him or her for interrogation if the police officer has reason to believe that the person has committed or intends to commit the crime of terrorism or subversion or the offence of harbouring, assisting or failing to report the

1 See section 29 of the Internal Security Act 74 of 1982; section 17 of the General Laws Amendment Act 37 of 1963; Section 6 of the Terrorism Act 83 of 1967.

2 Du Toit et al Commentary on the Criminal Procedure Act (1989) 24-58; Hiemstra Suid-Afrikaanse Strafproses 4ed (1987) 497-98; Schmidt Bewysreg (1989) 3ed 506; Hoffmann and Zeffertt The South African Law of Evidence (1988) 219-220; Ananias 1963 3 SA 486 (SR); Mkhwanazi 1966 1 SA 736 (A); and Sibanda 1965 1 SA 236 (RA).

presence of someone reasonably suspected of having committed these crimes; or is withholding from the police information regarding the commission or intended commission of such offence.³ Before 1991 no court of law had jurisdiction to pronounce on the validity of any action taken in terms of section 29 of the Internal Security Act.⁴

A section 29 detainee is held according to the directions issued by the Commissioner of Police for a period not exceeding ten days and for such further period or periods not exceeding 10 days each, as the case may be, as a judge of a provincial or local division of the Supreme Court of South Africa may, on application in accordance with subsection 29(3), determine from time to time.⁵ In terms of the original section 29, a detainee's release was at the discretion of the commissioner when he was satisfied that the detainee had satisfactorily replied to all questions

3 Section 29(1) of the Internal Security Act 74 of 1982.

4 Section 29(6) of the Internal Security Act 74 of 1982. Section 29 was substituted by section 13 of Act 138 of 1991. Subsection 29(6) was deleted in the amended section 29.

5 Section 29(1) of the Internal Security Act 74 of 1982 as amended by section 8 of Act 4 of 1992; see Mathews Freedom, State Security and the Rule of Law (1986) 79.

or that no useful purpose was served by further interrogation.⁶

This was a drastic procedure which resulted in a detainee being kept in custody even after the interrogation has been concluded where the docket had been referred to an Attorney-General for a decision on whether to prosecute.⁷

5.2 Historical background of statutory compulsion to speak

5.2.1 Section 17 of the General Laws Amendment Act 37 of 1963

In Ismail(1)⁸ the court was considering the question of admissibility of statements made by suspects who were detained in terms of section 17 of the General Law Amendment Act 37 of 1963 (the so-called 90 days detention clause). The focus was on the interrogation of the detainees until they replied satisfactorily to all questions. Milne JP expressed the following view:

"Does the fact that the procedure was authorised by parliament make it necessary

6 Section 29(1) of the Internal Security Act 74 of 1982; see Hurley v Minister of Law and Order 1985 4 SA 709 (D) and Minister of Law and Order v Hurley 1986 3 SA 568 (A) regarding the power of the court to investigate the circumstances surrounding the decision to detain a person in terms of section 29.

7 Mathews 79 117.

8 1965 1 SA 446 (N).

to say that as long as there was no violence or other unlawful inducement, any statement made by a person under 90-day detention was made freely and voluntarily, especially when regard is had to the consideration, which I think is manifest here, that the police would not regard a statement by him as satisfactory unless it included an admission of his own complicity? I think that there is much to be said for Mr *Thirion's* submission that the mere authorisation of this machinery by parliament for obtaining the desired information cannot be treated as rendering the making of a statement free and voluntary when it is made in order to avoid the 90-day detention.

Having regard to all the evidence, I find myself not persuaded that it was not a fear of further detention that induced the accused to make the confession."⁹

The court was correct in holding that it was a fear of further detention that could have induced the accused to make the confession. The same could be said of an accused who is subjected to interrogation by relays of police interrogators. It must be realised that an accused has a breaking-point where he may make statements against himself in order to avoid further interrogation. To some people police interrogation is a frightening experience - let alone lengthy interrogation in detention. The place where the interrogation is conducted is also a relevant factor. For example, where a suspect is interrogated in court, he or she is protected by the impartial judge or

9 Ismail(1) *supra* 494.

magistrate; the court is open to the public except in very few cases; friends and members of his or her family may attend the hearing; the suspect has a right to legal representation albeit at a price. All these factors are not present when a suspect is interrogated at a police station. The fact that a suspect is subjected to an all-night interrogation by teams of experienced police interrogators may disorientate a suspect. All these factors are borne out by the reported decisions discussed *infra*.

The position of a detainee was considered in Rossouw v Sachs.¹⁰ In that case, a practising advocate was detained in terms of section 17 of the General Law Amendment Act.¹¹ The appellant was the police officer who was second in command of the security branch of the South African Police in Cape Town.¹² The court *a quo* granted an order prayed, namely:

- "1. Declaring that the respondent is not entitled to deprive the applicant of any of his rights and liberties save to detain him for interrogation and save to deprive him of access to other persons.
2. Declaring that applicant, even though detained under sec. 17 of Act 37 of

10 1964 2 SA 551 (A).

11 Act 37 of 1963.

12 Facts and arguments not relevant to admissibility of statements of a detainee would be omitted.

1963, is entitled at least to the same rights and liberties while in custody as are enjoyed by awaiting-trial prisoners or other non-convicted persons who are being detained under the provisions of some other law, and more particularly to the following rights:

- (a) To be allowed out of his cell daily for adequate and reasonable periods for the purposes of exercise and/or recreation;
- (b) to be permitted to receive an adequate supply of reading material subject to the right of scrutiny thereof by the persons detaining him;
- (c) to be permitted to receive and use a reasonable supply of writing materials."

Ogilvie Thompson JA (as he then was) interpreted section 17 of the General Law Amendment Act as implying that although an accused person is entitled to decline to answer incriminating questions and that he may, even at his trial, elect not to give evidence,¹³ the position was different under section 17. It is implicit in that section that interrogation is to take place at the first reasonable opportunity, but once a commissioned officer suspects upon reasonable grounds that any person has committed any offence to which section 17 applies, or is in possession of any information relating to the commission of

any such offence, the arrest occurs and, unless the person concerned replies satisfactorily to all questions, the detention in custody ensues and continues until the commissioner considers that the detainee has replied satisfactorily to all questions at interrogation."

According to Ogilvie Thompson JA, the initial arrest and the detention in custody is for the purpose of interrogation, but in the case of a detainee who declines to speak or who fails in the opinion of the commissioner, to reply satisfactorily to all questions, the continued detention authorised by section 17 is designed to induce the detainee to speak - that is to say, to reply, in the opinion of the commissioner "satisfactorily to all questions."¹⁵

Having expressed this view, the judge of appeal emphasized that:

"It may readily be postulated that Parliament can never have intended that the detainee should, in order to induce him to speak, be subjected to any form of assault, or that his health or resistance should be impaired by inadequate food, living conditions or the like. Equally, the interrogation expressly authorised by sec. 17 cannot, in my judgment, be construed as in any way sanctioning what are commonly described as third degree methods. Readily

14 Rossouw v Sachs *supra* 559.

15 Rossouw v Sachs *supra* 561.

conceding all this, as also an obligation on the part of the State to see that the detainee is, at the end of his detention, released with his physical and mental health unimpaired, counsel for appellant argued that, during the period of his detention, a detainee is entitled to necessities but not to comforts. Reading matter and writing materials, so the argument continues, fall into the latter category unless, in a particular case, such matter or materials are shown to be necessary for the preparation of a detainee's defence or, upon medical ground, necessary for the maintenance of his health."¹⁶

This quotation correctly points out that the detainee must not be assaulted, be denied food or tortured in any way. But it appears to ignore the general well-being of the detainee save to say that the state has an obligation to ensure that "the detainee is, at the end of his detention, released with his physical and mental health unimpaired".

To sum up the position of a detainee as set out in Rossouw v Sachs the following principles may be enunciated.

- (a) The initial purpose of the detention is to bring a suspect in a setting conducive to police interrogation. The suspect is arrested and kept in any custody selected by the commissioned

police officer. The police exercise exclusive right of access to and control over a detainee subject to a visit by a magistrate at least once a week.

- (b) If the detainee fails to answer questions or refuses to talk, the continued detention is intended to induce him or her to speak. In short, he may incriminate himself.
- (c) The detention and exclusive police control over the detainee do not entitle the police to subject the detainee to any maltreatment in either body or mind.

In Schernbrucker v Klindt,¹⁷ Botha JA expressed the view that the detention of a person under the provisions of section 17 places that person as effectively beyond the reach of the court as his absence from its jurisdiction would.

In Moiloa,¹⁸ the appellant had been charged with culpable homicide, alternatively with contravention of section 31(1)(b) of the Transvaal Ordinance 17 of 1931 by driving a motor vehicle on a public road while under the influence of intoxicating liquor. In terms of section 32 of that Ordinance, the appellant was

17 1965 4 SA 606 (A).

18 1956 4 SA 824 (A).

compelled to answer questions put to him by the police. In answering questions put to him by the police he made admissions. Fagan JA held that the effect of the statutory compulsion was merely to remove the protection embodied in the maxim *nemo tenetur se ipsum accusare*, leaving the question of admissibility in other proceedings to be decided by the principles applicable to that branch of the law; and that these had been so construed as not to make the statutory compulsion a ground for ruling the statements to be inadmissible.¹⁹ The judge left open the question whether his holding would be the same if he were called upon to determine the admissibility of a confession made under statutory compulsion.

In Hlekani,²⁰ counsel for the accused submitted that statements made by the accused whilst he was a detainee under the provisions of section 17 of the General Law Amendment Act 37 of 1963 were not freely and voluntarily made, and that they were accordingly inadmissible in evidence against him.²¹ The defence argued that these statements were made by the accused in order to persuade those who detained him to release him. Wynne J in referring to Rossouw v Sachs, adopted

19 Moiloa supra 834.

20 1964 4 SA 429 (O).

21 See Hlekani supra 431.

the view of Ogilvie Thompson JA in that case.²² It is now trite law that the initial arrest and detention in custody of a detainee is for the purpose of interrogation, and that in the case of a detainee who declines to speak, or who fails, in the opinion of the Commissioner of Police to "reply satisfactorily to all questions" the continued detention authorised by section 17 of Act 37 of 1963²³ is expressly designed to induce him to speak - that is to say, to reply, in the opinion of the Commissioner of police, "satisfactorily to all questions". In an attempt to create an impression that a detainee is offered some protection, Ogilvie Thompson JA in the Rossouw v Sachs decision, stated obiter that a detainee was not to be subjected to any form of assault nor any maltreatment in body or mind, nor that his health or his resistance should be impaired by inadequate food, living conditions and the like, nor that the interrogation should amount to third degree methods.²⁴ In *casu*, the statements of a detainee were admitted in evidence against him.

The case of Hlekani approved the obiter remarks by Ogilvie Thompson in Rossouw v Sachs. It would appear

22 See Hlekani *supra* 435.

23 Section 29 of the Internal Security Act 74 of 1982 repealed section 17 of Act 37 of 1963.

24 See Hlekani *supra* 435-6.

that the fact that the continued detention of a detainee was intended to induce him to speak was played down. If a person is induced to speak it means he is not making a statement freely and voluntarily especially if it is by somebody in authority. For that reason, that statement is inadmissible. The purpose of 90 day detention was not to wring confessions out of the mouths of a detainees, but to elicit information needed by the police to investigate certain crimes. The detainee's statements are not supposed to be elevated to the level of statements made freely and voluntarily and without having been unduly influenced thereto. The fact that the compulsion is sanctioned by a parliamentary enactment does not mean that the courts should not be suspicious of a detainee's statement.

5.2.2 Section 6 of the Terrorism Act 83 of 1967

In Moumbaris,²⁵ counsel for one of six accused objected to the admissibility of evidence of pointing out by his client on the ground that the accused was a detainee under the provisions of section 6 of the Terrorism Act²⁶ at the time when he was alleged to have

25 1973 3 SA 109 (T).

26 Act 83 of 1967.

pointed out the points where bucket bombs containing pamphlets were found. That objection was based on the provisions of sub-section (6) of section 6 of the Terrorism Act which read:

"No person other than the Minister or an officer in the service of the State acting in the performance of his official duties, shall have access to any detainee or shall be entitled to any official information relating to or obtained from any detainee."

The pointing out of anything by a person under trial carries with it an implied admission that he has some knowledge of the thing pointed out or of the facts connected with it.

Boshoff J held that there was nothing in section 6(6) which either expressly or impliedly precluded the police or the State from using such information obtained from a detainee in the prosecution of offences under the Terrorism Act or any other offences for that matter.²⁷ The judge observed that the machinery of section 6 of the Terrorism Act was introduced for the very purpose of getting evidence and information for prosecution under the Act. Consequently, the court held that section 6(6) does not preclude the state from placing evidence before the court of the things and places pointed out by the accused to the police while he was a detainee.²⁸

In Hassim,²⁹ the appellate division pointed out that by the Terrorism Act, Parliament conferred extensive powers upon the police, and that the object of detention in terms of Section 6 of that Act was the acquiring of information. However, the court retains its normal power and function to evaluate "any evidence so obtained with vigilance and scrutiny, to pronounce upon the evidence placed before it, bearing in mind, *inter alia*, in any particular case, the question whether the circumstances under which the evidence was obtained has affected its credibility."³⁰ The judgment of James JP in the court *a quo* made it clear that:

"The court's function is, however, not altered by that fact [of detention]; its plain duty to come to a conclusion regarding the reliability of witnesses giving evidence before it remains unimpaired, and in performing that duty it must inevitably take into account the circumstances in which a witness arrives in the witness-box. [There] is, however, no all-embracing general rule that any witness who has been held under the provisions of the Terrorism Act must, for that reason alone, be rejected. The circumstances in each case must be carefully weighed and a decision come to in the case of each individual witness."³¹

28 Moumbaris *supra* 117.

29 1973 3 SA 443 (A).

30 Hassim *supra* 454.

31 Hassim *supra* 454-5.

Similarly, in Christie³² the appellate division decided that being held in detention under a fourteen-day detention law did not in itself deprive a statement of the quality of voluntariness. The Medical Association of South Africa has the following to say on the reliability or veracity of information or evidence obtained from a detainee:

"Information gathered from a detainee [by the interrogation of detainee held in isolation] will often result in evidence lacking all reliability and therefore of limited use to the interrogators either for further investigation or legal proceedings. A statement could be made quite contrary to the individual's true belief or knowledge. The above methods of detention would render the detainee susceptible to suggestion with no limit to the potential distortion of the information obtained."³³

In Van Niekerk,³⁴ the accused made a speech wherein he called upon judges of the supreme court and other judicial officers not to admit or attach any credence to evidence given or statements made by persons detained in accordance with the provisions of the Terrorism Act.³⁵ At the time of the accused's speech a

32 1982 1 SA 464 (A).

33 Report of the *Ad hoc* Committee of the Medical Association of South Africa (n187).

34 Van Niekerk 1972 3 SA 711 (A), see section 6 of Act 83 of 1967; see Dugard "Judges, academics and unjust laws: the Van Niekerk contempt case" 1972 SALJ 271; Parmanand "South Africa's state security legislation: exit section 6" 1984 THRHR 181.

35 See discussion *supra*.

criminal prosecution under the Terrorism Act had been in progress in another city. That was the Hassim case. The accused did not mention the Hassim case in his speech, but had personally extended an invitation to counsel appearing in it, to attend the meeting where he made his speech. The counsel did not attend.

It was held in the Van Niekerk case that for a judge to deny creditworthiness to evidence irrespective of its intrinsic merits would be grossly improper and that the accused's remarks had been made with reference, inter alia, to the current trial in the Hassim case. The accused was accordingly convicted of contempt of court. On appeal, Ogilvie Thompson CJ, pointed out that the Terrorism Act undoubtedly contains many stringent provisions, not least of which are those relating to detention in solitary confinement and the virtual exclusion of all resort to the courts in relation to such detention. The chief justice pointed out that criticism of these, and other provisions of the Act is readily understandable and provided it be expressed within legitimate bounds, constitutes no contravention of the criminal law.

In disagreeing with the accused's call to exclude all evidence obtained from a witness under section 6 of the Terrorism Act, the Court pointed out that in practice, most, if not indeed all, of those who are

called upon to testify for the state after having been previously detained under the provisions of the Terrorism Act are accomplices of the persons charged with contravention of that act.³⁶

5.2.3 Pre-trial detention in terms of section 29 of the Internal Security Act 74 of 1982

The purpose of pre-trial detention is to obtain information or evidence (or both) from the detainee.³⁷ A pre-trial detention under section 29 of the Internal Security Act enables the police to exercise absolute power of interrogation over a detainee for a period or periods of 10 days at a time.

Section 29 of the Internal Security Act has the following implications for a detainee:

- (a) No detainee may be held for a period exceeding ten days from the date of his arrest unless a judge of the supreme court on application extends it for a further period.³⁸ If the judge is not

36 Van Niekerk supra 721.

37 Mathews Freedom, State Security and the Rule of Law (1986) 79.

38 Section 29(1) of the Internal Security Act 74 of 1982.

convinced that further interrogation is necessary for purposes of interrogation, he may decline to extend the period of detention. This constitutes a judicial safeguard for the section 29 detainee.

- (b) The Commissioner of the Police is required to inform the Minister of Law and Order of the name of the detainee and the place of detention as soon as possible after his arrest.³⁹

- (c) According to the original section 29(6) of the Internal Security Act, a court of law had no jurisdiction to pronounce on the validity of any action taken in terms of section 29 of the Internal Security Act. As usual, the courts did intervene under certain conditions to determine whether the detention was valid.⁴⁰ The courts may now intervene since the subsection which excluded their jurisdiction has been repealed.

- (d) A magistrate and a district surgeon must also visit the detainee at least once every five days. A detainee may now be visited by his legal

39 Section 29(2)(a) of the Internal Security Act 74 of 1982.

40 See Minister of Law and Order v Hurley 1988 3 SA 19 (A).

41 See section 13 of Act 138 of 1991.

representative and his private doctor but not by members of his family and his friends.⁴² Such visits may be disallowed if the minister or commissioner has reason to believe that it may hamper any investigation by the police.

Mathews sums up the effect of the visits by a district surgeon and a magistrate in terms of the original section 29 as follows:⁴³

"The compulsory visits to the detainee, at least once a fortnight, of a magistrate and a district surgeon have proved ineffective in the past ... The central reason why these visits have proved to be inadequate is that the detainee remains at all time in the control of the security police who have the ability to make things much worse and unpleasant following complaints to any of the official visitors."⁴⁴

A detainee may incriminate himself when replying to questions at his interrogation. A section 29 detainee is subjected to a lengthy detention and interrogation by relays of police officers.⁴⁵ The tone of the interrogation may be described as aggressive.⁴⁶ It is

42 See subsections 29(3) and 29(10) of the Internal Security Act.

43 Mathews 89.

44 See Lyser (ed) Handbook for Public Interest Lawyers (1991) 70-72; Rudolph 22-29.

45 Mathews 90.

46 Mathews 90.

not far-fetched to suggest that a detainee is subjected to the following pressures and/or influences:

- (a) possible coercion caused by the interrogators;
- (b) disorientation caused by interrogation by relays;
- (c) lengthy and potentially indefinite incarceration in a solitary cell where there is no access to family, friends; and
- (d) imminent assault and/or possible death. Several detainees died in detention, for that reason a fear of possible death by a detainee is understood.

The accumulative effect of all these influences may constitute a traumatic experience for most detainees. Breyten Breytenbach said the following of his interrogators:"

"There is nothing, there is nobody, no power anywhere in the world that has any say over them. They can keep you for ever. They can put their heavy hands on you. They can break you down. They may even go red in the face and really let rip."

Dr West, who gave evidence in Gwala,⁴⁸ described the situation of a detainee in court as the D.D.D. syndrome.⁴⁹ This shorthand expression means the debility, dependency and dread syndrome. This describes the physical and psychological impact of enforced isolation and interrogation on detainees. Dr West's evidence was based on medical research which was done over a decade; and his conclusions were as follows:

"That research reveals that persons held and interrogated under the conditions described may experience one or more of the following states or conditions: a feeling of extreme helplessness; intense fear for himself and close family; mental confusion (ranging from a mild to an extreme degree); disturbance of concentration and of the memory function; malleability in the hands of those who control his destiny during detention, suicidal tendencies and mental breakdown; and the experience of hallucinations and the development of delusions."⁵⁰

At its meeting held on 10 May 1983, the Federal Council of the Medical Association of South Africa

48 Unreported decision of the Natal Provincial Division of the Supreme Court decided in July 1977.

49 Mathews 91.

50 Mathews 91; see Mathews and Albino "The permanence of the temporary: an examination of the 90 and 180 day detention laws" 1966 SALJ 31; Riekert "The D.D.D. syndrome: solitary confinement and the South African security law trial" in Bell and Mackie (eds) Detention and Security Legislation in South Africa (University of Natal 1985) 121; Fine "Re-examining the validity of detainee evidence: A Psycho-legal approach" 1984 SACC 156.

adopted a report of the ad hoc committee of the Medical Association of South Africa to Institute an Inquiry into the Medical Care of Prisoners and Detainees.⁴ In the report, the general duty of all medical practitioners is set out as follows:

"The duties of medical practitioners do not only extend to the treatment of sick or injured patients, but include a duty to practise preventive medicine actively. A system which makes legal provision for indefinite detention of security detainees without adequate judicial safeguards to minimize possible abuse inherently presents a serious health threat to those who fall in the security net."⁵

The *ad hoc* committee report contained the following recommendations:

- (a) It recommended that a detainee should under no circumstances be kept in isolation for more than seven days without regular physical and psychiatric assessment.³
- (b) During the interrogation of a detainee at least two persons must be present. If a detainee is a female, another woman must be present; and there

51 The members of the *ad hoc* committee were Professors S A Straus (chairman), N S Louw, J M de Klerk, J D Loubser, Drs G B Borchelor, J Gluckman and R C Otten.

52 Paragraph 4.1 of the *ad hoc* committee report.

53 Paragraph 6.2 of the *ad hoc* committee report.

must be a closed circuit monitoring of the interrogation.⁵⁴

(c) All detainees should be medically examined within twenty-four hours after their arrest.⁵⁵

(d) It was recommended that the clinical independence of the district surgeon should be guaranteed by law to enable the district surgeon to decide when, where and what medical treatment should be given to a detainee.⁵⁶

(e) It was recommended that a detainee be afforded an opportunity to be examined by a medical practitioner of his choice if he has requested it.⁵⁷

(f) Lastly, it was recommended that a peer review committee should be created to monitor the medical treatment given to detainees; and that the former be given the right to examine a detainee and to take a statement from him.

54 Paragraph 6.3 and 6.9 of the *ad hoc* committee report.

55 Paragraph 6.4 of the *ad hoc* committee report.

56 Paragraph 6.5 of the *ad hoc* committee report.

57 Paragraph 6.6 of the *ad hoc* committee report.

The government accepted the recommendations of the *ad hoc* committee except the last two. These were those relating to the right of a detainee to be examined by his own medical practitioner, and that a peer review committee be established to monitor the treatment given to detainees.

The concern of the *ad hoc* committee on the clinical treatment of a detainee is understood if one takes into account the fact that several detainees died in detention.⁵⁸

Moreover, statements made by detainees before justices of the peace or magistrates have been used as evidence in courts.⁵⁹

5.3 Approach of the courts to statements made under statutory compulsion to speak

In Mpetha(2),⁶⁰ Williamson J could not understand how the purpose of the section governing detentions of persons is nullified if a statement obtained thereunder is not admitted in evidence.⁶¹ The judge

58 e.g. Steve Biko and others.

59 See Ismail(1) 1965 1 SA 446 (A); Alexander (1) 1962 2 SA 796 (A); Christie 1982 1 SA 464 (A); Hlekani 1964 4 SA 429 (E).

60 1983 1 SA 576 (C).

61 Mpetha(2) *supra* 591.

emphasized that the purpose of those sections was to obtain information which was presumably achieved when a detainee satisfactorily answered all questions.⁶²

Williamson J held that:

"...the value judgment that I must make as to whether or not the statutory condition for admissibility are satisfied must take into account the actual effect upon the accused of detentions either under s22 or under s6."⁶³

Our courts have formulated the following principles on the admissibility of statements made under statutory compulsion:

- (a) The courts retain their normal power and function to evaluate evidence of any statement made under statutory compulsion. The actual effect of the detention and other circumstances under which a statement was made must be taken into account. No hard and fast rule can be formulated.
- (b) The courts are free either to admit or exclude any statement of a detainee from evidence in the exercise of its normal function to evaluate evidence. There is no presumption of exclusion of a detainee's evidence.

62 Section 22 of the General Laws Amendment Act 62 of 1966 and section 6 of the Terrorism Act 83 of 1967.

63 Mpetha(2) supra 591.

(c) Although no persons other than the Minister or any officer in the service of the State acting in the performance of his official duties shall have access to any information from any detainee, the prosecution is entitled to that information and may use it in court. That implies that the detainee is entitled to place before the court his version of what happened in order to assist the court to come to a correct decision.

(d) The courts have refrained to comment on the drastic powers conferred by section 29 of the Internal Security Act on the police except where criminal proceedings were instituted by the State."

5.4 Impact of a Bill of Rights on police interrogation

5.4.1 Fundamental Rights - a general introduction to the new constitution

The new constitution of the Republic of South Africa was enacted by parliament on 22 December 1993. Although its provisions will come into effect after the general election which will be held on 27 April 1994, it is necessary to refer to the chapter dealing

with fundamental rights.⁶⁵ The fundamental rights are those enshrined in a Bill of Rights.

5.4.2. Provision of the new constitution which will have an impact on the admissibility of confessions.

Before the adoption of the new constitution, there were many proposals as to what a Bill of Rights may or may not contain.⁶⁶ The chapter on fundamental rights shall bind the legislatures, the cabinet, provincial governments and all executive organs of state at all levels of government.⁶⁷ It shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of the new constitution.⁶⁸ This implies that when the police detain a person in terms of section 29 of the Internal Security Act for questioning, the provisions of this

65 See chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993.

66 See the Bill of Rights proposed by the South African Law Commission; the ANC Draft Bill of Rights: Preliminary Revised Version February 1993; the DP's Freedom under the Rule of Law: Advancing Liberty in the New South Africa, May 1993; Technical Committee on Fundamental Rights during Transition Seventh progress Report: 29 July 1993; Technical Committee on Fundamental Rights during Transition Sixth Progress Report: 15 July 1993.

67 See section 7(1) and (2) of the Constitution of the Republic of South Africa Act 200 of 1993.

68 Section 7(2) of the Constitution of the Republic of South Africa Act 200 of 1993

chapter on fundamental rights shall apply. The detainee is entitled to apply to a competent court of law for appropriate relief which may include a declaration of his or her rights.⁶⁹

In terms of the new constitution, every person shall have the right to freedom and security of his person, which shall include the right not to be detained without trial.⁷⁰ There is no provision for detention for purposes of interrogation. There are two types of detention allowed in terms of the new constitution. Firstly, detention for purposes of bringing the detainee to court on a criminal charge is allowed. This is implied from the wording of section 11(1) of the Constitution of South Africa Act. Secondly, the detention of a person or persons following the declaration of a state of emergency⁷¹ for purposes of restoring peace or order is allowed. The new constitution spells out clearly how to deal with the process of effecting the detention of a person.

69 Section 7(4) of the Constitution of the Republic of South Africa Act 200 of 1993.

70 Section 11(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

71 In terms of section 34 of the Constitution of the Republic of South Africa Act 200 of 1993.

When the entrenched rights against detention are suspended,⁷² the detention of a detainee shall be review by a court of law as soon as it is reasonably possible, but not later than ten days after his or her detention.⁷³ The court shall order the release of the detainee if it is satisfied that the detention is not necessary to restore peace or order.⁷⁴ A detainee is entitled to apply for a review of his or her detention at any stage after the expiry of ten days of review. The detainee enjoys the rights set out below.

(a) A detainee has a right to appear in person, to be represented by legal counsel, and to make representations against his or her continued detention.⁷⁵

(b) He is entitled at all reasonable times to have access to a legal representative of his or her choice.⁷⁶

72 i.e. rights entrenched in terms of sections 11 and 25 of the Constitution of the Republic of South Africa Act 200 of 1993.

73 Section 34(6)(c)(i) of the Constitution of the Republic of South Africa Act 200 of 1993.

74 Section 34(6)(c)(i) of the Constitution of the Republic of South Africa Act 200 of 1993.

75 Section 34(6)(d) of the Constitution of the Republic of South Africa Act 200 of 1993.

76 Section 34(6)(e) of the Constitution of the Republic of South Africa Act 200 of 1993.

(c) He is entitled at all times to have access to a medical practitioner of his or her choice.⁷⁷

When a detainee has been released following a court order, her or she shall not be detained again on the same ground unless the state shows good cause to a court of law prior to such re-detention.⁷⁸

A person detained when there is no state of emergency, that is, any person in police custody, enjoys the rights set out below.⁷⁹

(a) A right to be informed promptly, in a language which he or she understands, of the reason for his or her detention.⁸⁰ The purpose of this right is to place the police under a duty to inform the detainee of the purpose and circumstances that have led to his arrest. This prevents arbitrary action on the part of the police.

77 Section 34(6)(f) of the Constitution of the Republic of South Africa Act 200 of 1993.

78 Section 34(7) of the Constitution of the Republic of South Africa Act 200 of 1993.

79 Section 25(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

80 Section 25(1)(a) of the Constitution of the Republic of South Africa Act 200 of 1993.

(b) A detainee (including every sentenced prisoner) has a right to be detained under conditions consonant with human dignity which must include at least the provision of adequate nutrition, reading material and medical treatment at the expense of the state.⁸¹ This right is intended to prevent any mental and physical torture of a detainee.⁸²

(c) A detainee has a right to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the state.⁸³ A lawyer would ensure that all the rights of a detainee are respected and upheld by the police.

(d) A detainee is entitled to communicate with, and to be visited by, his or her spouse or partner, next-of-kin, religious counsellor and a medical

81 Section 25(1)(b) of the Constitution of the Republic of South Africa Act 200 of 1993.

82 Section 11(2) of the Constitution of the Republic of South Africa Act 200 of 1993.

83 Section 25(1)(c) of the Constitution of the Republic of South Africa Act 200 of 1993.

doctor of his or her choice.⁸⁴ Such visits are necessary to prevent the inherently coercive pressure of a police custody. This helps to ensure that detainees are not disorientated by the custody in which they find themselves.

- (e) Lastly, a detainee has a right to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.⁸⁵

A person who has been arrested in connection with the commission of a crime has the rights detailed below in addition to his rights as a detainee. This suspect has the right to be informed promptly in a language which he or she understands of his or her right to remain silent and to be warned of the consequences of making a statement.⁸⁶ The duty of the police to inform a suspect of the right to remain silent does not depend on whether they intend to question him. The constitution provides that a suspect must be informed and warned. The exact wording of a warning is not spelt out in the constitution.

84 Section 25(1)(d) of the Constitution of the Republic of South Africa Act 200 of 1993.

85 Section 25(1)(e) of the Constitution of the Republic of South Africa Act 200 of 1993.

86 Section 25(2)(a) of the Constitution of the Republic of South Africa Act 200 of 1993.

The legislature has enacted the right to remain silent for the first time in our law as a fundamental right. As soon as reasonably possible after arrest, a suspect must be informed of this right. It is not adequate to warn a suspect in terms of the judges' rules. In interpreting the right to remain silent and the wording of a warning to be given to suspects of the consequences of making a statement, our courts would have regard to comparable foreign case law.⁸⁷ Police interrogation is not prohibited. What is required is that a suspect must be informed of his right to remain silent and of the consequences of making a statement. Future arguments in our courts would centre around the question whether a suspect understood his or her right to remain silent and on whether a warning given to him by the police was adequate.

A suspect who has been arrested has a right not to be compelled to make a confession or admission which could be used in evidence against him or her.⁸⁸ This does not differ significantly from the current law on the admissibility of confessions. What is clear is that compulsion is recognised as a ground on which a confession could be excluded from evidence. What this

87 Refer to Chapters 12 and 13 *infra*.

88 Section 25(2)(c) of the Constitution of the Republic of South Africa Act 200 of 1993.

really means is that all circumstances that led to the making of a confession should indicate the absence of compulsion.

5.5 Evaluation

The law⁸⁹ authorising the police to detain a person for purposes of interrogation is not compatible with the fundamental rights enshrined in the constitution of our country which will come into effect after the general election due to be held on 27 April 1994. Police interrogation will continue to be a useful tool in law enforcement. The circumstances under which a suspect will be questioned must enable the suspect to exercise his or her right to remain silent as well as his or her right not to be compelled to make a confession or a statement.⁹⁰

As soon as the new constitution of South Africa comes into effect, the admissibility of confessions will be governed by the Bill of Rights enshrined in it. For this reason, comparable foreign cases will have to be considered in deciding the admissibility of a

89 Section 29 of the Internal Security Act 74 of 1982; the Negotiating Council has recognized this and resolved that section 29 of the Internal Security Act be repealed.

90 Section 25(2)(a) of the Constitution of the Republic of South Africa Act 200 of 1993.

confession in a criminal trial.⁹¹ Our courts will be entitled to have regard to American law cases on the admissibility of confessions.

The atmosphere created by a statutory compulsion to speak carries its own badge of intimidation.⁹² This is not physical intimidation, but it is equally destructive of human dignity.⁹³ The Bill of Rights enshrined in our new constitution is likely to protect a suspect against incommunicado police interrogation. The reason for this is that in a legal system that has a Bill of Rights, the practice of incommunicado interrogation is at odds with one of the most cherished principles - that the individual may not be subjected to statutory compulsion to speak. An individual is subjected to statutory compulsion to speak for no other purpose than to subjugate him or her to the will of those questioning him. Warren CJ pointed out in Miranda v Arizona⁹⁴ that an individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to

91 Section 35(1) of the Constitution of the Republic of South Africa Act 200 of 1993.

92 See Miranda v Arizona 384 US 436 (1966) 457.

93 Miranda v Arizona *supra* 457.

94 Miranda v Arizona *supra* 461.

the techniques of persuasion cannot be otherwise than under compulsion to speak.

The absurdity of denying that a confession obtained under incommunicado interrogation is compelled, is aptly portrayed by Sutherland.⁹⁵ A statement made under statutory compulsion to speak is involuntary and therefore inadmissible. This will be the case in our law following the adoption of a Bill of Rights. The contents of the chapter⁹⁶ dealing with fundamental rights is not compatible with incommunicado police interrogations.

Where an accused is subjected to statutory interrogation, to which he is obliged to reply, the element of voluntariness is absent.⁹⁷ An accused, who makes a confession or admission because of fear of further detention or further interrogation by relays of police interrogators cannot be said to be acting freely and voluntarily. An individual who is subjected to

95 "Crime and confession" 1965 Harv.L.Rev. 21 37.

96 Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993.

97 See Section 29 of the Internal Security Act 74 of 1982; Ismail(1) 1965 1 SA 446 (N); Rossouw v Sachs 1964 2 SA 551 (A); Moiloa 1956 4 SA 824 (A); Hlekani 1964 4 SA 429 (O); Moumbaris 1973 3 SA 109 (T); Hassim 1973 3 SA 443 (A); Christie 1982 1 SA 464 (A); Mpetha(2) 1983 1 SA 576 (C); Hoffmann and Zeffertt 219; 220; Schmidt 506.

protracted statutory compulsion to speak may reach a breaking point after which he or she may make any confession and/or admission.*

The current law is that the courts do not exclude a confession on the basis of having been made under statutory compulsion to speak.⁹⁸ It is clear that the legislature has changed the law in this regard.¹⁰⁰ The Bill of Rights provides that every person has the right not to be compelled to make a confession or admission which could be used in evidence against him or her. Our courts must have regard to this when exercising their normal power and function to evaluate evidence of any statement made under statutory compulsion to speak.

98 See Ismail(1) *supra* 494.

99 See Christie *supra*; Mpetha(2) *supra*.

100 Section 25(2)(c) of the Constitution of the Republic of South Africa Act 200 of 1993.

CHAPTER SIX

**PRELIMINARY WARNING AND QUESTIONING OF A SUSPECT BY THE
MAGISTRATE OR JUSTICE PRIOR TO RECORDING OF CONFESSIONS**

6.1 Introduction

The purpose of this chapter is to discuss the warning given to a suspect and his questioning prior to the recording of his confession. The purpose of the warning of a suspect is to enable him to speak freely and frankly in the presence of the magistrate or justice. The other purpose of this chapter is to enquire whether such warning and preliminary questioning of a suspect are clearly understood in practice. In terms of section 217 of the Criminal Procedure Act, confessions made to a peace officer, other than a magistrate or a justice of the peace, shall be inadmissible in evidence.¹

6.2 Customary questions set out on a roneod form as prescribed by the Department of Justice

A suspect is always subjected to preliminary questioning prior to the recording of his confession.

¹ Mavela 1990 1 SACR 582 (A) 589.

A warning that is usually given to an accused may read as follows:

"The deponent is informed that he is in the presence of a magistrate, that he has nothing to fear, can speak frankly, and that, should it be necessary, protection can be afforded him against any irregularity. Deponent is warned that he is not obliged to make any statement whatsoever and if he should make a statement it will be reduced to writing and may later be used as evidence against him.

Deponent is informed that the magistrate has no connection with the police and that this is not a hearing of the case."

The Department of Justice, on the recommendation by the judiciary, has designed a roneod form on which confessions are recorded. That prescribed form may contain the following questions:

"1. Do you understand the warning I have given you?

Answer:

2. Do you wish to make a statement?

Answer:

3. Has any person assaulted or threatened you to influence you to come and make a statement?

Answer:

4. Were you threatened with assault should you decline to make a statement to a magistrate?

Answer:

5. Were you ever threatened that action would be taken against you so that you would be prejudiced in any way whatsoever, should you decline to make a statement to a magistrate?

Answer:

6. Have you been threatened with assault or any other prejudice should you advise me of assaults or threats against you prior to your being brought to me?

Answer:

7. Are you in custody?

Answer:

8. Are you satisfied that you are in your sound and sober senses?

Answer:

9. (i) Do you expect any benefits should you make a statement?

Answer:

- (ii) If so, what benefits?

Answer:

- (iii) To what extent, if at all, did the fact that you expect to benefit contribute to your decision to make a statement?

Answer:

- (iv) Should no benefits be forthcoming from the statement, would you still wish to make one?

Answer:

10. (i) Have you previously made a statement to any person in respect of this incident?

Answer:

(ii) If so, to whom, when, and under what circumstances?

Answer:

(iii) Why do you wish to repeat this statement?

Answer:

11. Did anyone tell you what to say in this statement?

Answer:

12. What was the date of the commission of the alleged offence in connection with which you wish to make a statement?

Answer:

13. Is what you are about to say in your statement the truth according to your personal knowledge?

Answer:

6.3 Endorsement by a magistrate/justice of the peace

After the preliminary questioning, a magistrate or justice of the peace makes the following endorsement:

"1. Deponent appears normal and in his sound and sober senses.

2. Whereas it appears that deponent:

(a) is in his sound and sober senses;

- (b) was not unduly influenced thereto; and
- (c) freely and voluntarily desires to make a statement, he is told that he can now make such a statement."

The magistrate endorses at the end of the statement:

"Statement read back to deponent in X language; the language in which it was made, and the declarant affirmed it by signing it. Mr Z (the person referred to as interpreter) was also present."

6.4 Certificate of the interpreter

A certificate by the interpreter, where applicable, must be attached. It usually reads as follows:

"Certificate by interpreter.

In terms of section 217 of the Criminal Procedure Act... I hereby certify that in the confession made in my presence by BK, I interpreted truly and correctly to the best of my ability with regard to the contents of the statements and replies by him put by the magistrate from Y language to X language and vice versa."

The interpreter must sign the certificate.

6.5 **Duties and responsibilities of a magistrate when recording a confession**

The appellate division in Gumede² pointed out that the proceedings before a magistrate, as faithfully recorded by him, may convey a very misleading impression of spontaneity on the part of the person making the statement, when, as a matter of fact, the statement is not really made spontaneously, but as a result of a series of interrogations, in the course of which illegitimate methods may have been applied for the purpose of inducing the accused to make the statement.³ Feetham JA warned that although the bringing of an accused to a magistrate to make a statement is primarily for his protection, the same procedure may actually work very much against him, and tend to facilitate the obtaining of statements by improper means, which may not come to light owing to the dropping of a veil between the previous interrogation by the police and the subsequent appearance of the interrogated person before the magistrate.⁴

2 Gumede 1942 AD 398.

3 Gumede supra 433.

4 Gumede supra 433.

To reform this procedure, the court pointed out that the magistrate should ask certain questions in order to encourage the accused to disclose what has led up to his appearance before the magistrate for the purpose of making his statement. De Wet CJ in the same case said:

"I also wish to associate myself with the concluding remarks of my Brother Feetham on the second proviso to s273. This proviso was no doubt inserted for the protection of the accused, but I am afraid that in some cases its practical working has had the contrary effect. The evidence as to how the confession was made before the magistrate is, as a rule, entirely satisfactory, but one's experience shows that in the case of natives the formal warning and caution by the magistrate seldom bring out the fact, where such is the case, that there have been antecedent threats or promises to induce the accused to make the confession. I would suggest very earnestly for the consideration of the Minister of Justice the desirability of issuing instructions to all magistrates and justices of the peace that, when an accused is brought before them for the purpose of making any statement in the nature of a confession, they should in the first place inquire from him whether he had already made a statement and if so the nature of such statement and especially the reasons actuating him in wishing to repeat the statement."⁵

Subsequent case law has laid down that the questioning by the magistrate must be such as to pierce the veil adverted to in the Gumede case and to ensure that the result of such piercing is that one is satisfied beyond reasonable doubt that whatever untoward circumstances may have prevailed at the time the

accused made the statement to the police were no longer operative at the time when the accused appeared before the magistrate.⁶

In the case of Jakatyana⁷ Heath J pointed out that it is important to keep in mind the principle that a magistrate taking down a confession is not merely a recording machine, but is supposed to investigate the matter in order to establish whether the statement was made freely and voluntarily.⁸ He also said that the fact that an accused person has made a statement previously to the police is something that should be investigated. Merely following the printed forms is not sufficient, the magistrate should investigate the history. A history of an interrogation by the police may be the very reason why he was influenced to repeat the statement.⁹

When one of the magistrates in Jakatyana was busy taking a confession from an accused, the latter's attorney came into his office and he wanted to say something. The magistrate was not prepared to allow him to say anything. Heath J said that this was

6 Jika supra 500.

7 1990 1 SACR 420 (Ck).

8 Jakatyana supra 421.

9 Jakatyana supra 422.

indicative of the problem when a magistrate was not prepared to have an open mind when he takes down a statement from a person who wishes to make a confession. *In casu*, the appearance of the attorney was a good reason for the magistrate to investigate the circumstances leading to the making of a confession. It is disquieting to note that an officer of the court, namely the attorney, was not given audience.

There is strong argument for the view that the duty resting on a presiding officer at a trial, of informing the accused of the right to legal representation also rests on police officials at the time of arrest.¹⁰ It is advisable that this duty be extended to the recording of confessions and provisions be made therefore in the form used by magistrates for recording confessions.¹¹

10 Januarie 1991 2 SACR 682 (SE) at 684.

11 See Januarie *supra* 686.

6.6 Confessions made to a police officer *ex officio* justice of the peace.

6.6.1 Confessions recorded by police officers (*ex officio* justice of the peace) attached to the police unit responsible for investigating the crime

A person may become a justice of the peace when the Minister of Justice appoints him to that office,¹² or by holding a particular office either in the public service or in the security forces.¹³ The first schedule to the Justices of the Peace and Commissioners of Oaths Act sets out a list of *ex officio* justices of the peace. The list includes any office of deputy director-general, chief director, director or assistant director of a department;¹⁴ chief state law adviser, deputy chief state law adviser, senior state law adviser and state law adviser in the permanent service of the state.

12 Section 2(1) of Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

13 Section 4 of Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

14 See Column 11 of Schedule 1 to the Public Service Act 111 of 1984.

The list of *ex officio* justices of the peace also includes:¹⁵

- (a) Commandant-general of the South African Defence Force and Commissioned Officer of the Permanent Force of the South African Defence Force.
- (b) Attorney-General, Deputy-Attorney-General, Senior State Advocate and State Advocate.
- (c) Commissioned Officer of the South African Police.
- (d) Commissioned Officer of the Prisons Service.
- (e) Registrar of any division of the Supreme Court of South Africa.
- (f) Magistrate, Additional Magistrate and Assistant Magistrate.

When the phrase "*ex officio* justice of the peace" is used in this thesis, it refers to members of the security forces who are commissioned officers of the South African Police and commissioned officers of the prison services. Other categories of *ex officio* justices of the peace fall outside the scope of the exposition set out below.

Our courts have considered the question of confessions recorded by justices of the peace. In the case of

¹⁵ Section 2(1) of Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

Selebano¹⁶ the court held that the fact that a police officer (who is also a justice of the peace) who records a confession is also involved in the investigation of the case was irrelevant.¹⁷ Similarly, in Mahlala¹⁸ Margo J took the view that confessions are not *per se* rendered inadmissible by the fact that the justice of the peace who recorded them is also attached to the police unit responsible for investigating the crime in question. Those are merely circumstances to be taken into account in determining whether or not each confession was made freely and voluntarily and without undue influence.¹⁹ Colman J remarked in the case of Mofokeng²⁰ that confessions must be recorded by magistrates only. *In casu*, the court rejected a confession recorded by a justice of the peace.

16 1957 1 SA 384 (O); see De Vos "Die toelaatbaarheid van bekentenisse afgeneem deur polisie-offisiere verbonde aan die ondersoekkeenheid" 1984 TSAR 192; Goosen and Vorster "Die toelaatbaarheid van bekentenisse afgele aan polisie-offisiere" 1981 THRHR 428; Labuschagne "Bewyslas en waarheid" 1980 De Jure 153; Redgmen "They brought me to make a confession" 1984 CILSA 380; Riekert "Police assaults and the admissibility of 'voluntary' confessions" 1982 SALJ 175; Van der Merwe "Videotaping of accused person being questioned by the police" 1988 De Rebus 187.

17 Selebano supra 387-388; Jacobs 1954 2 SA 320 (A).

18 1967 2 SA 401 (W).

19 Mahlala supra 404.

20 1968 4 SA 852 (W) 858-860.

Jansen JA pointed out in the case of Dhlamini²¹ that it was not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace; it was rather the fact that this procedure constituted fertile earth for an accused in which to plant the seed of suspicion, which readily sprouts and burgeons to the stature of a reasonable doubt whether he, when making the confession to the police officer (as justice of the peace), was not being actuated by an improper inducement that might have gone before.²² *In casu*, the court held that the prosecution proved beyond a reasonable doubt that the confessions were made by the appellants freely and voluntarily and without having been unduly influenced thereto.

In the case of Mdluli²³ the three appellants made their confessions to a commissioned officer of the South African Police who was ex officio a justice of the peace. The appellants' objection to the admissibility of the confessions was rather unusual and the trial judge recorded that a somewhat unusual feature of that case was that the accused did not claim that they were

21 1971 1 SA 807 (A).

22 Dhlamini supra 815.

23 1972 2 SA 839 (A).

coerced by the assaults, or motivated by inducements, to go before the justice of the peace and tell him what they know.²⁴

Holmes JA held that the confessions were confirmed and reduced to writing in the presence of the justice of the peace.²⁵ That police officer was attached to the unit which investigated the crime, and he did not personally take part in the investigation and his office was in the same building. The court held that this was undesirable; in its opinion it would be preferable to enlist the services of an experienced magistrate.²⁶

The appellate division has pointed out in the case of Khoza²⁷ that the taking down of confessions by peace officers in the persons of police officers and by the investigating officer and the use of policemen as interpreters has been condemned in a number of decided cases and confessions have been held to be inadmissible in the light of such irregularities.²⁸

24 Mdluli supra 840.

25 See section 244(1) of the Criminal Procedure Act 56 of 1955.

26 Mdluli supra 841.

27 1984 1 SA 57 (A).

28 Khoza supra 59.

Hefer AJA said that it must, however, still be emphasized that the primary question in the adjudication of the admissibility of any confession is whether that confession was made in accordance with the requirements of section 217(1) of the Criminal Procedure Act, that is freely and voluntarily, by an accused in his sound and sober senses, and without undue influence.²⁹ The condemnation of such practices or irregularities must not be seen as the establishment of requirements of admissibility different or additional to those set out in section 217(1)(b)(ii) of the Criminal Procedure Act.³⁰ The learned judge also said that whenever a confession has been excluded in the light of such practices (namely taking down of confessions by peace officers in the persons of police officers, the investigating officer, etc.) it has clearly been indicated that it had been done because it had, in the circumstances of the particular case, raised doubts as to whether the confessions had been voluntarily made, as such an "irregularity" is only one of the factors which, together with all the other available information, is used to decide whether the confession was made in

29 See Radebe 1968 4 SA 410 (A) 419; Khoza supra 59.

30 Khoza supra 59.

accordance with the requirements of section 217(1) of the Criminal Procedure Act.³¹

Hefer AJA concluded his judgment by saying:

"Die algemene patroon van die polisieonderzoek is ongetwyfeld ter sake, maar wat klaarblyklik deurslaggewend is, is die feitesamestelling in elke afsonderlike geval. Selfs teen die agtergrond van die algemene patroon van die ondersoek, is dat telkens daardie feitesamestelling wat tot die gevolgtrekking lei dat die verhoorhof tereg bevind het dat elke beskuldigde se bekentenis toelaatbaar was."³²

The facts of the case of Mazibuko³³ were briefly as follows: The appellants made confessions to the police officer who was justice of the peace and head of the investigation team. The interpreter who was used was the investigating officer of the case. The reason why the services of a magistrate were not used was because the nearest one was 120 km away from the police station. The trial court found that notwithstanding this "irregularity" there was nothing sinister with regard to the conduct of the police and rejected the objection by the defence that the confessions were not made freely and voluntarily.

31 Mahlala supra 404; Mazibuko 1978 4 SA 563 (A) 568.

32 Khoza supra 61.

33 1978 4 SA 563 (A).

Joubert JA remarked as follows on the undesirability of the procedure followed in Mazibuko:

"Section 244(1) sanctions the procedure whereby a confession is confirmed and reduced to writing in the presence of a justice of the peace (who may be a police officer), but the trial Judge rightly drew attention to judicial remarks relating to the undesirability of having confessions taken by members of the police force who are actually concerned in the investigation of a crime and in the arrests by them... [The] presence of this feature of undesirability in a given case is of course not without legal significance. It is a circumstance to be considered in conjunction with other relevant circumstances, if any, by a court of law in making the ultimate decision whether or not the State has proved beyond a reasonable doubt that the confession in question was made in conformity with s244(1), i.e. freely and voluntarily and without undue influence."³⁴

The "undesirability in a given case" is that mentioned by Homes JA in Mdluli.

In Mogale³⁵ the court expressed itself strongly against the recording of confessions by commissioned police officers who are also investigating officers of the case in question. Steyn J said:

"Ofskoon die bewoording van art 217 sekerlik nie hierdie Hof magtig om te weier om 'n bekentenis wat gemaak is aan 'n ondersoek-beampte, wat ook 'n vrederegter is, en wat dit boekstaaf en voor wie dit bevestig word,

34 Mazibuko *supra* 568.

35 1980 1 SA 457 (T).

toe te laat nie, is dit na my mening 'n praktyk wat so ongewens is dat 'n mens nie enige uitbreiding daarvan moet toelaat wat nie streng binne die bepaling van die Strafposeswet verpligtend is nie."³⁶

The judge in Mogale pointed out that a commissioned police officer may, in his capacity as justice of the peace, record a confession which he also obtained in his capacity as investigating officer.³⁷ The officer may also refer the accused to another justice of the peace to record the confession. Lastly, he may refer the accused to a magistrate. *In casu*, the court held that a confession tendered in terms of section 217 of the Criminal Procedure Act by means of a tape recording and the transcription thereof is inadmissible.³⁸

The undesirability of making a confession to a justice of the peace attached to the investigation unit as well as the use of a police interpreter received

36 Mogale *supra* 458-459.

37 In this regard, he may question the accused in terms of the roneod form for recording questions; see Gumede 1942 AD 398; Mofokeng 1968 4 SA 852 (W) which was approved by the appellate division in Dhlamini 1971 1 SA 807 (A) 815.

38 Mogale *supra* 460-461.

consideration in Mbele.” Although the confession in the guise of pointing out was held inadmissible, another confession made to another peace officer, who was also justice of the peace, contained the truth and the appeal was not therefore upheld. The criticism directed at the practice of a police officer attached to the investigation unit taking down confessions in respect of crimes, the investigation whereof takes place under his command was summed up as follows by the judge:

"Die onreelmatighede waarna ek verwys sluit onder andere in die volharding in en verontagsaming deur die polisie, ondanks die herhaalde afkeuring daarvan deur hierdie en ander Howe, van die ongewenste praktyk dat 'n offisier verbonde aan die ondersoek-eenheid optree die gebruikmaking van 'n tolk betrokke in die ondersoek en verbonde aan sodanige eenheid..."⁴⁰

6.6.2 Criticism of recording of confessions by police officers

The appellate division in the case of Mbatha⁴¹ held that the above criticism goes too far. It found that there is no legal basis for labelling such practice as an irregularity; and the legislature does not deny an

39 1981 2 SA 738 (A).

40 Mbele supra 743.

41 1987 2 SA 272 (A) 279.

officer attached to an investigating unit the right to take down confessions and the courts can also not deny him this. Joubert JA found that the courts are not entitled to lay down requirements for admissibility of confessions taken down by officers as justices of the peace which are not prescribed by section 217(1)(a) of the Criminal Procedure Act.⁴² *In casu*, the court agreed with the evidence under cross-examination of Captain T when he said:

"Ek is 'n offisier, ek is 'n vrederegter. Daar is nêrens in die Wet, behalwe die kritiek wat in die Howe uitkom dat ek nie 'n verklaring mag vat nie. Ek is 'n mede-onderzoekbeampte in die saak en ek het dit as my plig beskou toe die man na my toe gebring was om die verklaring te neem of uitwysing te laat doen."⁴³

In the case of Magwaza,⁴⁴ the appellate division pointed out that it is well known that the taking down of a confession by a peace officer, *ex officio* justice of the peace, in the person of a police officer, particularly when the latter is the investigating officer in the case or the senior police officer of the unit investigating the crime, and likewise the use of such a policeman as an interpreter in the taking down of such a confession, represent practices which

42 Mbatha *supra* 279. Joubert JA referred to Khoza *supra* 59-60 with approval.

43 Mbatha *supra* 278.

44 1985 3 SA 29 (A).

in the long line of decisions have been consistently criticised and deplored by our courts.⁴⁵ Hoexter JA referred with approval in his judgment to the remarks made by Hefer AJA in the case of Khoza where the learned Judge said:

"Dit moet egter steeds beklemtoon word dat die primêre vraag by die beoordeling van die toelaatbaarheid van enige bekentenis is of dit volgens die voorskrifte van art 217(1) van die Stafproseswet 51 van 1977 gemaak is, d.w.s. vrywillig, ongedwonge en sonder onbehoorlike beïnvloeding... Die veroordeling deur die Howe van praktyke soos dié waarna so pas verwys is, moet nie gesien word as die daarstelling van toelaatbaarheidsvereistes anders as of benewens die van art 217(1) nie. Telkens wanneer 'n bekentenis in die lig daarvan uitgesluit is, is immers duidelik aangedui dat dit geskied het omdat dit in die omstandighede van die bepaalde saak, twyfel laat ontstaan het of die bekentenis vrywillig gemaak is ... aangesien so 'n 'onreëlmatigheid' slegs een van die faktore wat saam met al die ander beskikbare inligting, gebruik word om te oordeel of die bekentenis in ooreenstemming met die vereistes van art 217(1) gemaak is."⁴⁶

It is clear from the above quotation that it need hardly be said that each case involving an enquiry whether a confession by an accused was made freely and voluntarily, and without his having been unduly influenced thereto, falls to be decided on its own

45 See Mofokeng supra 858; Dhlamini supra 852; Mdluli supra 841.

46 Khoza supra 59-60; see Radebe supra 419; Mbele supra 743; Mofokeng supra 858; Mahlala supra 404 and Mazibuko supra 856.

particular facts.⁴⁷ The circumstances leading up to the making of a confession are more often than not of critical importance. The decision in Mbatha⁴⁸ should be seen against this background.

The ratio of the Mbatha decision did not finally neutralise the criticism levelled at the practice of recording confessions before a commissioned police officer, *ex officio* justice of the peace, who is attached to the unit investigating a crime or who works in close liaison with the investigating officer. This criticism was repeated in Maluma⁴⁹ The reason for this would appear to be that such a criticism is a valid one and, although not conclusive, remains a devastating one under certain circumstances.

Our courts have interpreted the principle enunciated in the case of Mbatha in reported decisions.⁵⁰ In Mavela, a justice of the peace and captain in the South African Police warned the accused that he was not obliged to point out anything but that, if he did,

47 Magwaza supra 37-38.

48 Mbatha supra 279.

49 Maluma 1990 1 SACR 65 (T) 73 per Bertelsmann AJ; see also Benjamin 1 PH 440 (A); Mbatha and Khoza cases *supra*.

50 See Mavela 1990 1 SACR 582 (A); Mahlabane 1990 2 SACR 558 (A) and Maluma supra.

what he pointed out and what he might say would be noted down and could be used as evidence against him. This officer was not involved in any way with the investigation of the offence. An interpreter was a police sergeant who was not involved in the investigation of the offence. The accused made a confession to the justice of the peace and this was tendered by the prosecution into evidence. The accused alleged that he had been assaulted by several policemen in order to get him to confess to the crime. A trial within a trial was held by the trial court. The accused's allegation was rejected as false and that finding could not be successfully attacked on appeal. The gist of the accused's allegation did not suggest that any of the assaults prompted him to make a confession. In fact he denied making any confession at all.

Applying the ratio in the Mbatha case to the Mavela decision the court held that the mere fact that an officer in the unit which investigated the offence to which a confession related, although such officer was not himself involved in the investigation but was required from time to time as an officer to check the docket of various investigations to see that they were proceeding properly and to offer advice where necessary, had taken the confession did not amount to an irregularity justifying such confession being held

to be inadmissible, even though such officer had from time to time checked the docket.⁵¹

The case of Mahlabane can be distinguished from that of Mavela in that in the former the officer who took the confession was an investigation officer and an interpreter was his assistant, whereas in the latter both the officer and the interpreter were not involved in the investigation of the case. They were members of the same police unit investigating the crime.

In the decision in Mahlabane⁵², the court conceded that a certain V in his capacity as police officer and justice of the peace was entitled to record a confession to a crime. But the appellate division, in a unanimous decision, pointed out that the decision in Mbatha does not mean that the objections and criticisms levelled against police officers who investigate crimes and also record confessions where they are involved as investigating officers were no longer valid.⁵³ Grosskopf JA said in his judgment that

51 See Mbatha *supra* 279-280; Khoza *supra* 59-60; Mavela *supra* 589.

52 Mahlabane *supra* 562; Mbatha *supra* 279; Mbele *supra* 743 and Khoza *supra* 59-60.

53 Mahlabane *supra* 562; Mofokeng *supra* 858; Dhlamini *supra* 815; Mdluli *supra* 840-841; Mazibuko *supra* 568-569.

it remains an undesirable practice for a police officer to record a confession in a case where he himself is an investigating officer; where he is involved in the investigation of the case; and where he is attached to the same police unit responsible for the investigation of the offence.⁵⁴ The court said that it is equally undesirable to employ the services of a police interpreter who is a member of the unit investigating the crime.⁵⁵

In its judgment, the court pointed out that if a police officer who is involved in a case takes down a confession from a confessor, he unnecessarily creates room for allegations by the accused that the confession was not made freely and voluntarily.⁵⁶ It is preferable to employ the services of a magistrate or other police officer available to take down the confession. The reason for this is that the police officer who records a confession in a case where he is involved exposes himself unnecessarily to the accusation that he took down the confession himself in order thereby to attempt to conceal the allegation of assault, threats or other irregularities by himself or

54 Mahlabane supra 562.

55 Mahlabane supra 562.

56 Mahlabane supra 562.

other members of his staff. The court took the view that if police officers refrain from taking down confessions in cases in which they are personally involved, it ought to lead not only to a reduction in the number of unfounded accusations of improper action by the police but should also on the other hand give greater peace of mind and protection to suspects.⁵⁷ If the police officers stop this undesirable practice, it might even reduce the necessity for conducting lengthy trials within trials.

Jansen JA expressed himself as follows in his judgment in the Dhlamini case:

"It is not a question of impugning in any way the integrity of responsible police officers in carrying out their duties as justices of the peace; it is the fact that this procedure constitutes fertile earth, for an accused, in which to plant the seed of suspicion, which there readily sprouts and burgeons to the stature of a reasonable doubt whether he, when making the confession to the police officer (as justice of the peace), was not being actuated by an improper inducement that might have gone before."⁵⁸

In the decision in Mahlabane the accused created sufficient suspicion that this confession had been improperly obtained. His appeal to the Transvaal

57 Mahlabane *supra* 562.

58 Dhlamini *supra* 815.

Provincial Division of the Supreme Court was dismissed; but the appellate division upheld it since the trial court wrongly rejected his evidence and its finding on credibility had been based largely on a misinterpretation of the evidence.

6.7 Analysis of warning and questioning of suspects prior to recording of their confessions

In our law the admissibility or exclusion of a confession depends on the answers to the customary questions enumerated above. These are questions which were prepared by either the Department of Justice or the Department of Law and Order. Apparently, they were prepared by law advisers of the State in order to assist magistrates and justices of the peace. Generally speaking these customary questions must be regarded as real questions and answers to them may have serious implications for an accused.

It is possible to reply to all these customary questions by saying "YES" or "NO". They do not encourage the suspect to speak freely to cover all circumstances that led to his decision to confess. Instead, the questions are pre-arranged apparently to cover all the prerequisites of admissibility in terms of section 217 of the Criminal Procedure Act. Where a reply to any of the customary questions is not a "YES"

or "NO" the magistrate or justice of the peace is required to investigate the additional information.

6.7.1 Accused is asked leading questions

The customary questions put to a suspect prior to recording his confession are in the form of leading questions in our law.⁵⁹ A leading question is one which either suggests the answer desired or assumes the existence of certain facts which might be in issue.⁶⁰ Schmidt⁶¹ points out that:

"Daarmee word natuurlik nie te kenne gegee dat 'n vraag wat slegs 'n antwoord van 'ja' of 'nee' uitlok, noodwendig 'n leidende vraag is nie (of omgekeerd, dat een wat 'n omvattende antwoord uitlok dit nie is nie); die toets is of die vraag so gestel is dat dit die antwoord van die getuie suggereeren selfs die intonasie of houding van die vraesteller kan 'n rol speel."

The drafters of the customary questions on the roneod form suggested by implication a "yes" or "no" answer to the questions. The main reason for objecting to leading questions is that a witness might be favourably disposed to the person asking those questions and readily adopts the suggested answers.

59 Hoffmann and Zeffertt 444-446; Van der Merwe et al Evidence (1983) 288.

60 Van der Merwe 288.

61 Bewysreg 3ed (1989) 272.

6.7.2 Purpose of the preliminary questioning and warning of a suspect prior to recording his/her confession

When a suspect is brought before a magistrate or a justice of the peace to record his confession, he is warned before his confession is recorded. He is warned that he is in the presence of a magistrate or justice of the peace, that he has nothing to fear and that he can speak frankly, and that should it be necessary, protection can be afforded him against irregularity; that he is not obliged to make a statement and that if he makes it it will be reduced to writing and may later be used as evidence against him.

It is not clear in what way the deponent may be protected against irregularity if necessary. There is no reported decision where such protection was given. This warning informs a suspect of the following aspects of our predominantly adversarial system of criminal procedure:

- (a) The magistrate or justice of the peace before whom the suspect appears is prepared to allow him to speak freely and voluntarily. The very purpose of bringing the suspect before a magistrate is to safeguard him against duress or undue influence

in making a statement which may be used in evidence against him.⁶²

(b) The suspect is informed that he is not obliged to make a statement. Again this is intended to assure the suspect that he must speak freely and that he is not bound to make the statement he may have been coerced to make. Moreover, the promise to give protection to the suspect against irregularity or assault is intended to inform the suspect that he has a right to choose between making a statement or exercising his right to remain silent.

(c) The suspect is informed that if he makes a statement it will be reduced to writing and that it may be used as evidence in court. This serves to warn the accused that although he may speak freely and frankly, he is about to make a statement that may be used in court for what it is worth. The suspect is made aware that he is faced with a phase of an adversarial system of criminal procedure and that what he says may be used in court. This further informs the suspect that the process of making a statement before a magistrate

or justice of the peace is not a private deal and that a statement he may choose to make would be made public in court.

The suspect is also informed that the magistrate has no connection with the police and that the proceedings before the magistrate is not a hearing of his case. This warns a suspect that a magistrate is acting independently of the police and that although his usual duties include presiding in court, he is merely recording the suspect's confession and not trying his case.

Finally the suspect is asked whether he understands the warning given to him. If his reply is positive, the magistrate or justice of the peace asks him the preliminary questions. Seeing that a person may make a statement freely and voluntarily and yet he may have been influenced to make the statement, the magistrate must enquire into the reasons actuating a suspect in wishing to repeat a statement previously made, where this is the case.⁶³

63 See the list of questions in para 6.2 of chapter 6 *supra*.

The words of Solomon J in Jonas⁶⁴ on the preliminary enquiries to be made by a magistrate or justice of the peace before recording a confession are appropriate. They read:⁶⁵

"When raw blacks are brought from their kraals into an official atmosphere and are brought in by a policeman, I cannot be too careful in insisting that any confession which is produced must be actually in the words of the person who made it, and I think I ought to say he should not be assisted in the telling of his story... I think when it comes to the narrative part, the accused must be left entirely to himself, and if he chooses to wander and never come to a point, then he has never made a confession..."

The judge also made pertinent observations on the question of the possibility of undue influence operating on illiterate blacks making confessions before officials⁶⁶ -

"Undue influence is the ordinary way of interfering with the freedom of the will, and as a rule takes the form of a direct inducement or of direct pressure. But where a raw black is concerned I am not prepared to say that actual inducement must be proved before it can be said that the confession is not freely and voluntarily made. I think that the circumstances in which the accused were brought in ... are such that ... although there was no undue influence in the ordinary sense brought to bear on them, they might have thought they were under some compulsion to make a confession."

The appellate division illustrated the difficulties

64 1928 TPD 520.

65 Jonas *supra* 525.

66 Jonas *supra* 526.

that are encountered in connection with the taking of confessions by magistrates in the case of Gumede⁶⁷. In that case, Feetham JA opined that where an accused person is brought to a magistrate for purposes of making a confession or other statement and it appears that he has already made a statement, it is necessary that the accused be questioned in such a way as to pierce the veil adverted to in that case.⁶⁸ This refers to the "veil between the previous interrogation by the police and the subsequent appearance of the interrogated person before the magistrate."⁶⁹ The questioning must aim at ensuring that the result of such piercing is that the court is satisfied beyond a reasonable doubt that whatever possible untoward circumstances may have prevailed at the time the accused made the statement to the police were no longer operative at the time when the accused appeared before the magistrate.

The reason for this is that there is a danger that by reason of untoward conduct on the part of the police the accused might have been brought to a confessing state of mind which might persist at the time of his appearance before the magistrate and which might give

67 1942 AD 398.

68 Gumede supra 433.

69 See Jika 1991 2 SACR 489 (E) 490-91.

rise to an apparent but deceptive voluntariness on his part to make a statement to a magistrate." The magistrate should, therefore, enquire of the accused person appearing before him "whether he has already made a statement and if so the nature of such statement and especially the reasons actuating him in wishing to repeat the statement".⁷¹ If such an enquiry by the magistrate or justice of the peace is not done, the proceedings as faithfully recorded by him may convey a very misleading impression of spontaneity on the part of the accused when, as a matter of fact, "the statement is not really made spontaneously, but as a result of interrogations, in the course of which illegitimate methods may have been applied for the purpose of inducing the person concerned to make the statement, including possible admissions of guilty."⁷²

The practice of bringing accused persons before a magistrate to make a confession or any other statement is for his protection against undue influence. But where the enquiry is not properly done by a magistrate the procedure of bringing accused persons before a magistrate may actually work very much against them,

70 Jika *supra* 490 quoted with approval in Colt 1992 2 SACR 120 (E) 123.

71 Gumede *supra* 400.

72 Gumede *supra* 433 per Feetham JA.

and tend to facilitate the obtaining of statements by improper means which may not come to light owing to the dropping of the veil between the previous interrogation by the police and the subsequent appearance of the interrogated person before the magistrate.⁷³

The accused person must be asked certain questions when he appears before a magistrate so that he may be encouraged to disclose what has led up to his appearance before the magistrate for the purpose of making his statement. Ogilvie Thompson AJA (as he then was) pointed out in the case of Mtabela⁷⁴ that:

"As is well known, a comprehensive set of departmental instructions in relation to these matters, together with a specific form containing the various questions to be asked, has, as a result of Gumede's case, been in existence for some time; and one of the matters thus prescribed is that the person wishing to make a statement should be asked whether he has previously made a similar statement and, if so, where, to whom and why he wishes to repeat it. Salutory though this rule is, it remains an administrative rule only, the mere non-observance of which will not necessarily render the statement inadmissible. The question remains one of fact: has it been established in the particular instance that the statement was voluntary? (R v Kuzwayo 1949 (3) SA 761 (A) at 768; R v Jacobs 1954 (2) SA 320 (A) at 327)."

73 Gumede supra 433.

74 1958 1 SA 264 (A) 268.

The learned acting judge of appeal also opined that not only should magistrates be meticulous in making the appropriate preliminary enquiries of persons brought before them for purpose of recording a statement or confession, but when such statement or confession is tendered as evidence in court, the prosecution should, by way of introduction, specifically lead evidence of such preliminary enquiries having been duly made. Magistrates should, before proceeding to record a confession or a statement, be meticulous in making the various preliminary enquiries prescribed by the departmental instructions and in recording the replies thereto.⁷⁵ The safeguards prescribed by the statute are rendered illusory if a magistrate permits himself to become merely an amanuensis.

On the other hand, the courts must not require an over-meticulous adherence to the rules. A degree of balance is necessary.⁷⁶ Schreiner JA warned in Baartman⁷⁷ that:

"Nothing should of course be said that could be construed as qualifying what was said in R v Mtabela ... about the importance of the magistrate's making the preliminary enquiries prescribed by the Department. But

75 Hector 1954 2 SA 138 (C) 142.

76 Mpetha(2) *supra* 410.

77 1960 3 SA 535 (A) 540.

it is also of some importance not to require of the magistrate more than is reasonable in the circumstances".

The principle enunciated in the Gumede case with reference to the position where a deponent states that he has previously made a statement to the police, should be extended to enjoin a magistrate or justice of the peace who has been requested to minute a confession, in all cases to properly investigate, by appropriate questioning of the deponent, the events and circumstances which led to the deponent appearing before him and to record the results of such investigation.⁷⁸ Such a procedure would go a step further in assisting a trial court which may later be called upon to adjudicate on the admissibility of the confession or any other statement and would work against injustice to an accused.

The appropriate questioning of the deponent may probably obviate the situation where a deponent, for whatever reason, wrongly states that he has not made a previous statement and his answer is accepted at face value.⁷⁹

78 Colt supra 124.

79 Colt supra 124.

6.7.3 Critique of the warning given to an accused

The suspect is informed that "protection may be afforded him against irregularity" and that "any statement made will be reduced to writing and may later be used as evidence against him." There are aspects which are not clear in this warning. In what way may the magistrate protect the suspect against irregularity? This may mean that if it appears that the suspect does not wish to make a free and voluntary confession, the magistrate may not take his statement. That is not protection against irregularity - it is simply the recognition of a principle of our law that an accused is presumed innocent until his guilt is proved beyond a reasonable doubt. In practice, where a suspect is brought before a magistrate and later returned to the police cells without having made a confession, the likelihood is that he may be subjected to custodial interrogation again.

It is doubtful whether an unsophisticated suspect will truly understand the implication of the warning when it is said: "any statement made will be reduced to writing and may later be used as evidence against him". A suspect may honestly believe that he will tell his whole story in court. He may prefer to make a statement because he does not want to be subjected to

further police questioning. Other suspects may not entertain this fear. But, whether a suspect understands the implication of the preliminary warning or not is a question of fact.

A suspect is asked: "Do you understand the warning I have given you? Answer: YES." This is a very important stage in the process of taking a confession. Does the "yes" reply indicate that the suspect fully appreciates the consequences of confession made and reduced in writing by a magistrate? It is doubtful whether a suspect knows and understands that in his trial he may not exclude his confession. This is cause for concern because the warning is vaguely worded. The warning does not include the following:

- (a) It does not inform a suspect that he has a right to remain silent unless he is detained under section 29 of the Internal Security Act of 1982. This is important because he may feel obliged to co-operate with the magistrate. One does not want to disappoint a magistrate, isn't it? Maybe this is a minor point, but it may be reason for saying "yes".
- (b) It does inform him that he is not obliged to make a statement, but does not advise him to speak to

his attorney before making one. The reason for this is that, unlike in the United States of America, our law does not regard legal representation as fundamental right which is protected by the Bill of Rights at the time of making extrajudicial statements.

- (c) The suspect is not warned that at his trial the confession may be excluded if he proves on a balance of probabilities that it was not made in terms of section 217 of the Criminal Procedure Act. Even the most experienced members of the bar do have problems when they apply for suppression of some confessions.

After the preliminary warning, a suspect is asked the customary questions referred to earlier on. His answers may be decisive on the admissibility or exclusion of his confession. There is a problem in this regard because he is simply asked questions without explaining to him fully the real reason for asking them. Once again he is subjected to inquisitorial type of criminal procedures. The purpose is to determine the voluntariness or otherwise of the statement he is about to make. Why is he not informed of the purpose? A medical practitioner diagnoses a patient to identify a cause of his disease and the

patient knows this and he has given an informed consent. But in the issue of confessions, questions are just fired. This may be the real cause of some problems relating to the admissibility of some confessions.

Some suspects may fully understand the reasons for asking the customary questions. The fact that there are standard questions is not really an issue. The accused in the case of Kekane⁸⁰ was asked the preliminary questions quoted above. Thereafter the magistrate recorded the following paragraph:

"Whereas it appears that deponent:

- (a) is in his sound and sober senses;
- (b) was not fully influenced thereto; and
- (c) freely and voluntarily desires to make a statement, he is told that he can now make such statement."⁸¹

Kirk-Cohen J concluded that this paragraph amounted to a recording of the observations and conclusions of the magistrate. Counsel for the accused tried in vain to attack the admissibility of the alleged confession. It is clear from the opinion of the court that the

80 1986 4 SA 466 (W) 474-75.

81 Kekane *supra* 475

preliminary warnings, the standard questions and the recorded observations of the magistrate contained indiciae of compliance with, and proof of, the *sine qua non* under section 217(1)(b)(ii) of the Criminal Procedure Act. The *sine qua non* under section 217(1)(b)(ii) refers to the issue whether it appears *ex facie* the document in which the alleged confession is contained that it was made freely and voluntarily by the accused in question, in his sound and sober senses and without having been unduly influenced thereto. Counsel for the accused tried to attack the indiciae by raising issues like.⁸²

- the fact that the accused was arrested at 3.30am and made his statement at 2pm the same day;
- the fact that the accused replied positively to the question whether he expected any benefit should he make a statement.

For what it is worth, it must be pointed out that Mr Browde SC (with him M Basslian) appeared for the accused in the Kekane case. They were unable to advance cogent and compelling argument to persuade the court to attach little weight or no weight at all to the so-called preliminary questions and answers thereto on the standard form for confessions. The

accused did not have his attorney or counsel present when his confession was made before a magistrate.

It may be argued that the purpose of the preliminary questioning is not to prejudice the accused, but to protect him. The problem with this observation is that the questions were prepared by lawyers in government departments. These were lawyers who represented the interests of the prosecuting authority. At what stage do we expect an input from an accused's attorney or counsel? It is submitted that the accused is entitled to be represented by counsel or attorney prior to making a confession. That is a critical stage when he needs legal advice more than any promise like "protection will be given against irregularity".

The holding of the court in the Kekane decision was that the onus shifted to the accused to rebut the presumption in terms of section 217(1)(b)(ii) of the Criminal Procedure Act.

In Mkhwanazi,⁸³ the accused in reply to the question whether he had been forced or encouraged by the police or anyone else to make his alleged confession, said that "the police didn't actually force me but they

disturbed me from my sleep and questioned and handcuffed me". His reply to another question whether anyone held out any promises or other inducements of any kind to him to make a confession, he said that he was merely told by the police that if he made his statement to a magistrate he may be treated more leniently.³⁴ In this case, the magistrate and the trial court did not appear to have regarded the question of disturbing the accused in his sleep and of questioning him as of any importance. This case was decided in the sixties; they might have been correct in their approach in those days. On the question of leniency, the magistrate said "I say it may not affect you in so far as leniency is concerned." The problem with this is that it does not throw more light on what the accused understood as leniency. The magistrate appears to have used words signifying nothing. Although the accused said he understood it, it is doubtful.

At his trial, the accused in Mkhwanazi case *supra* he informed the court that he had made the confession because he was assaulted by the detective who also overpowered him. He continued to describe how he was assaulted. He was disbelieved and his evidence was rejected. The decision of the court in so far as it

relates to the rejection of the accused's evidence, cannot be faulted. The court rightly concluded that:

"The accused himself is usually the best witness as to whether and as to how he was influenced, if at all, to make a confession. When he specifically puts his mind to the question and gives the reasons why he made a statement, it is generally an unnecessarily artificial approach to search for other hypothetical reasons."⁸⁵

Lastly, it must be pointed out that although the bringing of a suspect before a magistrate for purposes of recording his confession is for his own protection, it is possible that the very appearance before an official may be intimidating to an unsophisticated suspect. A magistrate is an impartial official but his questioning of the suspect may create the impression to a suspect that he is connected to the police who questioned him before. It is even worse if a suspect is brought before a justice of the peace who is a police officer to make his confession.

It would appear that it is necessary for the magistrate to explain fully to a suspect that he is not connected to the police and that this preliminary questioning of the suspect is aimed at establishing whether there has been any untoward conduct on the part of the police which might have brought him to a confessing state of mind. The current practice of

subjecting a suspect to a questioning by a magistrate with inadequate warning is not satisfactory. It is sufficient to inform the suspect that the name of the official is a magistrate and that he has no connection with the police without explaining the real reason for his preliminary questioning. A suspect must be informed that the purpose of police questioning is to investigate his crime whereas the questioning by the magistrate is to establish the treatment of whatever kind meted out to him by the police.

6.7.4 Hypothetical nature of the preliminary questioning

The customary questions on the standard form for confessions are also hypothetical questions. They are asked in order to establish probable reasons whether a suspect wished to make a confession freely and voluntarily, and without having been unduly influenced thereto. The preliminary enquiry is done on an hypothetical basis. Consequently, the questions must be couched, if at all, in such a way that they assist the trial court to establish the surrounding circumstances under which an alleged confession was made.

A suspect may not fully understand that he is bound by any reply he gives to any of the magistrate's

hypothetical questions. These questions may be hypothetical in the sense that some or most of them may not be based on fact. Similarly, an accused may give false answers in order to hide something. The point made here is that a suspect may either mislead a magistrate when taking his confession or the trial court. The question whether the accused's version at his trial should be disbelieved or not must be considered in the evidence as a whole.

6.7.5 Impact of preliminary questioning on the scope of inquiry

The other problem with the preliminary questioning by a magistrate is that it has the effect of limiting the scope of information that a suspect may give. A suspect is not asked any question on whether or not he was interrogated by the police. At his trial a suspect may talk of lengthy interrogation by the police for the first time. Since this would come as a surprise, the accused's testimony in this regard is likely to be rejected. In the Mkhwanazi case the accused was disbelieved when he attacked a confession on the ground of lengthy interrogation. A suspect is also not asked any question whether the fact that he was in custody had any effect on his "decision" to confess. He is merely asked "Are you in custody?" Answer:

"Yes". Moreover, the questioning appears to be limited to assaults or threats but not to the general treatment a suspect experienced while he was in custody and in the company of the police.

6.8 Judges' rules

6.8.1 Three types of warnings in terms of the Judges' rules

The judges' rules are a set of rules to which a judges' conference in Cape Town in 1931 agreed. These rules are based on the set of rules which were developed in England.*

The caution or warning to be administered in terms of the judges' rule may take one of three forms. A suspect who is not in custody may be cautioned as follows:

"I am a police officer. I am making enquiries (into so and so) and I want to know any thing you can tell me about it. It is a serious matter and I must warn you to be careful what you say."⁸⁷

If the suspect is required to comment on a special matter to which an explanation is desired, the police

86 Voisin [1918] 1 KB 521.

87 A warning in terms of rule 2 of the Judges' rules; Hiemstra Introduction to the Law of Criminal Procedure (1977) 133 et seq.

officer may add the following words to the above warning: "You have been found in possession of XY and unless you can explain this I may have to arrest you."

A police officer may administer the following warning to an accused who is formally charged with a crime:

"Do you wish to say anything in answer to the charge? You are not obliged to do so, but whatever you say will be taken down in writing."

But where an awaiting-trial accused volunteers a statement otherwise than on a formal charge, he may be warned as follows:

"Before you say anything (or, if he has already commenced his statement, 'anything further'), I must tell you that you are not obliged to do so, but whatever you say will be taken down in writing and may be given in evidence."

6.8.2 Purpose of the warning

The purpose of the caution or warning in terms of the judges' rules is to draw the attention of the suspect to the consequences of making a statement to the police. There are three main aspects of the warning. In the first place, the suspect is warned that he is not obliged to make a statement at all. In other words, whatever statement he decides to make must be free and voluntary. Secondly, if the suspect makes a statement it is reduced to writing by the police

officer, preferably in the language in which it is used. The suspect is informed that his statement may be used in evidence. It is assumed that the suspect knows that evidence is given in court at his trial.

6.8.3 Legal status of judges' rules and approach of our courts to statements made contrary to these rules

The question is: what is the attitude of our courts to a statement obtained from a suspect contrary to the judges' rules? Our court regard the judges' rules as rules of fair play between the police and the accused persons.⁸⁸ In his judgment in the Kuzwayo⁸⁹ case, Van den Heever JA expressed the view that it must be obvious that rules formulated by a conference of judges at the invitation of the minister cannot have the force of law; and that at most they may constitute administrative directives, that is, domestic regulations for the guidance of the police force.⁹⁰

Van den Heever JA held in the Kuzwayo decision that the mere fact that the judges' rules have not been observed can have no direct bearing on the question

88 Machinini 1944 WLD 85 per Blackwell J.

89 1949 3 SA 761 (A) 767.

90 See Barlin 1926 AD 459 at 465; Holtzhausen 1947 1 SA 567 (A) 570; Mpetha(2) 1982 2 SA 406 (C) 411-412.

whether a statement imputed to an accused person was voluntarily made." The judge took the view that the judges' rules are based on considerations of expedience and designed broadly to forestall such malpractices as browbeating, intimidation and trickery." In his views, speed limits are laid down to prevent accidents, but the fact that a speed limit has been exceeded is not *per se* proof of reckless driving. Moreover, if evidence was to be rejected on the ground that it was obtained contrary to the judges' rules, that would be contrary to the warning of Innes CJ in the case of Barlin⁹³ where he said:

"if he were to reject it because on general grounds he disapproved of the conduct of a police officer and desired to prevent such conduct in future, then he would be sacrificing legal principle to administrative reform, for due consideration of all the facts might show that, although the officer acted irregularly, still the statement was voluntary."

A reading of the Kuzwayo decision indicates that whether the judges' rules have been observed or not, the question remains one of fact: has it been established in the particular instance that the alleged confession was voluntary?

91 Kuzwayo *supra* 767.

92 Kuzwayo *supra* 767.

93 Barlin *supra* 465.

In his obiter remarks in the case of Hackwell,⁹⁴ Macdonald AJA said that the judges' rules are designed to ensure as far as possible that the fair and impartial treatment received by an accused person in court is extended to him at all times before he reaches court.⁹⁵ In his judgment, compliance with the rules ensures that the role of the police is limited to investigation. The police are not allowed to ignore the judges' rules in order to embark upon an irregular and informal "trial" of the suspect. The judge pointed out that if a stage has been reached when it is in the interest of justice to subject a suspect to interrogation designed to establish his guilt, it is desirable that this power be exercised in an open court, and it is undesirable that the power should be exercised by the police in private.⁹⁶

The court in Hackwell, while accepting that the judges' rules can only be regarded as a guide, believed that it was in the long-term interest of the administration of justice that a breach of the rules which results in influence being brought to bear upon an accused should only be regarded as being properly

94 1965 2 SA 388 (S.R.AD).

95 Hackwell supra 400.

96 Hackwell supra 400.

or duly brought to bear if there are valid and substantial reasons for such conclusion.”

The approach of the court to the judges' rules in Hackwell is supported. The rules are designed to ensure that a suspect makes an informed decision before making a statement to the police. The rules impose a moral duty on the police to disclose to a suspect the purpose for which a statement may be taken from him. The suspect is warned that his statement may be produced as evidence in court should he be formally charged.

In our system of criminal justice, the judges' rules remain the only instrument which is used to inform a suspect of his rights prior to appearing in court. It is regretted that the violation of these rules does not *ipso jure* render anything done under these circumstances null and void or even illegal. A need to upgrade the rules to basic human rights principles is long overdue.

6.9 Conclusion

6.9.1. Proposed procedure with regard to the warning and questioning of suspects by magistrates/justice of the peace before recording their confessions

It is recommended that the warning and questioning of suspects prior to the recording of their confessions be done as set out below.

- (a) The suspect must be asked to comment on the effect of police interrogation on him, if any, and to indicate in what way that may have contributed to his decision to make a statement. It is not satisfactory to put to him a leading question that may be answered by a simple YES or NO. The magistrate or justice of the peace must conduct a real enquiry into this, he must not just comply with the departmental instructions in relation to the matters to be asked. It would be preferable to ask the suspect questions that do not suggest an answer.

- (b) The suspect must be asked to explain in his own words why he wishes to make a statement. If the suspect has made a statement before, he must be asked why he wishes to make a second statement.

The enquiry must ascertain the real reason for wishing to repeat the statement. He must be encouraged to explain this in his own words.

If the suspect expects to receive some benefit in the form of bail or good treatment in custody, the magistrate or justice must stop the proceedings because that is an indication of possible undue influence. It is true that the very purpose of bringing the suspect before a magistrate is to protect him, but it is equally true that he would try to impress a magistrate by speaking. One does not go before such an official to show him how he can keep quiet.

- (c) The suspect must be invited to comment on any threat of assault or assault by the police, the complainant, members of the community or any person who might have an interest in the crime on which he wishes to make a statement.
- (d) The suspect must be asked to explain the effect of the custody on him as well as the treatment meted out to him by the police in so far as this is relevant to his decision to make a statement.

- (e) The suspect must be asked whether he has had sufficient sleep, adequate food and reasonable access to friends and relatives if he is in custody. This is intended to indicate whether there are psychological pressures which were brought to bear on him which has had the effect of coercing him to make a statement.

- (f) Lastly all the matters prescribed in the departmental guidelines must be enquired into but no leading questions should be put to the suspect.

- (g) The magistrate or justice of the peace must clearly explain to a suspect that if he makes a statement it will be used in court and that he may have difficulty in convincing the court to exclude it from evidence. This would warn the suspect of the seriousness of making a statement.

6.9.2 Judges' rules

Our courts regard the judges' rules as rules of fair play between the police and suspects.⁹⁸ They do not

have the force of law. They may be regarded as administrative directives for the guidance of the police force.”

CHAPTER SEVEN

DETERMINING THE ADMISSIBILITY OF A CONFESSION

7.1 Introduction

Where an accused disputes the admissibility of a confession, a trial within a trial must take place in order to decide on the admissibility of the confession.¹ The purpose of the trial within a trial is to enable the court to decide on the admissibility of a confession.² In Afrikaans "a trial within a trial" is called "verhoor binne 'n verhoor", tussen-tydse verhoor", "'n tussenverhoor" or "binneverhoor".³

The purpose of this chapter is to discuss the

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- 1 Mofokeng 1992 2 SACR (O) 261 264 per Classen AJ; see Nieuwoudt(3) 1985 4 SA 510 (C) 517; Gaba 1985 4 SA 734 (A) 749-50; Naka 1990 4 SA 250 (A) 261. Schmidt Bewysreg 3ed (1989) 350-352; Hoffmann and Zeffertt The South African Law of Evidence 4ed (1988) 228-29; Hiemstra Suid-Afrikaanse Strafproses 4ed (1987) 491-492; Van der Merwe et al Evidence 261-262; Du Toit et al Commentary on the Criminal Procedure Act 24-64; W 1963 3 SA 516 (A) 521.
 - 2 Hoffmann and Zeffertt 228; Schmidt 30; Hiemstra 492; Van der Merwe 261; Du Toit et al 24-63.
 - 3 Khuzwayo 1990 1 SACR 365 (A) 367 per Kumleben JA.
 - 4 Malinga 1992 SACR 138 (A) 141 per Eksteen JA.

so-called trial within a trial. Reference will be made to both the case law and the views of some textbook writers.

7.2 Constitution of the court to hear evidence in a trial within a trial

Originally a trial within a trial procedure was conducted by a judge sitting alone in the absence of assessors.⁵ The judge is now allowed to sit with assessors in hearing evidence during a trial within a trial.⁶ The judge may sit alone if he is of the opinion that it would be in the interest of justice that the assessors be temporarily excluded from the case.⁷ Where assessors take part in the trial within a trial, they take part in all questions of fact.⁸ The assessors take part in determining whether a confession was made freely and voluntarily, by an accused in his sound and sober senses, and without

5 Hiemstra 492; Schmidt 350.

6 Section 145(4)(b) of the Criminal Procedure Act 51 of 1977; Schmidt 350; Hiemstra 492; Van der Merwe 261; Du Toit et al 24-63.

7 Hoffmann and Zeffertt 228; see Ngcobo 1985 2 SA 319 (W) where the assessors were involved in deciding fact and law; Schmidt 350.

8 Du Toit et al 24-63.

having been unduly influenced thereto.⁹

7.3 **Overall purpose of a trial within a trial**

Van der Merwe takes the view that the purpose of the trial within a trial is to decide on the voluntariness of the confession.¹⁰ This may be interpreted to mean that the purpose of a trial within a trial is to give an opportunity to both the prosecution and the accused to give evidence to enable the court to decide whether to admit or to reject the confession in terms of section 217(1) of the Criminal Procedure Act. Only the question of admissibility of a confession is in issue during a trial within a trial.¹¹

The purpose of a trial within a trial is not to prove that the contents of a confession is true. To admit a confession into evidence means that after complying with the requirements for its admissibility in terms of section 217 of the Criminal Procedure Act, the confession becomes evidence before the court and the accused may be convicted on the strength of such a confession subject to certain requirements.

9 Compare Van der Merwe *et al* 261.

10 Van der Merwe *et al* 261.

11 Du Toit *et al* 24-63.

7.4 Evidence given during a trial within a trial

In Antony,¹² the court held that evidence given during a trial within a trial must be repeated before the full court if it was to be admissible in the main trial. In casu, the assessors were allowed to sit with the judge in deciding the admissibility of the confession. During the trial within a trial, the contents of a confession are not in issue.¹³

In Mabaso¹⁴ it was decided that all assessors had a duty to decide on questions of fact and that there was no need to distinguish between assessors who were magistrates or lawyers and other types of assessors.

The Mabaso decision is supported. The reason for this is that evidence given during a trial within a trial may be detrimental to the accused. The credibility of an accused may be attacked to such an extent that he is accepted by the full court (that is, the judge and his assessors) as a liar or even an unreliable witness. It would be difficult for that accused to

12 1981 1 SA 1089 (A).

13 Du Toit et al 24-63; Manionjo 1963 4 SA 708 (FC); De Vries 1989 1 SA 228 (A); Hoffmann and Zeffertt 229; Schmidt 351.

14 1952 3 SA 521 (A).

rehabilitate and make a favourable impression to the court when he gives evidence later on in the trial. Is this not potential prejudice? Whether this is so is of course a question of fact to be decided on the facts of each case.

In De Vries,¹⁵ Nicholas AJA (as he then was) held that it is essential that the issue of voluntariness of a confession should be tried as a separate and distinct issue. That is done by insulating the inquiry into admissibility of a confession in a compartment separate from the main trial. The accused who has clearly raised the question of admissibility of a confession has the right to have that question tried as a separate and distinct issue. At the trial within a trial, the accused may go into the witness-box on the issue of admissibility without being exposed to general cross-examination on the issue of his guilt.¹⁶ This means that the prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the accused at the trial within a trial.¹⁷ Similarly, where the judge sits with assessors to decide on the admissibility of a

15 1989 1 SA 228 (A) 233.

16 De Vries *supra* 233; *Du Toit et al* 24-64.

17 De Vries *supra* 234.

confession, evidence given by the accused in the trial within a trial must be disregarded when the issue of guilt is to be considered. The cross-examination of the accused in the trial within a trial is similarly limited. The cross-examination of an accused must not enter upon the investigation on the merits.¹⁸

7.5 Cross-examination of an accused on the contents of a confession during a trial within a trial

The appellate division has taken a view that under certain circumstances, an accused may be cross-examined on the contents of a confession. In Lebone,¹⁹ the court said:

"Die geskilpunt in die onderhawige saak was of voldoen is aan die bepalings van art 244(1) van die Strafkode en of die appellant die bekentenis vrywillig en sonder onbehoorlike beïnvloeding afgelê het. Vir die doeleindes van daardie ondersoek is die waarheid van die inhoud van die verklaring in die algemeen gesproke irrelevant en geen verhoorhof sal toelaat dat 'n aanklaer probeer om te bewys dat die inhoud waar is nie, 'n bewyslas wat hy juis probeer kwyt deur die bekentenis toegelaat te kry. Kruisverhoor van 'n beskuldigde deur the Staatsaanklaer oor die waarheid van die inhoud van die bekentenis is derhalwe, in die algemeen gesproke, nie tersaaklik nie en sal nie toegelaat word nie. Anders is die geval egter wanneer die beskuldigde self beweer dat die inhoud van sy bekentenis vals is en deur die Polisie ingegee is en hierdie

¹⁸ De Vries supra; Dunga 1934 AD 223.

¹⁹ 1965 2 SA 837 (A) 841-42.

feite gebruik word as deel van sy saak dat hy deur die Polisie gedwing is om 'n verklaring te maak. In so 'n geval moet die aanklaer die reg hê om die beskuldigde onder kruisverhoor te neem oor die inhoud van die bekentenis om aan te toon dat die beskuldigde self die bron van die inhoud is en nie die Polisie nie, soos deur die beskuldigde beweerd. Die kruisverhoor word dan gedoen met die doel om die geloofwaardigheid van die beskuldigde aan te tas, 'n relevante onderwerp, en nie om te bewys dat die inhoud waar is nie."

If the purpose of cross-examining an accused on the contents of a confession during the trial within a trial is to prove the authorship thereof, it is difficult to agree with the Lebone decision. The prosecution is always in a position to call all the members of the police force who were present during the interrogation of the accused up to the stage when he went to make a confession either before a justice of the peace or a magistrate. The evidence of the police, the magistrate or justice of the peace and the interpreter can be led by the prosecution during the trial within a trial. Such evidence would enable the

court to decide on the credibility of the accused. To cross-examine the accused on all issues relating to the requirements of the admissibility of a confession in terms of section 217(1) of the Criminal Procedure Act is in order. The ambit of the enquiry should be limited accordingly.

An accused is entitled to give evidence to the effect that the contents of a confession are false and that it was made as a result of an influence exerted on him by the police. This issue may be resolved without cross-examining the accused on the contents of the confession. The prosecution may cross-examine the accused on his evidence in so far as it relates to the circumstances which led to the making of the confession. This is the proper enquiry to the question of admissibility. Moreover, the accused is entitled to have the issue of admissibility resolved without recourse to the unusual step of cross-examining on the contents. In the trial within a trial the contents of a confession are not in issue. It is the circumstances under which it was made that must be subjected to scrutiny.

20 1990 1 SACR 365 (A); see also Mafuya(2) 1992 2 SACR 381 (W) 382-3; Gxokwe 1992 2 SACR 355 (C) 357-358; Hiemstra 492; Hoffmann and Zeffertt 298; Schmidt 351; Van der Merwe 261; Du Toit et al 24-64.

In Khuzwayo,²¹ the court re-affirmed the holding in Lebone that where an accused in a trial within a trial alleges that the confession is false and that he had been told by the police what to say in the confession, the prosecution is entitled to cross-examine him on the contents of the confession.

Kumleben JA, pointed out that the fact that an accused denied the actual authorship of a confession supported his evidence on involuntariness during the making thereof.²¹ On the other hand, the accused's allegation that he was told by the police what to say in his statement may prejudice the case of the prosecution if it is accepted without cross-examination. To ignore the accused's allegation may prejudice his case.

Kumleben JA held:

"In so 'n geval kom die waarheid van die verklaring in geskil as 'n ondergeskikte aspek wat betrekking het op die vraag of hy voorgese is, en gevolglik mag 'n beskuldigde daarvoor 'ondervra word. (In die uitsonderlike geval waar die beskuldigde sy outeurskap ontken, dog die waarheid van die bekentenis erken, sou enige kruisondervraging en hypothesi tot die vraag of hy voorgese is, beperk word.)".²²

21 Khuzwayo supra 371.

22 Khuzwayo supra 371; see Lebone supra 841-42; Talane 1986 3 SA 196 (A) 206; Gaba 1985 4 SA 734 (A) 748-49; De Vries supra 530; Dunqa supra 226.

As a general rule, in a trial within a trial to determine whether or not a confession by the accused was freely and voluntarily made while he was in his sound and sober senses and without having been unduly influenced to make the confession, the contents of the confession may not be canvassed with the accused in cross-examination.²³ That is because the contents of the confession, and the truth of the confession, are not ordinarily considered to be relevant to the issue of admissibility, and the finding in a trial within a trial as to whether the confession is the accused's own and is true may, be pre-empting the very decision which the court is required to make at the conclusion of the trial.²⁴

The courts have recognised that an excessive adherence to that particular doctrine in all cases (i.e. namely that the admissibility of a confession may not be canvassed with the accused in cross-examination on the contents of the confession) could result in the court sometimes being deprived of important and highly relevant evidence which goes to the very heart of the inquiry in the trial within a trial, namely whether the accused may be telling the truth in making the

23 Gxokwe *supra* 357.

24 Gxokwe *supra* 357.

allegations which he does about the unlawful and irregular conduct of the police.²⁵ In particular situations, cross-examination of the accused on the contents of the confession has been permitted.²⁶

The rationale for allowing cross-examination of the accused in cases where he alleges that the confession which he made had been prescribed to him by the police and that it was false may be summed up as set out below.

Such an allegation by an accused is so much part and parcel of his attack upon the admissibility of his confessions, and so plainly relevant to the question of whether or not he was coerced or unduly influenced to make the confession, that in the interest of fairness the prosecution must be permitted to explore by appropriate cross-examination the truth or untruth of that particular allegation.²⁷ The outcome of such cross-examination is highly relevant and would throw light to both the accused's credibility as a witness in the trial within a trial, and the central issue

25 Gxokwe *supra* 357.

26 Gxokwe *supra* 357; Khuzwayo *supra* 371; Lebone *supra* 841-42; Talane *supra* 206; Gaba *supra* 748-49.

27 Gxokwe *supra* 358.

which is being considered in such a trial, namely the voluntariness of the accused's confession.²⁸ Marais J emphasised in Gxokwe that there has to be a close logical correlation between the accused's allegation on the one hand, and the issues which are being considered in the trial within a trial on the other hand before it becomes legitimate to allow cross-examination of the accused on the contents of his confession.²⁹

In Gxokwe the court allowed cross-examination of the accused at a trial within a trial on the contents of a confession. *In casu* the accused had claimed under cross-examination that the policeman had named certain people as being implicated. Similarly, the cross-examination of the accused on the contents of a confession in a trial within a trial is permissible where the purpose is to attack credibility of the accused where he has alleged that the confession was merely a repetition of allegations put to him by the police and of which he has no knowledge.³⁰

28 Gxokwe *supra* 358.

29 Gxokwe *supra* 358.

30 Mafuya *supra* 383; see Motlhabakwe 1985 3 SA 188 (NC).

In Dhlamini,³¹ the court remarked that, strictly speaking, the question of fact whether an accused has made or not made a confession is not directly relevant to the question of law whether or not that alleged confession is admissible in evidence.³² Where such a confession was held admissible by a judge sitting alone, it is for the judge and assessors, where applicable, to decide on the totality of the evidence whether the prosecution has proved that the accused had made the confession.³³

The prosecution applied for a formal ruling in Yengeni(3)³⁴ that the accused be cross-examined on the contents of an alleged confession. That application was made when the accused had given her evidence-in-chief in a trial within a trial. The court pointed out that the procedure for the admissibility of a confession in terms of section 217(1) of the Criminal Procedure Act³⁵ arises out of policy. It is a wholly autonomous rule which by its nature ignores the truth

31 1971 1 SA 807 (A) 810.

32 see Nieuwoudt (3) 1985 4 SA 510 (C) 513.

33 Jada 1991 1 SACR 602 (TK) 605.

34 1991 1 SACR 837 (C).

35 Act 51 of 1977.

of the contents of the alleged confession. Moreover, neither the truth nor the reliability of the contents of the accused's confession constitutes the criterion by which its admissibility is determined.³⁶ Selikowitz J held that:

"The reliance which is to be placed on the contents of a confession found to be admissible against an accused is a matter which is only determined at the end of the trial and in the light of all the evidence properly before the trial court. The sole issue to be decided when an accused challenges the admissibility of an alleged confession is whether its making satisfies the requirements of s217 of the Criminal Procedure Act."³⁷

The trial within a trial procedure is a distinct, separate and insulated enquiry which is used to determine the issue of admissibility separately from the issue of guilt.

The Privy Council decision in Won Kam-ming³⁸ re-affirms the view that in a case where the trier of admissibility is also a trier of guilt, evidence given by an accused in the trial within a trial must be disregarded when the issue of admissibility comes to

36 Yengeni (3) *supra* 391.

37 Yengeni (3) *supra* 391.

38 [1980] AC 247 (PC) 257-8.

be considered. Claydon ACJ quoted, with approval from the Won Kam-ming case that in any criminal trial, the accused has the right not to give evidence at the conclusion of the state's case. The reason for this is that to regard evidence given by him on the question of the admissibility as evidence in the trial itself, would mean either that he must be deprived of that right if he wishes properly to contest the admissibility of a confession, or that, to preserve that right, he must abandon another right in a fair trial, the right to prevent inadmissible statement being admitted in evidence against him.³⁹

The opinion of the court in Yengeni(3) may be summed up as follows:⁴⁰

- (a) Before an accused is cross-examined on the contents of his alleged confession in a trial within a trial, it must be clear that he has alleged that the contents of the confession were prescribed to him by the police and that the contents are false.

39 Chitambala 1961 R&N 166 (FC) 169-70.

40 Yengeni (3) *supra* 394.

- (b) The trial within a trial procedure was created by the courts to enable the issue of voluntariness to be determined entirely separately from the issue of guilt. Consequently, the policy behind the exclusion of confessions which are not freely and voluntarily made without undue influence cannot be properly serviced if the offer of an insulated enquiry at the same time presents the accused with a dilemma as to whether to take advantage of the enquiry.

- (c) To cross-examine the accused on the contents of his alleged confession outside the ambit of the rule enunciated in the Lebone decision, undermines the very purpose for which the insulated enquiry has been established.

- (d) Where the accused raises issues during the insulated enquiry which make matters relevant otherwise only to guilt also relevant to the issue of voluntariness, the rule in Lebone ought to be applied.

The opinion of the court in Yengeni(3) is supported. It enables the accused to make a decision whether or not to raise issues that would subject him to possible

cross-examination on the contents of his alleged confession. This means that the accused must obtain legal advice before the onset of the trial within a trial. The court is expected to warn an unrepresented accused of this procedural right.

In Nkatha,⁴¹ an accused communicated with her counsel during the course of her cross-examination. Counsel for the state asked her to disclose the contents of her communication with counsel. The trial court allowed this over her counsel's objection. On appeal, the appellate division held that the principle that confidential communications between counsel and client relating to the litigation being conducted are privileged is recognised in our law.⁴² Eksteen JA held that the procedure followed by the trial judge, namely to allow cross-examination on a disputed document on the assumption that its admissibility will be proved at the end of the accused's case, seems to be a most undesirable procedure and one fraught with possible prejudice to the accused.⁴³ The court warned that:

41 1990 4 SA 250 (A) 254.

42 Nkatha supra 255; Safatsa 1988 1 SA 868 (A) 885-86; Du Toit et al 24-64.

43 Nkatha supra 261.

"Such cross-examination may show up an accused as a bad witness and affect his credibility adversely. If subsequently the state should fail to prove the admissibility of the statement it may well be very difficult to eliminate the prejudice suffered by the adverse impression left by the cross-examination."⁴⁴

7.6 Cross-examination of an accused on the preamble of a confession

Counsel for the accused Nkatha relied on the decision in Cibixegu⁴⁵ and Bonsi⁴⁶ for his submission that the procedure followed by the trial court in allowing the prosecution to cross-examine the accused on the preamble to the inadmissible confession amounted to an irregularity. These decisions lay down the principle that an inadmissible confession may not be referred to by the prosecution at any stage of the proceedings for any purpose whatever.⁴⁷ The trial court relied on the decision in Cele⁴⁸ for holding that the preamble to the inadmissible confession could be used. But, the two decisions can be distinguished because in Cele supra

44 Nkatha supra 261.

45 1959 4 SA 266 E.

46 1985 4 SA 544 (B).

47 Nkatha supra 262.

48 1985 1 SA 767 (A).

the confession was admissible and in Nkatha it was inadmissible. In the latter case, the court held that the confession was inadmissible and therefore no portion of it may be used in cross-examining an alleged confessor.⁴⁹

The decision in Nkatha is supported. It re-affirms the purpose for which the trial within a trial procedure was designed, namely to determine the issue of admissibility of a confession without the contents of the confession being prematurely brought before the court.

7.7 Consolidation of trials within a trial

In the case of Yengeni(2)⁵⁰ the defence team applied for an order consolidating into one trial within a trial of the hearing of evidence and argument pertaining to the admissibility of all statements on which the prosecution sought to rely as confessions allegedly made by the accused persons to magistrates. The prosecution opposed this application on the ground that the state, as *dominus litis*, could decide the order in which it wanted to lead its evidence, and

49 Nkatha supra 262.

50 1990 4 SA 429 (C).

that the court was not empowered to dictate to it how it should run its case. Counsel for the accused argued that the issue raised in his application was one of procedure, and that the court must regulate its procedure so as to ensure that justice was done.⁵¹ He emphasised that the defence was relying on the facts of the specific case and that he did not contend for a general rule that where the prosecution wished to rely upon multiple confessions they should always, or even as a rule, be considered in one consolidated trial within a trial.⁵² The reason advanced by the defence for its application was that it wanted to prove that: "an irregular concerted investigational modus operandi or system was applied by members of the security police who were active in the case in order to obtain statements before magistrates."⁵³ Selikowitz J referred to case law⁵⁴ and gave the opinion of the court. In Van Coller⁵⁵ the trial court had decided the admissibility of four confessions in separate trials within the

51 Yengeni (2) *supra* 432.

52 Yengeni (2) *supra* 432.

53 Yengeni (2) *supra* 431.

54 see Van Coller AD unreported case no 214/86; Letsoko 1964 4 SA 768 (A); Musekiwa 1965 3 SA 529 (SR); Mahlala 1967 2 SA 401 (W); Nyembe 1982 1 SA 835 (A); Kekane 1986 4 SA 466 (W); Nieuwoudt (2) 1985 4 SA 507 (C).

55 *Supra* of the typed judgment.

trial. The court delivered its judgment on the admissibility of the confession at issue at the end of each trial within a trial. In each of the trials within a trial a certain captain of the South African police testified. His credibility was in issue on each occasion. Smalberger JA who gave the opinion of the court in the Van Coller case stated:

"In die onderhawige geval sou dit raadsaam gewees het, na aanhoor van al die relevante getuienis, uitspraak tegelykentyd ten opsigte van al vier bekentnisse te gegee het. Sodoende sou daar net eenmaal oor kaptein Kleyn se geloofwaardigheid besin moes word, en sou die Verhoorregter 'n behoorlike geheelbeeld kon gevorm het van die getuienis en waarskynlikhede betreffende die aflê van die bekentnisse, wat nou verwand is aan mekaar. Waar in so 'n geval soos die onderhawige bekentnisse afsonderlik afgehandel word, bestaan die wesentliche gevaar dat die geheelbeeld uit die oog verloor kan word - wat trouens hier die geval blyk te gewees het."⁵⁶

The court also referred to the cases discussed below. In the decision of Letsoko the court *a quo* considered the admissibility of a number of confessions in separate trials within the trial, save that by consent the state first called the magistrate and the interpreter in regard to each of the confessions. Each accused then testified in each trial within the trial relevant to him and the prosecution led its evidence

56 Van Coller *supra* 11.

to rebut what each accused said. Holmes JA observed that it would have been far more convenient and practical in the Letsoko⁵⁷ case to consolidate the trials within the trial. This observation was an *obiter dictum*. The court *a quo*'s decision to accept the confession was set aside because of a misdirection relating to its refusal to hear certain evidence which the defence wished to lead.

It is possible that in certain cases the need to hold a trial within a trial arises unexpectedly or at a time when it will be inconvenient or impracticable to consolidate such a trial with other similar trials.⁵⁸ In the Mahlala⁵⁹ case five accused were charged with murder. When the prosecution gave notice that it intended to lead evidence of confessions allegedly made by four of the accused, the trial judge had to determine its procedure. *In casu*, Margo J, as he then was, held that the question of admissibility must be resolved separately in regard to each accused, and the trials within the trial were consolidated because of the convenience referred to in Lesoko.⁶⁰ In the Mahlala

57 *supra* 774.

58 Yengeni (2) *supra* 433.

59 1967 2 SA 401 (W).

60 *supra* 774.

decision, each of the accused in a joint trial alleged duress and/or undue influence in relation to a confession sought to be proved against him. For that reason, a consolidated hearing in the trials within the trial had obvious advantages in providing the court with the conspectus of all relevant aspects of police investigation and the reaction of all the accused concerned."

In Nyembe⁶² the trial court was required to decide the admissibility of a confession made by an accused to a magistrate and a "pointing out" made by the same accused to a police captain. There was a possibility of holding two trials within a trial. The trial court decided to determine the issue of admissibility in a single trial within a trial. Diemont JA expressed some reservation about the procedure adopted. He held that while this was a practical course for a trial judge to adopt, it may lead to error.⁶³ The onus to prove that the confession was not made freely and voluntarily was on the accused; and onus was on the prosecution to prove the pointing out. But since the trial judge was

61 Mahlala *supra* 402.

62 1982 1 SA 835 (A).

63 Nyembe *supra* 840-41.

alert to the pitfalls inherent in the procedure he adopted and recognised that it was necessary to consider the admissibility of the confession separately, there was no irregularity.

Reverting to the Yengeni(2)⁶⁴ case *supra*, it is clear that the procedure to be followed in deciding the admissibility of multiple confessions is a matter which ought to be regulated by the trial judge or magistrate. The factors which influence the decision must always depend on the circumstances which prevail in each case. The guiding principle is that justice must be done. The reasons for this opinion are the following:

- (a) *Prima facie* each accused ought to be entitled to conduct his own trial within a trial; and other co-accused whose cases are different or who may wish to present their cases differently ought not to be accommodated by him.⁶⁵

- (b) The decision whether or not to hold a joint trial within a trial depends on the facts and circumstances of each case. Even where accused

64 Yengeni (2) *supra* 434.

65 Yengeni (2) *supra* 434.

agree to consolidated a trial within a trial the court must ensure that the effect of such a procedure would not be prejudicial to any of the accused." Friedman J once stated:

"Hierdie is 'n kwessie van prosedure wat in die hande van die Hof berus en nie in die van die beskuldigde nie. Die Hof het 'n plig om toe te sien dat reg en geregtigheid geskied en dat daar nie 'n onreelmatigheid plaasvind nie, ongeag die houding wat die beskuldigde mag inneem."⁶⁷

- (c) The question of onus is one of the facts to which the court should have regard in deciding whether justice will best be served by a joint trial within a trial or by a separate trial within a trial.⁶⁶
- (d) The court will consider the position of witnesses called to testify in a trial within a trial and where this would require that they testify more than once in a fragmented manner about the same issues it is likely that a joint trial within a trial would be held. The fact that this may result in the court finding itself having a

66 Yengeni (2) supra 434.

67 Nieuwoudt 1985 4 SA 507 (C) 517.

68 Yengeni (2) supra 435.

greater difficulty in determining and evaluating the evidence than if the witnesses had been able to testify once on all issues.⁶⁹

In conclusion, Selikowitz J held that a trial within a trial is a procedure which the courts have themselves evolved in the interests of justice and fairness. The procedure is one which the courts control and which must at all times be flexible enough to achieve its purpose in the given circumstances of a particular case.⁷⁰ In casu the court granted the application sought by the defence to consolidate into one trial within a trial of the hearing of evidence and argument pertaining to the admissibility of all statements upon which the prosecution sought to rely, as confessions allegedly made by the accused to a magistrate.

In the Williams⁷¹ case, Farlam AJ took the opposite view. This case was an appeal from a decision of a trial court where two trials within a trial had been held to decide on the admissibility of statements made by the accused. The court found that the decision by the trial court to hold two trials within a trial was

69 Yengeni (2) *supra* 436.

70 Yengeni (2) *supra* 436.

71 Williams 1991 1 SACR 1 (C).

in order. The reason for this is that there is no hard and fast rule on the procedure to be followed provided the accused is not prejudiced thereby.⁷² On the question whether a trial court should defer its decisions on objections to statements until all the trials within a trial have been held, the court took the following view: both the prosecution and the accused should be invited to address the court on the procedure to be followed.⁷³ The inherent danger of deferring a decision on the admission of a statement until the end of a series of trials within a trial in order to form a "behoorlike geheelbeeld" of the evidence and probabilities may, in certain cases, prejudice the accused where a witness has fared badly in some trials within a trial and who has rehabilitated in later ones.⁷⁴

There is no appellate division decision on the question of deferment of judgment at the end of a series of trials within a trial. It would appear that the facts of each case would indicate on the procedure to be adopted. If the series of trials within a trial involve the same witnesses and the same accused

72 Williams *supra* 10.

73 Williams *supra* 10.

74 Williams *supra* 10.

persons and the same defence team, it would appear that a consolidated trial within a trial would be appropriate. However, where different witnesses testify in the series of the trials within a trial, no consolidation may be necessary.

7.8 Admissibility of similar fact evidence in a trial within a trial

The question may be asked whether the so-called similar fact evidence is admissible in a trial within a trial. It may be pointed out at this stage that all the rules of evidence apply *mutatis mutandis* to the testimony of witnesses in a trial within a trial. This was confirmed in the cases of Yengeni(1)⁷⁵ and Yengeni(3)⁷⁶. Similar fact evidence is admissible in exceptional cases because it relates to incidents not directly in issue.⁷⁷ In Yengeni(1) took the view that the primary requirement for the admissibility of similar fact evidence is its cogency.⁷⁸ By "cogency" is meant the ability of the evidence to assist the trier

75 1991 1 SACR 322 (C).

76 1991 1 SACR 329 (C).

77 Yengeni (1) *supra* 324; see generally Hoffmann and Zeffertt 291; Van der Merwe 67-81; Schmidt 387-411; Hiemstra 450-54; Du Toit *et al* 24-13.

78 Yengeni (1) *supra* 324.

of facts in drawing reasonable inferences." This is what is usually referred to as relevance. Selikowitz J pointed out that in his view, the term "relevance" is ambiguous and its meaning is rather too wide. *In casu*, the defence made an application for an order allowing it to prove by means of similar fact evidence a *modus operandi* employed by the security police of the Eastern Cape in the treatment of detainees who later made confessions. The defence wanted to prove the *modus operandi* by introducing evidence relating to the arrest, detention, interrogation and making of confessions by a number of other persons who were held by the security police in the Western Cape between the end of 1985 and early 1988.

The defence was permitted to lead similar fact evidence only in regard to that part of the so-called concerted investigation *modus operandi* of the security police which related to the arrest, detention, interrogation and making of confessions by persons who were detained in terms of section 29 of the Internal Security Act like one of the accused in Yengeni (1).⁷⁹

79 Yengeni (1) *supra* 324.

80 compare Yengeni (2) *supra* 331-32.

The present rules of the trial within a trial procedure appear to be adequate. Having said this, it must be borne in mind that the proposed Bill of Rights⁸¹ may necessitate some changes when it becomes the basic law.

This relates to the question of the onus where the accused has to negative a presumption under section 217(1)(ii)(b) of the Criminal Procedure Act.

7.9 Conclusion

A trial within a trial is a procedure followed by the court to decide on the admissibility of a confession or admission by an accused.⁸² This is a procedural

81 see Article 6(c) of the proposed Bill of Rights.

82 see Antony 1981 1 SA 1089 (A); Mabaso 1952 3 SA 521 (A); De Vries 1989 1 SA 228 (A); Lebone 1965 2 SA 837 (A); Khuzwayo 1990 1 SACR 365 (A); Dhlamini 1971 1 SA 807 (A); Yengeni (3) 1991 1 SACR 837 (C); Won Kam-ming [1980] AC 247 (PC); Nkatha 1990 4 SA 250 (A); Cibixegu 1959 4 SA 266 (E); Bonsi 1985 4 SA 544 (B); Yengeni (2) 1990 4 SA 429 (C); Van Coller AD unreported case no 214/86; Letsoko 1964 4 SA 768 (A); Mahlala 1967 2 SA 401 (W); Nyembe 1982 1 SA 835 (A); Williams 1991 1 SACR 1 (C); Yengeni (1) SACR 322 (C), Van der Merwe Evidence (1983) 261; Hiemstra Suid-Afrikaanse Strafproses 4ed (1987) 491; Hoffmann and Zeffertt The South African Law of Evidence 4ed (1985) 288, 229 and 484; Schmidt Bewysreg 3ed (1989) 350; Du Toit et al Commentary on the Criminal Procedure Act 24-62A; 24-63; 24-64; 24-65; Potwana 1994 1 SACR 159 (A); Latha 1994 1 SACR 447 (A); Shezi 1994 1 SACR 575 (A).

matter which is chosen by the court. The accused has no right to choose the stage when it may be followed during the trial or that a joint trial within a trial be held. It is for the court to decide.

CHAPTER EIGHT

BURDEN OF PROOF

8.1 Introduction

In our law of confessions, a misdirection as to the incidence of the onus of proof is clearly an irregularity.¹ It is trite law that an onus rests on the prosecution to prove that the accused made a confession freely and voluntarily, in his sound and sober senses and without having been unduly influenced thereto.² But, section 217(1)(b)(ii) of the Criminal Procedure Act shifts the onus to an accused if a confession was reduced to writing by a magistrate.

8.2 Confessions made to a magistrate

8.2.1 Presumption in terms of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977

The provisions of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 states that where a

1 Loate 1962 1 SA 312 (A); Pethla 1956 4 SA 605 (A); Moleko 1955 2 SA 401 (A).

2 See authorities cited *infra*.

confession is made to a magistrate it shall on its mere production be presumed, unless the contrary is proved:

"to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

In Nene(2)³ the court was called upon to interpret the expression "unless the contrary is proved" in section 217(1)(b)(ii) of the Criminal Procedure Act. Counsel for the accused argued that a provision which placed an onus of proof on an accused operated harshly and unfairly. Counsel contended that if an accused simply advanced some evidence which laid some doubt, then whatever onus there was on that accused would be discharged and that the initial and overall onus would remain on the state.⁴ Another counsel who appeared in Nene(2) *supra* for accused no. 7 developed this argument further. He argued that on a proper interpretation of section 217 the *proviso* contained in sub-section (1)(b)(ii) operated simply as an intermediate onus which required the accused to speak

3 1979 2 SA 521 (D).

4 Nene(2) *supra* 523.

first and to lay some foundation for the statement not complying with the requirements of admissibility. Counsel for the state referred the court to the case of Ex parte Minister of Justice: In re R V Jacobson and Levy⁵ where the appellate division was concerned with the same expression, that is the words "unless the contrary is proved".

Broome J in Nene(2) *supra* pointed out that when the prosecutor is in possession of a document which appears to be a confession, made by a person whose name corresponds to that of the accused, to a magistrate, that document may be handed in without further ado.⁶ It is a confession which is admissible in evidence. The judge pointed out further that if it appears from the document handed in that it was made freely and voluntarily by the person in his sound and sober senses without having been unduly influenced, then the presumption operates. The presumption is that the statement was made freely and voluntarily, by the accused in his sound and sober senses and without having been unduly influenced thereto.

That presumption operates unless the contrary is proved. In Jacobson and Levy the appeal court said:

5 1931 AD 466.

6 Nene(2) *supra* 523.

"It is not enough for him to raise a doubt whether he did or did not intend to prefer, for to raise such a doubt is not proof to the contrary. 'Unless the contrary is proved' means unless the accused establishes as a fact that he did not intend to prefer one creditor above another. He may produce evidence which, if accepted, raises a presumption in law that he had no such intention, and if the case stopped there he is entitled to an acquittal, but it will still be open to the Crown to show that this evidence is false or that it should be so qualified as to destroy the presumption in favour of the accused."

Broom J relying on the ordinary meaning of the words used in section 217(1)(b)(ii) of the Criminal Procedure Act and on the passage quoted *supra* from the Jacobson and Levy case held that the expression "unless the contrary is proved" means unless the accused establishes upon a balance of probabilities that he did not make the statement freely and voluntarily, that he was not in his sound and sober senses, or that he had been unduly influenced thereto. Hiemstra's interpretation on the Afrikaans expression "tensy die teendeel bewys word" reads as follows:

"Die uitdrukking "tensy die teendeel bewys word" in sub-a.(1)(b)(ii) beteken "tensy die beskuldigde op oorwig van waarskynlikhede bewys dat hy nie die verklaring vrywillig en ongedwonge gedoen het nie of dat hy nie by sy volle positiewe was nie of dat hy onder onbehoorlike invloed was". Die bewyslas word op hom geplaas deur the vermoede in par. (ii) dat the bekentenis geag word vrywillig en ongedwonge afgela te gewees het indien dit uit die dokument self blyk dat die bekentenis gedoen is deur iemand wie se naam met die beskuldigde s'n ooreenstem, en dit

die bewering bevat dat dit aldus afgele is. Dan word die dokument gewoon ingedien en dit is toelaatbaar as getuienis totdat die beskuldigde die bewys gelewer het waarna hierbo verwys word. Die beskuldigde hoef nie wanneer hy sy bekentenis voor 'n landdros afile, gewaarsku te word dat die bewyslas op hom sal wees indien hy by the verhoor die toelaatbaarheid daarvan wil betwis nie (S v Nene(2) 1979 2 SA 521 (N)). 'n Betoog dat die beskuldigde eers sy saak moet stel voordat die dokument ingedien mag word, is tereg verwerp op 523E.

Wanneer die bewyslas op die beskuldigde oorgeskuif het en die waarskynlikhede van vrywilligheid en nie-vrywilligheid ewe sterk is, sal die bekentenis toegelaat word (S v Mphahlele 1982 4 SA 505(A))."

Erasmus J in Stieler⁷ said:

Vir my kom dit ook voor asof art 217 van Wet 51 van 1977 die bewyslas, onder andere, op die beskuldigde plaas om sy beswaar te bewys wanneer hy 'n beswaar het, want hy alleen weet wat sy beswaar is."

Where the onus rests upon the accused to rebut the presumption it has to be discharged on a balance of probabilities.'

The ratio of the Nene(2) decision *supra* is supported. The court rejected an argument in support of the contention that an accused who elects to make a

7 Hiemstra Suid-Afrikaanse Strafproses 4ed (1987) 493.

8 1978 3 SA 38 (O) 40.

9 Hiemstra 493; Mkanzi 1979 2 SA 757 (T) 758; Nene(2) *supra* 524; Hoosain 1987 3 SA 1 (A) 9; Hoffmann and Zeffertt 223.

statement to a magistrate may find himself in a worse position than does an accused who elects to make a statement to a justice of the peace, and that an accused should therefore be warned of the effect of change of onus. In *casu*, the court held that the general warning or cautions were perfectly adequate. This approach of the court is not supported. In its reasons for rejecting the argument the court held that the ostensible and the actual independence of the magistrate was in its judgment the paramount consideration. It concluded by saying that if an accused does not avail himself of, or take advantage of, the protection afforded by this independence, he must then bear the consequences of the change of onus. The latter holding presupposes that an accused makes an informed decision whether to make a confession before a magistrate or a justice of the peace. That is in fact not the case. Hence the argument that the accused should be warned of the consequences of making a confession before a magistrate. Surely an accused who has a positive duty to discharge an onus on a balance of probabilities is in a worse position than an accused who can do nothing more other than cross-examine state witnesses who testify against him or even to remain silent.

In Nyembe¹⁰ the court, on appeal, was dealing with the question of whether a confession made to a magistrate was rightly admitted in evidence by the court *a quo* (namely the Witwatersrand Local Division per Nestadt J). The document on which the confession was contained did not expressly mention that it was "made freely and voluntarily nor was it stated in so many words that the deponent had not been "unduly influenced thereto". The document did state that the appellant was "apparently in his sound and sober senses". It was clear from the document that the magistrate warned the deponent that he was not obliged to make a statement and that if he did it would be reduced to writing and might be used later as evidence against him.

In deciding the question of admissibility in Nyembe supra the court took into account that the onus was on the accused to rebut the presumption in terms of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977. Diemont JA said that there was no equivalent of absolution.¹¹ In order to succeed the appellant must satisfy the court of appeal that the trial judge erred, that he overlooked evidence, that his evaluation of evidence was at fault or that there was some misdirection.

10 1982 1 SA 835 (A).

11 Nyembe supra 843.

In Mkanzi,¹² the judge said:

"Indien 'n beskuldigde hom nie van die bewyslas kwyd nie, is die bekentenis toelaatbaar. 'n Beskuldigde sal hom nie van die bewyslas kwyd nie waar die Hof die Staat se getuienis glo en syne verwerp en ook nie waar die Hof nie tot 'n slotsom op al die getuienis kan kom nie. Daar is geen plek vir 'n bevinding gelykstaande aan absolusie nie. Gevolglik moet die bekentenis in bogenoemde omstandighede as getuienis toegelaat word. Die waarde daarvan as getuienis is iets waaroor die Verhoorhof, dit wil se Regter en assessore, sal moet besluit.

Ek bevind dus dat daar geen "billikheidsgronde" of "inherente diskresie" bestaan as gevolg waarvan 'n hof 'n bekentenis kan uitsluit nie."

This passage gives a clear procedure to be followed in the event that an accused fails to discharge an onus.

In Mbonane¹³ the appellant challenged his conviction and sentence on appeal. His conviction was based on a confession which had been made before a magistrate. The appellant's replies to the preliminary questions by the magistrate during the making of the confession were as follows:

¹² Mkanzi *supra* 759.

¹³ 1979 2 SA 182 (T).

1. Begryp u die waarskuwing wat deur my aan u gegee is?
Antwoord: Ja.
2. Is u begerig om 'n verklaring to maak?
Antwoord: Ja.
3. Is enige dwang deur enige persoon op u uitgeoefen om 'n verklaring te kom maak, en indien wel, deur wie and wanneer?
Antwoord: (sic) Nee.
4. Is u deur enige persoon beïnvloed om 'n verklaring af te lê?
Antwoord: Nee.
5. Is u deur enige persoon aangemoedig om 'n verklaring af te lê?
Antwoord: Nee.
6. Het enige persoon enige beloftes aan u gemaak indien u 'n verklaring sou aflê?
Antwoord: Nee.
7. Verwag u enige voordele as u 'n verklaring maak en indien wel watter voordele?
Antwoord: Ja, die waarheid.
8. Het u vantevore 'n verklaring in verband met hierdie voorval aan enige persoon gemaak, en indien wel, aan wie, wanneer en onder watter omstandighede?
Antwoord: Nee.
9. Waarom verlang u om die verklaring te herhaal?
10. (a) Is jy in hegtenis geneem?
(b) Wanneer is jy gearresteer?
(c) Wat is die datum van die voorval in verband waarmee u die verklaring wil aflê?
Antwoord: (a) Ja.
(b) Gister
(c) Verlede jaar om en by Desember.
11. Is u deur enigiemand aangerand of gedreig nadat die voorval plaasgevind het?
Antwoord: Die polisie wou my slaan toe ek wou uitgaan en ek het gepleit dat hulle my goed behandel. Ek het gevra wat het gebeur, toe het hulle my in die gesig geklap.
12. Het u beserings van enige aard aan u?
Antwoord: Nee. Ek het net 'n operasie ondergaan en het nog die operasiemerk sewe duim lank op regterarm. Ek het ook 'n oogoperasie ondergaan."

Under cross-examination, the magistrate was attacked for failing to ask questions other than those that appeared on the roneod form. Spoelstra AJ (as he then was) referred to Ndoyana¹⁴ with approval where De Villiers JP pointed out that the real check whether the requirements for the admissibility of a confession have been fulfilled should be done by the judicial officer before whom the accused appears to make his confession. In the case of Ndoyana¹⁵ it was pointed out that it must be carefully explained to the accused person, especially where he is an illiterate black, that he is in the presence of a magistrate or justice of the peace who had no connection with the police and that he had nothing to fear and can speak freely. Spoelstra A J in Mbonane referred with approval to the case of Mtabela¹⁶ where the appellate division emphasized that not only should magistrates be meticulous in making the appropriate preliminary enquiries of persons brought before them for the purpose of recording a confession, but that when such a confession is tendered as evidence in court, the prosecution should, by way of introduction, specifically lead evidence of such preliminary enquiries having been made.

14 Ndoyana 1958 2 SA 562 (D) 563.

15 Ndoyana supra 563.

16 1958 1 SA 264 (A) 268.

8.2.1.1 Introductory portion of a roneod confession form

Spoelstra AJ in Mbonane *supra* pointed out that it must be borne in mind that the introductory portion of the roneod confession form is a departmental guideline. That does not absolve a magistrate from his duty and responsibility to explain carefully to the confessor the contents of the questions. A mere mechanical recording of answers to the questions on the roneod form is contradictory to what is expected of a magistrate.

Harcourt J in Majozi¹⁷ held that:

"Mere reliance upon, and completion of, the roneod form which contains a number of questions which are put to the accused person and upon which his answers are recorded is not, in principle, a good way of showing that all the requirements of the law are complied with, because it was suggested that it might tend to prevent the magistrate from asking any other question and the case suggested that there should be no slavish adherence to these suggested questions."

The holding of the court in Mbonane¹⁸ was that section 217(1)(b)(ii) of the Criminal Procedure Act made it clear that the onus only shifts to the accused when the document containing the confession was not

17 1964 1 SA 68 (N) 71-72.

18 Mbonane *supra* 185-186.

reasonably susceptible of an interpretation other than that the confession was made freely and voluntarily by the deponent in his sound and sober senses. Where the confession, read as a whole, raised a reasonable doubt as to whether one of the requirements was present, the prosecution, in order to be able to adduce the confession in evidence, must prove that requirement, in respect of which a doubt existed, was indeed present when the confession was made.¹⁹

In Mphahlele,²⁰ the magistrate who recorded a confession stated in his evidence before the court *quo* that when one of the appellants wanted to give an explanation, he told him that he had been brought there to make a statement, not to give an explanation. The court, on appeal, held that since the confession did not contain an explanation, it was incomplete. For that reason, the presumption contained in section 217(1)(b)(ii) of the Criminal Procedure Act could not be invoked because it did not appear *ex facie* the document containing the confession that it was made freely and voluntarily, by the confessor in his sound and sober senses, and without having been unduly influenced thereto.

19 Mbonane *supra* 186.

20 1982 4 SA 505 (A).

8.2.1.2 The expression "mere production of the confession at
the proceedings"

The decision of the Transkei supreme court in Ndzamela²¹ throws some light on the "mere production" of a document containing a confession made before a magistrate. In that case, the court interpreted section 222(1) of the Transkeian Criminal Procedure Act 13 of 1983 a Transkeian section which is an equivalent of section 217 of the South African Criminal Procedure Act. Mitchell J pointed out that the expression "the mere production thereof at the proceedings" means simply that the document containing the confession is produced.²² In other words, the document is produced to the court without further proof whatsoever. This view was expressed to reject the argument of counsel that the prosecution should prove by evidence aliunde that the person to whom a confession was made was a magistrate. The court held that it would be extra-ordinary, if not preposterous, to suggest that the prosecution would present a document on the face of it a statement or confession made to a magistrate if that was in fact made to a policeman.²³

21 1989 3 SA 361 (Tksc).

22 Ndzamela supra 365.

23 Ndzamela supra 365.

Counsel for the accused in Ndzamela made an observation that the onus of proof shifts as a whole or it stays where it normally is, namely on the prosecution.²⁴ In other words, the onus of proof cannot be divided up, nor can any aspect be treated separately from an onus point of view. The court agreed with this view.²⁵

In Dhlamini,²⁶ Ackermann J said:

"Immers, 'n baie belangrike oogmerk met art 219 A (1) (soos dit trouens die geval is met art 217 met betrekking tot bekentnisse) was om die bewys van erkennings aan landdroste in verskeie opsigte te vergemaklik, insluitende die verplasing van die bewyslas. Die feit dat die prosedure nog verder vergemaklik kon gewees het, bied na my mening egter geen basis om aan te voer dat die letterlike uitleg van die bepaling tot absurde resultate sal lei nie, of dat dit die Wetgewer se bedoeling sou ontsenu nie."²⁷

This passage is contradictory to the Ndzamela decision. It would appear that the case of Dhlamini is to be preferred as it recognises the fact that where the prosecution seeks to rely on the provision of section 219 (A)(i)(b) it must appear beyond reasonable doubt from the document containing the admission that

24 Ndzamela supra 367.

25 Ndzamela supra 367.

26 1981 3 SA 1105 (W).

27 Dhlamini supra 1112.

the admission was voluntarily made by the accused. If the document containing the confession read as a whole causes doubt whether the admission was made voluntarily, then the onus does not shift to the accused.²⁸ It must be pointed out that in interpreting the document containing the confession the court may not interpret it as if it is a parliamentary enactment or a contract.

**8.2.1.3 Proof that a confession was made to a magistrate
does not require *viva voce* evidence**

Does the Dhlamini decision *supra* limit proof of the fact that a confession was made to a magistrate to *viva voce* evidence? Kirk-Cohen in Kekane²⁹ held that *viva voce* evidence was not necessary to establish that the statement had been made to a duly appointed magistrate.³⁰ In fact, the Dhlamini decision *supra* did not exclude proof by way of section 231 of the Criminal Procedure Act, namely that the provisions of that section may be invoked to prove that the confession was made before a magistrate provided it is applicable.³¹

28 Dhlamini *supra* 1112-1117.

29 1986 4 SA 466 (W).

30 Kekane *supra* 471.

31 Kekane *supra* 472.

The test to be applied in deciding whether it appears *ex facie* the document containing the confession that it was made freely and voluntarily, is from an analysis of the said document itself and not the surrounding circumstances.³² The approach of the court is that it must exercise caution because the shift of onus in section 217(1)(B)(ii) has the effect of changing the common law and the previous existing position prior to the commencement of the 1977 Criminal Procedure Act. In this regard the court in Dhlamini said:

"Voorbehoudsbepaling (b) tot die gemelde artikel het 'n ingrypende verandering met betrekking tot die strafregtelike bewysreg meegebring deur die bewyslas op die beskuldigde te plaas, en ek is gevolglik van mening dat die slagspreuk *in poenis strictissima verborum significatio accipienda est* wel deeglik in die uitleg van hierdie artikel toepassing vind en dat dit streng ten gunste van die beskuldigde uitgelê moet word."³³

In interpreting and analysing a document containing a confession, the court, although it is limited to the four corners of that document, must have regard to the preliminary questions and the answers (on the roneod confession form).³⁴ If there is a "red light" the

32 Kekane supra 473.

33 Dhlamini supra 114; quoted with approval in Kekane supra 473.

34 Kekane supra 474.

magistrate taking the confession must investigate the cause thereof carefully; for it is only by careful and proper investigation that it may be eliminated.³⁵ If there is a reasonable doubt that the confession regarding the voluntariness, absence of undue influence and sobriety of the confessor, the presumption in section 217(1)(b)(ii) cannot be invoked. In Kekane the court held that the prosecution could invoke the presumption in section 217(i)(b)(ii) since it appeared *ex facie* the document containing the confession that it was made freely and voluntarily.

8.2.1.4 Accused's onus to rebut the presumption created by section 217(1)(b)(ii) of Act 51 of 1977

In most cases an accused fails to discharge the onus to rebut the presumption created by section 217(1)(b)(ii) of the Criminal Procedure Act.³⁶ The common reason for this is that an accused does not perform very well as a witness in the witness-box; whereas the police usually impress the court as honest and reliable witnesses. Even where the accused makes allegation of assault, his evidence is usually

35 Gumede 1942 AD 398 at 433.

36 See Januarie 1991 2 SACR 682 (E) 685; Williams 1991 1 SACR 1 (C); see Engelbrecht "Veranderde bewyslas: toelaatbaarheid van 'n bekentenis" 1989 De Rebus 568; Engelbrecht "Fundamentele regte van die beskuldigde" 1990 De Rebus 791.

rejected because his performance in the witness-box cannot outweigh the performance of the police witnesses. The police receive training both as law enforcement officers and as witnesses. In short, the police are used to the witness-box and they are likely to perform better if they compete with an unsophisticated, illiterate accused who hardly understands his procedural rights in court.

In the case of Thwala,³⁷ the court held that the defence had discharged the onus of proving that the confession did not comply with the requirements for admissibility. The court's reasons for that holding may be summed up as follows:³⁸

In the first place, the accused was kept in the same office for 48 hours with a fresh team of interrogators taking over every eight hours. Finally he agreed to be taken before a magistrate where he made a confession. The accused concluded his first confession by saying "I think it is all". Five days later, he was further questioned. He made further statements dealing with other and more serious crimes.

37 1991 1 SACR 494 (N).

38 Thwala *supra* 496.

Secondly, a district surgeon who examined the accused, after making his first statement, found traces of ketones in his urine which, on the expert evidence led by the defence, was consistent with the accused virtually having been starved for about two days prior to the examination.

Thirdly, the court found that although the accused had exaggerated the extent to which he had been maltreated by the police during his interrogation, the evidence of the stress response syndrome confirmed that the interrogation had to have been traumatic.

The case of Thwala indicates that the onus to be discharged by an accused in terms of section 217(1)(b)(ii) is a heavy one. What would have happened if the accused had no legal representation at his trial? What would have happened if the accused did not lead expert psychiatric evidence? It would appear that an unsophisticated accused would not appreciate his procedural rights when the presumption has been invoked.

No exposition of the presumption created by section 217(1)(b)(ii) of the Criminal Procedure Act is complete without reference to the judgment of Kroon J

in the case of Jika.³⁹ In that case three accused were charged with murder. The prosecution tendered confessions in evidence; and the defence, while admitting that the confessions in question were made by the accused, placed the admissibility thereof in issue. The provisions of section 217(1)(b)(ii) of the Criminal procedure Act were accordingly of application.

Kroon J pointed out in the case of Jika that the effect of the provisions set out in sub-section 217(1)(b)(ii) of Act is that, where the prosecution proffers in evidence a statement contained in a document which complies with all the requirements set out in the subsection, that statement is admissible in evidence on the mere production thereof and, unless the accused proves the contrary on a balance of probabilities, it is deemed to have been made freely and voluntarily by the confessor or deponent in his sound and sober senses without his having been unduly influenced thereto.⁴⁰ The court held also that the question whether the document is one which complies with all the requirements referred to in subsection (1)(b)(i) and (ii) of the Act is something which must appear from the document beyond a reasonable doubt, and that it was a question which must be decided on

39 1991 2 SACR 489 (E).

40 Jika *supra* 492.

the consideration only of the contents of the document itself."⁴¹

On subsection 217(1)(b)(ii) of the Criminal Procedure Act, the court in the case of Jika pointed out that if the document is reasonably capable of a construction other than that the deponent made the statement freely and voluntarily and without being unduly influenced thereto, and while in his sound and sober senses, the accused should not be burdened with any onus, and same would rest squarely on the prosecution.⁴² The court expressed the view that because of the shift of onus to the accused the document containing the confession must be strictly construed.⁴³

In Jika the prosecution contended that, inasmuch as it appeared *ex facie* the documents that the person who recorded the statements was a magistrate, the prerequisites provided for in the introductory portion of section 217(1)(b) for the documents to be

41 Jika supra 492.

42 Jika supra 492.

43 See Dhlamini 1981 3 SA 1105 (W); Mpetha(2) 1982 2 SA 405 (C); Yolelo 1981 1 SA 1002 (A); Nene(2) 1979 2 SA 521 (D); Mkanzi 1979 2 SA 757 (T); Nyembe 1982 1 SA 835 (A); Mkhwanazi 1966 1 SA 736 (A); Mbonane 1979 3 SA 182 (T); Kekane 1986 4 SA 466 (W); Jakatyana 1990 1 SACR 420 (CK); Williams 1991 1 SACR 1 (C); Maluma 1990 1 SACR 65 (T); Khuzwayo 1990 1 SACR 365 (A); Hendricks 1990 2 SACR 373 (C); Yengeni(2) 1991 1 SACR 329 (C); Januarie 1991 2 SACR 682 (E); Yengeni(1) SACR 322 (C).

admissible on their mere production and for the accused to be visited with the onus.* In short, this contention was that it was sufficient merely if the document in question reflected that the statement had been made to a magistrate. The court could not agree. The contention by the defence that something more than a mere statement in the document that the person by whom the confession was recorded is required, was upheld by the court. In the court's judgement:

"a clear distinction must be drawn between the provision of the introductory portion of s217(1)(b) and the provisions of s217(1)(b)(ii), albeit that the latter follow and are dependent on the former. In contradistinction to the wording of s217(1)(b)(ii), which provides for a presumption to operate on the mere strength of what is set out in the document in question, there is no provision in the introductory portion of the subsection for any presumption to come into operation by reason of the wording of the document under consideration. In the absence of any such presumption I know of no principle of law which permits the mere statement in the document that the confession was recorded by a magistrate to prove the fact that it was so recorded."⁴⁵

The prosecution may either adduce viva voce evidence or invoke the provisions of section 231 of the Criminal Procedure Act to prove that a confession was

44 Jika supra 493.

45 Jika supra 493.

made to a magistrate." Section 231 provides as follows:

"Any document

- (a) which purports to bear the signature of any person holding a public office; and
- (b) which bears a seal or stamp purporting to be a seal or stamp of the department, office or institution to which such person is attached.

shall, upon the mere production thereof at criminal proceedings, be *prima facie* proof that such person signed such document."

Section 231 of the Criminal Procedure Act may be invoked only if the document in question complies with the provision of both paragraphs. Consequently, the document must be signed and stamped in such a way that the stamp must purport to be a stamp of the department, office or institution to which the deponent is attached; and that the position of the stamp must qualify the said signature.⁴⁷ The test to be used is common sense and a realistic approach.

The approach of the court in Jika to the question whether the presumption referred to in section 217(1)(b)(11) of the Criminal Procedure Act comes into operation may be summed up as detailed below.

46 Jika supra 493; Kekane supra 473; Dhlamini supra 1112-1117.

47 Jika supra 493.

Kroon J referred with approval to the dicta Mpetha(2) which read:

"In regard, however, to the passage quoted from Mbonane's case I have one reservation. The learned Judge in that case seems to suggest, in the second paragraph of the portion quoted, that if the confession read as a whole raises doubt as to whether one or the other of the prerequisites for admissibility is present then the State must lead evidence to prove that prerequisite if it wants to tender the confession as evidence. If by this it is meant to suggest that the *onus* shifts to the accused in respect of those prerequisites which are not in doubt and only remains on the State in respect of those prerequisites which are in doubt then I do not agree with this view. Either the *onus* shifts as a whole or it stays where it normally is, namely on the State. I do not think one can divide up the prerequisites and treat each one separately from *onus* point of view. One is dealing here with a situation where the *onus* shifts only if all three prerequisites are present and if any one of them is absent then there is no shift of *onus* at all."⁴⁸

The above remarks are restricted to the three prerequisites set out in subsection 217(1)(b)(ii) of the Criminal Procedure Act and are not of application to any prerequisite set out in the introductory portion of subsection 217(1)(b) notwithstanding that such prerequisite is a basic premise for the coming into operation of the presumption referred to in subsection 217(1)(b)(ii).⁴⁹ The three prerequisites set

48 Mpetha(2) *supra* 414.

49 Jika *supra* 495.

out in subsection 217(1)(b)(ii) are that it must appear from the document containing the confession that it was made freely and voluntarily by the accused in his sound and sober senses and without having been unduly influenced thereto. The prerequisite set out in the introductory portion of subsection 217(1)(b) is that where a confession is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the confession shall be admissible in evidence upon the "mere production thereof". What the court elucidated in the case of Jika is that where a confession has been reduced to writing or confirmed and reduced to writing in the presence of a magistrate, there is no presumption of law that it was in fact made to a magistrate. That fact must be proved by the prosecution beyond a reasonable doubt. If the state fails to do so, the onus rests squarely on the state and the presumption referred to in subsection 217(1)(b)(ii) of the Criminal Procedure Act cannot be invoked. But, where the document containing the confession has been shown to comply with all the provisions of section 217(1)(b)(ii), it must be clear that it is not reasonably capable of any construction other than that the confession was made freely and voluntarily and without undue influence, and under those circumstances the onus of proving that the

confession was not made freely and voluntarily and without the accused being unduly influenced thereto will be on the accused.⁵⁰

8.2.1.5 Critique of the shift of onus in terms of section 217(1)(b)(ii) of the Criminal Procedure Act

The prosecution is in a position to lead the evidence of a magistrate who minuted a confession as well as the evidence of an interpreter where applicable. The legislature has given the state a kick-start by creating the presumption in section 217(1)(b)(ii) of the Criminal Procedure Act. The state does not need this type of assistance - it comes as a bonanza to it from the legislature. Apart from leading the evidence of a magistrate and an interpreter, the state may also lead evidence of the police to prove that there was no untoward conduct on their part which might have coerced an accused to make a confession.

The number of witnesses that the state may call depends on the size of the police station and the number of policemen who may have either interrogated the accused or dealt with him in the course of their official duty. It is clear from this that the state is

in a position to prove the requirements for the admissibility of a confession without the assistance of the presumption.

The presumption created in terms of section 217(1)(b)(ii) of the Criminal Procedure Act shifts the onus onto an accused to show on a balance of probability that the requirements for the admissibility of a confession were not met. In other words, the legislature enables the state to produce a confession recorded by a magistrate and the accused is saddled with the onus of proving that it should not be admitted into evidence. The magistrate who records a confession is not expected to warn a suspect that he may have difficulty in court in proving that his confession was not made freely and voluntarily, by him in his sound and sober senses, and without having been unduly influenced thereto.

The presumption created in terms of section 217(1)(b)(ii) of the Criminal Procedure Act may prejudice an unsophisticated accused who is not represented at his trial. Even an accused who is represented may have difficulty in discharging the onus on the balance of probability.

It would appear that it is in the interest of justice either to abolish the presumption or to introduce measures that would ensure that a suspect makes an informed choice before his confession is minuted by a magistrate. The scales would be balanced if the presumption is abolished and both parties (the state and an accused) are called upon to argue the admissibility or otherwise of a confession without an unfair advantage to the prosecution.

8.3 Evaluation

The state bears the onus to prove that the requirements for admissibility of a confession are met before it is admitted into evidence. This onus may shift to the accused⁵¹ in terms of section 217(1)(b)(ii) of the Criminal Procedure Act if the confession was minuted by a magistrate and if it appears *ex facie* the document containing the confession that it was made freely and voluntarily by an accused in his sound and sober senses, and without having been unduly influenced thereto. Moreover, the name of the accused must correspond to the name of the person who made the

51 See section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977; Nene(2) supra 521; Stieler supra 40; Mkanzi supra 759; Nyembe supra 843; Mbonane supra 185-186; Ndzamela 365; Dhlamini supra 1112-1117; Thwala supra 496; Jika supra 492.

confession and where the services of an interpreter were used, a certificate by an interpreter must be attached.

It is clear from the foregoing:

- (a) that the phrase "mere production" used in section 217(1)(b)(ii) of the Criminal Procedure Act means that the document containing the confession is produced;⁵²

- (b) that the phrase "unless the contrary is proved" used in section 217(1)(b)(ii) means that unless the accused establishes upon a balance of probabilities that he did not make the confession freely and voluntarily, in his sound and sober senses and without having been unduly influenced thereto.⁵³

The Afrikaans phrase "tensy die teendeel bewys word" means "tensy die beskuldigde op oorwig van waarskynlikhede bewys dat hy nie die verklaring vrywillig en ongedwonge gedoen het nie of dat

52 Ndzamela supra 365.

53 Ex parte Minister of Justice: In re R v Jacobson and Levy supra 466.

hy nie by sy volle positiewe was nie of dat hy onder onbehoorlike invloed was."⁵⁴

Once the onus shifts to the accused he must discharge it otherwise the confession will be admitted into evidence. There is no equivalent of an absolution - if the accused discharged the onus the confession is excluded or if he fails, the confession is admitted.⁵⁵

54 Hiemstra 493.

55 Mkanzi *supra* 759.

CHAPTER NINE

CONVICTION OF A CONFESSION

9.1 Introduction

The purpose of this chapter is to discuss the criteria which our courts take into account before accused are convicted solely on the basis of their confessions.

Section 209 of the Criminal Procedure Act provides:

"An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed."

A confession in terms of section 209 bears the same meaning as it does in section 217 of the Criminal Procedure Act. The latter section relates to the admissibility of confessions.

To convict on a confession, there has to be either confirmation of the confession in a material respect, or evidence aliunde (outside) the confession must be led to prove that the offence was in fact committed.¹

¹ Hoffmann and Zeffertt The South African Law of Evidence 4ed (1988) 598; Van der Merwe et al Evidence (1983) 398.

9.2 **Confirmation of a confession in a material respect**

Confirmation of a confession in a material respect was found to be present in the case of Blyth.² In *casu* the accused made a confession that she had murdered her husband by arsenic poisoning. The fact that the body of the deceased contained some arsenic was held to be sufficient confirmation of the accused's confession. The holding of the court is accepted as correct notwithstanding the fact that the mere presence of the quantities of arsenic did not connect the accused with the offence nor did it prove that the deceased had been murdered. The deceased might have committed suicide by taking the poison. The requirement is that a material aspect of the confession should be confirmed.³

The confirmation of the confession in Blyth emanated from a source other than the accused. A question may be asked whether an admission made by an accused person in his statement under section 115 of the Criminal Procedure Act, or in his answers to questions put to him in that connection, is capable in law of furnishing the confirmation of a confession by him which section 209 of the same Act requires, although

2 1940 AD 355.

3 Van der Merwe *et al* 399.

the admission was never formally recorded in terms of section 115(2)(b).⁴

In his majority judgment, Viljoen JA (Jansen JA dissenting) pointed out that the inquiry is not from what source the confirmation emanated.⁵ The inquiry in each case is whether the confirmation is such as to reduce the risk of a false confession. The judge held that if the source of the confirmation is the accused himself, the court will be more cautious and scrutinise the confirmatory material more closely because under those circumstances the risk of a false confession would not be reduced to the same extent as it would be had the confirmation emanated from some independent source.⁶ But that does not mean that a consideration of such confirmatory material is not permissible at all. It is clear in the judgment of Viljoen JA that if an accused has made a confession which is admissible and, conscience-stricken and contrite, he repeats the confession or makes a statement or an admission which is consistent with the confession to a priest or minister of the church or some other father confessor whose testimony about this

4 This was a question of law reserved by Didcott J in Mjoli 1981 3 SA 1233 (A).

5 Mjoli *supra* 1245.

6 Mjoli *supra* 1245.

occurrence in court can be relied upon both as regards the motive of the accused in unburdening his heart as well as the tenor of the confession, he can see no reason why the court should not, in accepting that evidence, decide that the statutory requirements of confirmation has been satisfied.⁷

In Mjoli it was held that it depends entirely on the circumstances under which the confirmatory statement is made by the accused whether there can be said to be confirmation in a material respect, or not.⁸

Rumpff CJ concurred in the judgment by Viljoen JA. He pointed out that the danger of a conviction on a false confession was averted when the plea of not guilty was entered by the trial judge and when the requirements of section 209 of the Criminal Procedure Act were satisfied. Jansen JA in his dissenting opinion, took the view that both formal and informal admissions would not constitute "other evidence" or evidence aliunde by which the confessions could be confirmed.⁹ The value of an extra-judicial confession, as evidence of the truth of the contents thereof, is a matter of

7 Mjoli *supra* 1245.

8 Mjoli *supra* 1245.

9 Mjoli *supra* 1245.

debate. Moreover, there is a recognized danger of a false confession. In our law, the insufficiency of a confession standing alone has been recognized for over a century and a half.¹⁰ It was held in the minority judgment in Mjoli that it has been long recognised that an accused may bind himself by admissions.¹¹ When admissions are formally made, in terms of section 220 of the Criminal Procedure Act, they are "sufficient proof" of the facts so admitted. But where the admissions are informally made¹² as in cross-examining witnesses¹³ for the prosecution, they will not *per se* "be sufficient proof" of the facts admitted, and their weight will depend on the circumstances.¹⁴

In Mokgeledi¹⁵ the appellate division held that an admission in terms of section 284(1) of the Criminal Procedure Act 56 of 1955 of the actual commission of

10 See Section 29 of the Cape Ordinance 72 of 1830; Section 18 of the Transvaal Proclamation 16 of 1902; Section 286 of the Criminal Procedure and Evidence Act 31 of 1917; Section 51 of the General Laws Amendment Act 46 of 1937; Section 258 of the Criminal Procedure Act 56 of 1955; Section 209 of the Criminal Procedure Act 51 of 1977; Sikosana 1960 4 SA 723 (A) 729.

11 Section 220 of the Criminal Procedure Act 51 of 1977.

12 Fouche 1958 3 SA 767 (T) 779.

13 W 1963 3 SA 516 (A) 523.

14 Mjoli supra 1242.

15 1968 4 SA 335 (A) 337.

the offence could not serve to corroborate an extra-judicial confession. It held that such an admission in terms of section 284(1) of Act 56 of 1955 did not constitute "competent evidence" as required by section 258(2) of the same Act for proof of the commission of the offence.¹⁶ In Mjoli, Jansen JA held that it followed that neither an informal admission, not made by an accused in giving evidence, would do so.¹⁷ Moreover, both formal and informal admissions (not made by the accused in giving evidence) would not constitute "other evidence" or evidence aliunde by which the confession could be confirmed. In conclusion of the minority judgment, Jansen JA held that admissions made or elicited in the course of proceedings under section 115 of the Criminal Procedure Act, whether they are deemed admissions under section 220 or not, do not constitute "evidence" as decided in Mokgeledi and that these admissions cannot serve to confirm an antecedent extra-judicial confession.¹⁸

The minority decision in Mjoli is preferred to the majority one. The former is paying careful attention to the dangers of a false confession. The majority

16 Compare Nzuza 1963 3 SA 631 (A) 634.

17 Mjoli *supra* 1242.

18 Mjoli *supra* 1243.

decision in Mjoli was rightly criticized.”

In Khumalo²⁰ the appellate division considered, on appeal, an alleged confirmation of a confession in terms of section 209 of the Criminal Procedure Act. The court found discrepancies between the appellant’s confession and the objectively indisputable facts of the case. For example, the accused stated in his confession that he fired a shot at the deceased and that the bullet struck him. The indisputable facts were that two bullets struck the deceased and that at least two shots must have been fired. Moreover, the accused said in his confession that the firearm which he had with him at the time of his arrest was the one used to fire the shot at the deceased. The truth, on the other hand, was that the deceased had not been killed by means of the firearm which was found in the appellant’s possession when he was arrested.

Botha JA held in Khumalo that the trial court’s erroneous reading of the appellant’s confession seemed to have led to a failure on its part to be fully alive to the danger that the appellant in his confession may have falsely implicated himself in the killing of the

19 Paizes (1982) 6 SACC 115; Skeen 1982 SALJ 26.

20 1983 2 SA 379 (A).

deceased.²¹ The judge of appeal pointed out that in general, the danger of an innocent person freely and voluntarily confessing to a crime he did not commit is no doubt slight,²² but it is nevertheless real, and, when once it appears that a purported confession contains a material untruth, the need for the court to be on its guard against the danger of the confession being false in essence, that is as to the guilt of the confessor, is immediately more compelling.²³ The court observed that experience in the administration of justice has shown that people occasionally do make false confessions, for a variety of reasons, and that our courts have recognised this phenomenon for human nature.²⁴

Our legislature has provided safeguards to be complied with before an accused person could be convicted on the strength of a confession. At present the position is governed by section 209 of the Criminal Procedure Act 51 of 1977 which is quoted above.

Referring to the divergent views expressed by Jansen JA and Viljoen JA in Mjoli Botha JA held that

21 Khumalo *supra* 383.

22 Sikosana *supra* 729.

23 Khumalo *supra* 383; Sikosana *supra* 729; Mjoli *supra* 1237, 1239, 1245.

24 Mjoli *supra* 1239-1240 per Jansen JA.

the learned judges of appeal differed in regard to the effect of the decision in Mbambo's²⁵ case. Having regard for the judgments of both judges in Mjoli, Botha JA considered it to be an open question whether it is permissible in principle to use an extra-judicial confession made to a police officer as confirmation of another confession for the purpose of section 209 of the Criminal Procedure. In other words, the minority decision in Mjoli was cogent enough to create doubt about the correctness of the majority decision.

9.3 Evidence aliunde of the commission of the offence

Evidence aliunde must be furnished to establish every element of the offence. There is no limit on the kind of evidence which may prove the commission of the crime.²⁶

Holmes JA held in the case of Letsedi²⁷ that:

"There may be cases where, although a confession is confirmed in material respects, at the end of the whole case the

25 1975 2 SA 549 (A) 554.

26 Du Toit et al Commentary on the Criminal Procedure Act (1989) 24-11; Sikosana supra 729; Kearney 1964 2 SA 495 (A); Mokgeledi supra; Nzuza supra.

27 1963 2 SA 471 (A) 474-5.

court is in doubt as to whether the accused is proved to have been the wrongdoer."

In other words, mere compliance with the statutory provisions of section 209 does not relieve the court of its duty to satisfy itself beyond a reasonable doubt of the accused's guilt.²⁸

9.4 Evaluation

9.4.1 False confession

A crime may be committed by an unknown person. The requirement that a confession be confirmed in a material respect does not mean that positive proof is required that the confessor is also the perpetrator. In a situation where a crime is committed by A and B makes a confession to admit guilt, and the confession is confirmed in a material respect, B may be convicted. It is disappointing that the process of confirming the confession in a material respect does not always prove beyond a reasonable doubt, independent of the confession that the confessor is indeed the perpetrator of the crime confessed. This is a weakness inherent in the use of confessions as a substitute for evidence. It would appear therefore that triers of

fact must exercise caution before they convict on a confession.

9.4.2 Coerced confession

The requirement that the prosecution may lead evidence aliunde to prove that the crime was committed before a court convicts on a confession is welcomed. But, there is always a danger that a coerced confession may be admitted into evidence where the accused fails to discharge the onus in terms of section 217(1)(b)(ii) of the Criminal Procedure Act. There is not equivalent of an absolution from an instance. To prove by evidence outside the confession that a crime was committed is good; but it does not prove that the accused is the perpetrator. It would appear that to admit a coerced confession where the accused fails to discharge the onus in terms of section 217(1)(b)(ii) of the Criminal Procedure Act would constitute an irregularity. The reason for this is that a coerced confession is not admissible in terms of section 217 of the Criminal Procedure Act. Any subtle way of smuggling a coerced confession into evidence cannot be supported.

The leading of evidence outside the confession to prove that a crime was committed was intended to ensure that before a confessor is convicted, a crime

must be positively proved. But, what if the confessor is not the perpetrator. This requirement is not satisfactory.

9.4.3 **Caution**

The approach of our courts to evidence of a single witness is well known.²⁹ It is not a requirement of our law that the caution which counts exercise in convicting on an evidence of a single witness is also applicable to convicting an accused on the bases of a confession. It would appear that this is necessary to ensure that only the guilty is convicted.

9.4.4 **Suggestion that death or life sentence not be imposed on an accused who has been convicted on the basis of a confession**

A proviso to section 112(1)(b) of the Criminal procedure Act reads: "Provided that the sentence of death shall not be imposed unless the guilt of the accused has been proved as if he had pleaded not guilty". The implication of this is that if an accused pleads guilty in court, the death sentence may not be imposed. A judicial confession (i.e. the plea of guilty) excludes the death penalty unless the guilt of

29 See Mokoena 1932 OPD 79 80; Mokoena 1956 3 SA 81 (A) 85; Sauls 1981 3 SA 172 (A) 180; Webber 1971 3 SA 754; French-Beytaqh 1972 3 SA 430 (A) 445-6.

the accused is proved independently beyond a reasonable doubt. An extra-judicial confession on the other hand does not exclude either the death penalty or the life sentence. It is clear from the foregoing that it is necessary to exclude the death penalty or the life sentence in the case of an accused who has been convicted solely on the basis of a confession.

9.5 **Conclusion**

The criteria which our courts take into account before an accused is convicted on the basis of his or her confession have been discussed. The requirements that a confession be corroborated in a material respect or that evidence outside the confession be led to prove that the offence has been committed are meant to exclude the possibility of convicting a person where no crime has been committed at all. It has been pointed out in the above exposition that the requirements which must be met before an accused is convicted on his confession are not always adequate. The findings in this regard may be summarised as set out below.

- (a) The so-called corroboration of a confession in a material respect does not require that there must be proof beyond a reasonable doubt that the accused is both the perpetrator and the confessor. A confessor may be any person who made

the confession; and the perpetrator is the person who committed the crime. A confession is a statement where an accused accepts full responsibility for committing a crime. There must be checks and balances to ensure that an innocent man who makes a confession is not convicted.

- (b) To prove the commission of a crime by evidence outside the confession is another way of proving that a crime was committed. But in some cases such evidence does not prove that the accused is the perpetrator. It is important to prove beyond a reasonable doubt the identity of the perpetrator.
- (c) The change of onus to be accused in terms of section 217(1)(b)(ii) of the Criminal Procedure Act creates a danger of admitting coerced confessions into evidence. To convict on a coerced confession is an irregularity.
- (d) It is necessary to extend the caution exercised when convicting an accused on the strength of evidence of a single witness to cases where our courts convict accused on the basis of their confessions. Similarly the types of punishment to be imposed on an accused convicted on the basis of his or her confession should not include the death penalty or the life sentence.

CHAPTER TEN

EVIDENCE OF POINTING OUT

10.1 Introduction

Section 218 of the Criminal Procedure Act reads:

"(1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
(2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings."

This section enables our courts to admit evidence of facts which were discovered by a witness as a result of an inadmissible confession or admission. It also enables the courts to admit evidence at a criminal trial that anything was pointed out by an accused. The reason for this is that if an accused has pointed out

anything it means that he has some knowledge of some fact relevant to his guilt.¹

Evidence of a pointing out by an accused will be admissible in evidence even if no concrete facts were subsequently discovered, it being sufficient to show that the accused had certain knowledge which tendered to show his guilt.²

10.2 Pointing out

In the decision in Mbele,³ the trial judge had accepted as admissible evidence certain notes which had been made to a certain colonel, an *ex officio* justice of the peace, in connection with points which the appellant had pointed out to him but which embodied a confession of involvement in the murder, and a confession which had been made to another colonel of the police. In *casu*, the court on appeal found that certain irregularities entailed in the pointing out and accompanying statements raised reasonable doubt whether appellant had acted

1 Zeffertt and Hoffmann 205.

2 Tebetha 1959 2 SA 337 (A) 346; Van der Merwe et al 265.

3 1981 2 SA 738 (A).

voluntarily.⁴ Kotze JA held that section 218(2) of the Criminal Procedure Act legalises only the pointing out by the accused as stated therein and not the production of a confession in the guise of a pointing out.⁵

In the case of Magwaza,⁶ the court on appeal pointed out that subsection 218(2) of the Criminal Procedure Act does not exclude or purport to deal with a pointing out which forms part of an inadmissible confession, nor does it permit evidence of a confession by an accused in the guise of a pointing out by him. In *casu*, Hoexter JA held that it is one thing for a court to receive evidence of a pointing out by an accused when the court knows no more than that the pointing out may or may not form part of an inadmissible confession by the accused.⁷ The learned judge of appeal also held that it is an entirely different situation, and one which cannot be countermanded, for a court to have regard to what an accused has pointed out when the court has certain knowledge not only that the pointing out forms part of

4 Mbele *supra* 743.

5 Mbele *supra* 743.

6 1985 3 SA 29 (A) 38.

7 Magwaza *supra* 39.

an inadmissible confession but also what the precise content of the inadmissible confession is.⁸ In these circumstances the evidence of the pointing out should be disregarded.

The weight to be attached to a pointing out by an accused was correctly summed up by Miller JA in the case of Mphahlele⁹ when he said:

"The actual pointing out, as distinct from what he is alleged to have said in the course of pointing out certain places ... was not of such a nature that only one who was concerned in the commission of the crimes could have pointed them out. The 'pointing out' may be said to be a neutral factor."¹⁰

In the case of Duna,¹¹ counsel for the prosecution alleged that one of the accused circulated handwritten pamphlets in contravention of certain provisions of the security legislation. In order to link that accused with those pamphlets, the prosecution intended proving that he had written those pamphlets. In order to do so the state wished to call a handwriting expert who compared the writing on the pamphlets and an

8 Magwaza supra 39.

9 1982 4 SA 505 (A) 518.

10 Magwaza supra 3518; see Mbele supra 743.

11 1984 2 SA 591 (Csc).

inadmissible confession written by the accused in his own hand.

Counsel for the accused submitted that since the confession was inadmissible the prosecution may not extract portions of the confession as those portions too were inadmissible. He submitted further that even single words in the confession may not be referred to, as each and everyone of them form part of the confession.

Council for the prosecution argued that he had no intention of proving the statement of the accused or any portion of it. He asked the court to have regard only to the formation of the letters, not the import of the words themselves. The Court agreed with this submission. It held that it was permissible for the prosecution to have recourse to a handwritten statement constituting an inadmissible confession for the purpose of extracting therefrom certain words in evidence solely to establish that the words (extracted at random) reveal characteristics tending to establish the author thereof as also having been the author of another document or other documents.¹²

12 Duna supra 594.

De Wet CJ pointed out that the prosecution could invoke the provisions of section 218 of the Criminal Procedure Act. In this regard it said that in terms of section 218 the state wished to tender the evidence of facts of which it obtained knowledge in consequence of information furnished by the accused in a confessional statement which by law is inadmissible in evidence against him.¹³ This appears to be a better holding and it is supported.

In the case of Francis¹⁴ one of the two appellants made two pointings out after his arrest in consequence of which a quantity of arms and explosives was discovered. The circumstances surrounding the first pointing out were thus. The appellant, after alighting from the police vehicle, led the police along a footpath to the rear of his house. There he pointed out a spot between two small banana trees. The area was overgrown with fairly lush vegetation. The subsequent events which took place following the first pointing out were succinctly described by the trial judge as follows:

"A spade was obtained and accused No 10 started digging at the place which he had pointed out. He dug superficially and in the process dug up an area which eventually measured about 5 x 3m. After accused No. 10

13 Duna supra 596.

14 1991 1 SACR 198 (A).

had been digging for about 15 minutes one of the members of the police party discovered a plastic bucket in the ground at the point marked as E, about five paces from the point marked as D on exh. C. This bucket contained a number of books and also the reference book of accused No. 10. After the bucket had been inspected accused No. 10 resumed his digging and after having dug for about one and a half hours accused No. 10 eventually went back to the spot which he originally pointed out and on digging deeper there he unearthed a plastic bag. In this bag were found *inter alia* a handgrenade, a 158 mini limpet mine, a box of detonators, 4 MUV2 pull switches and 35 rounds of ammunition."¹⁵

Smalberger JA in his judgment in Francis pointed out that the fact that the appellant pointed out the precise location of the cache of weapons justified an inference of knowledge on his part that the weapons were buried there.¹⁶ The knowledge might have been acquired in various ways. Appellant might have personally concealed the weapons there; or he might have observed someone else do so; or he might have been told that they were buried there. The court was alive to the fact that knowledge by the appellant *per se* of the spot where the cache of weapons was found could not *per se* be equated with possession of the weapons. But such knowledge, depending on the circumstances, could lead to an inference of possession and ultimately guilt.¹⁷

15 Francis *supra* 206.

16 Francis *supra* 207; Tebetha 1959 2 SA 337 (A) 346.

17 Francis *supra* 207.

The trial judge concluded that the appellant possessed the weapons discovered behind his house. The finding of the appellant's reference book in a bucket close to where the weapons were discovered was a highly incriminating piece of evidence linking him to the area in question.

The court on appeal concluded that if the appellant innocently acquired knowledge of the presence of the weapons one would have expected him to testify; and the court was therefore not expected to speculate about possible innocent explanations not specifically advanced by him.

The second pointing out occurred as follows. Appellant directed the police to a spot in the vicinity of K sports grounds. There he pointed out an area where the police who accompanied him discovered two TM57 landmines.

In the results, the appeal was dismissed but his sentence was altered from eight years to one of six year's imprisonment.

10.3 Pointing out forming part of inadmissible confession

In Duetsimi¹⁸ the court pointed out that it seemed clear that all the pointing out was part of a single course of conduct, and if it was an elaboration of an inadmissible confession the whole of it should have been excluded. This in turn implied that in all cases where the prosecution sought to prove a statement made by an accused in order to establish his guilt, it was essential to examine the circumstances in which the statement was made and everything that was said by the accused on the occasion in question and on occasions associated with the occasion in question, in order to ascertain whether the statement was or was not a confession.¹⁹ This meant that unless the trial judge was satisfied that the necessary foundations for the admission of a statement, including a pointing out, have been proved the statement must be excluded.²⁰

In Masilela²¹ Grosskopf JA referred to the case of Magwaza (*supra*) where the court said:

"The next question which presents itself is whether it is somehow possible to excise the bare pointing-out by the appellant to Captain Oelofse from the statements which

19 Duetsimi *supra* 677.

20 Duetsimi *supra* 678-679.

21 1987 4 SA 1 (A).

accompanied it, and thus still to rely on the former. When a person points out a thing his act proves that he has knowledge of some fact relating to the thing. See R v Tebetha 1959 (2) SA 337 (A) at 346. It is one thing for a Court to receive evidence of a pointing-out by an accused when the Court knows no more than that the pointing-out may or may not form part of an inadmissible confession by the accused. It is an entirely different situation, and one which cannot be countenanced, for a Court to have regard to what an accused has pointed out when that Court has certain knowledge not only that the pointing-out forms part of an inadmissible confession but also what the precise content of the inadmissible confession is. In my view it is a necessary consequence of the exclusion of the inadmissible confession that in considering the criminal responsibility of the appellant in this case all the evidence of Captain Oelofse should be entirely disregarded."²²

Grosskopf JA did not understand this dictum to mean that where pointing out forms part of inadmissible confessions they are always inadmissible.²³ Such a conclusion would be in direct conflict with the provisions of section 218(2). The decision in terms of which the pointing out in Magwaza was held inadmissible was based on facts and circumstances of that case. In the Magwaza case the confession of which the pointing out formed part was admitted as an exhibit by the trial court. The consequence of this was that both the trial court and the appeal court not only knew that the pointing out formed part of a

22 Magwaza supra 39.

23 Masilela supra 6.

confession, but also knew the content of the confession in question. It was those circumstances which led the appellate division to conclude that the entire confession should be disregarded when deciding on the admissibility of a pointing out.

In Masilela (*supra*) Grosskopf JA held that the fact that a pointing out forms part of an inadmissible confession is irrelevant in as far as evidence regarding the admissibility of a pointing out²⁴ And if that fact is irrelevant, it is difficult to see how the court's knowledge of an irrelevant fact makes a difference, even where the court has knowledge of the content of the inadmissible confession. The reason for this is that the question of admissibility is determined by objective standards and not in terms of knowledge by the court of irrelevant facts regarding admissibility.²⁵ The facts of the Masilela (*supra*) and Magwaza (*supra*) cases were distinguished on the facts. In *casu*, the pointing out was held admissible and the appeals were dismissed.

In Mmonwa²⁶ Stafford J created the impression that the Masilela decision did not overrule Magwaza (*supra*)

24 Masilela *supra* 7.

25 Masilela *supra* 7; see Mathebula 1991 1 SACR 306 T.

26 1990 1 SA 81 (T).

because the latter decision was not expressly overruled. Harms J held in Mathebula²⁷ that express overruling is not required; and that the proposition in Magwaza (*supra*) should be restrictively interpreted so that a confession preceded or followed by a pointing out does not fall within the ambit of the prohibition: the confession must amount to an explanation of the pointing out before it can be said to contaminate the pointing out.

In Zimmerie²⁸ the accused had been charged with housebreaking with intent to steal and theft. One of the accused made a report to the police officer and he was taken to the house of the complainant. There he explained and demonstrated to a police officer how the alleged housebreaking had been committed, and the accused's conduct consisted of the aforesaid explanation and accompanying demonstration. The question which was to be decided on review (which was later referred to the full bench for argument) was whether this was a pointing out in terms of section 218(2) of the Criminal Procedure Act.

In answering this question Friedman J referred to the

27 1991 1 SACR 306 (T) 312.

28 1989 3 SA 484 (C).

judgment of Rabie CJ in Tsotsobe.²⁹ In that case Rabie CJ held that evidence of a pointing out is not admitted in evidence on the ground that it is, or amounts to, an extra-curial admission, but on the basis that it shows that the accused has knowledge of the place or thing pointed out, or some fact connected with it, from which knowledge it may be possible, depending on the facts of the case concerned, to draw an inference pointing to the accused's guilt.³⁰ It is incumbent upon the prosecution to prove beyond a reasonable doubt that the pointing out was done freely and voluntarily.³¹ In Zimmerie (*supra*) the court held that section 218(2) of the Criminal Procedure Act governs only the pointing out and not the production of a confession in the guise of a pointing out.³²

In *casu*, Friedman held that the explanation and demonstration by the accused to a police officer amounted to an inadmissible confession, and that the accused ought to have been acquitted at the close of the case for the prosecution because there was no

29 1983 1 SA 856 (A) 864.

30 Tsotsobe *supra* 864; see Tebetha *supra* 346.

31 Nyembe 1982 1 SA 835 (A) 840 per Diemont JA.

32 Zimmerie *supra* 489.

evidence in which a reasonable man could convict.³³

In Nhleko³⁴ the police sought to lead evidence that the accused had pointed out a place where he had left the body of the deceased. The body was not there when he indicated the spot and no one else had seen it there. Schreiner JA held that the only admissible evidence in law was that he had pointed to a place. Since that particular place had no significance without the accompanying explanation which was not admissible the pointing out proved nothing.³⁵

10.4 Pointing out in Namibian law

The Namibian High Court handed down a very important pointing out case in Minnies.³⁶ *In casu*, the court was called upon to interpret section 218(2) of the Criminal Procedure Act read with the articles of the Namibian Constitution.³⁷ Du Toit AJ in his judgment stated that a 'pointing out' takes place when the

33 Zimmerie *supra* 489 and 890; see Herholdt(3) 1956 2 SA 722 (W).

34 1960 4 SA 712 (A).

35 See Nkomo 1990 1 SACR 682 (ZS) for exposition on pointing out in the law of Zimbabwe.

36 1991 1 SACR 355 (Nm).

37 See article 12(1)(f) read with article 8(2)(b) of the Constitution of Namibia.

accused has physically drawn the attention of the witness to a place or a thing, by some gesture or movement; it could include the accused leading the witness to a place, and describing to him then what to do to ascertain the location of a thing.³⁸

The learned acting judge pointed out that the physical element is not always necessary. The court observed that section 218(2) of the Criminal Procedure Act has been interpreted to mean that the evidence can be admitted even when the pointing out or information forms part of an inadmissible confession on whatever ground.³⁹

After referring to foreign cases, the court held that in Namibian law, a pointing out which results from an interrogation conducted in a manner conflicting with articles 8(2)(b) of the Namibian Constitution cannot be used as evidence against the accused. Article 8(2)(b) reads:

"No person shall be subject to torture or cruel, inhuman or degrading treatment or punishment."

38 Minnies *supra* 368; Nkwanyana 1978 3 SA 404 (N) 405.

39 See Ismail(1) 1965 1 SA 446 (N) 450; Mbele *supra* 743; Magwaza *supra* 39; Masilela *supra* 7.

10.5 Evidence of facts or knowledge obtained from inadmissible confession

Section 218(1) of the Criminal Procedure Act enables a witness to give evidence at a criminal proceeding of any fact otherwise admissible in evidence, notwithstanding that such witness obtained the knowledge or discovered such facts as a result of an inadmissible confession.⁴⁰ Subsection (1) of the Criminal Procedure Act makes it clear that the evidence is admissible even if the fact is discovered 'against the will or wish' of the accused. In Ismail (*supra*) Milne JP pointed out that these words refer to the actual discovery of the fact sought to be led in evidence and not to the confession containing the information which led to the discovery.⁴¹

10.6 Evaluation

Evidence of a pointing out by an accused is admissible in evidence even if no concrete facts were subsequently discovered, it being sufficient to show that the accused had certain knowledge which tendered

40 See Du Toit et al 24-66A; Tebetha 1959 2 SA 337 (A) 343; Ismail(1) *supra* 450.

41 Ismail(1) *supra* 450.

to show his guilt.⁴² Section 218(2) of the Criminal Procedure Act legalises only the pointing out by an accused as stated therein and not the production of a confession in the guise of a pointing out.⁴³ It is also clear, that subsection 218(2) of the Act does not exclude or purport to deal with a pointing out which forms part of an inadmissible confession, nor does it permit evidence of a confession by an accused in the guise of a pointing out by him.⁴⁴

When an accused points out a *corpus delicti*, an inference of knowledge on his part is assumed.⁴⁵ That knowledge might have been acquired in various ways. The accused might have personally concealed the *corpus delicti* or he might have observed someone else do so; or he might have been told the *corpus delicti* was there. The court must be alive to the fact that knowledge by an accused *per se* of the spot where the *corpus delicti* was found could not *per se* be equated with possession. But such knowledge, depending on the

42 Tebetha *supra* 346; Van der Merwe *et al* 265.

43 Mbele *supra* 743.

44 Maqwaza *supra* 38.

45 Compare Francis *supra* 207; Tebetha *supra* 346.

circumstances, could lead to inference of possession and ultimately guilt.⁴⁶

If a pointing out is an elaboration of an inadmissible confession, the whole statement must be excluded.⁴⁷ However, it does not necessarily follow that where pointings out form part of inadmissible confessions they are always inadmissible.⁴⁸ Such a conclusion would be in direct conflict with the provisions of section 218(2) of the Criminal Procedure Act. The reason for this is that the fact that a pointings out forms part of an inadmissible confession is irrelevant in as far as evidence regarding the admissibility of a pointing out.⁴⁹

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

46 Francis *supra* 207; Tsotsobe *supra* 864; Shezi *supra* 906.

47 Duetsimi *supra* 678-679.

48 Masilela *supra* 6.

49 Masilela *supra* 7.

to the accused's guilt.⁵⁰ It is incumbent upon the prosecution to prove beyond a reasonable doubt that the pointing out was done freely and voluntarily.

A 'pointing out' takes place when an accused has physically drawn the attention of a witness to a place or thing, by some gesture or movement; it could include the accused leading the witness to a place, and describing to him then what to do to ascertain the location of a thing.⁵¹

50 Tsotsobe supra 864; Tebetha 346.

51 Minnies supra 368; Nkwanyana supra 405.

CHAPTER ELEVEN

MISCELLANEOUS

11.1 Status of an inadmissible confession

In Bontsi¹ the first accused was found guilty of commanding others to commit stock theft. During the presentation of the case for the prosecution, the accused was cross-examined on the statement (which amounted to a confession) he made to the police. Since that statement amounted to a confession made to a peace officer (and a policeman is a peace officer) it was inadmissible in terms of section 217(1) of the Criminal Procedure Act. The court referred with approval to the decision in Gibixegu² where it was held that an accused may not be cross-examined on the contents of an inadmissible confession and that an inadmissible confession cannot be admitted in evidence for any purpose.³ It was also held in Gibixegu (*supra*) that inadmissible confessions cannot be used to discredit an accused who is a witness.

1 1985 4 SA 544 (BGD).

2 1959 4 SA 266 (E).

3 Gibixegu *supra* 269-70 and 271.

It was pointed out in Bontsi *supra* that it is the duty of the prosecutor first to investigate the circumstances under which a statement by the accused was made and to establish whether it may amount to a confession.⁴ If the prosecutor is in doubt, it is his duty, when raising the issue in open court, to warn the presiding judicial officer in regard to what he is about to do. The latter must then investigate, firstly, whether or not the accused made the statement in question, and, if so, whether it amounts to a confession or not. If it is a confession, then it is not admissible for any purpose by the prosecution unless there has been compliance with the provisions of section 217 of the Criminal Procedure Act.

In short, an inadmissible confession must be excluded in evidence. If it is admitted that amounts to an irregularity. The exclusion of an inadmissible confession means that it must not be used in anyway by the prosecution.

Quenet J pointed out in his judgment in the case of Frank⁵ that any statement which forms part of an inadmissible confession is itself inadmissible. This

4 Bontsi *supra* 547.

5 1959 1 SA 401 (SR) 402.

is based upon the fact that the circumstances which led to the rejection of the confession carry their taint to any indication or statement forming part of the confession itself.⁶ This is supported because it is in line with the general rule that the confession as a whole is either admissible or not.

The prosecution in the case of Msweli⁷, on a charge of murder, sought to admit in evidence a statement made by the accused to a constable in the police force. The latter was a peace officer who was not a justice of the peace as defined in this thesis. The accused had described the incident fully and had made it in reply to specific allegations of murder. He admitted the stabbing of the deceased and that he had intended to kill him. This confession was held to be inadmissible in evidence because it did not comply with the provisions of section 217 of the Criminal Procedure Act. To be admissible the confession had to be confirmed and reduced to writing in the presence of a magistrate or justice of the peace.

In Lalamani⁸ the prosecution sought to admit in evidence a confession, which is inadmissible by reason

6 Frank *supra* 402.

7 1980 3 SA 1161 (D).

8 1981 1 SA 999 (VH).

of non-compliance with section 217(a) of the Criminal Procedure Act, on a lesser offence of assault. The accused had been charged with murder. The confession had been made to a peace officer and was not confirmed and reduced to writing in the presence of a magistrate or justice of the peace. Van Rhyn CJ held that the confession was inadmissible. He said:

"Na my oorwoë mening is dit nie toelaatbaar om 'n bekentenis op 'n mindere misdaad toe te laat, wat 'n bevegbare misdaad, by inbegrip, op die ten laste gelegde meerdere misdaad, in die aanklag, is nie ... [Sou] die bekentenis toelaatbaar word, sy prosesregtelike gebreke ten spyt, slegs omrede die werklike aanklag 'n meerdere misdaad behels, dan beteken dit dat waar 'n beskuldigde van moord aangekla staan, 'n dergelyke bekentenis van skuld aan strafbare manslag ewenwel toelaatbaar sou wees."

It is irregular for the prosecution to lead evidence of the accused's inadmissible confession; but if an accused voluntarily introduces such evidence it does not constitute an irregularity.¹⁰

11.2 Inadmissible confession elicited by the accused during cross-examination of witnesses for the prosecution

In the case of Perkins¹¹ the accused referred to an

9 Lalamani *supra* 1001-1002.

10 Mthembu 1988 1 SA 145 (A) 150.

11 1920 AD 307.

inadmissible confession during cross-examination, and counsel for the prosecution handed in the whole confession. Innes CJ said:

"The learned Judge considered that the statement amounted to a confession, and regarded it as having been made to the detective. That being so, it ought, *prima facie*, to have been excluded, - not having been confirmed or reduced to writing as required by s 273 of Act 31 of 1917. It was admitted however on the ground that the accused had first referred to the conversation in his cross-examination of Burger. 'It seemed to me,' says the learned Judge in his reasons, 'that in view of this cross-examination the prosecuting counsel was entitled, in re-examination, to elicit the whole of the statement, part of which had been brought out by counsel for the accused. It was obvious that an attempt was being made to blame the detective for not making greater efforts to find Williams, and unless the accused's statement in regard to Williams were given in evidence, the jury could not judge whether the finding of Williams would be a matter of importance.

The case in short seemed to me to be one where evidence, originally inadmissible, became admissible owing to the introduction of the subject thereof by cross-examination. The defence, by introducing the statement by means of cross-examination, had forfeited the right to have such statement excluded.'

The Court applied the rule that a party may be held to have waived his right to object to evidence, which he has himself opened.

That of course is founded on the principle that a litigant thus acting is regarded as having consented to the admission of evidence, to which he would otherwise have been entitled to object. But I do not think that this rule, applicable as it is in civil proceedings, can be allowed to operate in a case like the present. The terms of the statute are peremptory - a confession made to a peace officer, other than a magistrate

or justice 'shall not be admissible in evidence under this section' unless confirmed and reduced to writing as prescribed. Such confession, the Legislature in its wisdom has decreed, shall not be evidence at all, and an accused cannot by his consent remedy the defect."¹²

Herbstein AJ pointed out in the case of Makasani¹³ that the fact that an inadmissible confession was elicited by the accused himself through his cross-examination of the witness did not make it admissible.

In Bosch¹⁴ the court was considering the admissibility of a statement made by a witness to the police. That witness could not identify the accused in the identification parade which was held. The accused asked him the reason why he was so sure that it was him who committed the crime. The witness replied as follows:

"To put it bluntly, the Criminal Investigation Department told me that you admitted guilt."

The appellate division found that the above reply was admissible not to prove the guilt, but to prove the reason why the witness was so sure.

12 Perkins *supra* 310.

13 1947 3 SA 471 (C) 473; see Black 1923 AD 388 391.

14 1949 1 SA 548 (A).

It must be pointed out that after the Perkins and Bosch cases (*supra*) the legislature decided to make inadmissible confessions admissible in evidence if the accused elicited a portion of it favourable to himself.¹⁵ Section 217(3) of the Criminal Procedure Act reads as follows:

- (3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him -
 - (a) if he adduced in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and
 - (b) if such evidence, is in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person."

This section prohibits the prosecution from producing a confession which is inadmissible unless the court is satisfied that it is the accused who elicits a portion of it favourable to himself. If the accused elicits a portion of the confession which is not favourable to him, the state cannot produce the confession as evidence against the accused.¹⁶ In other words, the prosecution may lead evidence of the remainder of the

15 See section 217(3) of the Criminal Procedure Act 51 of 1977 and section 244(2) of the Criminal Procedure Act 56 of 1956.

16 Olifant 1984 SA 52 (NC) 57.

accused's statement if the presiding judicial officer gives a ruling that that could be done.¹⁷ The law does not allow the accused to put one side of the same picture before the jury.¹⁸

Section 217(3) entitles the prosecution to prove a confession if it was made "as part of" or "in connection with" the favourable statement made or elicited by the accused. In Mzimsha the court made it clear that there could be a connection between the favourable statement and the inadmissible confession if they were "parts of substantially the same transaction".¹⁹

In Magagula²⁰ Ackermann AJ held that an inadmissible confession elicited by the accused remains inadmissible unless it becomes admissible in terms of section 217(3) of the Criminal Procedure Act. This means that where an inadmissible confession does not fall under any of the exceptions mentioned in section 217(3) it is inadmissible in proof of guilt of the accused.

17 Zeffert and Hoffmann 232.

18 per Murray J in Mzimsha 1942 WLD 82 85.

19 Mzimsha *supra* 85; see Mokoena 1978 1 SA 229 (O) 235; Olifant *supra* 58.

20 1981 1 SA 771 (T).

11.3 **Right to legal representation during the recording of a confession**

In terms of section 73(1) of the Criminal Procedure Act, an accused person who is put under arrest whether with or without a warrant, is entitled to the assistance of his legal adviser as from the time of his arrest.²¹ However, this right is subject to the laws that govern the management of prison.²²

In the case of Khumalo,²³ counsel for the defence argued that a magistrate who is requested to take a statement from an accused either in terms of section 217 or 219 of the Criminal Procedure Act has a duty to inform that accused of his right to legal representation before any statement is recorded. It was argued further that a statement may be taken from the accused if he expressly waives his right to legal representation.

21 See Mabaso 1990 3 SA 185 (A) 201; Ndanozonke v Nel 1971 3 SA 217 E 219; Nqgulunga v Minister of Law and Order 1983 2 SA 696 (N) 698; Katofa v Administrator-General of SWA 1985 4 SA 211 (SWA) 225; Gibson 1979 115.

22 Minister of Prisons v Cooper 1978 3 SA 512 (C) 520; Alexander(1) 1965 2 SA 796 (A) 808; Mandela v Minister of Prisons 1983 1 SA 938 (A) 959-960; Mandela v Minister of Prisons 1981 1 SA 531 (C); Cooper v Minister of Prisons 1977 4 SA 166 (C); Minister of Prisons v Cooper 1978 3 SA 512 (C).

23 1992 1 SACR 28 (W); cf Januarie 1991 2 SACR 682 E.

Hartzenberg J rejected the argument by the defence counsel. The judge held that it was not a requirement of our law that the police should inform an accused when arresting him that he is entitled to legal representation and that they may only take a statement from him once he has waived that right.²⁴ Similarly, it is not a requirement that when an accused is brought before a magistrate for the purpose of making a statement²⁵ the magistrate must act likewise and may only take down such statement once the accused has expressly waived his right to legal representation.

The decision of the court in Khumalo supra does not clearly indicate how an accused could be given a fair trial if it was withheld from him that he has a right to legal representation. To confess to a crime under a mistaken belief could be fatal. A legal adviser would ensure that the confessor has made an informed decision when he confesses.

Although the argument that the accused should waive his right to legal representation is not supported, it is fair to warn an accused that he is not obliged to make a statement and that he may exercise his fundamental right to consult counsel. Our

24 Khumalo supra 38.

25 In terms of sections 217 or 219 of Act 51 of 1977.

administration of justice must not depend on the "ignorance" of some procedural right for its success. Consequently, the decision of the court in Khumalo supra that there is no duty on the police and the magistrate to appraise the accused of his right to legal representation prior to the making of a statement is not supported.²⁶

11.4 Judicial discretion to exclude a confession

In Mkanzi²⁷ Kirk-Cohen AJ (as he then was) pointed out that section 217(1)(b) of the Criminal Procedure Act has altered the position in regard to confessions. If an accused opposes the admissibility of a confession in terms of section 217(1)(b)(ii) of the Act, his position can be compared with a defendant in a civil action where there is a presumption in favour of the

26 See the following cases on legal representation generally:

Yantolo 1977 2 SA 146 (E); Khumbusa 1977 1 SA 394 (N); Sigodolo v Attorney-General 1985 2 SA 172 (E); Nel 1974 2 SA 445 (NC); Sehiri 1964 1 SA 29 (A); Baloyi 1978 3 SA 290 (T); Mabaso 1990 3 SA 185 (A); Masilela 1990 2 SACR 116 (T); Motsumi 1990 2 SACR 207 (O); Baxter 1990 2 SACR 100 (T); Radebe S v Mbonani 1988 1 SA 191 (T); Morrison 1988 4 SA 164 (T); Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk 1989 3 SA 368 (E); Mthethwa 1989 4 SA 361 (N); Nyanga 1990 SACR 547 (C); Yelani 1986 3 SA 802 (E); Moseli(a) 1969 1 SA 646 (C); Naidoo 1974 3 SA 706 (A).

27 1979 2 SA 757 (T).

plaintiff, or where the onus rests on the defendant to prove his defence against the plaintiff. In the event of the defendant discharging the onus then he wins the case: in the event of his not doing so then the plaintiff will of necessity succeed.

In the case of admissibility of a confession, there is not such as case a possibility of absolution. In the event of the accused not discharging the onus then the confession is admissible.²⁸ Consequently, there are no "grounds of fairness" or "inherent discretion" upon which a court could exclude a confession.²⁹

In Mphahlele³⁰ Miller JA left open the question whether the ratio of the Mkanzi decision was correct. In Mbatha³¹ Findley AJ (as he then was) after considering authorities found himself not persuaded that the general discretion to exclude a statement by an accused which does not amount to a confession, if there are appropriate circumstances, is no longer part of our law.³²

28 Mkanzi *supra* 759.

29 Mkanzi *supra* 759.

30 1982 4 SA 505 (A).

31 1985 2 SA 26 (D).

32 Mbatha *supra* 31.

SECTION III

AMERICAN LAW

CHAPTER TWELVE

**THE DUE PROCESS OF LAW AS A CRITERION FOR ADMISSIBILITY
OF CONFESSIONS**

12.1 Introduction

The overall objective of this chapter is to provide a comprehensive analysis of the issues relating to confessions in American law. The purpose thereof is to create the fullest understanding of how the law of confessions in the United States of America developed to where it is today, and perhaps even an understanding of where South African law of confessions is going to in future. It is by studying the laws of other countries that one can gain a better understanding of one's own law or that one can make sound proposals for reform. Confessions and self-incrimination in America evoked such a wealth of comment by judges, political historians, presidential candidates, textwriters, penologists and sociologists as to justify the conclusion that no confession text can be complete without reference to these views.

The major reason for choosing American law is that the American constitution has a Bill of Rights which is enforceable by the American courts. Our new constitu-

tion contains a Bill of Rights which will be enforced by our courts. For that reason a study of this nature is necessary. Like in America, the Bill of Rights in South Africa will protect certain fundamental procedural rights of those suspected of committing crimes. The right to silence and the privilege against self-incrimination are some of the fundamental rights which are protected.

12.1.1 Definition of a confession in American law

In American law a confession is a voluntary statement by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offence charges.¹ If a suspect admits all the elements of an offence, he makes a confession. A confession is extra-judicial if it is made out of court. In American law the admissibility of confessions, admissions and exculpatory statements is governed by the rules developed by the Supreme Court under the constitution. To an American court, the differences between extra-judicial statements is not of any importance. It is the underlying constitutional safeguard enshrined in the Bill of Rights which is important. No statement is

¹ Tompkins Trial Evidence: A Concise Statement of the Rules of Evidence in Civil Trials 2ed (1970) 544; Owen v State 120 Ga 296 (1904).

admissible in evidence if it infringes the constitutional rights of an accused.²

The words "he acknowledges himself to be guilty of the offence charged" in the definition of a confession in American law imply that the person confessing must admit all facts necessary for the conviction of the crime.³ In South African law, a confession is an unequivocal admission of guilt, an equivalent of a plea of guilt if made in a court of law.⁴ This view is based on the common law where a judicial confession (that is a plea of guilty) was made in court and the rules of its admission were later made applicable to an extra-judicial confession.⁵

Generally speaking, a confession is substitute for evidence, and not evidence itself.⁶ To become evidence, a confession must be admissible. Once it is admitted into evidence, a confession is submitted to the jury together with other evidence for determining

2 See discussion in chapter thirteen *infra*.

3 Cleary McCormick's Handbook of the Law of Evidence 2ed (1972) 310; People v Fitzgerald 56 Cal 855 861 (1961).

4 Becker 1929 AD 465 at 171; see paragraph 1.3 of chapter 1 *supra*.

5 See Tompkins 565.

6 Tompkins 565.

the verdict. The "other evidence" referred to here is either the corroboration of the confession or the proof of *corpus delicti*. The jury is not bound to recommend a guilty verdict as it may doubt the confession and attach little weight to it.

Suppose that a confession is sought to be tendered as evidence in a criminal trial. Before 1966, the prosecution had to prove beyond reasonable doubt that the alleged confession was not just an admission. This meant that the confession must have met the requirements discussed below.⁷

The statement should have been a declaration or statement made by the accused involved in the criminal proceedings. An accused is usually referred to as a "criminal defendant" or merely "defendant" in American criminal law. A statement made by a co-accused is not admissible against the other. In this respect, the South African law of confessions is similar to that of America.⁸

The statement must be incriminating. This is obvious because the prosecution would not try to prove an

7 Tompkins 546-47.

8 See section 219 of the Criminal Procedure Act 51 of 1977.

exculpating statement except where the purpose is to impugn the credibility of the accused.

The statement must be clear. This means that the statement must not be vague and that the only possible interpretation should be that the accused meant what is contained therein. In other words, the contents must be easily ascertainable, it must leave no room for speculation. If there is a reasonable doubt, the accused must be given the benefit of the doubt.

The statement must be a complete acknowledgement of guilt. If one or two elements necessary to prove guilt are not admitted, it does not qualify to be called a confession. Lastly the statement must be the product of the voluntary act of the accused.'

12.1.2 Confession and admission distinguished

In American law, the distinction between confessions and admissions is not clearly defined. Prince defines a confession as a direct acknowledgement of guilt made by an accused in a criminal prosecution; and an admission as an act or declaration by the accused from which, either alone or with other evidence, his guilt

may be inferred.¹⁰ Prince points out that the distinction then lies in the fact that a confession is an express acknowledgement of guilt, whereas an admission is circumstantial evidence of guilt.¹¹

Tompkins states that the term admission is usually applied to those matters of fact in criminal cases which do not involve criminal intent, while the term confession is generally restricted to acknowledgement of guilt.¹² In both cases, the rules governing admissibility are the same.¹³ Cleary¹⁴ points out that an admission is an acknowledgement of a fact or facts tending to prove guilt which falls short of an acknowledgement of all essential elements of the crime. An admission, he continues, need not be an acknowledgement of a fact essential to the establishment of guilt. An admission need not consist of spoken words; and acts which tend to prove consciousness of guilt are implied admissions of guilt and subject to the same treatment as verbal admissions.¹⁵

10 Prince Richardson on Evidence 10th ed. (1973) 533.

11 Prince 533; this view is supported.

12 Tompkins 544.

13 Tompkins 545; Prince 533.

14 Cleary 310.

15 Cleary 310.

In American law, a sharp distinction is not drawn between confessions and admissions; and that the rules governing admissibility are the same. This differs significantly from South African law.¹⁶ Both a confession and an admission are admissible if there is proof that they have been made voluntarily.

12.1.3 Theories and the role of the judge and the jury in determining the admissibility of confessions

A confession has been defined as a voluntary out-of-court statement acknowledging guilt.¹⁷ All out-of-court statements are potentially subject to objection on the basis of the hearsay rule.¹⁸ As a general rule, whether a statement is hearsay or not, there seems to be a general agreement in American law that any statement made by an accused which is in the nature of an admission or from which inference of guilt may be drawn, is admissible as indirect and original evidence.¹⁹ It is settled law that the major justification for excluding hearsay is the

16 See sections 217(1)(a) and (b) and 219A of the Criminal Procedure Act 51 of 1977; refer to chapter 1 *supra* for more details.

17 See para 4.2 above.

18 Cleary 145.

19 Lewis v State 458 P2d 309 312 (1969).

unavailability of the declarant for cross-examinations.²⁰ But since the accused is available for clearing up discrepancies or for an explanation, the rationale for the hearsay rule is not applicable. There are serious flaws in the argument for admitting hearsay evidence in this manner. Firstly, such hearsay is admitted in evidence before the accused become a witness, and prior to giving his evidence-in-chief. The fact that a witness is in the vicinity of the court does not entitle other persons to regard him as available for cross-examination.

Confessions which were deemed involuntary were excluded from evidence at common law.²¹ According to Wigmore²² the only justification for excluding a confession from evidence is a finding that it was untrustworthy as testimony. An untrustworthy confession is inadmissible because its contents are not reliable as proof of what is stated therein. This theory has created the impression that only an untrustworthy confession could be termed involuntary, and that a confession would be excluded only if it had

20 Cleary 145.

21 Warickshall 1 Leach 263; Spanogle "The use of coerced confessions in state courts" (1964) Van.L.Rev. 421.

22 Wigmore Evidence vol 3.

been obtained under torture or undue influence.²³ The United States federal courts have developed four basic approaches to determining the admissibility of a confession.

Firstly, the so-called orthodox rule under which the judge alone resolved the question of voluntariness was developed. In terms of the orthodox rule, the trial judge determines whether a confession is voluntary or not. If a confession is voluntary,²⁵ the judge may refer it to the jury. However, where the judge's finding is that a confession is involuntary, the confession is excluded and may not be referred to the jury.²⁶ This happens even where the judge could reasonably come to a different conclusion. It is important to note that under the orthodox rule, evidence surrounding the making of the confession may be presented to the jury. This happens when a confession is found to be voluntary and the jury determines its weight. A confession may be completely voluntary and not credible. For example, a confession which is a product of hallucination may be completely

23 Spanogle 423; see para 2.5 *infra*.

24 i.e. before Miranda v Arizona 384 U S 436 (1966).

25 See paragraph 12.2 *infra*.

26 Spanogle 320.

voluntary but not credible. To safeguard against false but voluntary confessions, the requirement that a confession be corroborated in a material respect serves a useful purpose. Under the orthodox rule, the judges decision on the voluntariness or involuntariness of a confession is final; the jury may not change it. However, the issues of credibility and competency are distinct.

A deviation from the orthodox rule is found in the other approach which, for purposes of convenience is called the New York rule. Under the New York rule the role of the jury depends on whether the evidence adduced to prove the voluntariness of a confession permits more than one reasonable conclusion. The procedure under this rule is that a trial judge may find that a confession is involuntary but refer it to the jury to determine credibility. The fifty federal supreme courts are not unanimous on the final recommendation of the jury.²⁷ But where the judge is of the view that a fair question of fact has been presented, he may refer that to the jury for a resolution. In this way, the judge respects the prerogative of the jury over questions of fact. The jury may find the confession credible and give weight to it.

27 See Spanogle 322 for details.

The third approach may be regarded as a compromise between the Orthodox and the New York rule. It is called the Massachusetts practice. Under the Massachusetts rule, the judge resolves the question of fact and judgment on which the admissibility of the confession depends.²⁸ If the judge finds the confession involuntary, he excludes it notwithstanding the fact that the evidence may be conflicting. If the judge finds the confession voluntary but the evidence is conflicting, he admits the confession but instructs the jury to disregard it, if the jury is satisfied that the confession is not voluntary.

The federal court appeared to create the fourth approach to the admissibility of a confession when it said that where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decided that it is admissible, the question may be left to the jury with the discretion that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the accused.²⁹

The foregoing discussion logically leads to the clear understanding of the roles of both the judge and the

28 Spanogle 323.

29 Wilson v United States 162 US 613 (1896).

jury in determining admissibility of confessions. The orthodox rule as to judge - jury allocation seems necessary in order to ensure the defendant a clear-cut adjudication of the voluntariness issue to ensure that the jury considers only the questions of fact.³⁰ The admissibility of a confession is a question of law which must be considered and finalised by the judge. Flowing from the different roles which the judge and jury should play, the preliminary hearing should be held in the absence of the jury. This marks the onset of the trial-within-trial in American law. The exclusion of the jury protects the accused from potential prejudice which may result if a confession is suppressed after a discussion of the facts or surrounding circumstances under which it was made in the presence of the jury.

The accused is not subjected to cross-examination on the merits of the case if he testifies during the preliminary hearing on the voluntariness issue. This can be done effectively in the absence of the jury.

12.2 Voluntariness as a common law prerequisite for the admissibility of confessions

Under the common law the exclusion of an involuntary confession rested entirely upon the theory of

30 Spanogle 338 et seq.

unreliability - an involuntary confession was suppressed because it was not likely to be truthful.³¹ This doctrine had been recognized by the eighteenth-century English decision in Warickshall where it was held that:

"A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it."³²

One of the prerequisites for admissibility of a confession is that it must be free and voluntary. Having said that, it is not clear what is meant by the terms "voluntary" in the context in which it is used. Chamberlayne³³ takes the view that one of the possible meanings of the term "voluntary" is that which is employed when a confession is rejected because the confessor (that is the accused) has been over-persuaded, coerced by hope or driven by fear into making it. Since it is a requirement that the contents of the confession must be true, the voluntariness

31 Richardson 534.

32 Warickshall (1783) 168 ER 234 at 235.

33 Chamberlayne A Treatise on the Modern Law of Evidence vol II Procedure (1911) 1875.

criterion implies that the confessor should have known the truth of the matter covered by his statement. For that reason, an incriminating statement made for some other reasons than that it was true, in order to gain some advantage or avoid some injury, may not qualify for admissibility.³⁴ Such a statement is suppressed often because it is deemed involuntary and therefore inadmissible.³⁵ It is necessary for proper understanding of confessions law to examine in detail the various meanings of the terms "involuntary" and "voluntary".

The words "voluntary" and "involuntary" lack precise definitions.³⁶ Under the common law the voluntariness of a confession is presumed if there is proof that the confession has not been obtained by any sort of threat or violence nor by any promise, either direct or implied, however slight the hope or fear produced thereby nor by the extension of any influence.³⁷ This implies that a factual basis must be laid for the admission of the confession by adducing evidence that

34 Chamberlayne 1876.

35 Newel v State 115 Ala 54; (1897); Mose v State Ala 211 (1860); State v Potter 18 Conn 177 (1846).

36 Grano "Voluntariness, free will and the law of confessions" 65 Va.L.Rev. 860 (1979) at 860.

37 Underhill A Treatise on the Law of Evidence 2ed (1910) 243.

the accused had not been promised any favour nor that he had been threatened with violence. If the confession is the product of a promise of benefit or was procured by threat, it is deemed involuntary, and thus inadmissible. A confession may be accepted as voluntary when it is made with the concurrence of the will - that is where volition is not forced.³⁸ If the making of the confession is the end result of what the accused wanted to do, his act is a voluntary one, and his motive for confession is not decisive.

The terms "voluntary" and "involuntary" are used in three entirely separate situations in confessions law. Firstly, they are used where the will of the accused has been unduly induced into making a confession for some other reasons than because it was true.³⁹ Although there is no compulsion or physical force applied to the accused, it is the undue influence which causes him to confess. Secondly, legal compulsion is the main cause of the making of a confession.⁴⁰ And thirdly, where the confession has been made after subjecting the accused to duress. The latter situation is realised when the accused is forced to make a

38 Chamberlayne 1882.

39 i.e. in a case of a coerced confession.

40 Chamberlayne 1877.

confession dictated by those responsible for the coercive behaviour.

The terms "involuntary" and "voluntary" create great problems because they lack precise definition. This lack of clear definition in turn makes it difficult for the courts to enunciate clear reasons for excluding involuntary confessions. As a result of this general confusion and lack of clarity in the application of procedural rules, Sherwood CJ pointed out in State v Patterson⁴¹ that there is no branch of the law of evidence which is in such inextricable confusion as that relative to confessions.

Under the common law, it is not clear why an involuntary confession is inadmissible.⁴² This is said notwithstanding the view that an involuntary confession is not likely to be true. But what if the contents of a coerced confession are true? It is obvious that we must look for other reasons to advance for excluding involuntary confessions. In American law, the supreme court developed the due process procedure of the fourteenth amendment as an attempt to solve this problem.⁴³ Later on, the fifth and the sixth

41 State v Patterson 73 Mo 695 705 (1881).

42 See paragraph 1.8 of chapter one *supra*.

43 See Fourteenth amendment to the constitution of the United States of America.

amendments received judicial analysis and developed the confessions law of the United States to where it is nowadays.

12.3 Due process of law

The Barons induced King John in 1215 to announce in Magna Carta that no man should be imprisoned or disposed of except by lawful judgment of his peers and by the law of the land.⁴⁴ This laid the basis on which the American constitutional law was to develop. The so-called "judgment of his peers" and "law of the land" came to be rendered alternatively as due process of law and in that format was adopted in the fifth amendment to the United States constitution as a restriction upon the federal government.⁴⁵

In 1354 an act of parliament reconfirming Magna Carta formulated the following phrase in chapter 29:⁴⁶

"That no man ... shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of Law."

44 Kadish "Procedural due process of law, criminal" in Criminal Justice and the Supreme Court edited by Levy et al (1990) 38.

45 Kadish 38.

46 Levy "Due process of law" in Criminal Justice and the Supreme Court (1990) 1.

As far as it can be ascertained, this was the first reference to due process in English legal history. The phrase "by the law of the land" was used in the conclusion of chapter 29 of the 1225 issue of Magna Carta.⁴⁷ The first American constitution to include a due process clause was the fifth amendment which was ratified in 1791.⁴⁸

During the controversy in Britain which eventually led to the American revolution, Americans spoke of trial by jury, fundamental law, the law of the land, no taxation without representation, but rarely referred to due process of law.⁴⁹ Their reference to "law of the land" did not indicate what they meant. They probably meant by "law of the land" a variety of safeguards against injustice and abuses of criminal procedure, and equated the "law of the land" with notice, hearing, indictment, trial by jury, the fundamental law or constitutional limitation of government.⁵⁰ Later

47 Levy 1.

48 Levy 4; see Howard The Road from Runnymede: Magna Carta and Constitutionalism in America (1968); Jurow "Untimely thought: a reconsideration of the origins of due process of law" American J. of Legal history (1975) 265; Mott Due Process of Law (1926); Allen "Due process and state criminal procedure: another look" 1953 Nw.U.L.Rev. 16.

49 Levy 4.

50 Levy 4.

on, the due process inherited all the contents and connotations of the law of the land.

The American supreme court declared that although the due process clause of the fifth amendment limited all branches of the government, it has only the procedural connotations that derived from the settled usages and modes of proceeding which characterized old English law suited to American conditions.⁵¹ The current state constitutions substituted "due process" for "law of the land" and judicial decisions (of the state courts and the American supreme court), as well as legal treaties, expound "due process of law", thus making it the most important and influential term in American constitutional law.⁵²

12.3.1 Fourteenth amendment due process clause

The fourteenth amendment to the constitution of the United States provides inter alia that: ".... Nor shall any state deprive any person of life, liberty, or property, without due process of law." This clause does not refer to confession or any extra-judicial

51 Murray v Hoboken Land Company (1856) referred to by Levy 5.

52 Levy 5.

statement of any accused. It appears to include the idea that law is supreme authority over persons and all governmental authority and that any act or conduct which undermines the supremacy of law is in violation of the due process. The fourteenth amendment was incorporated in a Bill of Rights which was later adopted as an addendum to the constitution of the United States. To give force and effect to the due process clause, the American supreme court had to put meaning to the grand words and phrases used by congress. Justices do make judicial policy whether they want it or not.⁵³

In Bram v United States,⁵⁴ the American supreme court held that in criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because it is not voluntary, the issue is controlled by the self-incrimination portion of the fifth amendment.⁵⁵ Although Bram's case was largely forgotten, it would appear to hold that the privilege against self-incrimination prevents a

53 Fox Justice Sandra Day O'Connor (1983) 85.

54 168 US 532 (1897).

55 See Benner "Requiem for Miranda: The rehnquist court's voluntariness doctrine in historical perspective" 1989 Wash.U.L.Q. 59 107-11; Saltzburg "Miranda v Arizona revisited: constitutional law or judicial fiat" 1986 Washburn L.J. 1-14.

police officer or any other person in a position of authority over a detained person from compelling the suspect to undergo an oral examination or interrogation.⁵⁶ The Bram's case constituted an early excursion from the then prevailing voluntariness test.⁵⁷

The first fourteenth amendment due process case handed down by the American supreme court is that of Brown v Mississippi.⁵⁸

12.3.1.1 Confession extracted by torture

The setting in Brown v Mississippi was as follows: The deceased was a farmer. Suspicion of murder fell on E and he was fetched by D, a deputy sheriff, to the house of the deceased. A mob of other farmers had gathered there. The mob began to accuse E of the crime and he denied. The mob seized him and hanged him by a rope to a limb of a tree. E was let down and continued to declare his innocence. He was released and he returned to his home suffering intense pain. On the second occasion the deputy sheriff D and another

56 Saltzburg 8; Kamisar *et al* Modern Criminal Procedure 7th ed (1990) 439.

57 Kamisar "Police interrogation and confessions" in Levy Criminal Justice and the Supreme Court (1990) 174.

58 Brown v Mississippi (1936) 297 US 278.

arrested E and whipped him severely on the way. E was informed that the whipping would be continued until he confessed. E reached a breaking point and agreed to confess under those circumstances. Two other suspects were arrested by the deputy sheriff. They were made to strip and laid over chairs. Their backs were cut to pieces with a leather strap with buckles on it. The deputy sheriff D made it clear to them that the whipping would be continued until they confessed. As they confessed the whipping was continued to induce them to adjust the contents of the confession.

The procedural problem at the trial was the admissibility of the confessions. The accused had been threatened that if they changed their confession at any time in any respect, they would be subjected to a similar whipping.⁵⁹ Counsel for the accused objected to the admissions of the confessions. The state witnesses admitted the whipping and the deputy sheriff D added the following in his response to E's whipping: "Not too much for a negro; not as much as I would have done if it were left to me."⁶⁰ The extreme brutality was known to the trial judge and all other officials

59 Brown v Mississippi *supra* 283.

60 Saltzburg American Criminal Procedure: Cases and Commentary 2ed (1984) 426.

connected with the trial. The confessions were admitted and the accused were convicted of murder and sentenced to death.

In reversing convictions obtained in the state court, the supreme court in Brown v Mississippi *supra* found that severe whippings, used to procure confessions from helpless suspects made their confessions involuntary and that violated essential due process rights. The court emphasized the unreliability of confessions extracted by torture, and referred to the confessions in Brown v Mississippi *supra* as "spurious". A conviction based upon an unreliable information is a violation of the due process of law, and as such, is a nullity.⁶¹ The Brown case also means that police techniques used to obtain confessions are themselves a part of the process which is subjected to evaluation under the due process clause.⁶² Coercive police techniques are regarded as anathema to the concept of fundamental fairness of the criminal trial at the core of which are the due process considerations.⁶³ This Brown case also shows that

61 Ringle Searches and Seizures, Arrests and Confessions vol II (1990) 24-2.

62 Ringle 24-2.

63 Watts v Indiana 338 US 49 (1949) majority opinion; Spano v New York 360 US 315 (1959).

torture is an efficient method of securing confessions although such confessions cannot be relied upon as containing the truth. Moreover, the application of physical force and threats thereof makes a suspect to confess to anything or any statement desired by the authorities.⁶⁴ The ultimate test whether the due process has been violated remains the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by the confessor? If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.⁶⁵ The line of distinction is that at which the governing self-control is lost and compulsion propels or helps to propel the confession.

12.3.2 Other forms of coercion

12.3.2.1 Mob violence

The clear message which law-enforcement officers clearly understood from the Brown case was that physical force violates due process. They resorted to other forms of coercions which did not involve direct

64 Berger Taking the Fifth: The Supreme Court and the Privileged against Self-Incrimination (1980) 101.

65 Culombe v Connecticut 367 US 568 604.

physical force." This takes us to the case of Chambers v Florida." In casu, the deceased had been robbed and murdered. About twenty to forty suspects were arrested without a warrant and detained in jail. That jail was outside the county of their usual residence. The reason for bringing them there was because they needed protection against an angry mob.

The procedural problem was as follows: The accused were detained without formal charges for five days. For five days they were subjected to interrogation and on one Saturday they were subjected to an all-night examination. Over a period of five days the accused steadily refused to confess and declared their innocence. The accused were extremely poor and were detained away from their homes. Eventually, they confessed and were convicted of murder and sentenced to death.

On appeal, the court in Chambers v Florida, held that the very circumstances surrounding the accused's confinement and their questioning without any formal charges having been brought were such as to fill them

66 Chambers v Florida 309 US 227 (1940); White v Texas 310 US 530 (1940); Ward v Texas 316 US 547 (1942); Harris v Carolina 338 US 68 (1949).

67 Chambers v Florida *supra* 238-239.

with terror and frightful misgivings.⁶⁸ This was a case where the accused were removed from their place of residence and thrown in a jail where they were strangers.

The court stated that the circumstances and haunting fear of mob violence was around the accused in an atmosphere charged with excitement and public indignation. Black J held that:

"To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol. [The] constitution proscribes such lawless means irrespective of the end... Today, as in the past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our constitution, commands that no such practice as disclosed by this record shall send any accused to his death."⁶⁹

The Chambers case recognises that a confession could be coerced psychologically as well as physically. It is a case which is critical about lengthy police interrogation and the judge's views are expressed in a

68 Chambers v Florida *supra* 239.

69 Chambers v Florida *supra* 241.

strong language. The judge's remarks quoted above are in line with the mischief which they intended to eradicate once and for all.

12.3.2.2 Interrogation of suspects in a foreign setting and denial of access to family, friends and legal advisor

Although the supreme court was determined to suppress confessions obtained in violation of due process, the police continued to ill-treat suspects. Their methods included incommunicado detentions, interrogation of suspects for several days without bringing formal charges against them, and denial of access to friends, family and denial of the right of access to counsel. The case of White v Texas⁷⁰ is a case in point. The facts were as follows: fifteen or sixteen suspects were rounded up from the jail, taken out to the woods, and whipped. The alleged crime against them was rape. During the period of their arrest up to and including the signing of the confession, the accused had no counsel, no charges were brought against them and they had no access to friends and relatives. The procedural problem was the admissibility of a confession allegedly made by them.

70 White v Texas *supra*.

The accused denied at their trial that they had confessed at all, and the prosecution argued on appeal that this prevented them from challenging the voluntariness of their confession. The supreme court disagreed. Since the prosecution presented a confession to the jury as that of the accused, the court had to determine whether that confession was obtained and used in compliance with the procedural due process guaranteed by the constitution. The evidence showed that confession was obtained in violation of due process and the appeal by the state for a rehearing was denied. Although brutality was denied, one officer testified that several times the accused was interrogated in the woods as set out above.

It is clear that the accused was taken out to the woods for interrogation for purposes of torturing them mentally. The intention of the police was obviously to confuse them and extract a confession. The ruling of the supreme court is supported. Moreover, the lengthy detention of the accused and denial of the right of access to family, friends and a lawyer indicates the constitutional guarantees were being flouted.

The *modus operandi* used by the police in White v Texas

was also used in Ward v Texas⁷¹ subject to minor adjustments. The accused was a suspect in a murder case. He was arrested without a warrant, was driven from county to county, placed in a jail more than one hundred miles from his home, questioned continuously, beaten, whipped and finally reached a breaking point. He confessed. The confession was admitted in evidence at his trial and the accused was convicted of murder and sentenced to three years. On appeal, the admissibility of his confession was in issue. The court held that the confession was involuntary and had been obtained by officers of the law by coercing the accused in violation of the due process clause of the fourteenth amendment.⁷²

It is not difficult to fully understand that the purpose of taking the accused by night and day to strange towns in several counties and his incarceration in several jails was to disorientate him. The court therefore was correct in holding that the confession was obtained when the accused was no longer able freely to admit or deny or to refuse to answer, and was willing to make any statement that the

71 Ward v Texas *supra* 549.

72 Ward v Texas *supra* 558.

officers wanted him to make.⁷³ The persistent questioning coerced the accused to confess.⁷⁴

In Harris v South Carolina⁷⁵, Harris, an illiterate black American, was arrested in Tennessee on a suspicion of murder and taken to South Carolina. Confined in a small hot room, he was interrogated day and night by relays of police officers until he finally broke after the police had threatened to arrest his mother. Meanwhile, he was denied counsel and access to family and friends, was not given preliminary hearing, and was not informed of his constitutional rights. Concurring in the opinion of the court reversing the conviction on appeal, Douglas J exclaimed: "This is another illustration of the use by the police of the custody of an accused to wring a confession from him. The confession so obtained from literate and illiterate alike should stand condemned."⁷⁶ The use of a confession obtained in that

73 Ward v Texas *supra* 555; Wan v United States 266 US 1; Brown v Mississippi *supra*; Chambers v Florida *supra*; Canty v Alabama 309 US 629; White v Texas *supra*; Pramax v Texas 313 US 544; Vernon v Alabama 313 US 547.

74 Ward v Texas *supra* 555.

75 Harris v South Carolina 338 US 68 (1948).

76 Harris v South Carolina *supra* 73; see Haley v Ohio 332 US 596.

manner violated due process of the fourteenth amendment and the conviction was reversed.

The early due process cases after Brown v Mississippi involved the alleged killing of whites by ignorant and illiterate blacks. Obviously this is a sensitive area of American politics. What is striking is that confessions seem to be used more often in cases involving ignorant and illiterate persons. The other common feature is the brutal murder of lonely victims or elderly persons. These cases excite high feeling in the community.

12.3.2.3 Interrogation of suspects held incommunicado

The supreme court curtailed the development of the law of confessions in the Miranda v Arizona.⁷⁷ In Lisenba v California indicates the difference between due process and "voluntariness". In that case, a husband who had fallen out of love, had been convicted of killing his wife as part of an insurance scheme. The accused tied the deceased to a chair, subjected her to rattlesnake bites, and then drowned her in a pond. The accused was questioned in several all night sessions over a two-week period, despite the invocation of his

right to remain silent and right to counsel. The accused's arraignment was illegally delayed and he was so held not under indictment or warrant of arrest, but by force. He eventually made incriminating admissions to the police over cigars after he had been taken out to a meal at a cafe. On appeal, the question to be considered was whether or not the use of his confession at his two trials were a violation of due process.

Roberts J pointed out that the aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence.⁷⁹ For example, tests are used to determine whether the inducement to speak is such that there is a fair risk that the confession is false.⁸⁰ This requirement varies in the fifty states in America. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether false or true.⁸¹ That is a constitutional enquiry and the criteria for deciding the question may differ from those appertaining to specific rules of

78 Lisenba v California 314 US 219 (1941).

79 Lisenba v California *supra* 236.

80 Wigmore Evidence (1940) 3ed par 823-824.

81 Lisenba v California *supra* 236.

the fifty states as to the admissibility of a confession. as applied to a criminal trail, denial of due process means the failure to observe the fundamental fairness essential to the very concept of justice. In order to declare a denial of due process, the court must find that the absence of that fairness fatally infected the trial; the conduct complained of must be of such quality as necessarily prevents a fair trial. Fundamental unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. The United States supreme court has held that due process has been violated in the instances set out below:

- (a) where torture induces an accused to make a confession which is later admitted as evidence against him;⁸²
- (b) where mob violence anterior to the trial is the inducing cause of the accused's confession;⁸³ and
- (c) where fraud, collusion, trickery and subordination of perjury on the part of those representing the prosecution results in the conviction of the accused.⁸⁴ That is having the same effect as where

82 Brown v Mississippi 297 US 278.

83 Moore v Dempsey 261 US 86.

84 Mooney v Holohan 294 US 103.

a confession is procured by fraud and later used in the accused's trial.

Due process is violated where an accused is induced by threats or promises to testify against himself. The case can stand no better if, by resort to other means, the accused is induced to confess and his confession is given in evidence.⁸⁵ After stating reasons for confirming the holding of the court *a quo*, Roberts J warned law enforcement officers:⁸⁶

"[We] disapprove the violations of law involved in the treatment of the [accused], and we think it right to add that where an accused, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession he is deprived of liberty or life through tyrannical or oppressive means. Officers of law must realise that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line."

The above passage has been cited to indicate the judge's prophetic warning indicating the inherent coercive power of custodial interrogation which received a stamp of disapproval in Miranda v Arizona.⁸⁷

85 Chambers v Florida 309 US 227 241.

86 Lisenba v California *supra* 240.

87 384 US 436 (1966).

All the cases decided after Brown v Mississippi form a logical development towards the Miranda decision. The facts of each confession case indicate the reason why the supreme court had to intervene. The other feature of many of the cases on confessions is that the state attorney or his representative took part in the interrogation of suspects.

In Ashcraft v Tennessee,⁸⁸ the uncontradicted evidence showed that Ashcraft had been held incommunicado for thirty-six hours, during which time without sleep or rest, he had been interrogated by relays of officers and investigators, and highly trained lawyers. The court per Black J found as a fact that a situation such as that was so inherently coercive that its very existence was irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force was brought to bear.⁸⁹ Black J pointed out that it was inconceivable that any court of justice in the United States, would permit prosecutors serving in relays to keep an accused under continuous cross-examination for thirty-six hours without rest or

88 Ashcraft v Tennessee 322 US 143 (1943) 153-4.

89 Ashcraft v Tennessee *supra* 154; see Bram v United States 168 US 532 556 and 562-563; Won v United States 266 US 1 14-15; Burdean v McDowell 526 US 465 475; Counselmon v Hitchcock 142 US 547 573-574; Lisenba v California *supra* 236-238.

sleep in an effort to extract a "voluntary confession".⁹⁰ In summing up the confession law of the United States, the judge pointed out that the constitution of the United States stood as a bar against the conviction of any individual in an American court by means of a coerced confession.⁹¹

Black J noted that there were certain foreign nations with governments which convicted individuals with testimony obtained by police officers possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical and mental torture.⁹² But, so long as the constitution of the United States remained the basic law of the Republic, America would not have that kind of government.

It would appear that the Ashcraft decision seemed to reflect less concern with the reliability of the confession than disapproval of police methods which appeared to the court to be dangerous and subject to serious abuse. The Ashcraft decision indicates further

90 Ashcraft v Tennessee supra 154.

91 Ashcraft v Tennessee supra 155; see Chambers v Florida 309 US 227; Canty v Alabama 309 US 629; White v Texas 310 US 547; Lisenba v California supra 236-238; Ward v Texas supra 555 and Bram v United States supra 532.

92 Ashcraft v Tennessee supra 155.

that the crude early cases became outmoded and cases involving more subtle pressures began to appear; it became more difficult to assume that the resulting confessions were untrustworthy." In the Ashcraft case the confession was obtained after thirty-six hours of almost continuous interrogation and there was good reason to believe that the accused was indeed involved in the murder of his wife. This decision marked the beginning of the "police misconduct" or "police methods" rationale for excluding or barring the use of confession in certain cases.*

12.3.2.4 Effect of prolonged interrogation

The American decision which examined the effect of physical violence, psychological coercion and interrogation by "relays" is that of Stein v New York.⁹³ The case involved the admissibility of confessions made by two out of the three accused. The third accused was implicated in both confessions and he sought a ruling to delete his name from the statements because he did not have an opportunity to cross-examine the confessors. After ruling that the confessions were

93 See Kamisar "Police interrogation and confessions" in Criminal Justice and the Supreme Court (1990) ed by Levy et al 175.

94 Kamisar (1990) 175.

95 Stein v New York 346 US 156 (1952).

free and voluntary and that their admission in evidence did not violate due process Jackson J gave reasons for his decision. Physical violence or threat of it by any official who has custody of a suspect renders a confession obtained thereby involuntary and therefore inadmissible.⁹⁶ It is not necessary to weigh or measure the effect of these factors on the will of the accused since their presence is sufficient to invalidate a confession. The American courts have long ago found it necessary to guard against a miscarriage of justice by treating any confession made as a result of torture or threat of brutality as too untrustworthy to be received as evidence of guilt.⁹⁷ In casu, the confessions were not obtained by physical force or threat.

On the question of psychological coercion, Jackson J agreed that a process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief, as to accomplish the extraction of an involuntary confession.⁹⁸ Jackson J averred that the advantages of interrogation were that suspects could clear

96 Stein v New York *supra*.

97 See n82 *supra*.

98 Stein v New York *supra* 184.

themselves and the information they gave frequently pointed out another who was guilty.” In his opinion, interrogation was a chief means to the solution of crimes.

In the minority decision indicated that the ruling in the Stein case was contrary to prior decisions dealing with the effect of a coerced confession.¹⁰⁰

12.3.2.5 Admissibility of later confession

A surprising opinion was expressed in Lyons v Oklahoma.¹⁰¹ In that case, Reed J stated that the fourteenth amendment did not protect one who had admitted his guilt because of forbidden inducement against the use at a trial of his subsequent confession under all possible circumstances.

The judge held that the test for the admissibility of a later confession is whether or not it was made confession was coerced was to be considered in

99 See n84 *supra*.

100 See Malinski v New York 324 US 401 (1945) 404; Stroble v California 343 US 181 (1951) 190; Lyons v Oklahoma 322 US 596 597; Haley v Ohio 332 US 596 599; Gallegos v Nebraska 342 US 55 63.

101 Lyons v Oklahoma 322 US 596 (1943) 603.

appraising freely and voluntarily; and the fact that the earlier the character of the later confession.¹⁰² This view is not supported because to conclude that the brutality inflicted at the time of taking the first confession suddenly lost all of its effect is to close one's eyes to the realities of human nature. An individual does not easily forget the type of torture that accompanied his previous refusal to confess.¹⁰³

The minority decision rightly pointed out that the majority decision means that the police are free to force a confession from an individual by ruthless methods, knowing full well that they dare not use such a confession at the trial, and then, as a part of the same continuing transaction and before the effects of the coercion can fairly be said to have completely worn off, procure another confession without an immediate violence being inflicted.¹⁰⁴ It is reasonable to conclude that the admission of such a tainted confession does not accord with the due process constitution safeguard. It is well known that a coerced confession is offensive to basic standard of justice, not because the confessor has a legal grievance against the police, but because statements

102 Lyons v Oklahoma *supra* 603.

103 Lyons v Oklahoma *supra* 606.

104 Lyons v Oklahoma *supra* 607.

procured by torture are not premises from which a civilized court will infer guilt.¹⁰⁵

12.3.2.6 Interrogation of a youthful suspect

In the case of Haley v Ohio¹⁰⁶ the accused, a fifteen year old boy, was arrested about midnight on a charge of murder and questioned by relays of police from shortly after midnight until about 5 a.m. the following day, without benefit of counsel or of any friend to advise him. When confronted with alleged confessions of his alleged accomplices around 5 a.m., he signed a confession typed by the police. The admissibility of that confession was challenged on appeal, following his conviction of murder in the first degree and his sentence to life imprisonment. On the facts, Douglas J held that in determining whether or not the due process of law is satisfied, special care must be used if the accused is a mere child. Age fifteen is a tender age and a difficult age for a boy of any race and he cannot be judged by the more exacting standard of maturity, the judge continued.¹⁰⁷ An influence which would leave a man cold and unimpressed

105 Lyons v Oklahoma *supra* 605.

106 Haley v Ohio 332 US 596 (1947).

107 Haley v Ohio *supra* 599.

can overawe and overwhelm a lad in his early teens. That age is the period of great instability which the crisis of adolescence produces. In casu, Douglas J held that a fifteen year old lad, questioned by relays of police, is a ready victim of inquisition.¹⁰⁸ The judge could not believe that a lad of tender years is a match for the police in such a contest. Apart from refusing this lad the benefit of counsel or friend, he was not allowed to see his mother. The judge held that when the police are so unmindful of these basic standards of conduct in their public dealings, their treatment of a fifteen year old boy behind closed doors in the dead of night, it becomes suspicious that the boy became a victim of coercion. As he summed up, Douglas J held:¹⁰⁹

"The age of [the accused], the hours when he was grilled; the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law. [The] Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."

108 Haley v Ohio *supra* 599.

109 Haley v Ohio *supra* 601.

The Haley v Ohio decision indicates that in determining the voluntariness of a confession under the fourteenth amendment, the age of the accused is one of the factors which must be considered together with others. A teenager does not have the maturity of an adult.

12.3.2.7 Police conduct that violates due process

Another important concept in American confession law is that a conviction based on a number of confessions is reversed if any one of them is coerced or involuntary in the sense that it violates the due process of law.¹¹⁰ The Supreme Court has stated frequently that, when faced with the question whether there has been a violation of the due process clause of the fourteenth amendment by the introduction of an involuntary confession, that it must make an independent determination on the undisputed facts.¹¹¹ This means that in determining the facts surrounding the voluntariness or otherwise of a confessor the supreme court is not bound by the finding of the jury and the states' appellate courts. In short, the supreme court

110 Malinski v New York 324 US 401 (1944).

111 Stroble v California 343 US 181 (1951) 190; Malinski v New York supra 404; Lyons v Oklahoma supra 597; Haley v Ohio supra 599; Gallegos v Nebraska 342 US 55 (1951) 63.

has a free hand in determining whether due process of law has been violated.¹¹²

In Malinski v New York, Malinski and S were partners in a rough sort of family protection plan. It was their agreement that if one of them was sent to prison, the other would provide for the convicted prisoner's family. S was sentenced to a term of imprisonment and Malinski committed a breach of their agreement. S knew that Malinski was involved in the murder of a police officer. Frustrated and worried about his family, S began to talk to other convicts. This eventually came to the attention of the police, Malinski was arrested and because he was an alleged killer of a policeman, he was about to receive unfavourable treatment from the police. Malinski was taken to a hotel where he was stripped naked and kept that way for three hours. After that he was given shoes, socks, underwear and blanket. Since Malinski had started to co-operate with the police, S was brought over and left alone with him. Malinski confessed. After a written confession had been signed, a preliminary hearing on the issue of voluntariness of the confession was held. His earlier oral confession was questionable but was admitted in evidence together

112 Malinski v New York *supra*.

with the written one. Malinski was not allowed to see his lawyer, and he was not allowed to see friends. The prosecutor described the police behaviour as follows:¹¹³

"The [police] hold men for several days. Are you satisfied with that? They are not going to let him go home, or let him get hold of a suant mouthpiece to preach about his rights and sue out writs. You want a District Attorney in this country that is worth his salt, not a powder puff District Attorney. When you are trying a case of murder, especially murder of a police officer, you don't go over and give him a pat on the back and say, "Do you want anything? Do you want to have your lawyer or your wife or somebody else?"

In addition to all this Malinski, was held incommunicado. The prosecutor added in his summation to the jury that Malinski was not hard to break.¹¹⁴ In his further remarks, the prosecutor said that the police had a right to undress Malinski to look for bullet scars, and keep the clothes off him. He regarded that as a proper police procedure. The aim was to let Malinski sit around with a blanket on him, humiliated for a while and think that he was going to get a sound thrashing, the prosecutor explained. The prosecutor appears to have misconstrued the attitude of the Supreme Court towards such talk in its area of

113 Malinski v New York supra 405 n3.

114 Malinski v New York supra 407.

jurisdiction. The tenor of the remarks of the prosecutor, the humiliation of Malinski, his illegal arraignment, the creation of fear of possible beating are factors which persuaded the court not to give much credence to the jury's finding of voluntariness. The court ruled that the confession was coerced. The conviction of Malinski rested in part on a confession obtained as a result of coercion. In this way, the coerced confession corrupted the trial. Moreover, constitutional rights may suffer much from subtle coercion to confess as from direct disregard.¹¹⁵ Malinski had made voluntary, untainted confession to S, to his girlfriend and to his brother in law. Since all these confessions were in evidence, it was argued notwithstanding the surprising prosecutor's remarks that the additional coerced confession would be "harmless error". The majority of the court disagreed. The presence of other over-whelming evidence of guilt will not save a conviction if a coerced confession is offered to the jury.¹¹⁶ The principle of harmless rule does not apply where an involuntary confession has been admitted because the trial would be a farce or a pretence.¹¹⁷

115 Malinski v New York *supra* 410.

116 Malinski v New York *supra* 404.

117 Brown v Mississippi *supra* 281.

**12.3.2.8 Questioning of a suspect in the absence of his
lawyer whose services have been employed**

In Spano v New York¹¹⁸, Spano was drinking in a bar. The deceased took some of Spano's money and beat him severely. Spano managed, after some assistance to reach his apartment. Spano fetched a gun from his apartment and walked to the scene where the body of the deceased was later found. Spano disappeared for a week or so. He was later found and indicted with murder. Two days after his indictment, Spano called B, a close friend for about ten years. B was at that time a police recruit who was still in the police training college. Spano described to B how the deceased beat him and how he got a gun which was eventually used to kill the deceased. Spano told B that he intended to secure the services of a lawyer and give himself over to the police. B relayed the information to his superiors. The following day, Spano, accompanied by his counsel, gave himself to the police. Spano's counsel told him not to answer any questions. The police began to question him for at least seven hours after his counsel had left the police station. Spano repeatedly asked for his lawyer but the request was denied. The questioning was persistent and continuous

118 Spano v New York 360 US 315 (1959).

by teams of police officers. After five hours of questioning and still no confession, Spano was transferred to another police station. The prosecutor joined the team of police officers and questioned Spano. But no confession was made.

Consequently, B was briefed to mislead Spano that because of their close contact, B was in a lot of trouble. On hearing this, Spano eventually agreed to make a statement. He was convicted and sentenced to death; and the issue which was to be decided on appeal was whether Spano had been denied due process of law when his confession was introduced to the jury.

Warren CJ announced a unanimous opinion of the court on the due process of law under the fourteenth amendment. Warren CJ held that the abhorrence of society to the use of involuntary confessions did not turn alone on their inherent untrustworthiness.¹¹⁹ The abhorrence of society also turned on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty would be as much endangered from illegal methods used to convict those thought to be criminal as from the actual criminals themselves.¹²⁰

119 Spano v New York *supra* 320.

120 Spano v New York *supra* 321.

The actions of the police in obtaining confessions have come under judicial scrutiny in a long series of cases.¹²¹ Those cases suggest that the police officers have become aware of the burden which they share, along with the American courts, in protecting fundamental rights of the American people, including that portion of the American citizenry suspected of crime.¹²² Warren CJ warned that although the police were becoming more responsible, and the methods used to extract confessions more sophisticated, the duty of the American Supreme Court to enforce federal constitutional protections was not about to end.¹²³ In *casu*, the court held that the conviction could not be sustained.

Concurring in the unanimous decision in Spano v New York Douglas J (with whom Black and Brennan JJ

121 See Ciceria v Lagay 357 US 504 (1958); Crooker v California 357 US 433 (1958); Ashdown v Utah 357 US 426; Payne v Arkansas 356 US 560; Thomas v Arizona 356 US 390; Fikes v Alabama 352 US 191; Leyra v California 343 US 181; Gallegos v Nebraska 342 US 55; Johnson v Pennsylvania 340 US 881; Harris v South Carolina 338 US 68; Turner v Pennsylvania 338 US 62; Watt v Indiana 338 US 49; Lee v Mississippi 332 US 742; Haley v Ohio 332 US 596; Malinski v New York 324 US 401; Lyons v Oklahoma 322 US 596; Ashcraft v Tennessee 322 US 143; Ward v Texas 316 US 547; Lisenba v California 314 219; Vernon v Alabama 313 US 547; Lomax v Texas 313 US 544; White v Texas 310 US 530; Canty v Alabama 309 US 629; Chambers v Florida 309 US 227; and Brown v Mississippi 297 US 278.

122 Spano v New York *supra* 321.

123 Spano v New York *supra* 321.

concurrent) took the principle a step further. Spano was subjected to questioning after he had been formally charged with a crime. The judge pointed out that the Spano case was a case of an accused who was scheduled to be tried by a judge and a jury, and who was tried in a preliminary way by the police.¹²⁴ He also indicated that the behaviour of the police amounted to a kangaroo court procedure whereby the police produced the vital evidence in the form of a confession which is necessary to obtain a conviction. In casu, Douglas J found that to deprive a person, formally charged with a crime of counsel during the period prior to trial was more damaging than the denial of counsel during the trial itself. Moreover, Stewart J, also concurring in the decision of the court said that it was his view that the absence of counsel when Spano's confession was elicited was alone enough to render it inadmissible under the fourteenth amendment due process of law. Stewart J concluded:¹²⁵

"Throughout the night (the accused) repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied. He finally was induced to make a confession. That confession was used to secure a verdict sending him to the electric chair. [Our] constitution guarantees the assistance of counsel to a man on trail for his life in an orderly courtroom, and

124 Spano v New York *supra* 325.

125 Spano v New York *supra* 327.

protected by all the procedural safeguards of the law. Surely a constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station".

The importance of the Spano v New York decision lies in what it says. The opinion of the court made it impossible to sustain a conviction based on coerced confession. The recognition of a right to assistance by counsel as a prerequisite for the due process of law was a distinctive feature of the Spano case.¹²⁶

In 1947 a woman was found dead under conditions suggesting murder. The police arrested Watts who was the appellant in Watts v Indiana¹²⁷ and took him to the county jail where he was questioned in relays. The police questioned Watts during the following periods:

- (a) On November 12, 1947 Watts was questioned from 23h30 until sometime between 02h30 and 03h00 the following day.
- (b) On November 13, 1947 he was questioned from 17h30 until about 03h00 the following day. The questioning was done by six to eight relays of police officers. The questioning was pursued during the following three days.

126 See discussion infra.

127 Watts v Indiana 338 US 49 (1949).

Watts made incriminating statements after six days of intensive questioning. But the statement did not satisfy the prosecutor who had been called in. The prosecutor began to question him. That prosecutor had experience of twenty years' as lawyer, and judge. Watts made a confession. Before making the confession, Watts was kept for the first two days in solitary confinement, was driven around town, hours at a time, with a view to eliciting identifications and other disclosures. At his trial in a State court, the confession was admitted in evidence over his objection and he was convicted. The matter was taken before the United States supreme court on appeal. The questioning of the appellant can be criticized. Frankfurter J made it clear in his introductory remarks that there was a torture of mind as well as of the body; the will was as such affected by the fear as by force.¹²⁸ A confession must be the expression of a free choice provided it is understood that a statement to be voluntary need not be volunteered. But if a confession was the product of sustained pressure by the police it was not a free and intelligent choice of the maker.

The judge made it clear that eventual yielding to questioning under the circumstances set out in Watts v

128 Watts v Indiana supra 52.

Indiana was plainly the product of the sustained process of interrogation and therefore the reverse of voluntary. Frankfurter J said:¹²⁹

"The very relentlessness of such interrogation implies that it is better for the [accused] to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process. [This] is so because it violates the underlying principle in the enforcement of the criminal law. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards."

The judge made it clear that the history of the criminal law proved overwhelmingly that brutal methods of law enforcement were essentially self-defeating, whatever their effect in a particular case might have been.¹³⁰ The conviction was reversed without enquiring whether the contents of the confession was truthful or not. The confession had been obtained in violation of due process under the fourteenth amendment.

129 Watts v Indiana *supra* 54-55.

130 Watts v Indiana *supra* 55.

12.3.2.9 The end of trustworthiness or reliability of a confession as a criterion for its admissibility

The last important issue to be resolved in developing a modern due process voluntariness doctrine had to do with the importance of the truth or falsity of the contents of the confession. The case in point is that of Rogers v Richmond.¹³¹ Rogers had allegedly shot and killed a woman during a liquor store hold-up in 1953. Rogers challenged the admissibility of his confession at his trial. The police had procured the confession by threatening to bring in Rogers' wife for questioning. At the trial in a state court Rogers was convicted of murder, two confessions which he claimed had been obtained by coercion were admitted in evidence over his objection. In determining that the confessions were voluntary, both the trial court and the State Supreme Court, which affirmed the conviction, gave consideration to the question whether or not the confessions were reliable. In rejecting the reliability or trustworthiness of a confession, the court held that the constitutional principle of excluding confessions that are not voluntary does not rest on that consideration.¹³² The due process clause

131 Rogers v Richmond 365 US 534 (1960).

132 Rogers v Richmond *supra* 541.

is not satisfied where a confession is obtained by impermissible methods, notwithstanding the falsity or truthfulness of its contents. In casu, since Rogers had been subjected to pressures which, under a accusational system, an accused should not be subjected, the court was constrained to find that the procedures leading to his conviction had failed to afford him the guarantees provided by the due process of law.¹³³

The due process voluntariness test is of the totality of the circumstances. In Culombe v Connecticut¹³⁴ this test is clearly set out; and it may be summed up as follows:

- (a) All the circumstances of the interrogation, and the particular characteristics of the accused must be examined. This means that all the surrounding circumstances - the duration and condition of the detention (if the confessor has been detained), the manifest attitude of the police towards him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control are

133 Rogers v Richmond *supra* 541-542.

134 Culombe v Connecticut 367 US 568 (1960) 601-602.

relevant.¹³⁵ As a general rule, no one factor is conclusive.

(b) Coercion can be physical as well as psychological¹³⁶

(c) If a coerced confession is received at the trial the conviction will not be sustained on appeal even if a separate voluntary confession or other overwhelming evidence of guilt is present on the record.

The due process of law has been discussed with reference to leading decisions of the supreme court of the United States. The purpose has been to indicate the factors on which the court took strong views which were eventually incorporated in the development of confession law since 1966.

12.4 Evaluation

It is clear from the above exposition that the development of American law may be summed up as set out below:

135 See Ciceria v Lagay 357 US 504 509.

136 See Malinski v New York *supra*.

- (a) In 1884, it was observed by the United States supreme court that a confession, if freely and voluntarily made, was evidence of the most satisfactory character.¹³⁷
- (b) The approach of the American supreme court regarding the admissibility of confessions was reflected in a series of decisions between 1936 and 1942, in which there was a new broader interpretation of the factors constituting coercion and undue influence. The cases had involved convictions of Black Americans charged with the crimes of murder or rape of white victims. In each case, the American supreme court held that police tactics used in obtaining the confessions and the use of those confessions by the trial courts, constituted a violation of the due process of the fourteenth amendment.¹³⁸
- (c) In 1944, the American supreme court laid down a new criterion for the admissibility of confession based upon whether the conditions and

137 Hopt v Utah 110 US 574 584; see Tompkins The Confession Issue - From McNabb to Miranda: A Bibliography (1968) 1.

138 Brown v Mississippi 297 US 278 (1936); Chambers v Florida 309 US 227 (1940); White v Texas 310 US 530 (1940); Ward v Texas 316 US 547 (1942); see Tompkins 1.

circumstances surrounding the making of the confession were inherently coercive.¹³⁹ This criterion appeared more stringent than those used in state cases by state courts.¹⁴⁰

(d) From 1944 to 1951, the American supreme court insisted that state courts determine a confession's admissibility on the basis of whether or not it had been obtained by inherent coercion. Three cases decided by the American supreme court after 1951 indicate the original voluntary-trustworthy test was re-established.¹⁴¹ That a test had been used prior to 1944.

(e) A confession obtained through extreme brutality constitutes a violation of the due process clause of the fourteenth amendment of the American constitution.¹⁴² Such a coerced confession is inadmissible in evidence.

(f) A confession obtained after an all-night interrogation of suspects, or where the

139 Ashcraft v Tennessee 322 US 143.

140 Tompkins 1.

141 Stein v New York 346 US 156; Gallegos v Nebraska 342 US 55; Stroble v California 343 US 181.

142 Brown v Mississippi 297 US 278 (1936).

interrogation lasted several days, violates the due process clause and is inadmissible.¹⁴³

- (g) Incommunicado interrogation of suspects, without sleep or rest, and the use of relays of police officers and prosecutors (district attorneys) to interrogate a suspect may result in a compelled confession;¹⁴⁴ and is in violation of due process.

- (h) A coerced confession cannot be used in a trial for any purpose and if it is introduced it cannot be a harmless error.¹⁴⁵

143 Chambers v Florida 309 US 227 (1940).

144 Ashcraft v Tennessee 322 US 401 (1944).

145 Malinski v New York 324 US 401 (1945).

CHAPTER THIRTEEN

**NEW EMPHASIS ON THE CONSTITUTIONAL RIGHT TO COUNSEL AND
TO INFORMED WAIVER: A REVIEW OF POLICE INTERROGATION**

13.1 New emphasis on the right to counsel

The growing dissatisfaction by some justices of the American supreme court with the voluntariness standard as a prerequisite for the admissibility of confessions became very apparent after Spano v New York¹ in 1959. The justices expressed greater concern about the refusal to Spano's request to see his lawyer than about the voluntariness of the confession under the totality of the circumstances.² It was settled law in 1959 that a coerced or involuntary confession that violated the due process clause of the fourteenth amendment also violated the fifth amendment against self-incrimination.³ What is also clear is that a confession could be rejected by a federal court even

1 Spano v New York 360 US 315 (1959).

2 Spano v New York *supra* 323; see Saltzburg American Criminal Procedure : Cases and Commentary 2ed (1988) 428.

3 Saltzburg 434.

without a finding of coercion.⁴ It is necessary to discuss the decisions of the supreme court in which emphasis is on the right to counsel. There are two main reasons for doing so. Firstly, the American supreme court wanted to ensure that the constitutional protections against self-incrimination and the use of involuntary confessions is placed in its proper perspective.

Seeing that the assistance or advice of counsel is fundamental to ensuring fairness and justice in an accusatorial trial, the supreme court began to emphasise this in its decisions that followed Spano v New York. An analysis of these decisions will eventually lead to the reasons which persuaded the supreme court to hand down the Miranda v Arizona decision and those that followed.

In the case of Massiah v United States⁵ Massiah and one C were indicted for possession of narcotics on a United States vessel. Massiah retained a lawyer, pleaded not guilty, and was released on bail. C decided to co-operate with the police. A radio transmitter was installed in an automobile where Massiah

4 See McNabb v United States 318 US 332 (1943) and Mallory v United States 354 US 449 (1957).

5 Massiah v United States 377 US 201 (1964).

and C were to hold a meeting. A federal agent M overheard conversations between Massiah and C from some distance away. During the conversations Massiah made several incriminating statements which were brought by the testimony of agent M statements. At Massiah's trial the incriminating statements were admitted over Massiah's objection. Massiah was convicted. The issue on appeal to the supreme court was whether Massiah had been denied his constitutional rights under the fifth and sixth amendments in a federal trial when evidence obtained by M was used against him. The incriminating statements had been obtained by M when he surreptitiously recorded the conversations with the assistance of C, a co-accused, and in the absence of Massiah's counsel, while he was out on bail.

The Massiah case was a federal case where the specific guarantee of the sixth amendment was directly applicable.⁶ The sixth amendment provides *inter alia* that:

"In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of Counsel for his defence."

Massiah's indictment, just like Spano, was followed by a trial. The trial took place in an orderly courtroom

6 Massiah v United States *supra* 205.

presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.⁷ It was the constitutional right of an accused to have assistance of counsel as from the time of indictment.⁸ Anything less might deny an accused effective representation by counsel at the only stage when legal aid and advice would help him. For that reason, any secret interrogation of an accused, from and after the finding on an indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of a criminal trial and the fundamental rights of persons charged with crime.⁹ Stewart J held in Massiah v United States that the appellant was denied the basic protections of the guarantee when there was used against him at his trial evidence of his own incriminating words which M, as one of the federal agents, had deliberately elicited from him after he had been indicted and in the absence of his counsel. The damaging testimony was elicited from the appellant without his knowledge that he was under interrogation

7 Spano v New York *supra* 327.

8 Massiah v United States *supra* 204.

9 See People v Waterman 9 NY 2d 561 at 565; People v Davis 13 NY 2d 690 (1963); People v Rodriguez 11 NY 2d 279 (1962); People v Meyer 11 NY 2d 544 (1960); People v Swanson 18 App.Div. 2d 832 (1963); People v Price 18 App.Div. 2d 739 (1962); People v Robinson 16 App.Div. 2d 184 (1962).

by a government agent. The right to assistance by counsel must apply to indirect and surreptitious interrogations as well as those conducted in a police station.¹⁰

The majority holding in the Massiah case does not question the right, if not indeed the duty, of the federal law enforcement agents, like M, to continue an investigation of the suspected criminal activities of an accused and his alleged confederates. The opinion of the court simply means that self-incriminating statements by an accused violate the sixth amendments right to assistance by counsel if they are indirectly or directly elicited in the absence of counsel and later used in the trial. Three dissenting justices took the opposite view.

White J, writing for the three dissenters, stated that a civilized society must maintain its capacity to discover transgressions of the law and to identity those who flout it; and it would not do to sweep these disagreeable matters under the rug or to pretend they are not there at all.¹¹ The dissenters found it a rather ominous occasion when a constitutional rule was

10 Massiah v United States *supra* 206.

11 Massiah v United States *supra* 207.

established barring the use of evidence which was relevant, reliable and highly probative of the issue which the trial court has before it - the issue there being whether the accused did or did not commit the acts with which he was charged.¹² White J also appeared to anticipate what the future would hold when he said:¹³

"Since the new rule would exclude all admissions made to the police, no matter how voluntary and reliable, the requirement of counsel's presence or approval would seem to rest upon the probability that counsel would foreclose any admission at all."

White J was correctly anticipating the sharp turn which the development of confessions law was about to take. The judge cursed the new approach as being nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of voluntary out-of-court admissions and confessions made by an accused. What his lordship failed to bring to focus was the fact that the majority holding was simply the unfolding of the meaning of the grand phrases used in the American constitution. Any viable system of criminal justice

12 Massiah v United States *supra* 208.

13 Massiah v United States *supra* 209.

based on the accusatorial model must ensure fundamental fairness to both the accused and the prosecution.

To sum up, the decision in Massiah means that an accused is entitled to counsel's assistance at his trial and that this must apply equally before trial but after indictment. It is not clear whether the majority decision also accepted the defence argument that the fifth amendment right against self-incrimination has been breached. On the whole, the decision in Massiah does not seem a particularly revolutionary one.

A decision which is regarded by some commentators as a revolutionary one is that of Escobedo v Illinois.¹⁴ The Escobedo decision focused on incommunicado police interrogation of suspected criminals as opposed to the right of persons suspected of crimes to assistance by counsel at the level of police investigation of a case. This landmark decision of the American supreme court marks a shift in emphasis from an analysis of the totality of the circumstances of a confession to the presence of counsel during interrogation. The facts of the Escobedo case were as follows: Escobedo

14 Escobedo v Illinois 378 US 478 (1964).

was arrested without a warrant for the murder of his brother-in-law. He made no statement to the police and was later released on the same day pursuant to a writ of *harbeas corpus* obtained by his retained lawyer, Wolfson. Eleven days later, a certain Di Gerlando, who was in custody, told the police that Escobedo fired the fatal shots to the deceased. Escobedo was again arrested. Shortly after Escobedo reached the police headquarters, his lawyer, Wolfson, arrived.

The retained lawyer asked P, a sergeant on duty, for permission to speak to Escobedo. His client was being questioned at the Homicide Bureau. The police refused him permission to see Escobedo. The evidence showed that the police informed Escobedo that his lawyer did not want to see him. But Escobedo testified that he heard a detective telling his lawyer that the latter would not be allowed to speak to him "until they were done" that is, until the police were through with the interrogation. The lawyer's request to see Escobedo was denied, even though they waved to each other from adjoining rooms. As the interrogation continued, Di Gerlando was brought to the interrogation room to confront Escobedo. During one exchange, Escobedo said "I didn't shoot Manuel, you did it."¹⁵ That was a fatal

15 Escobedo v Illinois *supra* 483.

incriminating statement under Illinois law because under it an admission of mere complicity in the murder plot was legally as damaging as an admission of the firing of the fatal shots.¹⁶

The majority opinion of the court took into account that to a layman like Escobedo, undoubtedly unaware of legal rules the guiding hand of counsel was essential to advise him of his rights in the delicate situation in which he found himself.¹⁷ The accused was refused legal aid and advice at the stage when these were most critical to him. This is so because the interrogation could certainly affect the whole trial since rights may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.¹⁸ Goldberg J, writing the opinion of the majority decision, referred to People v Donovan¹⁹ where the court observed that it would be highly incongruous if the system of justice permitted the prosecutor, the lawyer representing the state, to extract a confession from the accused while the latter's retained counsel,

16 Escobedo v Illinois *supra* 486.

17 Escobedo v Illinois *supra* 486.

18 Escobedo v Illinois *supra* 486.

19 People v Donovan 13 NY 2d 148 at 151.

seeking to speak to him is denied access to his client by the police.

Goldberg J emphasized that every person accused of a crime is entitled to a lawyer at his trial, and pointed out that in *casu*, the state sought a rule which would make the trial no more than an appeal from the interrogation. Under those circumstances, the judge continued, the right to use counsel at the formal trial would be a very hollow thing if for all practical purposes the conviction is already assured by pre-trial examination.²⁰ Under the Soviet criminal code, a lawyer is not allowed to be present during the investigation.²¹ The Soviet trial has thus been aptly described as an appeal from the pre-trial investigation. If the rule sought by the prosecution in the Escobedo case is granted, a cynical prosecutor could say:²²

"Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."

The prosecution argued in the Escobedo case that if the right to counsel is afforded prior to indictment,

20 See Escobedo v Illinois *supra* 487; Gideon v Wainwright 372 US 335.

21 See Feifer Justice in Moscow (1964) 86.

22 See Ex Parte Sullivan 107 Supp. 514 at 517-518.

the number of confessions obtained by the police would diminish significantly because most confessions are obtained during the period between arrest and indictment,²³ and that any lawyer worth his salt will tell a suspect in no uncertain terms to make no statement to the police under any circumstances.²⁴ Goldberg J took the view that this argument cuts two ways. The fact that many confessions are obtained during the period between arrest and indictment clearly points to its critical nature as a stage when legal aid and advice are surely needed.²⁵ In other words, the right to counsel would indeed be hollow if it began at a period when few confessions were obtained. In the Escobedo case, the court took the view that there is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.²⁶ The judge expressed the view that the American constitution, unlike some others, strikes a

23 See Barrat "Police practices and the law - from arrest to release or charge" 50 Cal.L.Rev. 11 at 43 1962.

24 See Watts v Indiana 338 US 49 at 59 (Jackson J concurring in part and dissenting in part).

25 Escobedo v Illinois *supra* 488.

26 Escobedo v Illinois *supra* 488.

balance in favour of the right of the accused to be advised by his counsel of his privilege against self-incrimination.²⁷

The majority decision makes it clear that a system of criminal law enforcement which comes to depend on confessions will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skilful investigation.²⁸ A celebrated commentator has remarked that:²⁹

"Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources."

The American supreme court has learned through history that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence.³⁰ Moreover, the court learned the lesson of history that no system of criminal justice can or should survive if it comes to depend for its continued effectiveness on the

27 Escobedo v Illinois *supra* 488.

28 Escobedo v Illinois *supra* 489.

29 Wigmore Evidence 3rd (1940) at 309.

30 See Haynes v Washington 373 US 503 at 519.

citizens' abdication through unawareness of their criminal constitutional rights.³¹ For that reason, no system of criminal justice worth preserving should have to fear that if an accused is permitted to consult with his lawyer, he will become aware of his rights and exercise them. In casu, the court held that Escobedo was denied the assistance of counsel in violation of the sixth amendment to the constitution as made obligatory upon the states by the fourteenth amendment. This is so because the police investigation was no longer a general enquiry into an unsolved crime but had begun to focus on Escobedo in police custody who had been denied assistance of counsel.

The minority decision in the Escobedo case indicates that some justices were not ready to accept the opinion of the court without a fight. Harlam J condemned the majority decision as announcing a most ill-conceived rule which would seriously and unjustifiably fetter perfectly legitimate methods of criminal law enforcement.³² White J correctly predicted the future decisions on police interrogation. His lordship remarked that although the majority decision purported to be limited to the facts of the case, it was naive to think that the new constitutional right

31 Escobedo v Illinois *supra* 490.

32 Escobedo v Illinois *supra* 493.

announced would depend upon whether the accused had retained his own counsel.³³ The accuracy of this prediction is taken a step further when the justice said:³⁴

"At the very least the Court holds that once the accused becomes a suspect and presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. The decision is thus another major step in the direction of the goal which the court seemingly has in mind - to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntary or not."

Before the birth of Jesus Christ, prophets like Isaiah correctly predicted His coming many years before the actual date of His arrival. It takes a good prophet to do this. It equally took a good justice to foresee the future development of American confessional law. Four justices vigorously opposed the move, but five out of the nine justices went ahead.³⁵

The exposition of the Massiah v United States and Escobedo v Illinois decisions had made two points clear.

33 Escobedo v Illinois supra 495.

34 Escobedo v Illinois supra 495.

35 The four dissenters were Harlan J; White J; Clarke and Stewart J. Let us watch their vote in the Miranda v Arizona decision.

Firstly, the American supreme court has placed new emphasis on interrogation of a suspect after arrest and/or before indictment.

Secondly, the police want to interrogate suspects in the absence of their retained lawyers. The supreme court disapproved of that procedure. Suspects must enjoy their constitutional right in terms of the sixth amendment to the American constitution which is obligatory to the states in terms of the fourteenth amendment. In other words, there are two conflicting issues to be resolved once and for all, namely "police interrogation" and "right to counsel". Although the due process fourteenth amendment clause is still applicable, the new emphasis seems to enjoy much attention.

The court in Massiah did not give a clear indication as to when an accused is to be regarded as formally charged and thus within the protective reach of the ratio of that case.³⁶ The Escobedo case, on the other hand, rejected the argument that an accused must be formally charged in order to have a valid claim to counsel.³⁷ The circumstances surrounding the

36 Saltzburg American Criminal Procedure: Cases and Commentary 2ed (1988) 439.

37 Escobedo v Illinois *supra* 485.

interrogation of the accused in Escobedo, the fact that the accused was handcuffed and had not slept well during that week, probably constituted sufficient ground to exclude the incriminating statements under the due process test.³⁸ But the court in Escobedo held that the accused's right to counsel in terms of the sixth amendment was violated because the interrogation occurred at a critical stage in the proceedings without the assistance of counsel and because the accused had not been warned that he had a right to remain silent.³⁹ Both the Massiah and Escobedo decisions left several questions unanswered. These are some of them:⁴⁰

"What is the concern in Escobedo and Massiah? Is it that confessions may not be reliable? Is it that the police are taking a shortcut to proving their case? Is it that police interrogation is basically unacceptable? Is it that suspects are not playing the game very well? It is all of these things, perhaps? Or none? How do you think the Escobedo majority would answer this question: "Is it a good thing for the police to get people to confess, as long as brutal methods are not utilized?" How would the dissenters answer?

Does the Escobedo Court give any indication when an investigation can be said to have focused on the accused? In their dissenting opinions, Justices Steward and White

38 Saltzburg 444.

39 Saltzburg 445.

40 Saltzburg 445.

strongly criticize the indefiniteness of the Sixth Amendment right that is recognized in the majority ruling. But is the voluntariness standard they espouse any more definite? Assuming that both a voluntariness standard and a counsel standard are indefinite, are the costs of uncertainty the same under both? If not, which standard keeps the costs to society lower?"

It is clear that the early due process cases focused on government efforts to compel an unwilling accused or suspect to say something that would work to his detriment at the trial. The question in each case was whether the police overwhelmed the suspect's free will so that the suspect could not be said to have been speaking voluntarily. The questions raised above were answered in Miranda v Arizona discussed below.

13.2 The fifth amendment approach

In Malloy v Hogan⁴¹ Brennan J declared that as from the day of that decision the admissibility of confessions in a state criminal prosecution was tested by the same standard applied in federal prosecutions since 1897, when in Bram v United States,⁴² the court held that in criminal trials in the courts of the United States, whenever a question arises whether a confession is

41 378 US 1 (1964).

42 168 US 532 (1897).

incompetent because it is not voluntary, the issue was controlled by the self-incrimination portion of the fifth amendment.⁴³ In this way the court paved the way for its decision in Miranda v Arizona by ruling that the fifth amendment privilege against self-incrimination is applicable to the states through the fourteenth amendment.⁴⁴ Two years later, in Miranda v Arizona, the court held that the fifth amendment is the touchstone for determining the admissibility of any statement obtained through custodial interrogation by the police.⁴⁵

13.2.1 Introduction to Miranda v Arizona

In American criminal and constitutional jurisprudence no decision involving criminal law was as controversial at the time it was decided as was Miranda v Arizona.⁴⁶ It is the best known criminal case not only in name, but also in the protection it accorded to suspects. It has become part of common awareness by both police officers, defence counsel and accused. A 1976 poll of members of the American Bar Association

43 See Kamisar (1990) 439.

44 Saltzburg 446.

45 Saltzburg 446; see discussion infra.

46 Miranda v Arizona 384 US 436 (1966).

to determine "milestone events" in American legal history gave the Miranda decision a fourth place ranking. No other criminal law decision was ranked higher. The only case which was ranked first was Marbury v Madison⁴⁷ and Brown v Board of Education of Topeka⁴⁸ came in fifth. On 13 June 1990 the famous case of Miranda celebrated its twenty-fourth birthday.

The Miranda case elicited a hostile reception from the date it was decided, and the question is: what is it that makes Miranda both a different and a celebrated decision? There are two sides to the argument. Those who believe in taking confessions from ignorant suspects who are not apprised of their constitutional rights are not happy with Miranda." The proponents of this view are highly celebrated scholars in the law of criminal procedure and it requires great skill to see through their arguments. They put their view clearly

47 Marbury v Madison 5 US 137 (1803).

48 Brown v Board of Education of Topeka 347 US 483 (1954). It is interesting to note that Mr Justice Thurgood Marshall, the well-known dissenter of the American supreme court argued the case for Brown; see J Lieberman Milestones (vii) (1976) for further details.

49 The rights referred to here are the fifth amendment right against self-incrimination and the sixth amendment right to legal assistance.

and in a scholarly manner.⁵⁰ That is not surprising because reasonable men may differ even though some may be politely wrong. On the other hand, those who subscribe to the view that the police must obey the law while enforcing it and that a viable system of criminal justice does not depend on taking advantage of those who are ignorant or deprived of their constitutional rights welcome Miranda. That happens to be the underlying consideration of the majority view taken in Miranda. It is beyond the scope of this study to dwell on the Miranda debate in so far as it does not reflect the law as it is as opposed to what the law ought to be.

13.3 The Miranda case

The setting of the Miranda case was in the state of Arizona. Ernesto Miranda was convicted by the Arizona state court of kidnaping and attacking a young woman. His conviction was confirmed by the Arizona supreme court following his appeal. Ernesto Mirandae, through his attorney, argued that he was denied his rights under the fifth and fourteenth amendment to the advice of counsel during the time he was interrogated by the

50 Grano "Voluntariness, free will, and the law of confessions" 65 Va.L.Rev. 589 (1979); Caplan "Questioning Miranda 38 Va.L.Rev. 1417 (1985).

police. The specific facts established that an 18-year old girl had been kidnapped and attacked. Ernesto Miranda was arrested and taken to the police station. At the police station, the complainant identified Miranda in the line-up or identification parade. The police questioned him for about two hours and he confessed orally. Thereafter he wrote a brief statement describing the crime and making fatal admissions which constituted a confession.

At his trial, the written confession was admitted into evidence over the objection of his counsel. The prosecution led evidence of the prior oral confession made by Miranda during the questioning. The Arizona supreme court took into account that Miranda did not specifically request counsel, and confirmed the conviction.

The procedural problem raised in his appeal to the American supreme court was: did the fifth amendment bar the use of exculpatory or inculpatory statements that stem from custodial interrogation where such statements are secured without first advising a suspect of his constitutional right to remain silent and assurance of a continuous opportunity to exercise this right?

Before an analysis of Miranda v Arizona can be made, it must be pointed out that Miranda was not just a single case but four cases involving unrelated crimes, all decided under the same title.⁵¹ Early in the decision, the court observed that there were common threads which ran through the cases. Each suspect had been taken into custody and was therefore not willingly associating with the police; each suspect had been taken to a police station, an environment dominated by the police; each suspect had been placed in an interrogation room and subjected to secret police interrogation, that is, interrogation not open to the public view; and each suspect had confessed.⁵² The confessions were made after the suspects had been questioned by police officers, detectives and a prosecutor and were admitted at their trials.

The court asked what police or custodial interrogation was like and what effect it was likely to have on a suspect. An answer to that question was essential for an informed decision. Warren CJ pointed out that the difficulty in depicting what transpired at those interrogations stemmed from the fact that suspects

51 The other cases were Vignera v New York Westover v United States, and California v Steward 384 US 436 (1966).

52 Miranda v Arizona *supra* 445.

were usually questioned incommunicado.⁵³ The court reviewed the literature detailing the pervasiveness of third degree methods in American police tactics.⁵⁴ In addition to this, the court referred to its previous decisions where the police resorted to physical brutality, beating, hanging and whipping and to sustained and protracted questioning incommunicado in order to extort confessions.⁵⁵ The court referred to People v Portelli⁵⁶ where the police brutally beat, kicked and placed lighted cigarette butts on the backs of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. Moreover, in Kat v Harlib⁵⁷ the accused suffered

53 Miranda v Arizona *supra* 445.

54 See IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931) known as Wickersham Report; Booth "Confessions and methods employed in procuring them" 4 So. Cal. L. Rev. 83 (1930); Kauper "Judicial examination of the accused - a remedy for the third degree" 30 Mich. L. Rev. 1224 (1932); Foote "Law and police: safeguards in the law of arrest" 52 Nw. U. L. Rev. 16 (1957); Hall "The law of arrest in relation to contemporary social problems" 3 V. Chi. L. Rev. 345 at 357 (1936).

55 Brown v Mississippi 297 US 278 (1936); Chambers v Florida 309 US 227 (1940); Canty v Alabama 309 US 629 (1940); White v Texas 310 US 530 (1940); Vernon v Alabama 313 US 547 (1941); Ward v Texas 316 US 547 (1942); Malinski v New York 324 US 401 (1945); Leyra v Denno 347 US 556 (1956) and Williams v United States 341 US 97 (1951).

56 People v Portelli 15 NY 2d 235 (1965).

57 Wakat v Harbliv 253 F. 2d 59 (1958); see Miranda v Arizona *supra* 446-447 for account of police treatment of suspects.

broken bones, multiple bruises and other injuries sufficiently serious to require eight months medical treatment after being manhandled by five policemen.

Firstly, the court took note of the police manuals. Since the Chambers v Florida case the court had recognised that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.⁵⁸ The interrogation of suspects took place in privacy, and privacy results in secrecy and this in turn results in a gap in one's knowledge as to what in fact goes on in the interrogation rooms.⁵⁹ In order to find out, the court rightly consulted various police manuals and texts which documented procedures employed with success. Those books advised the police or detectives to overcome a suspect's reluctance by using tactics such as:

- (a) telling the suspect that lawyers are expensive and silence is an admission of guilt;
- (b) acting always as though the guilt of the suspect has been established; and

58 See Chambers v Florida *supra*.

59 Miranda v Arizona *supra* 448

(c) instructing the interrogators to induce a confession out of trickery."⁶⁰

Having analysed the literature, Warren CJ concluded that the creation of an interrogation environment described therein was for purposes of subjugating the individual will or the suspect that of his examiner.⁶¹ That atmosphere carried its own badge of intimidation. Although it did not amount to physical intimidation, it was equally destructive of human dignity.⁶² The judge concluded:⁶³

"The current practice of incommunicado interrogation is at odds with one of our nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

The court pointed out that history had it that the roots of the privilege against self-incrimination goes back into ancient times. Those who framed the American constitution and the bill of rights were mindful of

60 Miranda v Arizona *supra* 448-456 for further details.

61 Miranda v Arizona *supra* 457.

62 See Sutherlands "Crime and confessions" 79 Harv.L.Rev. 37 (1968).

63 Miranda v Arizona *supra* 458.

subtle encroachments on individual liberty and that "illegitimate and unconstitutional practices get their first footing... by silent approaches and slight deviations from legal modes of procedure."⁶⁴ The sixth amendment to the constitution elevated the privilege to constitutional guarantee and has always been as broad as the mischief against which it seeks to guard.⁶⁵ The court noted that the privilege against self-incrimination had been rightfully recognised as an individual's substantive right, a right to a private enclave where he may lead a private life.⁶⁶ That right, the court continued, was a hallmark of American democracy. The privileged against self-incrimination was an essential mainstay of the American adversary system of criminal justice and was founded on a complex of values.⁶⁷ The recognition of the privilege against self-incrimination led to the conclusion that the government must accord respect to

64 See Morgan "The Privilege against self-incrimination" 34 Minx.L.Rev. 1 9-11 (1949); Lowell "The judicial use of torture" 11 Harv.L.Rev. 220 290 (1897); Pittman "The colonial and constitutional history of the privilege against self-incrimination in America" 21 Va.L.Rev. 763 (1935); Boyd v United States 166 US 616 at 635 (1886).

65 Counselman v Hitchcock 142 US 547 at 562 (1882).

66 Miranda v Arizona *supra* 460.

67 See Murphy v Waterfront Comm'n 378 US 52 at 55-57 ns (1964); Tahan v Shott 382 US 404, 414-415 n12 (1966).

the integrity and dignity of citizens.⁶⁸ In sum, the privilege was fulfilled only when a citizen was guaranteed the right to remain silent unless he preferred to speak in the unfettered exercise of his own will;⁶⁹ and the accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent sources, rather than by the cruel, simple expedient of compelling it from the accused's mouth. Warren CJ made the following remarks:⁷⁰

"We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning: An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak... [The] compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."

68 Miranda v Arizona *supra* 460.

69 Malloy v Hogan 378 US 1 8 (1964); see Alberton v SACB 382 US 709, 81 (1965); Hoffman v United States 341 US 479, 486 (1951); Arendstein v McCarthy 254 US 71, 72-73 (1920); Counselman v Hitchcock 142 US 547, 562 (1892).

70 Miranda v Arizona *supra* 461.

After referring to previous cases dealing with the application of the fifth amendment against self-incrimination,⁷¹ and that the historical development of the privilege and the sound policies which nurtured its evolution, the court indicated that judicial precedent established its application to incommunicado interrogation.⁷² Warren CJ took the view that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crimes contain inherent compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.⁷³ For that reason, it was necessary to ensure that an accused must be adequately apprised of his rights and the exercise thereof. Ultimately the court held that if the police wanted to interrogate a suspect who was in custody, they must first give him the now-familiar, four-fold warning of rights and then obtain a legally valid waiver of those rights.⁷⁴ A suspect must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used

71 See Bram v United States 168 US 532, 542 (1897); Wan v United States 266 US 1 at 14-15 (1921).

72 Miranda v Arizona *supra* 461.

73 Miranda v Arizona *supra* 467.

74 Miranda v Arizona *supra* 444-445 and 479.

against him in a court of law, that he had the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Moreover, a suspect must be afforded the opportunity to exercise these rights throughout the interrogation.⁷⁵ Following such warnings, and the opportunity to exercise these rights, the suspect may knowingly and intelligently waive these rights and agree to answer questions or make a statement.⁷⁶

If the suspect is not in custody, the mandatory Miranda v Arizona warnings are not required even though the police engage in interrogation. In the Miranda case, custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.⁷⁷

The minority decision (in which four justices joined dissenting) is strongly worded. Clark J called the majority decision "*ipse dixit*" and disapproved of the

75 See Malinski v New York *supra*.

76 Miranda v Arizona *supra* 479.

77 Miranda v Arizona *supra* 444.

new Miranda holding based on the fifth amendment privilege against self-incrimination. In his view, the new rationale was unnecessary because the due process clause was effective in protecting persons in police custody.⁷⁸ Harlan J took the view that the majority decision presented poor constitutional law and entailed harmful consequences for the country at large.⁷⁹

The implication of the Miranda v Arizona decision of a bare majority of five makes it clear that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of suspects unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.⁸⁰ This opinion for the first time extended the protection against self-incrimination to all extra-judicial statements. Secondly, it indicates a move away from the voluntariness totality of circumstances test. The court made it clear that unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the

78 Miranda v Arizona *supra* 503.

79 Miranda v Arizona *supra* 504.

80 Miranda v Arizona *supra* 444.

warnings detailed above are peremptory. In other words, the legislature may devise other means to replace the Miranda warnings, but instead it sought to repeal Miranda.⁸¹ Justice White rightly pointed out that the Miranda rule could not be expected to bring certainty into a confused area. "Today's decision," he said, "leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether non-testimonial evidence introduced at the trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution."⁸²

13.4 Implication of the Miranda case in confessions law

The Miranda decision merged the self-incrimination clause and the confession law and in this way departed from the previous decisions of the American supreme court handed down in the twentieth century.⁸³ For that

81 See Section 3501 of Title II of the crime control Act of 1968 which purports to "repeal" Miranda and the McNaff-Mallory rule.

82 Miranda v Arizona *supra* 545.

83 Bram v United States *supra* 542.

reason, the Miranda decision was seen by dissenters in that case as a radical change to the law.⁸⁴ The Bram v United States case contained some seeds of Miranda. The argument of the dissenters in Miranda boils down to the conclusion that the privilege against self-incrimination is not clear enough to justify its application in a modern day police station.⁸⁵

There are two distinct issues raised in Miranda. The first issue which was of concern to the Miranda court was the problem of judicial review of police interrogation practices. The supreme court was concerned before Miranda that judges had enormous difficulty in reaching conclusions where the voluntariness of confessions was in issue. It is particularly difficult to resolve an issue of voluntariness after an interrogation since it is not easy to determine how coercive it really was. The supreme court regarded lengthy police interrogation as inherently coercive. It was the extent of "coerciveness" which was in issue. It was necessary for the court in Miranda to create a prophylactic rule

84 Saltzburg 463.

85 See Saltzburg 463; Kamisar (1966) "A dissent from the Miranda dissents: some comments on the 'new' fifth amendment and the old 'voluntariness' test" 1966 Mich.L.Rev. 59.

to aid in judicial review of police interrogation practices.⁸⁶ If the Miranda warnings are not given, then a confession is tainted. Conversely, if the warnings are given the confession still may not be voluntary, but at least the courts have some greater confidence in confessions obtained after administering the Miranda warnings.

The weakness of the Miranda case is that even if Miranda warnings are given, statements obtained thereafter may be coerced. In Mincey v Arizona,⁸⁷ a detective went to the hospital bed where the accused was in the intensive care unit, and after giving the Miranda warnings, he proceeded to interrogate him. In casu, the court described how the accused lying in bed barely conscious and encumbered by tubes, needles, and breathing apparatus during the interrogation while the detective persisted in his questioning, despite the fact that the accused requested that the interrogation stop until he could obtain the services of a lawyer. The court held that the statements obtained from the accused were inadmissible because they were obtained contrary to the due process requirement that

86 Saltzburg 463.

87 347 US 385 (1978).

statements so obtained cannot be used in any way against the accused at his trial.⁸⁸

In most cases, unlike in the Mincey v Arizona case, the police behaviour is civilized and the question is whether the courts would screen confessions as carefully in the light of the totality of the circumstances after Miranda warnings are given as they used to do before the warnings were required.⁸⁹

The second issue raised in Miranda is that no person should be deemed to confess voluntarily and intelligently unless he or she knows of the right to remain silent and the statements made can be used as evidence against him or her in court.⁹⁰ In this way, Miranda involves educating suspects about the real choice they have to make during interrogation by the police. This educational aspect of Miranda has its own problems. The court held that the very police officers about whom it was concerned must give the Miranda warnings and record the waiver by the suspects. It is not clear whether it was the purpose or intent of the

88 See Saltzburg 464 where the Mincey v Arizona case is discussed.

89 See discussion below.

90 Saltzburg 464.

framers of the fourteenth and fifteenth amendments to the American constitution that the government through its police force should educate people so that they would exercise their choice whether or not to make an incriminating statement. That the set of warnings set out in Miranda is not wholly adequate is shown by the cases discussed below.

13.5 Applying and explaining Miranda

13.5.1 Resumption of questioning

In Michigan v Mosley,⁹¹ the court considered the issue of the resumption of questioning following the exercise of the Miranda rights. In the Mosley case, the accused was arrested in connection with certain robberies. He was given the Miranda warnings and was told that he could remain silent. The accused informed the police that he did not want to discuss the robberies, and the detective refrained from questioning him further. The court found it necessary to interpret the following language from Miranda:⁹²

91 423 US 96 (1975).

92 Miranda v Arizona *supra* 473-74.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

The court held in Mosley that the sensible reading of the above language is that the accused's right to cut off questioning must be scrupulously honoured. After a two-hour interval, a homicide detective brought Mosley from the cell for questioning. He was again given the Miranda warnings. This time he waived them and made an incriminating statement. The court held that the statement was admissible.

Distinguishing the Mosley case, the court held in Edwards v Arizona³ that once a suspect has invoked his right to counsel he may not be subjected to further interrogation until counsel has been made available to him unless he himself initiates further communication,

exchanges or conversation with the police.⁹⁴ In casu, Burger CJ and Powell and Rehnquist JJ agreed with the result, but expressed concern about the seemingly *per se* aspects of the majority decision in Edwards which they found to be an unnecessary embellishment on the standard knowing and intelligent waiver rule.⁹⁵

The American supreme court has drawn a clear distinction between the assertion on the right to remain silent⁹⁶ and the assertion of the right to counsel.⁹⁷ This distinction is questionable.⁹⁸ A better view is that once a suspect asserts his right to remain silent, the police may not resume interrogation, but the suspect may change his mind and initiate re-interrogation.⁹⁹ On the other hand, it would be preferable that once the suspect has invoked his right to counsel the police may not resume interrogation, and that the suspect may change his mind without any

94 Edwards v Arizona 489; see Kamisar (1990) 511 where the Edwards case is discussed. Schrock et al "Interrogational rights: reflections on Miranda v Arizona" 1978 So.Cal.L.Rev. 33-56.

95 Edwards v Arizona supra 491.

96 See Michigan v Mosley supra.

97 See Edwards v Arizona supra.

98 See Kamisar in Choper et al The Supreme Court: Trends and Development 1982-1983 (1984) 153.

99 Kamisar in Choper et al 154.

pressure or prompting by the police and initiate re-interrogation.¹⁰⁰ Another interpretation of the Miranda language quoted above is that regardless of which right the suspect asserts, the police interrogation may resume in the presence of counsel.¹⁰¹ This view found support in a footnote to the Miranda majority decision.¹⁰² The footnote in question indicates that if a suspect asserts his right to remain silent the interrogation must cease. The footnote reads:¹⁰³

"In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements."

13.5.2 Initiation of further communication with the police

In Oregon v Bradshaw,¹⁰⁴ B was suspected of causing the death of R, a minor, by drunken driving and was arrested for furnishing liquor to R. B agreed to talk

100 Kamisar in Choper et al 154.

101 Kamisar in Choper et al 154.

102 Miranda v Arizona supra 474 n44.

103 See Miranda v Arizona supra 474 n44; for further discussion of both the Mosley and Edwards decisions see Kamisar in Choper et al 154-157.

104 462 US 1039 (1983).

to an officer about the fatal crash, but when the officer suggested that B had been behind the wheel of the truck when R died, B denied his involvement and expressed a desire to talk to a lawyer. The officers immediately terminated the conversation.

A few minutes later, B asked the officer: "Well, what is going to happen to me now?" In response, the officer said B did not have to talk to him and, because he had requested a lawyer, he did not want B to talk to him unless he decided to do so as a matter of his "own free will". B said he understood. The next day, just before he took the lie detector test, B was given another set of Miranda warnings and he signed a written waiver of his rights.

The court held in Oregon v Bradshaw that there are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the accused to open up a more generalized discussion relating directly or indirectly to the investigation.¹⁰⁵ Such inquiries or statements, by either the accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense

105 Oregon v Bradshaw *supra* 1045.

in which that word was used in Edwards.¹⁰⁶ Although ambiguous, B's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship.¹⁰⁷

13.5.3 Assertion of right to counsel

In the case of Arizona v Roberson¹⁰⁸ the American supreme court was asked to craft an exception to the Edwards rule for cases in which the police want to interrogate a suspect about an offence which is unrelated to the subject of their initial interrogation.¹⁰⁹ In this case, R was arrested at the scene of a just-completed burglary. The arresting officer advised R of his rights. R replied that he "wanted a lawyer before answering any questions". Three days after his arrest R was still in custody

106 Oregon v Bradshaw *supra* 1045.

107 Oregon v Bradshaw *supra* 1046; see Tomkovicz "Standards for invocation of waiver of counsel in confession context" 1986 Iowa L.Rev. 975 1033-34; Kamisar in Choper et al 157-161; Kamisar (1990) 518-20.

108 486 US 675 (1988).

109 See Kamisar (1990) 512-518 where the case is discussed.

when another police officer interrogated him about a different burglary. That police officer was not aware of the fact that R had requested the assistance of counsel three days earlier. The second police officer gave the Miranda warnings to R and obtained a waiver. He interrogated R and obtained an incriminating statement concerning another burglary (i.e. not the burglary for which he was in custody). The trial court suppressed the incriminating statement and the state court of appeal affirmed the suppression order.¹¹⁰

The Edwards case *supra* constitutes a corollary to the Miranda admonition that if a suspect states that he wants the assistance of a lawyer, the interrogation must cease until a lawyer is present.¹¹¹ The Miranda warnings were intended to counteract the inherently compelling pressures of custodial interrogation and to permit opportunity to exercise the privilege against self-incrimination.¹¹² The Edwards corollary states that if a suspect believes that he is not capable of undergoing custodial interrogation without the advice of counsel, any subsequent waiver that is elicited by the police, and not at the suspect's own instigation,

110 Arizona v Roberson *supra* 678.

111 Arizona v Roberson *supra* 680.

112 Arizona v Roberson *supra* 681.

is itself a product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect.¹¹³ It would appear that there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he is not supposed to be subjected to further interrogation by the authorities unless counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversation with the police.¹¹⁴

A request for counsel creates the presumption that a suspect is unable to proceed with the interrogation without a lawyer's advice.¹¹⁵ When a suspect cuts off his interrogation without requesting for counsel, such a presumption does not arise.¹¹⁶ A request for counsel implies that a suspect considers himself unable to deal with the pressures of custodial interrogation without legal assistance. This presumption does not disappear even where the police approach the suspect in custody and without counsel about a separate investigation. It is common knowledge that a suspect's

113 Arizona v Roberson *supra* 681.

114 Arizona v Roberson *supra* 682.

115 Arizona v Roberson *supra* 683.

116 Arizona v Roberson *supra* 683.

request for counsel applies to any question the police may wish to pose.¹¹⁷

In Smith v Illinois,¹¹⁸ the court held that once a suspect has clearly requested the assistance of counsel, his responses to further reading, or discussion of, the Miranda warnings may not be used to cast retrospective doubt on the clarity of the initial request itself.¹¹⁹ The Smith case arose as follows: The accused who was 18 years old was taken to an interrogation room for questioning shortly after his arrest. The Miranda warnings were read to him, and when the detective came to the part of the warnings that dealt with the right to assistance of counsel, the following occurred¹²⁰:

"Q. ... You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?

A. Uh, yeah. I'd like to do that.

Q. Okay.

117 Arizona v Roberson *supra* 684.

118 469 US 91 (1984).

119 Smith v Illinois *supra* 100.

120 Smith v Illinois *supra* 93.

Q. If you want a lawyer and you're unable to pay for one, a lawyer will be appointed to represent you free of cost, do you understand that?

A. Okay.

Q. Do you wish to talk to me at this time without a lawyer being present?

A. Yeah and no. uh. I don't know what's what, really.

Q. Well. You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.

Q. All right. I'll talk to you then."

Smith then made a statement admitting his involvement in the robbery. The state supreme court confirmed Smith's robbery conviction. The state supreme court held that Smith's statements, considered in total were ambiguous and that they did not effectively invoke his right to counsel.¹²¹ The American supreme court pointed out that Smith's initial request for counsel could be considered ambiguous only by looking at his subsequent responses to continued police questioning and that this was unacceptable.¹²²

121 Smith v Illinois supra 99.

122 Smith v Illinois supra 100; Kamisar (1990) 521.

If a suspect has not requested a lawyer but, unbeknown to him, somebody else had retained one for him, does the failure to inform him that a lawyer is trying to see him vitiate the waiver of his Miranda rights?¹²³ Or, if the police misleads the lawyer about whether his or her client will be questioned or otherwise deceive an inquiring attorney, should the confession be suppressed?¹²⁴ In Moran v Burbine¹²⁵ the accused after being informed of his rights pursuant to Miranda and after executing a series of written waivers, confessed to the murder of a young woman.¹²⁶ At no point during the course of the interrogation, which occurred prior to arraignment, did the accused request an attorney to assist him. While the accused was in custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that the accused would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The procedural problem in the Burbine case was whether either the conduct of the police or the accused's ignorance of

123 Kamisar (1990) 523.

124 Kamisar (1990) 523.

125 475 US 412 (1986).

126 Moran v Burbine *supra* 415.

the attorney's efforts to reach him tainted the validity of the waivers and therefore required the exclusion of the confessions.¹²⁷

Justice O'Connor delivered the majority decision of the court in the Burbine case. On appeal, the accused contended that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his fifth amendment rights. In the alternative, he suggested that to fully protect the fifth amendment values served by Miranda, the American supreme court should extend that decision to condemn the conduct of the police.

Miranda holds that an accused may waive effectuation of the rights conveyed in the warnings provided the waiver is made voluntarily, knowingly and intelligently.¹²⁸ This inquiry has distinct dimensions. The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.¹²⁹

27 Moran v Burbine *supra* 416.

28 Moran v Burbine *supra* 421.

29 Moran v Burbine *supra* 421-426.

Secondly, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.¹³⁰ Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.¹³¹

13.5.4 Waiver of right to counsel

In the Miranda case the court stated that the accused may waive the rights contained in the warnings only if, under all the circumstances, he waives his rights "voluntarily, knowingly and intelligibly".¹³² But unless and until the Miranda warnings and waiver are demonstrated by the prosecution at the trial, no evidence obtained as a result of interrogation can be used against him. The state shoulders a heavy burden to show the validity of the waiver.

The question is whether it is ever "intelligent" for an accused to waive his rights and proceed to make an

130 Moran v Burbine *supra* 421.

131 Moran v Burbine *supra* 421.

132 Miranda v Arizona *supra* 479.

incriminating statement to the police.¹³³ It would appear that a suspect need only understand the Miranda warnings and that he need not understand all the tactical considerations that might lead a wise accused to remain silent.¹³⁴ The important inquiry is whether or not the Miranda warnings were clearly given. The validity of a waiver is a question of fact in any particular case.

In Brewer v Williams,¹³⁵ the court acknowledged that the right to counsel could be waived and that such waiver would not inevitably necessitate participation by the accused's lawyer. The Williams case is thus consistent with prior authority that the sixth amendment right to counsel is the right of the client rather than the attorney, so that it may be waived by the client without counsel's participation.¹³⁶

13.5.5 Custodial interrogation

The Miranda safeguards were intended to counteract the

133 Saltzburg 492.

134 Saltzburg 492.

135 430 US 387 (1977).

136 LaFave Criminal Procedure (1985) 279. See Kamisar "Brewer v Williams, Massiah and Miranda: What is 'interrogation'. When does it matter?" 1978 Geo.L.J. 1.

combined effects of interrogation and custody.¹³⁷ For that reason, the meaning of the phrase "custodial interrogation" is a matter of considerable importance.¹³⁸

In the Miranda case the term "custodial interrogation" is defined as questioning initiated by law enforcement officers after a suspect (or any person) has been taken into custody or otherwise deprived of his freedom of action in any significant way.¹³⁹ This is what the court meant in Escobedo when it spoke of an investigation which had focused on an accused.¹⁴⁰

The "focus" approach was expressly rejected in Beckwith v United States.¹⁴¹

The question may be posed whether Miranda is applicable where the purpose of the custody is unrelated to the purpose of the interrogation. In Mathis v United States,¹⁴² a government agent failed to

137 Miranda v Arizona supra 479.

138 LaFave 288.

139 Miranda v Arizona supra 479.

140 LaFave 288; Miranda v Arizona supra 444.

141 425 US 341 (1976).

142 LaFave 288.

give the accused the Miranda warnings when questioning him about his prior income tax returns while the accused was incarcerated in a state jail serving a state sentence. The prosecution argued that Miranda was inapplicable because the accused had not been jailed by the interrogating government agent but was there for an entirely different crime. The court rejected that distinction as too minor and shadowy to justify a departure from the well-considered conclusion of Miranda with reference to warnings to be given to a person held in custody.¹⁴³ The three dissenting justices rejected the majority:¹⁴⁴

"Miranda rested not on the mere fact of physical restriction but on a conclusion that coercion - pressure to answer questions - usually follows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings.... The rationale of Miranda has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect."

The Mathis case makes it clear that Miranda applies to interrogation of a suspect in custody for another

143 LaFave 288.

144 Quotation from Lafave 289, original report not available to me.

purpose or with respect to another purpose.¹⁴⁵ Another fundamental question concerning the Miranda "custody" element is whether it is to be determined by some subjective factor. Is it sufficient that the suspect in fact believed that he was in custody or that the police intended to put him into custody? The other question is whether the objective test of a reasonable man governs the situation. The courts appear to have utilized a subjective approach focusing upon the state of mind of the suspect, under which an accused would be in custody for Miranda purposes if he believed he was in custody.¹⁴⁶ This approach relates directly to the potentiality for compulsion with which the American supreme court was concerned in Miranda.¹⁴⁷ Lafave argues that if the combination of custody and questioning is sufficiently coercive to call for warnings, then certainly the situation is no less coercive as to the accused who actually but erroneously believes he is in custody.¹⁴⁸

145 LaFave 289.

146 Orozco v Texas 394 US 324 (1969); Oregon v Mathiason 429 US 492 (1977); LaFave 289.

147 LaFave 289.

148 LaFave 289.

13.5.6 The term "interrogation" within the meaning of Miranda

The question may be asked as to what is encompassed within the "interrogation" part of Miranda's "custodial interrogation" term.¹⁴⁹ This has caused the American courts considerable difficulty. Before the Rhode Island v Innis¹⁵⁰ case, there were two views on what the term "interrogation" means. The one view which finds support in Miranda's court explanation that "we mean questioning initiated by law enforcement officers" is that nothing but the asking of questions will bring a case within the constraints of Miranda.¹⁵¹

The other view, which is also consistent with the observation in Miranda, is that the suspect is placed "into police custody" and then subjected to "techniques of persuasion" which together produce the "compulsion to speak".¹⁵² The American supreme court finally resolved the issue of what the term "interrogation" means in the Innis case.

149 See LaFave 294-301.

150 446 US 291 (1980).

151 LaFave 294.

152 LaFave 294.

In Miranda the court held that once a suspect in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The procedural problem in Rhode Island v Innis (hereinafter referred to as Innis case) was whether the accused was "interrogated" in violation of Miranda. The Innis case arose from the following facts: The accused was arrested for robbery with a sawed-off shotgun and promptly given his Miranda warnings, at which he said he wished to speak with a lawyer. The accused was placed in a police vehicle. Three policemen were assigned to accompany the arrestee. While en route to the central police station, the officers conversed among themselves about the desirability of finding the shotgun because there was a school for handicapped children in the vicinity. The accused interrupted the conversation, stating that he would show the policemen where the gun was located. The police vehicle then returned to the scene of the accused's arrest where a search for the shotgun was in progress. Accused was again given his Miranda warning. He replied that he understood; and said he "wanted to get the gun out of the way because of the kids in the area in the school". The accused led the police to a nearby field, where he pointed out the shotgun under some rocks.

The accused was convicted of murder. The trial judge admitted the shotgun and the testimony related to its

discovery. On appeal, the Rhode Island supreme court concluded that the police had "interrogated" the accused without a valid waiver of his right to counsel; the conversation in the police vehicle had constituted "subtle coercion" that was the equivalent of Miranda "interrogation".¹⁵³

On a further appeal to the American supreme court, Stewart J, who delivered the majority decision of the court, pointed out that although various references to Miranda opinion to questions might suggest that the Miranda rules were to apply only to those police interrogation practices that involve express questioning of the accused in custody, he did not construe the Miranda opinion so narrowly.¹⁵⁴ The concern of the court in Miranda was the "interrogation environment" created by the interplay of interrogation and custody that would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination.¹⁵⁵

In casu, Stewart J held that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its

153 Rhode Island v Innis supra 296.

154 Rhode Island v Innis supra 298.

155 Rhode Island v Innis supra 299.

functional equivalent.¹⁵⁶ In other words, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police, (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.¹⁵⁷

In the case of South Dakota v Neville,¹⁵⁸ the court recalled that the Innis case had excluded "police words or actions 'normally attendant to arrest and custody'" from the definition of "interrogation". In the Neville case, the police inquiry was highly regulated by state law, and was presented in virtually the same words to all suspects.¹⁵⁹

The dissenting opinion in the Innis case defined any statement that would normally be understood by the average listener as calling for a response as the functional equivalent of a direct question, whether or

156 Rhode Island v Innis *supra* 301.

157 Rhode Island v Innis *supra* 301.

158 459 US 553 (1983).

159 Kamisar (1990) 489 n(a).

not it is punctuated by a question mark.¹⁶⁰

The major impact of the Innis case is with respect to conduct other than express questioning.¹⁶¹ Prior to the Innis case, there was a split authority as to what the outcome should be when the police engaged in such tactics as confronting the accused with physical evidence, with an accusing accomplice, or with the confession of an accomplice. The Innis case characterizes such tactics as "interrogation".

13.6 Exceptions to the Miranda's prophylactic standards

13.6.1 Admissibility of the testimony of a witness whose identity was learned in violation of the Miranda rules

Michigan v Tucker¹⁶² is a case decided in 1974. It is an important decision in that the supreme court had occasion to interpret the Miranda warning. The facts of that case were briefly as follows: A woman was found in her home by her friend and co-worker W. The

160 Rhode Island v Innis supra 309; see Kamisar in Choper *et al* The Supreme Court: Trends and Development Vol 5 (1982-1983 where the Innis case is discussed; Grano "Rhode Island v Innis: a need to reconsider the constitutional premise underlying the law of confessions" 1979 Am.Crim.L.Rev. 1 42-51.

161 LaFave 299.

162 417 US 433 (1974).

latter knew that she did not own a dog. That woman had been tied, gagged, partially disrobed and had been severely beaten and raped. While W was trying to find medical help for her friend and to call the police, she saw a dog inside the house. When the police arrived, they observed the dog. The victim's neighbours connected the dog with Tucker and the dog was followed until it reached Tucker's house. Tucker was arrested and brought to the police station for questioning. Prior to the questioning, Tucker informed the police that he knew the crime for which he was arrested, that he did not want an attorney and that he understood his constitutional rights. However, the police did not advise him that he would be furnished with counsel free of charge if he could not pay for those services himself.

The procedural problem in Michigan v Tucker concerned the admissibility of the testimony of a witness whose identity had been discovered by questioning Tucker without giving the latter the full Miranda warnings. Seeing that Miranda was applicable to the case, Tucker's own statement was excluded but the testimony of the witness was not. The court per Rehnquist J (as he then was) held that the Miranda warnings were not themselves rights protected by the constitution but only prophylactic standards designed to safeguard or to provide practical reinforcement for the privilege

against self-incrimination.¹⁶³ The court regarded the Miranda warning as merely a series of recommended procedural safeguards which were not intended to create a constitutional "strait-jacket".

The judge was correct in expressing this view because Warren C J in Miranda expressly stated that "unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it" the Miranda warnings are required.¹⁶⁴ What is not correct in Michigan v Tucker is the holding of the court where it departed from the Miranda rule where there were no alternative safeguards. Be that as it may, the opinion in the Tucker's case is law. It weakens Miranda somewhat but does not overrule it. This was an important deviation from Miranda because in American confessions law, evidence or facts discovered as a result of an inadmissible confession are not admissible in evidence because they are regarded as "fruits of a poisonous tree".¹⁶⁵

163 Michigan v Tucker *supra* 444; see Kamisar, LaFave and Israel Modern Criminal Procedure 7ed (1990) 470.

164 See Miranda v Arizona *supra* 444.

165 See Kamisar, LaFave and Israel 763-73.

13.6.2 The public safety exception to the Miranda warnings

A decade after the Tucker case, the supreme court decided the case of New York v Quarles.¹⁶⁶ In that case, two policemen were on road patrol when a woman approached their car. She told them that she had just been raped by a man who was carrying a gun and who had just entered a supermarket located near that vicinity. The police immediately drove the woman to the supermarket and radioed for assistance. One officer spotted a man who matched the description given by the woman and pursued him with a gun. Ultimately, the officer ordered the man to stop and put his hands over his head. The officer discovered that the man was wearing an empty shoulder holster. He handcuffed the man, and without giving him the Miranda warning, asked him where the gun was. The man, who is the accused in this case, nodded in the direction of some empty cartons and responded "the gun is over there".¹⁶⁷ The officer retrieved a loaded 38-calibre revolver from one of the cartons, formally placed Quarles under arrest, and then read him the Miranda warning from a printed card. The accused indicated willingness to answer questions without an attorney present. He informed the officer that he bought the gun from Miami.

166 New York v Quarles 467 US 649 (1984).

167 New York v Quarles *supra* 652.

In his trial, the court excluded the statement "the gun is over there". The gun as well as the place of purchase as evidence were tainted by prior Miranda violation.¹⁶⁸ Rehnquist J writing for the majority referred with approval to the Tucker¹⁶⁹ case and held that there was a public safety exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence;¹⁷⁰ and that the availability of that exception did not depend upon the motivation of the individual officers involved. The court took the view that a situation posing a threat to the public safety outweighs the need for the need for the prophylactic rule protecting the fifth amendment's privilege against self-incrimination.¹⁷¹ In casu, the judge was prepared to decline to place a policeman in an untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings. In other words, the court created a public safety exception irrespective of the motivation of the individual officers in a given situation.

168 New York v Quarles *supra* 652-753.

169 Michigan v Tucker *supra* 444.

170 New York v Quarles *supra* 655.

171 New York v Quarles *supra* 663.

O'Connor J (concurring in the judgment and dissenting in part) stated that in her view, a public safety exception unnecessarily blurs the edges of the clear line heretofore established and that it made Miranda's warnings more difficult to understand.¹⁷² That created a loophole and a potential benefit for the police where a reviewing court finds that an exigency excused their failure to administer the required warnings. On the other hand, a reviewing court may view the objective circumstances differently and require exclusion of admissions obtained in that manner. The major flaw in the majority decision was that when it fashioned its "public safety" exception to Miranda it made no attempt to deal with the constitutional guarantee against self-incrimination as established in that case.¹⁷³ Moreover, the majority decision does not clearly indicate that police questioning about issues of public safety is any less coercive than custodial interrogations into other matters, the dissent continued. As Miranda was not a decision about public safety, the issue was whether interrogations concerning the public's safety are any less coercive than custodial interrogations. Unless that has been

172 New York v Quarles *supra* 663.

173 See New York v Quarles *supra* 684, the opinion of Marshall J dissenting.

clearly established, it is not logical to endorse the "public-safety exception".

Although the argument in the minority decision appears to be persuasive and convincing, the law is that there is a "public safety" exception to Miranda.

13.6.3 Fruit of a poisonous tree

In Oregon v Elstad¹⁷⁴ the supreme court clarified the Miranda rule. The facts were as follows: the home of a certain G was broken into. Art objects and furnishings valued at one hundred and fifty thousand dollars were missing. A witness to the burglary contacted the police and implicated Michael Elstad, who was later arrested. The police officer told Elstad that he was involved, and prior to any warning Elstad stated, "Yes, I was there." Elstad was transported to the police headquarters where he was advised of his Miranda rights, read from a standard card. Elstad, hereinafter referred to as accused, waived his Miranda rights and made a full statement incriminating himself. At his trial for first-degree burglary, accused was represented by counsel. Accused moved at once to suppress his oral statement "Yes, I was there"

174 Oregon v Elstad 470 US 298 (1984).

and his written confession.¹⁷⁵ The defence argued that his response to questioning prior to the warning "let the cat out of the bag"¹⁷⁶ and tainted the subsequent confession as "fruit of the poisonous tree".¹⁷⁷ O'Connor J writing for the majority, stated that the accused's contention that his confession was tainted by earlier failure of the police to provide the Miranda warnings and must be excluded as the "fruit of poisonous tree" assumed the existence of a constitutional violation.¹⁷⁸

The fruits-of-a-poisonous-tree doctrine finds application where a specific clause of the constitution is violated.¹⁷⁹ The procedural problem which faced the court in the Elstad case was the effect of failure to give the Miranda warning. In casu, it was stated that a Miranda violation differs in significant respects from a violation of the fourteenth amendment due process clause which has traditionally mandated a broad application of the

175 Oregon v Elstad *supra* 302.

176 See United States v Bayer 331 US 532 (1947).

177 See Wong Sun v United States 371 US 471 (1963).

178 Oregon v Elstad *supra* 305.

179 Oregon v Elstad *supra* 306.

"fruits" doctrine.¹⁸⁰ The Miranda court itself recognised this point when it disclaimed any intent to create a "constitutional strait-jacket" and invited congress and the states to suggest potential alternatives for protecting the privileges against self-incrimination.¹⁸¹ It is for that reason that a Miranda violation does not have a status of a constitutional rule.¹⁸² A violation of the Miranda rule creates an irrebuttable presumption of coercion but does not require that the statements and their fruits be discarded as inherently tainted.¹⁸³ Here the argument concerned the "fruit" of an inadmissible statement in violation of Miranda. An inadmissible statement can be used for impeachment purposes on cross-examination.¹⁸⁴ This means that a statement which is inadmissible on the authority of the Miranda rule can be used to impugn the credibility of witnesses.

O'Connor J stated that the Miranda rule applies only to the accused's own testimony and does not extend to a "fruit" in the form of an article or a witness whose

180 Oregon v Elstad *supra* 306.

181 Miranda v Arizona *supra* 467.

182 Oregon v Elstad *supra* 307.

183 Oregon v Elstad *supra* 307.

184 See Harris v New York 410 US 222 (1971).

identity has been discovered as a result of the violation of the Miranda rights.¹⁸⁵ The court held:

"If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."¹⁸⁶

13.7 Evaluation

The purpose of the Miranda prophylactic rules is to safeguard the privilege against self-incrimination, and thus must be followed in the absence of other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.¹⁸⁷ The Miranda rules are not constitutional rules and their violation does not have the same consequences as a violation of a constitutional rule.

185 Oregon v Elstad *supra* 308; see Michigan v Tucker *supra* 210.

186 Oregon v Elstad *supra* 309.

187 LaFave 284.

The Miranda rules apply when the suspect is first subjected to police interrogation while in custody at the police station or otherwise deprived of his freedom of action in any significant way. The Miranda rules do not apply to a general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process or to volunteered statements of any kind.

Without regard to his prior awareness of his rights, if a suspect in custody is to be subjected to questioning, "he must first be informed in clear and unequivocal terms that he has the right to remain silent" so that the ignorant may learn of his right and so that the pressures of interrogation atmosphere will be overcome for those previously aware of the rights.¹⁸⁸ This warning must be accompanied by the explanation that anything said can and will be used against the suspect in court, so as to ensure that the suspect fully understands the consequences of foregoing the privilege.¹⁸⁹

Because the Miranda warnings are indispensable to the protection of the privilege against self-

188 LaFave 284; Miranda v Arizona *supra* 467-68.

189 Miranda v Arizona *supra* 469.

incrimination, the suspect also "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation", without regard to whether it appears he is already aware of this right.¹⁹⁰

Lastly, the suspect must also be warned "that if he is indigent a lawyer will be appointed to represent him", for otherwise the above warning would be understood as meaning only that an individual may consult a lawyer if he has the funds to obtain one.¹⁹¹ The suspect is always free to exercise the privilege against self-incrimination, and thus if he "indicates in any manner, at anytime prior to or during questioning, that he wishes to remain silent, the interrogation must cease", and likewise if he "states that he wants an attorney, the interrogation must cease until an attorney is present."¹⁹²

If a confession or any other statement is obtained from a suspect without the presence of an attorney, "a heavy burden rests on the Government to demonstrate that the [accused] knowingly and intelligently waived

190 Miranda v Arizona *supra* 471-72; LaFave 284-5.

191 Miranda v Arizona *supra* 473.

192 Miranda v Arizona *supra* 474.

his privilege against self-incrimination and his right to retain or appoint counsel", and such waiver may not be presumed from the suspect's silence after the warnings or from the fact that a confession was eventually obtained.¹⁹³

Any confession or statement obtained in violation of the Miranda rules may not be admitted into evidence, without regard to whether it is inculpatory or allegedly exculpatory. Warren CJ pointed out in the Miranda case that the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In those circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influences of the interrogation finally forced him to do so.¹⁹⁴

193 Miranda v Arizona *supra* 475; see Escobedo v Illinois *supra* 490 n.14; Johnson v Zerbst 304 US 458 (1938).

194 Miranda v Arizona *supra* 476.

SECTION IV

CONCLUSION

CHAPTER FOURTEEN

FINDINGS AND RECOMMENDATIONS

14.1 Introduction

There are many reported decisions on the admissibility of confessions. The reason for that is that our courts interpreted section 217 of the Criminal Procedure Act in the light of their previous decisions and our common law. The prerequisites for the admissibility of confessions evoked such a wealth of comment by our courts and legal writers that a study of this nature is justified.

It has been deemed necessary to include two chapters on American law of confessions. The reason for this is that the American constitution has a Bill of Rights which is enforceable by the American courts. The new constitution of South Africa has incorporated a Bill of Rights.¹ This was to be expected since the government also received a proposed Bill of Rights prepared by the South African Law Commission. When one studies the proposed Bill of Rights, it is clear that it will

1 See Chapter 3 of the Constitution of the Republic of South African Act of 1993 (sections 7-35).

have an impact on the methods used by the police when interrogating suspects as well as on the admissibility of confessions in our criminal courts.

It has necessary therefore, to make an extensive study of a legal system that has a Bill of Rights to enable our courts and the legal writers to provide possible scenarios for the future development of our law of confessions.

In America, the state and federal criminal procedure has been constitutionalized to a significant extent because of three important developments:²

- (a) the addition of a Bill of Rights to the federal constitution;
- (b) the modern incorporation of most of those rights into the fourteenth amendment due process clause, so that they are likewise applicable in state criminal procedure; and
- (c) a more expansive interpretation of those rights over the years by the United States supreme court.

2 See LaFave "Introduction" in Levy et al Criminal Justice and the Supreme Court (1990) xi.

14.2 The need for confessions

Confessions remain a proper element in law enforcement.³ Our system of criminal justice demands that those who are guilty be convicted and those who are innocent acquitted. To this end, confessions may play an important role in some convictions. Our predominantly accusatorial system of criminal procedure demands that the prosecution seeking to punish a suspect must produce evidence against him or her by its own independent labours, rather than by the cruel, simple expedient of compelling it from his or her own mouth.⁴

A study of our case law indicates that some criminal cases, even when investigated by the best qualified policemen, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.⁵

3 Miranda v Arizona 384 US 436 (1966) 478.

4 Miranda v Arizona *supra* 460.

5 S v Christie 1982 1 SA 464 (A); Ismail (1) 1965 1 SA 446 (N); Rossouw v Sachs 1964 2 SA 551 (A); Hlekani 1964 4 SA 429 (O); Moumbaris 1973 3 SA 109 (T); Hassim 1973 3 SA 443 (A); Mpetha(2) 1983 1 SA 576 (C); Culombe v Connecticut 367 US 568 (1961); LaFave Criminal Procedure (1985) 261; Inbau "Police interrogation - a practical necessity" 1961 J.Crim. L.C. & P.S. 16 17-19; Sowle (ed) Police Power and Individual Freedom (1962) 147.

14.3 Problem of admissibility of confessions

The procedural problem in every criminal case involving a confession is whether that confession is admissible. To be admissible in evidence, the prerequisites set out in section 217 of the Criminal Procedure Act⁶ must be satisfied. Although this is a problem relating to criminal procedure, it is also a problem relating to admissibility of evidence. The admissibility of confessions is discussed under both the law of criminal procedure and the law of evidence.⁷

In terms of the Criminal Procedure Act the problems of admissibility of a confession is resolved if the following requirements are met:

- (a) proof that the confession was freely and voluntarily made;

6 Act 51 of 1977.

7 See Hiemstra Suid-Afrikaanse Strafproses (1987) 4ed 480-498; Van der Merwe Evidence (1983) 242-266; Hoffmann and Zeffertt The South African Law of Evidence (1988) 4ed 207-235; Schmidt Bewysreg (1989) 3ed 495-515; Du Toit Commentary on the Criminal Procedure Act (1991) 24-51 to 24-70A; LaFave 260-319; Kamisar Modern Criminal Procedure (1990) 7ed 412-595; Cleary McCormick on Evidence (1984) 3ed 361-443.

- (b) proof that the confessor was in his sound and sober senses at the time of making the confession; and
- (c) proof that the confessor was not unduly influenced to make the confession.

A confession made to a policeman who is not a commissioned officer is inadmissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice of the peace.

14.4 Findings and Recommendations

14.4.1 Definition of a confession

This inquiry leads to the conclusion that a confession be defined as an out-of-court statement by a suspect in which he voluntarily, knowingly and intelligently admits that he committed or participated in the commission of a crime and that he had no defence in law that would make his conduct lawful. This is what the court meant in the Becker^s case when it said that a confession must be defined as an unequivocal acknowledgement of guilt.

A confession in American law is defined as a voluntary statement by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offence charged.

Once a statement meets the definition of confession, then section 217 of the Criminal Procedure Act⁹ becomes applicable if it is tendered into evidence in a criminal court. These are stringent requirements.

An admission, on the other hand, may be defined as an informal utterance of an accused which is adverse to him and which was made outside the court.¹⁰

An admission is a statement or conduct which falls short of a confession and the admissibility thereof is not so strictly controlled as in the case of a confession.¹¹ A formal admission may be made in court as it is not dealt with in this inquiry.

Although confessions, admissions and exculpatory statements of accused persons differ in their definitions, it is desirable that the prerequisites

9 Act 51 of 1977.
10 Hiemstra Introduction to the Law of Criminal Procedure led (1977) 129.
11 Hiemstra (1977) 129.

for their admissibility into evidence should be the same. Once this is achieved, the difference in definition of these extra-curial statements would be of academic importance only. The American supreme court held that when applying the prophylactic rules enunciated in the Miranda case no distinction be drawn between statements which are direct confessions and statements which amount to admissions of part or all of an offence.¹² Similarly, no distinction may be drawn between inculpatory statements and statements alleged to be "exculpatory".¹³ The reason for this is that the privilege against self-incrimination protects an individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. The reason why statements which are intended to be exculpatory by an accused are covered in the Miranda rules is because they are often used to impeach the accused's testimony at his trial or to demonstrate untruths in the statement given under interrogation and assist the prosecution to prove guilt by implication. Warren CJ held in Miranda that exculpatory statements are incriminating in any meaningful sense of the word and that they may not be

12 Miranda v Arizona *supra* 476.

13 Miranda v Arizona *supra* 477.

used without the full warnings and effective waiver required for any other statement."¹⁴

In our law, the admissibility of an exculpatory statement needs to be governed by the same prerequisites as confessions and admission. The reasons for this are that such statements are often made to deny guilt but may operate to prove guilt at an accused's trial. They may be used to impeach the accused. For similar reason, in Escobedo the accused fully intended his accusation of another as the slayer to be exculpatory as to himself when he said, "I didn't shoot Manuel, you did".¹⁵

14.4.2 The use of physical or psychological torture as a method for obtaining confessions

The views of Roman-Dutch writers on the use of physical torture in the administration of justice were divided. Some supported the use of torture and some were opposed to it.¹⁶ This inquiry has also shown that

14 Miranda v Arizona *supra* 477.

15 Escobedo v Illinois 378 US 478 (1964) 483.

16 The Roman-Dutch writers who supported the use of torture were Wielant, Van der Keessel, Johannes Voet, Ulric Huber and Simon van Leeuwen, Willem Schorer and Jan Samuel Almary were opposed to the use of torture.

during the period 1652 - 1795 torture was used in South Africa in order to extract confessions.¹⁷ In terms of the Octrooi, the Dutch East India Company was empowered to administer law and order in the Cape. Where a death penalty was a competent sentence, the accused had to make a confession. To force him to do this, he was subjected to torture. Although the methods of torture were not uniform, they did have at least one thing in common, namely that the pain caused by the act of torture must have been excruciating. Other methods of torture included placing the accused in a special dark room and at the same time subjecting him to a minimal diet of bread and water. A period of six weeks' incarceration in the dark room, had such a depressing effect that the accused would be prepared to confess his guilt to virtually any charge.¹⁸

Physical torture was abolished in South Africa in 1795 when the British took over the administration of the Cape. It is clear from the study of American law of confessions that when physical torture is abolished, the police resort to some other forms of persuasion

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- 17 See Hahlo and Kahn The Union of South Africa: The Development of its Laws and Constitution (1960) 10-11; Rudolph 205-6.
- 18 Rudolph 205; Venter Die Geskiedenis van die Afrikaanse Gevangenisstelsel 1699-1732 (1959) 9.

such as threats, detention without warrants or psychological pressures that are meant to disorientate a suspect until he is brought to a state where he can confess to virtually any charge. When physical torture was abolished in 1795 the police were not given a guideline in the form of a parliamentary enactment which would regulate the relationship between the police and suspects during police interrogation. It is a finding based on this inquiry, therefore, that although physical torture as a means to obtain confessions was abolished, there was an omission to abolish psychological torture or to ensure that any confession which is a product of a previously untoward conduct but later recorded by a magistrate or a justice of the peace is inadmissible per se.¹⁹ This could have been done by adopting a Bill of Rights to govern the admissibility of confessions, admissions and exculpatory statements.

In terms of our new constitution, no person shall be subject to torture of any kind, whether physical, mental or emotional.²⁰ This is an effective way of

19 See findings infra on the recording of confessions by magistrates.

20 Section 11(2) of the Constitution of the Republic of South Africa Act of 1993.

abolishing torture. Moreover, it gives any person a fundamental right not to be subjected to any conduct or omission which may constitute torture of any kind.

When a suspect is detained in terms of section 29 of the Internal Security Act,²¹ the purpose is to obtain information or evidence (or both) from him.²² The purpose of a detention under section 29 of the Security Act is to enable the police to exercise absolute power of interrogation over a detainee. A section 29 detainee is held incommunicado and may be released on order by the Commissioner of Police after a period of ten days has expired.²³ It is clear from the foregoing that the pressures exerted on a detainee under Section 29 of the Internal Security Act may have the same consequences as physical torture. This is the type of torture which is not physical, but may be both mental and psychological. It is impossible to detain a person in terms of section 29 of the Internal Security Act without violating the Bill of Rights enshrined in the new constitution at the same time. A detention of any person for questioning is therefore unconstitutional.

21 Act 74 of 1982.

22 See Mathews Freedom, State Security and the Rule of Law (1986) 79.

23 Section 29(1) of the Internal Security Act 74 of 1982.

The Negotiation Forum at the World Trade Centre has resolved that section 29 of the Internal Security Act be abolished. This is supported. It must be clearly understood that it is only detention for purposes of interrogation which is abolished. Police interrogation per se is not abolished. It must be done in such a way that the provisions of our constitution are not contravened.

14.4.3 A trial within a trial

The trial within a trial is an important tool used by the court to ensure that the evidence and argument relating to the admissibility of a confession is dealt with separately from the main trial. It is a procedure which is used in our courts to determine whether a confession is admissible in evidence or not. Since our constitution has incorporated a Bill of rights, this procedure will be used to determine whether a confession which is sought to be used against an accused or accused persons was obtained with due regard to the provisions of our constitution.

14.4.3.1 Cross-examination of accused on the contents of a confession: an unrepresented accused should be warned

It is recommended that the general rule that an accused is not cross-examined on the contents of his

alleged confession be retained.²⁴ Moreover, where an accused alleges either in his or her evidence or during cross-examination of witnesses that the contents of his or her confession are false or that he or she was told by the police what to say, that he or she should be warned that he or she is thereby making themselves available for cross-examination by the prosecution. If the accused does not understand what cross-examination means, the trial court should explain it until he understands. Where the trial court is satisfied that the accused does not understand what cross-examination means, the accused should be advised to obtain the services of an attorney at his expense, if he can afford it, or at the expense of the state if he is indigent. The reason for this is to ensure that justice is available to both the rich and the poor. Legal representation should be assured. An ordinary man in the street may find it difficult to understand what is expected of him during a trial within a trial unless he is informed of his rights.

Legal representation should be provided where an accused would otherwise suffer substantial injustice.²⁵

24 See Hiemstra 491-92; Schmidt 350; Du Toit et al 24-62A to 24-64; see the discussion in chapter 3 supra.

25 Section 25(3)(e) of the Constitution of Republic of South Africa Act of 1993.

This would be the case where an accused is unable to challenge the admissibility of a confession or where he or she does not understand the consequences of admission or a confession into evidence.

14.4.3.2 Preliminary questioning by magistrate/justice of the peace prior to recording of a confession to be explained in court under oath

To simplify issues further, it is in the interest of justice that an accused be given an opportunity to explain in a trial within a trial the reason why he decided to make his confession. His "YES" and "NO" replies to leading questions put to him or her during the recording of his or her confession should be reviewed in the light of his later explanation under oath in court. The procedure must be such that an accused's replies to preliminary questions be given less weight or excluded where the accused gives cogent reasons why his explanation in court should be believed. It is recommended that an accused be given the services of an attorney or advocate where he challenges the admissibility of a confession to a crime that may justify a term of imprisonment without an option of a fine. The reason for this is that our new constitution provides that legal representation is a fundamental right where substantial injustice would

otherwise result if it is not provided. An indigent accused must be given a legal representative at the expense of the state. Justice must not only be done when deciding on the admissibility of a confession to serious crimes, but must also be seen to be done.²⁶ This inquiry has led to the finding that the question whether or not a confession is admissible in evidence depends on the description of events that led to the recording of that confession.

14.4.3.3 Holding of a trial within a trial in all cases where a confession is to be tendered into evidence

A trial within a trial is held only when an accused challenges the admissibility of a confession or admission. It is recommended that a trial within a trial be held in all cases and to invite both the state and the accused to give evidence. This would help accused who do not have legal representation to use this procedure even though they are not aware of it. The holding of a trial within a trial is necessary to determine whether the fundamental rights of an accused enshrined in the Bill of Rights are respected. An accused person has a right not to be compelled to make a confession or admission.²⁷

26 See Steytler 1.

27 Section 25(2)(c) of the Constitution of the Republic of South Africa Act of 1993.

It is common knowledge that both the state and an accused are free to lead any admissible evidence during a trial within a trial. It is recommended that trial courts should invite the state and an accused to lead evidence on issues mentioned in the following paragraphs in a trial within a trial.

14.4.3.4 Police interrogation: evidence of a psychologist and proposed reform to police interrogation procedures

Both the state and an accused should lead evidence on the treatment the accused has received from the police who interrogated him. This would enable the court to have a background of what happened behind the scenes before the accused appeared before a magistrate for purposes of making a confession.

The problem with police interrogation is that it takes place in privacy and mainly in police stations. Compulsion is inherent in custodial surroundings such as a police station.²⁸ Warren CJ pointed out in Miranda v Arizona that the modern practice of in-custody interrogation is psychologically rather than physically oriented.²⁹ It is common knowledge that

28 Miranda v Arizona *supra* 458.

29 Miranda v Arizona *supra* 448.

coercion can be mental as well as physical.³⁰ The fact that police interrogation takes place in privacy in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.³¹ For that reason, it is necessary that, if an accused is charged with a serious crime, and if he has made a confession, evidence of a psychologist who has been nominated by an accused should be led in a trial within a trial. The purpose of such evidence is to describe to a trial court the impact of custodial interrogation on a suspect who made a confession after police interrogation. If the crime is not serious it is not necessary to lead such evidence. To level the playing field, the state should be allowed to lead evidence of a psychologist of its choice in rebuttal of the evidence led by an accused in this regard. If the police know that their treatment of suspects would be subjected to scrutiny by psychologists, they are likely to treat suspects well. Apart from the police treatment of suspects, the impact of the custodial surroundings to a suspect detained in police cells needs to be investigated before a court makes a finding on the question whether he acted freely and voluntarily when

30 Blackburn v Alabama 361 US 199 (1960) 206.

31 See Miranda v Arizona *supra* 448.

he decided to make a confession. The privacy of police interrogation creates an atmosphere where a suspect may be influenced to make a confession where he would otherwise not do so.

The South African Law Commission has recommended in its proposed Bill of Rights³² that everyone has the fundamental right to his or her personal liberty and security. This recommendation is supported.

According to the Law Commission's proposal, the right to personal liberty and security may be lost only in terms of a prescribed procedure generally in force which ensures that the individual's fundamental right to his or her mental and physical integrity is not denied.³³ The grounds on which an individual may lose his or her personal liberty do not include detention for purposes of interrogation.³⁴ It would appear that the Law Commission was aware of the criticisms levelled at custodial police interrogation.

32 Article 5 of the Bill of Rights proposed by the South African Law Commission.

33 Article 5 of the Bill of Rights proposed by the South African Law Commission.

34 See article 5(a) - (e) of the Bill of Rights proposed by the South African Law Commission.

In terms of our new constitution, every person who is detained shall have the right, inter alia, to be detained under conditions consonant with human dignity.³⁵ A detainee enjoys the rights enumerated below.³⁶

- (a) A right to be provided with adequate nutrition, reading material and medical treatment at state expense.
- (b) A right to consult with a legal practitioner of his or her choice, and where the detainee is indigent and substantial injustice would otherwise result, has a right to be provided with the services of a legal practitioner by the state.
- (c) A right to communicate with and to be visited by, his or her spouse, next-of-kin, religious counsellor and medical practitioner of his or her choice.

35 Section 25(1)(b) of the Constitution of the Republic of South Africa Act of 1993.

36 Section 25(1) of the Constitution of the Republic of South Africa Act of 1993.

- (d) A right to challenge the lawfulness of his or her detention in person before a court of law and to be released if such detention is unlawful.

The fundamental rights of a detainee enumerated above go a long way towards eliminating psychological and mental torture.

It is recommended that police interrogation be reformed in such a way that no one, whether suspected of committing high treason or the statutory crime of subversion, shall be subjected to mental or physical torture, assault or inhuman or degrading treatment.³⁷ There are several ways of achieving this. In the first place, a guide for police interrogation may be introduced. In this guide a clear procedure whereby a suspect may be subjected to police questioning may be set out. For example, the police guide on police interrogation may include the following:

- (i) A provision that no police officer is allowed to obtain answers to questions or to elicit a statement from a suspect by the use of mental or psychological torture, inhuman or degrading

37 See article 4(b) of the Bill of Rights proposed by the South African Law Commission.

treatment, and the use or threat of violence (whether or not amounting to torture).³⁸

- (ii) Keeping of police interview records which are open to inspection by the interviewee, his or her legal representative and any member of the public who may prove that he or she has an interest in the case.
- (iii) The procedure for police interrogation of suspects may be reformed by the proposed guide to include the following:

In a period of twenty-four hours, a suspect who is in police custody be allowed a continuous period of at least eight hours for rest, free from interrogation, travel or interruption arising out of the investigation concerned.³⁹

The period of rest should preferably be at night. The proposed guide may also provide that breaks must be made from interrogation at

38 See section 76(8) of the English Police and Criminal Evidence Act 1984.

39 See paragraph 12.2 of the code of practice for the police in English law.

recognised meal times. Moreover, the proposed guide should provide that short breaks for refreshment be provided at intervals of approximately two hours. Lastly, the proposed guide should provide that the person being interrogated is not required to stand during the interrogation. At the conclusion of the interrogation, the interviewee has a right to read the interview record and sign it or to indicate the respects he considers it to be inaccurate.

Although a police interrogation guide as described above will not forestall all untoward conduct by the police during interrogation, it would go a long way towards curbing the inherent compulsion created by in-custody police interrogation.

A Bill of Rights provides potential protection against detention without trial. Our new constitution⁴⁰ provides that every person shall have a right not to be detained without trial, and that no person shall be subjected to torture of any kind, whether physical or mental. The Bill of Rights provides a second method of reforming police interrogation.

40 See section 11(1) and (2) of the Constitution of the Republic of South Africa Act of 1993.

Although our new constitution appears to prohibit any form of detention for purposes of interrogation, it is necessary that some form of police interrogation be allowed to enable the police to investigate crime. It would appear that the police must prove "reasonable suspicion" before any person may be interrogated. Moreover, an accused person shall have a fundamental right to remain silent and to refuse to testify at the trial." This means that the police would have to rely more on evidence independently obtained other than admissions or confessions by suspects.

14.4.4 Recording/minuting of a confession

14.4.4.1 Who should be charged with the duty of recording a confession?

In terms of section 217 of the Criminal Procedure Act⁴² a confession may be recorded either by a magistrate or a justice of the peace. There is a controversy about the admissibility of confessions recorded by police officers in their capacity as *ex officio* justices of

41 See section 11(1) and (2) of the Constitution of the Republic of South Africa Act of 1993.

42 Act 51 of 1977.

the peace.⁴³ In the light of the criticisms levelled at the recording of confessions by police officers who are justices of the peace, it is recommended that no confession be reduced to writing by such officers.⁴⁴

The criticism that may be levelled at magistrates who record confessions is that an unsophisticated accused may not understand the difference between the role of a magistrate in court when trying a case and the role of a magistrate in chambers when recording a confession.

Although a suspect who is brought to a magistrate is given a preliminary warning, such a warning is wanting. The magistrate acts independently and impartially but a warning such as the one quoted below is not adequate. The warning reads:

43 See Selebano 1957 1 SA 384 (O); Mahlala 1967 2 SA 401 (W); Dhlamini 1971 1 SA 807 (A); Mdluli 1972 2 SA 839 (A); Khoza 1984 1 SA 57 (A); Mazibuko 1978 4 SA 563 (A); Mogale 1980 1 SA 457 (T); Mbele 1981 2 SA 738 (A); Mbatha 1987 2 SA 272 (A); Mavela 1990 1 SACR 582 (A); Maluma 1990 1 SACR 65 (T); Mahlabane 1990 2 SACR 558 (A); Du Plessis "Vonnisbespreking: S v Mogale 1980 2 SA 457 (T)" 1980 TSAR 204; Goosen and Vorster "Die toelaatbaarheid van bekentnisse afgele aan polisie-offisiere" 1981 THRHR 428; Labuschagne "Toelaatbaarheid van bekentnisse: Mogale 1980 1 SA 457 (T)" 1980 SACC 78.

44 De Vos "Die bekentenis uit 'n historiese en regsver-gelykende perspektief" 1990 TSAR 380.

The deponent is informed that he is in the presence of a magistrate, that he has nothing to fear, can speak frankly, and that, should it be necessary, protection can be afforded him against any irregularity. Deponent is warned that he is not obliged to make any statement whatsoever and if he should make a statement it will be reduced to writing and may later be used as evidence against him.

Deponent is informed that the magistrate has no connection with the police and that this is not a hearing of the case."

It would be interesting to hear an interpreter translating this warning into the Zulu language or any of the Sotho languages. This inquiry has led to the finding that this warning may not be understood by some suspects.

To ask a suspect whether he or she understands a warning does not cure the defect. Without prescribing how a preliminary warning should read, it is desirable that it should include the points discussed below.

Firstly, a suspect must be warned that he or she has a right to remain silent. The warning must make it clear that the right to silence may be exercised when the police interrogate him or her or when the magistrate puts his customary questions. It is desirable that a suspect who is about to make a confession should be reminded that he or she is free to exercise his or her

privilege against self-incrimination.⁴⁵ To ensure that a suspect acts freely and voluntarily, it is necessary to apprise him or her of that right. If a suspect does not understand his privilege against self-incrimination, that is an indication that he or she needs legal representation. The purpose of telling a suspect about his or her right to the privilege against self-incrimination is to emphasize to a suspect that he or she has a choice between silence and speech and that the magistrate too is prepared to respect that right. The omission to refer to the privilege against self-incrimination in the warning to a suspect immediately prior to the recording of a confession is an indication that our law of confessions needs to be reformed.⁴⁶ It is recommended that a suspect be informed in clear and unequivocal terms that he has a right to remain silent.

It is recommended further that once a suspect has been brought to a magistrate to record a confession, he or she should not be subjected to further police questioning should he or she decline to make a statement before a magistrate. This is implied in the

45 See Elsen and Rosett "Protection for the suspect under Miranda v Arizona" 1967 Columb.L.Rev. 479; Ratushney Self-incrimination in the Canadian Criminal Process (1979); Pye "Some views on Miranda v Arizona" 1966 Fordham L.Rev. 199.

46 Miranda v Arizona *supra* 469 - 70.

warning when it is said: "... should it be necessary, protection can be afforded him against any irregularity".

A suspect is warned by a magistrate prior to the recording of his or her statement that "he is not obliged to make any statement whatsoever and if he should make a statement it will be reduced to writing and may later be used as evidence against him."⁴⁷ The magistrate does not have powers to make an order whereby he instructs the police to respect the suspect's choice of not making a statement. All that a magistrate may do is to refrain from recording a statement and the accused is returned to police custody.

The other question to be asked is whether it is necessary to change the law in such a way that suspects may have their confessions recorded by attorneys, advocates and academic lawyers who are not employed by the state. There is merit in this view because these persons would not carry out a departmental policy but would merely ensure that any suspect speaks freely and frankly. Accordingly, it is recommended that section 217 of the Criminal Procedure

47 See preliminary warning quoted *supra*.

Act be amended to enable attorneys, advocates, professors of law and law lecturers to record confessions of suspects and that the state should remunerate them for such services. A police officer, whether a commissioned officer or not, should be disqualified from recording a confession. In this respect our law would differ significantly from that of America where any police officer may record a confession provided the Miranda warnings are given and there is a clear waiver.*

14.4.4.2 Are the Miranda prophylactic rules suitable for South Africa?

Our new constitution provides that a court of law in interpreting the provisions of the chapter dealing with fundamental rights shall promote the values which underlie an open and democratic society based on

48 Compare Caplan "Miranda revisited" 1984 Yale L.J. 1375; Caplan "Questioning Miranda" 1985 Vand.L.Rev. 1417; Collins et al "Interrogational rights: reflection on Miranda v Arizona" 1978 So.Cal.L.Rev. 469; Grano "Miranda v Arizona and the legal mind: formalism's triumph over substance and reason" 1987 Am.Crim.L.Rev. 243 Grano "Prophylactic rules in criminal procedure: a question of article III legitimacy" 1985 Nw.V.L.Rev. 100; Grano "The right to counsel" collateral issues affecting due process" 1970 Minn.L.Rev. 1175.

freedom and equality." A court of law shall, where applicable, have regard to comparable foreign case law in interpreting the Bill of Rights.⁵⁰ It shall also have regard to public international law applicable to the protection of rights entrenched in chapter 3 of the new constitution.

The legislature has given clues on how to interpret the Bill of Rights. This was done because the provisions of the Bill of Rights are not self-defining. Their impact depends largely on interpretations by a court of law. The United States supreme court has over the past decade tended to favour an expansive interpretation of the Bill of Rights.⁵¹ There are reasons why the American supreme court has been inclined to favour a liberal construction of the criminal procedure protections. The reason for this is that other effective controls upon state criminal processes did not exist. For that reason, judicial activism was largely a consequence of the failure of other agencies of the law, especially state

49 See section 35(1) of the Constitution of the Republic of South Africa Act of 1993.

50 See section 35(1) of the Constitution of the Republic of South Africa Act of 1993.

51 See LaFave "Introduction" in Levy Criminal Justice and the Supreme Court (1990)(xii).

courts and legislatures, to meaningfully regulate their criminal justice system.⁵²

Appreciation of the extent to which the American criminal justice has been constitutionalized may be gleaned from the process that runs from police investigation to the criminal trial and beyond.⁵³ Many of these protections of the Bill of Rights are intended to ensure against police excesses. Following an arrest of a suspect, in-custody interrogation may take place. For nearly thirty years after 1936, the American supreme court dealt with state confessions under the due process test of voluntariness which was determined upon the totality of the circumstances.⁵⁴ The dimensions of the totality of the circumstances test changed as the American supreme court's concern broadened from lack of reliability of confessions to unfair police methods and then to ensuring some degree of free choice. Those shifts, along with the fact-based character of the idea of "voluntariness" made the test amorphous and ineffectual. These concerns prompted the 1966 decision in Miranda v Arizona,

52 LaFave (xii).

53 See LaFave (xii)-(xiii).

54 see discussion in chapter 12 supra.

requiring a specific warning of rights and a waiver of those rights.

Miranda v Arizona is a decision which was controversial from the moment the opinion of the court was announced.⁵⁵ Warren CJ pointed out in Miranda that the case before his court raised questions which went to the roots of the American criminal jurisprudence: the restraint society must observe consistent with the federal constitution in prosecuting individuals for crime.⁵⁶ More specifically, the court dealt with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the fifth amendment to the constitution not to be compelled to incriminate himself.

This enquiry has led to the finding that Miranda v

55 See Arnella "Schmerber and the privilege against self-incrimination: a reappraisal" 1982 Am.Crim.L.Rev. 31; Berger "Compromise and continuity: Miranda waivers, confession, admissibility, and the retention of interrogational protections" 1988 U.Pitt.L.Rev. 1007; Benner "Requiem for Miranda: the Rehnquist court's voluntariness doctrine in historical perspective" 1989 Wash.U.L.Q. 59; Brandley "Criminal Procedure in Rehnquist court: has the Rehnquist begun" 1987 Ind.L.J. 273; Elsen and Rosett "Protection for the suspect under Miranda v Arizona" 1967 Columb.L.Rev. 479.

56 Miranda v Arizona *supra* 436.

Arizona is a liberal decision. It is a liberal decision because the American supreme court had constantly accorded a liberal construction to the privilege against self-incrimination.⁵⁷ A South African court would have regard to Miranda v Arizona in deciding a case with similar facts. It is in order for a South African court to adopt Miranda prophylactic rules in interpreting the right against self-incrimination and the right to consult a legal practitioner in terms of the South African Bill of Rights.⁵⁸

In terms of Miranda v Arizona, the procedure of dealing with a suspect in police custody may be demonstrated in a "Miranda Card" as follows:

57 See Albertson v SACB 382 US 70, 81 (1965); Hoffman v United States 341 US 479, 486 (1951); Arendstein v McCarthy 254 US 71, 72-3 (1920); Counselman v Hitchcock 142 US 547, 562 (1892).

58 Collin et al. "Interrogational rights: reflection on Miranda v Arizona" 1978 So.Cal.L.Rev. 469; Cronin "Incriminating statements to the police: state and federal norms" 1987 Massachusetts L.Rev. 61; Dix "Federal constitutional confession law: the 1986 and 1987 supreme court terms" 1988 Texas L.Rev. 574; Dix "Mistake, ignorance, expectation of benefit, and the modern law of confession" 1975 Wash.L.Q. 275; Dripps "Foreword: against police interrogation - and the privilege against self-incrimination" 1988 J.Crim.L.& C. 542; Elsen and Enker "Counsel for the suspect: Massiah v United States and Escobedo v Illinois" 1964 Minn.L.Rev. 439; Schulhofer "Reconsidering Miranda" 1987 U.Chi.L.Rev. 435.

WARNING OF CONSTITUTIONAL RIGHTS

1. You have the right to talk to a lawyer and have him with you while you are being questioned.
2. If you want a lawyer but cannot afford one, the court will appoint one for you.
3. You have the right to remain silent.
4. Anything you say can and will be used against you in court.

WAIVER

After the warning, ask the following questions and secure an affirmative answer to each to obtain a waiver.

1. Do you understand each of these rights I have explained to you?
2. With these rights in mind, do you wish to talk to us now?

Following the Miranda warnings, it is proposed that the police should give the warnings set out below to any person in police custody and who is subjected to police questioning.

PROPOSED WARNING OF SUSPECTS IN SOUTH AFRICAN LAW

1. You have the right to consult an attorney or advocate of your choice while you are in police custody; and (where applicable) in your particular circumstances a lawyer must assist you. You have the right to call for an attorney or advocate at any stage of the questioning.
2. You have the right to communicate with your partner, spouse, next-of-kin, religious counsellor and a medical practitioner of your choice.
3. You have the right not to be compelled to make a confession or admission which could be used in evidence against you in court.
4. You have the right to remain silent when the police question you. You may exercise this right at any stage of the police questioning.
5. Anything you say can and will be used in evidence against you in court.

REACTION OF A SUSPECT

After the warning, ask the following questions and secure an affirmative answer to each to ensure that a suspect understands his or her rights.

1. Do you understand each of these rights I have explained to you?
2. Do you have any questions about any of these rights?
3. With these rights in mind, do you wish to speak to the police?

A warning of this nature would enable a suspect to exercise his or her constitutional rights while being held in police custody. That would be conducive to creating a climate which is free of intimidation, coercion or of any influence that police custody may bring to bear on a suspect. A Bill of Rights would serve no purpose if suspects are not warned of their constitutional rights. The Miranda v Arizona decision

is likely to play an important part when our courts interpret the Bill of Rights and apply it.

14.5 Burden of proof

A confession made to a magistrate may under certain circumstances be presumed to have been made freely and voluntarily, by an accused in his sound and sober senses and without having been unduly influenced thereto. The effect of the presumption is that an accused should prove the contrary on the balance of probability that what is presumed is not true.⁵⁹ The shift of onus of proof from the state to an accused is not supported. The state has a number of witnesses to call in order to prove the admissibility of a confession. The state may call a magistrate who recorded a confession as well as an interpreter where applicable. If there is an allegation of assault or threats, the state may call the police who interrogated a suspect to testify. It is clear that the shift of onus to an accused is a bonanza to the state.

59 See Januarie 1991 2 SACR 682 (E); Williams 1991 1 SACR 1 (C); Thwala 1991 1 SACR 494 (N); Jika 1991 2 SACR 489 (E); Engelbrecht "Veranderde bewyslas: toelaatbaarheid van 'n bekentenis" 1989 De Rebus 568.

It is recommended that section 217 of the Criminal Procedure Act be amended to repeal the proviso that creates the presumption and also the other proviso that shift the onus of proof to an accused. In other words, it is recommended that the onus of proof should be on the state throughout the proceedings in the trial within a trial.⁶⁰

Section 25(3)(a) of the Constitution of the Republic of South Africa Act provides that a suspect is presumed innocent and has the right to remain silent throughout his or her trial. The burden of proof which shifts to an accused is incompatible with the rights to remain silent. It is not desirable to give the right to remain silent a more restricted interpretation which would allow the shift of onus.⁶¹

14.6 Criteria for admissibility of confessions

14.6.1 The requirements of voluntariness and absence of undue influence

It is clear from the exposition in chapters four and

60 Compare Nene(2) 1979 2 SA 521 (D); Exparte Minister of Justice: In re R v Jacobson and Levy 1931 AD 466; Stieler 1978 3 SA (O); Nyembe 1982 1 SA 835 (A); Mkanzi 1979 2 SA 757 (T); Mbonane 1979 2 SA 182 (T); Ndoyana 1957 2 SA 562 (D); Mtabela 1958 1 SA 264 (A); Majozi 1964 1 SA 68 (N); Mphahlele 1982 4 SA 505 (A).

61 See section 35(2) of the Constitution of the Republic of South Africa Act of 1993.

seven above, that in practice the distinction between the requirement of voluntariness⁶² and undue influence⁶³ does not serve any useful purpose.⁶⁴ The voluntariness requirement is defined in terms of undue influence.

The test for voluntariness reads:⁶⁵

"... has it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor's will was not swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition?"

The source of undue influence that may render a confession involuntary is a person in authority. The requirement of undue influence covers an influence from any source. The words "without having been unduly influenced thereto" in section 217 of the Criminal Procedure Act tends to be widely interpreted to include all cases in which external influences have

62 See Radebe 1968 4 SA 410 (A) 418-419; Hoffmann and Zeffertt 216; Van der Merwe et al 252; Lebone 1965 2 SA 837 (A) 844; Du Toit et al 24-55; Barlin 1929 AD 459 462.

63 Kuzwayo 1949 3 SA 761 (A) 767; Hiemstra 488; Van der Merwe et al 253; Ananias 1962 3 SA 486 (RAD).

64 Van der Merwe et al 253.

65 Kuzwayo supra 768.

operated to negative an accused's freedom of volition."⁶⁶

It is recommended that the two requirements be merged into one, and be called "voluntariness" and that the definition of this term not be limited to its common law meaning. This would mean that an improper influence from any source could, if it is substantial, cause or persuade a court of law to exclude a confession from evidence. The concept of undue influence is implied in the term "voluntariness". The term "voluntariness" is a compendious expression intended to indicate in a summary form multiple factors of legal significance, and these factors embrace a wide range of issues which modern confession law considers and which the law seeks to maximize.⁶⁷

Although the requirement of absence of undue influence would be deleted from section 217 of Criminal Procedure Act if this recommendation is accepted, its effect and substance would be incorporated in the requirement of voluntariness.⁶⁸

66 Frans Selepi 1919 TPD 105 110.

67 McCormick "The scope of privilege in the law of evidence" 1938 Texas L. Rev. 447, 452-57.

68 See Chadbourn and Wigmore Evidence at Trials at Common Law Vol 3 (1970) par 826 p351.

It is necessary to ensure that a confession is made voluntarily. For that reason, where a confession cannot be made to a person not employed by the state, it is necessary to make use of the services of attorneys and advocates in the same way as these legal practitioners assist when an accused represented by them enters a plea of guilty. If a magistrate records a confession of a represented accused, the latter may simply hand in a written confession and refer all issues relating to admissibility to a trial court.⁶⁹ Any active and prominent participation of attorneys and advocates in the recording of confessions may be of help in ensuring that confessions are made freely and voluntarily.

14.6.2 Sound and sober senses

To say that a confession must be made by an accused in his "sound and sober senses" means that an accused must know and appreciate what he says. In other words, an accused is in his sound and sober senses when he is *compos mentis*.⁷⁰ It is recommended that this requirement be retained.

69 See Kotze 412.

70 See Hiemstra 488; Hoffmann and Zeffertt 216; Schmidt 508; Du Toit et al 24-55.

14.7 Statutory compulsion to speak

Where a suspect is under a legal duty to speak or to respond to a question put to him, it cannot be said that he acted voluntarily.⁷¹ The bringing of such a person before a magistrate or justice of the peace to make a statement may create the impression that he does so freely and voluntarily whereas the opposite is true. The questioning of a suspect may in some cases reveal that he is not acting freely and voluntarily.

The problem here is the nature of the questions usually put to a suspect. Such questions may be answered with a "YES" or "NO".

It is recommended that any statement or confession made by an accused who had been subjected to a lengthy police interrogation whilst he was under a statutory duty to speak not be admissible in a criminal trial. The reason for this is that the court should apply the so-called disciplinary principle of the admissibility of confessions.

71 See the following authorities on a statutory duty to speak: Kotze 45-52; Moloo 1956 4 SA 824 (A) 834; Dhlamini 1952 2 SA 693 (T); Ismail(1) 1965 1 446 (M) 449; Hlekani 1964 4 SA 429 (O) 433-4 and 437; Rossouw v Sachs 1964 2 SA 551 (A); Moumbaris 1973 3 SA 109 (T) 117; Hassim 1973 3 SA 443 (A) 454; Christie 1982 1 SA 464 (A) 485; Mpetha(2) 1983 1 SA 576 (C).

The Bill of Rights provides that every person has the right not to be compelled to make a confession or admission which could be used in evidence against him or her.⁷² Any law which compels a suspect to incriminate him or herself is incompatible with the spirit of the fundamental rights enshrined in our new constitution. It is clear, therefore, that section 29 of the Internal Security Act⁷³ should be repealed. If it is not repealed by the legislature, the courts will declare it null and void as it is in conflict with the fundamental rights.

14.8 Judges' rules

The judges' rules do not have the force of law. They are merely intended to regulate the relationship between the police and suspects during the investigation of crime. In English law, the judges' rules have been repealed and replaced by the code of conduct of police officials which was created by an act of parliament.⁷⁴

72 See section 25(2)(c) of the Constitution of the Republic of South Africa Act of 1993.

73 Act 93 of 1982.

74 See the Police and Criminal Evidence Act of 1984.

It is recommended that our judges' rules be repealed and replaced by a code of conduct of members of the police force as detailed above.⁷⁵ The Criminal Procedure Act would have to be amended to make provision for such a code.

14.9 Conviction on a confession revisited

If an accused has been convicted on the basis of a confession, and where there is no other evidence outside the confession incriminating him, it is desirable to exclude the possibility of imposing the death sentence and the life sentence.⁷⁶ The reason for this is that in a case where an accused pleads guilty in terms of section 112 of the Criminal Procedure Act, the death sentence cannot be imposed unless his or her guilt is proved as if he has pleaded not guilty. It is necessary to exclude the death and life sentence if the conviction is based solely on the confession because in general, the danger of an innocent person freely and voluntarily confessing to a crime he did not commit is no doubt slight, but it is nevertheless real. There is always a need for the court to be on

75 See Kotze 411.

76 Compare section 112 of the Criminal Procedure Act 51 of 1977.

its guard against the danger of the confession being false in essence.⁷⁷

This study has shown that the requirement of section 209 of the Criminal Procedure Act is to exclude the possibility of convicting a person on the basis of a false confession and to enable a court of law to convict on the basis of a confession where the requirements of the section are met. There is no doubt that the truthfulness or otherwise of the contents of a confession plays a role when the courts consider and evaluate a confession with a view to making a decision whether to convict or acquit.

There is a need to protect an accused against a confession which is inadmissible in terms of section 217(1)⁷⁸ but which is admitted into evidence in terms of section 217(3) of the Criminal Procedure Act. A confession admitted in terms of section 217(3) of the Criminal Procedure Act is suspect; it constitutes a fertile ground whereby a false confession may be introduced into the evidence before a court of law. It would appear that the administration of justice would not be prejudiced if section 217(3) of the Criminal

77 Mjoli *supra* 1239-1240; Khumalo 1983 2 SA 379 (A) 383.

78 of the Criminal Procedure Act 51 of 1977.

Procedure Act is deleted. It is recommended that the legislature should delete section 217(3) of the Criminal Procedure Act. The reason for this is that such a confession is inadmissible in terms of section 217(1) of the Criminal Procedure Act and the circumstances under which it is admitted can be avoided by a ruling of a trial court that such a confession is inadmissible. It is doubtful that a defended accused would argue or persuade the court to admit an inadmissible confession.

14.10 Evidence of a pointing out

It is incumbent upon the prosecution to prove beyond a reasonable doubt that a pointing out was done freely and voluntarily before such evidence is admitted.⁷⁹ Evidence of a pointing out is admitted in evidence on the ground that it shows that an accused has knowledge of the place or thing pointed out, or some fact connected with it, from which knowledge it may be possible, depending on the facts of the case concerned, to draw an inference pointing out to the accused's guilt.⁸⁰

79 Nyembe 1982 1 SA 835 (A) 840. For details see Jordaan 1992 2 SACR 498 (A); Khumalo 1992 2 SACR 41 (N); Mathebula 1991 1 SACR 306 (T); Minnies 1991 1 SACR 355 (Nm).

80 Tsotso 1983 1 SA 856 (A) 864.

The law regarding the admissibility of evidence of a pointing out appears to be adequate. Where the pointing out forms part of an inadmissible confession a court would regard it as an irrelevant fact which does not affect the question of admissibility.⁸¹ It is recommended that the law regarding the admissibility of a pointing out be retained.

14.11 Recommended criteria for admissibility of confessions and adoption of certain principles of American confession law

14.11.1 List of persons who may record a confession

At present a confession may be recorded by a magistrate and/or a justice of the peace.⁸² A confession recorded by or made to a police officer who is not a justice of the peace is inadmissible.⁸³ Magistrates should continue to record confessions. However, police officers who are ex officio justices of the peace should be deprived of the opportunity because of the reservations expressed by the courts.

81 Masilela supra 7.

82 See section 217(1)(a) of the Criminal Procedure Act 51 of 1977.

83 See section 217(1)(a) of Act 51 of 1977.

It is recommended that the law should be amended to enable the following persons to record a confession in addition to magistrates:

(a) An attorney at law whether practising or not.

It does not matter whether he or she is employed by the state. However, this must be subject to the proviso that an attorney who will later defend the confessor in court should be disqualified from recording a confession. Articled clerks should not be included in the list of persons who may record a confession.

(b) Academic lawyers

It is recommended that academic lawyers (professors of law, senior lecturers and lecturers in law) should be entitled to record confessions of persons brought to them by police officers for that purpose; provided that they do not intend to defend the confessors in court.

14.11.2 List of persons who should not be allowed to record confessions

(a) Police officers

It is recommended that a police officer who is ex officio justice of the peace should not be allowed to

record a confession. The reason for this can be found in the long list of reported decisions of our courts where such practices were criticised.⁸⁴ The current position that an ordinary policeman should not record a confession should be retained.⁸⁵

(b) Persons who are not knowledgeable about the taking of statements or collection of evidence

Where there is a doubt that a person knows how to record a statement from a suspect, he or she is disqualified from recording it. The reason for this is that if a statement is inadequately recorded, it may result in an acquittal where justice required a conviction. Justice requires that the guilty should be convicted and the innocent acquitted. Where the guilty is acquitted there is a failure of justice.

14.11.3 Recommended criteria for the admissibility of confessions

14.11.3.1 Fundamental fairness during the interrogation of a suspect and during the recording of his/her confession

When a court of law considers a question whether a confession is admissible in evidence or not, it must

84 See Dhlamini 1971 1 SA 807 (A) 815; Mdluli 1972 2 SA 839 (A) 840; Khoza 1984 1 SA 57 (A) 59; Mazibuko 1978 4 SA 563 (A) 568; Mogale 1980 1 SA 457 (T) 458-461; Mbatha 1987 2 SA 272 (A) 279; Magwaza 1985 3 SA 29 (A).

85 Section 217 of the Criminal Procedure Act 51 of 1977.

be satisfied beyond a reasonable doubt that the confession was obtained voluntarily and in accordance with fundamental fairness to which the accused is entitled during his interrogation by the police and during the recording of his confession.⁸⁶ A trial court should have regard to a variety of safeguards against injustice and abuses of criminal procedure. It is recommended that the due process of law as applied in American confessions law should be regarded as a useful guide by our courts which is highly persuasive but should not feel bound by the American decisions.⁸⁷

The aim of the requirement of fundamental fairness is to prevent fundamental unfairness in the use of evidence whether false or true.⁸⁸ Fundamental fairness is a concept which is essential to the very concept of justice. In order to find that an accused was denied fundamental fairness during his interrogation and recording of his confession, the court must find that

86 Compare Mott Due Process of Law (1926); Allen "Due process and state criminal procedure: another look" 1953 Nw.V.L.Rev. 16.

87 See Brown v Mississippi (1936) 297 US 278; chapter 12 *supra* 387; Watts v Indiana 338 US 49 (1949); Spano v New York 360 US 315 (1959); Culombe v Connecticut 367 US 568 604; Chambers v Florida 309 US 227 (1940) 238-239; White v Texas 310 US 530 (1940); Ward v Texas 316 US 547 (1942) 555; Harris v Carolina 338 US 68 (1948) 73; Lisenba v California 314 US 219 (1941) 236.

88 See Lisenba v California *supra* 236.

the absence of that fairness fatally infected the procedural rights of that accused and the conduct on which that finding is made must be of such quality as necessarily prevents a fair trial. Examples of conducts that may infect the procedural rights of an accused and which may prevent a fair trial include the following:

- (a) Assault or threat of assault;
- (b) Promise of benefit;
- (c) Promise of release on bail should an accused make a statement;
- (d) Threat of prejudice should a suspect refuse to make a statement;
- (e) Lengthy interrogation in police custody;
- (f) Torture of mind or body which induces an accused to make a confession;
- (g) Denial of access to family, friends and legal advisor;
- (h) Psychological coercion or physical coercion;
- (i) Extreme brutality or simply brutality;
- (j) Interrogation of a suspect held incommunicado;
- (k) Detention for purposes of interrogation in terms of section 29 of the Internal Security Act.⁸⁹
- (l) Police conduct that violates fundamental fairness.

14.11.3.2 A suspect's right to mental and physical integrity

It is recommended that a trial court should be satisfied beyond a reasonable doubt before a confession is admitted into evidence that the suspect's right to mental and physical integrity was respected by the police during his interrogation as well as the person who recorded his or her confession.⁹⁰ It is recommended further that in case of doubt, an alleged confession should be suppressed.⁹¹ The suspect must be in his sound and sober senses during the recording of his confession.

14.11.3.3 A suspect's right of access to legal advisor, friends and relatives

It is recommended that a trial court should be satisfied beyond a reasonable doubt that there was neither physical nor psychological coercion of a suspect prior to or during the recording of his or her confession.⁹² Evidence of a suspect's access to legal

90 See clause 4(b) of the proposed Bill of Rights proposed by the South African Law Commission.

91 See clause 4(c) of the proposed Bill of Rights proposed by the South African Law Commission.

92 See clauses 6(f) and (g) of the proposed Bill of Rights proposed by the South African Law Commission.

advisor, medical doctor of his/her choice, friends and relatives may convince the court that there was neither physical nor psychological coercion exercised on a suspect by the police.

14.11.3.4 Accused's right to remain silent and to refuse to testify

A suspect's right to remain silent when the police interrogate him is very important. This is a phase of the accusatorial criminal procedure whereby the state investigates its case and an accused withholds his/her information until the onset of the criminal trial. It must be clear on the evidence before a confession is admitted into evidence that a suspect's right to remain silent is observed and that it is exercised until a decision is given whether the confession is admissible or not.⁹³

93 See clause 7(c) of the proposed Bill of Rights proposed by the South African Law Commission.

SECTION V

BIBLIOGRAPHY AND TABLE OF CASES

LIST OF ABBREVIATIONS

Am.Crim.L.Rev.	American Criminal Law Review
American J.of Legal History	American Journal of Legal History
Australia L.J.	Australian Law Journal
Baylor L.Rev.	Baylor Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Cal.L.Rev.	California Law Review
CILSA	Comparative and International Law Journal of Southern Africa
Crim.L.Rev.	Criminal Law Review
De Jure	De Jure
De Rebus	De Rebus
De Paul L.Rev.	De Paul Law Review
Duke L.J.	Duke Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ind.L.J.	Indiana Law Journal
Iowa L.Rev.	Iowa Law Review
J.Crim.L.& C.	Journal for Criminal Law and Criminology
J.Crim.L.& Police Science	Journal for Criminal Law and Police Science
J.Pub.L.	Journal for Public Law
Massachusetts L.Rev.	Massachusetts Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Nw.U.L.Rev.	Northwestern University Law Review
Ohio St.L.J.	Ohio State Law Journal
Rutgers L.Rev.	Rutgers Law Review
SA Journal of Human Rights	South African Journal of Human Rights
SALJ	South African Law Journal
So.Cal.L.Rev.	South California Law Review
Stan.L.Rev.	Stanford Law Review
Texas L.Rev.	Texas Law Review
THRHR	Tydskrif vir Hedendaagse Romeinse Hollandse Reg
Trans.L.J.	Transkei Law Journal
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U.Chi.L.Rev.	University of Chicago Law Review
U.Pa.L.Rev.	University of Pacific Law Review
U.Pitt.L.Rev.	University of Pittsburgh Law Review
Univ.of Pennsylvania L.Rev.	University of Pennsylvania Law Review
Va.L.Rev.	Virginia Law Review

Vand.L.Rev.
Wash. & Lee L.Rev.
Wash.U.L.Q.

Washburn L.R.
Western St.L.Rev.
Yale L.J.

Vanderbilt Law Review
Washington and Lee Law Review
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Washburn Law Review
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