
STUDYGUIDE: Activities & Feedback EVI301-A

1. OVERVIEW

State whether the following statements are true or false:

- 1.1. The Law of Evidence is the name of the field of law that you are currently studying.
False (with capitals it refers to the course name)
- 1.2. When it is said that "the court" makes a finding, this actually means that the judicial officer presiding in the case (plus assessors where applicable) is making the finding.
True
- 1.3. Oral evidence refers to evidence given by a witness from the witness box.
True
- 1.4. If evidence is contained in a document, the party who wants to present this evidence will simply hand the document to the court.
False
- 1.5. Evidence that is provided by modern technology, such as computers and video tapes, presents the law of evidence with difficulties that have not yet all been resolved.
True
- 1.6. In the case of judicial notice and presumptions, evidential material is provided without the presentation of evidence.
True
- 1.7. Decisions on the admissibility of evidence are made during the trial - decisions on the weight of the evidence are made only at the end of the trial.
True (although, the weight of evidence may also impact on its admissibility)
- 1.8. The burden of proof plays an important role during the evaluation of evidence at the end of the trial.
True
- 1.9. It is sometimes necessary for the court to approach certain evidence with caution.
True
- 1.10. The law of evidence plays an important role in every single court case conducted in our courts.
True

2. CONCEPTS OF THE LAW OF EVIDENCE

- 2.1. Besides evidence, what other forms of evidentiary material are there? Try to give an example of each. Where possible, write down the references to decided cases in which these other kinds of evidentiary material were at issue.
 - **Admissions → S v Mjoli 1981 (3) SA 1223 (A)**
 - **Formal admissions → S v Mokgoledi 1966 (4) SA 335 (A)**
 - **Judicial notice**
 - **Presumptions → S v AR Wholesalers 1975 (1) SA 551 (NC)**

3. SOURCES OF THE LAW OF EVIDENCE

- 3.1. Write down the wording of Section 252 of the CPA.
The law as to the admissibility of evidence which was in force in respect of criminal proceedings on the thirtieth day of May 1961, shall apply in any case not expressly provided for by this Act or any other law.
- 3.2. Explain what is meant by a "residuary clause" in South African law.
A residuary clause determines that foreign law has to be followed on topics for which no express local statutory provision had been made.

4. RELEVANCE AND ADMISSIBILITY OF EVIDENCE

- 4.1. From your reading material, give at least two examples that show that evidence may be inadmissible, despite being relevant.

- **If the evidence is privileged.**
- **If the evidence was obtained in breach of constitutional rights.**

(More examples are available).

4.2. Write the essential elements of each definition of the relevance of evidence:

4.2.1. Stephen

1) two facts are related; 2) one normally proves the other or renders it probable (or not); 3) whether the fact is past, present or future; 4) either by itself or with other facts.

4.2.2. The US Federal Rules of Evidence

1) It is evidence with a tendency; 2) it makes one fact more, or less, probable than without the evidence; 3) the fact is of consequence (important) for the legal action.

4.3. Read *S v Shabalala 1986 (4) SA 734 (A)* in the casebook, focusing on 740F-743G, and answer the following questions:

4.3.1. What is the main reason why the evidence about the behaviour of the police dog was not admitted in *R v Trupedo 1920 AD 58*?

The probative value was too tenuous (flimsy), in other words not relevant. To draw inferences from dogs' abilities is to enter a region of "conjecture and uncertainty".

4.3.2. A number of writers have suggested that the decision in *R v Trupedo* does not mean that evidence about tracking dogs will always be inadmissible. In what way do they argue should the judgment be viewed?

The judgment was decided on the facts of the particular case and inadequacy of scientific knowledge at the time. Modern information about the scenting ability of dogs and their training may justify admission of the evidence.

4.3.3. What role did the untrustworthiness of the evidence play in the court's decision?

The (extreme) untrustworthiness was of fundamental importance. If this element is sufficiently reduced the evidence would become admissible.

4.3.4. Finally, the court warned that the distinction between weight and admissibility should not be blurred. What principle did the court establish in this connection?

If the weight of the evidence is so inconsequential and relevance so problematic, it serves no purpose to accept the evidence.

4.4. Read *S v Mavuso 1987 (3) SA 499 (A)* with the assistance of the casebook and focus on 505B-G. Answer the following questions:

4.4.1. Write down the "test" for relevance as stated in *R v Mpanza 1915 AD 348 at 352*.

"[A]ny facts are so relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue."

4.4.2. Why was the assumption that the accused knew dagga because of his previous conviction for possession of dagga, a false one?

Firstly, the previous conviction was a very long time ago. Secondly, the definition of "possession" at the time was so wide that a conviction could follow, even if the accused was merely found in the vicinity of the dagga.

5. SIMILAR FACT EVIDENCE

5.1. Read *R v Solomons 1959 (2) SA 352 (A)* in accordance with the guidelines in the casebook. Note that one of the more important additional aspects of the admissibility of evidence to come out of this judgment is that a piece of evidence may be inadmissible at one point in a trial, and become admissible at a later stage (or *vice versa*) – see 362D. Explain why the court eventually allowed the similar fact evidence. Identify the following in your answer: the facts in issue, the similar facts and the *nexus* between the similar facts and the facts in issue.

During examination-in-chief of a witness, the state wanted to submit evidence about two knife assaults which the accused had been involved in earlier on the night of the alleged crime. (This is the similar fact evidence). However, the court refused to admit this evidence because it was not sufficiently relevant at that stage. Even though there was a logical connection between the facts in issue and the similar fact evidence, the admission of the latter was not desirable. No reasonable inferences could be drawn from the similar fact evidence that could help to decide the facts which were in issue at that stage.

Later on it transpired that there were additional facts in issue: the accused not only denied that he had been in possession of a knife, but also denied that he had been anywhere near the scene of the murder. He also lied about how he had obtained the jacket and the watch. The similar fact evidence was then admitted, because a reasonable inference could be drawn (from the similar fact evidence) on the new issues as to whether the accused had a

knife in his possession, his alibi and how he had obtained the jacket and the watch. A *nexus* therefore existed between the similar fact evidence and the facts in issue.

6. CHARACTER EVIDENCE

- 6.1. The initial part of Section 197 of the CPA protects an accused against answering certain questions (mostly questions asked by the prosecutor in cross-examination). Name the four categories of questions for which protection are granted.
- **That the accused has committed an offence other than the one he is charged with.**
 - **That the accused has been convicted of an offence other than the one he is charged with.**
 - **That the accused has been charged with an offence other than the one he is currently charged with.**
 - **That the accused is of bad character.**
- 6.2. This protection falls away under the circumstances mentioned in Section 197(a)-(d) of the CPA. Briefly discuss these circumstances in your own words.
- **Attempting to indicate his own good character, or attacking the character of another party.**
 - **Evidence against a co-accused or similar person.**
 - **Proceedings under Sections 240 or 241 of the CPA (where the charge is one of receiving stolen property).**
 - **The accused may be cross-examined as to previous offences if the purpose of such evidence is to show that he is guilty of the offence with which he is charged. This section confirms the similar fact rule.**
- 6.3. Answer the following questions after studying Section 211 of the CPA:
- 6.3.1. What is the general rule regarding evidence of an accused's previous convictions?
It is inadmissible.
- 6.3.2. What are the two exceptions to the general rule?
≈ **firstly, where the CPA expressly provides otherwise; or**
≈ **secondly, where the previous conviction is an element of the crime with which the accused is charged.**
- 6.3.3. Try to think of an example of the second exception mentioned in Section 211 and write it down.
Escaping from prison.
- 6.3.4. What does Section 211 state about the cross-examination of the accused?
The accused may not be asked if he has previously been convicted.
- 6.4. What is the relationship between Section 211 of the CPA and the rule against the admissibility of similar fact evidence?
Section 211 deals with any previous conviction. In the case of similar fact evidence, the previous conviction has to be similar to the current one. In the latter event, the principles governing the admissibility of similar fact evidence will take precedence over Section 211, owing to the operation of Section 252 of the Criminal Procedure Act, which applies the law that was in force on 30 May 1961.
- 6.5. Answer the following questions after studying Section 227 of the CPA:
- 6.5.1. What does Section 227(2) state about the court's function when evidence of the character of a female complainant is to be led in cases of an indecent nature?
Such evidence may not be adduced, and such female shall not be questioned regarding her previous sexual history, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant.
- 6.5.2. Does the principle in question 6.5.1 also operate with regard to the crime for which the accused is being tried?
No, the proviso in Section 227(2) states that the complainant's prior sexual history with the accused "in respect of the offence which is being tried" is relevant, and may be adduced.
- 6.5.3. What does Section 227(3) provide for?
Section 227(3) provides that before an application for leave in terms of Subsection 227(2) is heard the court shall direct that any person whose presence is not necessary may not be present at the proceedings, and the court may direct that a female referred to in Subsection 227(2) may not be present.

- 6.5.4. Are the stipulations of Section 227 applicable to both male and female complainants?
Yes, Section 227(4) makes the Section 227 provisions also applicable to a male complainant.

7. PREVIOUS CONSISTENT STATEMENTS

- 7.1. Write down the reasons for the exclusion of previous consistent statements.
- **It has no probative force or value: a lie may be repeated as easily as the truth.**
 - **It is easy to fabricate the evidence.**
 - **It is superfluous.**
 - **It is time-consuming, involves numerous collateral enquiries, and duplicates evidence without any advantage.**
 - **The rule against self-corroboration limits its probative value.**
- 7.2. Two pieces of evidence about a complaint made soon after an alleged offence of a sexual nature are admissible even if this evidence is about a previous consistent statement. These are: (1) evidence that such a complaint was made; (2) evidence about the contents of the complaint. Why are these two pieces of evidence of any importance in cases dealing with a sexual offence?
- **Evidence that the complaint was made is important as it serves to support the credibility of the complainant.**
 - **Evidence on the content of the complaint will also indicate that the evidence tendered in court has not been recently fabricated and will support the consistency, and therefore credibility of the complainant.**
- 7.3. Summarise the legal position in *S v Bergh 1976 (4) SA 857 (A)* regarding the admissibility of previous consistent statements in order to rebut a charge of recent fabrication.
A charge of recent fabrication is rebutted when it is shown that, long before the alleged fabrication in court, the witness had made a written or oral statement out of court which is consistent with her evidence in court. The party calling the witness may prove that the witness had no motive or opportunity to fabricate a false version. The previous consistent statement will be admitted if it is relevant in supporting the credibility of the witness on this point, and thus rebutting the attack on the credibility of the witness. However, it will not be admitted to corroborate the witness' evidence.
- 7.4. Summarise the legal position regarding prior identification.
Prior identification carries more weight than identification in court ("dock identification"), which is of very little probative value. It was held in *R v Rassool* that prior identification should be regarded relevant for the purpose of showing from the outset that the person who is giving evidence in court identifying the prisoner in the dock is not identifying the prisoner for the first time, but has identified him on some previous occasion in circumstances such as to give real weight to his identification. Such evidence must go no further than mere identification, but identifying words accompanying any physical identification is allowed.
- 7.5. Read *S v Moti 1998 (2) SACR 245 (SCA)* with the aid of the guidelines in the textbook and answer the following question: The court found that, in principle, the evidence of the photo identification was admissible. On which two grounds could the evidence have been inadmissible? Why was it nevertheless admissible in this instance?
The most obvious ground on which the evidence could have been found inadmissible is that it amounts to a previous consistent statement. Such evidence is inadmissible unless it falls within one of the accepted exceptions. In this case, the exception of prior identification applies. The main reason for this exception is that a previous identification is usually much more valuable than an identification in court, when the mere fact that the accused is standing in the accused box suggests that he is the guilty party.
The second ground on which the evidence could have been found inadmissible, is that it does not have sufficient relevance to the facts in issue. The fact that the witness has identified the accused as the robber is, without doubt, logically relevant to the question who the perpetrator was, but for evidence to be admissible it should also have sufficient probative value (see study unit 4). It could be argued that the photo-identification took place under undesirable circumstances, where the investigating officer could have planted ideas in the mind of the witness, and where the accused and his legal representative had no control over the manner in which the identification was made (this is controlled during a formal identification parade). Corroborative evidence may increase the probative value (reliability) of evidence. In this case, there was substantial corroboration between the two witnesses and the reliability of the evidence was increased by a number of factors. The high level of logical relevance coupled with a fairly low level of undesirability made this evidence admissible.

8. HEARSAY

8.1. Write down the definition of hearsay evidence, as contained in Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

Oral or written evidence, the probative value of which depends on the credibility of any person other than the person testifying.

8.2. Consider each of the following factual situations. State whether the particular piece of evidence amounts to hearsay or not, and briefly explain your answer.

8.2.1. A is charged with theft. It is alleged that she took a radio belonging to C from C's house. While giving evidence C testifies that, although she did not see A taking the radio, her friend F did see A walking from C's house carrying a radio similar to C's. Is C's evidence hearsay?

Yes. This is a typical form of hearsay, where the witness (C) tells the court what F had obviously told her.

8.2.2. Would your answer in 8.2.1 have differed had the prosecutor intended to call F as a witness (and F was eventually called as a witness)? Would the evidence given by C be hearsay?

Yes. Although her hearsay now becomes admissible (see 4.3), it remains hearsay.

8.3. Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 contains three exceptions to the basic rule. Write down the essence of each of these exceptions:

- **Each party against whom the evidence is to be adduced agrees to its admission.**
- **The person upon whose credibility the probative value of the hearsay evidence depends testifies during the proceedings.**
- **The court, having regard to various factors, is of the opinion that such evidence should be admitted in the interests of justice.**

8.4. Make a list of the factors which the court must consider in exercising its judicial discretion to admit hearsay evidence if the admission would be in the interests of justice and briefly summarise what each of these factors is about. Include examples, where relevant. Pay particular attention to the case law as discussed in the textbook.

- **The nature of the proceedings – courts will more readily admit hearsay in civil cases than in criminal cases, where the presumption of innocence applies.**
- **The nature of the evidence – the reliability of the hearsay evidence is an important consideration here (eg, was the statement against the interests of the declarant himself, etc).**
- **The purpose for which the evidence is tendered – evidence tendered for a legitimate, rather than a doubtful purpose, will be more readily accepted.**
- **The probative value of the evidence – substantial probative value is one of the requirements for the relevance of evidence.**
- **The reason why the evidence is not given by the person upon whose credibility its probative value depends – necessity was a basis for the admission of hearsay at common law, and it is still relevant under section 3. Necessity can result from such factors as the death, illness (mental or physical) or absence from the country of the declarant.**
- **Any prejudice to opponents – because hearsay cannot be tested by the conventional safeguards of direct confrontation and cross-examination, it contains the potential for prejudice.**
- **Any other factor which, in the opinion of the court, should be taken into account – hearsay evidence that would have been admissible under common law will probably still be admissible (see *Mnyama v Gxalaba* 1990 (1) SA 650 (C)).**

8.5. As a practical example of how a court applied the considerations on which it based its discretion, read *Hlongwane v Rector, St Francis College* 1989 (3) SA 318 (D) in accordance with the guidelines in the casebook. Answer the following questions:

8.5.1. Name the considerations which favoured the exclusion of the hearsay evidence.

The court held that the nature of the proceedings, the nature of the evidence, and the purpose for which the evidence is tendered favoured the exclusion of the hearsay evidence.

8.5.2. Name the considerations which favoured the acceptance of the hearsay evidence, and briefly discuss why this was the case in each instance.

The following factors favoured the acceptance of the hearsay evidence:

- ≈ **The probative value of the hearsay evidence. The hearsay was corroborated (supported) by various other pieces of evidence.**

- ≈ **The reason why the person on whose credibility the evidence depended did not testify, namely intimidation and the fear of reprisals.**
- ≈ **Even though the opponents would be prejudiced by the admission of the evidence, the court found the prejudice not to be so great, in view of all the facts of the matter.**
- ≈ **Among the other factors the court found further support for the admission of the hearsay evidence in the fact that it would bring the issue to a close.**

8.5.3. Seeing that some considerations favoured the exclusion and other the acceptance of the hearsay evidence, how did the court come to a decision in this case?

The court weighed up all the relevant features referred to in Section 3(1)(c) of the Act and concluded that it would be in the interests of justice to admit the hearsay evidence.

8.6. The case of *McDonald's Corp v Joburgers Drive-Inn Restaurant* 1997 (1) SA 1 (A) provides a good example of the application of the statutory hearsay provisions. Read this case in accordance with the guidelines in the casebook, and make a summary of the most important principles on hearsay that are to be found in the case:

In the past, the admissibility of market survey evidence was sometimes questioned, owing to its hearsay nature. Under section 3 of the Law of Evidence Amendment Act 45 of 1988, the question now is whether such evidence falls within the statutory definition of hearsay evidence, in other words, whether it is evidence “the probative value of which depends upon the credibility of any person other than the person giving such evidence”. The court found neither the argument that it was hearsay nor the opposite argument to be convincing, but found it unnecessary to decide the issue, since even if the evidence was seen as hearsay evidence, it should be admitted under the exceptions provided for in section 3(1)(c). The purpose for which the evidence was tendered was to show the extent to which the name of McDonald’s and its trade marks were known amongst the public. There would be no prejudice to the other parties, since they would be given a full opportunity to check the results of the survey. Of course, we are also dealing with a civil case here. On the basis of this and other evidence the court admitted the evidence.

9. OPINION EVIDENCE

9.1. Cite six examples of instances where a court may allow for the evidence of a layperson.

A lay witness may express an opinion on:

- **the approximate age of a person.**
- **the state of sobriety of a person.**
- **the general condition of something.**
- **the approximate speed at which a vehicle was travelling.**
- **a summary of factual data as perceived by him, for example, a witness may be permitted to say that the complainant was “angry”.**
- **the identity of handwriting.**

9.2. Should a court allow for unchallenged opinion evidence given by a layperson?

The court may allow the unchallenged opinion of a lay person, subject to the following provisos:

- **The admissible opinion of a lay person is regarded as prima facie evidence.**
- **If the evidence is unchallenged the court has a discretion whether or not to accept it.**
- **This decision by the court will depend upon the issues and reasons that the witness can advance to support his conclusion, that is, his opinion. There is also authority which supports an enquiry into the ability of the witness to express an informed and sound opinion.**

9.3. Fill in the missing words: The inability to provide reasons for the opinion of a layperson shall, in principle, affect the ...**weight**... and not the ...**admissibility**... of the opinion evidence.

9.4. Give five examples of instances where expert evidence will play a role:

- **Ballistics**
- **Engineering**
- **Chemistry**
- **Medicine**
- **Accounting**
- **Psychiatry**
- **Intoxication**
- **Handwriting**

- 9.5. Despite the fact that the rule in *Hollington v Hewthorn & Co Ltd* [1943] 2 All ER 35 has been abolished in England for quite a while, theoretically it still applies in South Africa. Why is this so?

First of all, it should be remembered that this question deals with the admissibility of evidence in a civil case. The rule in *Hollington v Hewthorne* still applies in our law, because of a residuary clause: section 42 of the Civil Proceedings Evidence Act 25 of 1965. This section states that the law of evidence, including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on 30 May 1961 shall apply in any case not provided for by that Act or any other law. *Hollington v Hewthorne* was decided in 1943 and still has binding authority over the South African courts. In England, the effect of the decision was undone by the Civil Evidence Act of 1968, but this came too late for South Africa, which still adheres to the 1961 position.

- 9.6. W gives evidence on behalf of the state and as a consequence someone is convicted of negligent driving. In a subsequent civil case, W is not there to give evidence since she has passed away. The plaintiff now tries to tender the record of W's evidence (not the criminal court's finding) given at the criminal trial in order to prove negligence. Will she succeed?

The facts of this question are similar to those in *Hollington v Hewthorne*, in which it was decided that the finding on an issue in a criminal trial cannot serve as proof of that issue in an ensuing civil trial, since the finding of the criminal court is mere opinion. In the stated question, the situation is different, since what the plaintiff wants to introduce into evidence is not the finding of the criminal court, but the record of W's evidence given at the criminal trial. This changes things, because the record of W's evidence amounts to hearsay evidence.

10. ADMISSIONS AND CONFESSIONS: DEFINITION AND TYPES

- 10.1. What is meant by "the criterion employed is objective rather than subjective"?

"Objective" refers to an impersonal, general measure. One could say it represents the way a reasonable person would view the matter. "Subjective" is something more personal, namely what the person involved thinks of the matter. If an objective approach is followed, the result is that a statement will be an admission if, regardless of what the declarant thinks, an element of the crime is admitted in the statement. According to a subjective approach, the statement will be an admission only if the declarant intends to admit something, or is at least aware that something is admitted in the statement.

- 10.2. Indicate whether the following situations relate to a formal or an informal admission, or neither:

- 10.2.1. X's mother confronts him: "Martha tells me that you are the father of her baby girl!" X wishes the earth would swallow him up, but eventually answers: "Well, I suppose I did sleep with her."

Informal

- 10.2.2. X's mother confronts him: "Martha tells me that you are the father of her baby girl!" X who wishes the earth would swallow him up, hangs his head in shame, but can find no answer.

Informal (by conduct)

- 10.2.3. Immediately after a car accident, Mr Wagen admits to Mr Benz: "Yes, the robot was red for me, but I noticed it too late and could not stop in time."

Informal

- 10.2.4. Makgolelo pleads not guilty to a charge of rape. During the plea proceedings in terms of section 115 of the Criminal Procedure Act 51 of 1977, he claims that although he did have sexual intercourse with the complainant, she had consented to it. The magistrate asks Makgolelo whether the statement that he had intercourse with the complainant may be recorded in terms of section 220 of the Criminal Procedure Act. Makgolelo agrees. (See *S v Makgolelo* 1995 (1) SACR 386 (T).)

Formal

- 10.2.5. Makgolelo pleads not guilty to a charge of rape. During the plea proceedings in terms of section 115 of the Criminal Procedure Act 51 of 1977, he claims that although he did have sexual intercourse with the complainant, she had consented to it. The magistrate asks Makgolelo whether the statement that he had intercourse with the complainant may be recorded in terms of section 220 of the Criminal Procedure Act. Makgolelo is concerned that it will be to his disadvantage to agree, and refuses the magistrate's request.

Informal

- 10.2.6. The suspect in a murder case takes the investigating officer to a spot in the bush where he points out a pistol. "That is the pistol", he says. Ballistic testing proves that the particular pistol was used to kill the deceased. (Note: both the conduct of the suspect and his statement may or may not amount to an admission.)

Informal (both statement and conduct)

- 10.2.7. Cocky is arrested for stabbing his wife with a knife. As the arresting police official is explaining the reasons for the arrest to Cocky, he exclaims: "But I was defending myself!"
Informal
- 10.2.8. Cocky receives a summons in which his wife institutes a civil action against him. She is claiming damages for the stab wound inflicted by Cocky. Cocky consults his lawyer, who draws up the plea, which includes the following statement: "Cocky stabbed the plaintiff in self-defence."
Formal
- 10.3. How is a formal admission proved in a civil matter?
In terms of section 15 of the Civil Proceedings Evidence Act, a formal admission need not be proved in a civil matter - such admission is already on record, and forms part of the evidential material.
- 10.4. What is the evidential value of such a formal admission?
A formal admission places the fact(s) which is (are) admitted beyond dispute, and since that fact is no longer in dispute, no evidence needs to be adduced about it.
- 10.5. Can a formal admission be disproved by other evidence?
Section 15 disallows the rebuttal (proving false) by either of the parties of a fact which was admitted in a formal admission. However, admissions have been disregarded if disproved by other evidence.
- 10.6. Can a formal admission be withdrawn or amended?
Yes, the aim and function of the court is to do justice between the parties, and as such it would be reluctant to deny a party an opportunity to amend its pleadings. The Appellate Division in *S v Daniels* 1983 (3) SA 275 (A) held that the court has a discretion to relieve a party from the consequences of a formal admission made in error. A civil litigant must establish that a *bona fide* mistake was made, and that the amendment will not cause prejudice to the other side which cannot be cured by an order as to costs. An error in judgment, such as a failure to appreciate the crucial nature of the fact formally admitted, could be seen as a *bona fide* mistake. The mere fact that the withdrawal may defeat the opponent's claim or defence is not a matter amounting to prejudice in the legal sense.
- 10.7. Why is an admission by a person involved in a dispute protected from disclosure if the admission is made in order to achieve a compromise?
The rationale of the "without prejudice" rule is based on public policy which encourages the private settlement of disputes by the parties themselves. Parties would be reluctant to be frank if what they said may be held against them in the event of negotiations failing.
- 10.8. What is the effect of the words "without prejudice" in such a statement?
The statement is made without prejudice to the rights of the person making the offer in the event of the offer being refused. The words "without prejudice" do not by themselves protect the statement from disclosure. The statement may still be disclosed, even if the words are invoked, if it was not made during the course of genuine negotiations. It is not necessary to preface a statement with the words "without prejudice", because as long as the statement constitutes a *bona fide* attempt to settle the dispute it will be "privileged". Settlement of disputes is the main reason for the existence of this rule. However, before the "privilege" will come into effect, there must be some relevance to, or connection with, the settlement negotiations.
- 10.9. What is the most important prerequisite for a statement made without prejudice to be protected from disclosure?
The prerequisite for a statement made without prejudice to be protected from disclosure is that it has to be made in good faith. However, even if a statement is made in good faith, it will be disclosed, that is, it is admissible, if the statement constitutes an act of insolvency or an offence or an incitement to commit an offence, provided that the statement is tendered to prove the commission of the act.
- 10.10. State whether the following statements are true or false:
- 10.10.1. Statements made without prejudice occur only in civil matters.
True.
- 10.10.2. If such a statement is accompanied by a threat of litigation, the statement will no longer be privileged.
False. It will remain privileged, since such a threat is implicit in every offer of compromise. However, where an offer contains a threat relevant to establishing that the offer was not *bona fide*, evidence of both the offer and the threat will be admitted in court.

10.11. Answer the following questions after reading *R v Becker* 1929 AD 167:

10.11.1. What is a confession, according to *R v Becker*?

A confession is an unequivocal acknowledgement of guilt. It is the equivalent of a plea of guilty in a court of law. The court also stated that it is a statement which is consistent only with the accused's guilt, which cannot be explained in any other way.

10.11.2. What is the nature of a statement if the court may infer guilt on the part of the accused only if that statement is "carefully scrutinised and laboriously put together"?

It is stated that a statement of this kind is not a confession within the meaning of the Act. It would be dangerous to regard such a statement as a confession.

10.11.3. What is meant by the term "extra-judicial" as far as extra-judicial confessions are concerned?

"Extra-judicial" means that which is done out of court, in other words, not during the court proceedings or as part of the plea proceedings.

10.11.4. What test has the legislature devised to be applied to confessions?

The test used by the legislature is that a confession is an acknowledgment of guilt on the part of the accused which, if made in a court of law, would amount to a plea of guilty.

10.12. Draw up some guidelines to facilitate determining whether a statement amounts to a confession. Take note of the following aspects: the definition of a confession and the guidelines in *S v Yende* 1987 (3) SA 367 (A) 374C±375E. Make sure that you read the prescribed cases and apply the guidelines you devised to them.

Note that a confession is an admission of all the facts in issue. All the elements of a specific crime are therefore admitted. A confession can be described as a guilty plea and does not therefore contain any exculpatory part.

The court in *S v Yende* held that in order to decide whether a statement amounts to a confession, the statement must be considered as a whole. One should take cognizance of what actually appears in the statement and what is necessarily implied from it. Note that, if the content of the statement does not expressly admit all the elements of the offence, or excludes all the grounds of defence, but does so by necessary implication, then the statement amounts to a confession. If there is doubt in respect of the above, then the statement is not a confession, as it does not contain a clear admission of guilt. The court also held that an objective, rather than a subjective approach was suitable, since one is concerned with the facts which the accused states rather than the intention behind it. If the facts which the accused admits amount to a clear admission of guilt, then it is a confession, and it does not matter that in making the statement he acted in an exculpatory manner, that is, he did not intend it as a confession. The application of an objective standard does not mean, however, that all subjective factors are left out. The state of mind or intention of the declarant will sometimes be taken into account as one of the surrounding circumstances from which the objective meaning of his statement can be ascertained. The true meaning of a statement can often be decided only by taking the surrounding circumstances into account.

11. THE ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS

11.1. Complete the following sentences and, where necessary, choose the correct option:

11.1.1. The section refers to admissions made ...**extra-judicially**... ; in other words, outside the judicial process. This means that it refers to (formal/informal/both formal and informal) admissions.

11.1.2. The section emphasises that it relates only to admissions, if they don't amount to ...**confession**.

11.1.3. Such an admission will be admissible if it is proved that it was made ...**voluntarily**...

11.2. What does "freely and voluntarily" mean, according to *R v Barlin* 1926 AD 459?

According to this case, "freely and voluntarily" means that the accused should not have been induced by any promise or threat from a person in authority.

11.3. When will a court find that a promise or threat has been made?

A promise or threat will be found to have been made if a person, by means of words or conduct, indicates to an accused that she will be treated more favourably if she speaks, or less favourably if she does not speak. Whether such promise or threat was made will depend on the facts of each case. The mere existence of a promise or threat does not necessarily establish a lack of voluntariness. A subjective test is used to assess the voluntariness of the accused's statement in terms of which the threat or promise must have been operative on the mind of the accused at the time when the statement was made. The subjectivity of the test makes it impossible to specify what would constitute a threat or promise.

11.4. Who is a "person in authority"?

In terms of the common law, according to Zeffertt et al 467, a person in authority is "anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution". Persons such as a magistrate, police officer and the complainant clearly fall into this category. However, Schwikkard & Van der Merwe are of the opinion that "it would make more sense to define a person in authority as someone the accused believes to be capable of carrying out what he says, rather than someone able to influence the course of the prosecution".

11.5. What is the meaning of "freely and voluntarily" as used in section 217?

The common law definition is that the statement must not be induced by a threat or a promise emanating from a person in authority.

11.6. What is the meaning of the requirement that the person must have been "in his sound and sober senses"?

The accused must have been sufficiently *compos mentis* to understand what he was saying. The fact that the accused was intoxicated, extremely angry, or in great pain will not in itself lead to the conclusion that the accused was not in his sound and sober senses, unless it was established that he could not have appreciated what he was saying.

11.7. What does "without having been unduly influenced thereto" basically mean?

"Undue influence" occurs where some external factor nullifies the accused's freedom of will. Examples include the promise of some benefit, or an implied threat or promise. The undue influence need not emanate from a person in authority. Note that even a voluntary statement may be excluded if it was induced as a result of undue influence.

11.8. Read *S v Mpetha* (2) 1983 (1) SA 576 (C) from 578H±585H in accordance with the guidelines in the casebook and explain the test which is used to determine whether there was undue influence in a specific instance.

The concept of "undue influence" is wider than the concept of "free and voluntary". The circumstances of each individual case will have to be taken into consideration, in determining whether the confessor's will was swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition. The court held that the term "negative" was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at all. The criterion was held to refer to the improper bending, influencing or swaying of the will, and not to its total elimination as a freely operating entity.

11.9. Answer the following questions regarding *S v Nieuwoudt* 1990 (4) SA 217 (A) 243G±248G:

11.9.1. What are the requirements for the admissibility of an otherwise inadmissible confession?

The requirements for the admission of an otherwise inadmissible confession are:

- ≈ Evidence is adduced by the accused,
- ≈ which, in the opinion of the judicial officer, is favourable to the accused,
- ≈ of a statement made by him,
- ≈ as part of, or
- ≈ in connection with, such an inadmissible confession.

11.9.2. According to the court, what meaning should be given to the words "in connection with" in section 217(3)?

The court says that although this is a wide concept, it should be interpreted restrictively. In accordance with the decision in *R v Mzimsha* 1942 WLD 82, the favourable part of the statement must be a natural part of the confession, or else the favourable statement and the confession must be parts of substantially the same transaction. However, the court remarks that not everything said during the same conversation will necessarily be connected. Whether there is a sufficient connection will be decided on the facts of each case.

11.10. Why is a trial within a trial normally held?

A "trial within a trial" is held to determine the admissibility of an admission or confession. At this stage both prosecution and defence will adduce evidence as to the circumstances in which the statement was made. The presiding officer, sitting with or without assessors, will decide whether the requirements for admissibility have been met.

11.11. May evidence heard at a trial within a trial be taken into account when evaluating the evidence at the end of the main trial?

The principle applicable here is that the issue of admissibility must be kept separate from the issue of guilt. Therefore, the presiding officer in deciding the issue of guilt, that is when

she is evaluating the evidence at the end of the main trial, may not have regard to the evidence given at the trial within a trial.

- 11.12. If, at the end of a trial within a trial, the court is satisfied that the requirements for the admissibility of admissions or confessions have been met, the relevant statement will be admitted as evidence. Can a court amend such a decision at a later stage?

Yes, the Appellate Division has ruled that if during the course of the main trial evidence comes to light which causes the court to question its earlier ruling, it is entitled to overrule its own decision.

12. ADMISSIONS AND CONFESSIONS: REMAINING MATTERS

- 12.1. As far as pointing out is concerned, what did the exception that was accepted in *R v Samhandu* 1943 AD 608 involve?

The exception turns on a rule, accepted by English courts, that an otherwise inadmissible statement could still be admitted if confirmed in material respects by subsequently discovered facts.

- 12.2. Why does the exception that was accepted in *R v Samhandu* 1943 AD 608 no longer apply?

According to the January case, the exception by reason of the doctrine of confirmation by subsequently discovered facts, was contrary to the clear and unambiguous language of section 219A of the Criminal Procedure Act 51 of 1977, which allows no exception to the requirement of voluntariness.

- 12.3. A suspect is arrested for her involvement in an alleged cash in transit heist. During her arrest, she is warned in terms of section 35(1)(b) of the Constitution, and decides to keep quiet. After spending some time in the cells, she decides to point out the stolen money. She takes the investigating officer to a hiding place and points out containers filled with money. During her trial, the accused alleges that evidence of the fact that she pointed out the containers (a s 218(2) situation) is inadmissible since at no stage during her detention was she informed of her right to a legal representative. How will the court establish whether to allow the evidence to be admitted?

On the face of it, all the statutory requirements for the admissibility of evidence about the pointing out and the evidence discovered as a result of the pointing out have been met. However, this does not mean that the evidence will automatically be admissible. The accused had the right, as a detained person, to have chosen, and to have consulted with, a legal practitioner, and to have been informed of this right promptly. But the fact that the Constitution was infringed does not necessarily mean that the evidence will be inadmissible. The answer is found in section 35(5) of the Constitution, which states that any evidence obtained in a manner which violates any right in the Bill of Rights must be excluded if the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice.

This activity only required of you to mention the basic principles that are involved when one deals with unconstitutionally obtained evidence. Study unit 16 explains how section 35(5) functions in practice.

- 12.4. An accused is forced to point out a murder weapon and consequently, her fingerprints are found on the weapon. Evidence of the fact that the accused pointed out the weapon will be inadmissible in terms of section 218(2) (the pointing out was not done voluntarily), whereas evidence that the accused's fingerprints were found on the weapon will be admissible in terms of section 218(1). Nevertheless, at her trial, the accused argues that the fingerprints should be excluded in terms of section 35(5) of the Constitution because this evidence was obtained as a consequence of a breach of the accused's constitutional right not to be compelled to make an admission or confession. Such evidence should therefore be seen as derivative real evidence which connects her to the crime independently of an inadmissible communication. Reflect on this argument.

You will find a full discussion of this issue under "3.2.3 Fairness of a trial and derivative evidence" on page 121 of the study guide. In *S v M* 2002 (2) SACR 411 (SCA) the Supreme Court of Appeal notes that real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends on the say-so of a witness, the reason being that it usually possesses an objective reliability.

13. PRIVILEGE

- 13.1. Write a note in which you discuss the following statement, based on the judgment in *S v Dlamini* 1999 (2) SACR 51 (CC): "The privilege against self-incrimination is closely related to various rights of an accused, and these rights can only be exercised if the accused is properly advised of them. Self-incriminating evidence will generally be inadmissible if it was gathered without the accused having full knowledge of her rights."

The privilege against self-incrimination is manifested in various rights which are contained in the Bill of Rights, including the rights of an arrested person to remain silent (s 35(1)(a)), or not to be compelled to make any confession or admission that could be used in evidence against that person (section 35(1)(c)), and the right of an accused person to be presumed innocent, and not to testify at trial (section 35(3)(h)).

The court stated that not only did the record of the bail proceedings form part of the subsequent trial record, but any evidence which the accused elected to give at the bail hearing was admissible against him or her at the trial, provided that the court which heard the bail application had warned the accused of the risk of making such statements. The court accepted that the testimony at the bail application may cause prejudice to the accused later on, if it were incriminating for the purposes of the trial. That it may be a hard choice does not affect the question, as long as the choice remained that of the accused, and that it was made with a proper appreciation of what it entailed. An uninformed choice is no choice.

While the statement in the question is stated in the negative, the court in *Dlamini* came to the same conclusion, but stated the decision in positive terms, namely that (self-incriminating) evidence will be admissible if the accused was “properly advised” or warned by the judicial officer of the consequences of testifying (namely that such testimony could be used against the witness).

- 13.2. In terms of section 203 of the Criminal Procedure Act, which questions can no witness be compelled to answer?

The witness cannot be compelled to answer questions if the answer may expose her to a criminal charge.

- 13.3. At present, what is the purpose of this privilege?

The modern rationale is that a person should not be compelled to give evidence that will expose her to the risk of criminal charges. The other reason is that people should be encouraged to testify, and they will not do so if they are fearful that they may be forced to incriminate themselves.

- 13.4. Summarise the legal principles relating to the privilege against self-incrimination, as they appear from *Magmoed v Janse van Rensburg* 1993 (1) SACR 67 (A).

- **The privilege belongs to the witness and must be claimed by her.**
- **Before allowing the claim of privilege the court must be satisfied from the circumstances of the case and the nature of the evidence that reasonable grounds exist for the witness to appreciate the danger of being compelled to answer.**
- **The witness should be given considerable scope in deciding what is likely to be an incriminating reply.**
- **The privilege is also available to persons who testify in inquest proceedings.**
- **In South Africa, it is the duty of the presiding officer to inform the witness of her right not to answer an incriminating question.**
- **When a witness objects to answering a question based on the privilege against self-incrimination and the judicial officer overrules her objection by mistake and compels her to answer, then the reply, if incriminating, will not be admissible in subsequent proceedings against her.**

In *Magmoed*, the court referred to *S v Lwane* 1966 (2) 433 (A) where the Appellate Division decided that it is a well-established rule in our law that it is the duty of a presiding officer to inform witnesses about their right not to answer an incriminating question. The Constitution confirms this rule in section 35(3). The reason for this rule is that most people in our country, and especially illiterate people, are ignorant of this right. If the court fails to warn the witness accordingly, the incriminating statements will generally be inadmissible. However, the issue will be determined by the facts of the matter and if the witness is shown to be aware of the right (eg, if the witness is an attorney or a high ranking police official), it will not be inadmissible.

- 13.5. A and W (a former advocate) rob a bank. During the robbery, W shoots and kills a security guard, and A injures a bank official. Later an argument over the loot ensues between A and W, and A shoots W in the stomach. A is charged with attempted murder, and W is the state witness in this case. Obviously, the bank robbery comes up in this case, and during cross-examination, W makes a number of statements in which he implicates himself in the murder of the security guard. At no time does the presiding magistrate warn W of his right in terms of section 203 of the Criminal Procedure Act 51 of 1977. Some months later W is charged with the murder of the security guard. Can the state in this murder case use the statements that were made by W during his testimony in the other case, as evidential material against W? Explain your answer fully.

W has a privilege not to answer any questions which may expose him to a criminal charge (s 203). If he is aware of this privilege, and answers a question that does expose him to a criminal charge, then that answer can be used against him. Based on the judgment in *Magmoed v Janse van Rensburg W*, as a former advocate, can be presumed to be aware of this privilege, and the court will probably allow this evidence.

13.6. What right does marital privilege give a spouse?

A spouse is entitled to refuse to disclose communications from the other spouse made during the marriage.

13.7. By whom may this privilege be claimed?

Marital privilege may be claimed only by the spouse to whom the communication is made.

13.8. What is the probable reason for the existence of this privilege?

The probable reason for the existence of this privilege is that public opinion finds it unacceptable if one spouse is forced to testify about statements made by the other spouse.

13.9. What are the requirements for the existence of this privilege?

The communication must have been made whilst the spouses were married. If the spouses are divorced, the privilege remains in force as far as communications made during the marriage are concerned (s 198(2) of the Criminal Procedure Act).

13.10. What is the position regarding this privilege when a conversation between two spouses is overheard by a third party?

A third party overhearing the conversation between two spouses is not bound by the privilege and cannot be prevented from disclosing this conversation. It can be argued that this common-law principle infringes the constitutional right to privacy.

14. PRIVILEGE (continued)

14.1. Below you will find a list of the requirements for the operation of legal professional privilege. Write a brief note on the important aspects thereof.

14.1.1. The legal adviser must act in a professional capacity.

Whether the legal adviser has acted in a professional capacity is a question of fact. Payment of a fee is a strong indication that this may be the case, but it is not necessarily conclusive. It is not known whether the South African courts will follow the English example of recognising that salaried legal advisers (such as those employed by corporations and statutory bodies) are acting in a professional capacity for the purposes of this privilege.

14.1.2. The communication must be made in confidence.

Whether or not the communication was made in confidence will always be a question of fact. Confidentiality will be inferred if the legal adviser was consulted in a professional capacity, for the purpose of obtaining legal advice. However, where the nature of the communication makes it clear that it was intended to be communicated to the opposing party, it will not be accepted that the communication was made in confidence.

14.1.3. The communication must be aimed at obtaining legal advice.

The communications between legal adviser and client must be made with the intention of obtaining legal advice. Statements made simply to serve as a witness statement, for example, are not made with the intention of obtaining legal advice and will not be protected by the professional privilege.

14.1.4. The communication must not be made with the intention of furthering a crime.

Legal professional privilege will not be upheld if legal advice is obtained for the purposes of furthering criminal activities.

14.2. How does an agent differ from an "independent" third party?

An agent is employed for the specific purpose of getting hold of information, whereas an independent third party will usually be an expert from whom information can be obtained without having to do special research.

14.3. What is the difference in legal effect between information supplied by an agent, and information supplied by an independent third party?

If all the requirements are complied with, communication by an agent will be fully privileged. In the case of an independent third party, this information will be privileged only to the extent that the third party wishes it to be so.

14.4. Briefly write down the main principles related to police docket privilege which are evident from *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC).

The main limitation to police docket privilege is the constitutional right of an accused to a fair trial, as framed in section 25(3) of the interim Constitution – section 35(3) of the final Constitution. The police docket privilege which applied in terms of *R v Steyn* 1954 (1) SA 324 (A) cannot be reconciled with this. Normally, this right would ensure access by the accused to exculpatory documents (documents which tend to show that the accused is not guilty) in the docket, as well as to witness's statements which he may need in order to exercise his right to a fair trial. The State may oppose such requests on the ground that such access is unnecessary in order to exercise that right; that it may lead to the identification of a police informant; that it may lead to intimidation of witnesses or in some other fashion subvert the ends of justice. The court has to exercise a judicial discretion in determining whether access should be allowed.

15. STATE PRIVILEGE

- 15.1. Based upon *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC), make a summary of the general approach to be followed by a court regarding public policy, under the system of fundamental rights.

In terms of section 32 of the Constitution, every individual has a right of access to any information which is held by the state. However, this right may be limited if the requirements of the limitation clause are met. Generally speaking, it can be said that an individual is entitled to information held by the state if such information is necessary for the proper exercise of her right to a fair trial. The requirements of a fair trial will depend upon the circumstances of each case. A court must exercise discretion after weighing up the interests of the accused's right to a fair trial and the lawful interests of the state (which are directed at promoting and protecting the administration of justice). In the exercise of this discretion, the following factors are relevant:

- It would be difficult to justify withholding information from the accused which favours the accused or is exculpatory.
 - The fact that specific information has to do with state secrets, methods of police investigation, the identity of informers, or that disclosure may lead to the intimidation of witnesses or otherwise impede the proper ends of justice, does not in itself justify the withholding of information.
 - Sufficient evidence or circumstances ought to be placed before the judicial officer to enable the court to exercise its own judgment in assessing the legitimacy of the claim.
 - The prosecution must therefore in each case show that it has reasonable grounds for its belief that the disclosure of the information wanted carries with it a reasonable risk that it may lead to the disclosure of the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice.
 - If the state cannot justify denying access upon the above-mentioned grounds, the information must be revealed.
 - If, in the special circumstances of a particular case, the court needs access to disputed documents which are relevant in order to make a proper assessment of the legitimacy of the prosecution's claim and any access to that document may reasonably defeat the object of the protection which the prosecution is anxious to assert, the court would be entitled to examine such a document for this purpose without allowing the accused any knowledge of its content, but would make proper allowance for that factor in its final decision.
 - Even where the state has proved that a reasonable risk exists that the desired disclosure of the statements or documents may impede the proper ends of justice, it does not mean that access to such statements in such circumstances must necessarily be denied. The court still retains a discretion, since there may be circumstances where the non-disclosure of such statements may carry a reasonable risk that the accused may not receive a fair trial and may even be wrongfully convicted.
- 15.2. Imagine that you are a legal officer, having to decide between the applicant (in terms of Act 2 of 2000) on the one hand and the government on the other, in a matter concerning access to government information. Briefly stipulate what rights and duties you should consider in coming to a reasoned conclusion. Which cases and statutes might be relevant?

The applicant, of course, has a constitutional right of access to information in terms of section 32 of the Constitution. The Promotion of Access to Information Act 2 of 2000 has been promulgated to regulate this access. On the other hand, the state does possess a privilege in favour of secrecy in terms of the law which was in force on the 30th of May 1961, namely the English common law. This privilege has been thoroughly explored in the decision of *Van der Linde v Calitz* 1967 (2) SA 239 (A). In this case it was decided that the

court has a discretion in this regard and if the safety of the state, international relationships or high-level documents of the Executive Power come into the question, the discretion will be exercised in favour of secrecy. This position may be reconciled with the Constitution in that a restriction to constitutional rights is contained in section 36. In terms of section 7 of Act 2 of 2000 the operation of this Act may be curtailed in cases where other Acts regulate the procedure in civil and criminal trials and a start has already been made with such trials. Evidence which has been obtained in contravention of this curtailment will not be admissible in the case concerned.

16. THE EXCLUSION OF UNCONSTITUTIONALLY OBTAINED EVIDENCE

- 16.1. A 19-year-old student is arrested on suspicion of raping and murdering a fellow student. During the incident, the victim was seriously assaulted and it was quite evident that she fought bravely against her assailant. Clear evidence of someone else's blood and flesh is found under her nails. The police fail to inform the suspect of his right to a legal representative or the right to remain silent, and start questioning him. The suspect voluntarily gives a statement implicating himself. This eventually leads the police to a place where the murder weapon (a knife) is discovered. The police also force the suspect to submit himself to the taking of blood samples for the purpose of DNA testing. During the trial, the accused objects to the admission of his statement, the knife and the outcome of the blood tests as evidence and asks the court to exclude it in terms of section 35(5) of the Constitution. Explain fully whether you would exclude the evidence concerned.

Note that there is not necessarily a correct answer to a question like the one stated. What is important is how you substantiate any point of view you express. In the examination you will have to discuss the different aspects of the exclusionary rule in more detail before you come to any conclusion. We are not going to repeat the material given in the study guide, but you must do so in the examination. It is therefore important that you identify the issues involved, state the law on these issues, and only then come to a conclusion that are based on the facts of the question.

The question that was put required of you to apply the test for exclusion of evidence which is contained in the second part of the exclusionary rule mentioned in s 35(5) of the Constitution. You therefore had to determine whether admission of the evidence gathered by the police would render the accused's trial unfair or otherwise be detrimental to the administration of justice. Note that when answering a broadly framed question like the stated one in the examination, one would first of all consider whether specific evidence was obtained in a manner that violated any right in the Bill of Rights. A causal relationship between the Bill of Rights violation and the obtaining of evidence must therefore be established. In this regard you could have argued that the police obtained the evidence in violation of the accused's right to a fair trial, his right to human dignity or his right to privacy.

Although this activity mainly relates to evidence obtained in violation the accused's right to a fair trial (the first leg of the test in section 35(5)), you should bear in mind that there is a lot of overlapping between this leg and the second leg of the test for exclusion. See the discussion under "3.3 THE SECOND LEG OF THE TEST IN S 35(5): "IF ... ADMISSION WOULD OTHERWISE BE DETRIMENTAL TO THE ADMINISTRATION OF JUSTICE". You should therefore always take the considerations that make up that leg into account when answering any question about the exclusion of unconstitutionally obtained evidence.

It is pointed out in your study material that the failure to inform an accused of his constitutionally guaranteed rights does not necessarily lead to the exclusion of evidence obtained as a result thereof. The fact that the accused voluntarily provided the evidence is also not conclusive. The court must exercise a discretion in view of the facts of each case and by taking various considerations into account.

The following considerations could, for example, have influenced your answer:

The fact that the accused is still young stresses the fact that the police should have taken care to inform him of his rights. There is a good chance that he would not have made any statement or pointing out had he consulted with a legal representative. It is therefore important to look at the personal characteristics of the particular accused, such as his age, intelligence, education, background, nationality, his level of sophistication etc. Had the accused, for example, been a first year law student, he would have been aware of his rights. This will point to the admission and not exclusion of the evidence. One should therefore try to determine, on the facts of the case, whether there is any indication that the accused would still have provided the evidence had he been informed of his rights.

The reasonableness of police conduct is also an important factor to consider. Did they for example deliberately violate the accused's rights or did they have to act expeditiously to recover evidence that might be lost.

It was also important to make a distinction between the different types of evidence involved in the question, since the type of evidence in itself plays a role when deciding whether to exclude unconstitutionally obtained evidence. You therefore had to consider the admissibility of the different types of evidence separately. See the discussion under “3.2 FACTORS AFFECTING TRIAL FAIRNESS”. Note that the blood samples constitute real evidence emanating from the accused, whereas the knife can be termed as “derivative evidence”. Different considerations apply here and you should have discussed them.

- 16.2. Why did the court in *S v Mphala* 1998 (1) SASV 388 (W) exclude the evidence about the confessions which the two accused made? Discuss fully with reference to section 35(5) of the Constitution.

Please note the remarks that are made in the feedback to activity 1 of this study unit on the general approach that you should follow when answering any problem type question on the exclusion of unconstitutionally obtained evidence.

Although the court in *S v Mphala* 1998 (1) SACR 388 (W) mentions that the admission of the evidence would render the trial unfair, the evidence is actually excluded because its admission would have been detrimental to the administration of justice (the second leg of the test for exclusion). The court states that

“I cannot accept that the conduct of the investigating officer was anything but intentional. In such a case the emphasis falls on the ‘detrimental to the administration of justice’ portion of s 35(5) ... ”

The police conduct in the case was therefore objectively speaking unreasonable in view of the specific circumstances of the case. The investigating officer deliberately disobeyed investigative rules which seek to protect constitutional rights and that fact led to the exclusion of the evidence.