Combined Summary : The presentation and assessment of evidence

Part 1 : The presentation of Evidence: Study unit 1: Overview & Introduction SG1 TB

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Introduction:

The basic principle is that all available evidence should be used in proving the case. Only if there is some reason for excluding (or disallowing) evidence, may it be excluded.

The following principles are applied to determine inadmissibility of evidence:

- evidence may be *admissible only if* it deals with the problem in question (if it is *relevant*)
- evidence concerning a *prior statement* by a witness that *merely* serves to *corroborate (own evidence)* herself (previous consistent statement) *is inadmissible*
- the mere fact that a person has previously done something wrong does not mean that she has done so again, and such evidence is therefore inadmissible (*similar fact evidence*) *is inadmissible*
- evidence that merely deals with the *character* of a witness or a party *rarely has any bearing* on the question at hand, and is *usually inadmissible*
- a witness should generally tell about her first-hand experiences, and not about what she learnt
- from others (*hearsay evidence*) *is inadmissible*
- a witness may not give evidence which amounts to taking over the court's function to reach a conclusion (*opinion evidence*) *is inadmissible*
- people who *incriminate themselves (through admissions and confessions) have to do so absolutely voluntarily*, *otherwise* their incriminating statements *cannot be used against them*
- some evidence may be excluded simply because some higher value is believed to be protected by such exclusion (*privilege*) – *privileged evidence may be excluded*.
- finally, *evidence acquired in violation of the Bill of Rights in the Constitution* may often have to be excluded *is inadmissible*

Why evidence is presented, depends on nature of evidence:-

- *Oral evidence* – given by witness, delivering testimony from witness box. (certain q's may be
- asked by various parties, others may not)
- *Real things* – May be presented in court
- Other times a *document* of some kind may be required. Docs may not simply be handed to
- court – many requirements need to be met before doc may be used.
- Other times court may simply take notice of:
  - well-known / easily *determined facts*, or
  - some *legal rule* may provide
  - for the *presumption of a fact*.

Once all admissible evidence has been presented – court has task to evaluate evidence, in order to reach findings:-

- To *consider weight* of evidence
- To determine which party has *burden of proof*
- Amount *(measure) of proof required* (much greater in criminal cases then in civil)
- In *evaluation of evidence* – *weight of evidence* often measured by q's as *whether it presents direct evidence of q in issue*.
- *How evidence's* bits & pieces fit in one & other, support & strengthen *(corroborate)* one another.

Study unit 2 :

Witnesses SG1 TB

2.1 Securing presence in Court & affecting… witnesses

In criminal proceedings

Section 186 of the Criminal Procedure Act 51 of 1977 determines that

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

- It is an irregularity if the court fails to call a witness
- Both the prosecutor and the defence may, with leave of the court examine and cross examine

In civil proceedings

In civil proceedings it must have agreement of both parties

- Once all evidence present but before the court gives a finding both sides allowed to 'present the court in argument.'
- Parties provide their assessment of the evidence and argue the applicable law including precedent, statutes etc
- Refer to their strong points and emphasise weak points of the others

Section 8 of the Civil Proceedings Evidence Act 25 of 1965 determines that

Save as otherwise provided, every person competent and compellable to give evidence.- Save in so far as this Act or any other law otherwise provides, every person shall be competent and compellable to give evidence in any civil proceedings.

Competent witness

Competence has to do with whether a particular person has the mental capacity to testify.
As a general rule, all persons are considered to be competent to testify.

Determination of competency of a witness – procedures

(Read Schwikkard – 22 3)

- Parties *cannot consent to admission of an incompetent witness's evidence*.
- *Court must decide any question* concerning competence / compatibility of any witness
- *Method* of examining & deciding issues relating competence / compatibility is normally that of *trial within a trial.*
- May be necessary for court to *hear evidence* - but can also determine competence on basis of its *own observations*.

Competent witnesses can be compelled to testify…

- Competent / compellable *witness who refuses to attend* proceedings may be brought before court by way of *warrant of arrest*.

- Such a witness (or one who attends but *refuses to testify*) may also be *tried & punished* for his failure or refusal.
- Witness concerned can avoid punishment by presenting *acceptable excuse*.

Competent witnesses are…

- *Every person is competent and compellable to give evidence (S192 - CPA)*
- Whether an individual has the *mental capacity* to testify
- *A person whom the law allows a party to ask* but *not compel to give evidence*
- *A person whom the law allows a party to compel to give evidence*
- Concerned with whether a person *can be forced to give evidence*

Possible exclusions…

- Limited by *statutory provisions and constitutional rights* - *Privilege* - *(S206 - CPA)*
- Concerned with *whether the person in the box is obliged to answer*
- For example, *privilege against self-incrimination* can only be claimed when relevant question is put to him.
- ***Admissibility** is different since it has to do with the evidence of an already competent witness*

***Competence** – relates to whether a particular person has the mental capacity to testify.*

As a general rule, all persons are considered to be competent to testify.

Sec 192 of Crim Procedure Act 51 of 1977: ' **Every witness competent & compellable unless expressly excluded –** Every person not expressly excluded by this Act from giving evidence shall, subject to provisions of Sec 206, be competent & compellable to give evidence in Crim Procedure'

Sec 206 The law in cases not provided for: The law as to the competency, compellability or privilege of witnesses 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. ∴ English law (as at 30 May 1961) will be applicable.

Sec 7 of Civil Proc Evid Act 25 of 1965: ' **Save as otherwise provided, every person competent & compellable to give evidence –** Save in so far as this Act or any other law otherwise provides, every person shall be competent & compellable to give evidence in any Civil Procedure'

2.2 Exceptions to general rule of incompetence to testify

Children *(Read Schwikkard – 22 4)*

- *There is NO statutory provision barring children under certain age from testifying* / age above child is competent. *Children above age are subject to same general rule of presumed competency as all other… Provided they understand what it means to tell the truth, have sufficient intelligence & can communicate effectively*.

Evidence by Children – case law

R v Zulu

The principle is to compell children to testify against their parents is undesirable.

The decision to call them - lies at the discretion of prosecutors, and will depend on circumstances such as the seriousness of the charges against the parents and the availability of other witnesses

Mentally disordered / intoxicated witnesses *(Read Schwikkard – 22 5)*

Section 194 of the CPA re: ***Incompetency due to state of mind*** *determines that*

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

- Person only to be withheld from giving evidence when his ability – such a nature that he cannot make a contribution to matter before court
- Following aspects are important in this regard:-
  - Person's ability to observe – able to
  - remember his observations
  - communicate them to court.
  - understand necessity to speak the truth
- Court usually gives ruling on competence of such witness after questioning & heard evidence as to his mental condition.
- 'and who is thereby deprived of proper use of his reason' - only certain degree of mental illness / imbecility of mind will make a person a incompetent witness.
- 'while so affected / disabled' = person will only be incompetent for duration of affliction / disability. (drunk person that has to sober up)

S vs Katoo – Court in considering sec 194 held that:-

1st req of sec is that it must be shown to trial court that witness suffers from (1) mental illness, or (2) they labour under imbecility of mind due to intoxication / drugs or the like.

2nd Must be established that as direct result of such mental illness / imbecility – witness deprived of proper use of their reason.

These two provisions must be collectively satisfied…

In Katoo the …

- Evidence led short of establishing that stated requirements were met.
- Physiologist's evidence – didn't indicate that complainant suffered from mental illness
- Merely established that she was an imbecile.
  (is not a mental illness & didn't disqualify her as witness)
- Also clear by evidence led that complainant wasn't deprived of proper use of her reason just because she had limited mental capacity.

Officers of the Court *(Read Schwikkard – 22 7 & 22 8)*

- ***In interest of justice*** – ***presiding officers*** of court to stay objective with respect and are considered incompetent to be witnesses to cases over which they preside.
- ***Attorneys, advocates and prosecutors*** are competent witnesses in cases in which they are professionally involved
  - *But undesirable that they testify in such cases*
  - *Legal professional competence also restricts the capability to testify against a client*
- Where an officer perceives a certain fact he will become competent e.g. if he *recuses himself* from a case he then becomes competent. (Read example on page 9)
- *General rule* – Is party's representative / prosecutor competent to testify? (They are presumed to be) BUT it is undesirable that representative / prosecutor testify in that case.

3. *Competency & Compellability* *(Read Schwikkard – 22 2)*

Sec 192 of Crim Procedure Act 51 of 1977: ' **Every witness competent & compellable unless expressly excluded –** Every person not expressly excluded by this Act from giving evidence shall, subject to provisions of Sec 206, be competent & compellable to give evidence in Crim Procedure'

Only a competent witness may be a compellable witness.

As mentioned earlier, there are *cases where a competent witness may not be a compellable witness*.

- These cases can be divided into the following *three main categories: spouses, the accused and co-accused.* ➢ *Spouses* ➢ *the accused and* ➢ *co-accused.*

Spouses *(Read Schwikkard – 22 11)*

- General rule @ ***Common law*** – spouse of accused may not testify for / against one another.
- Rule does not apply to ***civil procedure*** anymore.
- Spouse / partner therefore competent / compellable witness for / against in civil matters
- Rules re **privilege** – may prevent from mentioning certain facts.
- Crim procedure – specific rules are in force (depends if spouse is state witness, defence - witness for co-accused.

Specific rules in criminal trials - Spouse as state witness

195 Evidence for prosecution by husband or wife of accused

(1) The wife or husband of an accused shall be competent, but not compellable, to give evidence for the prosecution in criminal proceedings, but shall be competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with-

(a) any offence committed against the person of either of them or of a child of either of them or of a child that is in the care of either of them; read with section 12 of the Criminal Law (Sexual Offences & Related matters) Amendment Act 32 of 2007

Witness for the prosecution:

- The spouse of an accused is a competent witness for the prosecution but cannot be compelled.
- However she becomes compellable when the accused is charged for the following crimes (instances affecting the well being of the spouse and children):
  - Offences against the person of either of them
  - Any offence under chapter 8 of the Child Care Act in respect of a child
  - Any contravention of the maintenance act
  - Bigamy / Incest / Abduction / Perjury
  - Contravention of certain sections of the Sexual Offences Act
- These sections also includes a child in care of accused & incest as contemplated. These sections also states that spouse is competent to give evidence on behalf of prosecution BUT can be compelled to testify only in certain circumstances.
- Exceptions deal with well being of & relationships between married couple & well being of children.
- Also applicable to people who were married when crime took place (but have separated in mean time)

Specific rules in criminal trials - Spouse as defence witness

196 Evidence of accused and husband or wife on behalf of accused

(1) An accused and the wife or husband of an accused shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that-

(a) an accused shall not be called as a witness except upon his own application;

(b) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence.

Example

Mr Brawn and Mr Brains are co-accused. Mr Brawn wants to call Mrs Brains as a witness. Mrs Brains is competent to testify in defence of Mr Brawn, but she cannot be compelled to do so. She can, however, be compelled to testify in defence of Mr Brains.

- The spouse is a competent and compellable witness for the accused but not compellable for a co-accused.
- In terms of the common law a former spouse is in the same position as a current spouse and hence in terms of the law this should be seen to be the case

Accused persons *(Read Schwikkard – 22 9)*

- Accused person is a *competent witness in own case but not compellable one*.
- Neither state, court or co-accused may compel accused to testify. – choice rests solely with the accused.

- A co-accused cannot compel another accused to testify on his behalf
- An accused may incriminate a co-accused while giving evidence but he cannot be called for the prosecution since he is confined as a witness in his own defence.
- Only by terminating his status as an accused in the same proceedings as the co-accused can the former become a witness against the latter.
- ***Change of status occurs if;***
  - The charge against the accused is withdrawn – note this is not an acquittal since the accused can be recharged
  - The accused is found not guilty and discharged
  - The accused pleads guilty and separation of trials takes place
  - The trials are separated for another valid reason

S35 Constitution

Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right-

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self-incriminating evidence;

Co-accused persons

(Read Schwikkard – 22 10)

- Where accused persons charged jointly = 'co-accused'

Co-accused as defence witness

- One may testify in defence of other.
- They are competent BUT not compellable by other to testify as defence – because other is also accused.

Co-accused as prosecution witness

- Co-accused *not competent witness for state*.
- *Question of compellability doesn't arise when witness not competent.*
- Circumstances when court may call someone who has *previously* been a co-accused to testify – *This can happen in one of 4 following ways:-*
  1. *Withdrawing charge against co-accused.*
  2. *By finding co-accused not guilty .*
  3. *By co-accused entering a plea of guilty. (trials of co-accused can be separated)*
  4. *If trials of co-accused are separated for some other valid reason.*
- At any point during trial, court may order separation of trials of co-accused.
- Then co-accused may give evidence against each other. (but advisable that accused state intends calling – be sentenced first)

157 Joinder of accused and separation of trials

(1) An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

4. Cross-examination

- After witness gave evidence-in-chief he may be cross-examined by his opponent
- When persons tried jointly – Practice is for defence witness to be cross-examined 1st by co-accuser's legal representative & then by prosecution
- ***Purpose of cross examination is…***
  - Elicit evidence supporting the cross examiners case
  - Cast doubt upon the credibility of the opposing party's witness
- Leading questions may also be asked but previous convictions and character are beyond scope.
- Witness may be asked leading q's during cross-exam
- Q's asked during CE must be relevant either to issue / credibility of the witness.

5. Re-examination

- After cross-exam – may be re-examined by party who originally called them.
- Purpose of re-examination is to enable witness to clear any misleading impressions which may have resulted from answers during cross examination.

  Re-exam similar to examination-in-chief:-
  - Undertaken by party who called witness
  - Leading questions are not permissible
  - NB: confided to matters arising from cross examination.
  - May be examined on new issues only with leave of court & in this event opposing party will have right to cross-examine on any new matter.

3. Witnesses called by Court

Section 186 of the Criminal Procedure Act 51 of 1977 determines that

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case. *(Read Schwikkard – 23 4 3)*

- Governed by S 186 of the CPA

- May be done at any stage of the proceedings by subpoena
- It is an irregularity if the court fails to call a witness whose evidence is essential for a just decision
- Both the prosecutor and the defence may, with leave of the court examine and cross examine
- Only done in criminal proceedings but rarely.
- In civil proceedings it must have agreement of both parties
- Our courts rarely rely on this provision – scared to become too involved in case
- No similar provision in Civil cases – Court may only call witness with consent of parties. *(Read Schwikkard – 23 5 4)*

4. ***Argument***

- Once all evidence is presented, but before the court evaluates evidence & comes to a decision, both sides are allowed to 'present the court in argument.'
- Parties provide their assessment of the evidence and argue the applicable law including precedent, statutes etc
- They will refer to strong points in own case & weak points in opponent's - to finally persuade the court in their favour

SUMMARY

The ***competence*** of witnesses has to do with whether a particular person has the mental capacity to testify.

Compellability, on the other hand, has to do with whether such a person can be forced to testify.

It is presumed that all persons are competent to testify and compellable, since it is in the interests of justice that every person who may have something to contribute to the resolution of a dispute should do so.

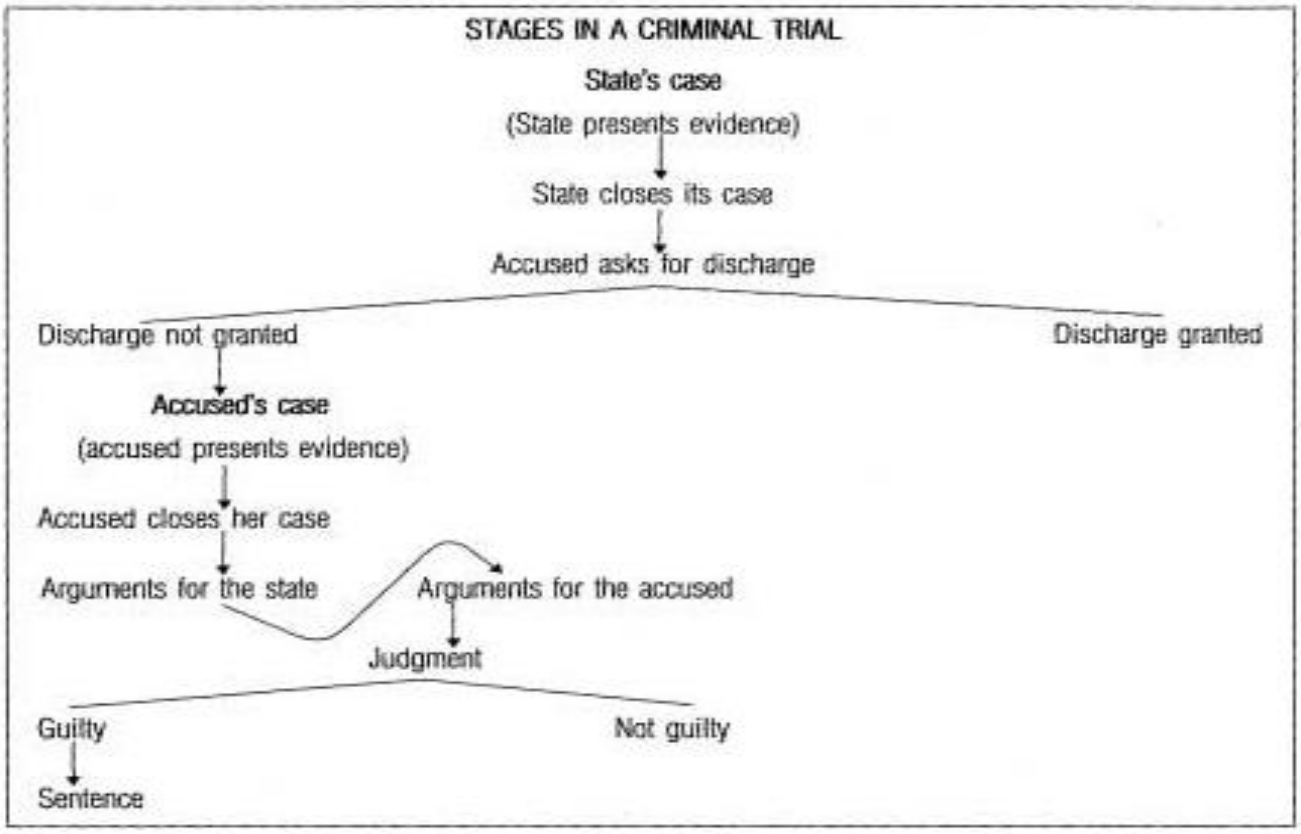
There may, however, be circumstances where a person will not be competent to testify, for example in the case of children, mentally disordered persons and officers of the court.

There may also be circumstances under which a person cannot be compelled to testify. In such cases (spouses, the accused and the co-accused), it is important to determine whether such a person is a witness for the defence or a witness for the prosecution.

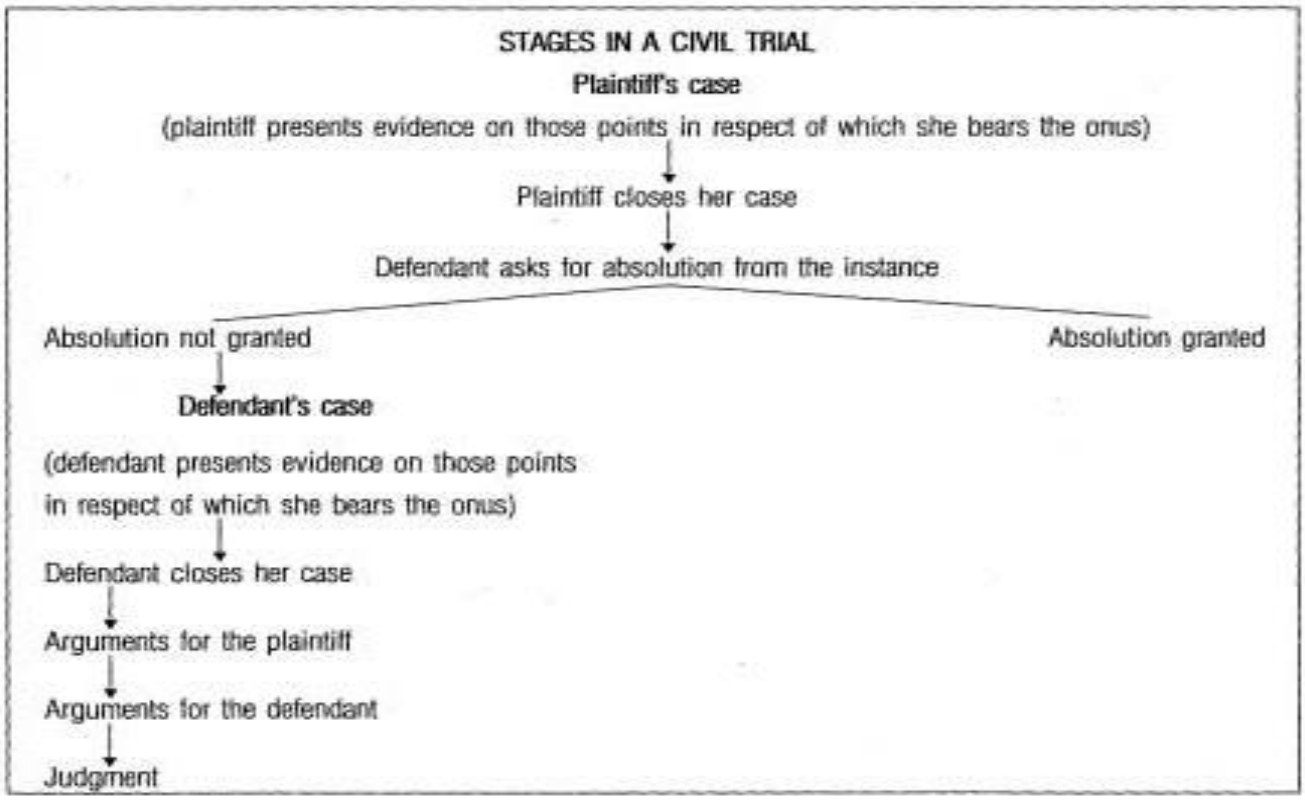
Study unit 3 :

Stages in the trail process & the presentation of oral evidence SG1 TB

(Read Schwikkard – 24 3 & 24 4)



In a civil trial, this diagram looks as follows:



Stages in the trial process and the presentation of oral evidence

Conduct of trial

Three significant stages in trial during presentation of oral evidence:

The presentation of oral evidence

- Most common means of evidence (in criminal cases)
- Cause of action in Civil case will determine nature of evidence required
- Oral Evidence = must be given under **oath or affirmation**
- 3 Stages in which oral evid is presented is: - examination-in-chief; cross-exam & re-exam

2.1 Examination in chief

- Conducted by the party who calls the witness.
- Purpose is to put relevant information before the court by means of questions and answers.
- ***Credibility***
  - The party who undertakes the examination in chief is not allowed to attack credibility of witness as - party calling witness relies on testimony of witness.
  - Questions about witnesses previous convictions & bad character may not be asked.

- ***Leading questions***
  - A leading questions is one which suggests an answer or assumes the existence of a disputed fact.
  - Leading questions may not normally be asked, unless it relates to undisputed facts
  - However presiding officer may allow it in the interests of justice or to expedite proceedings.

- ***Unfavourable or hostile witnesses***
  - An unfavourable or hostile witnesses is a witness whom gives evidence which contradicts or damages the case of the party which called him in the first place.
  - A party calling a witness will be entitled to attack the credibility of their witness if he gives evidence unfavourable to their case.
  - Evidence may be led to contradict the evidence of the unfavourable witness.
  - But if becomes clear that witness intends to **prejudice** case of party who has called her, that party may apply to court to have witness declared **hostile** witness.
  - Once declared such he may be cross-examined by the party who called him.

- ***Witness may refresh his memory… principles & requirements…***
  - The witness may refresh his memory - ***principles*** differ according to;
    - Refreshing memory during an adjournment – no general rule preventing this
    - Refreshing memory in the box – certain ***requirements*** that need to be proved must be met;
      - *Personal knowledge* of the event and a finding to this effect must be made. This is required to avoid inadvertent admission of hearsay evidence
      - *Inability to recollect*

- *Verification of the document* used to refresh memory - the witness must have made a recording but it can be accepted if the recording was made by someone else on the instruction of the witness
- Fresh in memory - that is *whether the recording was made at a time when the facts were still fresh in the memory of the witness*.
- The *presence or absence of substantial contemporaneity* is a factor to assist the court in determining whether the facts were fresh in the mind.
- *Use of the original document - where the witness has no independent recollection* - copy may be used if original shown destroyed / lost
- Production of the document - the *document* used to refresh memory *must be made available* to the court and opponent for inspection.
- *Precluded by privileged documents* - Where the document is privileged, the holder can either waive this & the witness may then use this or claim privilege and hence the witness may not use it.

General rule – refreshing of memory…

General rule – witness required to give independent oral testimony & not permitted to rely on or refer to earlier record.

- But owing to fallibility of memory & complexity of some issues – witness may be given time to refresh memory as necessary exception.
- Legal principle – determine if witness may refresh memory depends on whether:-
  (1) wants to refresh before testimony / during adjournment
  (2) wants to refresh by referring to doc while in witness box
- Legal position of (1) = no general rule that prevents from reading witness statement / other statement drawn up soon after event before / during. (practice should be encouraged)

R v O'Linn 1960

Facts – Appeal of Magistrates Court conviction - Efficacy of state relying on stopwatches & record of events & ticket issued. questioned. £ 6 speeding ticket for 50mph in 35mph zone.

Issue – whether witness may refresh memory:

Witness for the state – Insp Clark wished to refresh his memory by viewing the ticket. State permitted in the circumstances.

Condonation of the - general rule that – witnesses req to give independent oral testimony & not permitted to rely on / refer to earlier record, but owing to fallibility of memory & complexity of some issues – witness may be given time to refresh memory as necessary exception.

Court found in favour of the State

SUMMARY

Various forms of evidence may be adduced, including documentary evidence, real evidence and oral evidence. The nature of a case determines which means of adducing evidence will play the most important role in the case.

Examination-in-chief is conducted by the party who calls the witness, who should not ask leading questions and should not attack the credibility of the witness, unless the witness has been declared a hostile witness.

A witness may refresh her memory using a document which was drawn up at the time when the facts about which she is to testify were still fresh in her memory, subject to certain requirements.

Cross-examination is conducted by the opponent of the party who called that witness. Its purpose is primarily to cast doubt upon the credibility of the witness.

Re-examination is conducted by the party who calls the witness and its purpose is to enable the witness to clear up any misleading impressions which may have resulted from cross-examination.

The court may also call witnesses, but mainly in criminal cases. Before the court makes a judgment on the matter, both parties will be given the opportunity to ***address the court in argument***.

Study unit 4 :

Real Evidence SG25 TB

1. Definition of real evidence *(Read Schwikkard – 19 1)*

- While there is no formal requirement for the handing in of objects, it is however often accompanied by oral evidence, provided that someone has to identify object & place it in context.
- Court takes it into possession, marks it, & reference made to it as part of court record as an 'Exhibit #'
- An expert witness often is called to determine the efficacy of the object an possibly explain the utility and operation thereof.
- *An object* which upon proper identification, becomes, of itself, evidence e.g. knife, photograph, letter etc
- The party wishing to produce real evidence must, *in the absence of admission* by an opponent, *call a witness to identify it as such*
- *Real evidence usually owes its efficacy to a witness* who explains how it was found or used or why he is the owner
- *There are no formal requirements for the handing in of real evidence*
- *A court should not* attempt to make observations that require expert knowledge – however it may draw its own conclusions here expert knowledge is superfluous (footprints)
- An *expert called in to explain how an object operates is in fact opinion evidence* even though the *object itself remains real evidence*
- *Oral evidence* describing relevant real evidence not produced is not rendered inadmissible. *This deals with reported real evidence (the description) as opposed to immediate real evidence (the thing)*

The importance of the submission of real evidence:

S v Msane **1977** (4) SA 758 (N)

Mr Msane was convicted in court of the district Vryheid for trading / possession of 70g marijuana. Imprisoned 5 years – a quo.

On revision :

Justice Hoexter made two distinctions :

1. He distinguished between the admissibility and weight of oral evidence dealing with the exhibit, if the exhibit is not submitted in the form of real evidence to the court - why the weight issue is critical in the case of a single witness

2 . He distinguishes between the two possible consequences of prejudice that may arise from fraudulent evidence if the exhibit is not submitted.

Justice Hoexter's opinion was that the trial court had made a mistake in the conviction because the evidence did not prove the guilt of the accused beyond reasonable doubt.

Failure to submit real evidence will have the following effect:

A dishonest witness can easily falsely accuse an innocent accused person in one of two ways;

1. If the witness submits the marijuana (real evidence) that he bought X, but Y (the accused) identified as the seller, will be the presentation of real evidence in itself not be able to prevent a wrong conviction.
2. If the witness had not bought the marijuana from anyone, but nevertheless claims that Y sold the marijuana to him, will the submission of real evidence expose the dishonesty of the witness.

2. Personal appearance *(Read Schwikkard – 19 2)*

- *Court may look at person* to determine age, race, gender & observe witness performance.
- *Physical appearance and characteristics constitute real evidence* and demeanour of witness in the stand lends credence, or not, to credibility.
- *Courts observation of witness for purpose of determining competency to testify*: e.g. court may express own opinion on competency with regards the mentally ill.
- *Physical appearance as real evidence of approximate age* – this may serve as real evidence. However S337(b) of the CPA provides an estimation of age based on appearance is not permitted where the precise age is an element of the crime.
- *Resemblance of child to reputed parent*: this may afford some evidence of parentage but the value is marginal

337 Estimating age of person

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may, in addition to the provisions of sections 14 to 16 of the Child Justice Act, 2008, estimate the age of such person by his or her appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless-

(a) it is subsequently proved that the said estimate was incorrect; and

(b) the accused at such proceedings could not lawfully have been convicted of the offence with which he or she was charged if the correct age had been proved.

Personal appearance & single witness vs witnesses for the defence

S v Webber 1971 SA 754 (A)

- Single witness was called upon to testify in a murder trail which was the result of his brother's murder by 3 asailants.
- The brother's testimony was contrasted to the testimony and appearance of the defence witnesses, finding the brother as a credible witness contrasting the defence witnesses, contradicting each other and at times corroborating the brother's evidence.

***Testimony of a single witness*:**

R v Mokoena

- the Judge was wrong to say that the test that a single witness' testimony should be clear and sufficient in every material respect – was set too high

***Racial modeling*:**

R v Vilbro 1957 (3) SA 223 (A)

- Earlier – people were diffirentiated into racial groups and the court, classified as so-called experts, sometimes had such persons under observation as a form of real evidence.

***Determination of age*::**

S v Mavundla 1976 (2) SA 162 (N)

- The physical appearance of an accused, can be considered as real evidence in respect of his approximate age.

3. Inspections in Loco, Demonstrations & Bodily samples

(Read Schwikkard – 19 6 & 19 8)

- A decision to observe the scene of an incident lies solely with the court's discretion which is conferred by S169 of the CPA.
- *An inspection in loco may achieve two main purposes;*
  - *It may enable the court to follow the oral evidence more closely.*
  - *It may enable the court to observe some real evidence in addition to oral evidence*.
- Undesirable that these inspections take place after arguments have been completed since parties should be allowed the opportunity of correcting observations that appear incorrect.
- The inspection should be in the presence of both parties although the presiding officer can make the inspection on his own.
- If witnesses point out items and places they should be subsequently (re)called to provide such evidence in court on what was indicated.
- If a court draws any conclusions from such inspections that are unfavourable to a party it must mention these to allow that party the opportunity to prove otherwise.
- Inspection *in loco* – furnishes real evidence of what is inspected on site
  - If court draws any conclusions unfavourable to any party - should mention in order to give party opportunity to convince court that conclusion id incorrect.

Demonstrations

- The use of simulations may be allowed to show the effects of an incident.
- Locally the court should guard against accepting a particular course of events purely because it has been demonstrated in a dramatic fashion.
- In countries like USA – where jury system operates – sophisticated simulations (demonstrations) are used in order to give jury idea of what really happened.

- In South Africa our courts guard against the danger of accepting certain course of events simply because it has been demonstrated in dramatic fashion
- The use of simulations may be allowed to show the effects of an incident, the probative value thereof should be viewed critically and conservatively.

Bodily Samples

(Read Schwikkard – 19 8)

37 Powers in respect of prints and bodily appearance of accused

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

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

- Great advances have been made with sophisticated technology used to prove identity.
- Whilst blood tests play an important role in litigation e.g. affluence of alcohol - DNA fingerprinting has greatly advanced positive proof pertaining to the identity of victims / perpetrators etc.
- This technology heralds a vast improvement on old blood tests – which could only establish prove negative proof – excluding a person as any of the above…
- DNA fingerprinting can be used to establish parentage, identify the deceased, link a suspect to a crime – rendering positive proof that a person is or isn't a person as any of the above…
- It can thus be used to establish both guilt or innocence.
- All the above-mentioned is 'real evidence' & needs to be explained & corroborated by expert evidence.

Bodily Samples – DNA Sampling

In ***Van Der Harst v Viljoen* 1977** *(1) SA 795 (K)*

- DNA Tissue tests were used for the 1st time to in order to prove paternity – improving on the use of blood tests that only render negative proof, namely that a certain person cannot be the father of a child.

4. Fingerprints & Handwriting

(Read Schwikkard – 19 4 & 19 7)

- The taking of blood tests & fingerprints – is permitted by Sec 37 of Crim Proc Act. (Blood & other bodily samples may be taken against will of accused)
- Evidence of fingerprints found at the scene is often of strong probative value.
- Because of fine details of fingerprints – expert opinion to be called & his opinion accepted as admissible evidence.

- An expert examining a folien from the scene will look for at least 7 points of similarity on enlarged photographs of the accused's and crime scene fingerprints.
- 7 similarities provide proof beyond all reasonable doubt that they are from the same person
- The evidence thereof may be provided orally or by affidavit.
- When fingerprints are used - an enlargement of accused's fingerprint is compared in court with that of fingerprint found at scene of crime.
- Same procedure followed with handwriting – but court not bound by opinion of expert & may also hear lay evidence in this regard / draw own comparisons.
- Footprints do not require explanation of an expert & the court may follow its own conclusions, because detail is not as fine as with fingerprints & handwriting.

37 Powers in respect of prints and bodily appearance of accused

(1) Any police official may- (a) take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken - (i) of any person arrested upon any charge;…

5. Evidence derived from a computer and other digital devices *(Read Schwikkard – 21 1 to 21 4)*

- A trend has emerged in the South African Law of Evidence to classify this type of evidence into a third category, quite distinct from real and documentary evidence.
- This trend now seems to have come to an end as a result of the Ndiki-case. In this case the court made a distinction between machine-based evidence where a human had also been involved at some or other stage and evidence which had been created by machines (computers) working without human interference.
- The different exhibits were then classified into one of these two categories without resorting to a third, sui generis (of its own kind) category.
- *Where humans had been involved this would be documentary evidence and if not, real evidence. If required, the latter type of evidence would be brought before court by an expert testifying about the reliability of the working of the machine*.

S v Ndiki & Others 2008 (2) SACR 252 (Ck)

The matter dealt with evidence contained in certain documentary evidence in the form of computer printouts which the State wished to present in the course of a criminal trial. The accused had protested which resulted in a hearing-within-a-hearing so that the court could determine:

- the true nature of the printouts,
- the classification of documents in which it falls and
- Whether the admission of documentary evidence regulated by any legislation that deals with the admission of documentary evidence.

The court considered various provisions of the…

- The Law of Evidence Amendment Act 45 of 1988
- The Civil Proceedings Evidence Act 25 of 1965 - and
- The Criminal Procedure Act 51 of 1977:

The court held that

- Both section 35 of the Civil Proceedings Evidence Act and section 221 of the CPA leave it to the

discretion of the court to attach the necessary weight to evidence admissible with regard to computers. The reliability and accuracy of the computer and its operating system is relevant factors that must be taken into account in the exercise of the court 's discretion.

- Due to the above reason, the objections raised to the admission of specific exhibits computer generated exhibits were dismissed, and such evidence was provisionally admitted as evidence on the premise that *Where humans had been involved this would be documentary evidence and if not, real evidence. If required, the latter type of evidence would be brought before court by an expert testifying about the reliability of the working of the machine*.

SUMMARY

- We have showed how evidence in the shape of a physical object like a knife, or a quantity of dagga, may be brought before the court.
- Even a person, small samples of body tissue or the scene of the crime itself may constitute real evidence.
- In certain instances, as with fingerprints, expert evidence may be required to assist the court to draw inferences from the real evidence.
- Simply remember that real evidence may be any object, including daily readings by a computer, which may serve as evidence to help a court decide a case.

Study unit 5 :

Documentary Evidence SG31 TB

1. Admission of documentary evidence

- The main requirement that has to be met before documents can be used as evidence is - that the document will be admissible only in following circumstances:-
  - *if original document is produced in court*
  - *if document is proved to be authentic.*
- Other requirements may be described in particular instances – usually by legislation.
- Electronic documents are subject to the statutory regime imposed by Electronic Communications & Transactions (ECT) Act 2 of 2002.

2. Definition of Documentary evidence *(Read Schwikkard – 20 2)*

- There is no common law definition, but CPEA says it is any 'book, map, plan, drawing or photograph'
- The most widely accepted definitions can be found in ***Seccombe v Attorney General*** **1919** TPD 270 BY 277 *'The word document is a very wide term that includes everything that contains the written or pictorial proof of something'* - note two points 'written' and be able to provide proof of something.
- Currently it also includes *'data message'* which is data generated, sent, received or stored by electronic means and includes voice and stored records.
- First element of Doc evidence – that it refers to evidence that is presented by way of document.
- Less obvious what is to be understood term 'document'
- Ordinary consideration of word = important
- Legislation refers to specific things that should be considered documents
- For ordinary meaning of docs – to refer to case law:-
- Writing / drawing – integral part of any doc.
- Doc should be able to provide proof of something
- Examples = contracts, letters, pictures, photographs, birth certificates & wills etc.

3. Producing Original Document

- Not always clear how to identify the original but it appears to correspond to the original source of recording
- Secondary evidence may not be used to prove the contents, but if it is the only means it can be admitted and used in the following circumstances;
  - *Original document lost or destroyed*
  - *Document in the possession of the opposing party or a third party*
  - *Impossible or inconvenient to produce the original*

- *Permitted by statute*
- *Extracts of official documents, i.e. those under the control of a state official by virtue of his office, duly signed and authorised may be produced as evidence*

- In criminal matters these official documents may only be produced if authorised by the Attorney.
- ***General rule***- No evidence may be used to prove contents of document except original document itself.
- Often said: - 'primary evidence' / 'best evidence' of document has to be provided.
- Determining if document is original – factual matter.
- New technology created problems for law of evidence.
- Our law doesn't req existence of a status / relationship created between document to be proved with original document. – Oral / other evidence can be accepted as to these facts.

In ***S v Adendorff 2004*** –

- *Matter centred on a copy of paper receipt that was handed to court by state as evidence.*
- *Court found because it was not original – it had no relevance except for purpose of refreshing the witness's memory.*

An acknowledgment of the accused relating to the original source document, made the copy admissible, leaving it to court to deduce weight that should be assigned to it, subject to all facts

3.2 Exceptions (or admissibility of secondary evidence) *(Read Schwikkard – 20 5)*

3.2.1 General

- Many exceptions to the rule that original document has to be adduced in court
- Some exceptions to rule that permits *Secondary evidence* of document to be adduced
- Secondary evidence = Copy of original document / Oral evidence by witness who can remember contents of document
- Instances where secondary evidence can be accepted:-
  - Evidence that original is destroyed / cannot be located after diligent search
  - Where production of original would be illegal. (*R vs Zungu*)
  - Where production of original is impossible (where writing is fixed into immovable object)
  - Where original is in possession of opposing party / 3rd party who refuses to produce it / cannot be compelled to produce it.

3.2.2 Exception in case of official documents

Civil Procedure Evidence Act *25 of 1965 (19 & 20):-*

Production of official documents:-

(1) No original document in custody / under control of any State official shall be produced in evidence in any civil proceedings except upon order of head of department in whose custody such document is.

(2) Any such document may be produced in evidence of any person authorized by person ordering production thereof.

Criminal Procedure Act *51 of 1977 234(1) & (2):-*

Proof of official documents:-

(1) Shall at criminal procedure be sufficient to prove original official document in custody / under control of any State official by virtue of office, if copy thereof / extract there from, certified as true copy / extract by head of department concerned / any State official authorized thereto by such head, is produced in evidence at such proceeding.

(2)

(a) Original official document referred to in sub sec 1, other then record of official procedure, may be produced at criminal procedure only upon order of attorney-general

(b) It shall not be necessary for head of department concerned to appear in person to produce document under paragraph (a) – but such document may be produced by any person authorized to do so by such head.

4. Proof of Authenticity

- Original document cant simply just be handed in from the bar - has to be handed in by witness who can identify document & prove it's authentic.
- 'Authenticity' = Document is what it appears / is alleged to be.
- For a document to be authenticated means no more than tendering evidence of authorship or possession.
- Even if document is authenticated - doesn't mean contents will be admissible.
- If a document is not authenticated it will be inadmissible and cannot be used for cross examination
- Document may be admitted temporarily pending a finding in its authenticity.
- *A statute* provides an exception *Public documents* - by their very nature are more reliable than most other documents
- *Public document* - produced by a public officer in the execution of his duties, intended for public use for which the public has a right of access.
  - *Examples include title deeds, birth certificates but not baptismal certificates*
  - *At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule*

4.2 Proving Authenticity

A document may be authenticated by following persons:-

- *Author, executor / signatory of document*
- *Witness* – person who say author draw up document / signatory signing document.
- *Person who can identify handwriting / signature* – permitted if author/signatory not available

- *Person who found document in possession / control of an opponent* – Exception applies owing to principle that such document is admissible evidence against opponent.
- *Person who has lawful control & custody of document* – Principle applies in case of official document's. Also affects position of document's older then 20 years, which are presumed to be authentic.

4.3 Exceptions to rule regarding Authenticity

Sec 246(1) of Crim Proc Act

Number of instances where document doesn't need to be identified / authenticated by witness:-

(1) When opposing party has discovered document & has been asked to bring it before court
(2) When court takes judicial notice of document
(3) When opponent admits the authenticity of document
(4) When statute provides for exception

4.4 A document may be authenticated by the following persons;

- The author, executor or signatory of the document
- A witness to the drawing up of the document
- A person who can identify the handwriting or signature
- A person who found a document in the possession or control of an opponent
- A person who has lawful custody and control of the document
- A document need not be authenticated by a witness in the case of
- An opposing party discovery of the document
- When the court takes judicial notice
- When the opponent admits the authenticity
- When a statute provides an exception

5. Public Documents

- Public document - produced by a public officer in the execution of his duties, intended for public use for which the public has a right of access
- Examples include title deeds, birth certificates but not baptismal certificates or passports.
- By their very nature are more reliable than most other documents
- At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule
- Although admissibility of hearsay should be governed by provisions of Law of Evidence Act 45
- of 1988 – our courts still guided by common law.
- Sec 18(1) of Civil Procedure Act – allows admissibility of certified copies of public documents in civil procedure, under certain conditions. (Sec 233 of Crim Proc Act has same effect)
- There is some overlapping between public & official documents - Document that complies with both definitions - to be treated as public document by party wanting to use it.

According to ***Northern Mounted Rifles v O'Callaghan 1909*** a public document:-

- must have been made by public officer in execution of public duty,
- must have been intended for public use &
- public must have had right of access to it'

6. Stamp Duty Act 77 of 1968 *(Read Schwikkard – 20 10)*

- I.t.o Act – certain documents are required to be stamped with Revenue stamps.
- Should provisions not be complied with - relevant document is not supposed to be used as documentary evidence at all – but documents will be admitted even if stamping is late.
- Schmidt & Rademeyer 344 object to use of evidentiary sanction to ensure payment of monies to state - even if legislation doesn't really hamper out of court procedure in SA.

7. Discovery, inspection & production of documents - all are relevant to civil litigation

- ***'Discovery'*** = means it may be expected from one of litigants to discover all possibly relevant documents in their possession, (making them available to opposing party)
- This is done by means of written affidavit listing all possible relevant documents in possession of declaring / their lawyer (except those they may lawfully refuse)
- If party fails to discover possibly relevant documents – documents may not be used in subsequent litigation without express permission by court.
- ***'Inspection'*** - Once discovery affidavit has been analysed by opposing side – rules also provide for inspection of selected documents by such opposing party.
- ***'Production'*** - If documents are in hands of 3rd party, such [party may be ordered to come to court & bring document with them. (***subpoena duces tecum*** *– ' a summons to bring with you'*)
- Main requirements – document admissible in following circumstances;
- Original document produced in court & the document is proved authentic
- Where applicable the document must be stamped in accordance with the Stamp duties act
- Whether information is admissible is another matter dependent on admissibility of evidence

SUMMARY

- It is important to know what constitutes documentary evidence and to grasp its application both to civil and criminal matters.
- Generally it is essential to produce the original document in court, and for the witness who is doing so to be able both to identify the document and authenticate it.
- There are many exceptions to the basic rules, especially contained in legislation.
- This means that a lawyer should consider any legislation that might be applicable to the case at hand, to ensure that he picks up any statutory exceptions.
- It is also important to have a basic knowledge of how documents are to be discovered and produced in civil proceedings.

Study unit 6 :

Evidence of uncertain classification SG43 TB

1. *Products of modern technology as evidence* *(Read Schwikkard – 19 3; 19 5 & Chapter 21)*

- Schmidt – 1st to raise argument that law of evidence should stop trying to force products of modern technology into limited categories of either real / documentary evidence
- In support of argument - mentioned that present rules relating to discovery, reliability & authenticity were all based on paper documents.
- Although Schmidt made strong argument for unique classification of this type of evidence - Schwikkard uses same classification – Courts have not yet accepted it however in…

***S v De Villiers* 1993** (1) SACR 574 (Nm)

The court was concerned with the question of whether or not computer print-outs of bank statements were admissible in terms of section 221 of CPA 1977.

- Following the decision in *Harper*, O'Linn J held that such computer print-outs were admissible and that the computer print-outs certified as authentic, were in fact duplicate originals and admissible in evidence.
- Whilst the accused did not rebut anything contained in the computer print-outs of bank statements, O'Linn J "accepted these statements as a correct reflection of the transactions recorded in therein".

2. *Photographs as evidence*

- Photographs may constitute real evidence especially where the physical photo itself is central to the case because of e.g. fingerprints on its surface.
- Situation is different when it is used to represent something that is the subject matter of the case. (Then serves a documentary function & both dictionary & judicial definitions of 'document' are wide enough to cover it)
- Fact that subject matter of photo is subject to interpretation of a photographer should go to weight rather than to admissibility.

3. *Cinematographic film, Videos & Audio as evidence*

- ***Cinematographic Film***

- The judgment in ***S v Mpumlo* 1986** (3) SA 485 (OK) held that:
- a cinematographic film is similar to a photo:- 'A cine film is a series of images which can be visibly observed by naked eye, although detail thereon would normally require enlarged reproduction, either as prints / individual frames / as moving picture on screen'.
- That is was not a document, but rather 'real evidence' which can be presented as long as it complied with the relevance requirement… subject to any dispute regarding the efficacy or interpretation thereof.
- In the *Mpumlo* matter a copy of a video / cinematographic film was submitted into evidence.
- The court held that this only may have affected the weight of the evidence not its admissibility.

4. *Video - & Audiotapes as evidence*

- These tapes differ from previously mentioned as they can not be decipherable with naked eye & must be 'translated' by tape player - they need to be deciphered by a device unlike film which is by eye.
- Is more susceptible to manipulation then analogue data – therefore must be scrutinised with great care.
- More liberal attitude was taken towards videotapes in *S v Mpumlo* & *S v Bakela* then in *S v Singh & S v Ramgobin.*
- In previous 2 cases *S v Bakela* then in *S v Singh & S v Ramgobin.* – *videotapes where considered 'real evidence' & not documentary evidence & therefore decided that tapes did not have to comply with stricter requirements for documentary evidence*.
- At any rate it was felt that any possible deficiencies should go to weight rather then admissibility.

Motata v Nair & another 2009 (1) SACR 263 (T) *drunk-through-wall-video-clips*

- Applicant, *Nkola John Motata* a Judge of the High Court, was arrested consequent to a with collision boundary wall of Mr. Richard Baird's residence, whilst under-the-influence of alcohol.
- The State sought to introduce into evidence five video clips, recorded by Mr. Baird on his cellphone's SD card. Record was transferred to laptop, memory stick & CD prior to cellphone being broken & SD Card stolen.
- Council for the defence submitted that the applicant's constitutional rights and argued that a trial-within-a-trial should be held "*to safeguard*" applicant and to enable "*the defence and the court to test the weight, trustworthiness, caution, reliability and originality*" of the recordings and that presentation of the clips prior thereto would prejudice their client.
- The judges in *S v Singh* held "Originality is a requirement flowing from the so-called best evidence rule and is considered when admissibility is decided upon. *Authenticity is not a question of admissibility, but of cogency and weight*."
- The Court held the opinion that a serious injustice or denial of justice ***will not occur*** if the recordings in court played in a trial-within-a-trial and found no grounds by which the court may intervene at this stage of the process – the appellant's application was dismissed.

Position paper SA Law Commission 2010 – Admissibility of Electronic Evidence in SA

5. *Computer output as evidence* *(Read Schwikkard –21 3)*

- The first reported South African case involving the admissibility of electronic evidence was heard twenty-five years before Parliament passed the *Electronic Communications and Transactions Act, 2002*. Since the judgment of *Narlis v South African Bank of Athens*,
- The involvement of technology in criminal activity also means an abundance of evidence. Data in the course of transmission or stored in some form of storage media are now valuable sources of evidence in criminal and civil proceedings.

- Electronic evidence can originate from a variety of sources, in different file formats and application systems, across a number of jurisdictions.
- The special characteristics of electronic evidence also raise concerns about the manipulation, accuracy and authenticity of the evidence. This is primarily due to the intangible and transient nature of data, especially in a networked environment
- The media upon which electronic documents are stored is generally considered fragile. Unless stored correctly, storage media can deteriorate quickly and without external signs of deterioration and are at risk from accidental or deliberate damage or deletion.
- The main obvious issue in reading data relates to what can be seen. Electronic evidence is, by its very nature, binary patterns in magnetic, optical or electronic form—all of which need to be translated and interpreted for the court.
- Unlike documents in physical format, changes in computer data offer a greater range of variability.
- All documents, irrespective of its format or application, will contain some form of metadata that may reveal details such as the title of the document, the date of its creation, the author, when the document was last modified, its location, including details about when it may have been transmitted.

Section 15(3) of the Electronic Communications and Transactions Act 25 0f 2002, gives guidelines for assessing the evidential weight of data messages:

(3) In assessing the evidential weight of a data message, regard must be had to -
  (a) the reliability of the manner in which the data message was generated, stored or communicated;
  (b) the reliability of the manner in which the integrity of the data message was maintained:
  (c) the manner in which its originator was identified; and
  (d) any other relevant factor.

- In *Ex parte Rosche* 1998 1 All SA 319 (W) held that:
  - In our view a reading of the statute makes it plain that the statute does not require that whatever is retrieved from a computer can only be used if the statute's requirements have been met. *It is a facilitating act not a restricting one*.
  - The printout is real evidence in the sense that it came about automatically and not as a result of any input of information by a human being. There is therefore no room for dishonesty or human error.
- In *S v Harper* the scope and meaning of section 221 of CPA 1977 was considered on the question of whether the computer-printouts are documents within the meaning of 'document' in section 221(5), it was held that:
  - the word 'document' in section 221(5) in its ordinary grammatical sense is wide enough to include computer print-outs of information stored or recorded on computer.

Section 11 - 14 of the ECT Act

- S1 - ***Data message*** in the Act means any data generated, sent received or stored by electronic means and includes voice and records
- S11 - I.r.o. the *Legal recognition of data messages* information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message accessible in a form which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as, long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.
- S12 - A requirement in law that a document is in writing will be met if it is in the form of a data message and accessible for future use
- S13 - where a signature is required this can only be by an advanced electronic signature. A signature can also be met by a message indicating that the person approves of a transaction
- S14 - where the law requires information in its original form, this is met by a data message but the integrity thereof must be assessed by considering whether it is unaltered

Section 16 - 17 of the ECT Act

- S16 - where the law requires information to be retained that requirements is met by a data message if it is accessible , in a format in which it was generated, the origin and time of a message when sent can be determined
- S17 - where a law requires a person to produce a document or information that is met if it is a data message & the method of generation was reliable, the maintenance of the integrity of the information is reliable & all information in it can be readily accessed.

Section 15 of the ECT Act

Admissibility and evidential weight of data messages – NB!

15. (1) In any legal proceedings - the rules of evidence must not be applied so as to deny the admissibility of a data message. in evidence –

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message must be given due evidential weight.

(3) In assessing the evidential weight of a data message, regard must be had to -

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained:

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

In ***S v Ndiki*** *and others*,[141] Van Zyl J states:

- As I shall attempt to show when I deal with the provisions of the Law of Evidence Amendment Act 45 of 1988, computer evidence which falls within the definition of hearsay evidence in s 3 thereof may become admissible in terms of the provisions of that Act.
- Evidence on the other hand that depends solely on the reliability and accuracy of the computer itself and its operating systems or programs, constitutes real evidence.
- What s 15 of the Act does, is to treat a data message in the same way as real evidence at common law. It is admissible as evidence in terms of ss (2) and the court's discretion simply relates to an assessment of the evidential weight to be given thereto (ss (3)).

S v Ndiki & Others 2008 (2) SACR 252 (Ck)

The matter dealt with evidence contained in certain documentary evidence in the form of computer printouts which the State wished to present in the course of a criminal trial. The accused had protested which resulted in a hearing-within-a-hearing so that the court could determine:

- the true nature of the printouts,
- the classification of documents in which it falls and
- Whether the admission of documentary evidence regulated by any legislation that deals with the admission of documentary evidence.

The court considered various provisions of the…

- The Law of Evidence Amendment Act 45 of 1988
- The Civil Proceedings Evidence Act 25 of 1965 - and
- The Criminal Procedure Act 51 of 1977:

<u>The court held that</u>

- Both section 35 of the Civil Proceedings Evidence Act and section 221 of the CPA leave it to the discretion of the court to attach the necessary weight to evidence admissible with regard to computers. The reliability and accuracy of the computer and its operating system is relevant factors that must be taken into account in the exercise of the court 's discretion.
- Due to the above reason, the objections raised to the admission of specific exhibits computer generated exhibits were dismissed, and such evidence was provisionally admitted as evidence on the premise that *Where humans had been involved this would be documentary evidence and if not, real evidence. If required, the latter type of evidence would be brought before court by an expert testifying about the reliability of the working of the machine*.

5.1 Background to the Electronic Communications and Transactions Act, 2002.

- The ECT Act was enacted to give effect to 'electronic commerce' ('e-commerce', for short), as the name of the Act indicates.
- In the second place, its evidential provisions were designed to cope with evidence in a 'digital' format.
- ***'e-commerce'*** refers to buying and selling by electronic means - consequence - certain aspects of an electronic transaction might later have to be proved in court.
- As has been shown above, the traditional categorisation of evidence into 'real evidence' and 'documentary evidence' is inadequate to cope with electronic transactions.
- The evidential provisions of the ECT Act provide a third way.
- In addition, e-commerce may be transacted internationally and it is thus of the utmost importance that any legislation in this regard be in keeping with international norms in this regard. Therefore, the evidential norms laid down by the ECT Act are based on those laid down by the European Union.
- ***What is meant by a 'digital' format?*** Once a photograph, a letter, a picture or even a video has been stored in a computer, the format changes from analogue (much the same format as the original) to digital. In order to be stored in digital format, the entire content of the file or document is broken up into electronic bits and bytes (eight bits being a byte) and the content is then said to be stored 'digitally'. The digital format is very advantageous in terms of storage space and speed of communication but the traditional rules of evidence have struggled to keep up with and classify this evidence.

5.2 Application of the Electronic Communications and Transactions Act, 2002.

- Fortunately the legislature finally tackled this problem head-on with the ECT Act . Although the Act also covers electronic contracting, privacy and computer crime (to mention but a few topics), we shall be concentrating on the evidential aspects, contained in sections 11-20 of this Act, as well as the concept of a 'data message', as defined in section 1.
- *The concept of a 'data message' is quite central to the Act because a data message is the digital alternative to the traditional evidential concepts of statement*, object or document. The Act also covers problems such as the 'best evidence rule' and electronic signatures (traditionally part of documentary evidence), as well the admissibility and weight of evidence in digital format.
- Electronic signatures are also quite important because they replace those made in analogue format by means of pen and paper, but make use of an electronic apparatus connected to the computer.
- Note that in section 1 of the Act, the definitions of 'electronic signature' and 'data message' both refer to 'data' as the basic component.
- *'Data' itself is defined as 'electronic representations of information in any form' and constitutes the basic 'currency' in which computers deal.*

- **Photographs as evidence:**
- These may constitute real evidence especially where the physical photo itself is central to the case because of e.g. fingerprints on its surface
- Situation is different when it is used to represent something that is the subject matter – then it serves a documentary function.
- The subject matter of the photo go to its weight rather than admissibility
- **Cinematographic film**
- Like photos it should also be considered documentary evidence.
- **Video and audio tapes**
- These differ from the above since they need to be deciphered by a device unlike film which is by eye
- Video and audio tapes differ from magnetic data since these store data in digital form.
- **Computer output**
- Data is stored data in digital form.
- Now covered by the ECT Act but some provisions have poor consequences for the right to privacy and may be in conflict with the constitution.

SUMMARY

- After the century-old secure and seemingly fool proof division of most non-oral evidence into either real or documentary evidence, the products of new technology have thrown these traditional classifications into disarray.
- Photographs, cine film, videotape and computer output have either to be classified into real or documentary evidence.
- Courts and academic writers have not yet been able to agree on this contentious issue, but recent legislation, such as the ECT Act has tackled the problem head-on.
- Cases such as the Ndiki and Motata cases have shown that courts are prepared to grapple with a new set problems. The former evaluated the ECT Act (25 of 2002), although it was found not to be necessary to decide the case on this basis.

Study unit 7 :

Judicial Notice SG49 TB

1. *The Meaning of Judicial Notice* *(Read Schwikkard –27 1)*

- ***Nature of judicial notice***
- **Judicial notice** is *a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted. This is done upon the request of the party seeking to rely on the fact at issue. Facts and materials admitted under judicial notice are accepted without being formally introduced by a witness or other rule of evidence, and they are even admitted if one party wishes to lead evidence to the contrary. Judicial officer should play a passive role and should withdraw from a case if he has personal knowledge thereof.*

  A doctrine of evidence applied by a court that allows the court to recognize and accept the existence of a particular fact commonly known by persons of average intelligence without establishing its existence by admitting evidence in a civil or criminal action.
- 'Judicial' - refers to fact that action is taken by judicial officer (when judicial officer takes note of fact that judicial notice has been taken)
- But a JO is to a limited extent allowed to accept the truth of certain facts known to him even when no evidence is led to prove such facts
- Only facts which are particularly well known / can be tested without difficulty may be judicially noticed.
- This doctrine is allowed since it can expedite hearings and produces uniformity of decision on matters of fact where one could get a diversity of findings
- However since it does not allow cross examination it is applied with caution.

2. *Practical working of Judicial Notice* *(Read Schwikkard –27 2 & 27 3)*

- Some facts are judicially noticed without any inquiry whereas other with reference to a source of indisputable authority
- In the former instance evidence may not be led to refute facts but in the latter, evidence may be led to dispute the source in question
- The question as to whether a fact should be judicially noticed is one of law and decided by the court which should inform the parties in advance
- Facts which are judicially noticed can be well known to all reasonable persons or to a reasonable court in a specific locality
- Purpose - is to prevent a waste of time. (no evidence may be used to rebut such fact)
- When the court takes judicial notice – received no evidence on fact.
- Because parties are deprived of opportunity cross-exam = courts apply judicial notice with caution & should where possible advise parties beforehand if they intend to take judicial notice of particular fact.

3. Facts of which Judicial Notice may be taken

3.1 Notorious Fact

- A well-known fact - these can be facts of general knowledge and specific facts notorious within the locality of the court

Matters of general knowledge

Notorious facts can be divided into 2 categories *(Read Schwikkard – 27 4 1)*

1. *Facts of general knowledge* (eg. Fact that there are 7 days in a week.)
2. *Specific facts which are notorious in locality of court* (In *R v African Canning Co* WA A Ltd these facts include elemental experience in human nature, commercial affairs & everyday life)

Assorted Examples: *(Read Schwikkard – 27 5 1)*

Animals

- Instinctive behaviour of domesticated animals should be judicially noticed.
- Animals - the nature of domesticated and wild animals but not specific characteristics such as specific type, market value, age

In *S v Soko* – held that judicial notice may not be taken on fact that ordinary fowls do not wander off like other stock.

Following facts have been Judicially Noticed:-

- Scab is a well-known sheep disease
- Dangerous wild animals remain potentially dangerous even after docile behaviour has come about as a result of semi-domesticity
- Brand marks on cattle do not fade completely
- Rhinos are rarer then elephants

Matters of local notoriety

Courts may not take Judicial Notice of fact that is not general knowledge ('notorious among all reasonably well- informed people in area where court sits')

- Courts are reluctant to take notice of locally well-known facts (but they have)
- Courts have declined to take Judicial Notice of distance between certain cities.
- Presiding officers should also not take notice of local conditions of which they may be aware (if she is aware of them because of personal interest / observation)

3.2 Facts which are readily ascertainable *(Read Schwikkard – 27 4 3 & 27 5 3 to 27 5 7)*

Basic principle is that court can take Judicial Notice of facts that are readily ascertainable, if they are readily ascertainable from source of indisputable authority.

Calendars

- In *S v Sibuyi 1988* – court found courts may take Judicial Notice of accuracy of calendars & diaries in so far they deal with days & months, but cannot be accepted as indisputably accurate as far as phases of moon / state of tides etc are concerned.

Political & Constitutional Matters

- Political and constitutional matters such as sovereignty of states, recognition of governments, existence of a specific political system that is sufficiently notorious.
- However an appropriate certificate may be obtained from the executive if the court has insufficient knowledge to take judicial notice of certain political or state affairs

Science & Scientific instruments

- Only scientific matters which have become common knowledge to non-specialists may be Judicial Notice - eg. no 2 fingerprints are alike
- Measurement by scientific instrument requires testimony on accuracy of method of measurements & instruments used.
- Science and scientific instruments- only those that have become common knowledge may be judicially noticed e.g. different fingerprints

Financial Matters & Commercial Practice

Judicial Notice have been taken of the following facts:-

- Financial matters and commercial practice
- *Value of money has declined over years*
- *Purpose of most public companies is to make profit from income*
- *Practice of making payment by cheque*
- *Interest charged on overdue accounts*

Courts have declined to take notice of:-

- Rate of exchange rate between SA rands & a foreign currency

Textbooks

- Judicial Notice may be taken on facts contained in technical & medical books.
- But our courts do use standard dictionaries to establish meaning of words & history books have been used to establish historical facts.

The function of traffic lights

- In number of cases court found they can take Judicial Notice of fact that if traffic lights in an intersection facing one direction are green, lights facing right angles are red.
- Also been held that evidence may be accepted in order to rebut such Judicial Notice

Functioning of traffic lights – may be taken from assumption if lights one way are green then the others are red in civil but not in criminal cases

Crime

- Courts have taken notice of frequency with which people in positions of trust commit theft & fraud & have also taken notice that SA has unacceptably high crime rate.
- Has been regarded as sufficiently notorious for sentencing purposes.

3.3 The Law *(Read Schwikkard – 27 6 & 27 6 1)*

- Courts *must* take judicial notice of the law – no evidence may therefore be led with regard to the nature and scope of a legal rule
- Judicial notice is taken of Acts of Parliament and of the provincial legislatures
- Colonial laws, provincial ordinances are judicially noticed in terms of common law
- Public international law that has acquired the status of custom is judicially noticed
- Judicial notice may now be taken of foreign law in order to determine some legal aspect of our law for purposes of comparison
- The courts may take judicial notice of indigenous law only if it is consistent with the Bill of Rights and if they are not in conflict with public policy and natural justice
- Presiding officer supposed to be legally trained
- No evidence may be led with regard to nature / scope of any SA legal rule.
- But parties have to be given opportunity to address court with respect to legal position that may be applicable in any given case.

S39 Interpretation of Bill of Rights (Const)

(1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the BoR

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

Statutory Law

- Judicial notice of statutory law is prescribed in:
  Sect 224 of the Criminal Procedure Act & Sect 5 of the Civil Procedure Evidence Act
- With reference to the above provisions – courts have to take notice of any law / matter officially enacted and published law in the Government Gazette or other official publications.

Common law

Courts have to take notice of Common law.(no matter how vague / obscure – no exceptions)

S173 Inherent power

- The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Foreign Law *(Read Schwikkard – 27 6 3)*

Judicial notice of foreign law is governed by sect 39 of the Constitution and the sect 1 of the Law of Evidence Amendment Act 45 of 1988

S1 Judicial notice of law of foreign state and of indigenous law

(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty:
Provided that indigenous law shall not be opposed to the principles of public policy and natural justice:
Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) The provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.

Hence…

- When law of foreign state is relevant in case in order to determine legal aspect of our law.
- The courts may take Judicial Notice of that Foreign law for purpose of comparison
- This used to be position – now been confirmed by Constitution for purposes of interpreting the Constitution & BoR.
- When law of Foreign law itself is in issue – i.t.o Sect 1(1) of the Law of Evid Act – a court may take Judicial Notice as far as can readily ascertained with sufficient certainty.

Indigenous Law

Read Sec 39(2) & (3) of Const – above & Read Sec 1 of Law of Evid Act - above

- Court can take Judicial Notice of indigenous law only if is consistent with Bill of Rights.
- Can also take Judicial Notice if can be readily est with sufficient certainty & if not in conflict with 'public policy & natural justice'

SUMMARY

- By taking judicial notice of certain facts, the courts allow them to become part of the evidential material without any evidence being led.
- Courts may take judicial notice of facts which are generally notorious, of some facts which are locally well-known and of facts which can easily be ascertained.
- In general, courts also have to take notice of the law of the country.
- The main purpose of judicial notice is to prevent the presentation of unnecessary and superfluous evidence.

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Study unit 8 :

Presumptions SG58 TB

1. The Meaning of Presumption *(Read Schwikkard – 28 1)*

- A true presumption is a legal rule in terms of which the existence of a certain fact is presumed, based on the existence of another fact.
- Since it is only a presumed fact, the 'fact' may not be true.
- Nevertheless, the presumed fact is considered to be a fact until this can be disproved.
- Generally classified as those with and without basic facts – the latter is a conclusion drawn unless the contrary proved, the former a conclusion on proof of a basic fact
- The presumption of innocence only means the prosecution needs to prove guilt

Example

If it is proved that a man and a woman went through what appeared to be a marriage ceremony, the marriage is presumed to be formally valid.

Let us use the above example to demonstrate the following things about the operation of a presumption:

(1) Something has to be proved before any presumption can come into operation. This is called laying the basis for the presumption.
In the above example it has to be proved that the parties went through an apparent marriage ceremony, before the presumption can come into operation.

(2) As soon as the basis has been laid, the presumption will come into operation. Therefore, in the example, as soon as the basis has been laid the parties will be presumed to be formally married.
This may not be true, but it does not matter.

(3) A presumption can be rebutted, however. This means that the presumption can be proved not to be the truth in a specific instance. If, in the example, it is proven that the parties were in actual fact not legally married, the presumption will fall away. *Therefore, a presumption will always yield to the truth*.

2. Presumption of innocence *(Read Schwikkard – 28 1)*

- Ito *Sec 35(3)(h)* of Const, each person has right to be presumed innocent – as part of right to fair trial - 'Presumption of innocence'

  35 Arrested, detained and accused persons
  (3) Every accused person has a right to a fair trial, which includes the right-
  (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

- Not a true presumption – not part of evidential material
- It's a principle placing onus of proving accused guilty on prosecution

3. Classification of Presumptions

3.1 Categories:

Irrebuttable presumptions of law; *Rebuttable presumptions of law* & *Presumptions of Fact*

3.2 Irrebuttable Presumptions of Law

- Simply an ordinary law rule of Substantive law formulated to look like a presumption.
- Provides conclusive proof of the fact presumed and cannot be rebutted
- Not really a presumption & doesn't operate like one (We call it that because was described as such in Common Law)
- *Eg. A child under 7 years of age is presumably incapable of discerning good from evil & thus 'irrebuttably presumed' not to be able to commit a crime.*

3.3 Rebuttable Presumptions of Law *(Read Schwikkard – 28 3)*

The true presumption

- Rules of law compelling provisional assumption on a fact
- Assumption will stand unless destroyed by countervailing evidence
- These are therefore the true presumptions of our law

Examples of Rebuttable Presumptions of law

- Presumption that a marriage is valid *(Schwikkard – 28 5 1)*
- Presumption that man & woman living together as man & wife do so in consequence of a valid marriage *(Schwikkard – 28 5 1)*
- Presumption - a child conceived / born during a lawful marriage is legitimate *(Schwikkard – 28 5 3)*
- Presumption that a man admitting to having intercourse with a woman is the father of her illegitimate child *(Schwikkard – 28 5 4)*
- Presumption that a registered letter that was posted was delivered *(Schwikkard – 28 5 6 1)*

Marriage

- Validity presumed once evidence is adduced showing that a marriage ceremony was performed.
- Onus is on challenger to show the marriage is invalid which is done on a balance of probabilities.
- Where couple lived together as man and wife, the law will presume unless the contrary is proved that this was a consequence of marriage.
- Every marriage is presumed in community of property

Bigamy

- S237 of the CPA – where an accused is charged with bigamy, when it is proved that a marriage ceremony took place it will be presumed the marriage was on the date of solemnisation.

Legitimacy

- Once a party has proved that the child was conceived by a woman whilst married, the child will be presumed legitimate.
- The party contesting this must prove on a balance of probabilities that the child was not conceived between the spouses – this creates a legal burden

Paternity of children born out of wedlock

- If it is proved that a person had intercourse with the mother at the time the child could have been conceived, the person is, in the absence of other evidence presumed to be the biological father – S36 of the Children's Act
- This clause places an evidential burden on the alleged father in contrast to common law which created a legal burden

3.4 Presumptions of a Fact *(Read Schwikkard – 28 3 3 & 30 5 4)*

Definition

- As in the case of an irrebuttable presumption, a presumption of fact is not really a presumption, but merely an inference which a court may draw, representing the most logical outcome of a given situation.
- Thus - merely an inference representing a logical outcome of a given situation.
- Presumptions of fact have also been described as 'frequently recurring examples of circumstantial evidence'
- Not really a presumption but a inference which a court may draw- representing most logical outcome of given situation
- 'Frequently recurring examples of circumstantial evidence'

Examples of presumptions of Facts

Regularity & res ipsa loquitur

Regularity *(Read Schwikkard – 28 5 6 & 28 5 6 1)*

- What happens regularly is likely to have happened again
- ***Letters:*** circumstantial evidence can prove a letter was posted – party alleging posting, may lead evidence establishing the existence of a routine. An unregistered letter that was posted will not be presumed to have received but this is not the case with registered letters.
- For the latter the presumption places an evidentiary burden that the person did not receive the registered letter.
- Party who alleges that a **letter** has been posted may lead evidence with fact that routine for posting of letters was followed & letter in question was dealt with in routine manner
- Once it has been established – will provide for circumstantial evidence that owing to *'presumption of regularity'* the letter was posted.

- ***Validity of official acts:*** public officials are rebuttably presumed to have been properly appointed – i.e. legal burden to prove the contrary.
- Such routine easier to prove in case of public officials (court will take judicial notice of existence of office routine) than i.r.o people working in private sector
- Court not entitled to infer that letter was also **received.**

***Res ipsa loquitur* – the matter speaks for itself**

- Means 'matter speaks for itself'
- Used in our law exclusively if cause of certain occurrence is unknown & court asked to draw inference as to cause of event from picture painted by provided evidence
- Principle has come to be exclusively applied to infer negligence from circumstantial evidence i.r.o conduct of defendant, which may infer that such incident does not normally occur in the absence of negligence… thus an inference of negligence may be drawn.
- Where an inference of negligence is drawn, an evidential burden is cast on the defendant - whom must then show that the facts are consistent with an inference not involving negligence or adduce evidence to raise reasonable doubt
- ***Administrator, Natal v Stanley Motors* 1960** (1) SA 690 (A).

  The principle *res ipsa loquitur* is exclusively applied to infer negligence from circumstantial evidence about the actions of the defendant, as in the case of the cause of collisions or other accidents. Negligence can only be deduced in this way if the actual cause of the accident is unknown.

4. Relationship between presumptions & onus of proof *(Read Schwikkard – 28 4)*

- If the presumption is a true presumption of law (legal burden), proof on a balance of probabilities has to be provided to counter this
- If the presumption prevails in the absence of evidence to the contrary, this place an evidential burden on the party wishing to disprove it
- If the court draws an inference from a basic fact, there is no burden of proof on the other party, at most it amounts to a presumption of fact.

How much proof is required before presumed fact will not be accepted any longer?

***S v Zuma* 1995 - following analysis was found to be useful:-**

(1) If presumption is true presumption of law – proof on balance of probabilities has to be provided to upset the presumption.

(2) If presumption prevails in absence of evidence to contrary , it merely places evidential burden on party wanting to disprove. If any evidence to contrary is provided – presumption will no longer prevail

(3) If court merely permitted to draw particular inference from proof of basic fact – but not obliged to – there is no burden of proof on other party.

In the end, the decisive consideration for the court in S v Zuma that a statutory presumption is unconstitutional if a conviction is possible in spite of the existence of reasonable doubt about the guilt of the accused.

SUMMARY

- In the case of presumptions, the court is sometimes required to apply a legal principle, while at other times it simply provides an inference which can be logically drawn from certain facts.

- In the case of a legal principle, a presumption comes into operation once its basis has been laid, but it merely provides a fiction which may be rebutted by the actual facts.
- Factual presumptions are simply based on the application of common sense to the normal outcome of certain human activities.

Answer the following questions based on the Zuma decision:

(1) *In paragraph [19] the court referred to the fact that section 217(1) of the Criminal Procedure Act 51 of 1977 contains a ``reverse onus''.* ***What is the full implication of this phrase?***

- A ``reverse onus'' is a legal onus of proof that is placed on the accused. It has to be discharged on a balance of probabilities.
- This onus is not discharged by the accused if he merely raises a doubt with respect to the applicability of the presumption.
- Therefore, if at the end of the trial (or trial-within-a-trial) the probabilities are evenly balanced, the presumption will apply.

(2) What effect does a statutory presumption, which leaves the accused with a legal burden of proof, have on the ``presumption of innocence''?

- The presumption of innocence is a legal principle which has the result that, in criminal matters, the state is burdened with the onus of proving the guilt of the offender beyond reasonable doubt.
- This was so under common law, and was reinforced by the Constitutional rights to remain silent after arrest, and not to have to make a confession or testify against oneself.
- All these rights are seriously endangered and undermined when the burden is reversed and the accused has to prove his own innocence.

(3) *In the end, the most important consideration for the court in S v Zuma was that a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt about the guilt of the accused.* ***Therefore, a presumption can survive only if it survives the limitations clause. How did the court deal with this part of its enquiry?***

- The presumption that a confession would be presumed to have complied with the requirements for an admissible confession, was instituted following the Report of the Botha Commission into Criminal Procedure and Evidence, i.t.o which it was found that
  (a) it should be made more difficult for a dishonest accused to make false allegations of duress
  (b) trials need to be shortened by counteracting unduly long trials-within-trials on the admissibility of the confession.
- The court found that these grounds were insufficient to reverse the onus of proof to the accused. As a result, the presumption could not be saved by the limitations clause, and was declared unconstitutional.

(4) What did the judgment in Zuma not decide (par [41])?

(a) All statutory provisions which create presumptions have not been declared invalid by this decision. It does not, for instance, influence “evidential presumptions'' which simply require the accused to create doubt.
(b) It has not declared all reverse onuses invalid.
(c) Neither does it effect statutory provisions which have the appearance of a presumption, but which actually create new crimes.

Study unit 9 :

Statutory Presumptions SG65 TB

1. *Overview: Statutory Presumptions*

- Created to assist state with evidential difficulty
- Statute which contains many Statutory Presumptions is *Drug & Drug Trafficking Act 140 of 1992.*
- A typical example of a presumption was contained in section 21(1)(a)(i) of this Act, which read as follows:

  "If in the prosecution of any person ... it is proved that the accused was found in possession of dagga exceeding 115 grams ... it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance". Such a provision leaves accused with legal burden of proof.
- Many presumption on the statue books are now unconstitutional owing to the presumption of innocence.
- *The statutory presumption often leaves the accused with a legal burden of proof – i.e. on the balance of probabilities instead of the mere raising of evidence to the contrary – this is a reverse onus provision which is unconstitutional*

2. *Constitutional Provisions*

35 Arrested, detained and accused persons
(3) Every accused person has a right to a fair trial, which includes the right-
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

S 35(3)(h) of the Constitution provides for the following three rights;

- *Presumed innocent*
- *Remain silent*
- *Not to testify during proceedings*

In *S v Zuma* it found a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt. A presumption can survive only if it survives the limitation clause

3. *The approach of Const Court* Read paragraph 3; 4; 12; 19 – 21; 25; 33; 36 – 39 & 41 – 42 of S v Zuma 1995

Answer the following questions based on the Zuma decision:

(1) In paragraph [19] the court referred to the fact that section 217(1) of the Criminal Procedure Act 51 of 1977 contains a ``reverse onus''. What is the full implication of this phrase?

- A ``reverse onus'' is a legal onus of proof that is placed on the accused. It has to be discharged on a balance of probabilities.
- This onus is not discharged by the accused if he merely raises a doubt with respect to the applicability of the presumption.
- Therefore, if at the end of the trial (or trial-within-a-trial) the probabilities are evenly balanced, the presumption will apply.

(2) What effect does a statutory presumption, which leaves the accused with a legal burden of proof, have on the ``presumption of innocence"?

- The presumption of innocence is a legal principle which has the result that, in criminal matters, the state is burdened with the onus of proving the guilt of the offender beyond reasonable doubt.
- This was so under common law, and was reinforced by the Constitutional rights to remain silent after arrest, and not to have to make a confession or testify against oneself.
- All these rights are seriously endangered and undermined when the burden is reversed and the accused has to prove his own innocence.

(3) In the end, the most important consideration for the court in S v Zuma was that a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt about the guilt of the accused. Therefore, a presumption can survive only if it survives the limitations clause. How did the court deal with this part of its enquiry?

- The presumption that a confession would be presumed to have complied with the requirements for an admissible confession, was instituted following the Report of the Botha Commission into Criminal Procedure and Evidence, i.t.o which it was found that
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  (b) trials need to be shortened by counteracting unduly long trials-within-trials on the admissibility of the confession.
- The court found that these grounds were insufficient to reverse the onus of proof to the accused. As a result, the presumption could not be saved by the limitations clause, and was declared unconstitutional.

(4) What did the judgment in Zuma not decide (par [41])?

(a) All statutory provisions which create presumptions have not been declared invalid by this decision. It does not, for instance, influence “evidential presumptions" which simply require the accused to create doubt.
(b) It has not declared all reverse onuses invalid.
(c) Neither does it effect statutory provisions which have the appearance of a presumption, but which actually create new crimes.

4. Subsequent judgements on Statutory Presumptions

- Many statutory presumptions reversing onus of proof on accused have been declare unconstitutional since *S v Zuma*
- Those presumptions that assisted prosecution in drug cases have fallen away one by one.

- The decision in all these cases were based on most important decision in *S v Zuma* – eg that a presumption that allows for conviction despite reasonable doubt as to guilt of offender is unconstitutional

One exception was in ***S v Meaker*** -

Appellant was convicted of contravention of sec 85(4)(a) of Road Trafficking Act 29 of 1989. Conviction was dependant on application of presumption contained in sec 130(1) – which provides that 'it is material to prove who was driving the vehicle, it shall be presumed, until contrary is proved' that it was the owner of the vehicle

- It was a clear reverse onus presumption – found in violation of Constitution BUT the presumption survived owing to application of limitation clause.
- A reverse onus is a real onus on the accused to be placed only on a balance of probabilities disproved.
- This is in conflict with and an infringement of section 35(5)(h) of the Constitution which ensures;
  - the presumption of innocence
  - the right to remain silent - and -
  - the right not to testify during the proceedings.
- In applying principles set out in *S v Zuma* – court found provision is designed to achieve effective prosecution of traffic offenders.
- Presumption furthermore, targets specific group of people - vehicle owners
- Furthermore, must be proved that offence was committed by driver of vehicle before presumption finds any application
- On other hand – is frequently impossible for prosecution to determine identity of driver
- All these factors distinguish presumption of those which have been found not to comply with requirements of the limitations clause

SUMMARY

The legislature has provided for many presumptions in order to ease the burden of the state and to overcome evidential difficulties.

Many of these presumptions will have to be repealed or amended, because any presumption which allows for the conviction of an accused person despite the existence of reasonable doubt, is likely to be unconstitutional since it violates the right to be presumed innocent.

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reverse onus is a real onus	**on the accused**	**on a balance of probabilities disproved.**		**which ensures**		**presumption of innocence**
			of the Constitution		**the right to remain silent**	
in conflict with		**and an infringement**		**not to testify during the proceedings**		
Applying Zuma						
The court found that		**object was**	**traffic offences**		**vehicle owners**	
	effective prosecution of			**Targeting**		**must be proved**
			before presumption finds any application		**offence by driver**	

All these factors distinguish presumption of those which have been found not to comply with requirements of the limitations clause

Part 2 : The Assessment of Evidence
Study unit 10 :

The onus of proof in criminal matters SG70 TB

1. Distinction between Onus of Proof & Evidentiary Burden *(Read Schwikkard – 31 1 & 31 2)*

Onus of proof

- Onus of proof functions to assist decision makers in conditions of uncertainty
- *Allocates the risk of non-persuasion – the person who bears the onus will lose if they do not satisfy the court that they are entitled to succeed in their* claim
- Refers to the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions.
- Party not baring onus of proof will always get benefit of doubt where court in doubt.
- In Criminal cases – State bares onus of proof & accused always gets benefit of doubt
- Onus of proof rests on the prosecution to prove the accused's guilt beyond a reasonable doubt in a criminal trial – fundamental principle

In *S v Bhulwana, S v Gwadiso* the court found that an evidentiary burden requires the accused to create reasonable doubt, whereas the true burden of proof relies on a preponderance of probabilities

- Note in court the onus does not shift during the course of a criminal trial - it always rests with the state.
- The *constitution and common law presumption of innocence* and the principle that the *burden of proof rests on a party seeking to change the status quo* casts on the state the burden of proving everything necessary to establish liability.
- The statutory exceptions are an infringement on the presumption of innocence and will be tolerated only if they meet the limitation clause.
- *The evidentiary burden shifts during the trial – it first rests with the state in presenting evidence then after the state has closed its case it shifts to the accused to rebut the evidence*.
- *There is a duty for an accused to introduce his defence but this does not mean that there is an onus of proof on the accused.*
- Ambit of the state's onus of proof in criminal cases

S v Bhulwanna; S v Gwadiso **1995** SACR 748 (CC)

Both possess marijuana over v 150g. Possession vs suspicion of trading in... prohibited substance. - Section 21(1) Drugs and Drug Trafficking Act No. 140 of 1992. Presumption of constitutionality - Unconstitutional.

Legal question:

- Presumption in act (provided that if in the prosecution of anyone prove that the accused was in possession of over 115 grams of marijuana was found shall be presumed, until the contrary is proved, that the accused in such material was trading) – Test: Constitutionality i.t.o. sect 35 of the Constitution regarding the right to : a fair and just trial; to be presumed innocent; & not giving incriminating evidence.

Facts:

- Mr. Bhulwana was arrested in possession of 850g marijuana & in another case Mr Gwadiso was arrested in possession of 444.7 grams of marijuana - in separate hearings – both were convicted in the trading of dagga and sentenced to a fine , imprisonment & suspended.
- Both issues were automatically referred to the Cape Provincial Division Court for review in order to Establish or whether the section 21(1)(a)(1) presumption of trafficking drugs – was prima facie unconstitutional in so far as the legitimacy of the conviction depends on the constitutionality of the presumption. Both cases were referred to the CC in order to decide on the constitutionality of the presumption.

Decision:

- Judge O'Regan argued that an *evidentiary burden* on the accused was simply to create reasonable doubt in the minds of the court.
- The *real onus of proof* - "unless the contrary is proved" i.t.o. section 21(1)(a)(1) requires proof on a balance of probabilities - that he has in fact not traded in dagga. If not, the accused will be found guilty of trafficking drugs .
- The effect of the *real onus of proof* on the accused, lies therein that it may cause a conviction for trafficking in spite of the existence of reasonable doubt of guilt .
- The presumption in the section is therefore unconstitutional because it permits a conviction in spite of the fact there is reasonable doubt .

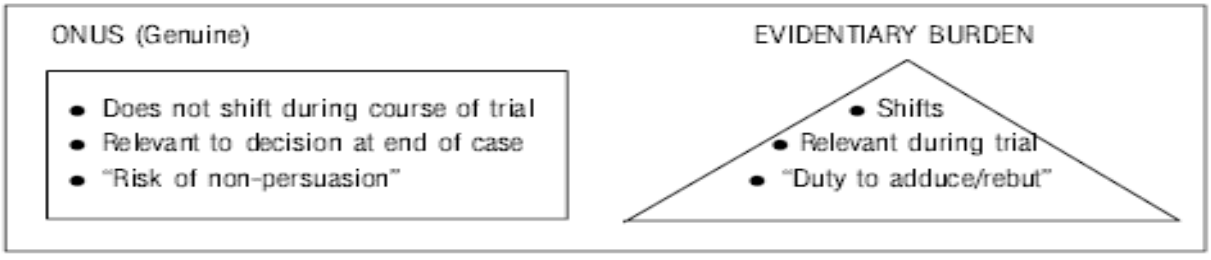
Distinction between Onus of Proof & Evidentiary Burden

*In **S v Bhulwana, S v Gwadiso** the court found that an evidentiary burden requires the accused to create reasonable doubt whereas the true burden of proof relies on a preponderance of probabilities. Note in court the onus does not shift during the course of a criminal trial – it always rests with the state.*

Evidentiary burden;

- Refers to a party's duty to produce sufficient evidence for a judge to call on the other party to answer - i.e. to call upon a litigant to adduce evidence to combat a prima facie case made by his opponent
- At the outset the state must discharge this burden by establishing a prima facie case against the accused - once established this shifts to the accused to adduce evidence to escape conviction.
- Under the constitution the accused can remain silent and not adduce this evidence

The distinction between onus of proof and evidentiary burden may also be explained by means of the following diagram:



Distinction is the following:-

ONUS	**EVIDENTARY BURDEN**
# Does not shift during course of trial	# Shifts
# Relevant to decision at end of case	# Relevant during trail
# 'Risk of non-persuasion'	**#** 'Duty to adduce/rebut'

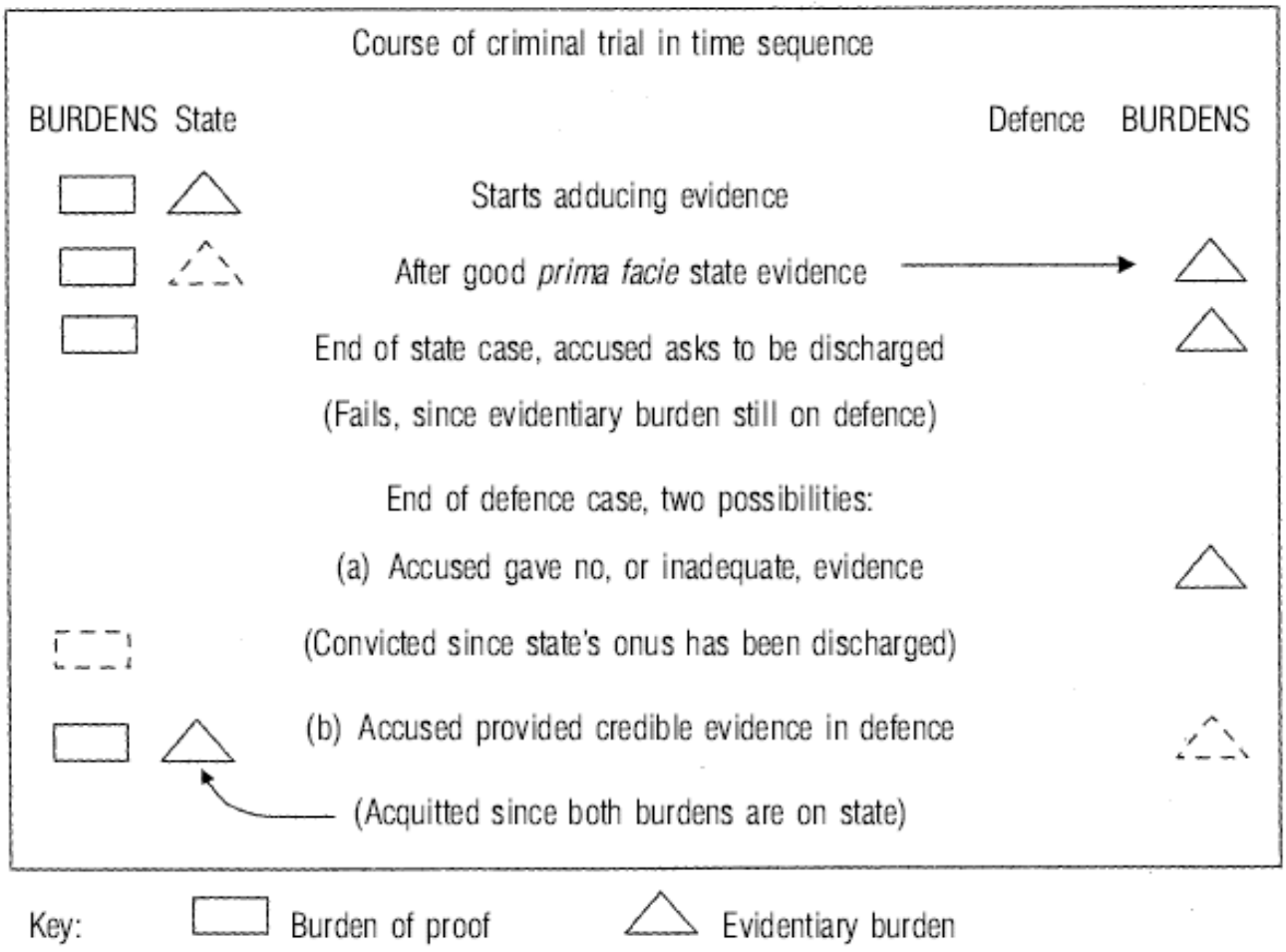
- RD is the common law for the formal law whereas English is common law for substantive law
- Onus has now been decided as a matter of substantive law
- The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff

  Pillay v. Krishna **1946** AD 946 951 -3

  From this decision, the basic rule arose with regard to the location of the burden of proof that he who alleges must prove. This decision illustrates the fact that the real onus has usually already been established in the pleadings.
- The true onus of proof is usually established during the pleadings and the evidentiary burden comprises the duty cast upon a litigant to begin adducing evidence and the duty to adduce evidence to combat a prima facie case made by the opponent.

2. Operation of Evidentiary Burden & Onus of Proof in Crim matters

This operation can probably be best illustrated by means of a diagram.



- There is an interaction between Onus of Proof & Evidentiary Burden
- Onus of Proof rests on state throughout – but Evidentiary Burden sometimes shifts onto accused, for instance when good prima facie evidence has been given.
- If accused doesn't acquit herself of Evidentiary Burden by giving satisfactory evidence – court will no longer have any reasonable doubt about her guilt , and the state will have acquitted itself of the onus of proof.
- If the accused, on the other hand, provides satisfactory evidence and persuades the court, or even creates a reasonable doubt in the mind of the court, the court will have to find against the state because the onus of proof has not been discharged.

3. *Incidence of Onus of Proof in Criminal Cases* *(Read Schwikkard – 31 3 & 31 4)*

- The matter of the incidence of the onus of proof is not really contentious in criminal matters.
- The state always bears the onus of proof with regard to all issues, even with regard to defences which the accused may raise.
- Traditionally, there has been an exception to this rule, namely in the case of a lack of criminal capacity as a result of mental illness or defect (the so-called M'Naghten rule).
- The question used to be whether this rule should simply be seen as a constitutional limitation which leaves the true onus of proof to the accused, or whether a better option might not simply be to leave her with an evidentiary burden.
- This question has now been dealt with by the legislature in the shape of sections 78(1A) and (1B) of the Criminal Procedure Act 51 of 1977.
- These two sections have been inserted into the Act by the Criminal Matters Amendment Act 68 of 1998 and came into operation on 28 February 2002.
- Section 78(1A) codifies the M'Naghten position in that every accused person is presumed to be sane and criminally responsible until the contrary is proved.
- This piece of legislation might, however, be open to constitutional challenge in light of section 35(3)(h) of the Constitution which provides that all accused persons have the right to be presumed innocent.
- Section 78(1B) has been interpreted by S v Eadie 2002 (1) SACR 663 (SCA) to mean that a defence of *sane automatism* now imposes an evidential burden on the accused and not Read Sec 78(1)(a) & (1B) of Crim Proc Act

Mental illness or mental defect:

An accused is criminally non-responsible if at the time of the offence he was, as account of this defect, unable to appreciate the wrongfulness of the act S78(1) of the CPA provides that every person is presumed sane unless the contrary is proved on a balance of probabilities = codification of the M'Naghten rule merely an obligation to raise the defence.

The M'Naghten rule - *Queen v. M'Naghten*, 8 Eng. Rep. 718 [1843]

States that: "A criminal defendant is not guilty by reason of insanity if, at the time of the alleged criminal act, the defendant was so deranged that she did not know the nature or quality of her actions or, if she knew the nature and quality of her actions, she was so deranged that she did not know that what she was doing was wrong.

Ambit of the state's onus of proof in criminal cases

S v Eadie the court provided that: - A sane person who engages in conduct giving rise to criminal liability does so consciously and voluntarily

- An accused who raises such a defence is required to lay a foundation sufficient to provide reasonable doubt. Evidence in support of this must be scrutinized
- The court must decide on the question of criminal capacity taking into account the evidence and nature of accused's action during this period

4. Right to silence and onus of proof

How can the const right to silence be reconciled with fact that accused can be convicted if she keeps quiet while the evidentiary burden rests upon her?

Following argument useful:-

- In past – keeping quiet meant guilty conscience
- Constitution changed everything – now has a right to silence – to speak when she wanted to.
- Doesn't mean she cannot be convicted
- BUT if court in no way contested by accused / her legal team – will have no other option but to convict (provided other prerequisites have been complied with)
- Then its done objectively – evid burden rests upon her because of good evidence state had to produce which she made no effort to rebut.
- *The Constitution has changed the notion that the silence of the accused was a form of circumstantial evidence used to bolster a weak case*.
- In *S v Hena* the Court emphasised a lack of evidence on the part of the defence in order to rebut the state's case did not mean automatic conviction – *silence on the part of the accused could not make up for deficiencies in the state's case*.

*In **S v Hena** the Court emphasised a lack of evidence on the part of the defence in order to rebut the state's case did not mean automatic conviction – silence on the part of the accused could not make up for deficiencies in the state's case.*

In ***S v Hena & Another***

- Accused failed to testify themselves after state's case had been closed
- Judge emphasised lack of evidence on defence side in order to rebut state's case – didn't mean automatic conviction of accused
  - Silence on part of accused could not make up deficiencies in state's case.
  - On other hand, Accused nr.2 was linked by DNA to case.
  - Because had done nothing to controvert this evidence – conviction stood.

5. Standard of proof in criminal matters *(Read Schwikkard – 31 6)*

- In Crim Case where burden rests on prosecution – court req **beyond a reasonable doubt.**
- In crim case where onus rests on accused court req proof **upon a preponderance of probabilities** (also in Civil)
- Although evidentiary burden might sometimes rest on accused – in final instance – states still carries onus of proof to
- prove her guilt beyond reasonable doubt
- Proof beyond reasonable doubt should never be extended to req proof beyond slightest doubt

*In **S v Van der Meyden** – the onus of proof in a criminal case is discharged by the State if the evidence establishes guilt beyond all reasonable doubt.*

- Alternatively he is entitled to an acquittal if it is reasonably possible that he is innocent
- In criminal cases where the onus rests on the defence, the burden requires proof upon a preponderance of probabilities just like in civil matters (i.e. less exacting proof)
- If a statute merely places an evidentiary burden on the accused, the state will still have to prove beyond all reasonable doubt

SUMMARY

- In this SU you learnt to distinguish between the so-called true onus of proof and the evidentiary burden. You also looked at the interaction between the two.
- The implications of the Constitution for the incidence of the onus of proof, especially in cases of insanity, was also considered. Finally, we dealt with the question of what the standard of proof really comprises in criminal cases.

Study unit 11 :

The onus of proof in civil cases SG77 TB

1. Is question of the incidence of the Onus of Proof one of Substantive or Formal Law?

- Important to determine whether incidence of the onus of proof is substantive or formal since it determines whether English or Roman Dutch law is used (*Tregea v Godart below)*
- RDL is the common law for the formal law whereas English is common law for substantive law
- The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff
- The true onus of proof is usually established during the pleadings and the evidentiary burden comprises the duty cast upon a litigant to begin adducing evidence and the duty to adduce evidence to combat a prima facie case made by the opponent.

Introduction / Onus

- *Principle of finality requires presiding officers to make an affirmative finding in every case irrespective of the deficiencies in the evidence*
- Important to determine whether incidence of the onus of proof is *substantive or formal* since it determines whether English or Roman Dutch law is used (*Tregea v Godart*)

Q is important because will determine if English / Roman-Dutch Law will have to be consulted

The onus of proof in civil matters ... substantive of formal... law?

***Tregea v Godart* 1939** AD 16 :

Validity of a will – a substantive matter i.t.o the RDL. The will-denier carries onus of proof i.r.o. validity. Failing which the denier will lose the case.

Facts :

A testator made a new will about 2 hours before he died. He left half of his estate & his house to his nurse. His heirs (family) disputed the will a.r.o of his alleged mental incapacity, prior his death. The majority of the judges were not sure that he was really mentally impaired.

Legal question:

Q in this case concerned incidence of burden of proof.

Court had to determine which party bore onus of proof

Ratio dicidendi:

- They considered the Roman-Dutch law approach to determining validity – which placed the onus on the heirs to prove the invalidity of the will.
- They considered the English law law approach to determining validity – which stated that the person who claims that a will is valid bore the burden of proof, which meant that the nurse would carry the onus of proof.
- The Roman-Dutch law is the common law regarding the substantive law in South Africa , while the English law is the common law that applies to the formal law.

Decision:

- The court decided that it was a matter of substantive law, and therefore Roman-Dutch law applied, which means that the family members carried the burden of proof and lost the case.
- AD confirmed that burden of proof was a matter of substantive law.

2. Incidence of the Onus of Proof in Civil Cases

- **Basic rule in civil cases – for onus of proof – *HE WHO ALLEGES MUST PROVE***
- Rule derived from decision in Pillay v Krishna – Illustrates fact that true onus of proof is usually est by pleadings
- Distinction between "true" onus of proof & so-called "evidentiary burden"
- ***Evidentiary burden comprises:-***
  1. Duty cast upon a litigant to begin adducing evidence
  2. Duty to adduce evidence to combat a *prima facie* case made by opponent

The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff

Pillay v. Krishna **1946** AD 946 951 -3

From this decision, the basic rule arose with regard to the location of the burden of proof that he who alleges must prove. This decision illustrates the fact that the real onus has usually already been established in the pleadings.

3. In civil matters… Different issues may generate different onuses of proof

- In civil issues, different issues may generate different onuses.
- For example in a case of assault
  - First issue – plaintiff claims damages for assault (plaintiff to prove)
  - Second issue – defendant may admit assault but claim it was in self-defence (defendant to prove)
  - Third issue – plaintiff believes assault exceeded limits of self defence (plaintiff to prove)
- In civil cases the burden of proof is discharged as a matter of probability – balance of probabilities – i.e. on a preponderance if it is probable that the particular state of affairs existed
- The civil standard is a comparative or relative standard rather than a quantitative test (beyond reasonable doubt), the latter determines how much evidence is required to comply with the standard.
- In Civil cases – Possibility that different parties may bear onus of proof regarding different issues – one may get impression that onus does indeed shift from one party to another
- *The burden of proof, once established never shifts*
- the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff

Pillay v. Krishna **1946** AD 946 951 -3

- From this decision, the basic rule arose with regard to the location of the burden of proof that he who alleges must prove. This decision illustrates the fact that the real onus has usually already been established in the pleadings.

The AJA explained question on multiple onuses: -

Where there are several & distinct issues; eg claim on special defence; then there are several & distinct burdens of proof, which have nothing to do with each other, of course 2nd will not arise before 1st has been discharged.

In ***Klaasen v Benjamin*** – Schreiner JA illustrated principle that real onus never shifts:-

In some cases impression of shifting may be derived from fact that there are different issues in pleadings.

For instance, the plaintiff has to prove the publication of a defamatory statement concerning him, the defendant has to prove that it was published on a privileged occasion, and the plaintiff has to prove that the occasion was abused.

In such a case an impression of shifting may be created although onus on different issues is fixed initially by pleadings & does not change.

This may arise when defendant admits basic facts as pleaded by complainant – but claims existence on an exceptional fact. This problem may be compared with a situation where the defendant admits the basic facts as pleaded by the complainant, but claims the existence of an exceptional fact, such as a ground of justification, and the complainant alleges, in turn, that the ground of justification has been exceeded.

The following factual situation might help to explain this.

In a civil case, the plaintiff claims damages from the defendant, since he claims that the defendant assaulted him.

- This is the first issue and obviously the onus of proving the assault rests on the plaintiff because of the rule ``he who alleges must prove''.
- However, it may turn out that the question of an assault by defendant upon plaintiff is not even in dispute since the defendant admits the assault, but claims that it was done in self-defence against an attack launched by the plaintiff. This is the second issue, and the onus to prove that the pre-requisites for self-defence existed rests upon the defendant.
- Again, this might not even be in dispute since the plaintiff might acknowledge the primary attack from his side, acknowledge also that the defendant might have started off acting in lawful self-defence, but then claim that the defendant exceeded the bounds of his self-defence, that he went much further in the counter-attack than was necessary to ward off the primary attack, and that he was therefore no longer acting in lawful self-defence and should therefore be held liable. This becomes the third issue, where the onus of proof will be on the plaintiff to prove that the defendant exceeded the bounds of self-defence.

Example: The above situation is based roughly on the facts of the case of *Bernhard Goetz*, who was attacked on the New York subway by youths armed with screwdrivers. He then shot and injured the plaintiff in the back while the plaintiff was already running away.

4. Standard of proof in Civil Cases *(Read Schwikkard – 32 7)*

- Proof **on a balance of probabilities** is required
- Civil Standard consists of a **comparative / relative** standard rather then **quantitative** test (in crim matters –
- determines how much evidence is req to comply with standard)
- Comparative test is easier – because easier to say one thing is more probable then the other
- This way one has also determined on whose side balance of probability lies.

In the case of *Eskom v First National Bank* 1995 (2) SA 386 (A)

Here the judge, Grosskopf JA, had to determine on which of the two parties the onus of proof lay. With cognisance of the role of legislation, he applied the principles of statutory interpretation and because the requirements for protection in terms of section 79 of the Banks Act were positive and conjunctive (together), and personal knowledge of the Banker he felt that the incidence of proof lay with the banker who had to prove two things, namely:

1. Good faith and
2. A lack of negligence (391I±J).

It was further held that the question whether the banker had been acting in good faith, was one which was particularly within the knowledge of the banker and that was why he had to bear the onus of proof.

5. Conclusion:

- You should note that the standard of proof that applies in civil proceedings is different from that which applies in criminal proceedings - in civil proceedings proof on a balance of probabilities is required.
- According to Zeffertt the civil standard consists of a comparative or relative standard (on a balance of probabilities) rather than a quantitative test (beyond reasonable doubt).
- The quantitative test determines how much evidence is required to comply with the standard which does not provide much help with regard to the determination of the ideal quantity.
- A comparative test is easier to understand because it is not so difficult to say that one thing is more probable than another.
- In this way one has also determined on whose side the balance of probabilities lies.
- We have seen that in civil cases, the onus of proof is more complex than in criminal cases.
- For this reason there has been much more litigation in civil cases pertaining to matters such as the incidence of the onus of proof, particularly when several issues result in different onuses of proof.

Study unit 12 :

The Assessment of Evidence SG82 TB

1. Introduction *(Read Schwikkard – 30 1 & 30 2)*

- Assessment stage is very important – Court has to weigh all evidence 1st by itself & 2nd in context of all other evidence.
- Correct approach is to weigh up elements pointing to the guilt of the accused against the elements that are indicative of innocence.
- The court must Must take into account inherent:
  - Strengths and weaknesses and probabilities of both sides
  - Absence of interest or bias
  - Intrinsic merits / demerits

Two basic principles apply…

1. The evidence must be weighed in its totality
2. Probabilities and inferences must be distinguished from conjecture or speculation – these must be considered in the light of proved facts
   - Evidence needs to be weighed as a whole, not piecemeal.
   - The principles must be used in conjunction with the legal issues that apply when specific issues are involved, which include circumstantial evidence, corroboration and the cautionary rule.

Case law i.r.o the assessment of evidence

In S v Chabalala – Supreme Court of Appeal pointed out that correct approach in evaluating evidence is to weigh up all elements that point towards guilt of accused against all those elements pointing to innocence.

In ***S v Chabalala*** **2003** (1) SACR 134 (SCA).

The Supreme Court of Appeal *pointed out that the correct approach in evaluating evidence is to weigh up all the elements that point towards the guilt of the accused against all those elements that are indicative of his or her innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance is so heavily in favour of the state that it excludes any reasonable doubt about the accused's guilt.*

The result may prove that one scrap of evidence or one defect in the case for either party was decisive, but that can be only an ex post facto determination and a trial court should avoid the temptation to latch onto one obvious aspect without assessing it in the context of the full picture presented in evidence.

- Supreme Court of Appeal pointed out that correct approach in evaluating evidence is to weigh up all elements that point towards guilt of accused against all those elements pointing to innocence.

- Assessment stage is very important – Court has to weigh all evidence 1st by itself 2nd in context of all other evidence. The evaluation process is a very important stage of the proceedings, during which the court must weigh every piece of evidence, firstly by itself and secondly in the context of all other evidence.
- In doing this, a systematic and logical process is of the greatest importance. When the court evaluates probative material at the end of the case, it is faced with certain well-known issues.
- Generally speaking, the court has to determine the credibility of witnesses, draw inferences, and consider probabilities and improbabilities.
- There are also some specific legal rules that apply during this evaluation process, but it is to a large extent a question of common sense, logic and experience.

2. Basic Principles

(Read Schwikkard – 30 2 1 & 30 2 2)

The stated basic principles provide a good starting point in the evaluation process, but these principles must be used in conjunction with the legal rules that apply when specific issues are involved.

- First, evidence must be weighed as a whole. A piecemeal process of adjudication should therefore be avoided. In essence, a trier of fact must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others:
  - all probabilities;
  - the reliability and opportunity for observation of the respective witnesses;
  - the absence of interest or bias;
  - the intrinsic merits or demerits of the testimony itself;
  - inconsistencies or contradictions; and
  - corroboration.
- It is, however, important to distinguish inferences and probabilities from conjecture (guesswork) and speculation.
- No proper inference can be drawn unless there are objective facts from which to infer the other facts.
- Probabilities must likewise be considered in the light of proven facts.
- A court should therefore, in principle, place more weight on credible direct evidence, even though this evidence might be in conflict with probabilities arising from human experience or expert opinion.

3. Circumstantial Evidence

- Direct evidence is an eye witness account of the act taking place
- Circumstantial evidence is indirect evidence and inferences have to be drawn – in some cases it is stronger than direct evidence

In assessing this evidence, certain rules of logic follow

- Cumulative effect of all the circumstantial evidence must always be considered by the court

- *In criminal proceedings two rules (from R v Blom):*
  1. The inference drawn must be consistent with the proved facts – if not no inference can be drawn
  2. The proved facts should be such that they exclude every reasonable inference save for the one drawn – if not there must be doubt as to whether the inference is correct.
- In the first case reasonable doubt can be created (if other inferences drawn) and in the second takes account of standard of proof (beyond reasonable doubt)
- In civil proceedings the inference must be consistent with the proved facts but need not be the only inference. It is sufficient that it is a probable inference (proof on a balance of probabilities)

3.1 What is circumstantial evidence?

- Direct evidence is given when an eye witness testifies about actually seeing the prohibited act taking place.
- Circumstantial evidence can provide only indirect evidence and inferences then have to be drawn about the prohibited act.
- An eyewitness sees, for example, a suspect running from a house with a bloody knife in his hand. Upon further investigation the eye witness finds someone fatally stabbed inside the house.
- Other examples of circumstantial evidence are fingerprint evidence and DNA tests performed upon the tissue of the suspect in a rape case.

The Evaluation of Circumstantial Evidence *(Read Schwikkard – 30 5; 30 5 1; 30 5 2; & 30 5 3)*

In a criminal matter:

- As a starting point, it can be said that the evaluation of a case based on circumstantial evidence *depends on the presiding officer's ability to think logically*.
- When evaluating circumstantial evidence, the *court should consider the cumulative effect of all the circumstantial evidence* presented in the case.
- It would therefore be *wrong to consider each piece of circumstantial evidence in isolation*.
- If inferences are to be drawn from circumstantial evidence in a criminal case, *two cardinal rules of logic apply*:

  First, the *inferences* sought to be drawn *must be consistent with all the proven facts*. If this is not the case, an inference cannot be sustained.

  Secondly, the proven facts should be such that they *exclude every reasonable inference except the one sought to be drawn*.

  If not, then there must be doubt about the inference sought to be drawn and the accused cannot be convicted. This is because the state must furnish proof beyond a reasonable doubt in a criminal case.
- Note that only reasonable inferences must be excluded. The state need not exclude every possibility, especially when it is far-fetched.

In a civil matter:

- In a civil case the inference sought to be drawn must also be consistent with all the proven facts, but the *inference need not be the only reasonable inference*.
- It is sufficient if it is the most probable inference. This is because a litigant in a civil matter must *furnish proof on a balance of probabilities*.
- Note that circumstantial evidence is not necessarily weaker than direct evidence and that the *cumulative effect of pieces of circumstantial evidence* could have even more value than direct evidence.
- Also, *recent strides in technology have greatly strengthened* some classes of circumstantial evidence. Here one thinks of fingerprint and DNA evidence.

The Evaluation of Circumstantial evidence

R v Blom **1939** AD 288 *is the locus classicus (most famous case) on the question of circumstantial evidence.*

- Blom had made the deceased pregnant.

The premises that led to the final conclusion, namely that Blom murdered his girlfriend:

- He had bought chloroform shortly before the deceased died on the railway tracks outside of Graaff-Reinet.
- He was seen riding away from the scene of the crime shortly after it happened.
- He gave false explanations for everything and relied on a false alibi.
- All these premises could only lead to one final conclusion, namely that Blom had killed his girlfriend.

The test laid down in this case concerning the drawing of valid inferences from the circumstances

- In criminal cases, guilt has to be proven beyond reasonable doubt and therefore the inference of guilt has to exclude all other reasonable inferences, beyond being consistent with all the facts.
- In civil cases, only the latter requirement applies.

The court formulated two rules pertaining to the assessment of circumstantial evidence

In criminal proceedings two rules need to apply:

1. The inference drawn must be consistent with the proved facts – if not no inference can be drawn
2. The proved facts should be such that they exclude every reasonable inference save for the one drawn – if not there must be doubt as to whether the inference is correct.

- In the first case reasonable doubt can be created (if other inferences drawn) and in the second takes account of standard of proof (beyond reasonable doubt)
- In civil proceedings the inference must be consistent with the proved facts but need not be the only inference. It is sufficient that it is a probable inference (proof on a balance of probabilities)

Assessing an alibi : 5 factors are involved

1. No burden of proof on the accused to prove his alibi
2. If there is a reasonable possibility that the accused's alibi is true, then the prosecution has failed to discharge its burden of proof
3. If there are identifying witnesses the court should be satisfied that they are honest and their identification of the accused is reliable
4. The alibi must be assessed in the totality of the evidence
5. The ultimate test is whether the prosecution has furnished proof beyond reasonable doubt

CONCLUSION

- In this SU we have started discussing the weighing of evidence admitted by the court. In the case of circumstantial evidence, the court should be on its guard against drawing false inferences and applying faulty reasoning.
- In general, all the relevant evidence should be taken into consideration and weighed up against other evidence.
- When this is being done, certain rules of thought have to be borne in mind, such as the avoidance of piece-meal reasoning.

Study unit 13 :

Corroboration of Evidence SG87 TB

1. *Definition of Corroboration*

- Evidential material
- which independently
- confirms
- other (untrustworthy) evidential matter
- and which is admissible

1.1 Requirements for Corroboration *(Read Schwikkard – 30 3 1 & 30 3 2)*

The rules of corroboration

- Rules are derived from English common law – corroboration is required by statute in only one case, when the state relies for a conviction on a single confession by an accused that she committed the offence in question.
- Whenever corroboration is present the required standard of proof has been satisfied.
- ***S v Gentle*** – stated that by corroboration is meant: other information which supports the evidence of the complainant and which renders the evidence of the accused less probable on the issues in dispute
- There is a rule against self corroboration which is confined to oral or written confirmation of the witness concerned

Corroboration of evidence must meet following requirements:-

1. Has to be **admissible.**
2. May take on a **variety of forms** & doesn't consist solely of **oral evidence**
3. Should consist of **independent** evidence (comes from rule against self-corroboration)
4. Should **confirm** other evidence. Sec 209 of Crim Proc Act req confession be 'confirmed with material aspects'
5. The standard of proof does not change in a particular case

- One final aspect of corroboration which requires our attention relates to the relationship between corroboration and the standard of proof in a particular case.
  - When a party is required to provide corroboration of certain evidence upon which its case is built, this does not mean that the standard of proof changes.
  - Corroboration and standard of proof are two distinct concepts.
  - The result of this requirement with respect to corroboration is simply that the particular party has to find additional evidence in order to meet the existing standard of proof.

2. *Corroboration in case of a confession* *(Read Schwikkard – 30 3 3)*

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led – provided it has been made voluntarily.

- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- *For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;*

209 Conviction may follow on confession by accused

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.

- Corroboration is satisfied if other material is produced which confirms the confession in a material respect
- Evidence that that an offence had actually been committed is satisfied by adducing evidence. This may also be evidence outside the confession
- But even if either of the above two requirements have been met, it does not mean a conviction follows since guilt beyond reasonable doubt must be proved
- By nature, a confession should be handled with care in court (because of damning nature of confession)
- Confession is admission of all charges against accused & can be convicted by strength of confession alone.
- Another danger – confession may not have been made voluntarily.
- Law of evidence attempts to exclude possibility of untrustworthy confessions in 2 ways:-
  # Applying strict rules of admissibility of confession
  # Applying statutory req of corroboration

2.1 Requirements of the Corroboration of a confession

Sec 209 – Confession may follow on accused's confession if 1 of 2 req are met.

1st = Relates to **confession itself**

2nd = Relates to **crime** i.r.o which confession is made

- Section 209 states that a conviction may follow on the accused's confession if one of two requirements are met.
- The first requirement relates to the confession itself (corroboration of the confession) and the second relates to the crime in respect of which the confession is made (evidence that the crime was committed).

2.1.1 Corroboration of a confession

- This requirement is satisfied if other (independent) evidential material is produced which confirms the confession in a material respect. May be from various sources

  Eg: Where the accused confesses to the charge of murdering her victim by poisoning him with arsenic, and where evidence is adduced that a quantity of arsenic was found in the body of the

deceased. Confirmation may come from a variety of sources, such as the accused's fingerprints or answers given by the accused during proceedings in terms of section 115 of the Criminal Procedure Act. (incriminating evidence)

- When considering whether certain evidence confirms a confession in a material respect, we should ask ourselves primarily whether the confirmation provided by the evidence is of such a nature that it reduces the risk of an incorrect finding being made by the court.

Evidence that an offence had actually been committed

- Criminal Procedure Act specifically states that this requirement be satisfied by adducing **evidence.**
- Any other form of evidentiary matter eg: a presumption - will not suffice

2.2 Relationship between the 2 requirements

In *R v Mataung*

- Accused charged with stock theft – to which he confessed
- BUT could not be convicted before prosecution had satisfied one of req mentioned earlier.
- Prosecution had adduced evidence that stock had disappeared from fenced camp
- Court found evidence not to be sufficient to satisfy 2nd req
- It did, however, confirm confession in material respect & sufficient to found conviction upon confession alone

R v Mataung* *1949 (2) SA 414 (O)

- The accused is charged with theft. He made a confession (which had all the elements of the crime admitted).
- The confession confirmed the confession a material respect, as such that it was sufficient to justify a conviction on the confession alone.

The court however insisted that:

1. Corroboration evidence be adduced by the state and that...
2. Evidence that crime had in fact been committed (predecessor SPW 209) be adduced.

- In this case the corroborating evidence comprised supporting affidavits of the witnesses, Siemens and Fourie.
- Both provided circumstantial evidence regarding the missing cattle, that they were well encamped and that there was no means of escape from the encampment.
- This testimony did not meet the 2nd requirement, namely that the crime was in fact committed and that the court could postulate other possibilities regarding the disappearance of the cattle.
- This lead to discharge of the accused.

In *S v Makeba & Another*

- Supreme Court of Appeal stated that indirect use of confession of another person as evidence against accused amounts to contravention of sec 219 of Crim Proc Act & is not permitted – even if used only for purpose of corroboration

***S v Makeba & Another* 2003** *(2) SASV 128 (HHA)*

SCA ruled that the indirect use of a confession from someone else as evidence against an accused amounts to a breach of the CPA a219 and is therefore inadmissible, even if used only for corroboration.

SUMMARY

- In some cases, evidence is not sufficiently trustworthy for a court to rely on it when making its judgment.
- Such evidence should then be backed up or corroborated by other evidence.
- Last mentioned evidence must be admissible and must confirm the unsatisfactory evidence.
- Corroborative evidence may take on a variety of forms, including oral evidence, real evidence and documentary evidence.
- The corroboration of a confession in terms of section 209 of the Criminal Procedure Act is the only instance in our law in which corroboration is required by statute.
- Corroboration and the standard of proof are two distinct concepts. The fact that evidence has to be corroborated does not have any effect on the requirement (in a criminal case) that the guilt of the accused must be proved beyond reasonable doubt or (in a civil case) that the plaintiff must prove her case on a balance of probabilities.

Study unit 14 :

The Cautionary Rule SG93 TB

Introduction… Why is caution by the court required?

- The cautionary rule is a rule of practice bearing the mandatory character of a legal rule that prescribes a specific approach to be adopted by the court when evaluating certain evidence
- ***The rule requires:***
  - That the court should be cautious when assessing evidence that experience has shown should be viewed with suspicion
  - The court should seek some other safeguard reducing the risk of a wrong finding based on the suspect evidence
  - The exercise of caution should not displace that of common sense and the application of the cautionary rule does not affect the standard of proof
  - To this end this rule only guides the court in answering a bigger question as to whether the party carrying the burden of proof has satisfied this burden
  - The judge should indicate the application of this rule in his judgement but it must be shown it was actually applied
  - *Most common safeguard is found in the corroboration of suspect evidence*

1. Definition

- **A rule of practice** bearing the **mandatory character** of a legal rule and
- prescribing a **specific approach** to be adopted by the court
- to assist in the **evaluation** of certain evidence

- This rule has developed from practice and is independent of legislation. However, it may not be disregarded.
- In ***R v Mbonambi*** 1957 (3) SA 232 (A). Non-compliance with the cautionary rule will generally result in the finding of the court being set aside.
- In ***R v J*** 1966 (1) SA 88 (SRA) 90 it was shown that - on the other hand, our courts tend not to apply this rule in such a formalistic manner that the exercise of caution is allowed to displace the exercise of common sense.
- In the end, this rule really only guides the court in answering the bigger question: ***has the party carrying the burden of proof satisfied this burden?***
  - Although Cautionary rule was intended for Criminal Cases – Also applied in Civil Cases

The rule requires that the judge or magistrate evaluating the facts

- must consciously remember to be on guard regarding certain types of evidence
- must seek a safeguard which will sufficiently dispel the suspicion and the dangers inherent in the suspect evidence.

- The requirement that the judge or magistrate evaluating the facts must consciously remember to apply the cautionary rule means that he must indeed indicate that he has applied these rules.
- Practically, this will mean that the judge or magistrate will mention the application of the rule in his judgment.
- However, it is not enough to mention the rule without showing that it has actually been applied

  R v Mgwengwana 1964 (2) SA 149 (C):

  The Judge / magistrate should cautiously be on the lookout for inconsistent or corroborative evidence, and must show that he has applied the cautionary rules. In practice this means that in his ruling that he must mention and show that he actually applied these rule.
- The ultimate purpose of the cautionary rule is to exclude the possibility of the court reaching an incorrect finding.
- The safeguard sought by the judge or magistrate who is evaluating the facts should have exactly this purpose.
- The most common safeguard can be found in the corroboration of the suspect evidence. However, the safeguard can also take other forms.
- The real test is whether the court is satisfied, upon rational grounds, that the witness or the evidence is reliable.
  - Judge/Mag will mention application of rule in judgment (must show it has been applied)
  - Ultimate purpose of rule is to exclude possibility of court reaching incorrect finding
  - Most common safeguard can be found in corroboration of suspect evidence
  - But safeguard can also take other forms
  - Real test is if court is satisfied that the witness / evidence is reliable

2. Specific Instances

2.1 The Accomplice *(Read Schwikkard – 30 11 1)*

- Our courts accept that an accomplice may have motive for falsely incriminating the accused or they could have intimate knowledge of a crime and downplay their involvement.
- For these reasons the evidence of an accomplice should be treated with caution.

S v Masuku **1969** (2) SA 375 (N)

- Case is about a 78 year old woman who was raped and murdered. There is evidence that she was raped and murdered. The state wished to determine if she was robbed as well. The case was dependent on the evidence of 2 accomplices.
- The judge warned that when a judgment is sought on the testimony of a single accomplice, there has to be a source other than the single accomplice to the commission of the crime, or affirmation in the sense of support from the testimony of the accomplice in the form aspect of material that is not necessarily directly linked the accused to the offense.
- He further warned that the cautionary rule should be strictly applied in such cases and formulated the following 10 principles:

The basic principles from S v Masuku are;

1. Caution in dealing with the evidence of an accomplice
2. An accomplice has a motive to lie in order to obtain immunity
3. Corroboration is not conclusive of the truthfulness of an accomplice
4. If corroboration sought it must directly implicate the accused
5. This corroboration from 4 may be found in another reliable witness
6. Where there is no corroboration, there must be some other assurance to show the evidence of the accomplice is reliable
7. This may be found where the accused is a lying witness or where he does not give evidence
8. The risk of false incrimination will be reduced where the accomplice is a friend of the accused
9. If none of the above is present, it is insufficient for a court to convict on the evidence of an accomplice
10. Where corroboration is obtained from another accomplice, the evidence still needs to be treated with caution.

2.2 Evidence of Identification… the accomplice… caution advised… *(Read Schwikkard – 30 11 2)*

- Evidence of the identity of the accused should be treated with caution
- The court in ***S v Mthethwa*** **1972** 3 SA 766 (A) 768 identified the following factors that the court emphasized when the reliability of a witness's ability to perceive is considered – to wit:
  1. Lighting
  2. Visibility
  3. Strength of Vision
  4. The proximity of the witness
  5. The opportunity for observation by the witness, both with respect to time and situation
  6. The extent of his prior knowledge of the accused
  7. The mobility of the scene
  8. Authentication of fact
  9. Openness to perceive
  10. The accused's voice, face, body, gait and clothing
  11. Outcome of any identification parades

In a nutshell:

- The reliability of his observation needs to be tested
- This depends on numerous factors: lighting, visibility, eyesight, proximity, time and situation, prior knowledge of the accused, mobility, corroboration, the accused's face, voice, build and gait, the result of ID parades etc.
- The factors must be weighed one against the other in the light of the totality of the evidence and its probabilities
- Evidence of identification at a formal ID parade – a court will more readily accept this where such has been confirmed by a properly constituted ID parade i.e. no material irregularities.
- Identification based on a photographic ID parade – creates the problem that the witness will identify the person whose photograph he saw rather than the one committing the offence
- Identification in the "Dock" has little probative value

Evidence of Identification… continued… the accomplice… ***photo line-up***

In ***S v Moti*** **1998** (2) SACR 245 (SCA) (only read pages 247i to 248e & 248e to 249d)

- The appellant was convicted of a series of armed robberies while a member of a gang, he did not appeal against the robberies but against the charges of murder and robbery.
- The witnesses were never asked to identify the appellant during a formal identification parade, but only on a photo line-up comprising six photos including that of the appellant.
- The court ruled that the primary objective of a photo line-up was not so much to adduce evidence against perpetrator, but rather to assist in the investigation, and that all the stringent requirements for a regular identity parade was not necessary. Thus - testimony during such photo identification occurred would, in principle, be admissible.

The court ruled that:

The reliability of the evidence - will depend on several factors , namely

- Credibility of the witness and anyone else that attended the photo identification.
- Whether the investigating officer or member of the research team attended the identification.
- Opportunity which an eyewitness may have had to observe the suspect during the commission of the crime
- Whether the witness presented the police with a prior description of the suspect to the police that matched the picture
- Where , by whom and under what circumstances the photograph of the suspect was shown to the eyewitness.
- What his instructions were, and in particular whether they were told prior to the parade that it was a photo of the suspect whom probably would not have been at the identification parade.
- Whether the witness was alone when the identification was made and whether it was made in the presence of other potential witnesses
- Nature and clarity of the picture of the suspect
- Whether only the picture of the suspect was revealed to the eyewitness, and if not. what number of other pictures were also shown to the eye witness.
- The comparability of the other photos that was shown to the witness reflecting the suspect
- Whether the photos shown to the witness (of the suspect and the others) were still available and whether those could be presented to the court to enable the court to formulate its own impression and opinion on the comparability thereof.

The court held:

- The that the early identification through a photograph may impair the witness's subsequent identification of the suspect via an identity parade or testimony in court – having seen him on a photo rather than via the events witnessed – circumstantial to the case.
- That such prior identification may impair the State's case, therein that the witness may not identify the suspect at an identification parade & that dismissal of innocents is just as important as the condemnation of the accused, in our legal system.

- That regarding H and D's identification of the appellant on the witness stand, the possibility of influence by the prior viewing of photograph of the appellant could be discarded.
- That a witness 's identification of the accused from the witness stand is in itself suspicious
- That considering all three of these issues : the questionable photo parade, the absence of a formal identification parade and the identification of the appellant in the dock, the accused could not be found guilty of murder, robbery charges on the alternative charges could not have been lawful.
- That these three issues were not the only factors considered. H and D for S also recognized as one of the men who attacked them. If the appellant 's denial of involvement was true, it was just a coincidence that the witnesses, independently, firstly photos of S and later of the accused personally.
- The Coincidence grew exceptionally, if it is kept in mind that the two persons who were identified according to accepted evidence at about exactly that period and in that very area, whom participated in a series of robberies that exactly corresponded with the robbery in question. Such a coincidence was too great to be true
- That the evidence of a common modus operandi of the appellant and S's direct involvement in other similar cases of robbery was relevant, not as inference that the appellant therefore participated in the offending robbery, but H and D's identification supported the allegation that he was “the man in the grey suit”.

The court held that there was no reasonable doubt that the appellant was correctly identified as the murderer.

It was argued that…

- Even most honest witness could identify wrong person as one who committed crime.
- For this reason evidence of the identify of the accused should be treated with caution

Evidence of Identification… continued… the accomplice… ***injustice through mistaken identity….***

Following held in ***R v Shekelele*** **1953** (1) SA 636 (T) 638G:

- Gross injustices aren’t infrequently done through honest but mistaken identifications. People often resemble each other. Strangers sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence.

Evidence of Identification… continued… ***Voice identification***

- Voice identification must be treated with caution and in the absence of prior acquaintance and is considered extremely poor evidence.

2.3 Children

In ***S v V*** **2000** (1) SASV 453 (HHA)

- Court emphasized that although there is no statutory requirement that a child's testimony be corroborated, it need not be assumed that the testimony of young children, in light of the nature of the complaint and the age of the complainant, should not be threated with caution.

- The South African Law Commission has recommended that the cautionary rule as it applies to children, should be abolished, but this had not as yet provokes any reaction on the part of the government.
- In this case the court held that one must guard against labelling children as "imaginative and susceptible to influence". The court followed a different approach, in which the child witness was viewed with less scepticism.
- The SCA holds that courts should assume a cautious approach in case of child witnesses in appropriate conditions.

- Court stresses there is no statutory req that a child's evidence should be corroborated – its accepted that – given nature of charges & age of complainant, evidence of young children should be treated with caution
- SA Law Commission has recommended that cautionary rule applicable to children be abolished

- Court has to be sure child understands importance of telling the truth.
- Trustworthiness depends on number of factors
- Should guard against labelling children as 'imaginative & suggestible'

In ***S v V*** court followed different approach, in which less scepticism regarding child witness was evident evidence of young children should be treated with caution due to their imaginativeness and suggestibility

- There is no statutory requirement that a child's evidence be corroborated
- The court has to be sure that the child understands the importance of telling the truth
- Trustworthiness depends on the child's ability to observe, to remember the observations and to recall the events
- Current position is that the cautionary approach be applied to child evidence even though it has been suggested that it should not be

2.4 The Single Witness

(Read Schwikkard – 30 11 4)

208 CPA Conviction may follow on evidence of single witness
An accused may be convicted of any offence on the single evidence of any competent witness.

16 CPEA Sufficiency of evidence of one witness.
Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.

In ***S v Webber*** **1971** SA 754 (A) the court held that:

- If conviction is only possible on the testimony of a single witness, such a witness must be credible, whilst the evidence should be approached with caution.
- Proper attention should be given to the factors that either support or undermine the credibility of the evidence.

- The probative value of the testimony of a single witness cannot be equated to the probative value of encompassing wide & evidence from multiple witnesses.
- It was decided that the evidence of a single witness should be approached with caution but need not be rejected merely because of bias - the bias needs to be assessed in the light of the evidence as a whole

The Single Witness… continued… ***statutory provisions***

- Statutory provisions make it **possible** for a court to convict a person / to give judgment against a party in evidence of a single witness alone
- If court satisfied that evidence given by single witness is satisfactory – it **may**, but **need not** regard evidence as sufficient to convict accused
- Degree of caution to be applied to testimony of single witness may also be increased by other factors
- Note a single witness may be for only one aspect of a case and numerous single witnesses may be required to prove each aspect

The Single Witness… continued… ***Who are single witnesses?***

- Cautionary rule i.r.o single witnesses not limited to situation where only one person gives evidence for prosecution.
- Usually more than one point in issue in a any case, & if only 1 witness available to testify on particular point in issue – witness will be single witness
- If more then one charge – charges will be considered separately

Example

- A number of witnesses testify that a certain crime has been committed.
- Only one, however, is able to identify the accused as the person who committed this crime. For purposes of the identification of the accused, that particular witness is regarded as a single witness.

2.5 Cases of Sexual Nature

- Cautionary rule that used to exist in cases of Sexual Nature – was effectively abolished in *S v Jackson.*
- Oliver JA pointed out – 'collective wisdom & experience' of judges – had no factual justification.
- The empirical research which had been done in this regard disproved the idea that women lie more frequently than men / are by nature unreliable witnesses.
- Another important consideration = Cautionary rule had collapsed in number of countries with similar legal system to ours.
- Court reached conclusion that cautionary rule was based on outdated & irrational perceptions.
- Court also confirmed burden on state to prove guilt of accused beyond reasonable doubt.
- Doesn't mean that cautionary rule should not be followed simply because it's of sexual nature.

- In *S v Jackson* – Court endorsed statement that is up to the judge's discretion to exercise caution. Position still remains : **If there is another basis for considering the evidence to be unreliable** then caution is applicable.
- This court also confirmed the strength and terms of the cautionary approach will depend on the content and manner of the witness' evidence – thus there needs to be an evidential basis for suggesting the evidence may be unreliable.

2.6 Police traps & Private Detectives

- Police trap's credibility may be questioned because he received remuneration in exchange for obtaining evidence for the state.
- Our courts apply caution because there are valid reasons for suspecting reliability of their evidence.
- Because police trap gets paid money – might colour in occurrences as to falsely incriminate accused.
- Private detective in same situation (also gets paid to secure evidence)
- Difference between the 2 = Police trap takes part in committing crime – Private detective doesn't.
- More than one cautionary rule can apply in a certain case and the witness' evidence must be approached with caution in respect of each element which is suspect.

2.7 More than one cautionary rule

- When more than one rule applicable in certain case – evidence to be approached with caution in respect of each element which renders it suspect
- Sec 60 Of Crim Law (Sexual Offences & Related Matters) Amended Act 32 of 2007 – also states court may not approach evidence of a complainant in Criminal procedure involving alleged commission of sexual offence pending before that court – with caution – merely on account of nature of that offence

S60. Court may not treat evidence of complainant with caution on account of nature of offence
Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.

END