

THE RIGHT TO REMAIN SILENT: AN UNFAIR ADVANTAGE

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DECLARATION

I, Chantal Bodha Khedun, hereby declare that this dissertation contains my own work except where specifically acknowledged. Further, I declare that I have obtained the necessary authorisation and consent to carry out this research.

I further declare that this research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.



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CHAPTER 1

A BRIEF HISTORICAL BACKGROUND ON THE RIGHT TO REMAIN SILENT

1.1 Introduction

The aim of this dissertation is to critically analyse the right to remain silent. This will be achieved through an overview of the history and origins of the right to silence, the position of the common law on the right to silence and thereafter by conducting a comparative study with foreign law and assessing what their views are as regards the right to remain silent. Finally, the focus will be shifted to the South African law context and the central question to be examined here is, 'whether the accused's right to remain silent at the plea stage of the trial (after the entire docket content has been made available to him) is consistent with the right to a fair trial.

The premise of this dissertation will be based on the conclusion that, in an accusatorial legal system, the silence principle ought to be one of a flexible compromise. Whilst abolishing the right is considered to be a misdirection, has retaining it as a constitutional right not proved to be somewhat of a similar misdirection? These are but some of the many considerations which will be critically analysed during the course of this dissertation.

The methodology which will be used in the course of this dissertation will involve an evaluative and relative scrutiny of the silence principle, and will be broken down as follows:

- a) A historical analysis of the right to silence. In terms of description and scope: does the historical approach to the right to silence reinforce the modern approach? Further, if any, what is the distinction between pre-trial silence and trial silence?
- b) The common law position on the right to silence, from the Criminal Evidence Act of 1898 to the Criminal Justice and Public Order Act of 1994, and a brief overview of its interpretation contained in South African judicial precedents, namely:

- i) *S v Brown*¹
- ii) *S v Boesak*²

¹ 1996 2 SACR 49 (NC).

² [2000] ZACC 25; 2001 (1) SACR (1) (CC).

- iii) *Thebus and Another v The State*³
- iv) *Osman and Another v Attorney General, Transvaal*⁴

- c) A review of the foreign law perspective on the right to silence. Taking into consideration that as a general rule, South Africa follows English law in both criminal and civil procedure, close attention will be paid to England's new 'limits' on the right to silence. Is it a workable approach? Will its aim to aid in the reduction of crime be achieved? Is it an approach which can be adopted and successfully implemented in South Africa? These are some of the arguments and views which will be considered.
- d) The South African law position on the right to silence, with due regard to its interpretation and application by our courts. Focus will be placed on various judgments dealing with the right to silence.
- e) Finally, an overall summary of the right to silence will be conducted and a conclusion will be drawn from the comparative analysis between the English law approach to the right to silence *versus* the South African law approach. Is the English law approach to the right to silence a commendable one? And should the right to silence in South Africa be limited?

1.2 Origins and historical background

The history behind the right to remain silent is not entirely clear... "for at least three hundred years, between the sixteenth and nineteenth centuries, an accused in a criminal case was not permitted to testify on his own behalf even if he desired to do so."⁵ At this point in time the accused had no information in advance of the charges that he⁶ faced, neither was he given any information of the evidence to be led against him. Furthermore, incriminating questions could also be put to the accused and he was expected to answer them accordingly, for at that time, the right to remain silent was a concept that was unknown.⁷

³ (2003) AHRLR 230 (SACC2003).

⁴ 1998 (4) SA 1224 (CC), 1998 (2) SACR 493 (CC).

⁵ Robert Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U. L. Q. 454 (1962)

⁶ Any reference to one gender includes the other gender as well.

⁷ Burchell op cit (n5) 31. See also: MRT MacNair 'The early development of the privilege against self-incrimination' (1990) 10 *Ox J Legal Stud* 66 at 67.

During the 16th century in England the notorious Court of the Star Chamber and High Commission prosecuted religious and political dissidents. It was during this period when “the Latin brocard *nemo teneat se ipsum accusare* (‘no man is bound to accuse himself’), became a rallying cry for help to the said dissidents.”⁸

“The Court of the Star Chamber used the procedures of the Kings council. Cases began upon petition or information received. Depositions were taken from witnesses, but no jury was used. The punishments, which were arbitrary, included imprisonment, fine, the pillory, whipping, branding and mutilation, but never death.”⁹ The Court of the Star Chamber was accordingly abolished by the Long Parliament in 1641.¹⁰

In the United States of America the right to remain silent “existed prior to the American Revolution. It was considered to be one of the most important safeguards which protected its citizens against the arbitrary actions of the State, and it was enshrined in the Fifth Amendment to the Constitution.”¹¹

“The right to silence spread to many nations of the British Empire”¹² and throughout the late 20th century, it spread across continental Europe, “due to developments in international law which saw an increasing universalisation of certain due process protections.”¹³

Today it is a legal right which is recognized and protected by the constitutions of various countries and “in many of the world’s legal systems.”¹⁴

The right to remain silent covers various issues which are focused “on the right of an accused person to refuse to provide an answer when being questioned; this can be either before or during legal proceedings in a court of law.”¹⁵ Such a right not only entails the right to remain silent when being questioned, but, it also includes the right to avoid self-incrimination.

So, if an accused refuses to answer any question before or during a trial, a hearing or any other legal proceedings, the presiding officer before which these proceedings are taking place, cannot then draw an adverse inference based solely on the fact that the accused elected

⁸ *Supra* note 5.

⁹ <https://www.britannica.com/topic/Court-of-Star-Chamber> accessed on 10 August 2017.

¹⁰ *Ibid.*

¹¹ <https://www.law.cornell.edu/wex/fifth> amendment “Fifth Amendment of the US Constitution” accessed on 10 August 2017.

¹² <https://www.lawteacher.net> “What is the right to silence” “The History” accessed on 10 August 2017.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

to remain silent. There are however, exceptions to this provision, which shall be discussed in due course.

In South Africa, the right to silence is safeguarded and enshrined in s35 of the Constitution, more specifically, s35 (3) (h), which is set out as follows:

35.

- “Arrested, detained and accused persons.
(3) Every accused person has a right to a fair trial, which includes a right –
(h) to be presumed innocent, to remain silent, and not to testify during the Proceedings;”¹⁶

In other words, this means that a person who is accused of allegedly having committed an offence has the right to a fair trial which entails him having adequate legal representation and being able to understand the court proceedings. Such an accused also has the right to be presumed innocent until proven guilty beyond a reasonable doubt in a court of law. Further, his right to remain silent and not to testify means that there is no burden that rests upon him to assist the State in proving his guilt and this is considered to be one of the most vital aspects of the right to a fair trial.

1.3 The distinction between pre-trial silence and trial silence

In order for one to comprehensively understand the right to silence, one needs to first understand the distinction between pre-trial silence and trial silence. There is not much of a logical difference between an inference drawn from a suspect’s silence during a police interrogation and an inference drawn from an accused’s silence at trial. Yet, in most countries across the world, pre-trial silence is granted an extraordinary level of protection as compared to trial silence. What is not strictly true, is the assumption that both pre-trial and trial silence equally display the main advantage against self-incrimination. During the seventeenth century, the prerogative courts enforced a harsh inquisitorial system from which stemmed the common law reaction of pre-trial silence. The trial silence principle on the other hand, originated in the nineteenth century, when procedural reforms were said to be taking place

¹⁶ The Constitution of the Republic of South Africa, 1996, section 35(3)(h).

together with the rise of defence counsel which allowed for the first time, an accused to be “a competent but not compellable witness at his own trial.”¹⁷

“Apart from these historical considerations, various other reasons exist which assist in explaining the difference between pre-trial and trial silence and why they are treated differently.”¹⁸ One of these reasons is based on the perception that during the pre-trial investigation a suspect is placed at a disadvantage with regard to procedural and substantive fairness, whereas, during the trial, the accused is said to be at a procedural advantage. When drawing an adverse inference from silence, fairness is considered to be a critical companion of the process. To “draw an adverse inference from a suspect’s pre-trial silence”¹⁹, or to assign to him, any particular voluntary action, is considered to be unfair because “during the pre-trial interrogation stage, the suspect”²⁰ is faced with forceful, pressurizing and threatening influences at the hands of the State. However, any interpretation placed on an accused’s silence at trial is bound to be fair, because fairness, at trial, is a fundamental safeguard. At the trial stage, an accused is fully aware of the case he faces and exactly what needs to be answered. The accused is further allocated legal counsel and he faces no risk of State influences such as intimidation, coercion, subjection et cetera, therefore at this stage it is said to be fair to draw an adverse inference from such an accused’s silence.

“A practical consideration of unavailability is another reason put forward for the distinctive treatment of the silence principle at the pre-trial and trial stage. At trial it is virtually impossible to prevent the court from taking notice of an accused’s failure to testify, especially when the accused faces a case that calls for an explanation.”²¹

1.4 Theoretical framework

One of the most important aspects of a fair trial in the accusatorial legal system, to which South Africa belongs, is the right to remain silent. Indeed prior to the Constitution an accused person had the same right to remain silent during the plea stage of the trial and during trial itself.

¹⁷ C. Theophilopoulos, *The right to silence and the privilege against self-incrimination: A critical examination of a doctrine in search of cogent reasons* (Phd thesis, University of South Africa, 2011) at 318.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

However, an accused who remained silent during the trial ran the risk of an adverse inference being drawn against him as a result of his failure to testify in circumstances where a case was made out against him which *prima facie* pointed to his guilt.²²

During this pre-constitutional era of criminal trials in South Africa, an abuse of police investigative powers was a common occurrence in the investigation of cases and an accused who elected to remain silent even during the investigative stage of a case ran the risk of an adverse inference being drawn against him.²³

Even at that stage of the South African criminal justice system, the criminal courts were reluctant to question an accused in terms of s115 of the Criminal Procedure Act 51 of 1977, where the accused pleaded not guilty and elected to remain silent.

During this era, however, the accused was not entitled to all statements in the police docket except for the charge sheet and further particulars to the charge if he requested this from the prosecution. In this context, therefore, the accused was not unfairly advantaged in the sense that he could fabricate a defence to the charge because the evidence was first heard in court.²⁴

With the advent of the Constitution given the past accusatorial system in South Africa and the history of abuse of State or police powers, the right to silence was reaffirmed in s35 of the Constitution. The writers of the Constitution at that time did not envisage that an accused will at some time in the future have unrestricted access to the content of a police docket well before the trial and could then literally concoct a defence that would fit in perfectly with the nature and extent of the State's case. In this sense the accused is unfairly advantaged and is not treated on an equal footing with the complainant in the criminal trial.

This submission can best be illustrated by a practical example, taking a set of facts: A is a female on her way home, who is unknown to the accused. He accosts her and rapes her, and thereafter flees into the night. During the flashes of lightening in the thunder storm, she adequately identifies him as a local member of the community, who lives in the neighbourhood about 500 meters from her house and whom she had occasionally seen, but never had any dealings with. A semen sample taken from her matches the accused's DNA.

²² E. Du Toit *Commentary on the Criminal Procedure Act* Volume 1 (1987).

²³ *Ibid.*

²⁴ *Ibid.*

Now that the accused has been given her police statement as well as the DNA report, it is open to him to tailor a defence of consent. Conversely, if the accused was not given these statements, he would have to answer the charge by a denial or by remaining silent.

In these circumstances the effect of the accused's right to remain silent even after being furnished with the entire content of the police docket, places the complainant on an unequal footing thereby prejudicing the State in the presentation of its case.

It is needless to say that if one were to treat the complainant and the accused on an equal footing, the accused should only be entitled to contents of the police docket after he pleads to the charge and makes a detailed statement in terms of s115 of the Criminal Procedure Act, disclosing his defence.

During the course of this study there will be a comparative assessment of foreign jurisdictions and how the right to remain silent is interpreted in those jurisdictions, with particular reference to the plea statement in court and not any statements of an extra curial nature.

Furthermore, the facts of a few cases will be summarized and presented in order to show that the accused has an unfair advantage at trial when exercising his constitutional right to remain silent.

This unfair advantage arises out of the accused being given all the statements in the police docket before the trial. He is now able to consult with his lawyer on the strength of the State's case before the trial commences and fabricate a defence.

By remaining silent at the plea stage of the trial the accused has the further advantage of assessing the strength or weakness of the State's witnesses during the course of the State presenting its case. He can now come up with a defence that fits into the loopholes of the State case.

1.5 Conclusion

Rationale:

In conclusion, the questions that must be asked are the following: - Is such an approach to the current application of the right to silence in South Africa:-

1. Consistent with the right to a fair trial?
2. Fair to the accused and the complainant, and the criminal justice system?
3. Consistent with access to information in the docket and its impact on the interests of justice in the context of an accused who elects to remain silent?

It is respectfully submitted that these are the central considerations that are foundational to fundamental rights and the equality of accused's and complainants.

In researching this topic, various works of different authors and academics have been studied, with focus on how their articles and works have contributed to this specific subject area.

In contribution to this specific area of study one must revert to the topic, in which it will be submitted, during the course of this study, that requiring the accused to disclose the basis of his defence at the plea stage of the trial is not inconsistent with his right to remain silent in s35 (3) (h) of the Constitution, but rather, it will assist the accused himself, along with the State, the judiciary and the administration of justice as a whole, in arriving at a fair and speedy outcome.

Requiring the accused to disclose the basis of his defence at the plea stage of the trial clearly provides the accused with no opportunity to concoct a defence in light of all the statements he now has at his disposal. However, should he nevertheless attempt to do so, it will certainly make the courts duty a whole lot less difficult and less tedious in arriving at its decision.

Furthermore, one may argue that taking this stance (requiring the accused to disclose the basis of his defence at the plea stage of the trial), is indeed keeping in line with the values enshrined in our Constitution, which spells out that one lives in an open and democratic society based on equality, dignity and freedom. In keeping with these constitutional values, taking this stance will allow for a fair and speedy outcome, in that, both the accused and the complainant will be placed on an equal footing. Moreover, by the accused disclosing the

basis of his defence at the outset, the issues will in turn be narrowed down to what is important and relevant.

What will follow in the next chapter is a summary of the common law position on the right to remain silent, as well as a discussion of a few South African cases in which the courts were faced with issues pertaining to the interpretation of the right to remain silent as entrenched in s35 of the Constitution of the Republic of South Africa. Moreover, it will be argued that the common law position remains very much intact as regards the right to remain silent within South African law. However, whether this position should change is a question which will be discussed in further chapters to this study.

CHAPTER 2

THE COMMON LAW POSITION

2.1 Introduction

The common law is that body of the law that is derived from judicial decisions of courts and similar tribunals. The defining characteristic of the common law is that it arises as a precedent. This chapter therefore entails a review of the English law position on the right to silence and the precedent it has set in respect of same.

2.2 The provisions under the English law regarding the right to remain silent

The accused's right to testify at his own trial and also his right not to be compelled to do so were rights that were established by the Criminal Evidence Act of 1898.²⁵ Under this Act the accused was held to be a competent witness for the defence but never one for the State. As regards the drawing of inferences the Criminal Evidence Act placed a restriction on a prosecutor's ability to draw adverse inferences in respect of an accused person's silence or failure to testify. However, s35 of the Criminal Justice and Public Order Act of 1994²⁶ has now put an end to the historic curb of the Criminal Evidence Act, in that, an accused who elects to remain silent now faces an attack by the prosecution in which adverse inferences from such an accused's silence may be drawn in specific circumstances.²⁷

Historically, the judiciary has reserved the right to comment and to instruct its jury on the accused's silence, this is unlike the position with the prosecution, as there is a restriction placed on prosecutorial comment.²⁸ At the appellate level the subject of some form of confusion is just how far an accused person's silence can be used against him. This is something that has never been clearly articulated by judicial comment. However, numerous guidelines have been developed over the years which regulate just how far judicial

²⁵ The Criminal Evidence Act, Sec. 1, 61, 62, Vict. C. 36, 9 Statutes 613 (1898).

²⁶ The Criminal Justice and Public Order Act 1994 (c.33).

²⁷ *Supra* note 17 at 300.

²⁸ *R v Rhodes* (1899) 1 QB 77, 83 and *R v Littleboy* (1934) 2 KB 408, 413-414.

commentary can go, and further, places a limit on the drawing of adverse inferences by the judiciary.²⁹

These guidelines are as follows:

- “(a) Did the investigating officer caution and inform the accused of his right to silence? A distinction is drawn between pre-caution silence and post-caution silence.
- (b) The even term principle. Was the accuser a person in authority?
- (c) The presence of a solicitor during the pre-trial police interrogation.
- (d) The stage at which the accused invokes the right to silence, either at the pre-trial or the trial stage. Judicial precedent has clearly established that no adverse inferences may be drawn from pre-trial silence. At trial no direct adverse inference of guilt may be drawn from the accused’s failure to testify.
- (e) Has the prosecution established a prima facie case which necessitates rebuttal?”³⁰

Over the twentieth century the abovementioned guidelines have determined exactly what kinds of adverse inferences and commentaries may be drawn or made by an English judge. An unalterable rule however, has always been that when an accused person is properly cautioned, one cannot then draw an adverse inference against him.³¹

As can be noted from the above, “under the common law, which is the part of English Law that is derived from custom and judicial precedent rather than statutes”³², a suspect or an accused person has the right to remain silent during the pre-trial investigations, which also includes the “right not to answer any questions put to him by the police”³³. In this instance the State must prove its case beyond a reasonable doubt, as an adverse inference of guilt cannot be drawn from the accused’s election to remain silent during the pre-trial stage alone.³⁴

Furthermore, one cannot expect an accused person to assist the State to prove its case against him by furnishing the police with information. This rule originated from the common law.³⁵

²⁹ Theophilopoulos *supra* note 17 at 300.

³⁰ *Idem* 301.

³¹ *Ibid.*

³² Van De Walt Tharien and De La Harpe Stephen ‘*The right to pre-trial silence as part of a free and fair trial: an overview*’ at pg 7.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *R v Mashelele & Another* 1944 AD 571 where the Court relied on the English decision of *R v Leckey* 1943 2 A11 ER 665.

The rule was formulated by Tindall JA as follows:

“If the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril; for an innocent person might well, either from excessive caution or from some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination.

It would, also, in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted.”³⁶

2.3 An interpretation of the English common law position on the right to silence by the courts of South Africa

In laying down the foundation of the common law position, it is important to consider some judicial precedents in which our Courts have adopted and interpreted the abovementioned common law custom to best suit the needs of our accusatorial legal system, as regards the right to remain silent.

In *S v Boesak*³⁷, the applicant had been convicted on four charges in the “Cape of Good Hope High Court (the High Court), on 17 March 1999.”³⁸ The first charge was one of fraud (count 4) and the balance of the three charges were of theft (counts 5, 9 and 31). He received “an effective sentence of six years imprisonment.”³⁹ On appeal to the Supreme Court of Appeal (hereafter referred to as the SCA), the conviction on count 9 was set aside “but the appeal in respect of counts 4, 5 and 31”⁴⁰ was dismissed. Due to the partial success of the appeal, the applicant’s sentence was reduced to an effective three years imprisonment. The applicant then “sought special leave to appeal to the Constitutional Court against the SCA’s decision to uphold the other three counts.”⁴¹ The Constitutional Court was then faced with the issue as to whether the applicant’s contention, that his right “to remain silent and not to testify during the proceedings”⁴², as enshrined under s35(3)(h) of the Constitution, was infringed by the SCA.

³⁶ *Ibid.* See also *S v Zwayi* 1998 2 BCLR 242 (CK).

³⁷ *Supra* note 2.

³⁸ <http://www.saflii.org/za/cases/ZACC/2000/25.html> accessed on 15 August 2017.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

The applicant “contended, amongst others, that the SCA improperly relied on his failure to give evidence to conclude that there had been proof beyond a reasonable doubt.”⁴³

As regards the right to remain silent in *Boesak*, Langa DP set out the principle as follows:

“The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”⁴⁴

What is stated above is consistent with the marks of Madala J, writing for the Court in *Osman and Another v Attorney-General, Transvaal*⁴⁵, when he said the following:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond a reasonable doubt.

An accused, however, always runs the risk that, absent any rebuttal, the prosecution’s case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.”⁴⁶

The history of this case was that it arrived before the Constitutional Court “by way of an appeal from the judgment and order of McCreath J, with Van Dyk J concurring, in the Transvaal High Court”⁴⁷, who dismissed “the appellants application which challenged the constitutionality of s36 of the General Law Amendment Act 62 of 1955 (the Act).”⁴⁸

⁴³ *Ibid.*

⁴⁴ *S v Boesak supra* note 2 at 9.

⁴⁵ *Supra* note 4.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

The appellants had been charged with a contravention of s36 of the Act.⁴⁹ The prosecution alleged that the appellants could not give a satisfactory account of tyres which “were found in their possession and which were reasonably suspected to have been stolen. The appellants objected to the charge, contending that s36 of the Act was in conflict with”⁵⁰ their rights as afforded by the interim Constitution⁵¹, namely s25 (2) and s25 (3) (c).

“Section 25(2) (c) affords an arrested person the right:

(c) not to be compelled to make a confession or admission which could be used in evidence against him or her...

In respect of trial rights, s25(3) guarantees an accused person:

(3) ...the right to a fair trial, which shall include the right –

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial...”⁵²

The appeal was dismissed by the Constitutional Court.

As can be noted, that, under the “common law, the prosecution can refer to the accused person’s silence once a *prima facie* case has been established.”⁵³ In these circumstances where an accused person refuses to testify in the face of *prima facie* evidence established against him by the prosecution, one may clearly propose that this could be a factor in assessing his guilt. However, the High Court in the case of *S v Brown*⁵⁴ has observed that the new constitutional status could affect the application of this common law position; in that, under our new constitutional dispensation, an infringement of any right as enshrined in the Constitution, must now “be justified in terms of s36 of the Constitution, which is the limitation clause.”⁵⁵

In the case of *S v Brown*⁵⁶ the Court ruled that the use of the accused’s silence as an item of evidence only amounted to indirectly compelling the accused to testify and that where an adverse inference was drawn from silence, this in turn, would only diminish and nullify the right to remain silent.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Constitution of the Republic of South Africa Act 200 of 1993.

⁵² *Osman and Another v Attorney-General, Transvaal* see *supra* note 4.

⁵³ <http://lawexplores.com/a-constitutional-revolution-in-south-african-criminal-procedure/> By PJ Schwikkard at pg 11 para 3 accessed on 10 August 2017.

⁵⁴ *Supra* note 1 at 1.

⁵⁵ *Supra* note 53.

⁵⁶ *Supra* note 1.

It is then clear that if an accused person were to elect to exercise his constitutional right to remain silent it would, in turn, be unconstitutional for a court to draw an adverse inference from such silence. However, the Court went on to clarify that this does not mean that an accused will never face adverse consequences when electing to remain silent.⁵⁷

Like in the previous two cases mentioned above, the Court in *S v Brown*⁵⁸ stated that where there is a *prima facie* case established by the State, and the accused fails to adduce any evidence to rebut it or fails to testify against it, the Court, in these circumstances is then obliged to assess the State's uncontradicted evidence against the accused. In the absence of any evidence to the contrary against which to weigh this evidence there is lesser or no reason at all to doubt its credibility thus facilitating its acceptance. In this situation it is indeed foreseeable that the *prima facie* case of the State will be sufficient in order to sustain a conviction.

2.4 The constitutionality of the common law approach to an accused persons late alibi defence

The constitutionality of the common law approach to a late alibi defence was considered by the Constitutional Court in *Thebus and Another v The State*⁵⁹. The common law position was that, if an alibi defence was raised for the very first time at trial, the court could take into account the fact that the State had no opportunity to investigate it properly, when determining whether such a late alibi defence was or could possibly be true.⁶⁰

Seven out of ten judges who presided over the case in *Thebus* had held that drawing an adverse inference regarding the guilt of the accused, from his pre-trial silence, was constitutionally impermissible. However, out of the majority of these seven judges, four of them pointed out that if the constitutional right to silence was put differently so as to inform arrested persons of the consequences of electing to remain silent, then in these circumstances it might be constitutionally acceptable to draw an adverse inference from the accused's pre-trial silence. It was held by the three remaining judges that although it was not justifiable to draw an adverse inference as to guilt, such an inference could be drawn as to the credibility of

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Supra* note 3.

⁶⁰ *Supra* note 53 at 12.

the accused and this limitation on the right to silence was held to be justified.⁶¹ It is submitted with respect that this is an artificial distinction because if the accused's silence could be used to draw an inference as to his credibility it could most certainly lead to a finding of guilt because findings on credibility in respect of an accused are inextricably intertwined to findings of guilt or innocence in a criminal trial.

It was further held that an accused could be cross-examined on his failure to timeously disclose his alibi. However, this conclusion was expressly rejected by four judges.⁶² A majority of the judges appeared to agree that by electing to remain silent, this did not mean that an accused will never face negative consequences being drawn against him, as in certain circumstances there may very well be acceptable negative consequences which attach to remaining silent.⁶³

It would therefore seem that to a great extent, the common law position remains intact and that the late disclosure of an alibi defence can constitutionally be taken into account when deciding what weight should be attached to it. It is submitted that the exact weight to be attached to the late disclosure of an alibi in these circumstances cannot be predetermined by a composite yardstick. It will vary from case to case depending on the facts and circumstances of each case.

Moreover, there are some questions which still remain to be answered. First, what is to become of incriminating silence which is invoked by a person who was not properly cautioned? And secondly, does the evident difference, which is drawn at common law, between the permissible inference drawn from an accused person's unexpected and late advancement of an alibi and the impermissible inference on the use of silence as evidence of an accused person's guilt ordinarily, survive the constitutional entrenchment of the right?⁶⁴

On the first question, the common law position remains unclear. In *Hall v R*⁶⁵ the Privy Council held that it made no difference as to whether or not a person was cautioned: should an accused person fail or refuse to provide an explanation then only in exceptional circumstances could an inference be drawn against him, because when approached by a person in authority an innocent person may very well be afraid to speak or may be aware of

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ DT Zeffertt, AP Paizes & A St Q Skeen, *The South African Law of Evidence* (2003) pg. 439.

⁶⁵ [1971] 1 All ER 322 (PC), (1971) 55 Cr App R 108.

their rights even if not warned. However, in the case of *R v Patel*⁶⁶ the Appellate Division seemed to have accepted that when a person is informed that he is being arrested on a specific charge and even before such a person receives the usual caution, his conduct under these circumstances “may be relevant”. It was further added that “the greatest caution must be exercised in considering whether such conduct must be regarded as evidence of a guilty mind, for the temperament of men vary and it is difficult to say how an innocent or guilty man ought or would be likely to act in the circumstances or whether he was too much or too little moved for an innocent man.”⁶⁷

2.5 Conclusion

As can be noted from this chapter, the common law silence principle of England has been transmitted to all foreign jurisdictions which were previously under British rule. In one form or another, it is to be found in the procedural law of many countries across the world. In the majority of the common wealth countries, the silence principle is predominantly interpreted in terms of the common law as stated in this chapter.⁶⁸

What will follow in the next chapter is a review of the foreign law perspective on the right to silence. Due to the fact that South Africa follows English law in both criminal and civil procedure, close attention will be paid to England’s new laws limiting the right to silence.

⁶⁶ 1946 AD 903 at 907.

⁶⁷ *Ibid.*

⁶⁸ Theophilopoulos *supra* note 17 at 311.

CHAPTER 3

AN OVERVIEW OF THE ENGLISH LAW PERSPECTIVE ON THE RIGHT TO SILENCE

3.1 An introduction to the new law limiting the right to silence in England

The British parliament, about two decades ago adopted a proposal, of then Prime Minister John Major, which set out to seriously limit the right to silence.⁶⁹ In terms of the new law, both, an accused's refusal to testify during trial and the failure by a suspect to answer police questions during an interrogation, will now be allowed to be considered as evidence of guilt by judges and juries.⁷⁰ Those who are in favour of the new law argue that change is very much needed because the right to remain silent is "a charade which is being ruthlessly exploited by terrorists".⁷¹ Supporters also state that the change would discourage offenders from forestalling the prosecution by simply saying nothing.⁷² Those who were in opposition of the then Prime Minister's proposal stated that the proposal would not assist in the reduction of crime, for even the innocent may have valid reasons for electing to remain silent,⁷³ such as, "the protection of family or friends, a sense of bewilderment, embarrassment or outrage, or a reasoned decision to wait until the allegation against them has been set out in detail and they have had the benefit of considered legal advice."⁷⁴ Those in opposition also stated that the proposal would expand the possibility of erroneous convictions and false confessions⁷⁵ and that by undermining the presumption of innocence it would erode the accusatorial system of justice in England.⁷⁶

⁶⁹ Royal Assent, November. 3, 1994, effective March 1, 1995.

⁷⁰ *Supra* note 26 at S27-31.

⁷¹ H. Mills, 'Tougher Policies Aimed at Helping Victims of Crime', *THE INDEPENDENT* (London) November. 19, 1993, at 6.

⁷² 'Howard's Beginnings', *THE TIMES* (London), October. 7, 1993, at 17 (editorial) cited in G. W. O'Reilly, *England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice*, 85 J. Crim. L. & Criminology 402 (1994-1995) at 403.

⁷³ 'The Right to Silence', *THE ECONOMIST*, January. 29, 1994, at 17 (editorial) cited in G. W. O'Reilly *ibid*.

⁷⁴ The Royal Commission on Criminal Justice, Report, 1993, Cmnd. 2263 at 52.

⁷⁵ *Ibid*.

⁷⁶ Michael Zander, 'Abandoning an Ancient Right to Please the Police', *THE INDEPENDENT* (London), October. 6, 1993, at 25 (editorial) cited in Gregory W. O'Reilly *supra* note 53.

3.2 The new limitation to the silence principle as codified in England

In 1988, the Parliament of Northern Ireland imposed certain restrictions on the right to remain silent. These restrictions had also been adopted by the then Prime Minister of England and were accordingly used in his new law.⁷⁷ It is also said that English politicians and police had made similar proposals regarding limiting the right to silence.⁷⁸ Thus, the Prime Minister's new law now places a limitation on the right to silence by permitting judges and jurors the freedom to draw adverse inferences if and when a suspect elects to remain silent. The new law is made up of four parts, which is set out as follows:

- “(1) judges and jurors may draw adverse inferences when suspects do not tell the police during interrogation a fact relied upon by the defence at trial, under the circumstance, the suspect could have been expected to mention the fact;
- (2) if the accused does not testify, judges and prosecutors may invite the jury to make any inference which to them appears proper – including the ‘common sense’ inference that there is no explanation for the evidence produced against the accused and that the accused is guilty;
- (3) judges and jurors may draw an adverse inference when suspects fail to respond to police questions about any suspicious objects, substances, or marks which are found on their persons or clothing in the place where they were arrested; and
- (4) judges and jurors may draw adverse inferences if suspects do not explain to the police why they were present at a place at or about the time of the offence for which they were arrested.”⁷⁹

3.3 A critical analysis of England's limitation of the right to silence

If the right to silence is limited, suspects will then be forced to confess, thus resulting in an increase of convictions, or so claims the new law in its aim to control crime.⁸⁰ Although

⁷⁷ The Criminal Evidence (N.I.) Order, enacted: November, 14, 1988, effective: December, 5, 1988.

⁷⁸ Criminal Law Revision Commission, Eleventh Report on Evidence (General), Cmnd. 4991, s28-45 (1972).

⁷⁹ The Criminal Justice and Public Order Act, 1994, Part iii, s34-37 (England) cited in G. W. O'Reilly *supra* note 72.

⁸⁰ D. Dixon, 'Politics, Research and Symbolism, in Criminal Justice: The Right to Silence and the Police and Criminal Evidence Act 20.' *ANGLO-AM. REV.* 27 (1991); M. H. Yeo, 'Diminishing the Right to Silence: The Singapore Experience', 1983, *CRIM. L. REV.* 89, 94-95.

Northern Ireland and Singapore had adopted similar proposals with great fanfare there is, however, little or no evidence that it aids in the reduction of crime.⁸¹

One may argue that it is not the low percentage of cases which are lost in courts by the State that results in a failing justice system, but rather, that the failure lies in the high percentage of cases in which the criminals are never caught. So even if the then Prime Minister's new law succeeds in raising the number of confessions and convictions, the question is, what can it really do for the greater number of cases in which a suspect is never caught.⁸² It was indeed concluded by the Royal Commission that the drawing of adverse inferences would not increase confessions or convictions. Even though there is no evidence to support the notion that the drawing of such adverse inferences will aid in controlling crime, England and the United States have, nevertheless, gained supporters in respect of the new-found laws.⁸³

One may argue that if a suspect is forced or induced to speak, this may, in turn, have practical consequences. In other words, due to the pressures of the new law, weak suspects could be prompted to give false confessions and the innocent may be convicted, simply because they were confused or failed to give a logical explanation for the manner in which they might have behaved. On the other hand, one may also argue that if you are genuinely innocent, why elect to remain silent? Why not take the opportunity to explain yourself? Under these circumstances one cannot help but think that it is due to the lack of trust in our criminal justice system that has led to the current situation: the fear of corruption, interrogation and abuse of power! Is this not the reason why the right to silence was established in the first place?

One cannot help but recall the words of Ronald Dworkin, "...the ancient right to silence is about to be extinguished in the nation which invented it"⁸⁴, and then came England's new limits to the right to silence. It cannot be said that England's new laws will result in a failure in its entirety. Elevating the right to silence to constitutional status has not in itself proved to aid in the reduction of crime. Rather, it had an adverse effect, in that, the right to silence (as elevated to constitutional status) is being used by accused persons as a tool to evade the direct consequences of their actions. In light of this view one ought to more willingly sit back and wait in anticipation for a positive outcome, because if the right to silence did not prove

⁸¹ *Ibid.*

⁸² G. W. O'Reilly *supra* note 72 at 404.

⁸³ *Supra* note 73 at 78-80.

⁸⁴ Ronald Dworkin, *A Bill of Rights for Britain* 9 (1990).

successful as a constitutional right then one should not criticize England for limiting it. England's new approach to the silence principle is an attempt to efficiently and carefully control crime and it is indeed one which merits close study.

3.4 An understanding of the accusatorial system

The accusatorial system is a criminal justice system which has been developed in England and the United States of America and one to which South Africa also belongs. This system imposes a burden on the State to prove its case beyond a reasonable doubt through witnesses and extrinsic evidence. Thus the accused is presumed to be innocent until proven guilty. The benefits produced by an accusatorial system are said to be of a wider range, as under this system the abuse of suspects is limited and the individual's privacy, dignity, and free choice are protected. It is also said to render more accurate verdicts.⁸⁵

The system uses contested trials in order to resolve disputes between the State and the accused. Each side is represented and is responsible for presenting witnesses and evidence in respect of the legal issues. Based on the evidence presented by both parties, a neutral decision-maker known as the presiding officer or judge then resolves the case.⁸⁶ The State's burden is twofold: first, as it is up to the State to take the matter forward, the State must put the charge and present the case; secondly, it is up to the State to convince the neutral decision maker that the accused is guilty. In this regard, the State is on a better footing than the suspect as it has at its disposal an investigation team to collect and preserve evidence. It is the State's duty to ensure that the trier of fact is made aware of all relevant evidence. By imposing the burden of proof on the State it is said to also balance the State's superior resources over the accused.⁸⁷ Since the accused is presumed to be innocent and carries no burden, he may remain silent. Should the prosecution fail in carrying out its burden to establish a *prima facie* case against an accused, then such an accused may be acquitted without having to produce evidence.⁸⁸

Thus the accusatorial system coupled together with the right to silence is said to place a limit on the State's power over the individual. Such a limit is consistent with the constitutional structure of the United States of America, in which the government has limited powers,

⁸⁵ G. W. O'Reilly *supra* note 72 at 419.

⁸⁶ *Ibid.*

⁸⁷ Wayne R LaFave & Jerold H. Israel, *Criminal Procedure*, Volume 1 (1984) s1.6, at 37-43.

⁸⁸ Leonard W. Levy, *Origins of the Fifth Amendment: the right against self-incrimination*, 2nd edition, (1968) at 13-24.

which is afforded to them by the sovereign people. Many argue that the right to silence manifests an ingrained distrust of authority.⁸⁹ Since the accusatorial system is in favour of proof by witnesses and extrinsic evidence, rather than relying on proof by confessions and interrogations, it allows for the protection of peoples' dignity by guaranteeing that they are not humiliated or abused by State investigators.⁹⁰

Through relying on extrinsic evidence and the adversarial process, the accusatorial system is said to produce accurate judgments.⁹¹ It is for this reason that the system is favoured and regarded as being effective. The adversary process entails each party putting forward their arguments and evidence in their favour, whilst trying to rebut and discredit the case put forward by the other side. The accusatorial system has to its advantage the reliance on extrinsic evidence such as the testimonies of professional investigators, independent witnesses and expert witnesses.⁹² Expert witnesses are capable of producing scientific evidence such as DNA tests, fingerprint comparisons, blood and fibre analysis and various other forensic techniques.⁹³

The right to silence is said to be the foundation of the accusatorial system. It is argued that, without it, the burden of proof may be shifted to the accused thereby requiring him to present evidence, answer questions and testify during trial. The question that must be asked is, if the right to silence is limited, would this then jeopardize the presumption of innocence?⁹⁴

3.5 Limitations on the right to remain silent

In 1972 a seminal report was published by the Criminal Law Revision Committee (CLRC) which fuelled the debate on the limitation of the right to silence. The report suggested that if an accused person failed to mention a fact during interrogation and later relied on that fact in his defence then in those circumstances an adverse inference should be drawn against the accused. The report also recommended that if a *prima facie* case was established against the accused and he failed to testify at trial then here too, should an adverse inference be permitted to be drawn.⁹⁵ What followed in October 1993 was the decision by the British government to

⁸⁹ *Supra* note 87 at 43-49.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Idem* 40.

⁹⁴ G.W. O' Reilly *supra* note 72 at 423.

⁹⁵ *Supra* note 78.

limit the right to silence. This was announced by Home Secretary Michael Howard, at the Conservative Party Conference and was said to be “part of a package of criminal justice reforms aimed at getting tough on crime”.⁹⁶

In 1976, the recommendations of the CLRC were adopted for the first time by the government of the Republic of Singapore. Singapore limited the right to silence with the expectation that it would persuade suspects to cooperate with the police in resolving crimes, and further, that it would aid in the reduction of cases in which it was believed that criminals got away because they elected to remain silent.⁹⁷

The new rules were embodied in the Criminal Law and Procedure Code (Amendment) Act, No. 10.⁹⁸ Under this Act if a suspect, when questioned, fails to inform the police of a fact which he could have reasonably been expected to mention, then the court may draw, as appears proper, an adverse inference from such failure by the suspect. The accused also faces adverse inferences if he fails to testify. After the prosecution closes its case, the court has a duty to inform the accused that if he refuses to answer any questions without a legitimate reason, then the court in determining his guilt, may draw such inferences as appear proper.⁹⁹

In 1988, the government of Britain placed a limit on the right to silence of suspects who were arrested in Northern Ireland; this was done in response to a number of terrorist attacks.¹⁰⁰ Since the right to silence was seriously obstructing the State’s ability to convict terrorists, the government viewed this move as a necessary one. The change applied to all suspects and in respect of all offences committed in Northern Ireland.¹⁰¹ The said limits formed part of the Criminal Evidence Order.¹⁰² The Order embraced the submissions of the CLRC, and in addition, added two situations, in which an adverse inference could be drawn from an accused’s silence: first, if a suspect failed to explain his possession of a suspicious object, and secondly, if a suspect failed to explain why he was present at the crime scene. As with Singapore, it rested upon the judge to warn an accused that if he fails or refuses to testify, then in such circumstances, an adverse inference may be drawn against him.¹⁰³

⁹⁶ *Supra* note 71 and 72.

⁹⁷ M. H. Yeo *supra* note 80 at 90.

⁹⁸ Criminal Law and Procedure Code (Amendment) Act, No. 10 (effective January. 1, 1977) (1976) (Singapore).

⁹⁹ *Idem* s121 (6).

¹⁰⁰ D. Dixon *supra* note 80 at 31.

¹⁰¹ J.D. Jackson, *Curtailing the Right to Silence: Cessions from Northern Ireland*, 1991 CRIM. L. REV. 404-405.

¹⁰² *Supra* note 77.

¹⁰³ *Supra* note 101.

3.6 Is there an ideal model of the silence principle

It is argued that England's new limits to the right to silence offers a logical and pragmatic body of rules by which to define the right to silence while at the same time not having to disturb the elements of an accusatorial system of justice.¹⁰⁴ According to this new approach, there is indeed, a need for the silence principle in adjectival law, but not like in South Africa, Canada or the United States of America, where the right is elevated to a constitutional right. Rather, it ought to be adopted as an ordinary evidentiary rule, which is capable of being rationally evaluated by the judicial officer.¹⁰⁵

An accused who refuses to testify in court or who refuses to answer police questions in an interview which is properly constituted, must do so, having been warned, that the use of silence as his defence may result in a reasonable adverse inference being drawn against him. The strength of the State's case will define what a "reasonable" inference is and will usually amount to circumstantial evidence against the accused. However, in certain situations it is possible that a reasonable adverse inference of "guilt" may be directly drawn from the accused's silence. Generally, there can be no logical adverse inference to be drawn from an accused's silence if the State makes no *prima facie* case which ought to be answered. If, however, the evidence against the accused calls for an explanation and the accused gives no such explanation, then in these circumstances, a reasonable adverse inference as to "guilt" may be drawn.¹⁰⁶

Such an approach is said to inspire confidence in the system of Criminal Justice because it allows for the accused to be convicted in accordance with all evidence that is relevant. The English Criminal Justice and Public Order Act of 1994 is said to model the ideal silence principle. Proponents state that it is a statutory compromise which is excellently crafted, and one which affords an accused person, a limited, but at the same time, well-defined, procedural exemption, without having to unnecessarily hinder effective law enforcement.¹⁰⁷ When an accused uses his right to silence as a defence mechanism, it affords him certain pre-trial and trial advantages, but at the same time, it also entails certain disadvantages. When used as a defence mechanism, the accused, together with his legal advisor, must strategically

¹⁰⁴ *Supra* note 17 at 445.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Supra* note 17 at 445-446.

¹⁰⁷ *Ibid.*

balance its use against any known adverse inferences which may possibly be drawn by the prosecution.¹⁰⁸

It is argued that the trend towards constitutionally entrenching the right to remain silent is a notion that is misguided. The use of the term “right” to silence is inaccurate. A right should contain the pre-eminent component of ethics and logic, in other words, it ought to be made up of morality and rationality.¹⁰⁹ However, as can be noted from the course of this study, the silence principle does not contain either of these stringent norms. The real outcome of advancing the silence principle into a constitutional right, free from rational meaning, serves only to hinder the well organised operation of fairness and to undermine the criminal justice system. An ideal model of the silence principle should allow for logical inferences to be drawn from an accused’s silence and these inferences should be determined by the particular circumstances of each case. From the evidentiary material placed before him, a judge, should be afforded the freedom to draw any reasonable inference he sees fit.¹¹⁰

3.7 Conclusion

In essence, the silence principle does indeed have a place in our criminal justice system, but not one that should be elevated to constitutional entrenchment; rather, it should be treated as an evidentiary rule capable of being weighed against the interests of justice. After all, evidence is said to be the basis of justice, and if it is excluded, then justice itself is excluded.¹¹¹

The discussion in the next chapter will be focused on the South African law position on the right to silence and in particular, exactly how the right to silence is interpreted and applied by the courts in South Africa. Close attention will be paid to some landmark cases within South Africa.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Idem* 448.

¹¹⁰ *Ibid.*

¹¹¹ *Idem* 448-449.

CHAPTER 4

THE SOUTH AFRICAN LAW POSITION ON THE RIGHT TO SILENCE

4.1 Introduction

While it is imperative to have an understanding of how the right to remain silent is put into practice in South Africa, it is also imperative to know its origins in terms of South African case law. Hence, in this chapter, the study will entail an analysis of some landmark cases within South Africa starting with the right to legal representation leading up to the right to remain silent.

4.2 The right to legal representation

The right to legal representation, as we know it, was traditionally based on the fundamental notion of the right to a fair trial. As a common law principle, it required an accused person to be legally represented when appearing before court. If a trial was conducted without this basic requirement being complied with, then such a trial could be declared to be unfair.¹¹²

In order to strengthen this common law position regarding legal representation s73(2) of the Criminal Procedure Act¹¹³ was enacted. Section 73(2) provides that “an accused shall be entitled to be represented by his legal advisor at criminal proceedings if such legal advisor is not in terms of any law prohibited from appearing at the proceedings in question.”¹¹⁴ However, although accused persons were entitled to appoint legal representatives, they were not of right entitled to demand that legal representation be accorded to them in instances where they could not afford legal representation. Despite the fact that at this time the Legal Aid Board was in existence and whose duty it was to provide legal representation to poor and needy persons¹¹⁵, the position was never interpreted as morally or legally binding. Through an institution known as *pro deo* counsel the Act provided legal services to accused persons

¹¹² *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 172.

¹¹³ The Criminal Procedure Act 51 of 1977 s 73 (2).

¹¹⁴ *Ibid.*

¹¹⁵ The Legal-Aid Board was established in terms of the Legal-Aid Act 22 of 1969.

who appeared in the higher courts, thus leaving a large majority of accused persons unrepresented in the lower courts.¹¹⁶

This position was soon to change with the landmark judgment by Didcott J delivered in the case of *S v Khanyile*¹¹⁷. The question in this case was whether the State had a moral and legal duty to provide, at State expense, legal representation to poor and needy accused persons who wished to have legal representation but were in no position to afford it, especially in circumstances where such accused faced the possibility of direct imprisonment or fines which would have had a crippling effect on them. The court in *Khanyile* concluded that the presiding officer dealing with such a case must consider certain factors such as whether the case before him is an easy or complicated one, the personal character of the accused (for example, the accused's intelligence, maturity et cetera) and the seriousness of the offence. Should it be found that the accused might suffer difficulties arising from a lack of legal representation then the presiding officer should refer the case to those who are dealing with legal-aid and should further decline to proceed with the trial until legal representation for such an accused was obtained with care and effort through some other agencies.¹¹⁸

The *Khanyile* judgment and other cases that followed, paved the way for the State's obligation to provide unrepresented accused persons with legal representation, and at State expense, if in the circumstances substantial injustice would otherwise result. Thus, it is important to understand that the *Khanyile* judgment is considered to be a landmark judgment because it highlighted the importance of the right to a fair trial and in so doing, it allowed for indigent persons to now be legally represented at State expense, if they meet the requirements of the means test. The means test is a test which is implemented by Legal-Aid South Africa to enquire into the financial background of indigent persons before affording them legal aid.¹¹⁹

Now that one understands the importance of the right to a fair trial within the South African context, it is also imperative to understand the right to remain silent and exactly how it is interpreted and applied by our courts; and in so doing the case of *S v Singo*¹²⁰ will now be discussed.

¹¹⁶ The Legal-Aid Act 22 of 1969.

¹¹⁷ 1988 (3) SA 795 (N).

¹¹⁸ *Idem* 815 D-E.

¹¹⁹ Legal-Aid South Africa Act 39 of 2014 (as amended).

¹²⁰ 2002 (4) SA 858 (CC).

4.3 *S v Singo*

This case deals with the failure by an accused person to appear before court as warned to do so. Such failure on behalf of the accused brings into force an enquiry in terms of s72 (4) of the Criminal Procedure Act 51 of 1977 (CPA). By its very nature s72 (4) is a summary procedure and does not conform to the customary adversarial trial procedure¹²¹ which is the judicial system by which all South African courts are governed. In essence it is a departure from the usual course of events, the reason for which one will understand in due course.

Section 72 (4) has a “reverse onus” in that, it imposes the burden of proof on the accused and this is an aspect which is said to be inseparable from the summary procedure and it further compels an accused to break his silence.¹²²

By failing to appear in court when warned to do so, an accused person is alleged to have knowingly committed an offence for which he may be arrested and brought before court. The summary procedure which must then take place requires the presiding officer to determine whether the failure by the accused to appear in court was due to any fault on his part. In this context the State has no burden to prove fault on behalf of the accused. Conversely, the accused must satisfy the Court that he was not at fault. Should the accused fail to do so then a conviction will follow and he may be sentenced to pay a fine not exceeding R300 or to serve a term of imprisonment not exceeding three months, as the case may be.¹²³ This was the law as prescribed by s72 (4) of the CPA.¹²⁴

The facts of *Singo* are as follows:

Mr Singo was charged with common assault and malicious injury to property on 1 November 1996. He was warned by a magistrate in Dzanani that he should appear in court on 17 January 1997. However, he failed to comply with such warning, which set in motion s72 (4), and which accordingly resulted in him being arrested and brought before court on 04 July 1999. He was then dealt with in terms of s72 (4) and the explanation he had put forward was that he had resolved the underlying dispute between the complainant and himself. He further explained that they had agreed to appear in court on the said date in order to withdraw the charges, but according to a misunderstanding by himself, he failed to appear and instead,

¹²¹ *Idem* 858.

¹²² *Ibid.*

¹²³ *Idem* 863- 864.

¹²⁴ *Ibid.*

went to work on that day and was sent to Namibia thereafter. The presiding magistrate rejected this explanation and convicted and sentenced him to three months imprisonment without an option of a fine.¹²⁵

Singo then successfully appealed to the Venda High Court which upheld his appeal and set aside his conviction and sentence. He had been legally represented on this occasion. The court had advanced three grounds for its decision, and these were as follows:

“First, s72 (4) contains an impermissible reverse onus, which violates the right to be presumed innocent, while the summary procedure envisaged in the section is inconsistent with the right to a fair trial guaranteed in s35 (3) of the Constitution; second, the magistrate had failed to advise the accused of his procedural rights with a resultant failure of justice, and third, the degree of culpability of the accused warranted nothing more than a caution and discharge.”¹²⁶

In this instance one may argue that a caution and discharge under these circumstances and for the particular reasons advanced by the accused for his failure to appear at court, will call for all future accused persons to undermine the administration of justice. It is further argued that one cannot take such serious matters lightly, and that such accused persons ought to be deterred from undermining the administration of justice and the criminal justice system as a whole.

The Constitutional Court was presented with three questions, and they are:

- “(a) whether the summary procedure envisaged in s72 (4) limits the right to a fair trial, more particularly, whether the phrase ‘unless such accused or such person satisfies the court that his failure was not due to fault on his part’ limits the right to be presumed innocent and the right to remain silent;
- (b) if the right to a fair trial is limited, whether such limitation is justifiable under s36 (1) of the Constitution; and
- (c) if any of the limitations imposed by s72 (4) are not justified, what the appropriate relief is.”¹²⁷

With due regard to s72 (4), it is imperative for the warning to be recorded in full. When implementing s72 (4), a presiding officer is obliged to comply with s35 (3) of the Constitution, in that, he must ensure that the procedure is just and fair. If an accused person is unrepresented, it is the duty of the presiding officer to explain to him, the nature, effects and

¹²⁵ *Idem* 865.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

the requirements of the proceedings. Such explanation should include informing the accused that:

- He was duly warned (as per the record) and that there was a failure on the part of the accused to comply with the warning;
- Non-compliance with the warning is an offence for which the law imposes a fine or imprisonment not exceeding R300 or 3 months;
- Unless the pre-conditions are convincingly challenged, they will be regarded as having been established;
- If so, the court will there and then be entitled to investigate the matter.¹²⁸

On the constitutionality of the summary procedure, the High Court held that it is in conflict with s35 (3) of the Constitution, in so far, that it is 'inquisitorial, unfair and inherently punitive.'¹²⁹

The Venda High Court then made an order of constitutional invalidity as regards the summary procedure which then resulted in the matter being brought before the Constitutional Court.

Chief Justice Ngcobo of the Constitutional Court held the following:

"A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to establish his or her innocence. That fundamental principle of our law is now firmly entrenched in s35 (3) (h) of the Constitution which provides that an accused person has the right to be presumed innocent. What makes a provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt."¹³⁰

As can be noted from all of the above, there were two features that raised constitutional concerns, these being: first, s72 (4) requires the accused to disprove an element of the offence that he is faced with, namely, "fault". Secondly, despite the existence of a reasonable doubt, the accused is nevertheless liable to be convicted. These are clear limitations of the presumption of innocence. Thus, in order for the accused to avoid a conviction, he is compelled to adduce evidence and thereby forced to break his silence.¹³¹

¹²⁸ *Idem* 867.

¹²⁹ *Idem* 868.

¹³⁰ *Idem* 871.

¹³¹ *Idem* 872.

It was argued by counsel for the State that, a limitation on the rights as guaranteed in s35 (3) of the Constitution is a limitation that is justifiable in terms of the limitation clause, as provided in s36 (1) of the Constitution. It was further submitted by the State that s72 (4) pursued an important social goal aimed at preventing conduct that was said to hinder or threaten to hinder the proper administration of justice.¹³²

One may argue, and correctly so, that the contentions put forward on behalf of the State are indeed contentions that are pragmatic in nature. The following statement by Ngcobo CJ from the case will make clear the aforementioned point of view-:

“The importance of effectively prosecuting conduct that hinders the administration of justice cannot be gainsaid. Failure to appear in court manifestly hinders the administration of justice. It has the potential to undermine it too. This may well result in the public losing confidence in the system of criminal justice. The ensuing consequences may be far-reaching. The State’s efforts to fight crime would be undermined and the public may well take the law into their hands. It is therefore essential that the courts be equipped with the power to deal effectively with any conduct that threatens the smooth running of the administration of justice. In this respect the impugned provision pursues a pressing social norm.”¹³³

To this extent the Constitutional Court held that it is indeed important to deal effectively with conduct that is said to hamper the administration of justice, and that the invasion into the right to remain silent in the present case is justifiable. The Constitutional Court went on to state that the same cannot be accepted with regard to the ‘legal burden’, which, despite the existence of a reasonable doubt, requires that the accused be convicted.¹³⁴

In the ordinary course of events, the State is required to establish that the accused is guilty beyond a reasonable doubt. But s72 (4), on the other hand, demands the complete opposite, in that, the accused is presumed to be guilty and is required to establish his innocence on a balance of probabilities. This inevitably carries a risk of an innocent person being convicted. It was further held by the Constitutional Court that, it does not matter if such an occurrence was rare, for once there is an establishment of the existence of such a risk, then indeed, “a fundamental principle of our criminal justice system has been offended.”¹³⁵

Furthermore, it was held that the State can achieve its objective through alternative means, such as, by merely imposing an evidentiary burden, which, whilst requiring an accused to

¹³² *Idem* 873.

¹³³ *Ibid.*

¹³⁴ *Idem* 874.

¹³⁵ *Ibid.*

prove facts within his knowledge, will also be faithful to the presumption of innocence. This would equally furnish the reason by the accused for his failure to appear in court.¹³⁶

The ultimate decision of the Constitutional Court is summed up in the following statement:

“having regard to the importance of the right to be presumed innocent in our criminal justice system and the fact that the State could have achieved its objective by using less intrusive means, the imposition of the legal burden upon an accused has a disproportional impact on the right in question. In these circumstances the risk of convicting an innocent person is too high. It outweighs the other considerations in favour of the limitation. There are no compelling societal reasons in this particular case that will justify imposing this legal burden on the accused. I conclude therefore that the limitation is not justified.”¹³⁷

In arriving at an appropriate remedy, Ngcobo CJ found it fit to read in words which were necessary to establish an evidentiary burden. This was the less invasive route, rather than simply striking down s72 (4). Part 3 of the order made by Ngcobo CJ reads as follows: “Section 72 (4) of the Criminal Procedure Act 51 of 1977, is to be read as though the words ‘there is a reasonable possibility that’ appear therein between the words ‘that’ and ‘his failure’.”¹³⁸

4.4 Conclusion

It can be seen from the above analysis of this judgment that South African law attaches much importance and significance to the right to remain silent as is evident from its entrenchment in the constitution. However, one may argue, is it not a right which has been taken too far? Does strictly enforcing it as a constitutional right and thus elevating it to constitutional status not create a hindrance to the administration of justice? Is the State not correct in its argument put forward?

It is argued that, because of the “status” that has been afforded to the right to remain silent, a blind eye is turned towards these truthful considerations posed on behalf of the State. Should such considerations be meaningfully taken into account in a pragmatic manner, then maybe the outcome will be different.

¹³⁶ *Idem* 874-875.

¹³⁷ *Ibid.*

¹³⁸ *Idem* 876.

As the court arrived at the conclusion that a mere “evidentiary burden” should be imposed on the accused and this will suffice in the State achieving its objective, by the same token, should the right to remain silent not be retained as an “evidentiary rule”? Will this not strike a balance of fairness between the complainant, the accused and the administration of justice as a whole?

It is respectfully submitted that, it will indeed, for when the outcry of society reaches its peak, alternative means will have to be sought, in search for an “appropriate” remedy.

In the following and final chapter to this study, an overall summary of the right to silence will be conducted. Furthermore, a conclusion will be drawn from a comparative analysis between the English law approach to the right to silence *versus* the South African law approach.

CHAPTER 5

AN OVERALL SUMMARY OF THE RIGHT TO SILENCE

5.1 Introduction

In approximately 108 nations around the world, warnings of the right to remain silent are given when a suspect is arrested.¹³⁹ The English Judges Rules as developed in the early twentieth century was traditionally followed by commonwealth countries, and some continue to do so to date.¹⁴⁰ On the other hand, many Member States of the European Union (EU) have adopted the directive of the EU on the issue.¹⁴¹ The main points of variance among these countries mainly concern the timing of the said warning and whether the suspect “is told that the fact of remaining silent will or will not be used in legal proceedings.”¹⁴²

5.2 The common law right to silence as defined internationally

The international character of the common law right to silence is defined by a number of general principles. In the trial process of most countries throughout the world, the accused is faced with three basic choices, namely:¹⁴³

- (a) By claiming the right to silence the accused may refuse to answer any questions;
- (b) The accused may make an election to give sworn evidence. In this instance the right to silence will fall away and the accused will be subjected to cross-examination. In the cross-examination, incriminating questions may be put to the accused;
- (c) A third choice which is said to indirectly preserve the right to silence is the prerogative to give an unsworn statement. In this instance the accused is not exposed to cross-examination, but, however, this choice has now statutorily been repealed by most countries.¹⁴⁴

¹³⁹ <http://www.loc.gov/law/hepl/miranda-warning-equivalents-abroad/index.php> accessed on 23 December 2017.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ McNicol *Evidence* Butterworths (1998).

¹⁴⁴ Statutorily repealed in South Africa by s 196 (3) of the Criminal Procedure Act 51 of 1977 and in England by s 2 of the Criminal Justice Act of 1982.

Accordingly, a court will be faced with a number of evidentiary alternatives where an accused elects to exercise his right to silence. These alternatives are as follows:

- “(a) Silence may be used as evidence in its own right.
- (b) Silence may be used as part of the total evidentiary material.
- (c) Silence may be used in a limited manner to evaluate other types of evidentiary material.”¹⁴⁵

When an accused invokes his right to silence, there are four kinds of inferences that may be drawn (these are usually adverse but may sometimes be positive) and they are said to be based on logic and common sense. These may have been mentioned during the course of this dissertation, but bear repeating:¹⁴⁶

- (a) If an accused fails to deny an accusation that is put to him, then this may be considered to be an acceptance of the terms of such accusation. In this instance, silence is used to infer an implied consent, however, it must be the only reasonable inference given the circumstances of the matter. Such reasonableness must reflect the accused's acceptance of the said accusation; making it his own either wholly or partially. When subjected to the administration of a caution, such adverse inference can never be drawn. However, when subjected to the even term principle it may only be drawn in circumstances where both parties are on an equal footing.
- (b) As a form of evidence, silence may be used to infer knowledge of guilt or a general consciousness. However, this is a possibility that is rejected by all countries.
- (c) Silence may be used in evaluating other evidence. In determining whether or not to reject or accept certain evidence, or whether or not to draw inferences arising from such evidence, silence is indeed taken into account. When an accused remains silent, this in effect, strengthens or adds weight to evidence by the prosecution or any such inferences arising from the evidence by the prosecution.
- (d) Subsequent to the abovementioned point, silence alone cannot change the course of an unsuccessful State case to that of a successful one. Before attaching any probative value to such silence the State must have established a *prima facie* case against the accused by means of some other alternative evidence. In other words, under these

¹⁴⁵ Theophilopoulos *supra* note 17 at 313.

¹⁴⁶ *Ibid.*

circumstances an inference from silence may only be drawn once the State has made out a *prima facie* case against the accused thereby casting upon the accused an evidentiary burden calling for an explanation, and should the accused through his silence fail to provide such explanation then an adverse inference will surely follow.

5.3 A brief comparative analysis between the English law approach to the right to silence, versus the South African law approach

In today's day and age, attempting to obtain a trial conviction in a system in which the accused is shielded by an intricate right to silence is indeed difficult. In order to secure a significant number of convictions, State prosecutors are virtually forced to depend on extra-curial devices. In recognition of this problem the South African legal system introduced a formal plea-bargaining process as envisaged in s105A of the Criminal Procedure Act.¹⁴⁷ The plea-bargaining system was endorsed by Parliament's Justice Committee and is said to closely resemble the American system. However, a problem with this system is that it creates an entirely new opportunity for bribery and corruption especially in a system where State prosecutors are badly paid.¹⁴⁸ This solution is further criticised for addressing the symptoms without curing the actual disease.

It is argued that, it makes a lot more sense to reform the existing trial procedures instead of adding another extra-curial executive layer to a criminal process that is already overburdened. By fast tracking an accused person's procedural rights at trial (that is, by limiting his right to silence), a conviction at trial can indeed be secured and be made as cost-effective as that of a plea-bargaining conviction. The deception implemented by the accusatorial system ought to be compared to the truthfulness of the inquisitorial system which is open about the interrogation of accused persons and the inducement of confessions. The cost-effective confession is something that both these systems rely heavily on. Having proper safeguards in place, what the inquisitorial system does openly, is exactly what the accusatorial system does but, covertly via backdoors and in the complete absence of proper procedural safeguards in place.¹⁴⁹ Thus one may argue, what is the purpose of having a theoretical right to silence when its actual role is diminished in practice? This is the problem that South Africa faces. Having followed first world procedural standards in theory, the criminal justice system in

¹⁴⁷ Section 105A of the Criminal Procedure Act 51 of 1977.

¹⁴⁸ Theophilopoulos *supra* note 17 at 442.

¹⁴⁹ *Idem* 442-443.

South Africa is distorted and further frustrated by its Third World pragmatic lack of resources.¹⁵⁰

It is argued that in order for South Africa to cope with the continuous disintegration of its criminal justice system, South African courts ought to be prepared to embrace a less combative adversarial trial process in which technical and so called pseudo safeguards, as well as the right to silence, ought to be reformed.¹⁵¹

The empiric incongruity of the silence principle is illustrated in the trial system of South Africa. It is argued that the silence principle is unnecessary in a criminal trial that is non-jury in nature. It is further argued that there was no need for South Africa to constitutionally entrench the right to remain silent, for an accused person needs no protection against a professional and impartial judge or magistrate. By constitutionally entrenching the right to remain silent, a judge or magistrate is now restricted when evaluating the probative value of evidence and may not draw adverse inferences from an accused person's silence even if he wanted to, given the circumstances of the matter before him. In this regard, having elevated the right to remain silent to a constitutional right was indeed an unnecessary and immoderate protection. One may argue that it is just another example of the sentimentalism of the philosophy of free will which is no longer in contact with practical reality. It is indeed an obstacle within the justice system of South Africa that is already staggering on the verge of collapse.¹⁵²

In the United States of America and South Africa, a due process model is followed with regard to the silence principle. This means that the balance of interest test weighs in favour of the individual and affords the individual procedural protection against meddlesome State violations. By contrast, the modern statutory versions of the silence principle by which England is now governed, is as a result of a philosophy aimed at 'controlling crime'. In terms of the crime control model, the balance of interest test is said to weigh heavily in favour of cost-effectively and efficiently combating crime. The due process model is founded on a human rights ideology which highlights human value over the efficiency of management. Its interests lie in increasing procedural protections for the individual whilst sacrificing a degree

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

of efficiency. On the other hand, the crime control model is practical in nature and requires that the right to silence be limited in the interest of increasing management efficiency.¹⁵³

The English Police and Criminal Evidence Act of 1984 and the English Criminal Justice and Public Order Act of 1994 are viewed as positive and realistic statutes which limit the accused's right to remain silent. Having opted for the due process model, the United States of America and South Africa have chosen to elevate the right to silence into a constitutional right thereby placing procedural limitations on the State's powers, both investigatory and trial powers. With regard to South Africa in particular, the right to silence is regarded as a relative right and is subject to a balancing test in terms of s36 of the Constitution, which is known as the limitation clause. The test is complex in nature. In the Anglo-American world the South African limitation clause is known as one of the most sophisticated for its balance of interest test. But unfortunately, by its nature, the silence principle cannot be easily tried in respect of the balance of interest test. Distinct from other constitutional rights, the right to remain silent cannot be partially upheld, nor can it be granted for some offences and denied in respect of others. "It is essentially an 'all' or 'nothing' kind of right."¹⁵⁴ And as a result thereof it becomes difficult for our courts to apply the reasonable balance of interest test.¹⁵⁵

5.4 Is the English law approach to the right to silence a commendable one and should the right to silence in South Africa also be limited

It is needless to say that the right to remain silent in South Africa is indeed inconsistent with the right to a fair trial. How can it be fair, when an accused person who faces a charge and has all the material facts before him, but nevertheless elects to remain silent instead of tendering an explanation for his actions or inactions. And even after such an accused person is afforded legal representation, he may still elect to remain silent through his legal representative. How can this then, be fair to the complainant and to the criminal justice system as a whole? Making a statement through one's legal representative, after having been fully advised on the facts and circumstances of the matter does not necessarily mean that you are assisting the State in attaining a conviction against you, but rather, if viewed with an open and realistic mind, you are in essence, making the entire process less tiresome and tedious which also aids in the effective and efficient administration of justice. It is respectfully

¹⁵³ *Idem* 444.

¹⁵⁴ *Idem* 444-445.

¹⁵⁵ *Ibid.*

submitted that tendering a statement in your favour can never work against you unless it is one that is false!

In the ordinary and natural course of events, remaining silent when one ought to speak is an indication of guilt. However, since the advent of the constitution and the constitutional entrenchment of the right to remain silent, this ordinary and natural course of events has now been turned into something which is somewhat 'un-natural'. What is meant by 'un-natural' would have been gathered during the course of this dissertation.

In the fear of abuse of State powers the accused has now been afforded an absolute power, that is, 'the right to remain silent'. Presiding officers are now burdened with the tiresome and tedious task of reaching the bottom of a matter by working around the 'silent accused'. It is no longer the accused who is at the mercy of our criminal justice system, but rather, it is our criminal justice system who is at the mercy of the 'silent accused'... how can this then, be in the interest of justice?

5.5 Conclusion

One may argue that, all in all, the silence principle may suffice as a procedural evidentiary rule, or if constitutional entrenchment is demanded then, another alternative is to have it defined as a relative right, but one which is 'open' to a balance of interest test which must be applied 'properly'. Defining the right to silence in absolute terms has proved to be problematic, not just in South Africa, but across the world, and as some may argue, it offsets the scales of justice thereby resulting in a trial that is unfair. One cannot help but applaud the English approach for its meaningful interpretation of the right to silence, having taken into account the logical flaws that accompany it. Having struck a balance between the need to protect the individual and the need to combat crime, it seems as if the English approach has reached a successful compromise.¹⁵⁶

While in South Africa, the interpretation of the right to silence seems to be a workable compromise, one may argue that South Africa ought to deal with it more pragmatically, much like the English approach, which efficiently and carefully controls the use of silence with the aim to combat crime.

¹⁵⁶ *Idem* vi.

In today's day and age, one must consider that there are constant changes in the world. Values, society, technology and the economy... these are constantly changing and evolving over time, and along with them, so too should the law evolve in order to meet the prevailing needs of society.

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29 June 2017

Ms Chantal Bodha Khedun (211558894)

School of Law

Howard College Campus

Dear Ms Bodha Khedun,

Protocol reference number: HSS/0935/017M

Project title: The right to remain silent: An unfair advantage?

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....
Dr Shamila Naidoo (Deputy Chair)

/ms

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