

# The Legal Status of Evidence obtained through Human Rights Violations in Uganda

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## Abstract

The *Constitution of the Republic of Uganda*, 1995 is silent on the issue of dealing with evidence obtained through human rights violations. This silence dates to the earlier *Constitutions* of 1962, 1966 and 1967. It is only the *Prohibition and Prevention of Torture Act* of 2012 that renders evidence obtained through torture and cruel, inhuman and degrading treatment inadmissible. This means that evidence obtained through human rights violations other than torture and cruel, inhuman and degrading treatment is not covered by any other legislation in Uganda. The position is different in other jurisdictions such as South Africa, Kenya and Zimbabwe, which have constitutional provisions on how to deal with evidence obtained through human rights violations. The decisions that have been handed down by the Ugandan courts reflect various jurisprudential inconsistencies in dealing with this kind of evidence. This study delves into this lacuna and suggests proposals for reform.

## Keywords

Admissibility; evidence; human rights violations; Uganda.

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## 1 Introduction

Uganda is a party to various international and regional instruments, which include the *African Charter*,<sup>1</sup> the *Convention against Torture*<sup>2</sup> and the *International Covenant on Civil and Political Rights*,<sup>3</sup> which require it to deal appropriately with evidence obtained through human rights violations. There is, however, no domestic regulation of evidence obtained through human rights violations in Uganda. The *Constitution of the Republic of Uganda*, 1995 is silent on the topic. This silence is also evident in the *Constitutions* of 1962, 1966 and 1967. In addition, the decisions handed down by the courts do not offer a consistent development of jurisprudence on the admission of evidence obtained through human rights violations. The situation regarding evidence obtained through human rights violations would be different if there were guidance from consistent case law, or a constitutional directive.

When courts are faced with the question of the admission of evidence obtained through human rights violations, they may use the reliability principle, because improperly obtained evidence may be as reliable as lawfully obtained evidence and may have a bearing on the innocence or guilt of an accused.<sup>4</sup> The courts may use the deterrent principle for the purpose of punishing a person who obtained the evidence improperly.<sup>5</sup> Alternatively, the courts may also follow the protective principle, whereby an accused does not suffer a disadvantage because of evidence obtained through human rights violations by investigators.<sup>6</sup>

This article discusses the silence of the *Constitution* in comparison with the earlier Ugandan constitutions by looking at its drafting history and the wording of previous *Constitutions* in Uganda, and evaluating various criminal procedure laws. The purpose of doing so is to establish if there are any statutory provisions that deal with evidence obtained through human rights violations. Thereafter the article evaluates decisions handed down by

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<sup>1</sup> *African Charter on Human and Peoples' Rights* (1981), ratified 27 March 1986.

<sup>2</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984), acceded 3 November 1986.

<sup>3</sup> *International Covenant on Civil and Political Rights* (1966), acceded 21 June 1995.

<sup>4</sup> John and Sarah *Internationalisation of Criminal Evidence* 154.

<sup>5</sup> John and Sarah *Internationalisation of Criminal Evidence* 154-155.

<sup>6</sup> John and Sarah *Internationalisation of Criminal Evidence* 155.

the courts from 1995 to 2014, to establish whether there is a developed jurisprudence, the extent to which the jurisprudence is consistent, and whether there is justification for a constitutional amendment. The article provides a comparative study of South African law, because it has a constitutional provision on how to deal with evidence obtained through human rights violations. This is coupled with a discussion of the most recent trends in case law, to justify the need for reform. A conclusion and recommendations follow.

The *Constitution* is silent on the issue of dealing with evidence obtained through human rights violations. It provides that:

- (1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.
- (2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.<sup>7</sup>

This Article guarantees rights for all individuals in Uganda by virtue of their nature as human beings. In addition, any person who claims that a fundamental or other right or freedom has been infringed or threatened may apply to a competent court for redress.<sup>8</sup> While these provisions guarantee rights and offer enforcement, they do not provide a directive on how to deal with evidence obtained through human rights violations. It would be desirable that constitutional rights which are violated in the course of gathering evidence should be subjected to a directive on how to deal with evidence so gathered. Some of these rights include the right to a fair trial,<sup>9</sup> the presumption of innocence until proven guilty,<sup>10</sup> and the right to be charged in accordance with the law.<sup>11</sup> Other rights are the rights to privacy,<sup>12</sup> personal liberty,<sup>13</sup> and against self-incrimination.<sup>14</sup> Some of the pre-trial guarantees for an accused person include a presumption of innocence until he or she is proved or pleads guilty;<sup>15</sup> the right to be informed immediately in a language that the person understands of the nature of the offence;<sup>16</sup> and the provision of adequate time and facilities to prepare his or her

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<sup>7</sup> Article 20 of the *Constitution of the Republic of Uganda, 1995 (the Constitution)*.

<sup>8</sup> Article 20 of the *Constitution*.

<sup>9</sup> Article 28 of the *Constitution*

<sup>10</sup> Article 28(3)(a) of the *Constitution*

<sup>11</sup> Article 28(7) of the *Constitution*

<sup>12</sup> Article 27 of the *Constitution*

<sup>13</sup> Article 23 of the *Constitution*

<sup>14</sup> Article 28(11) of the *Constitution*

<sup>15</sup> Article 28(3)(a) of the *Constitution*

<sup>16</sup> Article 28(3)(b) of the *Constitution*

defence.<sup>17</sup> These pre-trial guarantees do not, however, provide for a remedy where evidence has been obtained through human rights violations. The relief provided by the *Constitution* relates to an application for redress for the infringement of a human right and not evidence obtained through human rights violations.<sup>18</sup> Other jurisdictions such as South Africa,<sup>19</sup> Canada,<sup>20</sup> Zimbabwe<sup>21</sup> and Kenya<sup>22</sup> have constitutional provisions on how to deal with this evidence. Hong Kong lacks a constitutional provision but it has developed consistent case law which deals with evidence obtained through human rights violations.<sup>23</sup> It may be concluded from these instances that there is need for a developed, consistent jurisprudence with regard to evidence obtained through human rights violations. The consistency may be by way of statutory provision or case law. This study sets out to establish if there is any statutory provision in Uganda dealing with evidence obtained through human rights violations. Thereafter, an analysis of case law from the Supreme Court is done. An evaluation of the South African approach is done to show why it is inevitable to have a developed jurisprudence. Thereafter the author draws from the existing jurisprudence to justify the need for reform.

## 2 Drafting history of the Constitutions of Uganda

Uganda has had a turbulent constitutional history, with four *Constitutions* since independence.<sup>24</sup> A look at the drafting history of the four *Constitutions* gives an insight into the silence of the *Constitution* on how to deal with evidence obtained through human rights violations. The *Constitution*, 1962 referred to as the Independence Constitution, was drafted in London by the British, as the colonial masters.<sup>25</sup> An examination of the broader context within which it was drafted reveals that it was more of a political *Constitution* geared at creating a balance of interests between political factions in

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<sup>17</sup> Article 28(3)(c) of the *Constitution*

<sup>18</sup> Article 50(1) of the *Constitution* provides that "Any person who claims that a fundamental or other right or freedom guaranteed under this *Constitution* has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation".

<sup>19</sup> Section 35(5) of *Constitution of the Republic of South Africa*, 1996.

<sup>20</sup> Section 24(2) of the *Canadian Charter of Human Rights and Fundamental Freedoms*, 1982.

<sup>21</sup> Section 70(3) of the *Constitution of the Republic of Zimbabwe*, 2013.

<sup>22</sup> Article 50(4) of the *Constitution of the Republic of Kenya*, 2010.

<sup>23</sup> *HKSAR v Muhammad Riaz Khan* 2012 HKFCA 38 (*Khan*). See Mujuzi 2012 *IJEP* 425-430.

<sup>24</sup> *Constitutions of the Republic of Uganda*, 1962, 1966, 1967 and 1995. See Wapakhabulo "Managing the Constitution" 114-131.

<sup>25</sup> Wapakhabulo "Managing the Constitution" 24 114.

Uganda.<sup>26</sup> While it had a Bill of Rights, it did not have a provision relating to the status of evidence obtained through human rights violations.<sup>27</sup> The suspension of the *Constitution*, 1962 was as a result of the constitutional crisis of 1966, which led to the "pigeon-hole"<sup>28</sup> *Constitution* of 1966 and the subsequent *Constitution* of 1967 (*Constitution*, 1967).<sup>29</sup> The *Constitution*, 1967, just like the earlier two versions, had a Bill of Rights, but did not have a provision relating to evidence obtained through human rights violations.<sup>30</sup> This was partly because the broader context in which the *Constitution* was drafted required that it meet particular political ends. A discussion of this issue would be beyond the scope of this article.<sup>31</sup>

The final *Constitution* of 1995 was largely based on the recommendations of the *Report of the Uganda Constitutional Commission (Odoki Commission Report)*.<sup>32</sup> This Report did not specifically deal with evidence obtained through human rights violations. It provided for the rights most frequently violated in Uganda's history,<sup>33</sup> and recommended respect for the rights to personal liberty<sup>34</sup> and a fair trial,<sup>35</sup> among others. The Report provided for the enforcement of rights in the draft *Constitution*,<sup>36</sup> and recommended the establishment of the Uganda Human Rights Commission to exercise quasi-judicial powers in the investigation and enforcement of human rights issues.<sup>37</sup> The functions given to the Uganda Human Rights Commission, however, did not include a directive on how to deal with evidence obtained through human rights violations. In the author's view, the Uganda Human

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<sup>26</sup> Wapakhabulo "Managing the Constitution" 114.

<sup>27</sup> Tripp "Politics of Constitution Making" 159.

<sup>28</sup> Prepared and passed by the then Prime Minister, Dr. Apollo Milton Obote, without debate on 15 April 1966, clipping the powers of the President and vesting executive power in the prime minister. The *Constitution* was then placed in the pigeon-holes of members of parliament at the parliamentary buildings.

<sup>29</sup> Tripp "Politics of Constitution Making" 160.

<sup>30</sup> Tripp "Politics of Constitution Making" 160.

<sup>31</sup> Furley and Katalikawe 1997 *African Affairs* 261; Barya *Making of Uganda's 1995 Constitution* 42-46; Mutibwa *Uganda since Independence* 58.

<sup>32</sup> The *Report of the Uganda Constitutional Commission, 1992 (Odoki Commission Report)*. The Odoki Commission was appointed in accordance with the *Constitutional Commission Statute* 5 of 1988.

<sup>33</sup> *Odoki Commission Report* 146-147, paras 7.52-7.60.

<sup>34</sup> *Odoki Commission Report* 180, para 7.153. See art 35 of the draft *Constitution* of 1995, 764.

<sup>35</sup> *Odoki Commission Report* 181-183, paras 7.152-7.169. See art 37 of the draft *Constitution* of 1995, 765.

<sup>36</sup> *Odoki Commission Report* Appendix 1.

<sup>37</sup> *Odoki Commission Report* 186-188, paras 7.178-7.181. See arts 42-43 of the draft *Constitution* of 1995, 767.

Rights Commission was not accorded the status of a court of record,<sup>38</sup> because it is not a judicial body.

When the draft *Constitution* was presented to the Constituent Assembly for debate, the delegates acknowledged two issues that were instructive for the final outcome of the debate: first, that the aim of the Bill of Rights was to enhance the protection, promotion and enjoyment of human rights,<sup>39</sup> and second, that since Uganda was a signatory to many international instruments, its commitment would be judged by the manner in which the *Constitution* provided safeguards to avoid a violation of human rights in the country.<sup>40</sup> The Constituent Assembly, however, throughout the debates on the Bill of Rights, did not debate the issue of a directive regarding evidence obtained through human rights violations. The debates focused to a great extent on the recommendations of the Odoki Commission.<sup>41</sup> The drafting history shows that the omission of a constitutional directive by the drafters was not by design. This significant directive, which was omitted, could easily have been corrected through an amendment to the *Constitution* or by enacting legislation to complement the *Constitution*. In addition, the judiciary could have developed a consistent jurisprudence through case law to remedy the default. At the time of writing this article, neither has Parliament amended the *Constitution* nor has the judiciary developed a consistent jurisprudence on how to deal with evidence obtained through human rights violations.

### 3 Analysis of legislation

The current pieces of legislation do not adequately provide for a mode of dealing with evidence obtained through human rights violations. The *Prohibition and Prevention of Torture Act*<sup>42</sup> has a provision which is limited to evidence obtained through torture and cruel, inhuman or degrading treatment (CIDT). Section 14(1) thereof provides:

Any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceedings.<sup>43</sup>

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<sup>38</sup> Article 129 of the *Constitution*.

<sup>39</sup> Submission of Hon Cecil Ogwal in the *Report of the Proceedings of Constituent Assembly, 1994 (CA Proceedings Report)* 1809.

<sup>40</sup> Submission of Hon Cecil Ogwal, *Report of the Proceedings of Constituent Assembly, 1994 (CA Proceedings Report)* 1809.

<sup>41</sup> *Report of the Proceedings of Constituent Assembly, 1994 (CA Proceedings Report)*, generally dated 31 August 1994.

<sup>42</sup> *Prohibition and Prevention of Torture Act* 3 of 2012.

<sup>43</sup> Section 14 of the *Prohibition and Prevention of Torture Act* 3 of 2012.

This section limits its operation to evidence obtained through torture and CIDT.<sup>44</sup> Its effectiveness is also curtailed by the nature of the evidence that can be admitted under section 14. This evidence includes information, confessions or admissions.<sup>45</sup> While confessions and admissions are provided for in the *Evidence Act*,<sup>46</sup> information is not provided for. This means that while evidence with regard to confessions and admissions may be dealt with under the *Evidence Act*, evidence with regard to information obtained as a result of torture and CIDT is not covered by the *Prevention and Prohibition of Torture Act*.<sup>47</sup>

The *Evidence Act*<sup>48</sup> places emphasis on the admissibility of confessions, which is one form of evidence that is susceptible to human rights violations.<sup>49</sup> Other forms of evidence that may be susceptible to human rights violations include evidence arising from illegal searches,<sup>50</sup> such as autoptic evidence<sup>51</sup> and vigilante evidence,<sup>52</sup> are not covered by the legislation.<sup>53</sup> Autoptic evidence refers to passive evidence such as the suspect's complexion, stature, marks or features, which may be admitted as evidence that incriminates the accused.<sup>54</sup> Vigilante evidence, on the other hand, refers to evidence that has been obtained by third parties, like private security officers<sup>55</sup> or private persons<sup>56</sup> other than the police.

The *Evidence Act* regulates the relevance and admissibility of evidence in courts and provides guidelines for the recording of confessions.<sup>57</sup> It provides that a confession which would otherwise be inadmissible may still be admitted in evidence, if in the view of the court the impression making it inadmissible is removed.<sup>58</sup> The court therefore exercises a discretion either

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<sup>44</sup> Sections 7, 14 of the *Prohibition and Prevention of Torture Act* 3 of 2012. Mujuzi 2012 *IHRLR* 389. While the wording is limited to torture, the law also covers cruel, inhuman and degrading treatment.

<sup>45</sup> Section 14 of the *Prohibition and Prevention of Torture Act* 3 of 2012; Mujuzi 2012 *IHRLR* 387.

<sup>46</sup> *Evidence Act*, Cap 6 (Laws of Uganda) (the *Evidence Act*) - see Part II thereof.

<sup>47</sup> Mujuzi 2012 *IHRLR* 382-394 generally.

<sup>48</sup> *Evidence Act*, Cap 6 (Laws of Uganda).

<sup>49</sup> Sections 23-27 of the *Evidence Act*.

<sup>50</sup> Zeffert and Paizes *South African Law of Evidence* 711.

<sup>51</sup> De Waal, Currie and Erasmus *Bill of Rights Handbook* 658.

<sup>52</sup> De Waal, Currie and Erasmus *Bill of Rights Handbook* 658.

<sup>53</sup> De Waal, Currie and Erasmus *Bill of Rights Handbook* 658.

<sup>54</sup> Du Toit *Commentary on the Criminal Procedure Act* 3-1-3-32C.

<sup>55</sup> *S v Songezo Mini* (unreported) case number 141178/2015 of 30 April 2015 paras 20, 21, 22.

<sup>56</sup> *S v Hena* 2006 2 SACR 33 (SE) 40i-41b.

<sup>57</sup> Sections 24-26 of the *Evidence Act*.

<sup>58</sup> Section 25 of the *Evidence Act*.

to admit or not to admit the evidence.<sup>59</sup> Section 24 of the *Evidence Act* provides:

A confession made by an accused person is irrelevant if the making of the confession appears to the court, having regard to the state of mind of the accused person and to all the circumstances, to have been caused by any violence, force, threat, inducement or promise calculated in the opinion of the court to cause an untrue confession to be made.<sup>60</sup>

According to the section, if the judicial officer is of the view that the confession was not obtained voluntarily on account of the use of violence or force, a threat or any form of inducement, the confession shall no longer be relevant. Evidence which would otherwise have been inadmissible by the operation of section 24 becomes admissible only after the court has satisfied itself that the confession was obtained voluntarily.

The *Criminal Procedure Code Act*<sup>61</sup> provides for the mode of arrest and search of an accused person.<sup>62</sup> This Act is also silent on how to deal with evidence obtained through human rights violations, such as illegal arrests and searches. The *Magistrates Courts Act*<sup>63</sup> and the *Trial on Indictments Act*<sup>64</sup> are equally silent on how to handle evidence obtained through human rights violations. The silence in all these laws shows that there is no statutory provision that adequately deals with evidence obtained through human rights violations.

The *Regulation of Interception of Communications Act*<sup>65</sup> allows authorised persons from security organisations to obtain a warrant from a designated judge to intercept communications.<sup>66</sup> In instances where the holder of the warrant exceeds the bounds of the warrant, the Act still sanctions the admission of such evidence obtained, with due regard to the circumstances in which the evidence was obtained. Some of the circumstances include the potential effect of its admission or exclusion on issues of national security, and the unfairness to the accused that may be occasioned by its admission or exclusion.<sup>67</sup> This puts individuals at the mercy of state organs. The literal

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<sup>59</sup> Section 25 of the *Evidence Act*.

<sup>60</sup> Section 24 of the *Evidence Act*.

<sup>61</sup> *Criminal Procedure Code Act*, Cap 116 (Laws of Uganda) (the *Criminal Procedure Code Act*).

<sup>62</sup> Sections 2-27 of the *Criminal Procedure Code Act*.

<sup>63</sup> *Magistrates Courts Act*, Cap 16 (Laws of Uganda).

<sup>64</sup> *Trial on Indictment Act*, Cap 23 (Laws of Uganda).

<sup>65</sup> *Regulation of Interceptions of Communications Act* 18 of 2010 (the *Interceptions of Communications Act*).

<sup>66</sup> Section 4 of the *Interceptions of Communications Act*.

<sup>67</sup> Sections 7(a)-(c) of the *Interceptions of Communications Act*.

interpretation of the Act is that where there is a violation of the rights of an individual, the evidence may still be admitted on the grounds of national security.

While the *Constitution* is silent, legislation that governs criminal justice has done little to solve the issue of dealing with evidence obtained through human rights violations. Most of the legislation has not been amended since the passing of the *Constitution* in 1995.<sup>68</sup> Therefore the silence of the *Constitution* is exacerbated by the inadequate ability of the existing legislation to complement it in dealing with evidence obtained through human rights violations.

#### 4 Analysis of case law

The courts have handed down different decisions on how to deal with evidence obtained through human rights violations. An analysis of these decisions helps us establish how the courts have dealt with this evidence, and what can be done to improve the situation. In *Namulobi Hasadi v Uganda (Namulobi)*,<sup>69</sup> the appellant appealed to the Supreme Court on five grounds:<sup>70</sup> first, that the confession had been repudiated in the course of the trial;<sup>71</sup> second, that the confession had been improperly recorded since the appellant had not signed it;<sup>72</sup> third, that the apparent insertion of the name of a detective was evidence of a pre-written statement rather than a voluntary statement;<sup>73</sup> fourth, that the confession had been obtained as a result of torture;<sup>74</sup> and last, the confession had been recorded after the accused had spent a week in custody<sup>75</sup> beyond the mandatory 48 hours as determined by the *Constitution*.<sup>76</sup>

The Court upheld the admission of the confession in evidence on the ground that it did not occasion any injustice to the appellant.<sup>77</sup> With regard to the irregular recording of the confession, the Court stated that although the

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<sup>68</sup> The *Criminal Procedure Code Act*, *Magistrates Courts Act*, and *Trial on Indictment Act* do not contain any substantive amendments made since 1995 to deal with evidence obtained through human rights violations.

<sup>69</sup> *Namulobi Hasadi v Uganda* (unreported) case number 16/1997 of 13 July 1998 (*Namulobi*).

<sup>70</sup> While the Memorandum of Appeal has four grounds, the record shows there were five grounds that were determined by the Supreme Court.

<sup>71</sup> *Namulobi* 3.

<sup>72</sup> *Namulobi* 3.

<sup>73</sup> *Namulobi* 3.

<sup>74</sup> *Namulobi* 3.

<sup>75</sup> *Namulobi* 3.

<sup>76</sup> Article 28 of the *Constitution*.

<sup>77</sup> *Namulobi* 4-11.

recording of the confession took place in a room occupied by other people, these people were busy about their own duties.<sup>78</sup> The Court recognised the fact that the police do not usually have enough rooms for a recording officer to be alone with an accused,<sup>79</sup> and that the appellant had never complained about an irregularity in the mode of recording the confession.<sup>80</sup> In addition, the law that the appellant relied on to claim that the recording of the confession was in a language he did not understand had been repealed.<sup>81</sup> With regard to the allegation that the appellant had been tortured before the confession was recorded, the Court relied on the evidence of another accused person who had been arrested and detained with the appellant.<sup>82</sup> This person had stated that the appellant had not been tortured, which he knew since they had been in the same police cell for the entire week, from the time of arrest.<sup>83</sup> The Court noted that there was evidence other than the confession which would sustain the conviction of the appellant. This included corroborative evidence such as informal confessions made by the accused to the witnesses for the prosecution, and evidence of the appellant's volunteering to give information to the police, which evidence had led to the recovery of items the belonging to the victim.<sup>84</sup>

It is clear that obtaining the confession after the accused had been in custody beyond the mandatory 48 hours was a violation of the appellant's right to liberty.<sup>85</sup> In admitting this evidence, the Court was setting a precedent that permitted for disregard of the rules governing the recording of confessions and that aided the voluntary recording of a confession. The Court seemed to state that provided the illegal presence of other people in a room where a confession was recorded did not directly interfere with the recording of the confession, the Court would admit it. In addition, if the confession was corroborated, the Court would admit it. The rationale of the case was based on the reliability theory and to admit the confession on the basis of its probative value, instead of deterring the police from using illegal methods in obtaining the evidence. By upholding the confession, the Court condoned the illegal actions of the police<sup>86</sup> and went against its own

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<sup>78</sup> *Namulobi* 4.

<sup>79</sup> *Namulobi* 4.

<sup>80</sup> *Namulobi* 4.

<sup>81</sup> Repealed by the Evidence (Amendment) Decree No. 25 of 1971.

<sup>82</sup> *Namulobi* 4.

<sup>83</sup> *Namulobi* 4.

<sup>84</sup> *Namulobi* 8.

<sup>85</sup> *Namulobi* 8.

<sup>86</sup> To read more on the condonation rationale, see Milhizer 2012 *Mil L Rev* 239. See also *R v Collins* 1987 1 SCR 265 para 45.

principle that required that it not uphold an illegality once it was brought to its attention.<sup>87</sup>

In *Uganda v Kalawudio Wamala (Kalawudio)*,<sup>88</sup> the accused was indicted for the offence of rape.<sup>89</sup> The prosecution sought to tender an exculpatory statement made by the accused person.<sup>90</sup> Just as in *Namulobi*, the statement in *Kalawudio* was made after the accused had been in custody beyond the mandatory 48 hours.<sup>91</sup> The High Court declined to admit the statement because it was made after the accused had been in custody for 10 days, which exceeded the statutory 48 hours.<sup>92</sup> Secondly, the statement was recorded contrary to the rules in the Evidence (Statement to Police Officers) Rules.<sup>93</sup> The rule referred to states:

If a police officer decides that the statement of any person should be taken down in writing and is likely to be tendered in evidence in any proceedings, then - (a) if there is present any police officer literate in the language being used by such person, the police officer literate in such language shall write down the statement as nearly possible in the actual words used by the person making the statement ... .<sup>94</sup>

The Court noted that while the accused could speak the Luganda dialect, the police officer recorded the confession in English. The Court stated that the conduct of the police officer was contrary to this Rule.<sup>95</sup> The other reasons that the court gave for not admitting the exculpatory statement were that it protected the accused, that the court had to uphold the public interest, and that it had to deter persons and organs of government from condoning a breach of human rights.<sup>96</sup> In addition, the admission of the confession would be against the tenets of the right to a fair trial.<sup>97</sup> This was instructive of the Court's willingness to develop case law on the exclusionary rule. It must be noted that the Court declined to admit the evidence because the statement had not been recorded in accordance with the Evidence (Statements to Police Officer's) Rules. These Rules had been declared by

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<sup>87</sup> *Makula International v Emmanuel Nsubuga* 1982 HCB 11. See also *Francis Mpamizo v Uganda* 2011 UGHC 30 (18 March 2011) 4.

<sup>88</sup> *Uganda v Kalawudio Wamala* (unreported) case number 442/1996 of 6 November 1996 (*Kalawudio*).

<sup>89</sup> Sections 117, 118 of the *Penal Code Act*, Cap 120 (Laws of Uganda).

<sup>90</sup> *Kalawudio* para 19.

<sup>91</sup> *Kalawudio* paras 1, 19.

<sup>92</sup> *Kalawudio* para 22.

<sup>93</sup> *Kalawudio* paras 22-24. These Rules were declared annulled by the repeal of s 24 of the *Evidence Act*.

<sup>94</sup> Rule 7(a) reproduced in *Kalawudio* para 23.

<sup>95</sup> *Kalawudio* paras 22-23

<sup>96</sup> *Kalawudio* para 28.

<sup>97</sup> *Kalawudio* paras 31-33.

the Supreme Court in *Namulobi*, to have been annulled by the repeal of section 24 of the *Evidence Act*.<sup>98</sup> Although the Court had not relied on Rule 7(a) to arrive at its decision, it made it clear that the statement was illegal because it had been recorded after the accused had been in police custody for more than the mandated 48 hours.<sup>99</sup> The illegal procuring of a statement from an accused for use against him at trial was found to be repugnant to the values and standards set out in the new *Constitution* (as it then was), and that the Court would not be complying with its duty if it admitted the statement and permitted the wrongful and unconstitutional conduct of the police or any other organ in its investigation of crime.<sup>100</sup> The Court took a cautious stand not to condone the improper excesses of the police, and used the protective theory to ensure that the accused did not suffer a disadvantage because of evidence obtained through human rights violations by the police.<sup>101</sup> This case illustrated a shift of the jurisprudence from the admission to the non-admission of evidence obtained through human rights violations.

In *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda (Ssewankambo)*,<sup>102</sup> the three appellants were convicted by the High Court of simple robbery.<sup>103</sup> The first and second appellants were arrested on the same day, and upon interrogation by the police they named the third appellant as a person who took part in the robbery.<sup>104</sup> The third appellant was subsequently arrested. All three appellants made confessions, giving detailed accounts of the parts they had played in the robbery. The appellants appealed to the Supreme Court, claiming that the judges of the Court of Appeal erred in law when they admitted the confessions.<sup>105</sup> They asserted that the Court had not inquired from the defence as to whether it had any objection to the admission of the confessions, and a failure to do so on the part of the judge was a failure of justice.<sup>106</sup> The Court held that it was improper to admit the confessions.<sup>107</sup> This was because the trial judge had not given the defence (the appellants) an opportunity to say anything about the confessions before they were admitted.<sup>108</sup> The court re-

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<sup>98</sup> *Namulobi* para 5.

<sup>99</sup> *Kalawudio* paras 1, 19.

<sup>100</sup> *Kalawudio* para 26.

<sup>101</sup> John and Sarah *Internationalisation of Criminal Evidence* 154-155.

<sup>102</sup> *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda* (unreported) case number 33/2001 of 20 February 2003 (*Ssewankambo*).

<sup>103</sup> *Ssewankambo* 1.

<sup>104</sup> *Ssewankambo* 2.

<sup>105</sup> *Ssewankambo* 4.

<sup>106</sup> *Ssewankambo* 4.

<sup>107</sup> *Ssewankambo* 8.

<sup>108</sup> *Ssewankambo* 8.

enunciated the principle that it is improper to admit a confession without subjecting it to a trial-within-a-trial.<sup>109</sup> This was so because in Article 28(3)a the *Constitution* provided for the right to the presumption of innocence that required that

... where in a criminal trial, an accused has pleaded not guilty, the trial court must be cautious before admitting in evidence a confession statement allegedly made by an accused person prior to his trial.<sup>110</sup>

The Court stated further that

... it is not proper or safe to admit a confession statement in evidence on the ground that counsel for the accused has not challenged or conceded to its admissibility. Unless the trial court ascertains from the accused that he or she admits having made the confession statement voluntarily, the court ought to hold the trial-within-a-trial to determine its admissibility.<sup>111</sup>

In this case the Court upheld the rights to the presumption of innocence and against self-incrimination, where a confession was not subjected to the process of testing the voluntariness of the accused in making it.<sup>112</sup> The Court also noted some irregularities in the recording of the confessions.<sup>113</sup> First, the confessions of the first and second appellants had been recorded by the same officer, and this could have led him to be tempted to use the contents of the first statement in the second.<sup>114</sup> Second, a police officer who did not adequately understand the language of the appellants had not used an interpreter for the recording of the confession.<sup>115</sup> Third, the appellants claimed to have been assaulted by the police before their statements were recorded, yet no medical evidence was adduced to rebut this claim.<sup>116</sup>

The decision served a triple purpose. It enhanced the presumption of innocence, and buttressed the need for the procedure of a trial-within-a-trial to ascertain the voluntariness of the making of the confession. It also upheld the right against self-incrimination of an accused from an adjudication perspective. This decision buttressed the duty of courts to ensure that they do not provide an enabling environment for self-incrimination by the accused.<sup>117</sup> The case also illustrated the move by the courts from a reliability perspective to a protective perspective in an attempt to protect the accused

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<sup>109</sup> *Ssewankambo* 8.

<sup>110</sup> *Ssewankambo* 9.

<sup>111</sup> *Ssewankambo* 9.

<sup>112</sup> *Ssewankambo* 10.

<sup>113</sup> *Ssewankambo* 10.

<sup>114</sup> *Ssewankambo* 10.

<sup>115</sup> *Ssewankambo* 10.

<sup>116</sup> *Ssewankambo* 10.

<sup>117</sup> *Ssewankambo* 9..

person from human rights violations by the police in the procurement of evidence.

In *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda (Walugembe)*,<sup>118</sup> the first, second and third accused were indicted and convicted of three counts of robbery. Some of the facts on which their convictions were based were that the third appellant had told the police that they had gone to a certain swamp, where they had hidden goods they had stolen earlier on.<sup>119</sup> He had led the police to the scene and items, including a television and a video deck, had been recovered. In the course of their defence, all the appellants repudiated the confessions they had made to the police.<sup>120</sup> A confession is considered to be repudiated when the accused person acknowledges that although he made it, it was made involuntarily.<sup>121</sup> Where a confession is made involuntarily and the state seeks to tender the said confession in evidence, the rights of an accused against self-incrimination and to a presumption of innocence are violated. It is therefore proper that the Court satisfies itself that a confession was obtained voluntarily before it is admitted in evidence. The first and second appellants averred that the confessions had been obtained through torture;<sup>122</sup> that the recording of the statements had been irregular because they were recorded in English and not in the languages the appellants understood;<sup>123</sup> and that the confessions had been recorded by the same police officer.<sup>124</sup> It was also noted that the confession of the second appellant had been recorded in the presence of the officer in charge of the police station. The Court held that it was a misdirection to admit the confessions in the light of the irregularities in recording them. The rationale for this holding was that the confessions had not been meticulously tested as regards the voluntariness of their making.<sup>125</sup> The Court stated that it was prudent to establish the onus of proof and consider the irregular recording of the confessions.<sup>126</sup> In instances where the accused challenged the admissibility of a confession, the trial court was duty bound to have it proved in a trial-within-a-trial that the confessions had been made voluntarily.<sup>127</sup> The Court agreed with the

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<sup>118</sup> *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda* (unreported) case number 39/2003 of 1 November 2005 (*Walugembe*).

<sup>119</sup> *Walugembe 2*.

<sup>120</sup> *Walugembe 4*.

<sup>121</sup> *Tuwamoi v Uganda* 1967 EA 84.

<sup>122</sup> *Walugembe 5*.

<sup>123</sup> *Walugembe 5*.

<sup>124</sup> *Walugembe 6*.

<sup>125</sup> *Walugembe 6*.

<sup>126</sup> *Walugembe 6*.

<sup>127</sup> *Walugembe 7*.

principle in *Ssewankambo* that it is not proper for a police officer to record statements from two accused persons in a single case that he is investigating.<sup>128</sup> In this case, the Court used the protective theory as a basis for the holding. In addition, the Court made it clear that the right procedure ought to be followed in recording confessions, which required that an investigating officer would not record the confessions of two accused persons in the same case before him.<sup>129</sup> The Court did not, however, pronounce itself on the standard of proof. It did by implication validate the decision in *Kalawudio*.

In *Kizza Besigye v the Attorney General*,<sup>130</sup> the applicants were re-arrested and detained illegally after the High Court granted them bail.<sup>131</sup> While this case did not involve the admission of evidence obtained through human rights violations, it involved the continued prosecution of accused persons in disregard of their rights to liberty during trial.<sup>132</sup> The Court reiterated that the applicants had the constitutional rights to be tried before an independent and impartial body, to be presumed innocent until proven guilty, and to apply for bail.<sup>133</sup> Other rights included the right to protection from torture and CIDT, and a fair hearing.<sup>134</sup> On the basis of these facts, and with reference to persuasive decisions on the right to a fair trial from other jurisdictions,<sup>135</sup> the Court stated that it could not sanction the continued prosecution of the petitioners where during the proceedings their human rights had been violated.<sup>136</sup> The right to a fair trial referred to was based on the interruption of the court's adjudicating a criminal case, and not on the violation of rights during the collection of evidence. While the Court was of the view that the continued detention of the accused persons would have been a violation of their rights to liberty and security of person, it did not address this issue. That could be partly because the accused raised the grounds but failed to substantiate them.<sup>137</sup> The principles in this case are very instrumental in relaying the need for law enforcement agencies to respect human rights in the course of investigating a crime and during a trial. In addition, the Court

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<sup>128</sup> *Walugembe* 9-10.

<sup>129</sup> *Walugembe* 10.

<sup>130</sup> *Kizza Besigye v The AG* (unreported) case number 07/2007 of 12 October 2010 (*Besigye*).

<sup>131</sup> *Besigye* 2.

<sup>132</sup> *Besigye* 1-38 generally.

<sup>133</sup> *Besigye* 38.

<sup>134</sup> *Besigye* 38.

<sup>135</sup> See *Albanus Mwasia Mutua v R* 2006 eKLR 3, *R v Amos Karuga Karatu* 2008 eKLR 1 and *R v Horseferry Road Magistrates Ex Parte Bennet* 1994 1 AC 42. Also see *Gerald Macharia Githuku v Republic* 2007 eKLR.

<sup>136</sup> *Besigye* 38.

<sup>137</sup> *Besigye* 4 para 1(d) (vii).

reiterated its duty to enforce the provisions of the *Constitution*, regardless of how strong the evidence against the accused person was.<sup>138</sup> The Court suggested that the yardstick was whether a fair trial would be achieved, depending on the circumstances of each case. If the trial would be a waste of time and an abuse of the court process, then it would not be fair.<sup>139</sup> The Court's view that a prosecution instituted in breach of the law is a violation of the rights of the accused was instrumental in the continued development of the jurisprudence regarding evidence obtained through human rights violations.

In *Uganda v Robert Ssekabira*,<sup>140</sup> the eleven accused persons were arrested and detained, and then charged eleven days later.<sup>141</sup> Before they were charged the accused had been in police custody without charge. This was contrary to the right to be promptly informed upon their arrest of the charges against them.<sup>142</sup> It is important to note that the police and the prosecutors had to ensure that the consent of the Director of Public Prosecutions was obtained before charging anyone under the *Anti-terrorism Act*.<sup>143</sup> Although the failure to get consent was not a human rights violation, it would amount to an impropriety on the part of the police or the prosecutor. It would be expected that the prosecutor, as an officer of the court, would adequately guide it with regard to all the administrative requirements that had to be complied with before the accused persons were brought before it. Therefore the evidence that had been procured after the initial 48 hours of their detention had been obtained in violation of their right to liberty.<sup>144</sup> The prosecution conceded to the violations of the right to a fair trial since the accused had been remanded beyond 48 hours;<sup>145</sup> however, it requested the Court to take into account the circumstances that led to the violation of the *Constitution*.<sup>146</sup> The major issue before the Court was whether in the light of the constitutional violations there was any statutory authority or case law that granted the Court the power to excuse the breach of a constitutional provision.<sup>147</sup> The Court found that there was no such authority and held that improper evidence or evidence obtained through human rights violations

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<sup>138</sup> *Besigye* 38.

<sup>139</sup> *Besigye* 38.

<sup>140</sup> *Uganda v Robert Sekabira* (unreported) case number 85/2010 of 14 May 2014 (*Sekabira*).

<sup>141</sup> *Sekabira* 3.

<sup>142</sup> Article 28(1) of the *Constitution*.

<sup>143</sup> *Sekabira* 3.

<sup>144</sup> Article 28(1) of the *Constitution*.

<sup>145</sup> *Sekabira* 7.

<sup>146</sup> *Sekabira* 7.

<sup>147</sup> *Sekabira* 7.

should not be admitted if it affected an accused's right to a fair trial. The rationale for this holding was that the Constitutional Court had in *Besigye* decided that it could not sanction any continued prosecution of the petitioners where during the proceedings their human rights had been grossly violated.<sup>148</sup> Secondly, the *Constitution* had set a new threshold for all organs and agencies of government to be mindful of the duty to guard it from violation by agents of the state.<sup>149</sup> The trend was intended to ensure that evidence obtained through human rights violations was not tendered. The protection sought by the Court was not provided for in the *Constitution*, because it lacked provisions on evidence obtained through human rights violations and what constituted justifiable limitations on the rights of an accused person. If there had been a constitutional directive with regard to evidence obtained through human rights violations, the Court would have dealt with the specifics of the violation in the light of the constitutional directive. In addition, the Court would have made a more nuanced decision as regards what would constitute a justifiable limitation of the enjoyment of human rights in a constitutional dispensation.<sup>150</sup> While the Court noted the failure of the prosecution to guide it,<sup>151</sup> it did not use this opportunity to clarify the role of prosecutors in guiding a court in instances where they had knowledge of the obtaining of evidence in violation of the petitioners' rights.<sup>152</sup> The Court opted to use the protective principle in dealing with evidence obtained through human rights violations, whereby it sought to protect the accused persons from the procedural excesses of the investigating officers.<sup>153</sup>

In *Uganda v Ekungu Simon (Ekungu)*,<sup>154</sup> the state appealed against the decision of a Magistrate to acquit the respondent on two counts of bribery.<sup>155</sup> The respondent had corruptly solicited a bribe from the complainant, who had informed the Office of the Inspectorate of Government about it. This Office had organised a trap and the respondent had been arrested after receiving the bribe.<sup>156</sup> The High Court upheld the appeal on the basis of the fact that the Magistrate had not evaluated the evidence adequately and as

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<sup>148</sup> *Sekabira* 7.

<sup>149</sup> *Sekabira* 8.

<sup>150</sup> Compare s 36 of the *Constitution of the Republic of South Africa*, 1996.

<sup>151</sup> *Sekabira* 17-18.

<sup>152</sup> See *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), principle F generally. Also see Mujuzi 2013 *IJEP* 284-294 generally.

<sup>153</sup> John and Sarah *Internationalisation of Criminal Evidence* 154-155.

<sup>154</sup> *Uganda v Ekungu Simon* (unreported) case number 19/2011 of 5 January 2012 (*Ekungu*).

<sup>155</sup> *Ekungu* 1.

<sup>156</sup> *Ekungu* 2.

a result arrived at a wrong decision, and ordered that the case be retried before another Magistrate.<sup>157</sup> This case is important for the present purposes because while the Court took issue with the evidence obtained through human rights violations, it did not offer any recommendations on how to deal with evidence obtained through entrapment. In this case, after the police had used a trap to arrest the respondent, they forced the respondent's colleagues in the office to sign the Search Certificate as witnesses to the recovery of the bribe from the office of the Respondent.<sup>158</sup> While *Ekungu* involved evidence of a search certificate corroborating the evidence of recovery of the bribe from the respondent, most cases decided are limited to confessions, which require a court to conduct a trial-within-a trial before the confession is admitted.<sup>159</sup> The Court stated that the mode of arrest and the requirements for search certificates needed to be re-examined.<sup>160</sup> The Court relied on the cogency of other evidence and a consideration of whether it was sufficient to sustain a conviction. The evidence would not, however, be sufficiently substantial to sustain a conviction where the mode of acquiring it involved the use of duress to compel witnesses to sign search certificates. It was prudent to establish the process of conducting the search, acquiring the evidence, and signing of the search certificate. If this process had been tainted by human rights violations, the Court had to determine whether the violation of third party rights would affect the admission of the prosecution's evidence.<sup>161</sup> The illegality involved in procuring the search certificate and the violation of the accused's right to dignity<sup>162</sup> were upheld by the Court in allowing the accused's appeal. Since courts are becoming cognisant of the use of entrapment and showing their distaste for it, it is only proper that entrapment should be regulated. While the Court took issue with the use of traps, it neither offered solutions nor held that it was improper to admit the evidence. The Court neither used the protection theory nor clearly embraced the reliability theory.

The practice of setting police traps is an unusual crime prevention strategy based predominantly upon deceptive law enforcement techniques,<sup>163</sup> and it needs to be regulated. In jurisdictions like South Africa entrapments are

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<sup>157</sup> *Ekungu* 10.

<sup>158</sup> *Ekungu* 9.

<sup>159</sup> See *Namulobi*, *Ssewankambo* and *Walugembe* discussed above.

<sup>160</sup> *Ekungu* 10.

<sup>161</sup> For instance, in South Africa evidence obtained through a violation of the rights of a third person is a ground for its non-admission; see *S v Mthembu* 2008 2 SACR 407 (SCA) para 27.

<sup>162</sup> Article 34 of the *Constitution*.

<sup>163</sup> *Narnia* 1999 SACJ 317.

regulated by statute.<sup>164</sup> This is not the case in Uganda. There are instances where the police go beyond providing an opportunity for the commission of an offence. The Courts recognise traps as an aid to the arrest of suspects,<sup>165</sup> and the human rights violations that accompany them.<sup>166</sup> They need to be regulated and streamlined so that the constitutional values and aspirations of the *Constitution* are upheld.

This article shows that the status of the evidence obtained through human rights violations is a significant question in the light of the legislative framework and the judicial development of jurisprudence. The *Constitution* is silent on how the courts should deal with evidence obtained through human rights violations. It does create a working framework for the enforcement of the right to a fair hearing for an accused person, but fails to secure strict observance of this right in so far as it is silent on how to deal with evidence obtained through human rights violations. The lack of provisions in criminal procedure legislation exacerbates the situation. A few Uganda cases have adequately grappled with this issue. These include *Kalawudio*, *Ssewankambo*, *Walugembe*, *Besigye* and *Ssekabira*. The other cases have not deal with this issue adequately. Before a conclusion is drawn and recommendations are made, a brief examination will be undertaken of the South African approach to evidence obtained through human rights violations in the belief that this will contribute to the value of the conclusions drawn.

## 5 The South African approach

South Africa has a constitutional provision dealing with evidence obtained through human rights violations and a wealth of case law for the purpose of interpreting the provision. The *Constitution* of 1996 provides that:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.<sup>167</sup>

From the wording of section 35(5), there is a need to evaluate the manner in which evidence is obtained, the nature of the right in the Bill of Rights that is affected, and the two legs of the test for inclusion or exclusion of the evidence. The two legs of the test are the fairness of the trial and the

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<sup>164</sup> Section 252A of the *Criminal Procedure Act* 55 of 1977.

<sup>165</sup> *Uganda v Cheptuke David Kaye* (unreported) case number 121/2010 of 11 November 2010 (*Cheptuke*).

<sup>166</sup> *Cheptuke* 9.

<sup>167</sup> Section 35(5) of the *Constitution of the Republic of South Africa*, 1996 (*RSA Constitution*).

administration of justice. This section presumes that the evidence is admissible, unless it renders a trial unfair or is detrimental to the administration of justice.<sup>168</sup> There is no similar provision in the Uganda *Constitution* to offer courts a directive on how to deal with such evidence.

The evidence should not be obtained in a manner that violates any right in the Bill of Rights. The major situations relevant to this provision include cases of pointing-out, where the accused is not informed of his or her rights before the pointing-out,<sup>169</sup> illegal searches,<sup>170</sup> illegal surveillance,<sup>171</sup> autoptic evidence,<sup>172</sup> and evidence obtained through the improper treatment of witnesses.<sup>173</sup> Therefore, in instances of the violation of statutory rights, the common law exclusionary rule or the application of judicial discretion may be used.<sup>174</sup> The distinction between the common law exclusionary rule and the rule under section 35(5) is that, unlike the latter, the former applies to all cases, and not only criminal cases.<sup>175</sup> Unlike section 35(5), which requires a court to subject evidence that has been obtained through human rights violations to the test set therein, the common law exclusionary rule is a discretionary remedy that a judicial officer exercises if the admission of a given piece of evidence will operate unfairly against the accused.<sup>176</sup> The exclusionary rule may apply even when there has been no violation of a human right; the presence of improperly obtained evidence without a human right violation may be sufficient for a court to invoke the exclusionary rule.<sup>177</sup>

Some of the rights canvassed in the Bill of Rights include the right to freedom and security of the person,<sup>178</sup> privacy,<sup>179</sup> expression<sup>180</sup> and movement,<sup>181</sup> and a fair trial.<sup>182</sup> The right to a fair trial is guaranteed by the provision of pre-hearing safeguards in the *Constitution*. These safeguards include an accused's right to be informed promptly of the charge against

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<sup>168</sup> *S v Tandwa* 2008 1 SACR 613 (SCA) para 116. See *Mthembu v S* 2008 3 All SA 159 (W) para 25.

<sup>169</sup> Zeffert and Paizes *South African Law of Evidence* 724.

<sup>170</sup> Zeffert and Paizes *South African Law of Evidence* 725.

<sup>171</sup> Zeffert and Paizes *South African Law of Evidence* 728.

<sup>172</sup> Zeffert and Paizes *South African Law of Evidence* 731.

<sup>173</sup> Zeffert and Paizes *South African Law of Evidence* 736.

<sup>174</sup> *Mthembu v S* 2008 3 All SA 159 (W) para 32.

<sup>175</sup> *Mthembu v S* 2008 3 All SA 159 (W) para 32; see note 22 of the judgment.

<sup>176</sup> *Kuruma v R* 1955 AC 157, 203.

<sup>177</sup> Zeffert and Paizes *South African Law of Evidence* 711.

<sup>178</sup> See s 12 of the *RSA Constitution*.

<sup>179</sup> Section 14 of the *RSA Constitution*.

<sup>180</sup> Section 16 of the *RSA Constitution*.

<sup>181</sup> Section 21 of the *RSA Constitution*.

<sup>182</sup> Section 35 of the *RSA Constitution*.

him,<sup>183</sup> the right to remain silent<sup>184</sup> and the consequences of not remaining silent.<sup>185</sup> These rights are also provided for in Uganda's *Constitution*.<sup>186</sup> Other guarantees are the right not to be compelled to make a confession or admission that could be used in evidence against an accused,<sup>187</sup> the right to be brought to court within 48 hours,<sup>188</sup> and the right to be presumed innocent till proven guilty.<sup>189</sup> Where the safeguards are disregarded by the investigating authority while collecting evidence, a violation of the constitutional rights occurs. This consequently creates an enabling environment for the accused person to invoke the section.

Unfairness of the trial is one of the grounds for the exclusion of evidence under the section. In *S v Tandwa (Tandwa)*,<sup>190</sup> the Court noted that some of the factors that may be grounds for the exclusion of evidence include the severity of the human rights violation, the degree of prejudice to the accused, the need to balance public policy on fighting crime and the interests of society, and the need to balance the due process of law against crime control. Therefore, where the conduct of the police is deliberate and flagrant,<sup>191</sup> a court will be inclined not to admit the evidence, because it would render the trial unfair. In the view of the author, these grounds apply to both the unfairness of the trial and placing the administration of justice into disrepute. This is so because, although the Court in *Tandwa* held that the grounds listed are relevant in establishing the unfairness of the trial of the accused,<sup>192</sup> they added that what is unfair to an accused will always be detrimental to the administration of justice.<sup>193</sup>

Where the admission of the evidence brings the administration of justice into disrepute, then the evidence will not be admitted. In examining this ground, a court looks at factors like the presence of good faith on the part of law enforcement officers. In *Soci* the Court was reluctant to uphold the evidence obtained as a result of the failure of a police officer to perform the right procedure before the accused made a pointing out.<sup>194</sup> Other factors which the courts consider include: the nature and seriousness of the

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<sup>183</sup> Section 35(3)a of the *RSA Constitution*.

<sup>184</sup> Section 35(3)h of the *RSA Constitution*.

<sup>185</sup> Section 35(1)a of the *RSA Constitution*.

<sup>186</sup> Article 28(3) of the *Constitution*.

<sup>187</sup> Section 35(b)a of the *RSA Constitution*.

<sup>188</sup> Section 35(1)c of the *RSA Constitution*.

<sup>189</sup> Section 35(3)h of the *RSA Constitution*.

<sup>190</sup> *S v Tandwa* 2008 1 SACR 613 (SCA) (*Tandwa*) para 120.

<sup>191</sup> *Tandwa* para 128. Zeffert and Paizes *South African Law of Evidence* 741.

<sup>192</sup> *Tandwa* para 117.

<sup>193</sup> *Tandwa* para 118.

<sup>194</sup> *S v Soci* 1998 2 SACR 275 (E) 297a.

violation,<sup>195</sup> urgency and public safety,<sup>196</sup> the availability of other alternative means of obtaining the evidence in question,<sup>197</sup> and the deterrence or disciplinary factor to discourage police from using illegal methods.<sup>198</sup> If the violation involves torture, the evidence is not admitted.<sup>199</sup>

The Courts have added to the jurisprudence of section 35(5) through interpretation. They have dealt with the issue of a causal link between the violation of the right and the collection of evidence. While the causal link may vary in magnitude, this variance is not a condition that determines whether the evidence may be admitted. Its degree of severity is not a condition precedent to the determination of the admissibility of evidence. A court examines each case on its merits. In *Tandwa* the Court held that there is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused.<sup>200</sup> In *S v Orrie*<sup>201</sup> the Court held that a weak causal link between the violation and the evidence would not render the evidence obtained through human rights violations inadmissible. In *S v Mthembu*<sup>202</sup> the court held that where torture had irredeemably tainted the evidence of a third party, the subsequent voluntary testimony in court could not alter the fact that the evidence had been obtained through torture. In addition, evidence can be excluded when a third party's rights have been violated in the process of obtaining evidence against an accused.<sup>203</sup> The above principles show that if the rigid rule on the use of the intensity of a causal link is used, judicial integrity and the purpose of the constitutional directive would be compromised. The position is different in Canada. Canadian courts do not require the presence of a causal link to justify the application of section 24(2) of the *Canadian Charter of Rights and Freedoms*.<sup>204</sup> The reason advanced is that the causal connection is too narrow and difficult to apply and its existence is therefore not determinative. This was a departure from the earlier position of the courts that required the presence of a causal link. This

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<sup>195</sup> *S v Mark* 2001 1 SACR 572 (C); *S v Naidoo* 1998 1 SACR 479.

<sup>196</sup> Zeffert and Paizes *South African Law of Evidence* 749.

<sup>197</sup> Zeffert and Paizes *South African Law of Evidence* 751; *S v Hena* 2006 2 SACR 33 (SE).

<sup>198</sup> *S v Mphala* 1998 1 SACR 388 (W).

<sup>199</sup> *S v Mthembu* 2008 2 SACR 407 (SCA) para 32.

<sup>200</sup> *Tandwa*, para 117.

<sup>201</sup> *S v Orrie Mogamat Phadiel* (unreported) case number 32/2003 of 14 October 2004.

<sup>202</sup> *S v Mthembu* 2008 2 SACR 407 (SCA).

<sup>203</sup> *S v Mthembu* 2008 2 SACR 407 (SCA) 202. See *Gafgen vs Germany* (ECtHR) Application 22978/05 para 74.

<sup>204</sup> Part I (Schedule B) to the *Canadian Charter of Human Rights and Fundamental Freedoms*, 1982.

position was subsequently confirmed in *R v Brydges*,<sup>205</sup> where the Court held that section 24(2) would be used as long as a Charter violation occurred in the course of obtaining the evidence.

The section is silent on whether an accused person has standing to bring an application under section 35(5), where the rights of a third party or a person other than the accused have been violated. The courts have held that an accused person can apply section 35(5), even where it 'is the rights of a third party that have been violated in obtaining evidence that incriminates the accused.'<sup>206</sup> A hypothetical situation to illustrate this is where the accused person, A, seeks to have the evidence obtained from B in violation of B's rights not to be admitted against A. This reinforces the policy behind the enactment of the section by ensuring that it is not only in instances where the accused's rights are violated that section 35(5) may be applied. A strict interpretation for that requirement would be inconsistent with the purpose of preventing the exclusion of evidence obtained through human rights violations.<sup>207</sup>

In instances where evidence is obtained by third parties or vigilantes in violation of an accused's rights, it is subjected to section 35(5) before a court exercises its discretion to admit it. In *S v Songezo Mini (Mini)*,<sup>208</sup> the Court subjected the evidence obtained by security officers to section 35(5) scrutiny before admitting it, because the evidence had not been obtained by the police but by other law enforcement officers.<sup>209</sup> The Court did not reject the evidence outright but rather subjected it to the test under section 35(5) and admitted only such evidence as passed that test.<sup>210</sup> In instances where there had been a violation of the rights of the accused before the evidence was obtained, the evidence was not admitted. In instances where the violation of the rights of the accused persons had occurred after the evidence had been obtained, the evidence was admitted.<sup>211</sup> In *S v Hena*<sup>212</sup> the Court held that section 35(5) covers situations where the police abdicate their statutory duty to investigate crimes by sub-contracting it to anti-crime committees who gather evidence by seriously and deliberately violating the

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<sup>205</sup> *R v Brydges* 1990 1 SCR 190, 210.

<sup>206</sup> *S v Mthembu* 2008 2 SACR 407 (SCA) para 27.

<sup>207</sup> Schwikkard and Van der Merwe *Principles of Evidence* 219.

<sup>208</sup> *S v Songezo Mini* (unreported) case number 141178/2015 of 30 April 2015 (*Mini*) paras 20, 21, 22.

<sup>209</sup> *Mini* paras 11, 12, 13, 16, 18, 20 and 23.

<sup>210</sup> *Mini* paras 11, 12, 13, 16, 18, 20 and 23.

<sup>211</sup> *Mini* paras 11, 12, 13, 16, 18, 20 and 23.

<sup>212</sup> *S v Hena* 2006 2 SACR 33 (SE) 40i-41b.

constitutional rights of an accused person. In *S v Zuko*<sup>213</sup> the Court provided four factors which may form the basis for not admitting such evidence. These are: a lack of good faith on the part of vigilantes; the non-justification of their conduct on the basis of public safety or emergency concerns, the seriousness of the violation of the appellant's rights to privacy; the freedom and security of person and dignity; and the availability of lawful means to acquire the evidence. This approach enhances the right to a fair trial from the pre-trial stages.

The answer to the question of who bears the burden of proof to establish that there has been a violation of rights in obtaining evidence is not clear in South Africa. While two decisions have varying views on the matter, a textual reading of the section requires the state to bear the burden. In *Director of Public Prosecutions, Transvaal v Viljoen (Viljoen)*<sup>214</sup> the Court held that the accused has to show a violation of his or her rights before it makes a decision on whether to admit the evidence.<sup>215</sup> In other words, the accused should prove a violation of a right as a threshold requirement to the application of section 35(5). This meant that the accused had to violate his right against self-incrimination and the right to remain silent if it were to be proved that there had been a violation of his rights. Conversely, in *S v Mgcina (Mgcina)*<sup>216</sup> the Court placed the burden on the prosecution to disprove that the evidence had been obtained in an unconstitutional manner.<sup>217</sup> The Court seems to agree with the common law principle that it was for the prosecution to prove the guilt of the accused and not for the accused to prove his innocence.<sup>218</sup> In the author's view, *Viljoen* was decided erroneously and cannot pass the constitutional test, because the accused's right to remain silent would be infringed. The case of *Mgcina* offers a purposive approach to the application of section 35(5). Schwikkard suggests two alternative solutions for the situation. First, the accused alleges a violation but need not prove that the evidence was obtained in violation of his or her constitutional rights.<sup>219</sup> Second, in the course of holding a trial-within-a-trial a distinction is made between matters of fact as opposed to matters of judgment and value, which would point to the proof of guilt. The two alternatives enable a court to establish the existence of the factual violation of the rights of an accused on a balance of probabilities,

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<sup>213</sup> *S v Zuko* (ECD) (unreported) case number 159/2001 (22 November 2006).

<sup>214</sup> *Director of Public Prosecutions, Transvaal v Viljoen* 2005 2 All SA 355 (SCA) (*Viljoen*).

<sup>215</sup> *Viljoen* paras 32, 33, 34, 43.

<sup>216</sup> *S v Mgcina* 2007 1 SACR 82 (T) (*Mgcina*).

<sup>217</sup> *Mgcina* 95h-i. See *S v Brown* 1996 2 SACR 49 (NC) 73.

<sup>218</sup> *Woolmington v DPP* 1935 AC 462 (HL).

<sup>219</sup> Schwikkard and Van der Merwe *Principles of Evidence* 260.

without forming a value judgement. At this stage of the hearing, the court would not be concerned with the proof of guilt beyond reasonable doubt but only with the admission of the evidence.

The procedure used for the application of the exclusionary rule is a trial-within-a-trial to test the admissibility of evidence. The application is made before the evidence is admitted.<sup>220</sup> This is done when the accused objects to the admission of a piece of evidence. The reason for this procedure is to ensure that the accused can testify on the issue concerning the admissibility of the impugned evidence without exposing himself to cross-examination as to his guilt. In *S v Ntzweli*,<sup>221</sup> it was held that the lower court's refusal to hold a trial-within-a-trial to determine the admissibility of the evidence obtained as a result of an illegal search amounted to a failure of justice.<sup>222</sup>

## 6 Conclusion and recommendations

The cases that have been discussed fall into three categories of jurisprudence. The first category involves a situation where a court admits the evidence obtained through human rights violations, as occurred in *Namulobi*. If the court is able to satisfy itself that admission of the evidence does not occasion an injustice to the accused person, it will admit the evidence. The yardstick for the admission of this evidence is the probative value of the evidence based on a judgment of its reliability. It follows that a court is more inclined to follow the reliability theory on the grounds that illegally obtained evidence may be as reliable as lawfully obtained evidence and may have a bearing on the innocence or guilt of an accused.<sup>223</sup> This line of jurisprudence requires a court to hold that the reliability of the evidence is of greater importance than the protection of the accused's rights. This justification is done through the use of evidence that corroborates the evidence that points to the guilt of the accused.<sup>224</sup> A court is more inclined to labour to distinguish the cases before handing down its judgement. In *Namulobi*, the court distinguished the facts in *Edong v Uganda* to justify its decision.<sup>225</sup> In *Edong*, the appellant made two statements. In the first one, he denied any involvement in the murder, and in the second he volunteered information as regards the way he committed the murder. At the hearing of the case he denied the confession, claiming it was obtained through

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<sup>220</sup> *S v Makhanya* 2002 3 SA 201 (N) 201.

<sup>221</sup> *S v Ntzweli* 2001 2 All SA 184 (C) 187f-189g. Also see *Viljoen* para 32.

<sup>222</sup> *S v Ntzweli* 2001 2 All SA 184 (C) 187f-189g.

<sup>223</sup> John and Sarah *Internationalisation of Criminal Evidence* 154.

<sup>224</sup> *Namulobi* 8.

<sup>225</sup> *Namulobi* 8.

coercion, and the court agreed. In addition, the confession was the only source of evidence, unlike the situation in *Namulobi*, where there was evidence of the appellant's voluntary co-operation with the police to recover items of the victim, and confessions to various witnesses as to how he committed the offence.<sup>226</sup> Unlike *Edong*, even if the confession in *Namulobi* were to be expunged he would still be convicted on the other existing evidence.<sup>227</sup> Finally, the holding in *Namulobi* shows that the court went to great lengths to show that there was no unfairness occasioned to the accused at his trial.

The second category involves a situation where a Court has not admitted evidence obtained through human rights violations. This category forms the bulk of most of the cases, which include *Kawaludio*, *Ssewankambo*, *Besigye* and *Ssekabira*. It is important to note that in all these cases the Court rejects the admission of improperly obtained evidence on the grounds that its admission would be against the aspirations of the *Constitution*,<sup>228</sup> the trial court had not followed the procedure to ascertain the voluntariness of the confession,<sup>229</sup> or the police had not followed the right procedure in recording the confessions,<sup>230</sup> that the court would not sanction the continued prosecution of the accused where there was a violation of their rights to a fair trial,<sup>231</sup> that the yardstick for establishing whether the accused would have a fair trial was premised on whether a fair trial would be achieved in the circumstances of each case, or that the trial would be a waste of time and an abuse of the court process.<sup>232</sup> Furthermore, the courts upheld the protective theory over the reliability theory,<sup>233</sup> because the *Constitution* mandated it to do so and not to condone the excesses of the police.<sup>234</sup> This line of jurisprudence was frequently evident in the period 1996 to 2014, and it was rooted in the need to uphold the ideals of the *Constitution*. The four cases of *Kawaludio*, *Ssewankambo*, *Besigye* and *Ssekabira* show an attempt by the courts to balance the fairness of a trial and at the same time not to bring the administration of justice into disrepute.

The third category involved instances where a court would take issue with evidence obtained through human rights violations but did not offer any

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<sup>226</sup> *Namulobi* 8.

<sup>227</sup> *Namulobi* 8.

<sup>228</sup> *Kawaludio* para 26.

<sup>229</sup> *Ssewankambo* 8; *Walugembe* 6.

<sup>230</sup> *Ssewankambo* 10; *Walugembe* 9.

<sup>231</sup> *Besigye* 38; *Ssekabira* 7.

<sup>232</sup> *Besigye* 38.

<sup>233</sup> John and Sarah *Internationalisation of Criminal Evidence* 154.

<sup>234</sup> *Kawaludio* para 26; *Besigye* 38; *Ssekabira* 7.

recommendations or develop any jurisprudence to aid the otherwise dangerous situation. This was evident in *Ekungu*, where the Court took issue with the use of traps, yet at the same time did not indicate whether the evidence had been adequately adduced.<sup>235</sup> In this category there was uncertainty and a lack of guidance where a Court identified a violation of the rights of third parties to incriminate the accused but did not offer direction.<sup>236</sup> Although the case of *Ekungu* was decided by the Anti-Corruption Division of the High Court under the new *Anti-Corruption Act*,<sup>237</sup> it does not consider the need for a fair trial and the proper administration of justice.

In the light of the three models of jurisprudence, it would be most appropriate for the courts to embrace the second model, which upholds the protection of the accused from the excesses of the investigative organs as much as possible. This model ensures fairness at a trial and that the administration of justice is not brought into disrepute. It seems to embrace section 35(5) of the South African *Constitution* in that it ensures that the constitutional rights of an accused are not trampled on. The first model would be appropriate where the probative value of the evidence outweighs the manner in which it was obtained and does not occasion an injustice to the accused person. This would technically mean that all evidence is presumed to be admissible until it is proved that it was obtained in a manner that violated the constitutional rights of an accused person. It is on this basis that the jurisprudence could grow systematically, since there would be a constitutional provision as a normative framework for continued growth and consistency. The Justice, Law and Order Sector (JLOS), a priority sector of government that co-ordinates the activities of the institutions that deal with justice, like the Judiciary, the DPP, and the police,<sup>238</sup> could consult on the workability of a constitutional provision to deal with evidence obtained through human rights violations.

To this end, therefore, the *Constitution* should be amended to provide for a directive on how to deal with evidence obtained through human rights violations. This should not be an instance of copying the contents of a *Constitution* from another jurisdiction. The Uganda Law Reform Commission in conjunction with other stakeholders should conduct a due

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<sup>235</sup> *Ekungu* 10.

<sup>236</sup> See *Ekungu* 10; *Uganda v Muwonge Emmanuel* (unreported) case number 738/2009 of 3 September 2009, where the Court decried the malicious prosecution by the state but declined to offer guidance on how to deal with evidence obtained through human rights violations.

<sup>237</sup> *Anti-Corruption Act* 6 of 2009.

<sup>238</sup> Information on activities: JLOS 2016 <http://jlos.go.ug/>.

diligence study to establish what the contents of the amendment should be. It is proposed that the amendment should at least provide for a dual test of fairness of the trial and of the administration of justice. The test of public opinion might conflict with the administration of justice. The amendment could be placed after Article 50 of the *Constitution*, which provides for a right of redress. The principles of the need for a causal link, standing, and evidence procured by third parties should be left to the courts to develop as the amendment is applied. The amendment should have clarity to compel the exclusion of illegally or improperly obtained evidence in the form of information, statements and confessions provided that they do not render a trial unfair or are detrimental to the administration of justice. Chapter eight of the *Constitution* provides for the Courts of Judicature. The courts of record in Uganda's legal system should be empowered to develop the common law in instances where there is an apparent problem with the law, which cannot be solved. Apart from confessions, one of the problems exacerbating the admission of evidence obtained through human rights violations is the lack of a law to subject this evidence to a trial-within-a-trial to establish whether or not it was obtained voluntarily. The courts' ability to develop the common law will enable them to subject all issues of admissibility of evidence to a trial-within-a-trial.

There should be the enactment of a DPP Act, to provide for the duties of a prosecutor to the accused, the victim and the court in instances where evidence is obtained through human rights violations. While the principles and guidelines on the right to a fair trial are applicable in Uganda, as a State Party to the *African Charter*, they are not reflected in any criminal procedure law. This diminishes the chances of their being used by conventional judicial officers who follow the law as it is written.

The police should be compelled to stop using procedures that taint the voluntariness of an accused and other individuals to provide evidence. The procedure from arrest to the production of a person in court for plea should be streamlined to avoid human rights violations. Amendments to the *Criminal Procedure Code Act* should provide for the limitation of using entrapments to acquire evidence and should provide guidelines for the use of entrapments. This would enhance professionalism in investigations, while at the same time upholding human rights in the process. The *Police Act* could also be amended to provide for the obligations of investigators in the course of gathering evidence. This legislation would play a significant role in preventing human rights violations and procedural irregularities in the process of collecting evidence.

The courts should be dynamic in making decisions which enhance the jurisprudence relating to evidence obtained through human rights violations. There should be a shift from reliance on a procedural approach to a human rights approach in making decisions. The decisions made should reflect the need to uphold human rights as the first priority. The procedural aspects of the chain of investigations should be used to enhance a fair trial. There is a heavy reliance on the reliability theory of evidence. A shift to the use of the deterrent and protective theories should also be made. This would deter the police from committing human rights violations and protect accused persons being placed at an unfair disadvantage due to the conduct of the police. The burden of proof should be on the prosecution to prove that evidence was obtained without the violation of any of the rights of the accused. This would serve to protect the integrity of the criminal justice system by ensuring the presumption of innocence, the principle of legality, the protection of the right not to self-incriminate, and the right to remain silent.

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### **List of Abbreviations**

AHRLJ	African Human Rights Law Journal
CIDT	cruel, inhuman or degrading treatment
DPP	Directorate of Public Prosecutions
IHRLR	International Human Rights Law Review
IJEP	International Journal of Evidence and Proof
JLOS	Justice, Law and Order Sector
Mil L Rev	Military Law Review
SACJ	South African Journal of Criminal Justice