

The right to pre-trial silence as part of the right to a free and fair trial: An overview

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Summary

The right to pre-trial silence as part of the right to a free and fair trial is included in many international human rights treaties, albeit not expressly. The exact content of this right is, however, not clearly defined and the scope thereof differs in various jurisdictions. In this contribution, the provisions of the African Charter, decisions of the European Court of Human Rights and the position in South Africa are discussed. As a general rule, it can be stated that it is accepted that during the pre-trial stage the right to remain silent serves as a safeguard against the abuse of powers. There is, however, a difference of opinion as to what extent negative inferences can be drawn from pre-trial silence. We conclude that it ought to be impermissible to draw an adverse inference as to the guilt or the credibility of the accused from his pre-trial silence alone.

1 Introduction

Since the end of World War II, human rights have played an increasingly important role in international law.¹ The right to a free and fair trial has formed one of the basic human rights since its inclusion in the 1948

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¹ J Dugard *International law — A South African perspective* (2000) 234.

Universal Declaration of Human Rights (Universal Declaration).² It was subsequently included in most international human rights treaties such as the International Covenant on Civil and Political Rights (CCPR),³ the European Convention on Human Rights and Fundamental Freedoms (European Convention),⁴ the American Convention on Human Rights (American Convention)⁵ and the African Charter on Human and Peoples' Rights (African Charter).⁶ Respected authors such as Dugard even regard it to form part of customary international law.⁷

Some international instruments, such as the European Convention, include a detailed description of the right to a free and fair trial, while others, like the African Charter,⁸ indirectly provide for the right to a fair trial. The right to a free and fair trial is also protected in the domestic laws⁹ of most democratic orders.

Most international instruments do not specifically refer to the right to silence. The right to silence, and specifically pre-trial silence, is usually protected as part of the right to a free and fair trial. Express reference to the right to silence, is, however, made in CCPR. CCPR provides that everyone has the right not to be compelled to testify against themselves or to confess to guilt.¹⁰ This right is generally known as the common law privilege against self-incrimination and is the corollary of the right to silence.¹¹

The right to silence was referred to in the European Court of Human Rights' decision of *Murray v United Kingdom*¹² as a 'generally recognised international standard'.¹³ The Court stated further that, while the right to silence is not an absolute right, it nevertheless lies at the heart of the notion of a fair trial.¹⁴ Historically, the right to silence developed as a procedural protection against state coercion and as a fundamental element of the notion of a fair trial.¹⁵

In this paper the right to pre-trial silence is discussed with reference to:

² Art 10 Universal Declaration.

³ Art 14 CCPR.

⁴ Art 6 European Convention.

⁵ Art 8 American Convention.

⁶ Arts 7 & 26 African Charter.

⁷ Dugard (n 1 above) 241.

⁸ Arts 5, 6, 7 & 26 African Charter.

⁹ See *inter alia* sec 35 of the Constitution of the Republic of South Africa Act 108 of 1996 and secs 7-14 & 24(2) of the Canadian Charter of Rights and Freedoms.

¹⁰ Art 14(3)(g) CCPR.

¹¹ C Theophilopoulos 'The European Convention on Human Rights and the right to silence: The lesson for South Africa' (2003) 36 *De Jure* 372 373.

¹² *Murray v United Kingdom* (1996) 22 EHRR 29.

¹³ n 12 above, para 45.

¹⁴ n 12 above, paras 29 & 56.

¹⁵ *Saunders v United Kingdom* (1997) 23 EHRR 313.

- the provision for this right in the African Charter and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles and Guidelines), drafted by the African Commission on Human and Peoples' Rights;¹⁶
- the application of this right by the European Court of Human Rights; and
- the development and application of this right in South Africa.

In conclusion, we set out our views as to what the right to pre-trial silence should entail.

2 The African Charter on Human and Peoples' Rights

As mentioned above, the African Charter only indirectly provides for the right to a free and fair trial. The protection of this right in the African Charter can be inferred from the following: Article 5 provides for the protection of the right to human dignity of every individual and recognition of his legal status.¹⁷ Article 6 protects the right to liberty and security of person and prohibits the deprivation of freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained.¹⁸ Article 7 provides that everyone shall have the right to have his cause heard, which comprises of the right to appeal, the right to be presumed innocent, the right to defence, and the right to be tried within a reasonable time by an impartial court or tribunal. It also refers, in subsection 2, to the principle of legality.¹⁹ Article 26 places a duty on state parties to guarantee the independence of the courts.²⁰

¹⁶ Adopted at its 33rd ordinary session in Niamey, Niger in May 2003.

¹⁷ Art 5 of the African Charter provides: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

¹⁸ Art 6 of the African Charter provides: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

¹⁹ Art 7 of the African Charter provides: '1 Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2 No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

²⁰ Art 26 of the African Charter provides: 'States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'

None of these articles specifically contains provisions relating to the right to silence. However, the African Commission on Human and Peoples' Rights (African Commission) is mandated by article 45(1)(b) of the African Charter to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and freedoms. As a result, the African Commission drafted Principles and Guidelines. These Principles and Guidelines are not binding on state parties to the African Charter, but are indicative of how the right to a free and fair trial is interpreted by the African Commission. It is submitted that these Principles and Guidelines will have persuasive value in the African Court on Human and Peoples' Rights. In these Principles and Guidelines, the right to silence, including pre-trial silence, is expressly provided for.²¹

The Preamble of the Principles and Guidelines recognises that it is necessary to formulate and lay down principles and rules to strengthen and supplement the provisions relating to a fair trial contained in the African Charter and to reflect international standards.

The Principles and Guidelines are divided into various sections. Section A deals with the general principles applicable to all legal proceedings in Africa and lays down principles and guidelines regarding fair and public hearings and independent and impartial tribunals. Section B deals with judicial training; section C with the right to an effective remedy; section D with court records and public access; section E with *locus standi*; section F with the role of prosecutors; section G with access to lawyers and legal services; section H with legal aid and assistance; section I with independence of lawyers; section J with cross-border collaboration; section K with access to judicial services; section L with the prohibition of civilians to be tried by military courts; section M with provisions regarding arrest and detention; section N with provisions relating to criminal charges; section O with children and the right to a fair trial; section P with victims of crime and abuse of power; section Q with traditional courts; section R contains a non-derogability clause; and section S contains the definitions.

Section M of the Principles and Guidelines deals extensively with provisions applicable to arrest and detention. It lays down various guidelines regarding the rights of arrested persons which state parties should observe. The pre-trial right to silence is specifically protected in Part 2, which deals with rights upon arrest.²² Subsection (f) deals with the right

²¹ See secs M, N & O of the Principles and Guidelines.

²² Sec M Part 2 of the Principles and Guidelines provides for rights upon arrest: '(a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her; (b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right; (c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must

upon arrest not to be obligated to answer any questions or participate in any interrogation without his or her lawyer being present.²³

Section N deals with provisions applicable to proceedings relating to criminal charges. Part 6 thereof (in subsection (d)) deals with the accused person's right not to be compelled to testify against himself or to confess to guilt.²⁴ Subsection (d)(1) provides for the exclusion of any confession or other evidence obtained through coercion or force. An admission or confession obtained during *incommunicado* detention shall be considered to have been obtained by coercion and thus be excluded. Subsection (d)(2) provides that silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.

From the above, it is clear that the right to silence, including pre-trial silence, is protected by the African Charter, as expanded on by the Principles and Guidelines, as an integral part of the right to a fair trial.²⁵ The exposition in the Principles and Guidelines is, generally

include the fact of their arrest or detention and the place the person is kept in custody; (d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization; (e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization; (f) Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present; (g) Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution; (h) Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.'

²³ Sec M Part 2(f): 'Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.'

²⁴ Section N Part 6(d): 'The accused has the right not to be compelled to testify against him or herself or to confess to guilt. 1 Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during *incommunicado* detention shall be considered to have been obtained by coercion. 2 Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.'

²⁵ The African Commission's Principles and Guidelines includes a non-derogatory clause which provides that not even times of war or other similar conditions may be invoked to justify a derogation from the right to a fair trial.

speaking, in accordance with other international instruments²⁶ and with some common law jurisdictions. It is therefore worthwhile to compare the position as stated by the European Court of Human Rights and some common law jurisdictions.

3 The European Court of Human Rights

Article 6(1) of the European Convention does not expressly provide for the right to silence.²⁷ Prior to the 1993 decision in *Funke v France*,²⁸ the European Court of Human Rights did not interpret the European Convention as providing protection for an individual's right to silence and privilege against self-incrimination.

In this case, the Court read an implied privilege against self-incrimination in the wording of article 6(1) of the European Convention.²⁹ The Court held that the European silence principle is a fundamental part of the European *communis opinio*, which places the burden of proof on the prosecution. According to the Court, it consists of two essential elements, namely a right to silence by the suspect during the pre-trial stage and the right to silence of an accused at trial, and, secondly, the privilege against self-incrimination which may be claimed by both the suspect and the accused.³⁰

The European silence principle is an extension of the principle that, where the state fails to prove its case against the accused, the accused is entitled to a discharge. It entails the following:³¹

- (a) The right is protected by article 6(1) of the European Convention but is not absolute and is subject to reasonable limitation.
- (b) It may be invoked by a suspect during pre-trial stage and by the accused at trial.
- (c) It applies to all legal and quasi-legal proceedings which lead to a criminal sanction, penalty or fine, including insolvency, competition, anti-trust and tax investigations.
- (d) The privilege against self-incrimination may be claimed by the witness personally to avoid self incrimination but also to avoid incrimination of a third party.

²⁶ See *inter alia* Amnesty International's Principles and Guidelines on the Right to a Free and Fair Trial as well as art 8 of the American Convention which provides for the right to a fair trial.

²⁷ This article provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law. . .'.

²⁸ (1993) 16 EHRR 297 326.

²⁹ Theophilopoulos (n 11 above) 373.

³⁰ As above.

³¹ Theophilopoulos (n 11 above) 374-375.

- (e) The right to silence applies to oral testimony and the discovery of documents, but not to non-testimonial evidence or physical (real) evidence.
- (f) The suspect must be informed of this right at the earliest possible stage.

It is proposed that article 6(1) of the European Convention should now be read with article 14(3)(g) of CCPR,³² which expressly recognises the right not to give incriminatory evidence against oneself.³³

In *Murray v United Kingdom*,³⁴ the European Court of Human Rights held that, in certain circumstances, the drawing of an adverse inference from silence during pre-trial investigations would not violate the right to remain silent. The Court, in this case, had to consider the question whether the provisions in the Criminal Evidence Order 1988 (Northern Ireland), permitting an adverse inference to be drawn from an accused's silence during interrogation, infringe articles 6(1) and (2) of the European Convention which protect the right to a fair trial.

The majority reasoned that no right is absolute and that the right to silence may be limited in appropriate circumstances. Caution is, however, required when drawing adverse inferences. Five members of the court disagreed with the majority finding. Judge Bussitil,³⁵ on behalf of the minority, held:

In my view, the attachment of adverse inferences to the right to silence in the pre-trial stage is a means of compulsion, in that it can constitute a form of direct pressure exercised by the police to obtain evidence from a suspect. The co-operation of the detainee can be obtained during interrogation with the threat of adverse inferences being drawn against him for remaining silent. Thus the suspect is faced with Hobson's choice — he either testifies or, if he chooses to remain silent, he has to risk the consequences, thereby automatically losing his protection against self-incrimination.

In *Averill v United Kingdom*,³⁶ the European Court of Human Rights confirmed the decision by the majority in *Murray*,³⁷ and held that adverse inferences may be drawn in a situation where the suspect refuses to co-operate if there was a clear calling for an innocent explanation. It was held that an adverse inference may not be drawn when the accused's reason for silence is based on a good cause. Where the accused's silence is based on a policy of non-co-operation³⁸ with the police, a reasonable inference may be drawn.

³² '[E]veryone shall be entitled . . . [n]ot to be compelled to testify against himself or to confess to guilt.'

³³ Theophilopoulos (n 11 above) 373.

³⁴ n 12 above.

³⁵ n 12 above, 51.

³⁶ (2001) 31 EHRR 372 para 47.

³⁷ n 12 above.

³⁸ This would be where the accused refuses to answer questions put to him or by the police solely because he refuses to co-operate and for no other legitimate reason.

The European Court of Human Rights thus allows adverse inferences to be drawn from the pre-trial silence of accused persons under appropriate circumstances. The failure of the European Convention to give a clear definition of, and justification for, the right to silence is, however, a major criticism of the Convention.³⁹ Hopefully the African Commission's Principles and Guidelines, which deals extensively with the right to silence, will enable the African Court on Human and Peoples' Rights to bring about legal certainty in this regard.

4 South Africa

South African courts have traditionally made a distinction between pre-trial silence and silence at trial. The South African Constitution also clearly distinguishes between the right to pre-trial silence⁴⁰ and the right to remain silent at trial.⁴¹ An accused person may rely on his right to remain silent in the pre-trial, trial and sentencing phase.⁴²

4.1 Silence at trial

In South Africa, the right to remain silent at trial includes the right not to give evidence against oneself and not to answer incriminating questions. The South African courts diligently protected the right to remain silent at trial, even before this right was constitutionally enshrined.⁴³ Section 35(3)(h) of the Constitution now grants every accused the right to be presumed innocent, to remain silent and not to testify during proceedings. The only instance where an adverse inference may be drawn from the accused's silence at trial is after the prosecution has established a *prima facie* case and the accused then still relies on his right to remain silent.⁴⁴

The position is the same in Canada. In *R v Noble*,⁴⁵ the Canadian Supreme Court held that an accused's silence at trial could not be used as inculpatory evidence against him. The Court held that if silence is treated as evidence, then the right to silence is violated, as it implies that the accused has no choice but to furnish evidence, whether or not

³⁹ Theophilopoulos (n 11 above), 385.

⁴⁰ Sec 35(1)(a) of the Constitution provides: 'Everyone who is arrested for allegedly committing an offence has the right to remain silent.'

⁴¹ Sec 35(3)(h) of the Constitution provides: 'Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.'

⁴² *S v Dzukuda* 2000 2 SACR 443 (CC).

⁴³ See *inter alia Gosschalk v Rossouw* 1966 2 SA 476 (C) 490-3; *R v Weyer* 1958 3 SA 467 (G) 470-2.

⁴⁴ See *S v Mthetwa* 1972 3 SA 766 (A); *S v Snyman* 1968 2 582 (A).

⁴⁵ (1997) 1 SCR 874, 6 CR (5th) 1.

he elects to testify. The Court held that the burden on the prosecution to prove the case beyond a reasonable doubt against the accused prohibits the accused's silence from being used as evidence by the state to meet the required standard of proof. The Court consequently held that if silence may be used against the accused to establish guilt, then part of the burden of proof is shifted to the accused.

It is, however, generally accepted in South Africa that the right to remain silent at trial may be limited in appropriate circumstances. In *S v Boesak*,⁴⁶ it was argued that an adverse inference was drawn against the accused from the fact that the defence did not challenge the authenticity of a letter, as well as from the fact that the accused elected not to testify during trial. The Constitutional Court held that the right to remain silent does not mean that there are no consequences attached to an election to remain silent at trial. If an accused person chooses to remain silent at trial in the face of evidence calling for an answer, the court is, depending on the weight of the evidence, entitled to conclude, as happened *in casu*, that the evidence is sufficient to prove guilt beyond a reasonable doubt.

4.2 South African common law position regarding pre-trial silence

At common law, suspects and accused persons have the right to remain silent during pre-trial investigations, which includes the right not to answer questions put to them by the police. No adverse inference of guilt can be drawn from the accused's pre-trial silence alone and the state has to prove its case beyond a reasonable doubt. It cannot be expected of an accused to help his adversary (the state) to prove the case against him by furnishing information to the police.

This rule originates from the common law.⁴⁷ Tindall JA formulated the rule as follows:⁴⁸

[I]f 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 for 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.

Section 35(1)(a) of the Constitution⁴⁹ states that everyone who is arrested has the right to remain silent. The High Court held in *S v Brown*⁵⁰ that, although the right to remain silent was recognised at

⁴⁶ 2001 1 SA 912 (CC).

⁴⁷ See *R v Mashелеle & Another* 1944 AD 571 where the Court relied on the English decision of *R v Leckey* 1943 2 All ER 665.

⁴⁸ n 47 above, 583-4. See also *S v Zwayi* 1998 2 BCLR 242 (CK).

⁴⁹ n 9 above.

⁵⁰ 1996 2 SACR 49 (NC).

common law, its constitutional status required a change in emphasis in its application. The right to remain silent, including pre-trial silence, calls for even stricter enforcement and, when needed, protection due to its constitutional status.

4.3 South African Law Commission's proposals

The Law Commission⁵¹ proposed two options regarding pre-trial silence:

- Firstly, that the right to remain silent should be developed to allow for adverse inferences to be drawn from an accused's pre-trial silence; and
- Secondly, that no change to the common law position, as confirmed by the Constitution, be made.

The first option, to allow for an adverse inference to be drawn during trial from an accused person's pre-trial silence, entails that in circumstances where the police question an accused during pre-trial investigations and the accused:

- fails to mention certain facts when questioned or charged; or
- fails or refuses to account for objects, substances or marks, which may implicate the accused in the commission of the offence, found in his or her possession at the time of arrest; or
- fails to account for his or her presence at a particular place which may implicate the accused in the commission of the offence;

an adverse inference, which may be reasonable and justifiable in the circumstances, may be drawn against the accused at the subsequent trial. The Law Commission, however, does not state whether the adverse inference sought to be drawn against the accused from his pre-trial silence should only affect the accused's credibility or whether it even may, in certain circumstances, be used to establish the accused's guilt. It is significant that the Law Commission uses the word 'may' and not 'must' with regard to the reasonableness and justifiability of the adverse inference.

The Law Commission is clear on the fact that an accused person's silence at trial may never, on its own, establish the guilt of the accused. The state must submit a *prima facie* case and if the accused then relies on his right to remain silent at trial, the accused may be found guilty. The conviction is based on his failure to answer to the *prima facie* case made out by the state — and is not based on his silence or the adverse inference drawn against him as a result of his silence. This is in agreement with the common law position regarding the accused's silence at trial.

⁵¹ The South African Law Commission, a government appointed body, which is tasked with researching and advising on law reform in South Africa.

The situation is different with regard to the pre-trial silence of the accused. Where an accused relies on his right to remain silent during interrogation, no *prima facie* case has yet been established against the accused, and it is in this instance that the Law Commission's proposals are not clear. Does evidence during trial of an accused's pre-trial silence only affect the accused's credibility or may an adverse inference be drawn, in appropriate circumstances, and used to establish the guilt of the accused? Although the Law Commission is not clear on what the adverse inference may be used for (credibility or guilt), it is submitted that it surely could not have been the intention of the Law Commission that the inference may be used, on its own, to prove the guilt of the accused.

The Law Commission's proposal regarding the drawing of an adverse inference from the pre-trial silence of the accused is based on sections 34, 36 and 37 of the Criminal Justice and Public Order Act 1994 (England). In English law, the right to remain silent has been substantially diminished. In terms of this Act, the court may draw a 'proper inference' from the accused's failure to mention relevant facts at pre-trial investigations. The court is also allowed, in terms of this act, to draw 'such inferences as appear proper' from silence at trial. Before the enactment of this Act, the English Law was similar to the South African common law position. In terms of recent developments, English law tends to move away from the complex evidentiary rules of common law jurisdictions⁵² towards the civil law principle where a more free evaluation of evidence exists. It is argued that this free evaluation of evidence assists the court in its search for the truth. However, not unexpectedly, the transplants of legal concepts of civil jurisdictions into common law jurisdictions carries its own problems. To allow a lay jury, which is not required to give reasons for its verdict (as is the case in England) to draw adverse inferences from an accused person's pre-trial silence may be inappropriate and dangerous in those circumstances.⁵³

In Canada, the Supreme Court of Appeal held in *R v Herbert*⁵⁴ that section 7 of the Charter⁵⁵ accords a detained person a pre-trial right to remain silent. The scope of that right extends beyond the narrow formulation of the confession rule.⁵⁶ The scope of the right to silence in

⁵² A Choo & S Nash 'Inappropriate procedural transplants: Recent developments in the law of evidence in England and Wales' paper delivered at the 2nd World Conference on Crime, Durban, South Africa 2001.

⁵³ As above.

⁵⁴ (1990) 2 SCR 151.

⁵⁵ The Canadian Charter in secs 7-14 & 24(2) protects the right to a fair trial. Sec 11(c) protects the right to silence indirectly by providing that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

⁵⁶ n 53 above, 152 (the confessions rule entails that an accused may not be forced to make a confession).

the pre-trial detention period must be based on the fundamental concept of the suspect's right to freely choose whether to speak to the authorities or to remain silent. The Court re-iterated that this right may be limited, but such limitation must be prescribed by law as required by section 1 of the Charter.

In the Canadian case of *R v Crawford*,⁵⁷ the Court on appeal confirmed that the right to pre-trial silence is not absolute. The Court said that the application of Charter values must take into account other interests and in particular other Charter values, which may conflict with their unrestricted and literal enforcement. The Court held that the right to remain silent means that a suspect has the right to refuse to talk to the police and not to be penalised for it. Further, since the police have informed the accused of the right not to speak, his exercise of this right cannot logically found an inference of credibility when he later testifies. Since the law of evidence precludes the admission of prior consistent statements to bolster the credibility of an accused, admission of evidence of an accused's silence would lead to further difficulties. If pre-trial silence can lead to a negative inference as to credibility, then the accused is placed in the anomalous situation of being obliged to make a prior consistent statement to the police, in order to avoid cross-examination on his silence. He is at the same time unable to tender that very evidence in support of his own credibility.

4.4 The South African Constitutional Court⁵⁸

The Constitutional Court in South Africa has had the opportunity to deal with the right to pre-trial silence. The right to remain silent and the constitutionality of a limitation of this right was considered in *S v Manamela & Another (Director of Justice Intervening)*.⁵⁹ The Constitutional Court confirmed that the right to silence, like the presumption of innocence, was firmly rooted in our law. These rights are inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at trial. The Court found that there is nothing unreasonable, oppressive or unduly intrusive in asking an accused, who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce evidence that he had reasonable cause to believe that the goods were acquired from the owner or some other person who had the authority to dispose thereof. The Court held that the limitation of the right to remain silent contained in this provision was justified.

In *S v Thebus and Another*,⁶⁰ the Constitutional Court had the

⁵⁷ (1995) 1 SCR 858.

⁵⁸ The Constitutional Court is the highest court in constitutional matters in South Africa.

⁵⁹ 2000 3 SA 1 (CC).

⁶⁰ 2003 2 SACR 319 (CC).

opportunity to decide on the permissibility to draw adverse inferences from an accused person's pre-trial silence. The justices of the Constitutional Court were not *ad idem* on this issue.⁶¹ Four separate judgments were delivered. The first appellant contended, with regard to the right to pre-trial silence, that both the trial court and the Supreme Court of Appeal drew an adverse inference from his failure to disclose his alibi before the trial. It was argued that such an inference constitutes an infringement on his constitutional right to remain silent as afforded by section 35(1)(a) of the Constitution.

It is convenient to summarise the judgment on the basis of the three questions discussed in the main judgment:

- Is it permissible to draw an adverse inference of guilt from the pre-trial silence of the accused?
- Is it permissible to draw an adverse inference regarding the credibility of the accused from his pre-trial silence?
- Is it permissible to cross-examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her response?

4.4.1 Is it permissible to draw an adverse inference of guilt from the pre-trial silence of the accused?

In the main judgment (Moseneke J, Chaskalson CJ and Madala J), it was held that it is not permissible to draw an adverse inference of guilt from the pre-trial silence of the accused. Goldstone J, O'Reagan J, Ackermann J and Mokgoro J also held that no inference as to the guilt of the accused may be drawn from the pre-trial silence of the accused in not disclosing his alibi defence. Yacoob J held that the right to silence, properly interpreted, has an impact on the way a criminal trial should be conducted. The need to ensure a fair criminal trial is the key to determine whether a right has been infringed. Such right will only be infringed if it is implicated in a way that renders the trial unfair. Drawing an inference to guilt solely on the silence of the accused would render the trial unfair. Ngcobo J and Langa DCJ held that on the facts of the matter, the first appellant's right to pre-trial silence was not implicated. The first appellant was warned of his right to remain silent and of the consequences of making a statement. The first appellant did not assert his right to remain silent. Guilt can, however, not be inferred from silence only.

4.4.2 Is it permissible to draw an adverse inference on the credibility of the accused from his pre-trial silence?

Moseneke J, Chaskalson CJ and Madala J held that a distinction may properly be drawn between an inference on silence and a credibility

⁶¹ See T van der Walt & SP de la Harpe 'The right to pre-trial silence: *S v Thebus* 2003 (2) SACR 319 (CC)' (2004) 17 *South African Journal of Criminal Justice* 379 for a detailed discussion of this case.

finding connected with the election of an accused person to remain silent. The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is well recognised in our common law. This is a law of general application. The late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone, it does not justify an inference of guilt. The absence of a prior warning that the non-disclosure of an alibi will be used against the accused is a factor which is taken into consideration when determining the weight to be placed on the evidence of the alibi. A failure to disclose an alibi timeously is not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him or her for failing to disclose the alibi timeously within the factual context of the evidence as a whole. The limited adverse inference regarding the credibility of the accused is a justifiable limitation in terms of section 36(1).

Goldstone J, O'Reagan J, Ackermann J and Mokgoro J held that no valid distinction can be drawn between adverse inferences going to guilt and adverse inferences going to credibility. In the context of an alibi, the practical effect of the adverse inference to be drawn for the purpose of credit, namely that the alibi evidence is not to be believed, will often be no different from the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty.

Yacoob J held that the appropriate protection of the right to silence does not require the cross-examination of the accused person about the reasons for the failure to disclose an alibi to be absolutely protected. It does not prohibit a judicial officer from drawing any legitimate inference from the evidence revealed by the cross-examination, the silence of the accused and all the relevant surrounding evidence. The overarching and abiding obligation of a judicial officer is to ensure a fair trial. Drawing an inference as to credibility solely on the silence of the accused would, however, render a trial unfair.

Ngcobo J and Langa DCJ held that the first appellant did not assert his right to silence.

4.4.3 Is it permissible to cross-examine an accused on the failure to disclose an alibi defence timeously, thus taking into account his or her responses?

Moseneke J, Chaskalson CJ and Madala J held that it is permissible to cross-examine an accused on why he or she opted to remain silent on an alibi or on any other defence. It is quite proper, and often necessary, to probe in cross-examination the reasons why the accused chose to

remain silent. This goes to the credibility of the accused and would not unjustifiably limit the content of the right to remain silent. There are, however, limits to such cross-examination. Such cross-examination must always be exercised with due regard to fairness towards both the accused and the prosecution and without unduly encroaching upon the right to remain silent or limiting a proper enquiry for the late disclosure of a defence.

Goldstone J, O'Reagan J, Ackermann J and Mokgoro J held that it is not permissible for an accused person to be cross-examined on why he or she opted to remain silent on an alibi or any other defence. No accused person should have to account for the exercise of a right entrenched in the Constitution. It would secondly be unfair to allow such cross-examination in the light of the accused person having been informed of the right to remain silent without at the same time being informed that he or she might be requested to account for the positive exercise of the right at the trial. This only relates to cross-examination on the pre-trial silence of the accused. It does not preclude other lines of cross-examination designed to test the veracity of the alibi.

Yacoob J held that cross-examination concerning why an alibi was not disclosed infringes the right to silence only if it renders the trial unfair. The responses obtained through cross-examination may be taken into account by judicial officers in conjunction with the failure to disclose an alibi in the process of making an inference, provided that the way in which the inference is made and the drawing of the inference does not render the trial unfair. All courts must be sensitive to the need of a fair trial in the process of determining whether or not to allow cross-examination or to use silence as a factor in drawing an inference.

Ngcobo J and Langa DCJ held that the first appellant's right to silence was not implicated as he chose to make an exculpatory statement which was inconsistent with his alibi. Where the accused person, having been warned of the right to remain silent and of the consequences of not remaining silent, chooses to make an exculpatory statement which differs from his or her alibi, it is a legitimate topic for cross-examination.

4.5 Opposing views of South African authors

Van Dijkhorst⁶² states that some aspects of the right to silence have become a procedural impediment, which is illogical, unnecessary, unwarranted, unworkable and costly beyond imagination. He argues that the right to be presumed innocent and the right to remain silent should not be confused. Although both are enshrined in our Constitution and fall within the concept of a fair trial, the principle underlying the presumption of innocence is basically to eliminate the risk of con-

⁶² K van Dijkhorst 'The right to silence: Is the game worth the candle?' (2001) 113 *South African Law Journal* 26-58.

viction based on factual error.⁶³ That is not the case with the right to remain silent. He does not pertinently distinguish between the right to remain silent at trial and pre-trial silence. What is clear is that he is not opposed to allowing adverse inferences to be drawn from an accused's pre-trial silence in appropriate circumstances.

Van Dijkhorst alleges that the defendants of the right to remain silent are unaware of the realities of practice. Emotionally, they rely on fairness, but fairness only to the accused. He argues that it is unfair to society to allow a dangerous criminal to walk free, as happens in cases where the accused relies on his right to remain silent and no adverse inference may be drawn against him, thus resulting in the acquittal of the accused. He emphasises the cost implications⁶⁴ in cases where the accused relies on his right to remain silent. He urges that a criminal justice system, which is fair and just, fast and effective, as well as user-friendly to witnesses and victims, should be created. In short — the rights of victims should also be protected.

According to Joubert,⁶⁵ no adverse inference should be drawn against a person who exercises his right to silence for two reasons:

- Firstly, no such inference *could* be drawn, for there may be a number of reasons why the accused relies on his right to remain silent (the accused may be scared, he may not trust the police or the criminal justice system, he may (erroneously) believe that there is no evidence against him, or he may simply want to exercise the right of which he has been informed, or a number of other reasons).
- Secondly, no such inference could logically be drawn to fill the gaps in the state's case. Where an element of crime has not been proven by the state (at least *prima facie*), then the fact that the accused refuses to give evidence at trial or answer questions before trial cannot logically fill that gap.

It is therefore not fair to assume that the accused cannot give a reasonable explanation for his silence. Joubert also states⁶⁶ that people should not be penalised for exercising their rights or else the rights afforded to individuals in reality amount to nothing, at best, and to liabilities or traps, at worst.

The right to silence is also inextricably linked with the right to be presumed innocent. If the state is expected to prove an accused person's guilt beyond a reasonable doubt as a result of the presumption of innocence, then it follows that the state is also expected to do so on its own without the help of the accused.

⁶³ n 62 above, 26.

⁶⁴ n 62 above, 43-46.

⁶⁵ JJ Joubert (ed) *Criminal procedure handbook* (2003) 10-11.

⁶⁶ n 65 above, 11.

Schwikkard⁶⁷ states that to draw an adverse inference against the accused on the basis of him relying on his right to remain silent at trial cannot be used as inculpatory evidence against the accused. To allow the drawing of a negative inference from a constitutionally inferred right negates the existence of that right.⁶⁸ Where an accused relies on his right to remain silent during his trial and the state presents a *prima facie* case resulting in the conviction of the accused, the conviction should be based on the undisputed evidence (proof beyond a reasonable doubt) and not on the accused's failure to testify. This is the position where the accused relied on his right to remain silent at trial and where an accused relied on his pre-trial right to remain silent and refused to, for example, answer questions put to him by the police. Evidence of the accused's failure to answer police questions may of course be tendered during trial, but no adverse inference may be drawn against the accused on grounds thereof. The accused must be afforded the opportunity, at trial, to give evidence. Failure to answer to the *prima facie* case put forward by the state might lead to conviction, but as explained above, not because of the failure to testify (relying on the right to remain silent) but because the *prima facie* case of the state now becomes proof beyond a reasonable doubt.

5 Conclusion

The law on the right to silence as part of the right to a free and fair trial is not altogether clear. On the one hand, we have the argument that a criminal trial is a truth-seeking process and if any adverse inferences from the accused's pre-trial silence may help the trier of fact discovering the truth, then such inferences should be allowed. Coupled with this is the fact that it is costly and time-consuming to allow accused persons to rely on their right to remain silent before the trial, without attaching any adverse consequences to their decision.⁶⁹

On the other hand, we have the argument that in an accusatorial criminal procedure system, such as in many countries in Africa, it is not advisable to limit the accused's right to pre-trial silence. An accused is a full legal subject with rights in an accusatorial system and as such entitled to participate in his trial in any way he deems fit — including the right to be allowed to rely on his right to remain silent as a way to conduct his defence — the so-called passive defence.⁷⁰

We are of the view that the protection of the right to remain silent during pre-trial investigations serves as a safeguard against abuse of

⁶⁷ P.J. Schwikkard *Presumption of innocence* (1999) 118-125.

⁶⁸ As above.

⁶⁹ Van Dijkhorst (n 62 above).

⁷⁰ Joubert (n 65 above).

powers, by *inter alia* the police. If negative inferences can be drawn from pre-trial silence, police may use unacceptable methods to gather evidence. An arrested person should not be coerced to make a statement or to answer questions put to him or her by the police. If an arrestee is informed that should he or she rely on his or her right to remain silent during pre-trial investigations, an adverse inference can be drawn against him or her at his or her trial, it amounts to a form of coercion. If he or she is not thus informed and an adverse inference is drawn against him or her at trial, it can be argued that he or she was not properly informed about the consequences of the exercising of his or her rights.

We are of the view that it ought to be impermissible to draw an adverse inference as to the guilt or the credibility of the accused from his or her pre-trial silence alone. Silence should also never be used to establish the guilt of an accused. To do so, would shift part of the burden of proof to the accused, and would render the trial unfair.

It would also be unfair to warn a person that he or she has a right to remain silent and thereafter to use that very silence to discredit the person at trial by drawing an adverse inference on credibility from the silence alone. However, this ought not to exclude cross-examination on an accused's choice to exercise his or her right to pre-trial silence. If an accused at trial leads evidence as to a defence, and he or she is given a fair opportunity to explain his or her choice to remain silent, the right to silence is limited, but justifiably so if the explanation is only taken into account to determine credibility. The weight attached to the accused's evidence ought to depend *inter alia* on the explanation given. At the end, taking into consideration all the relevant factors, the cumulative effect of all the evidence may justify the drawing of an adverse inference regarding the credibility of the accused.

No negative inference ought to be drawn if the accused's explanation is that he or she remained silent because he or she was merely exercising his or her right to pre-trial silence in accordance with the warning given that he or she has the right to silence. Any cross-examination on the accused's election to exercise his or her right to pre-trial silence must be reasonable. Such cross-examination must allow for the possibility that the accused can exercise his or her right to pre-trial silence with no other motive than the exercise of a fundamental human right.

It seems logical that the right to remain silent is not infringed where an accused person is warned that he or she has a right to remain silent and he or she then willingly chooses to give information. In such circumstances, the accused willingly waives his or her right to pre-trial silence and should carry the consequences of his or her choice. Similarly, if cross-examination is fair and done to determine the veracity of the accused's defence, cross-examination as to an accused's failure to disclose a defence timeously is in our view not an unjustifiable infringement of an accused's right to remain silent.

If one has regard to the different views with regard to the application of the right to pre-trial silence as part of the right to a free and fair trial, the last word has not yet been spoken. In due course, the African Court will have to give guidance in this regard to African countries.