The admissibility of evidence obtained through human rights violations in Mauritius

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ABSTRACT

The Constitution of Mauritius, unlike those of South Africa, Zimbabwe and Kenya, does not guide courts on the issue of the admissibility of evidence obtained through human rights. Jurisprudence from Mauritius shows courts have grappled with the issue of establishing the criteria that have to be followed in determining whether or not to admit evidence obtained through human rights violations. Courts have limited their jurisprudence to a few rights: the right to freedom from torture; the right to remain silent; the right against self-incrimination; and the right to counsel. The jurisprudence is inconsistent on the issue of whether or not evidence obtained through human rights violations should be automatically excluded. In some cases courts have held that such evidence is automatically inadmissible whereas in others courts have held that such evidence may be admissible. It is recommended that the best approach would be to only exclude such evidence if its admission would render the trial unfair or would be detrimental to the administration of justice.

1 Introduction

The Constitution of Mauritius,[1] (the Constitution), provides for various human rights[2] which include the rights of arrested and detained persons. The Constitution is silent on the issue of the relationship between the right to a fair trial[3] and the admissibility of evidence obtained through human rights violations. However, the Supreme Court and the lower courts, that is, the intermediary court and the district court, have grappled with the issue of whether or not to admit evidence obtained through human rights violations. Practice from Mauritius has been consistent on the fact that evidence obtained through torture

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1 Constitution of the Republic of Mauritius 1968 (hereinafter 'the Constitution').

2 See Chapter II of the Constitution, Protection of Fundamental Rights and Freedoms of the Individual.

3 The Supreme Court has referred to the right to a fair hearing as 'sacrosanct'. See *Sabapathee v State* (1997) SCJ 337 at 20.

is inadmissible.[4] However, the same cannot be said with regards to evidence obtained through the violation of other rights especially the arrested person's right to counsel and the right to remain silent. In the light of the fact that the Constitution does not guide courts on how to deal with evidence obtained through human rights violations, the Supreme Court has had to change its positions on whether such evidence has to be automatically inadmissible or whether there could be cases where it may be admitted. The purpose of this article is to highlight that jurisprudence and argue that the Supreme Court's recent position to the effect that evidence obtained through human rights violations has to be excluded, irrespective of the minor nature of the violation, is too rigid and not in line with the modern trend in other African countries such as South Africa,[5] Kenya,[6] Zimbabwe,[7] and Namibia.[8] It is also not in line with the approaches taken in jurisdictions outside of Africa such as Hong Kong[9] and could lead to some members of the public, especially victims of crime, to lose confidence in the criminal justice system in cases where the accused are acquitted simply because the police violated their rights. As the Mauritian district court held in *Police v Khodabaccus Ahmad Nooradeen,*[10] '[t]he ultimate duty of the court is to restore public confidence in the criminal justice system'.[11] It is recommended, *inter alia*, that there is a need for the Supreme Court to devise a flexible approach when dealing with evidence obtained through human rights violations. This evidence should only be held

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4 See *R v Mensa* (1989) MR 140, (1989) SCJ 243 (where the Court held that evidence obtained through oppression, which includes cruel treatment, is inadmissible). Under clause 43(6)*(a)* of the Police and Criminal Evidence Bill (No IV of 2013), 'oppression' is defined to include 'torture, inhuman or degrading treatment'.

5 Section 35(5) of the South African Constitution provides that '[e]vidence 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'.

6 Article 50(4) of the Constitution of Kenya (2010) provides that '[e]vidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice'.

7 Article 70(3) of the Constitution of Zimbabwe (2013) provides that '[i]n any criminal trial, evidence that has been obtained in a manner that violates any provision of the Chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest'.

8 JD Mujuzi 'The admissibility in Namibia of evidence obtained through human rights violations' (2016) 16 *Afr Hum Rights L J* 407-434.

9 See for example, *HKSAR v Mohammad Riaz Khan* (2012)15 HKCFAR 232 at para [22]; *HKSAR v. Yu Lik Wai William* [2015] HKDC 719; DCCC 325/2014 (30 June 2015) at para 171.

10 *Police v Khodabaccus Ahmad Nooradeen* (2007) MBG 215 at 6.

11 Ibid p.6. See also *Police v Peerbux Mohammad Hossman* (2007) MBG 219 at 8.

inadmissible if its admission would render the accused's trial unfair or would be detrimental to the administration of justice. The author will start by highlighting the relevant rights that courts have dealt with when grappling with the admissibility of evidence obtained through human rights violations before discussing the case law illustrating how courts have dealt with that evidence.

2 The rights of arrested and detained persons

Jurisprudence from Mauritian courts shows that three rights have been dealt with by courts on the question of the admissibility of evidence obtained through human rights violations: the right to freedom from torture; the right to silence; and the right to consult with counsel. Of the three rights, only the right to freedom from torture is provided for in the Constitution.[12] The other two rights have been read into the Constitution and therefore their detailed discussion is necessary. It is beyond the scope of this article to discuss in detail how Mauritian courts have dealt with evidence obtained through torture.

Article 5 of the Constitution provides for the right to personal liberty and it stipulates the rights of arrested and detained persons. For the purposes of this article, the most important clauses are 2 and 3 which are to the effect that:

> '(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.
> (3) Any person who is arrested or detained – (a) for the purpose of bringing him before a court in execution of the order of a court; (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence; or (c) upon reasonable suspicion of his being likely to commit breaches of the peace, and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial; and if any person arrested or detained as mentioned in paragraph (c) is not brought before a court within reasonable time in order that the court may decide whether to order him to give security for his good behaviour, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally.'

[12] Article 7(1) of the Constitution provides that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment'.

Although art 5 provides for several rights of arrested and detained persons, jurisprudence from Mauritian courts shows that only two rights have been emphasised when it comes to the issue of dealing with evidence obtained through human rights violations: the right to silence and the right to consult with a legal representative at the time of arrest. As mentioned above, this has been the case although these rights are not expressly provided for under the Constitution. It is therefore important to discuss how courts have developed these rights before illustrating how courts have approached the issue of admitting evidence obtained through a violation of these rights.

2.1 The right to silence

Unlike in the constitutions of other African countries,[13] an arrested person's right to silence is not provided for under the Mauritian constitution.[14] Mauritian courts have held that this right derives from Rule II of the Judges' Rules[15] and from the accused's right against self-incrimination. Rule II provides that:

> 'As soon as a police officer has reasonable suspicion that a person has committed an offence, that person shall be cautioned before putting any questions or any further question relating to that offence. "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.'

Rule II has to be read together with Rule III which regulates the caution that has to be administered when a person has been charged. The Mauritian Supreme Court has not been entirely consistent on the issue of whether or not police officers are required to follow the

[13] See for example, art 63*(f)* of the Constitution of Angola (2010); art 19(2) of the Constitution of Ethiopia (1994); art 49(1)*(a)*(ii) of the Constitution of Kenya (2010); art 42(2)*(a)* of the Constitution of Malawi (1994); art 23 of the Constitution of Morocco (2011); art 35(2) of the Constitution of Nigeria (1999); art 18(3) of the Constitution of Seychelles (1993); s 35(1)(*a*) of the Constitution of South Africa (1996); and art 50(4)*(a)* of the Constitution of Zimbabwe (2013).

[14] For a detailed discussion of the meaning of the right to silence see *Police v Dwarka Hans Yatindranath* (2007) INT 210.

[15] In *The State v Bundhun* (2006) SCJ 254 at 9-10, the Supreme Court observed that 'The Judges Rules in their present form were…made by the Judges in England for the guidance of police officers conducting investigations. They were formulated by a Committee of Judges and approved by a meeting of all the Queen's Bench Judges. They were made applicable to Mauritius in March 1965, as indicated in a letter dated 12 March 1965 written by Tom Vickers, Chief Secretary, on behalf of the Governor of Mauritius, and addressed to the Commissioner of Police.'

Judges' Rules strictly. For example, in *Martin v R*,[16] the Court held that for a statement obtained by the police from an arrested person to be admissible, the 'Judges Rules…must be scrupulously respected' by the police.[17] However, in the majority of the cases, the Supreme Court has held that failure by the police to follow the Judges' Rules to obtain a statement from an arrested person does not render the statement automatically inadmissible.[18] This is so because the Judges' Rules have no force of law but they are 'administrative directions for the guidance of the police authorities'.[19] In other words, '[i]n general the Judges' Rules are not rules of law but are rules of practice to guide police officers in conducting their investigations'.[20] The latter approach has been followed in some African countries such as Kenya,[21] Seychelles,[22] and Nigeria[23] where courts have also held that failure to follow the Judges' Rules does not render the accused's statement automatically inadmissible. The Judges' Rules also serve a limited purpose. As the Supreme Court held in *Carpen M v The State*,[24] 'the Judges' Rules are guidelines for enquiring officers to prevent an abuse of authority on their part and to ensure that confessions are made voluntarily.'[25] However, evidence obtained in violation of the Judges Rules is inadmissible if its admission would be prejudicial to the accused.[26]

In the light of the fact that the Constitution does not provide for the arrested person's right to remain silent, in *The Queen v M. Boyjoo and R.D. Boyjoo*[27] the Supreme Court referred to art 10(7) of the Constitution which is to the effect that '[n]o person who is tried for a

16 *Martin v R* (1991) MR 102; (1991) SCJ 221.

17 Ibid 6.

18 See for example, *Zariwala R H v State* (1999) SCJ 36 (the Court held failure by the accused to a sign a statement made to the police does not render it inadmissible); *Carpen M v The State* (2010) SCJ 105 at 3.

19 *The Queen v M. Boyjoo and R.D. Boyjoo* (1991) MR 284, (1991) SCJ 379 at 4.

20 *The State v E. Madelon* (2004) SCJ 129, p.4. See also *Police v Mallet Laval Emmanuel* (2006) INT 120.

21 *Jane Betty Mwaiseje & 2 others v Republic* [1992) eKLR 8.

22 *R v Lesperance (Ruling 2)* (CO 51/2013) [2017] SCSC 33 (23 January 2017) at para 8.

23 The Nigerian Supreme Court held in *Iregu Ejima Hassan v The State* (2016) LPELR-42554(SC) at paras 17-18, that '[t]he Judges Rules are rules made by English Judges to guide English Police Officers. The Rules are not Rules of law but Rules of administrative practice. They are rules made for the more efficient and effective administration of justice and therefore should never be used to defeat justice'. See also *Ogbenevweren Stanley Ogisugo v The State* (2015) LPELR-24544(CA); *John v State* (2015) LPELR-40424(CA); *Samuel Ojegele* v *The State* (1988) NWLR (Pt.71) 414.

24 *Carpen M v The State* (2010) SCJ 105.

25 Ibid 3.

26 *Police v Rosse* (2015) INT 368.

27 *Boyjoo* supra (n19).

criminal offence shall be compelled to give evidence at the trial' and held that:

> 'This constitutional principle against self-incrimination is not limited to cases where the accused is charged before a court of law. At the stage of the police enquiry, when he has been charged and before he is questioned, the accused must be told of his right of silence, leaving it to him to make the choice whether he wishes to waive the privilege or not.'[28]

The Court pointed out that this right has been recognised by courts in other countries such as the United States of America.[29] The court added that:

> 'The rule against self-incrimination would be ineffective if this fact is not brought home to the accused. And bringing that fact to the accused enables him to make a choice about making a statement or not. This would be highly relevant for the purposes of the voluntariness test. Indeed failure to administer the caution may well be construed as a breach of the voluntariness test and will therefore offend against the principle of self-incrimination. This would result in the virtual exclusion of a confession on the ground that a constitutional provision would have been breached in the sense that the rule against self-incrimination and the accompanying right to be cautioned are part and parcel of the fair trial requirement which is guaranteed to an accused under the Constitution.'[30]

Likewise, in *Joymungul A K v The State*,[31] the Supreme Court held that:

> '[T]he privilege against self-incrimination is a deeply-rooted common law principle. There is no doubt that the right to remain silent and the right not to be compelled to incriminate oneself extend both to the investigation process and trial proceedings. The classic formulation of this privilege is that no one is bound to answer any question if the answer would have a tendency to expose him to any criminal charge…'[32]

In *The State v Bundhun*[33] the Supreme Court distinguished between the accused's right to remain silent at his trial which is provided for under art 10(7) of the Constitution and the suspect's right to remain silent at the time of arrest.[34] The court held that a court may draw a reasonable inference against an accused if he chooses to exercise his right to remain silent at his trial.[35] The court added that:

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[28] Ibid 2.
[29] Ibid 2.
[30] Ibid 3.
[31] *Joymungul A K v The State* (2014) SCJ 143.
[32] Ibid 8.
[33] *Bundhun* supra (n15).
[34] Ibid 10.
[35] Ibid 11.

> 'The right to silence of a suspect at enquiry stage is really an extension of the right to silence enjoyed by an accused party. Under an old Common Law rule in England no adverse inference could be drawn against a suspect when he had, after caution, exercised his right to silence, but this rule is not part of our law…and indeed has been derogated from in England itself… In my view the right to silence, which is a natural corollary of the rule that the prosecution bears the burden of proof in a criminal trial, does not carry with it at investigation stage a subsidiary right to be completely spared from questioning once the decision to exercise that right has been communicated to the police. A reasonable number of questions may still be put to the suspect, and his response – be it mere silence – noted. However, care must be taken by the police, once a suspect has indicated an intention to exercise his right to silence, not to indulge in an oppressive form of questioning – as opposed to simply putting questions and recording the response – as the suspect's right to silence would then be infringed.'[36]

However, the fact that an accused person has exercised his right to remain silent is not 'an acknowledgement of the truth of the accusation' against him.[37] The importance of interpreting the right to a fair trial to include what transpires at the investigative stage was emphasised by the Supreme Court in *Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs*[38] when the Court held that '[t]he safeguard of a fair trial in fact includes and encompasses the methods of investigation by the prosecuting authorities'.[39] If the accused alleges before court that at the time of his arrest the police did not inform him of his right to silence, the police must convince the court of the manner in which the accused was informed of his right otherwise the accused's statement to the police will be inadmissible.[40]

An arrested person may waive his right to remain silent but before the waiver can be valid, the court has to be convinced that '[h]e expressed in unequivocal terms that he had fully understood his right to remain silent and not to say anything if he so wished and that whatever he may say would be put into writing and may be used as evidence against him.'[41] In practice, the police warn the accused that he has a right to remain silent and that if he chooses to speak, whatever he says will be written down and can be used in evidence

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36 Ibid 11.

37 *Carpenen G. N. v The State & Reine De Carthage G. v The State* (2014) SCJ 382, p.9. See also *Police v Arena Gregorio Marco* (2014) INT 90 for the discussion of the right to remain silent at the trial.

38 *Jugnauth P K v The Secretary to the Cabinet and Head of the Civil Service Affairs* (2013) SCJ 132.

39 Ibid 12.

40 *Police v Mohamad Yusuf Sheik Issah Ramjaun* (2016) PMP 231.

41 *Joymungul* supra (n31) 9.

against him.[42] In *ICAC v Balraj Appanah*[43] the court held that: 'this caution is also not given in void but as a result of the suspect's right to silence and right against self-incrimination, hence the words used in the caution…conveying to him in clear terms that he has a right not to self-incriminate himself and a right to silence'.[44] Failure to inform the arrested person that whatever he says may be used against him is in breach of the Judges' Rules although that in itself does not mean that the statement is automatically inadmissible.[45] An arrested person may waive his right to silence even if he is intoxicated as long as he fully appreciates the content of the right and the consequences of waiving it.[46] The accused may waive his rights to silence or to consult with counsel before making a statement to the police. In the event of waiving his rights, evidence obtained from him will not be admissible if 'the accused waived her constitutional right against self-incrimination not willingly but through by unfair means used by the police'.[47] Questioning the accused after warning him of his right to remain silent does not necessarily amount to a violation of that right unless the questioning was oppressive.[48]

2.2 The right to consult with counsel

Article 5(3)*(c)* of the Constitution provides that an arrested or detained person 'shall be afforded reasonable facilities to consult a legal representative of his own choice.' The Judges' Rules provide that:

> '[E]very person at any stage of an investigation should be able to communicate and to consult privately with a legal adviser. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so'.[49]

Paragraph 7 of Appendix B to the Judges' Rules is to the effect that:

> '(a) A person in police custody should be allowed to speak on the telephone to his legal adviser or to his nearest relative provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so. He should be supplied on request with writing materials and his letters should be sent by post or

[42] *Police v Vencatasamy K. R* (2008) LPW 56 at 2.
[43] *ICAC v Balraj Appanah* (2017) INT 306.
[44] Ibid 3.
[45] *Rosse* supra (n26).
[46] *Police v Auliar* (2015) INT 352.
[47] Ibid 8.
[48] *Police v Mamode Paul Robert* (2010) BMB 24. For a detailed discussion of what amounts to oppressive questioning, see *R v Mensa* supra (n4).
[49] See para 3(c) of the introductory notes to the Rules.

otherwise with the least possible delay. Additionally, telegrams should be sent at once, at his own expenses.

(b) Persons in police custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in police custody should be drawn to these notices.'

Whether or not an arrested or detained person has a right to consult a legal representative of his choice is an issue which has been hotly contested in the jurisprudence of the Mauritian Supreme Court. In *The Queen v M. Boyjoo and R.D. Boyjoo*[50] the Supreme Court referred to jurisprudence from the Judicial Committee of the Privy Council, to art 5(2)*(c)* of the Constitution and to the Judges' Rules to hold that:

> '[T]he adoption of the 1964 Judges Rules in Mauritius has become part of the rights of an accused person which are protected by sections 3 and 5 of our Constitution. This would mean that the rule requiring the accused to be informed of his right to counsel is protected by our Constitution. It is therefore the duty of the police to inform an accused person of this right and not only to assume that the person is or should be aware of that right. The police should also make sure that the person has understood that right. Such an information must be passed on to the accused as early as possible to the person in detention'.[51]

For the first time in Mauritian legal history and despite the fact that the Constitution is silent on these issues, the Supreme Court held that an arrested or detained person has a right to counsel and that the police have a duty to inform him of this right. Failure by the police to inform him of this right amounts to its violation. Apart from informing him of his right to counsel, the police have a duty to ensure that the person has understood this right. It is against this background that the court added that 'the mere exhibition of notices in police stations with regard to the right to counsel is insufficient in itself to make clear to the detained person of his right to retain a lawyer.'[52] The requirement established in this case has been referred to as 'stringent.'[53] However, in *Samserally v State*[54] the court (three-judge panel) changed its position on whether a police officer has a duty to inform an arrested or detained person of his right to counsel. It referred to its reasoning in *The Queen v M. Boyjoo and R.D. Boyjoo*, to art 5(2) of the Constitution, to the Judges' Rules and to the American Supreme Court decision of Miranda and held that:

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[50] *Boyjoo* supra (n19).

[51] Ibid 5.

[52] Ibid 5.

[53] *Police v Seenarain* (2006) INT 181 at 4.

[54] *Samserally v State* (1993) MR 94, (1993) SCJ 219.

> 'Section 5(3) of the Constitution does not impose a duty on the police authority to inform a suspect that he has a right to counsel. It merely covers situations where a suspect expresses the wish to consult a legal adviser of his choice whereupon he must, by law, be afforded reasonable facilities to do so. Should the intention of the legislator be construed differently, it would follow that a. suspect who falls within the financial prescriptions qualify him to be legally represented at public expense when he is charged with criminal offence under section 10(2)*(d)* of the Constitution should, on the principle of equality before the law, have the right to be legally assisted as from the enquiry stage.'[55]

In the same year, in the case of *State v Pandiyan*,[56] the Supreme Court (the same judge who decided *The Queen v M. Boyjoo and R.D. Boyjoo*), referred to the jurisprudence from the Privy Council, from the Court of Appeal of New Zealand, and from the United Kingdom and to academic publications, but without referring to its decision in *The Queen v M. Boyjoo and R.D. Boyjoo*, held that:

> 'There would be, therefore, a duty on the part of the police to inform a person under arrest or in detention that he has a right to consult a legal adviser. To hold otherwise would be tantamount to putting a retrograde interpretation on the provisions of our Constitution relating to the fundamental rights of the individual.'[57]

The same judge came to a similar conclusion two years later in the case of *The State v Bibi Fatemah Dilmamode*[58] and observed that although *Samserally v State* had been decided by three judges and in principle was 'bound by it', he decided, 'with due respect to the judges who decided *Samserally*', to 'depart or even ignore *Samserally*' because he felt 'bound by the decisions of the Judicial Committee referred to in *Pandiyan*, as the Law Lords were interpreting provisions of the law similar to ours in these cases.'[59] It is against that background that the court concluded that 'in Mauritius, there is a duty on the police to inform a suspect of his right to counsel, unless, this would hinder the conduct of the enquiry, in which case, the police should prove conclusively that this may be so'.[60] There are at least two issues to note about the court's decision in *The State v Bibi Fatemah Dilmamode*. First, apart from reaffirming the decision in *Pandiyan*, the court also adds an exception to the right to consult with counsel. This means that this right is not absolute. However, the exception has to be justified

[55] Ibid 4-5.

[56] *State v Pandiyan* (1993) MR 169, (1993) SCJ 317.

[57] Ibid 7.

[58] *The State v Bibi Fatemah Dilmamode* (1995) SCJ 416, (1995) MR 186.

[59] Ibid 13.

[60] Ibid 14.

by the police. Secondly, the court did not overrule *Samserally*. It just ignored it.

Two years later, in *State v Coowar*,[61] the Supreme Court, in a three-judge panel, had to determine, 'in view of the conflicting Mauritian case-law' the issue of whether 'the Police [are] under a legal obligation under ss 3 and 5(3)*(b)* of the Constitution, coupled with the Judges' Rules 1965, to inform an accused party who is in police custody of his right to Counsel?'.[62] The court referred to the jurisprudence from the Privy Council and from the United Kingdom and to its conflicting decisions and held that 'the Police is…under a legal obligation to inform a person in police custody of his right to communicate with Counsel'.[63] Equally important, the court also held that *Samserally* was 'wrongly decided'.[64] This decision brought the debate of whether or not the police have a duty to inform an arrested person of the right to counsel to an end. Although this right is not expressly provided for in the Constitution, the Supreme Court held in *Roberts Peter Wayne v The State of Mauritius*[65] the suspect's right to legal representation has, through case law, 'been elevated to a constitutional one'.[66]

Since the 1997 decision in *State v Coowar*, courts, both the Supreme Court and the lower courts have developed jurisprudence to expound on the content of the arrested or detained person's right to counsel. This jurisprudence shows the following issues: the police have to inform the arrested or detained person of the right to counsel as early as possible so as to protect his rights to silence and against self-incrimination;[67] a suspect may waive his right to counsel but for 'any waiver in order to be valid and effective must be one made by the suspect after having given full thought to the consequence of giving up such a right';[68] a suspect does not have 'a constitutional right to legal representation at public expense at the enquiry stage'[69] and 'that there being no constitutional right to legal aid at enquiry stage, there is no such right of the accused to be so informed'.[70] As the Supreme Court put it in *State v Moazzam Ali Shaikh*,[71] the Constitution is 'clear that the right

[61] *State v Coowar* (1997) SCJ 193, (1997) MR 123.

[62] Ibid 1.

[63] Ibid 6.

[64] Ibid 6.

[65] *Roberts Peter Wayne v The State of Mauritius* (2015) SCJ 290.

[66] Ibid 4.

[67] *State v Coowar Mamode Aniff* (1998) SCJ 64, (1998) MR 10.

[68] *Coowar Mamode Aniff* supra (n67) p.10. See also *Police v Golambossein Ramzan Elama* (2018) INT 3; *Rajubally M.R. v The State* (2016) SCJ 197, in which the suspect waived his right to counsel.

[69] *State v Mamitiana Thomson Rasamoelina* (1998) SCJ 265 at 6.

[70] *Mamitiana Thomson Rasamoelina* supra (n69) 7.

[71] *State v Moazzam Ali Shaikh* (1998) SCJ 80.

to counsel was limited to one of the suspect's own choice which could only be effected through his own expenses and not at public expense where a counsel is imposed upon him'.[72] However, there have been cases where the police have informed arrested persons of their right to legal aid before taking statements from them.[73]

The police have made facilities, such as free telephone call services, available to an arrested person to call his lawyer;[74] the police have no obligation to ask the accused 'if he wants to contact a relative with a view to retain the services of counsel';[75] an arrested person's lawyer is permitted to be present when he is being interrogated by the police[76] or other law enforcement agencies[77] although the 'fact that the statements were recorded in the absence of counsel is not itself a breach of the Judges' Rules and the Constitution';[78] the obligation to inform a person of his right to counsel only arises when he is arrested or under police custody[79] although in practice the police inform such persons of their right to counsel.[80] If a person is educated and aware of his right to counsel, the police do not have a duty to inform him of that right and the evidence obtained from him will be admissible especially if the court is 'extremely doubtful whether counsel's advice would have added anything to the accused's knowledge of his rights'[81] or where 'he is perfectly aware of his right to contact counsel'.[82] The arrested or detained person has to be informed of his right to counsel in a language that he understands.[83] It is now imperative to highlight the jurisprudence from Mauritian courts dealing with the admissibility of evidence obtained through a violation of the right to counsel and the right to silence.

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72 Ibid 4.

73 *Police v Jeetoo Sanjayduth* (2016) MBG 94 at 2.

74 *Police v Francis Gerald Michel* (2006) INT 206; *Police v Sooklall M T* (2008) INT 266.

75 *Police v L Boodhoo* (2015) INT 93 at 5.

76 *Police v Dwarka Hans Yatindranath* (2007) INT 210; *Police v Bageenath Gino Guillano Clovis – Ruling* (2014) LPW 159; *Police v Sundanum Richard Ansley* (2013) LPW 87.

77 *Police v Joymungul Ambar Kumar* (2010) INT 12.

78 *Boodhoo* supra (n75) 5.

79 *Police v Poonappa Naiken Veenesham* (2007) LPW 124.

80 *Police v Vencatasamy K. R.* (2008) LPW 256.

81 *Police v Ramsamy Devadrassen* (2007) LPW 473 at 11. See also *Police v Raphael* (2015) ROD 113 at para 24.

82 *Police v Lam Yee Man Lam Chai Kee* (2008) LPW 396 at 5.

83 *Police v Auliar* supra (n46) (the accused was informed of his rights in the Creole language); *Police v Mamun Ranna* (2015) PL3 55 (the accused, a foreign national, was informed of his rights in his mother tongue); *Police v Madhoo Kunal* (2011) PL3 9 (the accused made his statement to the police in the Creole language).

3 The admissibility of evidence obtained through human rights violations

With the exception of the right to freedom from torture where courts have held that evidence obtained through torture is inadmissible, the position on the admissibility of evidence obtained through human rights violations, in particular the violations of the rights to silence and to consult with counsel, remains unclear in Mauritius. The discussion below illustrates that Mauritian courts have taken two irreconcilable approaches on this issue: in some decisions, courts have held that evidence obtained through human rights violations must be excluded whereas in others, courts have held that, depending on the circumstances of the case, evidence obtained through human rights violations may be admitted. Cases on both positions will be illustrated below.

As mentioned above, the right of an arrested person to remain silent is not expressly provided for in the Mauritian constitution. The Supreme Court has referred to the accused's right not to be compelled to testify at his trial and the Judges' Rules that read the right of an arrested person to remain silent into the constitution. It has been mentioned above that the Supreme Court held that failure by the police to adhere to the Judges' Rules does not render a statement obtained from an arrested person automatically inadmissible. Elevating the arrested person's right to remain silent to a constitutional right means that the admissibility of evidence obtained through a violation of this right ceases to be governed by the Judges' Rules. It is now governed by the Constitution. It is against that background that the Supreme Court held in *The Queen v M. Boyjoo and R.D. Boyjoo*[84] that

> 'Violations of fundamental rights under the Constitution should not be looked upon with levity…To that extent the English approach to breaches of the Judges' Rules [that 'these rules have not the force of law; they are administrative directions and observance of which police authorities should enforce upon their subordinates as tending to the fair administration of justice'] may not now be applicable to Mauritius in so far as the right of silence and the giving of the caution as well as access to a legal adviser are concerned.'[85]

In *State v Coowar Mamode Aniff*[86] the Supreme Court, for the first time, dealt directly with the issue of whether there are circumstances in which evidence obtained through human rights violations may be admitted. The police had not informed the accused of his right to counsel at the time of arrest. The court held that a breach of the

[84] *Boyjoo* supra (n19).
[85] Ibid 3.
[86] *Coowar Mamode Aniff* supra (n61).

Judges' Rules should be distinguished from a breach of a fundamental right. Evidence obtained through a violation of the Judges' Rules may be admissible but that the same approach 'cannot be applied' when dealing with 'a breach of a fundamental right protected by the Constitution'.[87] The court referred to its earlier case law and added that:

> '[T]he Constitution must be observed as absolute command…and that "violation of fundamental rights under the Constitution should not be looked upon with levity…, it is clear that when dealing with fundamental rights, the provisions of the Constitution should not be treated lightly and that violation of those provisions should be sanctioned severely otherwise the provisions of the Constitution would cease to have any meaningful content whatsoever'.[88]

The court referred to jurisprudence from Canadian courts to the effect that evidence obtained through human rights violations may be admitted unless its admission would 'bring the administration of justice into disrepute', to hold that Canadian courts were justified to use such a test in dealing with such evidence because they are expressly permitted to do so by s 24(2) of the Canadian Charter of Rights and Freedoms. The court added that '[s]uch provision is unfortunately not found in our Constitution and…one should not read more into the Constitution than as provided or else one would be taxed of doing judicial activism.'[89] The court concluded that:

> '[I]n the light of the authorities above and in the absence in our Constitution of a provision giving the court the discretion to admit evidence obtained in breach of a fundamental right, evidence so obtained would *per se* be inadmissible and I do not have any discretion in the matter'.[90]

The court came to a similar conclusion in *Geneviève Alain Steeve v The State*[91] in which the accused's right to counsel had been violated by the police. However, in *State v E. Madelon*[92] the Supreme Court appears to have changed its position on this issue. In this case the police, contrary to the Judges' Rules, had not sufficiently informed the accused of the offence against him before they questioned him. The court found that '[i]n general the Judges Rules are not rules of law but are rules of practice to guide police officers in conducting their investigations'.[93] After discussing the different views on whether an arrested person

87 Ibid 4.
88 Ibid 8.
89 Ibid 12.
90 Ibid 12.
91 *Geneviève Alain Steeve* supra (n91).
92 *Madelon* supra (n92).
93 Ibid 4.

had a constitutional right to be informed of the offence against him before he is questioned by the police, the Court held that:

> 'It must be borne in mind that not every breach of a constitutional provision concerning the rights of an individual is fatal as it depends on the nature of the constitutional guarantee and the nature of the breach. In *Allie Mohammed v The State* [1999 2 WLR 552], which is a case that was decided subsequent to Coowar (supra) [Coowar v The State [1997 MR 123]], the Privy Council held that a voluntary confession obtained in breach of a suspect's rights under the Constitution of Trinidad and Tobago was not automatically inadmissible and the trial judge had a discretion to admit it.'[94]

There are two points to note about this decision. Firstly, in this case the Supreme Court neither refers to nor overrules its 1998 decision in *State v Coowar Mamode Aniff.*[95] The 1997 decision it refers to does not expressly deal with the issue of the test to be used in determining the admissibility of evidence obtained through human rights violations. The only issue that the court dealt with in its 1997 decision was: 'is the Police under a legal obligation under sections 3 and 5(3)*(b)* of the Constitution, coupled with the Judges' Rules 1965, to inform an accused party who is in police custody of his right to Counsel?'[96] Secondly, in the Privy Council decision referred to by the court, the Judicial Committee of the Privy Council was not dealing with a case from Mauritius but rather one from Trinidad and Tobago. In *Societe United Docks v Government of Mauritius; and Desmarais Brothers Ltd. v Government of Mauritius*[97] the Supreme Court held that '[t]he decisions of the Privy Council are binding upon us when they apply Mauritian law.'[98] In cases where the Privy Council is constraining the law of another country other than Mauritius, 'their decision would be binding only if it were first shown that, on the point in issue, [the foreign] law and Mauritian law are identical.'[99] In *M G C Pointu v The Minister of Education and Science*[100] the Supreme Court quoted with approval a conference paper to the effect, inter alia, that judgements of the Privy Council are of 'strong persuasive authority in cases involving the interpretation of constitutional guarantees of fundamental rights.'[101]

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94 Ibid 7.

95 *Coowar Mamode Aniff* supra (n61).

96 *Coowar Mamode Aniff* (supra (61) 1.

97 *Societe United Docks v Government of Mauritius and Desmarais Brothers Ltd. v Government of Mauritius* (1981) MR 500.

98 Ibid 15.

99 Ibid 15.

100 *M G C Pointu v The Minister of Education and Science* (1995) SCJ 350, (1995) MR 132.

101 Ibid 17.

In *State v Rome A N*,[102] the Supreme Court, without referring to any of its previous decisions on the issue of whether evidence obtained through human rights violations is admissible, held that '[a] voluntary confession obtained in breach of the Rules or a suspect's constitutional rights are not *per se* inadmissible.'[103] The court added that a confession obtained through human rights violations will only be excluded if a court is of the view that justice requires its exclusion.[104] The above discussion shows that there is still room for the argument that the position in Mauritius on the admissibility of evidence obtained through human rights violations is far from being clear.

Although there are conflicting Supreme Court decisions on this issue, lower courts seem to have adopted an approach which allows them to exercise discretion in determining whether or not to admit evidence obtained through human rights violations. For example, in *Police v Ramsamy Devadrassen*,[105] the district court, without referring to any Supreme Court or foreign decision, held that:

> 'Although the accused has a constitutional right to be assisted by counsel, a breach of such a right in itself does not automatically lead to the exclusion of any statement recorded. The seriousness and the effect of such a breach or other police malpractice have to be assessed. Hence, such breach needs to be material and substantial. As stated earlier, it has not been proved to the required standard that there has been a breach of the accused's constitutional right to counsel. There is merely some doubt as to whether he wished to be assisted or not'.[106]

Likewise, in *Police v Lam Yee Man Lam Chai Kee*[107] the same court and the same magistrate as in *Police v Ramsamy Devadrassen*,[108] came to the same conclusion. In *Police v Chandraduth Sharma Benidin*,[109] the district court referred to the Privy Council decision of *Mohammed (Allie) v The State*[110] and to the Judges' Rules and held that:

> 'Thus a voluntary statement obtained in breach of a fundamental right which may also be constitutional (e.g right to counsel) is not per se inadmissible; there is no automatic exclusion of such a statement in evidence. Admissibility will depend upon the seriousness, extent and effect of the breach.'[111]

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[102] *State v Rome A N* (2011) SCJ 319.
[103] Ibid 17.
[104] Ibid 17.
[105] *Police v Ramsamy Devadrassen* supra (n81).
[106] Ibid 10.
[107] *Police v Lam Yee Man Lam Chai Kee* (2008) LPW 396.
[108] *Police v Ramsamy Devadrassen* supra (n81).
[109] *Police v Chandraduth Sharma Benidin* (2009) RDR 212.
[110] *Mohammed (Allie) v The State* (Trinidad and Tobago)[1998] UKPC 49, [1999] 2 AC 111.
[111] *Chandraduth Sharma Benidin* supra (n109) 5.

Thus, in exercising their discretion, lower courts may exclude evidence obtained through human rights violations. However, sometimes the accused will be acquitted when his right was violated by the police although no evidence was obtained from him. For example, in *Police v Bhugwat Bhoomessur*[112] the district court held that failure by the police to inform the accused of the charge against him violated his right under art 10(2)*(b)* of the Constitution and therefore could not convict him of the offence against him in the light of that violation.[113] The accused must be informed of the charge unequivocally otherwise there will be a violation of the Judges' Rules and art 10 of the Constitution.[114] However, the police do not have a duty to inform the accused of the exact charge against him.[115]

Apart from the rights to freedom from torture, silence and access to counsel, the Supreme Court has also indirectly dealt with the issue of the admissibility of evidence obtained through violating the right to privacy. Article 9 of the constitution of Mauritius provides for the right to privacy.[116] Although the Supreme Court is yet to deal directly with the issue of whether or not evidence obtained through a violation of the right to privacy is admissible, there is room for the argument that the admissibility or otherwise of such evidence will depend on the conduct of the police. In *State v Pandiyan*[117] the Supreme Court held that 'evidence obtained as a result of an illegal search may well be excluded by a trial Court' and that 'the discretion to exclude should only be exercised where the police had acted in a reprehensible manner.'[118] This holding also raises the possibility of the Supreme Court developing jurisprudence indicating the difference(s) between illegally obtained evidence and unconstitutionally obtained evidence.

One important issue that the Supreme Court has not paid serious attention to is the admissibility of evidence obtained through violating the accused's right in a foreign country. In *State v Coowar Mamode*

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[112] *Police v Bhugwat Bhoomessur* (2009) PMP 166.

[113] See also *Police v Sooknauth Premowtee* – Ruling (2017) INT 62; *Police v Sheik Mohammad Nasser Jaulim* (2015) INT 292.

[114] *Police v Boodhun Vedanand* (2009) RDR 14.

[115] See for example, *Police v Mosaheb Barath* (2017) INT 266; *Police v M. A. Peerboccus* (2017) INT 232; *Police v Bholah Rajkumar* (2017) INT 253; *Police v D. Callichurn* (2017) INT 199; *Police v Marthe Louise Jimmy* (2018) INT 1; *ICAC v Ramdany Rajaramsing* (2017) INT 217, p.5; *Police v Prevost Louis Fulbert Henric* (2018) INT 45.

[116] For a detailed discussion of the right to privacy in Mauritius, see R Mahadew 'Does the Mauritian Constitution protect the right to privacy? An insight from *Madhewoo v The State of Mauritius*' (2018) 18 *Afr Hum Rights L J* 189-204.

[117] *Pandiyan* supra (n56).

[118] Ibid 10.

Aniff,[119] the accused, who was concealing drugs in his stomach, was arrested at the Air Mauritius counter at an airport in Mumbai, India, when he was about to board an aircraft to Mauritius. After his arrest in India, he made statements to a police officer although he, the police officer, had not informed him of his right to counsel. He was prosecuted in Mauritius for attempting to import the drugs to that country and the statements he made to a police officer in India were adduced in evidence. The court observed that:

> '[I]t is not disputed that the accused was not told of his right to counsel for there is evidence that it was not the practice in India that an accused party is informed of his right to counsel. It is only when an accused party requests to be assisted by counsel that the accused is brought to a Magistrate who would do the needful. In the absence of such request, it appears that there was no obligation on the part of the enquiring officer to tell a suspect that he has the right to be assisted by counsel.'[120]

As illustrated earlier, the court held that the statements in question were inadmissible because, unlike the position in Canada, Mauritian courts did not have discretion to admit evidence obtained through a violation of a constitutional right. It is argued that in this case the Supreme court left two difficult questions unanswered – this is because they were not amongst the issues that the court was required to resolve. First, whether the Constitution of Mauritius is of extra-territorial application – that is, are Mauritians who are arrested abroad expected to enjoy the rights which are provided for in the Mauritian Constitution even if those rights are not protected in a foreign country? These rights include the right to remain silent and the right to counsel which are not expressly provided for in the Constitution but found in case law. Secondly, are foreign police officers expected to know which rights a Mauritian national is entitled to at the point of arrest so that those rights are protected at the time of arrest for the evidence obtained from such Mauritian nationals to be admissible? It is argued that in the light of the fact that Mauritius signed an agreement with India on Mutual Legal Assistance in Criminal Matters,[121] which agreement is silent on the procedure to be followed by Indian officials in obtaining evidence from Mauritian nationals arrested in India, there may be a need for that agreement to be amended to address the issue of how Indian police officers should approach the obtaining of evidence from Mauritian nationals who are arrested in India for the purpose of being prosecuted in Mauritius. This would ensure that correct procedures

[119] *Coowar Mamode Aniff* supra (n61).

[120] Ibid 2.

[121] 'Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius on Mutual Legal Assistance in Criminal Matters' (24 October 2005). Available at http://www.cbi.gov.in/interpol/mlat/Maritius.pdf

are adopted to minimise the danger of having that evidence rejected by Mauritian courts.

Another important issue is whether the police have a duty to inform a person, who has not yet been arrested, of his constitutional rights. It has to be remembered that art 5(2) of the Constitution is only applicable to arrested and detained persons and case law shows that the rights to silence, against self-incrimination and to counsel are only applicable to arrested and detained persons. In *State v Ruhumatally M.J.*[122] the police delayed the arrest of the accused until after he had made a statement. He argued that the statement in question was inadmissible because he had not been informed of his right to remain silent and the right to counsel. The prosecution argued that the accused had no such rights because he had neither been arrested nor detained at the time he made the statement. The Supreme Court held that:

> 'The issue of the police delaying the arrest of an accused has serious implications. As has been stated earlier, the moment a suspect is arrested he has to be informed of the reason of his arrest and this is a constitutional right. One way of by-passing that constitutional right is for the police to allow a suspect to speak without knowing what he is suspected of and thus wait until they have a more or less air-tight case against the suspect before arresting him. He is then informed of the offence that he is suspected of having committed; but, by that time, it is much too late and the constitutional protection afforded to the suspect has, for all intents and purposes, been rendered nugatory. I do not wish to embark on an exercise to determine whether the police acted deliberately in this manner in the present case. However, it is amply clear from the written records that the accused was, through the approach taken by the police concerning the timing of his arrest, denied the opportunity of getting to know what was reproached of him in a timely manner'.[123]

In holding that the statement was inadmissible, the court held that 'the present case goes beyond the mere non-respect of certain technicalities in the Judges' Rules. The manner in which the police dealt with the accused as a whole is indicative of and reveals an overall unfairness which taints the procedure pursuant to which the statement was obtained from him.'[124] The above decision shows that the court does not hold that a person who is yet to be arrested or detained is protected by art 5(2) of the Constitution. The court also does not hold that a person who is yet to be arrested has a right to remain silent and a right to consult with counsel. Such a person is protected by the Judges' Rules. In *Police v Poonappa Naiken Veenesham*[125] the district court

[122] *State v Ruhumatally M.J.* (2015) SCJ 384.
[123] Ibid 9.
[124] Ibid 10.
[125] *Police v Poonappa Naiken Veenesham* (2007) LPW 124.

held that case law from the Supreme Court 'establishes that the police is under a legal obligation to inform a person in police custody of his right to communicate with Counsel…However, in the present case the accused was neither detained nor in police custody, so that the above obligation does not apply here.'[126] However, there are cases where law enforcement officers have informed people who have not yet been arrested of their 'constitutional rights' such as the right to retain a lawyer before they question them for their alleged involvement in the commission of offences.[127] Sometimes a person is not sure whether or not he has been arrested by the police.[128] Where there is doubt on the issue of whether or not the accused had been arrested at the time he made a statement, the court will look at the prevailing circumstances at the time in question.[129] The issue of whether or not a person who is yet to be arrested is protected by a constitutional provision which is applicable to arrested persons has resulted in conflicting decisions from South African courts. Section 35(1) of the South African constitution provides for the rights of arrested persons.[130] In *S v Orrie*[131] the court held that s 35(1) is applicable to suspects. However, in *Khan v S*,[132] the court held that s 35(1) is not applicable to suspects because '[t]he rights of "suspects" are adequately catered for by the application of the well-established provisions of the Judges' Rules'.[133] In *S v Lachman*[134] and in *Zwane and Another v S*[135] the Supreme Court of Appeal left the question open. It would appear that the Mauritian Supreme Court has settled this issue once and for all. People who have not yet been arrested are protected by the Judges' Rules and not by art 5(2) of

[126] Ibid 6.

[127] See for example, *ICAC v B. Jory* (2016) INT 170.

[128] *Police v Raphael* supra (n81).

[129] *Nobin v The Queen* (1952) MR 295.

[130] It is to the effect that '1. Everyone who is arrested for allegedly committing an offence has the right a. to remain silent; b. to be informed promptly i. of the right to remain silent; and ii. of the consequences of not remaining silent; c. not to be compelled to make any confession or admission that could be used in evidence against that person; d. to be brought before a court as soon as reasonably possible, but not later than i. 48 hours after the arrest; or ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and f. to be released from detention if the interests of justice permit, subject to reasonable conditions.'

[131] *S v Orrie* (SS 32/2003) [2004] ZAWCHC 25 (14 October 2004); 2004 (3) SA 584 (C). See also *Makwakwa v S* (A409/13) [2014] ZAGPJHC 185 (24 March 2014); 2014 JDR 1679 (G).

[132] *Khan v S* 2010 (2) SACR 476 (KZP).

[133] Ibid para [22].

[134] In *S v Lachman* 2010 (2) SACR 52 (SCA) at para [39].

[135] *Zwane v S* (426/13) [2013] ZASCA 165 (27 November 2013) at para [8].

the Constitution and they do not have the rights to remain silent and consult with counsel. The admissibility of any evidence obtained from them will be determined by resorting to the Judges' Rules.

The Supreme Court is yet to deal with the issue of whether evidence by private individuals in violation of a person's rights is admissible. It should be recalled that in Mauritian law private individuals are allowed to arrest suspects and in *State v Pandiyan*[136] the Supreme Court held that a private person who arrests on suspicion has a duty to inform the arrestee of the reason for his arrest. In *Police v Sooklall M T*[137] one of the accused made a confession to the police but he later retracted it on the ground that prior to making it, he had been assaulted by the complainant (the victim of the accused's crime) and that the complainant 'threatened to lock him up if he did not confess along the lines which the …[complainant] had told him.'[138] In holding that the accused had made his statement voluntarily and therefore the statement was admissible, the intermediate court observed that:

> 'The complaint of threat or inducement in the present case is not directed towards the persons in authority who recorded and witnessed the statement of accused…but instead towards a witness who is on the prosecution list and towards another person who, admittedly, does not form part of the investigating team. It is not the contention of the defence that the police officers who recorded and witnessed the first statement of the accused knew anything about the fact that he had been beaten a few days earlier by the … [complainant] who had allegedly threatened him to make confess to the charge in his statement'.[139]

It is argued that when a person alleges that his right, for example the right to freedom from torture, was violated before he made a statement, whether or not the perpetrator was a private individual or a person in authority, such as a police officer, should not be the decisive factor. The decisive factor is whether evidence was obtained through violating the suspect's right. It would appear that the court was prepared to exclude the evidence if there was evidence that the police officers were aware that the accused's confession had been influenced by complainant's assaults. The court's approach creates room for the argument that evidence obtained by private individuals through violating the rights of the accused may be excluded. This approach, which could strengthen the protection of the accused's right

[136] Pandiyan supra (n56).
[137] *Police v Sooklall M T* (2008) INT 266.
[138] Ibid 2.
[139] Ibid.

to a fair trial, has also been followed in some countries such as South Africa.[140]

4 Conclusion

In this article the author has examined the issue of how courts in Mauritius have dealt with evidence obtained through human rights violations although the Constitution is silent on the manner in which courts should deal with that evidence. The fact that the Constitution is silent on this issue means that courts have limited their jurisprudence to a few rights: the right to freedom from torture; the right to remain silent; the right against self-incrimination; and the right to counsel. The jurisprudence from Mauritian courts on the issue of whether or not evidence obtained through human rights violations should be automatically excluded is not consistent. In some cases courts have held that such evidence is automatically inadmissible whereas in others courts have held that such evidence may be admissible. It is recommended that the best approach would be to only exclude such evidence if its admission would render the trial unfair or would be detrimental to the administration of justice. In the light of the fact that the Supreme Court is of the view that this test is not applicable in Mauritius because it is not provided for in the Constitution, it is recommended that the Constitution may have to be amended to expressly address this issue. Otherwise, the Supreme Court may have to revisit its jurisprudence on this issue. Courts in some jurisdictions, such as Hong Kong and Namibia, have held that there are circumstances in which evidence obtained through human rights violations is admissible notwithstanding the fact that the constitutions of these countries are silent on the issue of how courts should deal with such evidence.

[140] See *S v Mini* (B325/2013) [2015] ZAWCHC 49 (30 April 2015) (private security officers assaulted the accused and the court held that the evidence obtained as a result of the assault was inadmissible); *S v Hena* (CC1/06 , ECJ25/06) [2006] ZAECHC 11 (8 March 2006) (members of the ant-crime committee assaulted the accused and the court held that the evidence discovered as a result of the assault was inadmissible).