The limits of police deception in obtaining a confession from a suspect who is neither arrested nor detained: the Canadian Supreme Court leads the way

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Abstract
In Canada, confessions are sometimes obtained through what is commonly known as 'Mr Big' operations. These involve recruiting a suspect into a fictitious criminal organisation with a view to obtaining a confession from him or her. Because of the unique circumstances under which such confessions are made, there is real danger of abuse of power by the police and of unreliable confessions. The suspect is unaware of the status of the person hearing the confession and no constitutional warnings are necessary. This practice provides an opportunity to view police deception from a different angle. Because of the central role played by the police in obtaining these confessions, and because even reliable confessions cannot be admissible in the face of improper police conduct, it is submitted that the reliability of such confessions and the manner in which they were obtained should be considered together when judging their admissibility.

INTRODUCTION[1]

This comment considers the admissibility of confessions obtained under specific circumstances, namely, confessions made during so-called 'Mr Big' operations.[2]

This Canadian invention was considered recently by the Canadian Supreme Court in *R v Hart*[3] and involves the police recruiting a suspect

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2 For a list of authors that have considered the legality of Mr Big operations, see Elizabeth Sukkau and Joan Brockman, '"Boys, you should be in Hollywood": Perspectives on the Mr. Big Investigative Technique' (2015) 48 UBCLawRev 47. About this technique in general, see Amar Khoday, 'Scrutinizing Mr. Big: Police Trickery, The Confessions Rule and the Need To Regulate Extra-Custodial Undercover Interrogations' (2013) 60 CrimLQ 277 and Steven Smith, Veronica Stinson and Marc Patry, 'High-Risk Interrogation: Using the "Mr. Big Technique" To Elicit Confessions: Successful Innovation Or Dangerous Development in the Canadian Legal System' (2009) 15 PsycholPubPol'y&L 168.

3 *R v Hart* above [2014] 2 SCR 544.

into a fictitious criminal organisation with a view to eliciting a confession from him or her.[4] Over time, the undercover officers who have befriended the suspect demonstrate that working with the organisation is the way to financial reward, independence, and lasting friendships. The suspect participates in simulated criminal activity with the officers, and learns that violence is a necessary part of the organisation's business model and that a past history of violence is regarded as an accomplishment of which to be proud. The undercover officers point out that full membership of the organisation is conditional upon the approval of the crime boss or person commonly known as Mr Big. The operation usually peaks when Mr Big interviews the suspect. Mr Big, typically, brings up the crime the police are investigating and starts questioning the suspect about it. All denials of guilt are dismissed, and the suspect is pressed for a confession. It is made clear that the confession will bring automatic acceptance into the criminal organisation. Once the suspect confesses, the fiction is revealed and the suspect is arrested and charged.

Mr Big operations are almost always used in cold cases involving serious crimes and can produce valuable evidence. But due to the nature of Mr Big operations and the central role played by the state, there is a real threat of unreliable confessions. The very purpose of such operations is to induce confessions. There is also the risk that Mr Big operations will resort to unacceptable police tactics in order to secure a confession. In *R v Hart*, Moldaver J, on behalf of the majority of the Canadian Supreme Court, states:[5]

> As mentioned, in conducting these operations, undercover officers often cultivate an aura of violence in order to stress the importance of trust and loyalty within the organization. This can involve – as it did in this case – threats or acts of violence perpetrated in the presence of the accused. In these circumstances, it is easy to see a risk that the people will go too far, resorting to tactics which may impact on the reliability of a confession, or in some instances amount to an abuse of process.

Mr Big confessions create a unique situation for the accused who questions their admissibility, since the suspect was not aware of the status of the person hearing the confession.[6] An important safeguard is also absent as the

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4 See generally, *R v Hart* (n 3) at para 56 etc. Also see Timothy Moore, Peter Copeland and Regina Schuller, 'Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the "Mr. Big" Strategy' (2009) 55 CrimLQ 348.

5 (n 3) at para 78.

6 About the appropriateness of using deceit to obtain confessions during police interrogations, see generally Miller Shealy, 'The Hunting of Man: Lies, Damn Lies, and Police Interrogations' (2014) 4 UMiami Race & SocJustLRev 21.

usual constitutional warnings do not arise.[7] These are only given to arrested, detained and accused persons.[8] This does not, however, mean that the accused cannot rely on his or her right to a fair trial to have such evidence excluded in terms of section 35(5) of the Constitution of the Republic of South Africa, 1996.[9] As the accused, he or she is entitled to a fair trial that cannot be divorced from the police conduct that took place before he or she became an accused.[10] In addition, the court has a common-law discretion to prevent an abuse of its own processes.[11]

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7 It can be argued that both the perceived authority of the person hearing the confession and the custodial status of the suspect are moot with respect to the degree of psychological control that is being exerted in Mr Big operations – see Timothy Moore and Kouri Keenan, 'What Is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations' (2013) 5 International Investigative Interviewing Research Group (II-RP) 46.

8 This is so even if one considers a wide interpretation of the word 'detained'; see generally, Bobby Naudé, 'A Suspect's Right to be Informed' (2009) 2 SAPL 506. Even if, in detention, placing an undercover officer with an inmate who subsequently confesses to the 'cellmate' can be seen as acceptable where the undercover officer does not initiate the contact and only passively listens to the inmate and does not encourage or take part in the conversations – see generally Shealy ibid (n 6) at 34. Also see Khoday (n 2) at 287. For a discussion of US Supreme Court cases that recognise the use of deceptive police practices in the investigation of criminal suspects, see Shealy (n 6) at 26. For a discussion of the admissibility of confessions in the US, see Shealy at 44 etc. See also Stacy du Clos, 'Lessons from *State v. Lawson*: The Reliability Framework Applied to Confessions and Admissions' (2014) 18 Lewis & Clark LRev 227.

9 See *S v Tandwa* [2008] 1 SACR 613 (SCA) at paras 116–117 where the court stated: 'The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.'

10 See generally Etienne du Toit and others, *Commentary on the Criminal Procedure Act* Revision Service 56 (Juta 2016) 24-50U etc.

11 In *S v Hammer* [1994] 2 SACR 496 (C), Farlam J held that there is a general discretion to exclude improperly or illegally obtained evidence on the grounds of fairness and public policy. In the post-constitutional era courts have also recognised a general discretion to exclude evidence that would otherwise be admissible because it would render the trial unfair – see *S v Basson* [2007] 1 SACR 566 (CC) at para 112; *S v M* [2002] 2 SACR 411 (SCA) at para 30; *S v Zürich* [2010] 1 SACR 171 (SCA) at para 10. Pamela Jane Schwikkard and Steph van der Merwe, *Principles of Evidence* (4 edn Juta 2016) 221, point out that this common-law discretion has not been rendered redundant by the provisions of s 35(5) of the Constitution. The admissibility of evidence obtained improperly, but not in violation of the Constitution, must, therefore, still be determined on the basis of this common-law discretion. There is, however, a high threshold for its application and conduct may tend to undermine the integrity of the administration of justice, but fail to provide a remedy in terms of this doctrine – cf *R v Hart* (n 3) at para 210.

It might, however, be simpler to judge the admissibility of Mr Big confessions in terms of section 217 of the Criminal Procedure Act 51 of 1977, since the question of undue influence stands out in this regard. A reliability confession cannot be admissible in the face of improper police conduct.[12] It is, therefore, preferable that the reliability of a Mr Big confession and the manner in which it was obtained be considered together, with the emphasis on the state's conduct.[13] The first consideration essentially focusses on the reliability of the confession. The second focusses on reliability and on the overall conduct of the police. It is submitted that the latter presents the better option. Because Mr Big operations are a Canadian invention, it is useful to consider Canada's approach to the admissibility of such confessions. But first it is necessary to look at the requirements for admissibility in terms of section 217 of the South African Criminal Procedure Act 51 of 1977.

ADMISSIBILITY IN TERMS OF THE SOUTH AFRICAN CRIMINAL PROCEDURE ACT

In South Africa, the artificial distinction made between admissions and confessions has not escaped criticism. When an admission is made, the accused admits one or more facts in dispute, but not all the facts. A confession, on the other hand, is seen as an admission of all the facts in issue. All the elements of a specific crime are admitted and therefore the confession contains no exculpatory element or defence.

In the case of admissions, the requirement of 'freely and voluntarily' has a restricted meaning and an admission will be only found to have been involuntary if it has been induced by a promise or threat from a person in authority.[14] Confessions, on the other hand, essentially have to be made freely and voluntarily whilst the maker is in his or her sound and sober senses and without having been unduly influenced thereto.[15] The requirement of undue influence is elastic and goes beyond the ambit of voluntariness, which is restricted to an inducement, threat, or promise from a person in authority.[16] In effect, it covers 'all cases in which external influences have operated to negative the accused's freedom of volition'. Schwikkard and Van der Merwe[17] point out that in practice, the inquiry into whether a confession was freely and voluntarily made is of little relevance, because it is subsumed in the inquiry into whether the confession was made without undue influence. A convincing argument can be made for why the 'person

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12 Cf *S v Khan* [1997] 2 SACR 611 (SCA).

13 Cf *R v Hart* (n 3) at para 218.

14 See s 219A of the Criminal Procedure Act 51 of 1977; Schwikkard (n 11) at para 16 7 1.

15 s 217(1) of the Criminal Procedure Act 51 of 1977. About the history of, and reason for, these requirements, see *R v Gumede* [1942] AD 398 at 412.

16 *R v Barlin* [1926] AD 459 at 462–3.

17 (n 11) at para 17 4 2. Also see *S v Radebe* [1968] 4 SA 410 (A); *R v Kuzwayo* [1949] 3 SA 761 (A).

in authority' requirement in the case of admissions should be eliminated or replaced by a wider definition, but a discussion in this regard is beyond the scope of this article.[18]

'Undue influence' occurs where some external factor nullifies the accused's freedom of will.[19] Examples include the promise of some benefit, or an implied threat or promise. A promise or threat will be found to have been made if a person, by means of words or conduct, indicates to an accused that he or she will be treated more favourably if he or she speaks, and less favourably if he or she does not speak. Whether such promise or threat was made will depend on the facts of each case. The mere existence of a promise or threat does not necessarily establish undue influence. A subjective test is used to assess the influence on the accused's statement. To 'pass the test' the threat or promise must have been operative on the mind of the accused at the time when the statement was made.[20] The subjectivity of the test makes it impossible to specify what would constitute a threat or a promise. It is a question of fact and the circumstances of each individual case will have to be considered in determining whether the accused's will was swayed by external impulses improperly brought to bear upon it and which were calculated to negative the apparent freedom of volition. In *S v Mpetha (2),*[21] the court held that the term 'negative' was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at all. The criterion was held to refer to the improper bending, influencing, or swaying of the will, and not to its total elimination as a freely operating entity. In the end, the state must prove beyond a reasonable doubt that this was not the case.[22]

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18 See generally, Schwikkard (n 11) at para 16 7 1.

19 Ibid at paras 16 7 1 and 17 4 4; David Zeffertt and Andrew Paizes, *The South African Law of Evidence* (2 edn LexisNexis Butterworths 2009) 534 and the cases referred to by them. For an informative discussion in this regard in the Australian context – see *Habib v Nationwide News Pty Ltd* [2010] NSWCA 34 at para 237.

20 However, objective factors cannot be discarded and will more often than not play an essential role in determining any possible undue influence. In *S v Mpetha (2)* [1983] 1 SA 576 (C) at 585C-D, Williamson J explains: 'It is his will as it actually operated and was affected by outside influences that is the concern ... Obviously, if in a particular case there is evidence of factors which a court thinks are objectively calculated or likely to influence the will of a person, then from a purely pragmatic point of view it will not be easy for the prosecution to satisfy the court that there is no reasonable possibility of these factors in fact having had an influence subjectively on the particular accused. Conversely, if there are factors which the court thinks are not objectively calculated or likely to influence the will of an accused, then it will, practically speaking, not be easy for the defence to persuade a court that there is a reasonable possibility that these factors in fact subjectively influenced the will of the particular accused ... An improper influence which is trivial must be ignored; so also an improper influence, which, though not trivial in itself, is shown in fact not to have had any meaningful influence on the will of the accused.'

21 See generally, *S v Mpetha (2)* (n 20) at 578H–585H.

22 See *R v Jacobs* [1954] 2 SA 320 (A) at 323A.

It is clear that the circumstances of each case will have to be assessed in order to determine the degree of undue influence. Mr Big operations involve certain unique circumstances that stand out and that can assist the court in determining the possible existence of any undue influence. A consideration of such circumstances was made in the Canadian Supreme Court case of *R v Hart*[23] and it is therefore useful to look at this judgment for guidance.

THE CANADIAN APPROACH

In Canada, a fresh approach to deal with Mr Big confessions was recently set out in *R v Hart*.[24] In short, it recognises a new common-law rule of evidence which relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct that often accompanies these confessions.[25] Their new common law of evidence functions as follows:

> Where the state recruits an accused into a fictitious criminal organisation of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession into context.[26]

Reliability can generally be established in one of two ways: by showing that the statement is trustworthy; or by establishing that its reliability can be sufficiently tested at trial.[27] In assessing the trustworthiness of a statement, a court must look at the circumstances in which the statement was made and whether there is any confirmatory evidence. The first step in assessing the reliability of a Mr Big confession is, therefore, to examine these circumstances and to assess the extent to which they call into question the reliability of the confession.[28] Such circumstances include the following: the length of the operation; the number of interactions between the police and

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23 (n 3).

24 Ibid.

25 See at para 84.

26 Per Moldaver J, on behalf of the majority, at para 85.

27 At paras 101–102. In this regard, Moldaver J draws an analogy with hearsay. Also see in this regard Khoday (n 2) 282; David Milward, 'Opposing Mr. Big in Principle' (2013) 46 UBCLRev 81.

28 For a general overview of the factors that contribute to false confessions, see Brandon Garret, 'Introduction: *New England Law Review* Symposium on "Convicting the Innocent"' (2012) 46 NewEngLRev 671 at 677; Brian Cutler, Keith Findley and Danielle Loney, 'Expert Testimony on Interrogation and False Confession' (2014) 82 UMKCLRev 589.

the accused; the nature of the relationship between the undercover officers and the accused; the nature of the inducements offered; the presence of any threats; the conduct of the interrogation itself; the personality of the accused; and the accused's age, sophistication and mental health. Moldaver J states that the key is to examine all the circumstances leading to and surrounding the making of the confession and to assess whether, and to what extent, the reliability of the confession is called into doubt.[29]

The confession itself should also be considered for markers of reliability.[30] Important factors are the level of detail in the confession, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public, or whether it accurately describes mundane details of the crime the accused would not likely have known had he or she not committed it. Moldaver J noted that confirmatory evidence is not a 'hard and fast' requirement, but that it can provide a powerful guarantee of reliability.[31]

The judge stressed that the suggested approach does not mean that police conduct will be forgiven so long as a demonstrably reliable confession is ultimately secured. In this regard, the doctrine of abuse of process will come into play as it is intended to guard against state conduct that society finds unacceptable and which threatens the integrity of the criminal justice system.[32] Moldaver J pointed out that police conduct becomes problematic in Mr Big situations where it approximates coercion.[33] Physical violence, or threats of physical violence, are examples of coercive police tactics. So are operations that focus on an accused's vulnerabilities.

Perhaps it can be said that this approach focusses too heavily on the reliability of the statement and that the focus should rather be on the conduct of the police. However, many of the factors mentioned in assessing reliability are relevant when it comes to judging whether the confession was made without undue influence in terms of the Criminal Procedure Act and are, therefore, clearly helpful in this regard. In view of how our courts currently interpret the undue influence requirement in terms of section 217 of the Criminal Procedure Act 51 of 1977, probably most confessions made in Mr Big circumstances would be inadmissible.

Mr Big operations do, however, create unique circumstances that justify a different and more principled approach in this regard. The police play a central role in these operations where the usual constitutional warnings

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29 See at para 104.

30 See at para 105.

31 Moldaver J states (at para 105): 'The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.' See *R v Mack* [2014] 3 SCR 3 for an example of a case where confirmatory evidence caused the Mr Big confession to be admissible.

32 At paras 112–113 with ref to *R v Babos* [2014] 1 SCR 309 at para 35.

33 At para 115.

are not required. They generate the confession in circumstances that affect the dignity and personal autonomy of the suspect and raise concerns about abuse of state power. The focus should rather be on broader constitutional considerations that arise due to the uniqueness of such operations. Insight into such an approach can be gained from the concurring opinion of Karakatsanis J in *R v Hart*,[34] but before this opinion is considered it is necessary to look at the meaning of the right to a fair trial in South African law.

MR BIG CONFESSIONS AND THE RIGHT TO A FAIR TRIAL

Unconstitutionally-obtained evidence must be excluded if the admission of such evidence would render the accused's trial unfair or otherwise be detrimental to the administration of justice.[35] The fair trial requirement has been interpreted as a flexible concept. Schwikkard and Van der Merwe note:[36]

> '[N]otions of basic fairness and justice', must be applied with reference to the facts of the case and have an inherent flexibility which links up neatly with the fact that section 35(5) provides a court with a discretion to determine whether the impugned evidence would render the trial unfair.

In determining whether the admission of evidence would deprive the accused of his or her constitutional right to a fair trial, the court has a discretion that must be exercised on the basis of the facts of each case and by taking into account considerations such as the nature and extent of a constitutional breach, the presence or absence of prejudice to the accused, the interest of society, and of public policy.[37] In this context, the right to a fair trial cannot be interpreted in the abstract, but must be applied in a

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34 (n 3). See the discussion below at (n 40).

35 In terms of s 35(5) of the Constitution of the Republic of South Africa, 1996.

36 Ibid (n 11) para 12 9 4.

37 See Schwikkard (n 11) para 12 9 3. In *S v Dzukuda; S v Thilo* [2000] 2 SACR 443 (CC) at paras 9–10, the Constitutional Court gives a succinct exposition of the general right to a fair trial by stating that the right to a fair trial is a comprehensive and integrated right and that the content thereof will be established on a case-by-case basis. Although it is possible to specify certain elements inherent to the right to a fair trial [see s 35(3) of the Constitution], it may also contain certain unspecified elements. The court explains: 'An important aim of the right to a fair trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possible other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.' Also see *S v Zuma* [1995] 1 SACR 568 (CC) at para 16 where it is said that the right to a fair trial 'embraces a concept of substantive fairness' and that it is up to the criminal courts 'to give content' to the basic fairness and justice that underlie a fair trial.

factual context.[38] In *S v Tandwa,*[39] it was said that when considering the exclusion of unconstitutionally-obtained evidence, the relevant factors for purposes of determining trial fairness would include:

> [T]he severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature ... There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused ... Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.

Insight into the way in which Mr Big confessions can affect the right to a fair trial can be gained from the concurring opinion of Karakatsanis J in *R v Hart*.[40] The judge differed from the majority's analysis of the legal framework that ought to apply to statements obtained from accused persons as a result of Mr Big operations, and was of the opinion that the Canadian Charter of Rights and Freedoms provides the appropriate analytical framework to regulate Mr Big operations, because of the state's central role in generating confessions so obtained. She saw the principle against self-incrimination as

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38 In *Key v Attorney-General, Cape Provincial Division* [1996] 2 SACR 113 (CC) at para 13, Kriegler J states: 'In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. [B]ut none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. [A]t times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted'.

39 (n 9) at para 117.

40 Above (n 3). See from para 164.

providing the necessary protection for Mr Big confessions.[41] This approach shifts the emphasis from the reliability of the confession to 'broader concerns that arise when state agents generate a confession at a cost to human dignity, personal autonomy and the administration of justice'.[42] She points out that Mr Big operations raise three vital concerns: the reliability of the confession; the autonomy of suspects; and the potential for abuse of state power.[43] Respect for human dignity and free choice mean that individuals should not be coerced by the state to provide self-incriminating evidence and discourage the state from conducting criminal investigations in a way that offends a sense of fair play or compromises the integrity of the administration of justice.[44] It is well known that miscarriages of justice are often caused by unreliable confessions, and for this reason, specialised

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41 This principle is contained in s 7 of the *Canadian Charter of Rights and Freedoms,* and states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. It can be compared to s 12 (Freedom and security of the person) of the South African Constitution that states: '(1) Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause; ... (2) Everyone has the right to bodily and psychological integrity, which includes the right – ... (b) to security in and control over their body; ...'. In South Africa, there is apparently a problem with accommodating substantive due process principles under the fair trial rights of arrested, detained or accused persons, even though the criminal justice process can interfere with the liberty of a person by the state and should therefore implicate s 12 of the Constitution. This would mean that s 12 would assume the status of a generic and due process right which would independently inform the interpretation of all the rights contained in s 35. Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Revision Service 6, 2 edn Juta 2014) ch 51 point out that this would mean that recourse to American 'due process' and Canadian 'fundamental' justice jurisprudence would then be based upon a structured and conceptual similarity in analytical process and that South African courts could have allowed for the incorporation of persuasive doctrines and principles with little scope for confusion. In addition, the common law rights that were based on these doctrines could also be used to interpret constitutional criminal procedural rights. The Constitutional Court has, however, moved in the opposite direction by keeping s 12 separate from the rights of arrested, detained and accused persons. It could be argued that this prevents 'due process' principles from informing s 35 issues – with ref to *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1996] 1 SA 984 (CC); *Nel v Le Roux NO & Others* [1996] 3 SA 562 (CC) and *De Lange v Smuts NO & Others* [1998] 3 SA 785 (CC). There is much to be said for an alternative approach in this regard and it can be argued persuasively why the opposite should and does apply – see Wium de Villiers, 'Fair Trial Rights, Freedom of the Press, the Principle of "Open Justice" and the Power of the Supreme Court of Appeal to Regulate Its Own Process' (2007) 1 Law, Democracy & Development (LDD) 99. Fortunately, the accused that has made a Mr Big confession does have the relevant rights in terms of the Constitution and it is in any event unimaginable that a court will not consider due process principles when the content of a right to a fair trial is at issue. Section 35 (3) states that every accused person has a right to a fair trial, which includes the right – ' ... (j) not to be compelled to give self-incriminating evidence'.

42 At para 167.

43 At para 168.

44 At para 171.

rules have developed to ensure both fairness to the individual and to the societal interest in investigating crime and seeking the truth at trial.

Karakatsanis J pointed to the dangers of Mr Big confessions:[45]

> These operations, often costly and complex, create elaborate false realities for their targets in which they are valued and rewarded. Threats and inducements are tailored to exploit suspects' vulnerabilities, and confessing becomes necessary for their new lives to continue. ... In addition, Mr. Big operations create prejudicial evidence of criminal propensity which has the potential to compromise accused persons' ability to make full answer and defence, undermining the fairness of the trial.

As the accused was not aware that he was speaking to a person in authority and since the right to silence is not implicated because the accused is not being detained at the time of the confession, Karakatsanis J felt that it is necessary to provide a principled and responsive legal framework. She stated:[46]

> The confession rule guards against unreliable confessions and regulates state conduct to protect basic fairness in the criminal process ... The right to silence focuses on autonomy, choice and fairness by protecting detained persons' 'right to choose whether to speak to the authorities or to remain silent' ... More broadly, the principle against self-incrimination from which these protections stem is based upon respect for an individual's autonomy and human dignity, which give that individual the right to choose whether to incriminate herself. The principle serves 'at least two key purposes, namely to protect against unreliable confessions, and to protect against abuses of power by the state' (*R v White*, [1999] 2 S.C.R. 417, at para. 43; see also *R v Jones*, [1994] 2 S.C.R. 229, at p 250).

As far as the principle against self-incrimination is concerned,[47] she referred to *R v P (MB)*[48] where Lamer CJ described the principle against self-incrimination as follows:

> Perhaps the single most important organising principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution ... The broad protection afforded to accused persons is perhaps

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45 At para 172.

46 At para 175.

47 Protected in terms of s 7 of the *Canadian Charter of Rights and Freedoms* and stating that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'– see at para 176.

48 [1994] 1 SCR 555.

> best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under section 7 of the *Canadian Charter of Rights and Freedoms*. As a majority of this Court suggested in *Dubois v The Queen*, [1985] 2 S.C.R. 350, *the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise* (577–8 emphasis added).

Karakatsanis J further pointed out that section 7 of the Canadian Charter has a well-recognised residual role with respect to the principles of fundamental justice and that the principle of self-incrimination manifests itself in specific protections such as the right to silence, the right to counsel, the rule of non-compellability and the privilege against self-incrimination.[49] She saw the principle against self-incrimination as a dynamic concept which provides a principled approach to dealing with confessions made to government officials. This is so because Mr Big operations involve significant state resources to create an altered reality where the suspect can feel that there is no choice but to confess. Such operations directly engage the 'individual privacy, autonomy and dignity interests that the principle against self-incrimination is meant to protect'.[50]

Karakatsanis J also pointed out that the principle against self-incrimination recognises the might of the state and protects the individual's freedom to choose whether to make a statement to the police. This right not to be compelled to incriminate oneself is an overarching principle in the Canadian criminal justice system. Therefore, it makes sense to rely on this foundational principle when considering Mr Big confessions that are generated by and made to government officials. It further enables a court to weigh concerns about reliability, autonomy and state conduct together in a subtle way.[51] If, for example, police threats and inducements go too far, this will be relevant to determining whether the operation was unduly coercive. It may also undermine the reliability of the confession and involve issues of abusive conduct. In the final instance, the principle against self-

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[49] At para 178. In the South African context, the principle against self-incrimination prohibits a person from being compelled to give evidence that incriminates himself or herself. Schwikkard op cit (n 11) para 10 2 point out that in current law the reason for the privilege against self-incrimination probably remains rooted in the public revulsion at the idea that a person should be compelled to give evidence that will expose him or her to possible criminal punishment. This entails that individuals have a right to privacy and dignity which may not be compromised easily. It further means that both the right against self-incrimination and the right to silence are necessary to deter improper investigations which may negatively influence the reliability of evidence.

[50] At para 180.

[51] At para 182.

incrimination also addresses suspects' rights, both during the Mr Big operations and at trial. Karakatsanis J stated:[52]

> A fair trial cannot be based on evidence obtained through fundamentally unfair state tactics. That being so, trial fairness and investigative fairness should not be addressed in freestanding inquiries. As the court explained in *White*, '[i]n every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant's statement (para 48 emphasis added).

Karakatsanis J also emphasised that the principle against self-incrimination works to secure trial fairness, a principle of fundamental justice recognised in terms of sections 7 and 11 (d) of the Charter of Rights and Freedoms:[53]

> Trial fairness may be compromised whenever there are concerns about how the police have obtained self-incriminating evidence, where such evidence is of dubious reliability, and where juries have difficulty evaluating the truthfulness of confessions. There is scope to consider all these factors under the principle against self-incrimination.

In applying the principle against self-incrimination to Mr Big operations, Karakatsanis J points out that three interrelated concerns are at issue: autonomy; reliability; and state conduct.[54] Four factors stand out that can help to determine whether the principle against self-incrimination has been violated by the production or use of a suspect's statement. The court must ask:[55]

- whether there was an adversarial relationship between the accused and the government at the time when the statements were made;[56]

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52 At para 183.

53 At para 185.

54 At para 186 and with ref to *R v White* [1999] 2 SCR 417 at para 43 where it was stated that '[t]he definition of the principle against self-incrimination as an assertion of human freedom is intimately connected to the principle's underlying rationale. As explained by the Chief Justice in *Jones*, above at 250–51, the principle has at least two key purposes, namely to protect against unreliable confessions, and to protect against abuses of power by the state. There is both an individual and a societal interest in achieving both of these protections. Both protections are linked to the value placed by Canadian society upon individual privacy, personal autonomy and dignity: see, eg, *Thomson Newspapers*, above at 480, per Wilson J.; *Jones*, above at 250–51, per Lamer C.J.; and *Fitzpatrick*, above at paras 51–52, per La Forest J'.

55 In line with *R v White* (n 54) at paras 53–66.

56 This factor does not contribute to the analysis in a Mr Big situation, since the relationship is by definition adversarial.

- whether there was coercion by the government in obtaining the statements;[57]
- whether there was a risk of unreliable confessions as a result of any compulsion;[58] and
- whether allowing the statements to be used would lead to an increased risk of abusive government conduct.[59]

Karakatsanis J points out[60] that although each factor deals with a particular concern, specific facts or tactics may implicate more than one danger, and therefore may be considered under more than one stage in the analysis.[61] It is useful to look at her exposition of these factors.

COERCION[62]

In the Mr Big context, a confession can be seen to have been coerced when the suspect is deprived of any reasonable alternative to confession. Some coercion will always be present, but the extent (nature or severity) of the coercion is the issue here. Karakatsanis J noted that coercion is not a binary and that even if the suspect had some alternative to confessing, the degree to which his or her free choice was compromised must be examined.[63] It is also not only threats of violence that should be seen as coercive; manipulative trickery, in particular, can also be seen as coercive.[64] In this regard, it is important to remember that a Mr Big operation is built upon layers of deception: the suspect is exposed to a false confidant, false friends, a false job, and a false life. Important considerations[65] here include the magnitude

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57 This factor is primarily concerned with the autonomy and dignity of the suspect and asks whether the suspect had a choice to speak to authorities. Karakatsanis J refers to *R v Hodgson* [1998] 2 SCR 449 at para 18 where Cory J (quoting L Herman, 'The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part 1)' (1992) 53 OhioStLJ 101 at 153, citing Sir G Gilbert, *The Law of Evidence* (1769) noted that the common law 'will not force any Man to accuse himself', and held that 'from its very inception, the confession rule was designed not only to ensure the reliability of the confession, but also to guarantee fundamental fairness in the criminal process'. This factor does, however, also contain the notion of 'a basic distaste for self-conscription' – see at para 197 with ref to *R v S (RJ)* [1995] 1 SCR 451 at para 83.

58 This factor focusses on the trustworthiness of the statement.

59 This factor deals with the question of whether the authorities used their position of power in an unfair, abusive or shocking manner.

60 At para 188.

61 See his remarks at para 215.

62 See from para 192.

63 At para 192.

64 Karakatsanis J refers to the examples of a police officer pretending to be a chaplain or a legal aid lawyer in order to obtain a confession – see at para 193.

65 At para 194.

and duration of the operation,[66] any explicit threats used, any financial, social, or emotional inducements applied, and the characteristics of the suspect.[67] In the end the coercion will exceed the acceptable boundaries when the suspect was made to believe that he had no choice but to confess.[68] These factors will clearly be relevant when a court has to decide on the admissibility of a confession in terms of section 217 (1) of the Criminal Procedure Act 51 of 1977.

RELIABILITY[69]

In assessing the risk of a false confession, the court will usually look for corroborating or supporting evidence.[70] Usual indicators of reliability might, however, not apply to Mr Big confessions. The confession of an accused is generally admissible as an exception to the hearsay rule in part because it is a statement against interest and therefore more likely to be reliable. But a suspect who confesses to Mr Big does not believe the statement to be against his or her interest.[71] He or she was made to feel safe from legal consequences, and confessed as a precondition to membership in a criminal organisation or some other benefit. In addition, there could be other strong inducements present, for example, financial rewards, legal protection, approval of friendship, all in exchange for simply confessing to a crime.[72] A corroborated and verified, and therefore reliable, confession will not, however, be admissible, if it was obtained by abusive government conduct or through coercion that 'overrode the suspect's autonomy interest'.[73]

ABUSE OF POWER OR POLICE MISCONDUCT[74]

Karakatsanis J points out that:[75]

> The state must conduct its law enforcement operations in a manner that is consonant with the community's underlying sense of fair play and decency. It cannot manipulate suspects' lives without limit, turning their day-to-day

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66 Shorter, less exploitative Mr Big operations will more likely respect a suspect's autonomy and the integrity of the administration of justice. This will also point to the reliability of such confessions.

67 This includes any mental, physical, social or economic disadvantages.

68 At para 199.

69 See from para 200.

70 In this regard, s 209 of the Criminal Procedure Act 51 of 1977 states that: 'An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed'.

71 See at para 203.

72 See at para 206.

73 At para 207.

74 See from para 209.

75 At para 209.

> existence into a piece of theatre in which they are unwitting participants. Such an approach does violence to the dignity of suspects and is incompatible with the proper administration of justice.

Mr Big operations must, therefore, be scrutinised to determine whether the police unfairly, unnecessarily or disproportionately manipulated the suspect. Other objectionable police tactics such as involving the suspect in dangerous conduct or exposing him to physical harm must also be considered.[76] Trickery is often necessary for effective police work, but trickery has limits. It might be acceptable to provide the opportunity to confess, but inducements, threats, and manipulation might constitute abusive and unacceptable state conduct. In drawing an analogy with entrapment, Karakatsanis J suggests that the following factors are relevant in this determination:[77]

- the type of crime being investigated and the availability of other techniques to detect its commission;
- the strength of the evidence causing the police to target the suspect;
- the types and strength of inducements used by the police, including deceit, fraud, trickery or reward;
- the duration of the operation and the number of interactions between the police and the suspect;
- whether the police conduct involved an exploitation of human characteristics such as the
  emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of the suspect such as mental, social, or economic vulnerabilities or substance addiction;
- the degree of harm to the suspect the police caused or risked;
- the existence and severity of any threats, implied or express, made to the suspect by the police or their agents, including threats made to third parties where those threats carry an indirect threat to the accused;
- whether an average person, with both strengths and weaknesses, in the position of the suspect would be induced to confess falsely; and
- the persistence and number of attempts made by the police before the suspect agreed to confess.

She stresses that these concerns should be considered collectively.[78]

Except for the possibility of excluding a Mr Big confession in terms of section 35(5) of the South African Constitution as infringing the accused's

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76 At para 211.
77 At para 213.
78 At para 215.

right to a fair trial, it is also possible to provide the accused with a remedy in terms of abuse of process principles. A brief look at the principles underlying this doctrine is consequently necessary.

MR BIG CONFESSIONS AND ABUSE OF PROCESS

There can be no doubt that the right to a fair trial also involves the question of whether the actual prosecution is fair, regardless of the fairness of the subsequent trial.[79] The fairness of the trial is, therefore, judged according to the fairness of the prosecution (substantive fairness). In terms of this principle, a criminal court has the inherent discretion to prevent an abuse of its own processes.[80] Substantive fairness focusses on the government conduct before the accused was detained, arrested, or accused. A decision that the process had been abused means that the prosecution cannot continue and the proceedings are permanently stayed.[81]

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79 Cf *S v Zuma* [1995] 4 BCLR 401 (CC) at para 16; *S v Ntuli* [1996] 1 BCLR 141 (CC) at para 1; *Key v Attorney-General Cape of Good Hope Provincial Division* [1996] 6 BCLR 788 (CC) at para 12. Also see Nico Steytler, *Constitutional Criminal Procedure* (LexisNexis Butterworths 1998) 216–217.

80 The term 'abuse of process' comes from English law – see the majority decision by the House of Lords in *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 and *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497. See Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford 1993) for a discussion of the origin and development of this principle. See generally, Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2 edn Oxford University Press 2008) and James Richardson (ed), *Archbold: Criminal Pleadings, Evidence and Practice* (Thomson Reuters 2013) para 4–75 etc. In *R v Beckford* [1996] 1 Cr App R 94, it was recognised that English courts can stay proceedings as an abuse of its process in two categories. The first is where it will be impossible to give the accused a fair trial and, the second deals with the integrity principle and is summarised by Sir John Dyson SCJ in *R v Maxwell* [2011] 1 WLR 1837, SC: 'In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in *R v Horseferry Road Magistrates' Court, ex p Bennet* [1993] 3 All ER 138 at 161) [o]r will "undermine public confidence in the criminal justice system and bring it into disrepute" (per Lord Steyn in *R v Latif, R v Shahzad* [1996] 1 All ER 353 at 360)'. Also see *Warren v Attorney General for Jersey* [2012] AC 22, PC. See *R v Jewitt* [1985] 2 SCR 128 about the application of this principle in the Canadian law.

81 The relationship between 'abuse of process' and the exclusion of unconstitutionally obtained evidence are evident from the following remark made by Auld J in *R v Chalkely, R v Jeffries* [1998] 2 All ER 155 at 178 f–h: 'The determination of the fairness or otherwise of admitting evidence under s 78 is distinct from the exercise of discretion in determining whether to stay criminal proceedings as an abuse of process. Depending on the circumstances, the latter may require consideration, not just of the potential fairness of a trial, but also of a balance of the possible countervailing interests of prosecuting a criminal to convictions and discouraging abuse of power. However laudable the end, it may not justify any means to achieve it'. S 78 of the Police and Criminal Evidence Act of 1984 provides for the exclusion of improperly obtained evidence – see generally Richard Glover and Peter Murphy, *Murphy on Evidence* (13 edn Oxford University Press 2013) para 3.7.2., etc.

An example is the case of *S v Nortjé*,[82] an entrapment case, where Foxcroft J was of the opinion that on the facts of the case the appellant's conviction:

> [D]oes indeed create the perception of injustice and does have such an adverse effect on the fairness of the proceedings that it ought not to be countenanced. Appellant was enticed by verbal and other persuasion to act as facilitator in a 'deal' which only eventuated after pressure on appellant by Christie and Steyn, ... The police procedures in this case were fundamentally unfair and the accused did not have a fair trial ... it would be farcical to insist on the highest standards of fairness in the courts while at the same time tolerating a low standard of fairness in police procedures which take place before an accused person reaches the court.

The court went further, and stated:

> Quite apart from the constitutional aspect of the case, I am also satisfied that to allow a conviction to take place on the evidence of the entrapment which occurred in this case would be to endorse a practice repugnant to the principles upon which our criminal law is based.'

As Williamson J put it in *S v Mpetha (2)* [1983] 1 SA 576 (C) 593, after referring to *S v Lwane* [1966] 2 SA 433 (A):

> This passage emphasises the high judicial traditions of this country and the vital interest of society that a trial should be fair. That that tradition of fairness should be extended to an accused before he reaches court is axiomatic. The passage which I have already quoted from the judgment of MacDonald AJA in Hackwell's case illustrates very clearly the undesirability of requiring a high standard of fairness in the courts while at the same time tolerating a low standard of fairness in the judicial process prior to an accused reaching court. See also in this regard the remarks of Holmes JA in *S v Dlamini* 1973 (1) SA 144 (A) at 146D-E. As Paizes puts it in his article *supra* at 133: 'The proceedings at the "mansion" (the court) cannot be divorced from the procedure in the "gatehouse" (the police station) and the Judge should take care to ensure that the confession presented in the "mansion" was not improperly obtained in the "gatehouse".'[83]

In considering a stay of prosecution, the court is not so much concerned about the potential unfairness of the actual trial, as about discouraging abuse of power. A stay of proceedings would be necessary if a sufficient danger exists that an innocent person may be convicted, or if continuance of

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82 [1996] 2 SACR 308 (C) at 320 e–g.

83 See, too, the remarks made by Steyn JA in *S v Ebrahim* [1991] 2 SA 553 (A) at 582 C–E.

the proceedings would undermine the moral integrity of the criminal justice process.[84] Although a high threshold is required before this doctrine will offer a remedy, it is an option available to an aggrieved accused.

CONCLUSION

In the case of Mr Big operations, the police use their overwhelming power and resources to create an alternate reality in order to obtain a confession. This type of operation does more than merely open the door to abusive police practices and false confessions. Perhaps the best way to deal with them is to establish legislative guidelines similar to those that apply in entrapment situations.[85] In the meantime, an accused who seeks a remedy will have to attack the admissibility of the confession in terms of section 217(1) of the Criminal Procedure Act 51 of 1977 as having not been done without undue influence. However, because of the uniqueness of Mr Big operations it is submitted that the approach suggested by Karakatsanis J in *S v Hart* above provides the better alternative. It is, therefore, necessary not only to determine whether the confession was made without undue influence, but also to examine the way in which the confession was obtained in view of the accused's constitutionally guaranteed right to a fair trial.[86] In this regard, the confession could either be excluded under section 35(5) of the Constitution, or, in cases not necessarily implicating the Constitution, the accused would be able to apply for a stay of his or her prosecution based on an abuse of process.

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84 See *R v Horseferry Road Magistrates' Court, Ex parte Bennet* [1994] 1 AC 42 at 62 A–C, where it was stated that the court 'accepts the responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law ... and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.' At 74 F–H Lord Lowry continues by stating: '[T]hat a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible ... to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case'.

85 See s 252A of the Criminal Procedure Act 51 of 1977. For an application of this section, see generally, *S v Matsabu* [2009] 1 SACR 513 (SCA); *S v Kotzé* [2010] 1 SACR 100 (SCA); *S v Lachman* [2010] 2 SACR 52 (SCA); *S v Thinta* [2006] 1 SACR 4 (E).

86 In *S v Tandwa* above (n 90), the court stated (at para 121): 'But in this country's struggle to maintain law and order against the ferocious onslaught of violent crime and corruption, what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence and other corrupt means in sustaining order. Section 35(5) is designed to protect individuals from police methods that offend basic principles of human rights.' (Quoted with approval in *S v Magwaza* [2016] 1 SACR 53 (SCA) at para 22).