PROOF BEYOND REASONABLE DOUBT: A SOUTH AFRICAN STUDY

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DECLARATION

I, Cindy Nomkosi Mtshali, hereby declare that this dissertation is original and has never been presented to any other University or any institution of Higher learning. I also declare that the secondary information used has been duly acknowledged in this dissertation. This research is being submitted for the degree of Master's specialising in Criminal and Procedural Law and Topic: Proof Beyond a Reasonable Doubt: A South African Study at the University of South Africa. This work has not been submitted before for any degree or examination at any other university.

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My only son, Samkelo Olwethu Mtshali, for his unconditional love and belief in me, and to whom this research is dedicated. I hope this will encourage you to continue with your law studies.

To my eldest sister, Kholeka Mchunu, who has always financially enabled me to study further.

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May God Bless Us All

ABSTRACT

This study explores the challenges and shortcomings in the interpretation and application of the phrase "beyond a reasonable doubt" in South African criminal law. The study will also examine the historical origins, evolution, and legal significance of this standard within the South African legal system. The phrase "beyond a reasonable doubt" is analysed in the context of the right to a fair trial, as enshrined in Section 35(3) of the Constitution and Section 174 of the Criminal Procedure Act, 51 of 1977.

Given the severe consequences of criminal convictions, this burden of proof is crucial in protecting the rights of accused persons. However, the effectiveness of this standard is often undermined by the state's inability to present credible, sufficient, and admissible evidence. The study uses two case studies, *S v Shrien Dewani* (the "honeymoon murder") *and S v Najwa Petersen and Others* (the contract killing of Taliep Petersen), to illustrate how similar factual circumstances can lead to divergent judicial outcomes. Through comparative analysis, the research interrogates inconsistencies in the presentation and evaluation of evidence and the broader implications for justice and fairness.

The research concludes that the instruction to prove guilt "beyond a reasonable doubt" remains conceptually ambiguous and practically difficult to implement. It calls for clearer definitions, improved evidentiary procedures, and strengthened collaboration between the NPA and SAPS to ensure justice is served in line with constitutional values.

Keywords: beyond a reasonable doubt, burden, sufficient evidence, judgment, fairness.

ABBREVIATIONS AND ACRONYMS

CPA	**Criminal Procedure Act 51 of 1977**
HC	**High Court**
JLSD	**Journal of Law, Society, and Development**
PELJ	**Potchefstroom Electronic Law Journal**
S	**State**
SACJ	**South African Journal of Criminal Justice**
SAPS	**South African Police Service**
SEC	**Section**
TV	**Television**

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CHAPTER 1

BACKGROUND TO THE STUDY

1.1 Introduction

In South African criminal law trials, it remains the duty of the National Prosecuting Authority (NPA) to satisfy the onus of proving the accused's guilt beyond reasonable doubt. This is an important principle in criminal case trials.[1] The onus rests on the NPA because of the presumption of innocent until proven guilty. The instruction is effectively met when the state displays proof that convinces the judge that the alleged suspect is guilty.[2] According to South African law, the individual who is required to prove the case to the court bears the responsibility in both civil and criminal proceedings.[3]

According to Dlamini, the concept means that the proof presented and the reasons put forward by the prosecutors establish the suspect's guilt beyond reasonable doubt.[4] It also refers to the proof which should convince a reasonable fact-finding, and it is the traditional standard for trials whereby the evidence of guilt permits a guilty verdict in a court of law. The effectiveness of the concept is of fundamental importance for discipline and for creating a conducive climate in society.

The ancestries of criminal procedure in South Africa can be found in Roman, Roman-Dutch, and English law.[5] The rule that the state should prove the defendant guilty excluding of all rational doubt is derived from eighteenth-century English law. The rule, which was directed at defending all citizens against the misuse of power by authorities,[6] ensures the presumption of innocence until proven guilty. This principle is found under section 35(3) (h) of the Constitution, which is a fundamental right in South Africa, guaranteeing the accused's right to a fair trial. It was held in the case of the *State V Coetzee* that the accused would be presumed innocent until the

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1 Ben-Haim Y, 'Assessing Beyond a Reasonable Doubt Without Probability: An Info-gap Perspective' (2019) 18 Law, Probability and Risk 77,77.

2 *S v Van der Meyden* [1999] (1) SACR 447 (W).

3 Dlamini CRM, 'Proof Beyond a Reasonable Doubt' (LLD Thesis University of Zululand,1998) 65.

4 Dlamini, 'Proof Beyond a Reasonable Doubt'472.

5 Van der Merwe SE, Swanepoel JP, Kemp GP, Basdeo M, Geldenhuys T and Karels MG, *Criminal Law Procedure Handbook* (Joubert JJ ed,12th edn, Juta 2016) 23.

6 Dlamini, 'Proof Beyond a Reasonable Doubt'473.

prosecution had proved all the elements necessary to give rise to the statutory criminal liability.[7] The accused's right to remain silent would remain.[8] This principle is essential to ensuring justice and protecting individuals from wrongful conviction. It emphasizes the value of a robust legal process where evidence is completely examined and the rights of the accused are upheld throughout the judicial proceedings.[9] In South African law, the right to a fair trial includes the presumption of innocence, meaning an accused person is believed to be innocent until the state proves their guilt beyond a reasonable doubt.[10]

Since the commencement of constitutional supremacy in South Africa in 1994, the Bill of Rights has had a significant effect on criminal jurisprudence.[11] According to section 35(3) of the South African Constitution, the defendant has the right to a fair trial and to have a public trial before an ordinary court.[12] Additionally, in subsection (3)(h), the right to be presumed innocent is provided, including the right to remain silent and to not testify during the trial proceedings.[13] The rights of all accused are protected in terms of section 35(3) of the Constitution. Furthermore, section 174 of the Criminal Procedure Act[14] (CPA) contains the right of a defendant to be declared not guilty of the allegation of committing crime. Section 174 of the Criminal Procedure Act allows a court to discharge an accused person at the close of the State's case if the State has failed to establish a prima facie case. In terms of this provision, if, after the prosecution has presented all its evidence, the court is of the view that there is no evidence on which a reasonable court, acting carefully, might convict, the accused is entitled to be acquitted without having to present any evidence.[15] A discharge under section 174 is only competent when the State has failed to establish a prima facie case upon which a reasonable court might convict. (See S v Lubaxa 2001 (2) SACR 703 (SCA)

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7 S v Coetzee and Others 1997 CCT50/95 ZACC 2
8 Coetzee case
9 Reddi M, '' Section 174 of the Criminal Procedure Act: Is it time for its abolition?''[2018]Dejure 251,251.
10 Reddi, ''Section 174 of the Criminal Procedure Act: Is it time for its abolition?'' 25.
11 Hoctor SV, *Criminal Law of South Africa* (Kluwer Law International 2013) 37-38.
12 Constitution of the Republic of South Africa, 1996 s 35(3).
13 Constitution of the Republic of South Africa, 1996 s 35(3)(h).
14 Section 174 of the Criminal Procedure Act 51 of 1977.
15 CPA s174.

This principle was clearly set out in *S v Lubaxa*, where the court held that a discharge under section 174 is appropriate only where the State has not led sufficient evidence upon which a conviction might reasonably be based. The provision therefore protects the accused from being compelled to testify in circumstances where the prosecution has failed to establish the essential elements of the offence.[16]

In essence, Section 174 ensures that the accused is not required to answer a case that has not been properly made out, thereby reinforcing the presumption of innocence and the constitutional right to a fair trial in terms of section 35(3) of the Constitution.Section 35(3) of the Constitution and section 174 of the CPA will be used in determining and demonstrating the level of judicial impartiality during trials.

In the case of *Woolmington v Director of Public Prosecutions,*[17] it was held that 'no onus rests on the defendant to prove their innocence and that the burden lies on the state, and at no stage is the state relieved of this burden of proof'.[18] The state fulfills its duty of demonstrating that a defendant is guilty if it proves all elements of a particular crime. The defendant is not obliged to provide evidence of his/her innocence. It is for this reason that a study on the effect of the instruction of using the concept in criminal hearings is of great importance. The two case studies, *S v Dewani*[19] (the honeymoon murder), together with *S v Petersen and Others*[20] (wife who hired a man to kill her husband), will be used to demonstrate the effects and shortcomings of the instruction.

1.2 Problem Statement

'Beyond a reasonable doubt' sounds like a simple[21] and assuring phrase that ensures and protects the interest of justice, as the accused cannot be found guilty unless a court finds him or her guilty beyond a reasonable doubt. However, regardless of being

16 S v Lubaxa 2001 (2) SACR 703 (SCA)

17 *Woolmington v Director of Public Prosecutions* [1935] AC 462.

18 Gantan D, 'Beyond Reasonable Doubt: What Does It Mean?'(MBHL, 22 January 2022) <https://www.mblh.co.za/OurInsights/ArticleDetail.aspx?ArticleID=4670>accessed date:11 November 2023.

19 *S v Dewani* [2014] JOL 32655 (WCC) 188.

20 *S v Petersen and Others* (02/08) [2008] ZAWCHC 70.

21 Cleary MD, Spellman BA, and Tenney ER 'Unpacking the Doubt in ''Beyond a Reasonable Doubt' 'Plausible Alternative Stories Increase Not Guilty Verdicts'(2009) Basic and applied social psychology 1,1.

defined by courts during sentencing, and despite the operational criteria and tests put in place, the phrase seems to be intricate. Currently, one of the most prominent factors that have a bearing on the concept in South Africa is the prosecutor's failure to handle the case and provide the evidence required. The fact that, in many instances, the state faces challenges in proving guilt beyond a reasonable doubt disadvantages the victims from receiving justice. South African citizens are concerned about the number of cases that do not make it to court, and those that do make it to court, but the state fails to provide the necessary evidence that will guarantee a conviction. The SAPS report published in May 2025, quarter 4 for the 2024/2025 financial year, shows that some crime areas have increased, while others have decreased.[22]

The table below shows the statistics

Crime	Percentage	status
Murder	12%	Decrease
Sexual offence	0,0%	Increase
Attempted Murder	5,8%	Decrease
Rape	0.3	Increase

Even though the statistics show that there is a huge decrease in some areas of crime, for South Africa to be considered not dangerous for citizens, all categories of crime must be reduced or made free of crime country.[23] The NPA annual report 2024/2025 shows that although recent crime statistics show a downward trend, particularly in murder rates, the figures remain alarmingly high. GBV is one of those crimes that has not significantly decreased, and crimes such as the trafficking, kidnapping, and prostitution of children continue to be unrecorded occurrences.[24] The recent case of Joshlin Smith, who went missing, and her mother and two other co-accused were found guilty by the Saldanha Bay court, near Cape Town. It is one of the cases that will stay with South Africans for a long time.

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22 Police Release of Crime statistics, Quarter 4 of 2024/2025, SAPS magazine, May 2025, pg 4

23 Mophulane K,' Spike in South Africa's Violence Cases requires Urgent Act' (Media statement Sonke Gender Justice, 3 December 2024) https://genderjustice.org.za/spike-in-south-africas-violence-cases-requires-urgent-action/ accessed 20 August 2024

24 National Prosecuting Authority, *Handing Over the Baton: Reflections on Progress and Challenges* (Annual Report 2024/2025)pg 65

Even though Joshlins' case was a successful conviction by the NPA, in their report on sexual offences and GBV, it remains a major challenge for the NPA to win the case.

In the last five years, there has been a 73% conversion rate for GBV cases, and a total of 16,895 sexual offenders were convicted.[25] One of the most strategic priorities for the NPA for the 2025/2026 financial year is to strengthen collaboration between the NPA, SAPS, and the Directorate for Priority Crime Investigation (DPCI).

The statistics below show the NPA performance.[26]

Crime	Conversion rate
GBV	73%
Fraud and corruption	87%
Conviction rate for murder	77.5%
Conviction rate for robbery with aggravating circumstances	84.7%
Conviction rate in organised crime	93.5%
Crime	Conversion rate

GBV still has the lowest conviction rate compared to other types of crime committed, hence there is a huge cry from communities to prioritize GBV. It is always a possibility that the evidence presented by the state during a criminal trial might fall short of proving guilt of the charges brought forward.[27] Recent case law continues to reaffirm that where the State fails to prove guilt beyond a reasonable doubt, acquittal must follow. In The *State v Beale, Peter Gordon,*[28] the court found the State's evidence "seriously wanting" and insufficient to sustain any conviction. Similarly, in *Tuta v The State*[29]the SCA overturned the conviction due to inadequate proof. This principle was further confirmed in *S v LJ and S v Mbull.*

25 NPA Annual Report 2024/2025
26 NPA Annual Report 2024/2025
27 Curlewis L, 'The Oscar Pistorius trial' (2016) 22 without prejudice the Law magazine 1,38.
28 S v Beale 2025 (SS10/2021)209 (ZAGPJHC)
29 Tuta v S 2022 (CCT 308/20)19 (ZACC)

The research, therefore, pursues to answer the questions:

1. What are some of the main challenges encountered by the state in proving that a suspect in a case is guilty?
2. What are some of the main shortcomings and effects of the term 'beyond a reasonable doubt'?

As per the Constitutional Court decision of *S v Zuma*[30], it is clear that 'the concept is the approach that always focuses on the state to prove that a suspect is guilty in a criminal case.'[31] Currently, the state finds it difficult to satisfy the burden of proof. Some of the issues that lead to failure that are mentioned by the courts include procedural irregularity, failure to handle case documents, documents going missing, incomplete dockets, lack of capacity within the justice system, and failure to present admissible evidence to the court. This research seeks to pave the way forward for the justice system, a path that does not put corruption or glory first, but the people of South Africa. Hence, the study seeks to explore the effects and shortcomings in the instruction of using the concept in criminal cases and the challenges faced by prosecutors in proving the case.

1.3 Significance of the Study

Various South African studies have been conducted on the instruction. This study is significant in that it examines the challenges, effects, and shortcomings of the concept. This research also takes into consideration the constitutional rights of the accused persons as contained in the Bill of Rights. This study will also scrutinise the shortcomings and challenges mentioned above using the two cases, *S v Petersen and Others,* and *S v Dewani*[32] to analyse similar situations to be able to identify the gaps. The controversy emanating from the two cases provides a potential point for innovative ways in which the state can address the challenges. This will involve coming up with a new strategy which may assist the judicial system by providing insights into how the state can deal with the problem of unresolved cases and the challenges of losing cases in courts. The television documentary program '*Ufelani?*' (What are you dying for?),

30 *S v Zuma* 1995 SA 642 (CC); 1995 (4) BCLR 401 (SA).
31 Dlamini, 'Proof Beyond a Reasonable Doubt' 279.
32 *S v Petersen and Others* (02/08) [2008] ZAWCHC 64 and *S v Dewani* [2014] JOL 32655 (WCC) 188.

which deals with real-life stories, also motivated this study, as the shortcomings and strengths of the justice system are further revealed in this program. '*Ufelani*?' focuses on gender-based violence and exposes how the justice system fails to apprehend and prosecute the perpetrators of gender-based violence.

1.4 Aim and Objectives

The main aim of the study is to identify the challenges, shortcomings, and effects of the instruction 'beyond reasonable doubt' in criminal case proceedings. The key objective of this research is to identify the shortcomings of the concept as defined in criminal law, and whether it is the best way of reaching a verdict in our justice system. The study will examine the impartiality in finding the accused guilty or not guilty based on evidence, and not merely on instinct or belief. The research will further discuss the standards, both cultural and historical, that underpin the reasonable doubt standard in criminal law.

The second objective of this research is to analyse the impartiality of using the phrase 'beyond a reasonable doubt' in criminal case court proceedings. In this regard, the research will verify the standard of sufficient evidence, and the precise method in which a court evaluates the evidence. This study will analyse the elements that a court takes into consideration when embracing the reasonable doubt standard. The focus will be on evidence provided by the prosecutors and the strength of the case required by the court to deliver the verdict beyond reasonable doubt. The research will also take into consideration the significance and admissibility of evidence that needs to be presented in court during criminal trials for the prosecutors to be able to prove the case. The study will refer to the two judgments made by the Cape High Court in both cases *S v Petersen and Others,* and *S v Dewani*.[33]

It is expected by the public that the state is well-equipped to bestow justice.[34] The study will emphasise the various issues surrounding the interpretation and implementation of the concept in South Africa. Furthermore, it will analyse the various standards of evidence required to achieve proof beyond reasonable doubt and its

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33 *S v Petersen and Others* 2008 ZAWCHC 64 and *S v Dewani* 2014 JOL 32655 (WCC)188.

34 Siyo L and Mubangizi JC, 'The Independence of South African Judges: A Constitutional and Legislative Perspective' (2015) 18 *PELJ* 819.

relevance in South African law. According to principles of legality, only the law can define a crime and prescribe a penalty.

The key objectives of the research are as follows:

- To investigate if the state complies with the instruction of proving beyond a reasonable doubt.
- To determine the challenges faced by prosecutors in providing evidence in court.
- To determine the role that communities can play in assisting the state.
- To determine and suggest strategies that can be used to address identified shortcomings.

1.5 Research Questions

The core research question is: what are the effects, challenges, and shortcomings in using the concept 'beyond a reasonable doubt' in criminal trials? And what challenges are encountered by the state in proving that a suspect in a case is guilty. In addition to the above main question, the following questions will be addressed in this research:

- What are the challenges and impacts of using the phrase 'beyond reasonable doubt'?
- What measures are put in place by the NPA to be able to comply with the burden of proof?
- What role does the South African Police Service (SAPS) play in enforcing the law in order to enable the prosecutors to achieve the burden of proof in court?
- What alternative methods can be put in place to overcome identified shortcomings?
- What challenges are faced by some of the countries that make use of the legal concept in criminal court cases?

1.6 Hypotheses

This research will critically analyse the two case studies, *S v Petersen and Others* and *S v Dewani*[35] and identify the challenges, effects, and shortcomings of the concept.

[35] *S v Petersen and Others* (02/08) [2008] ZAWCHC 64 and *S v Dewani* [2014] JOL 32655 (WCC) 188.

The crime-fighting is not just an SAPS and NPA responsibility, but a whole societal should come together to fight crime.

The hypotheses for this research are as follows:

i. A successful prosecution is far more complex with an onerous standard of proof since the phrase is not clearly defined.
ii. There are limited or no clear measures or steps put in place by the NPA, hence they are faced with challenges in achieving the burden of proof.
iii. It is clear that the NPA is faced with a lack of investigation skills, issues of capacity, corruption, budget constraints, and lack of interest.
iv. The challenges faced in prosecutions arise not only from capacity constraints but also from misalignment of investigative and prosecutorial roles between SAPS and the NPA.
v. There are innovative investigation strategies and various training programmes, including the presenting of evidence training, that will benefit both SAPS and NPA.
vi. Other countries are faced with corruption within Law enforcement and racial discrimination, hence it is not easy to achieve the burden of proof during criminal trials.

1.7 Literature review

South African literature that is in line with the topic was reviewed to support the study and to analyse the various contexts that have been researched by various academics. The evaluation was also done to define the challenges surrounding the concept in South Africa.

Although the standard has been used, it has not been clearly defined.[36] The two controversial cases, *S v Petersen and Others,* and *S v Dewani*[37] will be used to analyse the evidence presented by the state during the proceedings to investigate and analyse the shortcomings of the instruction during criminal hearings. The standard of

[36] Dlamini, 'Proof Beyond a Reasonable Doubt' [v].
[37] *S v Petersen and Others* (02/08) [2008] ZAWCHC 64 and *S v Dewani* [2014] JOL 32655 (WCC) 188.

evidence required has been debated numerous times, and the role that reliability should play at the closing stage of the trial.

Proof beyond reasonable doubt is a burden that is borne by the state during a criminal trial. In the case of *S v Shoba*, the judge mentioned that

> [T]o convict Mr Shoba of murder, the court must be convinced excluding of any doubt, that Mr Shoba reached an agreement with Mr. Malepane that he would murder Ms P and that he assisted Mr Malepane.[38]

In the case of *Robinson and Others v S,* it was held that in criminal trials, 'the prosecution must prove its case excluding of any suspicion'.[39] A defendant's testimony can only be declined if the court is convinced that it is false.[40]

In South Africa, many citizens have lost faith in the justice system due to the state's perceived and observed failures to guarantee justice to the people. Most evidence presented by the state is usually dismissed by the court, pointing out the deficiency of evidence to prove the case. Problems such as capacity, overwhelming cases, less experienced staff, lack of experience in investigating, and even corruption in the justice system have negative effects on the outcome of the case and lead to disruptions. The state often finds it difficult to enforce justice and win cases beyond a reasonable doubt, which means it fails to perform its duties effectively. This can be observed with several high-profile criminal cases, like *S v Dewani* [41]shown failures, leading to a perception that the NPA is not effectively delivering justice.[42] The prolonged resolution of GBV cases has resulted in the state failing to secure a conviction due to insufficient evidence. In some cases, the state does not get full support from communities to assist in bringing justice, community fear of being targeted by criminals.[43]

In the case of *R v Blom*[44] it was mentioned that 'the belief that the term cannot be effectively defined has been recognised in South African law some years ago'.[45]

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38 *S v Shoba 2022(SS36/2021) ZAGPJHC 942.*
39 *Robinson and Others v S 2018 (AR18/2017) ZAKZPHC 22*.
40 *Robinson and Others v S.*
41 *S v Dewani*
42 Balthazar P,' South Africa: NPA's Failure to Convict Timothy Omotoso is the Latest in a String of Debacles'(Daily Maverick, April 2025)https://www.dailymaverick.co.za/ accessed 26 October 2025
43 Mayoyo LE, Potgieter PJ, Ras JM ''Fear of Crime and the Role of the Police''[2011]3(1) Inkanyiso, Jnl Hum & Soc Sci,80,85
44 *R v Blom* 1939 AD 188,288.
45 *R v Blom*.

However, Dlamini continues to call for the concept to be formally defined.[46] He believes that to accept that the concept has to be used and then to say that it should not be defined is inconsistent.[47] A formal definition can assist the state in understanding the full meaning of the instruction since the prosecutor must provide evidence that the defendant is guilty to guarantee that only the guilty are sentenced. According to Dlamini, the testimony must be based on proof and not on mere character and feeling that the individual has committed a crime. The defendants must be provided with the benefit of the doubt and be cleared if innocent.[48] In conclusion, Dlamini has indicated that the abuse of power is a perennial problem. It is for this reason that the state must comply with this standard because the aim is the protection of the liberty of the individual.

The concept is compatible with core principles preserved in Section 7(1) of Chapter 2 of the Constitution(Bill of Rights), namely, freedom, equality, and human dignity, that underpin various human rights.[49] Dlamini leaves the reader with the tantalising exhortation that we must define the as-yet-undefined.[50] In my observation, the state does not have a full understanding of the instruction to be able to secure a guilty verdict in court. The uncertainty is illustrated by the number of cases that are presented to the court by the state which still fail to provide adequate proof to establish guilt in the court case. Even though Dlamini has given the definition in line with the Constitution of the country, the shortcomings were never identified by him. Hence this research intends, to identify shortcomings in the instruction of using the concept 'beyond reasonable doubt' in criminal cases and, furthermore, to investigate whether the way of using the burden is in the interest of justice, fairness, and efficiency.

The phrase 'beyond reasonable doubt' gives more duties to the state to provide sufficient evidence to convince the judge that the accused is guilty. This instruction gives all powers to the judges to determine whether enough weight can be attached to the facts supplied by the prosecutor before pronouncing the verdict.[51] According to De la Rey, in criminal cases, a close connection exists between the concept of

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46 Dlamini, 'Proof Beyond a Reasonable Doubt' 104.
47 Dlamini, 'Proof Beyond a Reasonable Doubt' 104.
48 Dlamini, 'Proof Beyond a Reasonable Doubt'104.
49 Burchell J, 'Criminal Justice and Constitutional Rights: An Introduction to the Tenth Anniversary Issue of South African Journal of Criminal Justice' (1998) 11 SACJ [ix].
50 Dlamini, 'Proof Beyond a Reasonable Doubt' 473.
51 Schmidt CWH and Rademeyer H, *Law of Evidence* (LexisNexis 2006) 77.

'reasonable doubt' and the 'reasonably possible truth'.[52] He further emphasises that the judgment made by Nugent J reiterated in *R v Difford*[53] that the obligation is fulfilled by the state if only the guilt of a suspect is proven. He adds that the outcome of the concept is that a defendant is permitted to be set free if he might be innocent.

After reading the various studies from academics, the concept has been analysed and attempts have been made by academics to define it as the phrase that places the burden on the state, to present evidence that is adequate to eliminate any doubts about the accused's guilt. However, the literature review has revealed that there are still some uncertainties surrounding the phrase as the concept has not been clearly defined.[54] Dlamini has written various articles that talk about the onus of proof in criminal cases. In one of his articles, he compares the three systems of American law, English law, and South African law. He observed that in all three systems, the instruction has been an unruly horse that has refused to be formally defined.[55] De la Rey[56], Dlamini[57], Van der Merwe[58], Rapulana[59], and Nsimbini[60] point out that the concept is applied in line with the Anglo-American law, and that the state bears the burden to prove that the accused is guilty or eligible to be acquitted if innocent. Kaplow observes that little consideration has been afforded to the discovered effects of the burden of proof.[61]

Furthermore, Ndude discusses the issue of the presence of the principle of fairness during a criminal trial in South Africa.[62] In conclusion, he points out that section 35(3) of the Constitution forms the foundation of the principle of fairness and that the CPA assists in the affirmation of the principle of fairness.[63] Chetty's research on the *S v*

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52 Verrier C, 'Things Fall Apart in The Criminal Court Room' 2012 (De Rebus) 335.
53 *R v Difford* 1937 AD 370.
54 Dlamini, 'Proof Beyond a Reasonable Doubt'[v].
55 Dlamini CRM, 'Proof Beyond a Reasonable Doubt: An Analysis of its Meaning and Ideological and Philosophical Underpinnings' (1998) 11 *SACJ* 461.
56 De la Ray, 'The Fact-Finding Progress and Burden of Proof During Litigation'(LLM Dissertation, University of Pretoria 2007).
57 Dlamini, 'Proof Beyond a Reasonable Doubt'.
58 Van der Merwe C, The Origin, and Characteristics of the Mixed Legal Systems of South Africa and Scotland and their Importance in Globalisation (2012)18(1) Fundamina 91,112.
59 van der Merwe A, Rapulana L, Nsimbini T ''Criminal Procedure and Sentencing''(2020/2021)YSAL 293.
60 van der Merwe, Rapulana, Nsimbini ''Criminal Procedure and Sentencing''.
61 Kaplow L, 'Burden of Proof' (2012) 121(4) Yale Law Journal 741.
62 Ndude T, 'The Principle of Fairness in South African Criminal Trials' (LLM Dissertation Nelson Mandela University 2022).
63 Ndude T, 'The Principle of Fairness in South African Criminal Trials' (LLM Dissertation Nelson Mandela University 2022) 23.

Dewani case suggested that, to repair the meaning of section 174 of the CPA, judges should apply their discretion appropriately; this will stop high-profile defence lawyers from exploiting gaps and misusing the justice system.[64] The author recommends that section 174 should not be ejected from the Act because it can be rejuvenated to be purposeful again.[65]

Masombuka mentions that the communities fail to understand that, unlike in Mozambique, where the accused person carries the burden of proof, in South Africa, the perpetrator is assumed to be innocent until proven guilty by a court of law.[66] According to Ntontela, the accused may carry an evidentiary duty during the trial; it is therefore not true that the alleged person does not have the subsequent obligation during the proceedings.[67] Reddy mentions that a failure by the prosecutor to produce enough facts for a guilty verdict at the close of its case gives the defendant the chance to flee without having to be put on their plea. While the onus of proof is with the prosecutor, the accused still has a duty to the evidential burden to rebut the case against him or her.[68] Verrier believes that the complexity of the test of reasonableness is that it is subjective because, theoretically, it is based on the decision which is prepared by the judge.[69]

Curlewis agrees with the general comment that the Constitution affected the rights of all South Africans in a fundamental manner.[70] However, Curlewis disagrees with the comment that 'the technical side of the law is not directly concerned with rights, such as the law of evidence'. According to him, the law of evidence has been largely affected. He mentions two scenarios to demonstrate how the law of evidence is related to the rights of people: the admissibility of hearsay evidence and evidence obtained in

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64 Chetty A, 'Section 174 of the Criminal Procedure Act 51 of 1977: Does the Interests of Justice and the Outcome in S v Dewani Herald That It is Time to Eject This Provision From Our Law?' (LLM thesis, UKZN 2017) 61.

65 Chetty A, 'Section 174 of the Criminal Procedure Act 51 of 1977: Does the Interests of Justice and the Outcome in *S v Dewani* Herald That It is Time to Eject This Provision From Our Law?' (LLM thesis, UKZN 2017) 61.

66 Masombuka T, 'Legal Practice and Morals '(2002) De Rebus 1.

67 Ntontela M, 'To Speak or Not to Speak, That is the Question: Does Prima Facie Evidence Place an Evidentiary Burden on the Accused to Lead Evidence?' (2022) De Rebus 13,14.

68 Reddy M, 'Section 174 of the Criminal Procedure Act: Is it Time for its Abolition?' (2018) De Jure 251.

69 Verrier C, 'Things Fall Apart in the Criminal Courtroom' (2012) De Rebus 336.

70 Curlewis, 'Proof Beyond Reasonable Doubt Altered by the Constitution' 59.

an unlawful manner.[71] The court will never take into consideration any evidence that was obtained unlawfully to protect the rights of the accused.[72]

In addition to local literature, international literature was also reviewed. The complexity of defining the concept 'beyond a reasonable doubt' has been widely acknowledged by the majority of researchers, like Solan.[73] Newman highlights that courts frequently do not make the standard of proof sufficiently clear to jurors, which then leads to jurors not correctly interpreting and applying the standard accordingly.[74] Laudan argues that the beyond reasonable doubt standard converts evidential proof into subjective assurance, hence it becomes an illegitimate standard of proof. He believes that the instruction results in a significant number of perpetrators being released due to the extensive amount of evidence that is required.[75] Most international academics suggest that the concept cannot be easily defined and requires a high threshold of evidence to be provided. If, upon viewing the evidence, any reasonable doubt remains in the minds of jurors, the accused will be entitled to an acquittal.

The concept has been accepted by many countries as a fundamental and appropriate method to be used during criminal trials. Ben-Haim, [76]in his assessment, mentions the concept as essential in legal procedures as it benefits and protects innocent people. He further mentions that ambiguity in judicial evidence motivates the concept.[77] Similarly to Dlamini's argument, Ben-Haim mentions that the concept still needs a proper definition.

Most foreign countries are using their constitutions and other legal frameworks as the fundamental legislations for criminal procedure. According to Ashworth, section 35(3) of Constitution states that 'the accused person has the rights to a fair trial and to be presumed innocent'.[78] According to Wilkinson,[79] the United Kingdom and the United

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71 Curlewis, 'Proof Beyond Reasonable Doubt Altered by the Constitution' 59.

72 Curlewis, 'Proof Beyond Reasonable Doubt Altered by the Constitution' 59.

73 Linder D, 'The Trial of Orenthal James Simpson' (2000) < http://law2.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm>accesed 05 December 2023.

74 Newman JO, 'Taking "Beyond a Reasonable Doubt" Seriously' (2019) 103(2) Judicature 33.

75 Laudan L, 'Is Reasonable Doubt Reasonable?' (2003) 9(4) *Legal Theory* 295.

76 Ben-Haim, 'Assessing Beyond a Reasonable Doubt Without Probability an Info-gap Perspective'77.

77 Ben-Haim, 'Assessing Beyond a Reasonable Doubt Without Probability an Info-gap Perspective'77.

78 Ashworth A, 'Four Threats to the Presumption of Innocence' (2006) *African Law Journal* 63.

79 Wilkinson S, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (Geneva Call 2015)17.

States of America both have an accusatory system that is typical of common law. The defence and prosecutor's evidence are evaluated by juries and the judge then decides. The prosecutor must show the court that the defendant is guilty and that no uncertainty exists regarding his/her innocence. The hypothesis is that it is pricier to convict an innocent man than it is to free a guilty person.[80]

It was held in *Woolmington v Director of Public Prosecutions*,[81] a case which both British and American jurisprudence still follow, that the defendant has to be set free at the end of the case if the prosecutor has not proven the case.[82] Linder, [83]discusses the case of O.J. Simpson who was suspected of killing his ex-partner, Nicole Brown-Simpson, and her friend Ronald Goldman. Mr Simpson was represented by a dream team of lawyers, whose main dispute during the case was the malpractice, racism, and corruption by the law enforcement authorities. The defence also argued that the law authorities attempted to frame Mr. Simpson by planting the glove which contained bloodstains in his house. The court requested Mr Simpson to try on the glove that had been located in his house and it did not fit. The defence team had argued that if the glove does not fit, Mr. Simpson must be acquitted by the court. Mr Simpson was subsequently found not guilty in both counts of murder.[84]

Anastaplo revisited the Simpson case, focussing on the question raised in the verdict that was pronounced in the case: what is the meaning of 'reasonable doubt' in the normal case where secondary evidence is essential? This case has divided African Americans as some who defend Simpson talk about a 'police plot' and others believe that 'enough evidence was provided by prosecutors to convict Mr. Simpson'.[85] According to Fukurai, in the OJ Simpson case, the findings were mixed and startling.[86]

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80 Wilkinson S, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions'17.

81 Woolmington v Director of Public Prosecutions AC 46 [1935] UKHL 462.

82 *Woolmington case*.

83 Linder D, 'The Trial of Orenthal James Simpson' (2000) SSRN Electronic Journal <http://law2.umkc.edu/faculty/projects/ftrials/Simpson/Simpsonaccount.htm> accessed 5 December 2023.

84 Linder, 'The Trial of Orenthal James Simpson'.

85 Anastaplo G, 'The OJ Simpson Case Revisited' (1997) 28(3) Loyola University Chicago Law Journal 461.

86 Fukurai H, 'Is the OJ Simpson Verdict an Example of Jury Nullification? Jury Verdicts, Legal Concepts, and Jury Performance in a Racially Sensitive Criminal Case' (1998) International Journal of Comparative and Applied Criminal Justice 187.

Ethnic minorities believed that, although the police force was accused of being racially biased, all the evidence provided was only indicating to the defendant being guilty.[87]

Mathumo discusses the issue of circumstantial evidence in Botswana where crime is committed in isolated areas, often with no eyewitnesses who can give complete evidence to support the victim's claim. Therefore, courts depend on secondary evidence such as check-up statements (medical reports).[88] Ashworth mentioned that the European Convention on Human Rights in art 6(2), declares that, according to law, an accused person shall be presumed to be innocent and the onus is on the prosecutor to demonstrate all criminal charges.[89]

According to Cole,[90] the Constitution of Botswana provides a right to legal representation, but it does make provision for the protection of basic human rights. Section 10(2)(d) of the Constitution of Botswana provides as follows: 'a person charged with a criminal offence shall be allowed to stand for himself before the court or select a legal delegate to represent him at his own cost.'[91] This section does not suggest that the state should provide a legal representative if the accused cannot afford one.

Abdulraheem-Mustapha discusses the Constitution of the Federal Republic of Nigeria (CFRN) 1999, section 36(5), which declares that 'The defendant shall be assumed to be innocent until established otherwise by a court of law'. The section 36 of the Constitution includes the right to a just trial.[92]

Taylor,[93] states that in the Australian justice system, proof beyond reasonable doubt is the main standard of proof. The Australian Constitution does not encompass a Bill of Rights; instead, it contains protection of limited rights. Section 80 includes the right

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87 Fukurai, 'Is the OJ Simpson Verdict an Example of Jury Nullification? Jury Verdicts, Legal Concepts, and Jury Performance in a Racially Sensitive Criminal Case'.

88 Mathumo DM, 'Country Report: Botswana' (UNAFEI 2003) <https://www.unafei.or.jp/publications/pdf/RS_No70/No70_14PA_Mathumo.pdf> accessed 3 December 2023.

89 Ashworth, 'Four Threats to the Presumption of Innocence'63.

90 Cole RJV, 'The Right to Legal Representation and Equality Before the Law in Criminal Proceedings in Botswana' (2011) Stellenbosch Law Review 94,108-110.

91 Cole, 'The Right to Legal Representation and Equality Before the Law in Criminal Proceedings in Botswana'.

92 Abdulraheem-Mustapha, 'Strengthening the Criminal Justice System in Nigeria through Alternative Dispute Resolution' 1, 15.

93 Taylor L, 'Should Australia Have a Bill of Rights?' (Australia Legal News 2018) <https://www.gotocourt.com.au/legal-news/australia-bill-of-rights/> accessed November 2023.

to a trial by jury.[94] Australia also adopts the right to a fair trial, which is derived from common law. Their criminal law is in section 141 of the Evidence Act 2 of 1995.[95] The state must provide that the accused has done the offence, the court must not have any doubt that the accused is guilty, and, consequently, that a decision of guilty is proper.[96]

According to Seclì, in the Italian context, the Supreme Court has clarified that the concept standard needs to be applied, not only to explain the causal link but also to assess all constitutive elements of the crime.[97]

In the recent case of *State of Georgia v Hanny Payne*,[98] the defence attorney believed that the prosecutor had not shown beyond reasonable doubt that certain things had happened. Prosecutors stated that the defendant had been acting as a cop in 2019 when she chased Herring after he left the scene, which she was not involved in. Payne was accused of killing sixty-two-year-old Kenneth Herring after he drove away from the accident scene. Payne followed and allegedly shot Herring several times as he sat in the driver's seat of his car, killing him. Throughout the trial, jurors heard 911 calls, Payne's interview with police, witnesses, and Payne herself. Payne testified that she had been scared and had not intended to shoot Mr Herring. However, according to the police, no one was hurt during the accident, and there was no extensive damage.[99] The jury found Payne guilty of murder and she was sent to prison for life with the probability of being released on parole.[100]

In a similar case, *State of Florida v George Zimmerman*,[101] George Zimmerman killed Trayvon Martin in Sanford Florida on 26 February 2012. Zimmerman, a neighbourhood watch volunteer, shot Martin, a seventeen-year-old African American, at close range,

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94 Taylor, 'Should Australia Have a Bill of Rights?'.

95 Taylor L, 'Should Australia Have a Bill of Rights?'

96 Taylor, 'Should Australia Have a Bill of Rights?'.

97 Secli C, 'Reaching the "Beyond Reasonable Doubt" Standard in International Criminal Law Cases: A Comparison with Italian Doctrine and Jurisprudence' (Stockholm University Law Research Paper Series (2019) 4.

98 FOX 5 Atlanta Digital Team, 'Hannah Payne Sentenced to Life for Murder of a Man During Citizen's Arrest' (Fox 5 Atlanta, 15 December 2023) <https://www.fox5atlanta.com/news/hannah-payne-murder-trial-closing-arguments> accessed 17 December 2023.

99 FOX 5 Atlanta Digital Team, 'Hannah Payne Sentenced to Life for Murder of a Man During Citizen's Arrest'.

100 FOX 5 Atlanta Digital Team, 'Hannah Payne Sentenced to Life for Murder of a Man During Citizen's Arrest'.

101 *State of Florida v George Zimmerman*.

killing him. During an interview with police, Zimmerman claimed that he had been attacked by Martin and shot him in self-defence. Zimmerman was later accused of murder. It was held in this case that 'views that are not supported by proof cannot influence the case, since all evidence must be traced and not formed.' The State of Florida adopted a law that says, 'Stand Your Ground', which permits a person who believes it mandatory to use extreme force to avoid serious harm to himself to do so. The perpetrator can claim to have acted in self-defence to obtain an exemption.[102] Zimmerman's attorney stated that they were requesting an immunity trial under the "Stand Your Ground" law. A not-guilty verdict was granted by the jury.[103]

The two cases *State of Florida v George Zimmerman* and *the State of Georgia v Hanny Payne*, [104]are similar but the verdicts by the jury are different. It brings up the questions of what evidence is required by a jury for the accused to be found not guilty or guilty; and under what circumstances can deadly force be used to protect oneself?

1.8 Research Methodology

The research methodology is mainly based on desktop research methods. Data collection will include a review of the literature, case law, books, dissertations, reports, and journal articles. The researcher will conduct a critical analysis of the two case studies and legislation involved during criminal cases. Moreover, the research will refer to foreign jurisdictions. The research is based on data collection and analytical methodology.

The analytical approach will be used to analyse the legislative framework involved as well as the Constitutional rights of an accused person as stated in section 35 of the South African Constitution.

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102 Linder D, 'The George Zimmerman Trial: An Account' <https://famous-trials.com/zimmerman1/2319-home> accessed 17 December 2023.

103 Linder, 'The George Zimmerman Trial:

104 *State of Florida v George Zimmerman and State of Georgia v Hanny Payne.*

1.9 Structure of the Research

This dissertation will consist of five chapters and will be set out as follows:

Chapter One: This chapter is the introduction chapter and will discuss the background of the study, the research questions, objectives, the significance of the research, and a brief description of the methodology.

Chapter Two: This chapter discusses the historical background and development of the concept of 'beyond reasonable doubt' in South Africa. This chapter tracks the roots of the concept and traces how it has developed in South African law. It focuses on reviewing the information using different sources of law such as case law, law journals, books, and legislation to support the research study.

Chapter Three: This chapter discusses the statutory requirements for the principle of fairness during criminal trials. Additionally, state compliance will be evaluated in line with section 35(3) of the Constitution of the Republic of South Africa of 1996, and section 174 of the CPA,[105] will also be examined. These two pieces of legislation are used to safeguard the principle of fairness in criminal law. Furthermore, the study will examine how foreign countries deal with the burden of proof and how their states present the evidence to the jury. Furthermore, the research will scrutinise how the jury system functions in overseas countries.

Chapter Four: This chapter examines the challenges and impacts of using the concept in South African criminal law. In this regard, the cases of *S v Petersen and Others* and *S v Dewani* will be used to discuss and analyse the decisions made by the courts. This chapter intends to display how the state has been bearing the burden of proof. The study will critically analyse the impact the Constitution and CPA have on the concept during trials.

Chapter Five: This chapter presents a summary of the findings. Conclusions are thereafter obtained from the findings. The recommendations are made for ways in which the findings can be used to improve the shortcomings in the instruction of beyond reasonable doubt.

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105 CPA s 174.

1.10 Summary

In South Africa, the law uses the term ‘proof beyond a reasonable doubt’ to indicate how convincing evidence must be in order to permit a guilty verdict. Even though the concept of 'beyond a reasonable doubt' is a fundamental principle in judicial proceedings, it is not easy to clearly define it. The lack of a clear definition triggers uncertainty and ambiguity in the judicial system about the evidential onus.

In most cases, the evidence presented by the state to the court appears to be insufficient, weak, or contradictory. The relevance of evidence should also be proved beyond a reasonable doubt to ensure the consistent application of reasonable doubt. The lack of proper investigation and poor presentation of evidence by the state creates uncertainty in proving beyond reasonable doubt, which often leads to the acquittal of the accused, and to the failure to protect the interest of innocent citizens. The study seeks to address the shortcomings and challenges encountered by the state and to determine what alternative methods and strategies can be used by the state to achieve the burden of proof beyond reasonable doubt.

Moreover, the concept beyond a reasonable doubt requires a high threshold of evidence. The standard can only be within reach after carefully weighing the evidence and it should be clear and convincing evidence. In criminal proceedings, it is up to the state to bring such evidence to remove any doubt about the guilt of a perpetrator, also evidence must always replicate all the facts.

Local literature, international literature, and cases from both local and international will be used to identify the gaps and to be able to come up with strategies that will eliminate the failure.

CHAPTER 2

HISTORICAL BACKGROUND AND DEVELOPMENT OF THE CONCEPT OF 'BEYOND REASONABLE DOUBT' IN SOUTH AFRICA

2.1 introduction

Criminal law is a branch of law that defines certain human behaviours as crimes and prescribes corresponding punishments. In criminal cases, the general rule is that the burden of proof lies with the state to establish the accused's guilt beyond a reasonable doubt. This principle is widely recognised as a cornerstone of criminal justice both nationally and internationally. According to this concept, an accused person is not required to prove his or her innocence to secure an acquittal.[106] Section 35 of the Constitution of the Republic of South Africa enshrines the rights of an accused person who has been arrested and detained.[107]

South Africa's legal history is rich and diverse, drawing from multiple sources including African customary law, Roman Law, Roman-Dutch Law, and English Law authorities.[108] Over time, these various influences have shaped different aspects of the law. Today, the South African legal system is primarily derived from four sources: common law (through precedent), customary law, statute, and the Constitution.[109] The Constitution stands as the supreme law of the land, setting forth the fundamental principles that define government powers and duties while guaranteeing certain rights to the people.

This Chapter will therefore delve into the historical background and development of the concept of 'beyond a reasonable doubt' in South Africa. This chapter explores the origins of this standard of proof within South African law and traces its evolution. It examines the concept through various legal sources, including case law, academic journals, books, and legislation. Both international and local literature are employed to support the study.

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106 Mthembu MH, 'The Constitutionality of Presumption in South Africa Law' (1998) CILSA 213
107 Constitution 1996
108 South African Editors Forum, The South African Legal System Chapter 1,(SANEF) 9
109 South African Editors Forum, The South African Legal System Chapter 1,(SANEF) 9

2.2. South African Law (Roman-Dutch and English law)

South Africa has a well-developed criminal justice system rooted in a combination of Roman-Dutch and English law. Over the years, it has evolved by drawing from a collection of recognised international legal systems, resulting in a hybrid and mixed criminal law system. Criminal law, a branch of law, covers the definition of crime and criminal behaviour, along with the rules and regulations governing the control and prevention of crime, and the punishment of criminal and non-standard behaviour.[110] It controls illegal behaviour within its jurisdiction and is enforced exclusively by the state.

The foundation of South Africa's criminal justice system was significantly influenced by Roman-Dutch law, dating back to 1652 when the Dutch settled in the Cape.[111] Later, during the British occupation in the eighteenth century, British law further shaped the system, leading to the marginalisation of indigenous law, with negative consequences for law enforcement in South Africa.[112] Although the works of Roman-Dutch authors were originally written in Latin or Dutch, most have since been translated into English. Roman-Dutch law was applied by the officials of the Dutch East India Company, who administered the Cape settlement after 1652. Even after the Cape became an English colony in 1795 and again in 1806, English law did not replace Roman-Dutch law as the common law. Roman-Dutch law eventually spread to all the territories, colonies, republics, and states that came together in 1910 to form the Union of South Africa.[113]

In the 20th century, the apartheid government used criminal law to enforce racial segregation and oppression under the notorious policy of apartheid.[114] Racially biased laws, including those allowing the death penalty, led to widespread political resistance.[115] In 1994, the first democratically elected government marked a fundamental break from the country's colonial history. This new government introduced a Constitution with a Bill of Rights, allowing all South Africans to participate in the law-making process.

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110 Snyman CR, *Criminal Law* (6th edn, LexisNexis 2014) 3-6.
111 Burchell J, *Principles of Criminal Law* (4th edn, Juta 2013)8.
112 Snyman, *Criminal Law* 6.
113 Snyman, *Criminal Law* 7.
114 Burchell, *Principles of Criminal Law* 9.
115 Burchell, Principles of Criminal Law 9.

Today, the Constitution of the Republic of South Africa, Act 108 of 1996,[116] holds the highest authority in the country, with the power to overturn laws passed by Parliament if they violate the rights outlined in the Bill of Rights. Parliament is no longer sovereign, and all rules of law, whether in statutes or common law, must align with the rights defined in the Bill of Rights. The Constitution's Chapter 2 contains the Bill of Rights, which applies to the executive, the judiciary, and all state organs.[117]

Although the Constitution does not list all sources of South African law, it recognizes most of them.[118] The fact that South African law is based on Roman-Dutch and English law has been increasingly challenged by South Africans, including politicians, who argue that these laws do not adequately reflect the beliefs and values of the South African people. This issue is under significant debate, with calls to amend the Constitution to better reflect South African norms and values, particularly those enshrined in the Bill of Rights. Until such amendments and reviews are made, Roman-Dutch and English law will continue to apply. For instance, the phrase 'beyond reasonable doubt' remains a cornerstone in criminal cases.

In South African criminal law, the State bears the burden of proving an accused person's guilt beyond a reasonable doubt. This standard requires the State to present evidence strong enough to eliminate any reasonable doubts about the accused's guilt. In the leading case of *Woolmington v DPP*,[119] it was held that the 'golden thread' running through English criminal law is the prosecution's duty to prove the accused's guilt beyond a reasonable doubt.[120]

2.3. Definition of the Phrase 'Beyond Reasonable Doubt'

In criminal proceedings, three critical legal principles are at play: the presumption of innocence, reasonable doubt, and the burden of proof.[121] The principle of 'proof beyond reasonable doubt' is particularly relevant in common-law systems, where lay factfinders must apply this concept.[122] The Criminal Procedure Act does not provide

116 Constitution 1996
117 Constitution s8(1)
118 Du Bois F and other, *Well Principles of South African Law* (9th edn, Juta 2015)35
119 *Woolmington case.*
120 Woolmington case.
121 Fukurai H, 'Is the O.J. Simpson Verdict an Example of Jury Nullification? Jury Verdicts, Legal Concepts, and Jury Performance in a Racially Sensitive Criminal Case '187.
122 Mosaka, 'An introduction to proof in South Africa'846.

for a definition of beyond reasonable doubt. However, it can be safely noted that the phrase 'beyond reasonable doubt' has no single definition, a fact acknowledged in South African law, as confirmed in the judgment of *R v Blom*.[123] Despite the lack of a clear definition, various precedents and judgments offer guidelines for interpreting the phrase. The definition remains uncertain among judges, academics, lawyers, and the public.

In the case of *Barlow Deshwin v The State*, *it was held that*

> [T]he proof beyond a reasonable doubt is regarded as proof that should convince a reasonable fact-finding, after considering all the relevant evidence, that an accused person is guilty of an offence with which an accused is charged. This proof must be based on the evidence and not merely on institution or belief otherwise it is not a standard at all.[124]

A court cannot convict a person if there is any reasonable doubt about their guilt. While the concept of reasonable doubt is fundamental and universally recognised, it is challenging to understand and apply in practice.[125] Much ambiguity surrounds what constitutes reasonable doubt during criminal cases. In *S v van der Meyden*, the accused was charged with the murder and assault of a three-month-old child. In that case, Nugent J stated that

> [T]he onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.[126]

In *S v Mokoena*, *it was held that*

> [T]he standard is 'beyond reasonable doubt', meaning that the assessment of guilt, or not, is based on the strength of the State's case. If there is reasonable doubt, the accused must be acquitted.[127]

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123 *Blom Case.*
124 *Barlow Case.*
125 Solan LM, ''Refocusing the burden of proof in criminal cases some doubt about reasonable doubt' 76.
126 *S* v *Van der Meyden* 1999 (1) SACR 447 (W)
127 *S* v *Mokoena* 2006 (1) SACR 29 (W) 49e–g.

In *Monageng v S*, *the court defined proof beyond a reasonable doubt as*

> [E]vidence with such a high degree of probability that the ordinary reasonable man, after mature consideration, concludes that there exists no reasonable doubt that the accused has committed the crime charged. An accused's evidence therefore can be rejected based on probabilities only if found to be so improbable that it cannot reasonably be true.[128]

In *S v Mavinini*, *it was stated that*

> [E]ven if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused but to vouch that the integrity of the system that has produced the conviction in our case, the rules of evidence interpreted within the precepts of the Bill of Rights remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through the proper application of the rules of the system.[129]

Various definitions and tests have been proposed to clarify the concept of 'beyond reasonable doubt' and assist the justice system in meeting the burden of proof. While it has been challenging to establish a single, definitive definition, it is clear that the phrase should be used in line with the Constitution, with impartiality, fairness, and a commitment to justice. The state's case must always be supported by evidence that establishes the accused's guilt beyond a reasonable doubt. Additionally, presiding officers must ensure that the rules of evidence, as interpreted within the principles of the Bill of Rights, remain intact. The judicial system, being independent, must maintain its integrity by ensuring that any subjective satisfaction of guilt is achieved through the proper application of the rules.

2.4 The Origin of the Phrase Beyond Reasonable Doubt

The reasonable doubt standard is supremacy to the common law, but the ambiguity remains among all the judges, lawyers, and academics as to what reasonable doubt means.[130] According to Whitman, the concept of 'reasonable doubt' was originally developed to shield jurors from the moral and spiritual jeopardy of condemning an

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128 *Monageng* v *The State* (590/06) [2008] ZASCA 129

129 *State* v *Mavinini* (224/2008) [2008] ZASCA 166

130 Dawood HS, 'The Origin of Reasonable Doubt: Theological Roots of the Criminal Trial By James Q Whitman'(2009)47 Osgoode Hall Law Journal 611

innocent person.[131] This was intended to offer them moral comfort, ensuring they did not risk their redemption. The main purpose of 'reasonable doubt' was not initially to protect the accused, but to provide moral reassurance to the jurors themselves.[132]

Solan argues that the phrase 'beyond reasonable doubt' was formalized in the late eighteenth and early nineteenth centuries as a method to convey that a defendant should only be convicted if the jurors are very certain of their guilt.[133] This implies that no person should be convicted of a crime unless their guilt is proven with such certainty that there is no reasonable doubt. If the accused does not willingly plead guilty, all the essential elements of the crime must be proven beyond a reasonable doubt to a jury or judge.[134]

Dlamini, on the other hand, believes that the main purpose of the phrase was to protect individuals from the abuse of state power. [135]These three academics present different views on the phrase 'beyond reasonable doubt', which is crucial in criminal cases. In South Africa, the Constitution embodies the principle of separation of powers, dividing authority among the executive (Cabinet), the legislature (Parliament), and the judiciary (courts). In criminal cases, judges must ensure that the prosecution proves its case beyond a reasonable doubt before finding the accused guilty. Although the words 'reasonable doubt' do not explicitly appear in the Constitution, South African courts apply this principle in line with the Bill of Rights, which safeguards the rights of the accused during legal proceedings.

Dlamini further argues that although the right to have a case proven against someone beyond a reasonable doubt is not explicitly mentioned in the Bill of Rights, it stems from the constitutional right to a fair trial.[136] The phrase 'beyond reasonable doubt' is a standard used by judges or juries to assess the persuasiveness of the evidence

131 HO HL, 'Book Reviews: The Origin of Reasonable Doubt: Theological Roots of the Criminal Trial By James Q Whitman'(2008) Singapore Journal of Legal Studies 455,455

132 Gallanist TP, ' Review: Reasonable Doubt and History of the Criminal Trail The Origins of reasonable: Theological Roots of the Criminal Trial By James Q Whitman'(Research Paper, University of Lowa 2009)942,943

133 Solan LM, 'Refocusing the burden of proof in criminal cases some doubt about reasonable doubt'76

134 Whitman JQ, 'The Origins of 'Reasonable Doubt'(Yale Law School 2005)

135 Dlamini, 'Proof Beyond a Reasonable Doubt'.

136 Dlamini, 'Proof Beyond a Reasonable Doubt'191.

presented during a trial. If they are morally certain that the evidence establishes the defendant's guilt beyond a reasonable doubt, they should convict.[137]

Every person accused of a crime has rights protected under Section 35 of the Constitution, which ensures that their rights are safeguarded against any abuse of power. If the prosecution fails to present sufficient evidence to establish guilt beyond a reasonable doubt, the accused has the right to be acquitted. Section 174 of the Criminal Procedure Act (CPA) allows for a verdict of not guilty if, at the close of the prosecution's case, there is no evidence to support the charge.[138] This provision allows the accused to be discharged from prosecution without needing to testify, ensuring that the rights of the accused are upheld and that fairness prevails in criminal proceedings.

In contemporary South Africa, the phrase 'beyond reasonable doubt' is a crucial element in criminal proceedings. It serves to protect the interests of the prosecution, the judge, and the accused person, ensuring that the burden of proof lies with the state. The prosecution must present evidence that leaves no reasonable doubt in the judge's mind regarding the accused's guilt. Academics like Whitman note that the phrase was developed to protect the jurors' moral integrity, offering them comfort in their decisions.[139]

2.5 Early Stages of Development in South Africa

During the early days of colonization in South Africa, most judges were trained in English law, which they applied in the colonies as it was applied in England.[140] Before South Africa became a republic in 1961, prosecutions were conducted in the name of the British monarch.[141] Criminal cases prior to 1961 were named 'R v the accused person, reflecting the monarch's role as head of state.[142]

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137 Waldman T, 'Origins of the Legal Doctrine of Reasonable Doubt'(1959)20 Journal of the History of Ideas 299,300

138 CPA s174

139 Gallanist TP, 'Review: Reasonable Doubt and History of the Criminal Trail The Origins of reasonable: Theological Roots of the Criminal Trial By James Q Whitman'942,943.

140 Snyman CR, *Criminal Law CaseBook* (4th edn,Juta 2002) xviii.

141 Snyman, *Criminal Law CaseBook* xviii.

142 Snyman, *Criminal Law CaseBook* xviii.

Dlamini notes that South African courts were slow to adopt the standard of proof beyond a reasonable doubt, which was more commonly used in English courts.[143] The phrase was only formally introduced in the Cape Colony around 1905. Dlamini analysed several cases where the concept of reasonable doubt was indirectly applied, or where similar tests were used by judges to assess the burden of proof.

In the case of *Queen v Van Ryn and Another*,[144] it was held that there must be clear proof of every material fact necessary to sustain a conviction.[145] This 'clear proof' test aligns with the requirement for proof beyond a reasonable doubt, which the prosecution must meet for the accused to be found guilty. Although the phrase 'beyond reasonable doubt' was not explicitly used in South Africa until later, its principles were applied in various cases throughout the 19th century. It was eventually solidified in South African law by the Appellate Division in the *case of Ocean Accident and Guarantee Corporation Ltd v Koch*, which adopted the English case of Miller v Minister *of Pensions* as a benchmark.[146]

Dlamini argues that despite the adoption of these tests and guidelines by South African judges, the concept of reasonable doubt has not been clearly defined in South Africa.[147] He calls for a more precise definition, although the concept originated in the English and American legal systems.[148]

During a criminal trial, the state bears the onus of proving that a crime has been committed. This responsibility stems from the presumption of innocence, which holds that the accused is innocent until proven guilty.[149] In the case of Britz, the Appellate Division held that the presumption of innocence is a fundamental safeguard of individual rights.[150] Before democracy, the presumption of innocence was merely a policy rule, given the absence of fundamental laws under a system where parliamentary sovereignty was paramount.[151]

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143 Dlamini, 'Proof Beyond a Reasonable Doubt'128.
144 Dlamini, 'Proof Beyond a Reasonable Doubt'128.
145 Dlamini, 'Proof Beyond a Reasonable Doubt'128.
146 de la Rey JH, 'The Fact-Finding Process and Burden of Proof During Litigation'(Masters Degree, University of Pretoria 2007)84.
147 Dlamini, 'Proof Beyond a Reasonable Doubt'142.
148 de la Rey JH, 'The Fact-Finding Process and Burden of Proof During Litigation'85.
149 Dlamini CRM, 'The Burden of Proof: Its Role and Meaning'(2003)Stell LR 68,86.
150 *Britz case*
151 Dlamini, 'The Burden of Proof: Its Role and Meaning' 86.

The principle of parliamentary sovereignty meant that all laws were subject to the will of Parliament.[152] However, with the advent of the new Constitution, the presumption of innocence was elevated to a fundamental right within the broader right to a fair trial.[153] As a result, any legislation that altered the common law rule by imposing a reverse onus has been deemed invalid and unconstitutional.[154] The Constitutional Court upheld this principle by declaring a reverse onus provision in section 332(5) of the Criminal Procedure Act invalid, as it infringed on the accused person's right to be presumed innocent until proven guilty.[155] This decision underscores that such provisions are incompatible with a democratic system.

It was held in *S v Bhulwana, S v Gwadiso 1996 (1) SA 388 that,*

> [I]t requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption that relieves the prosecution at part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt.[156]

In South African criminal law, it is well-established that the standard of proof during criminal proceedings is beyond a reasonable doubt. An accused can only be convicted if the prosecution proves its case to this high standard, demonstrating that the accused committed the crime and is guilty. The burden of proof remains with the state throughout the trial and does not shift to the accused, who is not required to prove their innocence.

2.6 Key Players in the Justice System

Crime affects all sectors of society and does not discriminate based on race, gender, religion, political affiliation, or economic status. It is constantly increasing in South Africa and anyone who lives in South Africa has a fair chance of having to interact, at some point, with the Criminal Justice System, either as a victim or witness or maybe even as an accused person. South Africa has a relatively well-developed and modern

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152 Dlamini, 'The Burden of Proof: Its Role and Meaning' 86.
153 Dlamini, 'The Burden of Proof: Its Role and Meaning' 86.
154 Dlamini, 'The Burden of Proof: Its Role and Meaning' 86
155 Farisani DM, 'Corporate Criminal Liability in South Africa: What Does History Tell us about the Reverse Onus Provision?'(2017)23 Fundamina1,2
156 S v Bhulwana, S v Gwadiso 1996 (1) SA 388

criminal justice system that draws its roots from a blend of Roman-Dutch and English law borrowed from a variety of respected international legal systems.[157] The Constitution, is the foundation upon which our criminal justice system rests, was designed to provide a system of human rights either not previously available to all citizens.[158] The Criminal Procedure Act ,[159] also plays an important role in criminal trials as it guides and determines every process in it.[160] The major role players in justice are the South African Police Force, National Prosecution Authorities, courts, and the various Legal Representatives.

2.6.1 The Role of SAPS

The duties of the South African Police Service (SAPS) include ensuring the safety and security of all individuals, upholding and safeguarding the fundamental rights enshrined in the Constitution, and preventing crime. SAPS is responsible for fostering harmony between citizens and the law, ensuring that everyone is governed by the rule of law.[161] The powers and functions of the SAPS are derived from Section 205 of the Constitution[162] and the South African Police Service Act.[163]

SAPS works closely with the National Prosecuting Authority (NPA) in various ways. In criminal matters, victims initially contact SAPS as it is responsible for law enforcement. SAPS investigates crimes that threaten public safety and security, bringing offenders to justice. It collaborates with communities through Community Policing Forums (CPFs), composed of local stakeholders, and other law enforcement agencies to prevent crime and enhance public safety. CPFs are established under Section 19 of the SAPS Act.[164] The community can assist SAPS by identifying crime hotspots and reporting wanted suspects.

While conducting investigations, SAPS must ensure compliance with the Constitution and the law. Section 205(3) of the Constitution[165] outlines the objectives of the police service, which include preventing, combating, and investigating crime; maintaining

157 The Criminal Justice System and You (Independent Projects Trust)6
158 The Criminal Justice System and You (IPT)6
159 The Criminal Procedure Act 51 of 1977
160 The Criminal Justice System and You (IPT)6
161 Heuer Lt Col, '2 0 Years of Policing in a Democracy' (2015)SAPS Journal 1-10
162 Constitution s205
163 South African Police Service Act 68 of 1995,s11-s15
164 SAPS Act s19
165 Constitution s205

public order; protecting and securing the inhabitants of the Republic and their property; and upholding and enforcing the law.[166] SAPS members must protect the fundamental rights of every individual, as guaranteed by the Constitution.

Section 13 of the SAPS Act provides for the powers, duties, and functions of SAPS members.[167] Under Section 13(5), SAPS members may be required to act as prosecutors or represent the State in criminal matters.[168] SAPS is responsible for various duties, including crime investigation, crime prevention, and the arrest of suspects. Once a crime is reported, SAPS opens a docket and investigates the case.

Section 35 of the Constitution[169] outlines the rights of accused persons, which SAPS must observe during arrests and detentions. Section 35(5) specifies that evidence obtained in violation of constitutional rights must be excluded if its admission would render the trial unfair or be detrimental to justice. [170] SAPS must present strong evidence to the NPA to enable effective prosecution. The NPA then works with the SAPS to prepare and conduct criminal prosecutions.

Despite its significant role, the SAPS faces several challenges, including corruption, skill shortages, and the loss of experienced officers to the private sector, citing poor pay and limited career advancement opportunities. In addition, poor training quality hampers the SAPS's ability to secure convictions beyond reasonable doubt in criminal cases. These challenges and their implications will be discussed further in Chapter 4, with reference to specific cases.

2.6.2 The Role of the NPA

In South Africa, the National Prosecuting Authority (NPA) is mandated to institute criminal prosecutions on behalf of the State, as outlined in Section 179 of the Constitution.[171] NPA members must act impartially, in good faith, and without fear, favour, or prejudice. In criminal proceedings, the NPA bears the burden of proof beyond reasonable doubt. No prosecution can proceed without the NPA's authority,

166 Constitution s205(3)
167 SAPS Act s13
168 SAPS Act s13(5)
169 Constitution s35
170 Constitution s35(5)
171 Ally D, and MokoenaTM, ''The Basic Guide of Criminal Procedure'' (Juta 2013).

and the prosecutor becomes involved in a case when presented with a crime docket by the SAPS.[172]

When the SAPS completes an investigation, the crime docket is submitted to the NPA for a decision. Section 179(2) of the Constitution empowers the NPA to institute criminal proceedings on behalf of the State and perform functions incidental to these proceedings.[173] The prosecution policy requires that the NPA assesses whether sufficient admissible evidence exists to provide a reasonable prospect of a successful prosecution. If there is no such prospect, prosecution should not commence or continue.[174]

Prosecutors evaluate evidence by considering factors such as the strength of the State's case, the admissibility and credibility of evidence, the reliability of witnesses, and the defence's case. The NPA also consults with victims and witnesses, advises victims, and assists courts during sentencing. In cases requiring further investigation, the NPA may refer the docket back to the SAPS.[175]

Section 20 of the NPA Act provides the power to institute and conduct criminal proceedings.[176] Section 20(1) states that power, as contemplated in Section 179 (2) and all other relevant sections of the Constitution, which are assigned in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.[177] Since 2012, the NPA's performance has been affected by numerous factors, including a lack of professional ethics, a shortage of appropriate skills (suitable candidates for jobs), corruption, a lack of funds, and inadequate strategies.[178] According to the 2020 report, the overall performance of NPA has deteriorated.[179] The report highlighted the NPA's declining performance and proposed reforms to address these issues. High ethical standards and impartiality remain critical to restoring public trust and improving performance.

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172 Matthews I and others, ''Criminal (In)justice in South Africa: A Civil Society Perspective''(Institute for Security Studies 2009) 101.

173 Constitution s179

174 Policy and Directives Relating to Prosecution of Criminal Matters Arising from Conflicts of the Past (2005)5

175 NPA Policy,5

176 National Prosecution Authority Act 32 of 1998

177 NPA Act

178 Muntingh L and Redpath J,''Recommendation for Reform of National Prosecuting Authory''(2020)ACJR 1,3-4

179 Muntingh and Redpath,''Recommendation for Reform of National Prosecuting Authory''3

2.6.3 The Role of the Courts

Section 165(1) of the Constitution confers judicial power in the courts, which are autonomous and subject only to the Constitution and the law. The courts are obligated to apply the law impartially, without fear or favour.[180] The South African court system includes Magistrates' Courts, High Courts, the Supreme Court of Appeal, and the Constitutional Court. It is significant to note that the High Court judgments are reported, and those made by magistrates are not.[181]

2.7 Chapter Summary

This chapter has provided an overview of the development of the phrase ‘beyond a reasonable doubt,’ highlighting its use during the early days of colonization in South Africa. It also addresses various definitions and guidelines provided by the courts in case judgments, the roles involved in delivering justice, and the legal frameworks employed during criminal proceedings.

The discussion demonstrates that the phrase ‘beyond a reasonable doubt’ cannot be clearly or singularly defined. According to James Q. Whitman, judges now use this rule to guide their factual inquiries in criminal law, leading to some confusion, as the phrase itself cannot be precisely defined.[182] The phrase, which originally served as a golden rule in English criminal law to protect juries, has evolved in meaning due to the introduction of the Constitution, which emphasises the protection of the accused's rights. Before the advent of the Constitution, the phrase was not intended to protect the accused. Now, it serves to benefit the accused, ensuring fairness and impartiality in proceedings and safeguarding against the conviction of innocent individuals. The goals of the criminal justice system remain straightforward: to uncover the truth, convict the guilty, and acquit the innocent. Various laws, including common law, play crucial roles throughout the legal process, even during sentencing.

It is evident that in many countries, the phrase ‘beyond a reasonable doubt’ was incorporated into the law through English common law. Over two hundred years later,

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180 Jourbert JJ, *Criminal Procedure Handbook* (11th edn, Juta 2016)32.
181 Snyman, *Criminal Law CaseBook* xii.
182 Dawood, ‘The Origin of Reasonable Doubt: Theological Roots of the Criminal Trial By James Q Whitman’612.

many foreign countries continue to use the same phrase for the reasons outlined above. In South Africa, the phrase ensures that the judge is fully convinced of a defendant's guilt before a conviction is handed down.

The next chapter will discuss the statutory requirements for the principle of fairness during criminal trials. The discussion of the statutory requirements for the principle of fairness is important in this study because it safeguards individual rights during the criminal trial and ensures a just and impartial process. In SA, the right to a fair trial is an important human right, which ensures that the suspect person is given a chance to defend him/her and all accused are treated with dignity during the proceeding.

CHAPTER 3

FAIRNESS AND STATE COMPLIANCE DURING CRIMINAL PROCEEDINGS IN LINE WITH THE RULE OF LAW AND LEGISLATION

3.1 Introduction

This chapter outlines the statutory requirements that govern the right to a free and fair trial, which is one of the fundamental human rights enshrined in the Constitution of the Republic of South Africa. Historically, the right to a fair trial has been a core principle in South Africa. Before the advent of democracy, these rights were primarily offered through common law. Despite the existence of these rights, human rights were often abused under the Apartheid regime, particularly in criminal trials. Through the advent of the Constitution, the right to a fair trial is enshrined in the Bill of Rights. According to Section 8(1) of the Constitution, the Bill of Rights applies to everyone and binds the legislature, the judiciary, and all organs of the state.[183] The right to a fair criminal trial was first introduced into South African law by Section 25 of the Interim Constitution 200 of 1993. Its nature and extent are now defined in Section 35(3) of the current Constitution. The essence of a fair trial is to protect the rights of the accused, and this right extends to the requirement that the state must prove its case beyond a reasonable doubt.

During a criminal trial, the burden rests on the state to establish all elements of the offense beyond a reasonable doubt, while the accused does not need to prove their innocence. The right to a fair trial encompasses the right to be presumed innocent, to remain silent, and not to testify during proceedings (Section 35 of the Constitution). The accused retains this right throughout the criminal justice process.[184] If the state fails to establish a case against the suspect, the court typically discharges the accused under Section 174 of the Criminal Procedure Act, 51 of 1977. This section stipulates that: “If at the close of the case for the prosecution at any trial, the court believes that there is no evidence that the accused committed the offense referred to in the charge

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183 Van der Walt T, ‘’The Right to a Fair Criminal Trial: A South African Perspective’’(2010)7 US-China Law Review 29,32.

184 Ntontela M, ‘’To Speak or Not to Speak, that is the Question: Does Prima Facie Evidence Place an Evidentiary Burden on the Accused to Lead Evidence?’’(2022)De Rebus,1,13

or any offense of which they may be convicted, it may return a verdict of not guilty."[185] These legislative measures safeguard the principle of fairness in criminal law. This chapter will provide a comprehensive analysis of these statutory provisions and further examine how other countries approach the burden of proof and the presentation of evidence in their legal systems.

3.2 Right to a fair trial

The right to a fair trial is a basic human right that is protected by international law. The right to a fair trial is considered essential in the global effort to guarantee human rights. It was recognised as a fundamental human right in 1948 by the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. [186] It is based on the impression that everyone must have an equal opportunity to present their case and have their rights determined by an impartial court.

It is a basic condition and an essential human right that a trial must be fair, as it is important to any criminal justice system. The right to a fair trial demands that the court be recognised by law and that the judges be independent and impartial(judges cannot be prejudiced or biased). A criminal trial is fair only if the rights of the accused have been valued throughout the procedure. The importance and universality of the right to a fair trial are evident from the fact that it is recognised in key international human rights instruments.[187]

3.2.1 International recognition of fair trial rights

An accused individual is entitled to a fair trial to determine guilt or innocence.[188] This right is internationally recognized as a human right. Article 6 of the European Convention for the Protection of Human Rights states: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a

185 Criminal Procedure Act 51 of 1977, s174

186 Harris D, ''The Right to a Fair Trial in Criminal Proceedings as a Human Right''(1967)16 International and Comparative Law Quarterly,352

187 *S v Jaipal 2005 ZACC 1; 2005 (4) SA 581 (CC)*

188 Van Der Walt T, De la Harpe S, 'The right to pre-trial silence as part of the right to a free and fair trial: An overview'(2005)5 AHRLJ, 70,81

fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[189]

The right to a fair trial helps establish the truth and is crucial for all parties involved in a case. It serves as a cornerstone of democracy, ensuring fair procedures and limiting the exploitation of power by authorities. The state's power to arrest, prosecute, and punish individuals is one of its most significant powers, which must be exercised with constraints to protect the rights of those accused throughout the criminal justice process. The African Charter on Human and Peoples' Rights, in Article 7(4), asserts that: 'Every individual shall have the right to have his cause heard'.[190]

Those accused of a crime should be treated with dignity and respect, and, if convicted, should not be solely defined by their actions. The criminal justice system must be fair, equal, and just to avoid the misuse of state power. Section 7(2) of the South African Constitution mandates that the state must respect, protect, promote, and fulfill the rights outlined in the Bill of Rights. The law requires state authorities to operate within legal boundaries and be held accountable. The right to a fair trial ensures fairness for the accused, the justice system, and the victim.

3.2.2 Fair Trials in a Democratic Society

A characteristic of a fair trial in a democratic society is that no person should be deprived of liberty by the state without the opportunity to challenge the accusations and supporting evidence in a court of law, and only after being found guilty beyond a reasonable doubt. To ensure the right to a fair trial, the following must be adhered to:

- Courts in the current constitutional era must ensure substantive fairness, not just procedural fairness as was previously the case.
- Courts are required to give substance to the notion of a fair trial.
- Each right within the section must be interpreted in light of the broader concept of a fair trial.
- A fair trial must balance the rights of the accused with the interests of society and the administration of justice.

189 European Convention for the protection of human rights and fundamental freedoms (1950).
190 The African Charter on Human and Peoples Rights (1986).

- Judicial officers must respect, protect, promote, and fulfill all fundamental rights.

In *S v Dzukuda, it was held that*:

> [T]he right to a fair trial is a complete and integrated right, the content of which will be recognised, on a case-by-case basis, as the constitutional jurisprudence in Section 35(3) develops.[191]

According to Swanepoel, the core of a fair trial lies in the values of human dignity, access to justice, and equality, all of which are fundamental to the right.[192] In South Africa, the Constitution provides a robust framework for ensuring the right to a fair trial.

3.3 The Nature of section 35(3) as enshrined in the Bill of Rights

Section 35(3) of the Bill of Rights is a cornerstone of democracy in South Africa. The Constitution of the Republic of South Africa is founded on the values of human dignity, equality, and freedom. It obligates the state to promote, fulfill, and protect human rights as outlined in the Bill of Rights.[193] Section 35(3) guarantees the accused several rights, including the right to a fair trial. Fair adjudication is characterized by honesty and justice,[194] with fairness being defined as the absence of fraud, injustice, prejudice, or favoritism within the court's decision-making process.[195] Dlamini argues that a dictionary definition of fairness is insufficient because human institutions rarely adhere to absolutist definitions. Thus, the basic right of the accused is to have a fair trial according to the forum's cultural understanding of fairness.[196] Section 35(3) of the Constitution states that every accused person has the right to a fair trial, which encompasses the rights specified in subsections (a) to (o).

The right to a fair trial is essential for establishing a just criminal justice system. It protects the freedom and dignity of the individual, with these rights being subject to review during the appeals process if necessary. Section 22 of the Superior Court Act provides for the review of lower court proceedings. When an accused exercises their

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191 *S v Dzukuda and Others; S v Tshilo 2000 (2) SACR 443 (CC).*
192 Swanepoel P, 'Criminal Procedure',(SACJ)2013,197,198
193 Ndinannyi M, 'A Critical Analysis of a Review Pendente Lite Application Against a Lower Court`s Proceedings and its Influence on the Right to a Fair Frial: A South African perspective',(LLM, University of Venda, 2023)Vi
194 Dlamini 187
195 Dlamini 187
196 Dlamini 190

right to appeal, the provisions of Section 35(3) are assessed by the higher court to ensure that the procedures are fair and aligned with the Constitution.

The Constitution has reaffirmed the presumption of innocence as a fundamental right within the broader context of the right to a fair trial. In criminal cases, the burden of proof rests with the accuser, who must prove the allegations beyond a reasonable doubt; this burden does not shift to the accused.[197] This means that the prosecution must establish all elements of the offense beyond a reasonable doubt before the accused can be found guilty. The right to a fair trial as conferred by Section 35(3) extends beyond the specified list of rights in paragraphs (a) to (o). It encompasses a concept of substantive fairness that is not to be equated with the standards applied in pre-constitutional criminal courts.[198]

This indicates that the right to a fair trial not only affects the accused but also extends to others who have a stake in the criminal justice system.[199] Fairness is determined based on the facts of each case, with judicial officers responsible for making this determination. The prosecution is tasked with proving the defendant's guilt beyond a reasonable doubt, while the defendant is not required to establish their innocence.

3.3.1 The Relevance of principle fairness during trials (Examples of Court decisions)

A fair trial ensures that no person is deprived of their freedom without a fair opportunity to challenge the charges in court. The following cases illustrate the Constitutional Court's interpretation of the right to a fair trial.

3.3.1.1 State v Bhulwana

In *State v Bhulwana*,*S v Gwadiso*,[200] the accused were found in possession of more than 115 grams of dagga. Under the Drugs and Drug Trafficking Act,[201]they were presumed to be drug dealers, which carried a heavier sentence. The Act placed the onus of proving innocence on the accused. The Constitutional Court found that this

197 Dlamini 190
198 *S v Zuma and Others 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); 1995 (1) SACR 568 (CC)16*
199 *Tuta v The State [2022] ZACC 19*
200 *S v Bhulwana, S v Gwadiso*.
201 Drugs and Drug Trafficking Act 140 of 1992.

reversed burden of proof infringed on the Constitutional right to a fair trial, particularly the presumption of innocence. Consequently, the court declared that part of the Drugs and Drug Trafficking Act was invalid.

3.3.1.2 *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others.*

In these combined cases, Mr. Moyo, a community leader, was charged under the Intimidation Act[202] for allegedly inciting fear among community members. The Act required him to prove that his statements were not intended to intimidate, effectively shifting the burden of proof onto the accused. Ms. Sonti was similarly charged under the same Act for her alleged actions during a community protest.

The Constitutional Court found that this reversed onus provision violated multiple fair trial rights, including the presumption of innocence, the right to remain silent, and the right against self-incrimination, as outlined in Section 35(3) of the Constitution. The Court declared the relevant section of the Intimidation Act unconstitutional, highlighting the need for legislative provisions to respect constitutional rights.

3.3.1.3 Lenkopane v The State

In *Lenkopane v The State*, the appellant was convicted of two counts of rape under Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, read with Section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act No. 105 of 1997. The charges alleged that Mr. Lenkopane unlawfully and intentionally committed acts of sexual penetration by inserting his penis into the vaginas of the victims without their consent, with the aggravating factor of grievous bodily harm. On count two, it was further alleged that the complainant had been raped multiple times.

The appellant was sentenced to two terms of life imprisonment by the Regional Magistrates' Court in Mmabatho. On appeal, the appellant argued that his constitutional rights were violated due to procedural irregularities. He cited Section 35(2)(e) of the Constitution, which guarantees detainees humane conditions of detention, including access to medical treatment, and Section 35(3), which protects

202 Intimidation Act No. 72 of 1982.

the right to a fair trial. Specifically, the appellant argued that he was denied adequate time to prepare his defense (Section 35(3)(b)) and the right to legal representation (Section 35(3)(f)).

The Constitutional Court reviewed the case and found that the lower court had infringed on the appellant's fair trial rights by invoking Section 342A of the Criminal Procedure Act No. 51 of 1977 to deny a postponement request due to his ill health. The Court held that these procedural shortcomings compromised the integrity of the trial. Consequently, the convictions on both counts were overturned, and the appellant was ordered to be released from custody immediately.

3.3.1.4 Boesak v The State

In *Boesak v The State*, the applicant sought special leave to appeal to the Constitutional Court against his conviction for fraud and theft, which had been upheld by the Supreme Court of Appeal (SCA). The appellant claimed that the trial violated his constitutional rights as guaranteed by Sections 12(1)(a) and 35(3) of the Constitution. Section 12(1)(a) protects the right to freedom and security of the person, while Section 35(3) safeguards fair trial rights, including the presumption of innocence, the right to remain silent, and the right not to testify.

The case revolved around the SCA's reliance on a letter admitted as evidence during the trial. The appellant argued that the letter's authenticity and relevance had not been proven beyond a reasonable doubt, and its inclusion compromised his right to be presumed innocent. Additionally, the appellant alleged that his right to remain silent was infringed by the SCA's interpretation of the evidence.

The Constitutional Court declined to grant leave to appeal, emphasizing that it would only intervene in matters where constitutional issues of justice were at stake. The Court found no infringement of the appellant's constitutional rights, stating that the SCA had correctly assessed the evidence and applied the law. The Court further held that the appellant had been afforded all the protections of a fair trial as outlined in Section 35(3). The application for leave to appeal was therefore dismissed, reaffirming the principle that procedural fairness and substantive justice must align in criminal proceedings.

3.4 Section 174 of the Criminal Procedure Act 51 of 1977

Section 174 of the Criminal Procedure Act No. 41 of 1977 Criminal Procedure Act (CPA) stipulates that: "If, at the close of the prosecution's case at any trial, the court is of the opinion that there is no evidence that the accused committed the offense referred to in the charge or any offense for which they may be convicted, it may return a verdict of not guilty."[203] The purpose of Section 174 is to ensure that an accused person does not need to present a defense in cases where the prosecution has not provided sufficient evidence to establish guilt.[204] If the accused believes that the state has not produced adequate evidence to warrant a conviction, they can apply for discharge under Section 174. The phrase "no evidence" does not imply an absolute lack of evidence but rather an absence of evidence upon which a reasonable person, acting carefully, might convict.[205]

Following the establishment of democracy in 1994, the Constitution was formulated to accommodate the diverse needs of the population, including those accused of crimes. As the supreme law, all legislation must conform to the Constitution. If found inconsistent, a law can be declared invalid.The discharge procedure was absent from South African criminal law at the beginning of the twentieth century. However, in 1917, it was adopted from nineteenth-century English law.[206] Originally, in civil courts, a plaintiff needed only to present a "scintilla of evidence" to avoid having their claim dismissed.[207] This principle was later applied in criminal cases to ensure fair trials.[208]

In the South African context, the earliest analyses of the procedure by the Appellate Division a little space for judicial discretion when faced with an request for discharge at the close of the State's case.[209] The position was that if there was no evidence of the defendant's guilt on the charges, then the judge was required to discharge the suspect from prosecution, removing his case from further deliberation and thus rendering a judgement of not guilty.[210] Section 174 of the Criminal Procedure Act, in a

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203 CPA Section 174.

204 Chetty, 'Section 174 of the Criminal Procedure Act 51 of 1977: Does the Interests of Justice and the Outcome in S v Dewani Herald that it is Time to Eject this Provision from our Law?'11

205 *S v Dewani [2014] JOL 32655 (WCC) para 7.*

206 *R v Smith 1912 AD 386.*

207 Reddi, 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'.

208 Reddi, 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'.

209 Reddi, 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'.

210 Reddi, 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'.

nutshell, is the discharge provision current in South African law that is available to an suspects.[211]

In the cases of *S v Dewani and S v Ugoka*, the courts clarified that "no evidence" does not mean a total lack of evidence but rather the absence of evidence upon which a reasonable court could convict.[212] The court can return a judgment of not guilty if there is no evidence that the accused committed the crime without requesting the accused to testify, or the defense can bring an application for discharge at the end of the prosecution's case. This was also done in *S v Dewani*, where the Cape High Court considered a Section 174 application by one of the accused.

Researchers criticised the Section 174 procedure, arguing that judges acted inappropriately when deciding on an application for discharge. Some judges may grant an application if they find the prosecution's witnesses unreliable. Some academics argue that Section 174 of the CPA can be used to prevent accountability and is subject to varying interpretations, which can lead to inconsistent verdicts. One way or another, the Section can be used to neglect the interests of victims. After the court granted the Section 174 CPA application in *S v Dewani,* it further raised concerns and opinions that justice through the courts exists only for the wealthy.[213]

Nevertheless, critics argue that the application of this section requires cautious consideration to avoid the premature dismissal of cases where further evidence may surface during the trial. Section 174 of the CPA should be applied consistently. When applying the section, the judge must ask whether the evidence presented by the prosecution is adequate to support a conviction to avoid possible imbalances and to ensure a fair trial for all parties. This section plays a significant role in ensuring fair and efficient criminal proceedings. It aligns with Section 35 of the Constitution, which protects the rights of citizens who are arrested, detained, or accused of a crime, ensuring their right to a fair trial and the right not to be forced to confess.

In South African criminal law, Section 174 of the Criminal Procedure Act is designed to protect an accused person's right to a fair trial by permitting discharge if the

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211 Chetty, ‘Section 174 of the Criminal Procedure Act 51 of 1977: Does the Interests of Justice and the Outcome in s v Dewani herald That it is Time to Eject this Provision from our Law?’

212 Dewine case.

213 Reddi, ‘Section 174 of the Criminal Procedure Act: Is it time for its abolition?’.

prosecution fails to present adequate evidence at the close of their case. An accused person is not forced to defend against a case where no prima facie evidence exists against them. Section 174 must be carefully considered to ensure a fair trial. The following are key points aligned with a fair trial.

3.4.1 Presumption of innocence

The principle that one is innocent until proven guilty allows a court to discharge an accused if the prosecution fails to present evidence demonstrating a reasonable suggestion of guilt.[214]

3.4.2 Judicial discretion

The court has the discretion to decide whether to grant a discharge based on the case's specific facts. This discretion should be exercised carefully to ensure fairness.

3.4.3 Application of section 174 in trials

The cases of *S v Gqoza and Lubaxa* emphasize that failure to discharge an accused where there is no evidence at the close of the prosecution's case would constitute an irregularity that could invalidate a conviction.[215] If the court does not discharge the accused under these circumstances, it would be a violation of Section 35(3) of the Constitution, which guarantees the accused's right to a fair trial, including the presumption of innocence, the right to remain silent, and the right not to testify.'' [216]

The accused has several options when responding to the state in a defence case.[217] They can choose not to testify and refrain from calling any witnesses, or they can present evidence to counter the state's case.[218] Legal practitioners representing the accused must carefully decide on these options, assessing whether the state has

214 Reddi, 'Section 174 of the Criminal Procedure Act: Is it time for its abolition?'.
215 S v Gqoza (2) 1994 (1) BCLR 10 (CK) and Lubaxa (supra).
216 R v Shein 1925 AD 6 (W)
217 van der Merwe SE and Joubert JJ, *Criminal Procedure Handbook* (12th end,Juta 2017)346.
218 van der Merwe and Joubert, *Criminal Procedure Handbook.*

presented a prima facie case. If the state shows prima facie evidence of the offence, the accused has an evidentiary burden to rebut this evidence.[219]

The judge in the *S v Ngwenya* case noted that the right to discharge at the end of the state's case does not arise from considerations related to the burden of proof, presumption of innocence, right to silence, or right to testify, but rather from a more general principle aimed at protecting the fairness of the proceedings.[220]

3.4.4 Section 174 of the CPA possibility for abuse

Section 174 could be abused in cases where a strong case exists but is not successfully presented by the prosecution, potentially leading to a miscarriage of justice.

3.4.5 Implementation of section 174 of CPA and Section 35(3) of the Constitution(fair trial considerations)

Section 174 of the CPA allows a court to discharge an accused person at the close of the State's case if no evidence could reasonably lead to a conviction. This protects the accused from having to testify unnecessarily.

In *S v Mphetha & Others,* the court held that the reliability of State witnesses should play a restricted role and that their evidence should only be disregarded if its quality is so poor that no reasonable person would accept it.[221] A discharge under Section 174 cannot be considered once the defense has started presenting its case. An suspect facing multiple charges may be discharged on some or all charges. A court should, where appropriate, raise the question of a discharge, regardless of whether the accused has legal representation. A court's refusal to apply Section 174 is not appealable, as confirmed in *S v Ebrahim.*

Section 35 of the South African Constitution guarantees an accused person the right to a fair trial, including the right to remain silent and not be compelled to testify. Section 174 functions within this constitutional framework.

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219 Ntontela, 'To speak or not to speak, that is the question: Does prima facie evidence place an evidentiary burden on the accused to lead evidence?'13

220 *S v Ngwenya*

221 *S v Mpetha and Others 1981 (3) SA 803 (C)*

3.4.6 Relationship between sections 174 and 35 of the Constitution.

Both sections work together to protect an accused person's right against self-incrimination. Section 174 allows a court to discharge an accused if the prosecution cannot present sufficient evidence for a potential conviction, while Section 35 guarantees the right not to testify in one's defense.

A court must interpret Section 174 in light of Section 35, ensuring that any decision to discharge an accused based on a lack of evidence does not infringe on the accused's constitutional right to a fair trial. As held in S v Golding and Others, according to Kruger Heimstra's Criminal Procedure, Section 174 provides the court with the discretion, not the obligation, to discharge an accused. The court must act wisely, exercising sound judgment in the interests of justice.

Essentially, a court can only discharge the accused if, after taking into consideration all evidence presented by the State, the court concludes that no reasonable court could convict the accused based on the available evidence, thus maintaining the principle of a fair trial.This section plays a crucial role in ensuring fair and efficient criminal proceedings, protecting individuals from unfounded prosecutions and unnecessary trials, and upholding principles of justice and due process. Section 174 of the Criminal Procedure Act and Section 35 of the Constitution also safeguard the rights of the accused while ensuring the integrity of criminal proceedings. Its application requires balancing the protection of the accused from baseless charges and upholding the public interest in prosecuting criminal offenses.

3.5 Jury systems in foreign countries and the burden of proof

A jury consists of ordinary citizens who do not have formal legal training but are tasked with hearing evidence, reconciling conflicting facts, and applying legal principles to reach a verdict that all (or most) jurors can agree upon.[222] Many countries, including Australia, Canada, England, Wales, Ireland, New Zealand, South Korea, Scotland, Spain, Japan, Russia, and the United States of America, employ juries in criminal cases, and some also in civil cases.[223] A jury trial is a legal proceeding where the jury

[222] Bornstein BH and Greene E, ‘’Jury Decision Making: Implications For and From Psychology’’, (2011)SAGE 63,64

[223] Bornstein and Greene, ‘Jury Decision Making: Implications For and From Psychology’64

makes decisions based on the evidence presented, distinguishing it from a bench trial, where a judge or panel of judges makes all decisions.

3.5.1 The role and function of jury trials in different jurisdictions of foreign countries

Jury trials are a cornerstone of most foreign countries' overseas legal system. The first rules for jury trials in the colonies were encoded in 1623 when the leaders of the Plymouth Colony decreed that both criminal and civil matters “should be tried by the verdict of twelve honest men to be impaneled by the authority in the form of a jury.” jury typically consists of people who represent a cross-section of the community.[224] Their role is to evaluate the facts of a case, weigh the evidence, and return a verdict, which can be “guilty” or “not guilty” in criminal cases. Whitman notes that it was not until the end of the 18th century that English judges began instructing jurors to acquit defendants if there was “reasonable doubt” about their guilt.[225] Evidence must persuade jurors of guilt “to a moral certainty.”[226] Even within the jury system, the prosecution bears the burden of proof, demonstrating that the accused is guilty beyond a reasonable doubt. The right to a fair trial is an internationally recognized human right, ensuring that anyone charged with a crime has the opportunity to determine their innocence or guilt.

3.5.2 Reasonable doubt and judicial guidance

Whitman reports a 1782 trial at London’s Old Bailey where the judge asked the jury, “Have you any reasonable doubt?,’’ and a 1783 trial where the judge told the jury, “If on viewing the evidence any reasonable doubt remains on your minds, the defendant will be entitled to your acquittal.” [227]A 1796 trial included a jury charge emphasizing that jurors must establish guilt “beyond any reasonable ground of doubt.”[228] Although there was significant debate regarding the adoption of the phrase “beyond a reasonable doubt,” it ultimately came to be understood not merely as a means to spare

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224 Ryskamp DA, ‘Academic Expert or Practicing Expert? Choosing the Best Witness For Your Case’(Expert Institute for Attorneys 26 June 2020)<https://www.expertinstitute.com/resource>accessed 20 October 2024.

225 Whitman,199.

226 Newman JO, “Taking Beyond a Reasonable Doubt Seriously”(2019)103 Bolch Judicial Institute,33,35.

227 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’35.

228 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’35.

jurors from convicting innocent individuals but as a necessary safeguard to reduce the likelihood of wrongful convictions.[229] Consequently, several appellate courts have advised trial judges against elaborating on the reasonable doubt standard to juries.[230]

A jury must determine the case before it is based solely on admissible evidence presented in court, avoiding prejudicial information from external sources.[231] While juries have a heavy responsibility, their role is limited. The judge has significant power to decide which evidence will appear before the jury. As such, the judge's decision may heavily influence the jury's decision-making.[232] The judge wields significant authority in deciding which evidence is permissible, profoundly influencing the jury's decision-making process. For example, a judge might rule a witness unqualified to offer expert testimony, preventing that witness from sharing valuable insights that could alter the jury's understanding of the case.

3.5.3 Owens v Stirling

In the case of *Owens v. Stirling*, Dist. Court, D. South Carolina (2016), Mr. Owens was found guilty of murder and sentenced to death in 1999. His death sentence was overturned twice before re-sentencing trials restored the penalty, which was subsequently upheld by higher courts. Owens was convicted of shooting store clerk Irene Graves in the head at a gas station in 1997. His conviction was largely based on testimony from his co-defendant, Steven Golden, who alleged that Owens was the shooter. The court also noted that Owens had confessed to five individuals, including two law enforcement officers and his girlfriend.

Notably, no forensic evidence directly linked Owens to the crime scene;[233] instead, prosecutors relied on surveillance footage showing two individuals entering the gas station shortly before one shot Graves. Owens' attorneys argued that scientific evidence proving he pulled the trigger was never presented. Later, Golden recanted his testimony, claiming he falsely identified Owens as the shooter and that the actual

229 Newman, 'Taking Beyond a Reasonable Doubt Seriously '34.
230 Newman, 'Taking Beyond a Reasonable Doubt Seriously '34.
231 Ryskamp, 'Academic Expert or Practicing Expert? Choosing the Best Witness For Your Case'.
232 Ryskamp, 'Academic Expert or Practicing Expert? Choosing the Best Witness For Your Case'.
233 Laird S,'SC justices again refuse to stop Friday's execution, despite new claims of innocence'(South California Daily Gazette,19 September 2024)< https://scdailygazette.com/2024/09/19/sc-prepares-for-first-execution> 23 October 2024.

perpetrator was someone else he refused to name due to fear of retaliation.[234] Despite these developments, South Carolina's Supreme Court declined to halt Owens' execution, and Governor Henry McMaster chose not to grant leniency. Witnesses testified that Owens wore the same mask as the shooter and bragged about the murder afterward. Owens was executed on September 20, 2024, by lethal injection.

Mr. Owens was executed based primarily on the testimony of his co-defendant, Steven Golden, even after Golden made a sworn statement admitting that he had lied during his testimony, stating that Owens was not with him at the convenience store when Graves was killed in a botched robbery.[235] Golden claimed to have had a secret deal with prosecutors, using his testimony to secure a more favorable outcome for himself.[236] Owens' execution raised critical questions about the reliability of witness testimony in the absence of scientific evidence.[237]

3.5.3.1 Marcellus Williams v. Missouri

In another case, Marcellus Williams was executed in Missouri on September 24, 2024, for a murder he maintained he did not commit. His death by lethal injection followed lengthy efforts to exonerate him based on DNA testing issues.[238] Despite his DNA not matching any forensic evidence collected from the crime scene, Williams was convicted based on testimony from two unreliable witnesses motivated by reward money and shorter sentences in their criminal cases.[239] This case has been classified as problematic and controversial. Although the prosecutor did not support Williams' execution based on new DNA evidence indicating contamination, the jurors who s The Attorney General argued, "The victim's items were found in Williams's car after the murder. A witness testified that Williams sold the victim's laptop to him. Williams

234 'Hours before Freddie Owens Execution, Friend who Testified Against him says he Lied: "Freddie was not there'(CBS News,21 September 2024)<"https://www.cbsnews.com/news/freddie-owens-execution-south-carolina-friend-says-lied-testimony/> accessed 22 September 2024.

235 Palin M,' Key witness who put Freddie Owens on death row admits he lied but the Execution still happening' New York Post (US News,20 September 2024)<https://nypost.com/2024/09/20/us-news/key-witness-who-put-freddie-owens-on-death-row-now-says-he-lied/> Accessed 21 September 2024.

236 Laird, 'SC justices again refuse to stop Friday's execution, despite new claims of innocence'.

237 Laird, 'SC justices again refuse to stop Friday's execution, despite new claims of innocence'.

238 Bellware K,' Missouri executes Marcellus Williams despite prosecutors' objections'The Washington Post (25 September 2024) <https://www.washingtonpost.com/politics/2024/09/24/marcellus-williams-execution-missouri-faq/> accessed 26 September 2024

239 Bellware,' Missouri executes Marcellus Williams despite prosecutors' objections'

confessed to his girlfriend and an inmate in St. Louis City Jail, and his girlfriend saw him dispose of the bloody clothes worn during the murder." [240]

3.5.3.2 Summary of the two cases and the burden of proof

In the jury system, the prosecution bears the burden of proof, needing to establish the accused's guilt beyond a reasonable doubt. Protecting the right to a fair trial involves ensuring that the processes leading up to a trial respect individuals' fundamental rights and that the legal system treats all parties fairly, equally, and justly.

In both cases, the juries included only one Black juror among eleven White jurors, highlighting a racial disparity. The absence of DNA evidence in both cases resulted in the defendants being sentenced to death based solely on witness statements. In Williams' case, one witness was a convicted criminal incentivized by monetary rewards and promises of reduced sentences. In both instances, the witnesses had undisclosed agreements with prosecutors.

The credibility of witnesses is particularly critical in criminal cases due to the severe consequences, such as the death penalty or life imprisonment. Factors such as a witness's honesty, potential biases, and consistency should be rigorously examined in court. In Williams' case, a witness's testimony was directly influenced by the promise of a reduced sentence and financial incentives, raising significant ethical concerns.

Williams's case has generated widespread debate, questioning whether the state of Missouri executed an innocent man. The lack of DNA evidence linking him to the crime scene and the presence of contaminated DNA evidence raise doubts about the validity of the conviction. Legal experts argue that the case highlights systemic flaws in Missouri's justice system, emphasizing that justice should remain open to new evidence and that the conviction does not meet the criminal standard of proof beyond a reasonable doubt. Many irregularities have been cited, with members of the victim's family, the prosecution, and jurors expressing their doubts about the correctness of the conviction. Nevertheless, the governor and the Supreme Court proceeded with the

[240] Von Quednow C and Yan H, 'Missouri executes Marcellus Williams despite prosecutors and the victim's family asking that he be spared'CNN (25 September 2024) <https://edition.cnn.com/2024/09/24/us/marcellus-williams-scheduled-execution-date/index.html > Accessed 26 September 2024

execution, prompting experts to conclude that significant injustices and reasonable doubts surround the case.

3.6 Fairness in the proceedings: The Vincent Simmons case

The case of Vincent Simmons serves as a stark example of racial bias and wrongful convictions in the U.S. legal system. In 1977, Simmons, a 25-year-old Black man from Mansura, Louisiana, was accused of attempting to rape two White teenage twins in Avoyelles Parish, Louisiana. He was convicted by a jury composed of eleven White men and a single Black woman, and sentenced to 100 years in prison. Critics argue that the case was built on a fabricated narrative by the teenagers and was marred by racial prejudice. Notably, no concrete evidence of the crime was presented at trial, raising significant doubts about the fairness of the proceedings.

The twins claimed that Simmons had brutally raped them, yet the medical examiner's report at the time indicated no signs of sexual assault. This critical evidence was never disclosed to Simmons's defense team. Furthermore, during the police lineup, Simmons was the only individual in handcuffs, creating a biased identification process. Family members of the twins also suggested the possibility of hidden family dynamics, such as a consensual relationship between one of the twins and a cousin.[241] After 44 years of imprisonment, Simmons's conviction was overturned in 1997, with the judge ruling that he had never been given a fair trial.

3.7 Systemic racism in jury selection and criminal trials

The right to a fair trial and an impartial jury is a cornerstone of the justice system, particularly in countries like the United States, where the Constitution enshrines these rights.[242]

3.7.1 Challenges in ensuring fairness and accuracy in verdicts

One of the primary goals of a legal trial is to uncover the truth; juries must determine what genuinely happened and provide accurate verdicts. However, verdict accuracy

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241 Soury L, 'Vincent Simmons – Incarcerated'(Families and Friends of the wrongfully convicted)<https://wrongfullyconvicted.info/profiles-cases/ >accessed 20 October 2024

242 Equal Justice InitiativeI'Race and the Jury Illegal Discrimination Jury Selection'(EJI 2021) para 8

is not the only objective of a trial. Several processes, policies, and individual rights concerns are also crucial during the proceedings.[243] The verdicts juries reach should reflect a balance between accuracy and these policy concerns.[244]

3.7.2 The presumption of innocence and reasonable doubt

Jurors are clearly instructed to presume that the defendant is innocent and to return a guilty verdict only if the prosecution has overcome this presumption by meeting the very high standard of proof: "beyond a reasonable doubt." Academics have noted that jurors can often be confused about the presumption of innocence, with only one in five able to accurately paraphrase it, and half mistakenly believing that suspects must provide evidence of their innocence. [245]

3.7.3 Racial bias in jury selection

Another concerning issue is that the fairness, reliability, and integrity of the legal system have been compromised by clear evidence of racial bias in jury selection. The case of Simmons exemplifies this unfairness; only one Black person served on the jury, who felt pressured into a conviction. This reflects systemic racism and a failed justice system, where the testimony of a White person led to the conviction of a Black individual without sufficient proof. The jurors were unaware of the medical report evidence that was never presented to them. No sexual assault or kidnapping occurred, and no compelling evidence was presented at trial.[246] Mr. Simmons was convicted without proof beyond a reasonable doubt as required by criminal law.

3.7.4 Consequences of racial imbalance injuries

In all three cases mentioned, juries excluded and marginalized communities of color, resulting in wrongful convictions and disproportionately harsh sentences that severely impacted Black individuals. The jurors did not uphold the principle of proof beyond a reasonable doubt, raising significant questions about fairness and the understanding of this phrase during criminal proceedings. Since trial judges are instructed not to

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243 KoehlerJJ, 'Train Our Jurors' (Northwestern University School of Law 2006)303.
244 Koehler, 'Train Our Jurors'(Northwestern University School of Law 2006)303.
245 Koehler, 'Train Our Jurors'(Northwestern University School of Law 2006)306.
246 Soury , 'Vincent Simmons – Incarcerated'.

provide juries with guidance on what “reasonable doubt” means, this lack of explanation can lead to varied interpretations, some of which may afford the accused less protection than the standard intends.[247]

3.7.5 Improving jury instructions on reasonable doubt

Academics argue that a more effective approach to jury instruction would focus on the purpose of the reasonable doubt standard:[248] ensuring that jurors do not convict a defendant unless they possess a high degree of certainty regarding guilt.[249] A guilty verdict should only stand if a reviewing court finds sufficient evidence that allows a jury to reasonably conclude guilt beyond a reasonable doubt.[250]

3.7.6 Impact of systemic bias in high-profile Cases

Mr. Owens case before the South Carolina Supreme Court, was found guilty of murdering the store clerk and sentenced to death in 1999, even though there was no forensic evidence linking him to the crime. In another case, Mr Williams's case was in the Missouri Supreme Court and was also sentenced to death although his DNA was not a match to the one that was found on the scene and he also maintained that he did not commit the crime. The two cases were so identical and have raised a lot of outrage among the public and controversy around the cases has elevated so many questions. The two cases were based on the testimony of witnesses who were paid or given some immunity.

The cases of the deceased accused, Mr. Williams and Mr. Owens, highlight the controversy surrounding what constitutes sufficient evidence for a jury and judge to find someone guilty and impose a death sentence. The disproportionate representation of jurors one Black member and eleven white members indicates a systemic imbalance that affects decision-making. A conviction can have severe consequences for the individual, their family, and the community.[251]

247 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’34.
248 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’34.
249 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’34.
250 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’34.
251 Newman, ‘Taking Beyond a Reasonable Doubt Seriously ’34.

3.7.7 The role of the presumption of innocence in judicial impartiality

In Mr. Williams's case, DNA evidence proved he was not the killer, yet he was still executed, raising questions about the presumption of innocence. This situation creates a conflict with the principle that every accused person is presumed innocent until proven guilty beyond a reasonable doubt. The impartiality of the justice system is crucial, referring to the conduct of jurors and judges who are meant to preside over trials and decide on acquittals or convictions without bias toward either the accused or the victim. Safeguards must be in place to protect the rights of the accused throughout the criminal process. Consequently, the prosecution must meet a high standard of proof. If reasonable doubt exists, the accused must be given the benefit of that doubt and found not guilty.[252]

3.7.8 The broader question of jury system relevance and reform

The central question is not whether the jury reached the correct verdict but whether the verdict was reasonable in light of the evidence and the law.[253] Take, for example, O.J. Simpson's criminal trial for the murders of Ronald Goldman and Nicole Brown Simpson. Was the jury's acquittal of Simpson the optimal verdict?[254] The issue of fairness in a criminal case and the burden of proving the accused guilty beyond a reasonable doubt are crucial attributes that need to be carefully followed. Some critics think that trial by jury in criminal cases is outdated, Furthermore, unhappiness with verdicts, especially in certain cases of widespread public interest, has also provoked criticism not merely of these questionable verdicts but of the system itself.[255]

According to Lewis F. Powell Jr., as society becomes more complex and increasingly relies on legislation and government regulations to solve problems, the pressure for trial by jury in criminal cases may rise. This necessitates examining the tradition to determine whether trial by jury is worth preserving.[256]Courts have consistently recognized that equal opportunity to participate in the fair administration of justice is

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252 'The Right to a Fair Trial' <https://www.fairtrials.org/the-right-to-a-fair-trial/> accessed 20 September 2024.

253 'The Right to a Fair Trial'

254 Theophilopoulos C and Bellengere A, ''Relevance, 'Admissibility, and Probative Value in a Rational System of Evidence: A South African Perspective''(2022)25 PER / PELJ 1,3.

255 Lewis F and Powell JR,' Jury Trial of Crimes', (1966) 23 Washington and Lee Law Review 1,2.

256 Lewis F and Powell JR,' Jury Trial of Crimes '2.

fundamental to a democratic system. The court has emphasized that eliminating racial bias in jury selection is essential for maintaining public confidence in the criminal justice system.[257]

3.7.9 Prerequisite for representation and eliminating bias

It is evident that Black people or "people of colour" are significantly underrepresented on juries during criminal justice proceedings. The law mandates that the proportion of Black individuals in a jury pool must reflect their representation in the overall population.[258] To prevent wrongful convictions and excessive sentences, it is crucial to achieve representative juries. Black individuals often face unfair treatment within the criminal legal system due to inadequate jury representation. Prejudice has been shown to affect all aspects of this system.[259] The exclusion of people of color, along with bias and discrimination, compromises the credibility, reliability, and integrity of the justice system. The purpose of the jury system is to assure criminal defendants and the general public that a verdict whether conviction or acquittal is rendered by fair individuals.[260]

3.8 Evidence and the burden of proof in South African criminal law

The evidence includes statements containing information about the alleged criminal acts perpetrated by the accused. In the South African legal system, the relevance of evidentiary facts is determined not by strict legal rules but by extra-legal principles grounded in inferential reasoning and probability theory.[261] The burden of proof is the responsibility of establishing evidence that meets the required standard, determining whether a defendant is innocent or guilty. In a criminal trial, the prosecution bears the burden of proving that the accused is guilty beyond a reasonable doubt. To succeed in their claims, they must present compelling evidence that supports their case.

One key principle is that evidence presented should ensure fairness, with the court admitting only the best evidence available. Various forms of evidence exist, including

257 'Equal Justice initiative,Race and the Jury Illegal Discrimination Jury Selection(EJI 2021) para 8
258 EJI, Race and the Jury Illegal Discrimination in Jury Selection.
259 EJI, Race and the Jury Illegal Discrimination in Jury Selection.
260 EJI, Race and the Jury Illegal Discrimination in Jury Selection.
261 Theophilopoulos and Bellengere, 'Relevance, 'Admissibility, and Probative Value in a Rational System of Evidence: A South African Perspective '2.

documents, video recordings, and both written and oral statements from witnesses. South African law recognizes different types of evidence, each governed by its own rules and requirements. Testimonial evidence, documentary evidence, and physical evidence are among the most common forms presented in court. The credibility of witnesses, the authenticity of documents, and the chain of custody for physical evidence are all scrutinized according to evidentiary laws.[262]

Section 3(4) of the Law of Evidence Amendment Act[263](the Hearsay Act) defines hearsay evidence as "evidence, whether oral or written, the probative value of which depends upon the credibility of any person other than the person giving such evidence."[264] As a general rule, hearsay evidence is inadmissible due to concerns that its admission may infringe on the accused's right to a fair trial.[265] However, the Hearsay Act provides exceptions under which hearsay evidence may be admitted. Section 35(3)(i) of the Constitution guarantees the right to adduce and challenge evidence, but in *S v Ndhlovu,* the Supreme Court of Appeal clarified that this section does not automatically grant a right to cross-examine. In *Makhi Kapa v. The State* in the Constitutional Court, the central issue was whether the hearsay statement of Ms. Bomikazi Dasi, a deceased eyewitness, was correctly admitted as evidence under Section 3(1)(c) of the Law of Evidence Amendment Act No. 45 of 1988.[266] The applicant's conviction was linked to alleged acts of vigilantism in Khayelitsha in 2018, where he, along with six others, faced multiple charges, including four counts of kidnapping, two counts of assault with intent to cause grievous bodily harm, two counts of murder, and one count of attempted murder related to the deaths of Mr. Makhuze Bungane and Mr. Monwabisi Nkayi. [267]

The prosecution's evidence included DNA evidence, blood spatter analysis, post-mortem reports, a statement made by one of the accused, testimony from the deceased's grandmother, the investigating officer's testimony, and Ms. Dasi's hearsay

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262 Snyders C,' The crucial role of laws of evidence in South African litigation: Deciding the fate of a case'(Golegal Industry News and insight,11 January 2024)< https://www.golegal.co.za/publishers/schoemanlaw-inc/ >accessed 2 September 2024.

263 Law of Evidence Amendment Act 45 of 1988

264 Ratshibvumo T, ''The Kapa case: A Landmark Ruling Redefining the Admissibility of Hearsay Evidence in Criminal Trials''(2023)Derebus 4.

265 Ratshibvumo T, ''The Kapa case: A Landmark Ruling Redefining the Admissibility of Hearsay Evidence in Criminal Trials''4.

266 *Makhi Kapa v The State CCT292/21*

267 *Makhi Kapa v S*

statement.[268] The accused was found guilty by the High Court and the Supreme Court of Appeal, leading him to approach the Constitutional Court. The applicant argued that the admission of Ms. Dasi's hearsay statement infringed his right to a fair trial as outlined in Section 35 of the Constitution.

The court emphasised the necessity of having adequate indicators of truthfulness, reliability, and probative value for the statement to be admitted as evidence.[269] The decision must consider the totality of the evidence available to the court. The court concluded that "the fact that the evidence in question strengthens the prosecution's case does not render the evidence prejudicial to an accused. It acknowledged that "there can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement, as he is deprived of the opportunity to cross-examine the deponent." However, it also considered the deceased status of the witness and the overriding interest of justice. Ultimately, the court granted leave to appeal but dismissed the appeal.[270] This case marks a significant shift in how hearsay evidence is treated in criminal trials, making it easier to admit even when it plays a decisive role in convicting an accused.[271]

In *S v. Beja and Another,* it was held that a witness's contradictions might cast doubt on their credibility, but this is for the court to determine based on all available evidence. The mere fact that a witness has contradicted themselves does not warrant disregarding or excluding their evidence entirely.[272]

3.9 Chapter summary

In South Africa, the principle of "Ubuntu" serves as a fundamental element of fairness, interpreted and expressed by Indigenous people.[273] In our criminal trials, the principle of fairness acts as a transformative element shaped by our historical context. South African criminal law requires the state to meet the evidential burden of proof beyond a reasonable doubt. The law mandates that the state must prove that the defendant,

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268 *Makhi Kapa v S*
269 *Makhi Kapa v S*
270 Ratshibvumo T, ''The Kapa case: A Landmark Ruling Redefining the Admissibility of Hearsay Evidence in Criminal Trials''6.
271 Ratshibvumo T, ''The Kapa case: A Landmark Ruling Redefining the Admissibility of Hearsay Evidence in Criminal Trials''6.
272 *S v Beja and Another (CC18/2021) [2023] ZAWCHC 113*
273 Ndude, 'The Principle of Fairness in South African Criminal Trials'10.

who is presumed innocent, is guilty beyond this standard. The evidential burden is addressed in Section 35(3) of the Constitution.

This discussion illustrates that the rights to a fair trial, a fair hearing, and sufficient evidence are crucial in criminal cases, in line with constitutional values. Section 35(5) states that evidence obtained in violation of any rights in the Bill of Rights must be excluded if its admission would render the trial unfair or disadvantage the administration of justice.

It is important to distinguish between the burden of proof and the evidential burden. The burden or onus of proof determines the outcome when the evidence is evenly balanced at the end of a trial, leaving the court unable to reach a definitive conclusion.[274] To secure a conviction, the evidence must establish the guilt of the accused beyond a reasonable doubt, meaning there must be no reasonable possibility that an innocent explanation could be true. This test must be evaluated based on all evidence presented.

In criminal proceedings, Section 174 of the Criminal Procedure Act No. 51 of 1977 and Section 35 of the Constitution both relate to the principle of discharge and the presumption of innocence. Section 35 guarantees the right to a fair trial, including the presumption of innocence until proven guilty. This section emphasizes the importance of the presumption of innocence as a fundamental right in criminal proceedings, placing the burden of proof on the prosecution to establish the accused's guilt beyond a reasonable doubt.

Section 174 of the Criminal Procedure Act allows for the discharge of an accused person at the close of the prosecution's case if the court finds no evidence that the accused committed the alleged offense. This section ensures that an accused person is not subjected to a trial lacking a reasonable prospect of conviction, upholding the principle of the presumption of innocence by requiring the prosecution to present sufficient evidence to establish a prima facie case against the accused.[275] While some have criticized section 174 of the CPA, calling for its abolition, Reddi argues that

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274 Ndude, 'The Principle of Fairness in South African Criminal Trials'10.

275 Reddi M and Ramji B, ''Section 174 of the Criminal Procedure Act: is it Time for its Abolition'', (2018) DE Jure 251,269

section 174 of the CPA is not harmful in itself; rather, its current implementation has proven detrimental.[276]

In relation to the principles of discharge and the presumption of innocence, these provisions work together to protect the rights of the accused. Section 174 of the CPA ensures that an accused person is not subjected to a trial without sufficient evidence, while Section 35 of the Constitution emphasizes the presumption of innocence and places the burden of proof on the prosecution.

Together, these provisions uphold the principle of the presumption of innocence and ensure a fair trial for the accused.[277] They also serve as safeguards against the wrongful exercise of power by the state and its prosecutors. Ultimately, a judge requires the state to prove that the defendant, presumed innocent, is guilty beyond a reasonable doubt.

Furthermore, the Bill of Rights, contained in Chapter 2 of the South African Constitution, protects the rights of accused persons. Specifically, Section 35(3)(h) states that every suspect has the right to a fair trial, which includes the presumption of innocence, the right to remain silent, and the right not to testify during proceedings. Based on this constitutional provision, the state must ensure that these rights are upheld for anyone accused of committing an offense. Essentially, it is the prosecution's responsibility to provide the court with sufficient evidence to sustain a conviction.

In the jury system, the prosecution bears the burden of proof that the suspect is guilty beyond a reasonable doubt. The ‘reasonable doubt’ formula was originally concerned with protecting the souls of jurors from damnation. In the older Christian tradition, convicting an innocent defendant was seen as a potential mortal sin.[278] The purpose of the reasonable doubt instruction was to reassure jurors that they could convict the defendant without risking their salvation, as long as their doubts about guilt were not ‘reasonable.’ [279] Thus, the phrase was not initially intended to protect the suspect but

276 Reddi and Ramji, ‘’Section 174 of the Criminal Procedure Act: is it Time for its Abolition’’, 269
277 Reddi and Ramji, ‘’Section 174 of the Criminal Procedure Act: Is it Time for its Abolition’’, 269
278 Gallanist TP,‘ Review, Reasonable Doubt and History of the Criminal Trial: The Origins of Reasonable: Theological Roots of the Criminal Trial By James Q Whitman ’943
279 Gallanist,‘ Review, Reasonable Doubt and History of the Criminal Trial: The Origins of Reasonable: Theological Roots of the Criminal Trial By James Q Whitman ’943

to offer moral comfort to the jurors.[280] The presumption of innocence until proven guilty is a cornerstone of fair trials that protects the rights of the accused. The witness's credibility is vital because witnesses can provide an impartial and objective account of the incident. It can also be inappropriate or unreliable. The composition of the juries seems to be another important factor. A jury is supposed to be an impartial representation of diverse people from a backgrounds.

The next chapter will discuss the impact and challenges that the Constitution and Criminal Procedural Act have on the concept of proof beyond reasonable doubt during trials.

[280] Gallanist,‘ Review, Reasonable Doubt and History of the Criminal Trial: The Origins of Reasonable: Theological Roots of the Criminal Trial By James Q Whitman ’944

CHAPTER 4

THE CHALLENGES OF USING THE CONCEPT OF PROOF BEYOND A REASONABLE DOUBT IN SOUTH AFRICA

4.1 Introduction.

This chapter examines the challenges of applying the burden of proof beyond reasonable doubt in South African criminal law. It explores how the State bears this burden in the South African criminal justice system. In this system, the prosecution has the burden of proving an accused person's guilt beyond a reasonable doubt. This means that the State must present compelling evidence to eliminate any reasonable doubt regarding the accused's guilt. This high standard of proof can, in some cases, make it challenging for the State to secure a conviction.

Two controversial cases, *S v Petersen and Others and S v Dewani*, will be analysed to illustrate how the courts have interpreted and applied this burden of proof. The discussion will also highlight the difficulties the State faces in proving all elements of a crime beyond a reasonable doubt.

4.2 Discussion of the two Cases(s v Dewani and s v Petersen and Others) Western Cape High Court

Two recent high-profile cases, *S v Petersen and Others and S v Dewani*, will be analysed to observe how the courts applied the "beyond reasonable doubt" standard and the errors made by the State in presenting these cases. The two case studies had similar circumstances; however, the judgments differ, hence, the research will be conducted to study the controversy surrounding the two cases.

In *S v Najwa Petersen and Others*, Najwa Petersen was found guilty of orchestrating the murder of her husband, musician Taliep Petersen, for life insurance money.In December 2008, the accused and her co-accused were found guilty of murder and robbery with aggravating circumstances.

The case of *S v Dewani* attracted significant media interest due to the wealth of the Dewani family and the allegations surrounding Shrien Dewani's sexuality. It raised numerous legal questions among legal practitioners and the general public.

Speculation suggested that Shrien may have organised his wife's murder to avoid the consequences of a divorce within his community. Mr Dewani confessed he considered himself bisexual and his relationship with Anni had been volatile.

4.3 Facts of the *S v Dewani* case

The trial, known as the "honeymoon murder," was held in the Cape High Court. Shrien Dewani, a British businessman, and his wife were on honeymoon in South Africa in 2010 when their car was hijacked in Gugulethu, Cape Town. Anni Dewani was abducted and later found murdered. The investigation led to the arrest of the taxi driver, Zola Tongo, who recruited two hitmen.

Tongo and the hitmen were convicted, and the prosecution alleged that Dewani had hired them to stage the carjacking and murder his wife. Dewani denied involvement. After a long legal battle, he was extradited to South Africa in 2014 to face trial. At the close of the State's case, Dewani's defense applied for discharge under Section 174.

The court found that the prosecution's case was effectively non-existent, as the only evidence linking Dewani to the crime was Tongo's testimony, which was contradictory and unreliable. The judge ruled that denying the application would be an injustice, and Dewani was discharged. Anni's family expressed deep disappointment, believing justice had not been served.

During the trial, the hitmen, who had already been convicted, testified against Dewani, claiming that he had paid them to carry out the murder of his wife. The prosecution mentioned that Dewani wanted to kill his wife because he was bisexual. The defense claimed that Dewani was innocent and that the hitmen had fabricated their evidence to ensure they got a lowered sentence. At the end of the case, the accused's defense brought an application for the accused's discharge in terms of Section 174 of the Criminal Procedure Act, No. 51 of 1977.

During the judgment, the court highlighted that during the case of *S v Phuravhatha and Others*, it was held that:

> [T]he presumption in favour of innocence, the fact that the onus rests on the State, as well as the dictates of justice, will require an exercise of discretion under s 174 in favour

of an accused person where the State case is effectively non-existent. Strengthening or supplementation of a non-existent State case is physically unfeasible.[281]

Since the commencement of the Constitutional instruction, contradictory views have arisen as to whether or not the Constitution has impacted the test to be applied by a court in an application in terms of Section 174.[282] The court also summarised the legal position in the application of Section 174 as follows: the accused person is eligible to be cleared at the close of the case for the prosecution if there is no likelihood of a conviction. In determining if an accused person is entitled to be discharged, the court may take into account the reliability of the State witnesses. The court can grant the accused a discharge if the evidence of the State witnesses incriminating the accused is of such poor quality. In this case, the only witness that implicated the accused was Tongo, the taxi driver.[283]

After deliberation, the judge decided to throw the case out, citing that the evidence presented by the prosecution fell far below the required threshold of what a reasonable court could convict on.[284] The judge said that the evidence of the prosecution's main witness was contradictory. The application in terms of Section 174 of the CPA was granted by the court, and the accused was found not guilty and discharged.

It has been held that the credibility of State witnesses at this stage of the proceedings only plays a very restricted role. In *S v Mpetha*, it was held that related evidence can only be ignored if it is of such poor quality that no reasonable person could accept it. When the judge revealed her ruling, she said the only reason not to grant the application would be in the hope that Mr Dewani would incriminate himself if he gave evidence. But to do so would be a demonstration of misdirection.[285] Anni's family was very disappointed and said they had been failed by the justice system.

4.3.1 Proof beyond reasonable doubt in the case

A legally binding affidavit was fabricated, and a witness Statement was taken unsigned. One key State witness confessed to being deceitful at a previous court

281 *S v Phuravhatha & Others, 1992 (2) SACR 544*
282 *Dewani case*
283 *Dewani case*
284 *Dewani case*
285 *Dewani case*

hearing. The SAPS's handling of the investigation was insufficient, including misplacing police pocketbooks.

The senior investigating detective was asked about the decision to offer a plea bargain to Tongo, whose evidence was the pivot of the prosecution's case. He said the decision had been made by the Western Cape's director of public prosecutions (DPP), and he also admitted disremembering a key piece of forensic evidence that could have led to one South African man being cleared of Anni's murder. It was SAPS's decision, taken in concurrence with the NPA, to offer three guilty men plea bargains and immunity deals in return for evidence identifying Mr Dewani. The judge ruled that Mbolombo's testimony was so untrustworthy that his immunity deal should not be granted. He could be charged with murder if he was not given the offer of an immunity deal.

The prosecution's case had insufficient direct evidence linking Shrien Dewani to the planning of the murder. One can easily identify the incompetence of the police or lack of knowledge and skill in certain areas, including handling documents, compiling Statements, conducting investigations, and knowing when to offer immunity deals to suspects. The biggest challenge is insufficient resources. There is a need to update the system and develop a strategy to be used for each case. In many instances, people may argue that the police are stereotyped and biased.

4.4 Facts of the case: *S v Najwa Petersen and Others.*

Taliep Petersen was a well-loved South African musician and actor who was murdered in his home in Athlone, Cape Town, on 16 December 2006 by hitmen hired by his wife, Najwa Petersen. Najwa hired Faheem Hendricks for an amount of R100,000 to arrange the contract killing of her husband. Najwa and Hendricks had known each other for a long time, as she used to lend him money. Hendricks then contacted the second accused to secure the services of two so-called hitmen, the third and fourth accused, to carry out the murder.

Originally, the plan was to stage the murder as a hijacking on 14 December 2006, when Taliep and Najwa were returning home from the airport after a trip to London. However, the third and fourth accused were unavailable on that day, so the plan was

postponed. Again, on 15 December 2006, when Taliep was returning from a performance at a theatre in Wynberg, the hitmen were still unavailable.

The murder was eventually carried out on the night of 16 December 2006, staged as a robbery while Taliep, Najwa, and their young daughter were at home. The agreement was that Najwa would leave the gate and door unlocked, ensuring the security system was off. At around 11:50 PM, the two hitmen entered the house.

Initially, the murder was believed to be a robbery gone wrong. However, police investigations later concluded that it was a planned execution. Najwa was accused of hiring three hitmen to kill her husband for his life insurance money. She had paid the second accused to acquire the two hitmen.

A detective testified in the High Court that he became suspicious of Najwa after hearing her sobbing account on the night of her husband's death.[286] When police arrived at the crime scene, Najwa was found sitting on the bed, crying and appearing confused. Contradictory Statements from those present in the house made it clear that Najwa was the only one who had heard the doorbell ring. She was also unsure of which bedroom her daughter had been in when the suspects entered.Additionally, when asked where Taliep was, she vaguely responded that they were "busy with him" and could not specify how many suspects had been involved.

Another key point was that Najwa had previously stabbed Taliep in the neck eight months before he was murdered. Her cousin, who lived in a granny flat on the premises, Stated that the couple had been sleeping in separate bedrooms and that Taliep had spoken about moving out.

After Taliep's death, Najwa attempted to claim his R5.3 million life insurance payout to her Namibian bank account, despite their daughter being the actual beneficiary. The trial lasted for almost two years, and in December 2008, Najwa and the three hitmen were found guilty of murder and robbery with aggravating circumstances. The judge dismissed claims that Najwa was suffering from mental health issues, instead describing her as a careless, cold, and manipulative person who ensured she controlled all of Taliep's finances. They were all sentenced accordingly.

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[286] Maclennan B, ‘How detective became suspicious of Najwa Petersen’Mail and Guardian(South Africa,10 April 2008) <https://mg.co.za/article/2008-04-10 >accessed 20 January 2025

4.5 The summary of the two cases on proof beyond reasonable doubt

The two controversial cases of *S v Dewani and S v Peterson* had similar circumstances; however, the judgments differed. Both cases involved contract killings where hitmen were hired to kill the deceased. Taliep Peterson, the popular South African musician, was killed by two hitmen at his house. Initially, this was identified as a robbery gone wrong; later, his wife was arrested and identified as the mastermind behind the killing. Najwa was found guilty by the court using key witness statements. The key witness statement remained intact during cross-examination.

Anni Dewani, a Swedish-born woman, was also killed in South Africa while on her honeymoon with her businessman husband, Shrien Dewani. The taxi transporting the couple was hijacked in Gugulethu by two hitmen; later, the husband was arrested, suspected to be the mastermind. In both cases, the hitmen identified the spouses as the masterminds behind the killings. The hitmen turned State witnesses in both cases.

Police collected damning evidence from a hotel's closed-circuit television video showing Shrien Dewani handing to Zola Tongo a small plastic bag, which the taxi driver testified contained the R1,000 cash allegedly paid for his role in the premeditated killing of Anni Dewani.

However, in the Dewani case, the court disregarded the confession statements from three men arrested for the incident, which implicated Mr. Dewani as the orchestrator of the hijacking that took place in Gugulethu in November 2010. The State presented insufficient evidence upon which a reasonable court might convict.

4.5.1 Witness credibility in the two criminal cases

In South Africa, the credibility of witnesses is crucial during a criminal trial, with their character for honesty or reliability, as well as their potential biases or motives, playing a significant role in evaluating their testimony.

In each case, witness credibility was critical, as it influenced the judge's ability to reach a conviction. The testimony of the witnesses in both cases had to be scrutinized, as the accused individuals could be classified as career criminals. The hitmen in both cases were known criminals, and hitmen often minimise their involvement to receive

reduced sentences. An accused may deny any direct or circumstantial evidence proving their guilt by demonstrating that they could not have committed the crime.

In Najwa's case, one of the accused claimed he was unsure whether he or Najwa had pulled the trigger. Clearly, this is not something one could forget if they were involved in a murder. Additionally, if the accused was not in a stable mental state at the time, it raises further doubts about the reliability of their testimony.

In Shrien's case, witnesses contradicted each other. The receptionist admitted to lying in court to protect himself, leading the judge to deem him unreliable and untrustworthy. His evidence was considered inconsistent and unbelievable. Furthermore, the testimony of the three convicted criminals contained numerous mistakes, lies, and inconsistencies.

In a criminal trial, the prosecution must prove beyond a reasonable doubt the accused's involvement in the crime. There must be a causal link between the accused and the offense committed. Witness testimonies help shape the theory of the case, and their statements should not be inconsistent. The integrity of witnesses is crucial in South African criminal trials, as the court depends on their testimony to determine the facts, significantly impacting the trial's outcome.

4.6 Challenges of Using the Standard of Proof Beyond a Reasonable Doubt in South African Criminal Law

In numerous cases, judges have highlighted several issues and challenges that prevent the prosecution from proving, beyond a reasonable doubt, that the accused is guilty of the charges. When the National Prosecuting Authority (NPA) fails to discharge its burden of proof, the case is dismissed by the court. The following paragraphs will discuss the challenges associated with applying the standard of proof.

4.6.1 Lack of precise definition

The phrase "beyond a reasonable doubt" is not clearly defined, yet it sets a high standard, making it challenging for judges to apply it consistently, particularly in cases with conflicting evidence or complex legal arguments. The lack of a precise definition for the standard of proof beyond a reasonable doubt presents several challenges in South African criminal law. Academics like Dlamini have called for a clear definition,

rather than leaving it to judges to interpret on a case-by-case basis. A standardised definition would assist in applying the standard consistently in complex cases, reducing confusion and mitigating the risk of acquitting guilty individuals due to unconvincing evidence. Different judges may interpret the concept differently, leading to inconsistencies in decision-making. This inconsistency can significantly impact cases with weak or circumstantial evidence, potentially resulting in the acquittal of guilty individuals despite a high probability of guilt.

The standard aims to protect the accused from State abuse, ensuring innocent individuals are not wrongfully convicted while holding the guilty accountable. However, its application sometimes creates tension. In the *S v Dewani* case, public dissatisfaction arose, with claims that justice favors the wealthy over the poor.

4.6.2 Misplacement of case documents

One of the key challenges contributing to these failures includes the misplacement of case documents, which can result in an inability to meet essential legal standards; insufficient or unreliable evidence; and failure to present credible testimony. Mismanagement of case files, including the disappearance of dockets, remains one of the most critical issues, often causing complications and delays that undermine the prosecution's ability to present a strong case. This challenge is further exacerbated by a lack of accountability within the justice system. When documents are lost or misplaced, there is often no consequence management in place to hold individuals accountable. This lack of oversight reflects a broader systemic issue. Every individual involved in the process must accept responsibility for their actions, with appropriate consequences for negligence or misconduct. Missing original documents can directly compromise the prosecution's ability to present credible evidence. While case files can be recompiled, this process risks omitting crucial information required in court. Implementing robust consequence management could help reduce the recurrence of these document-handling failures.

4.6.3 Failure to present credible evidence.

The case of *S v Dewani* illustrates another common challenge. The judge found the prosecution's evidence fell short of the vital standard for a conviction and also highlighted significant doubts and inconsistencies in the hitmen's testimonies,

ultimately undermining their credibility. Consequently, the court discharged Dewani, ruling that there was no reasonable probability of conviction. The prosecution must meet the threshold required, ensuring sufficient evidence is carefully evaluated before being presented to the court. Since the concept remains undefined, it should rely on evidence rather than perception or belief. Judicial discretion significantly impacts the lives of the accused and the victims' families, necessitating careful consideration. Proof beyond a reasonable doubt is critical, as wrongful convictions can lead to lengthy prison sentences or lawsuits against the State for wrongful prosecution.

4.6.4 Witness credibility and preparation for the case

In both cases, the court found the prosecution's witness to be unreliable due to numerous inconsistencies in their statement, ultimately rendering their testimony untrustworthy. The prosecution's case relied heavily on this witness, yet it appeared that the NPA had not adequately prepared to address the weaknesses in their testimony. Poor case preparation is a recurring challenge and can stem from multiple factors, including limited capacity and resources within the NPA, a lack of skills, or overwhelming caseloads allocated to prosecutors.

Witness credibility issues pose challenges when the prosecution relies heavily on testimony. Inconsistencies or doubts about a witness's credibility can make it difficult to meet the "beyond a reasonable doubt" threshold, especially in cases with limited forensic evidence. Thorough preparation is critical to successfully navigating the judicial process. Many witnesses are unfamiliar with courtroom proceedings, making it essential for prosecutors to meet with them well in advance, acquaint them with the courtroom environment, and prepare them for the types of questions they may face. The NPA should establish clear guidelines to assist prosecutors in case preparation, ensuring that every case meets specific requirements, such as verifying facts, compiling sufficient evidence, and structuring arguments effectively to support the case.

4.6.5 The Threshold of proof beyond a reasonable doubt is too high

The standard of proof in South African criminal law is proof beyond a reasonable doubt, the highest standard of proof. This requires the State to present convincing, reliable, and honest evidence that eliminates any reasonable doubts about the

accused's guilt.[287] The evidence must establish that the accused committed an unlawful act, intended the crime, or was negligent. Intention must extend to all elements of the crime, including unlawfulness and illegality.[288]

In South Africa, the onus of proof does not shift to the accused in criminal cases, as established by the Constitutional Court. While the accused is not obligated to testify, they may present evidence suggesting their innocence. The State must prove all elements of the crime, maintaining the burden of proof.

Finally, the state must do everything possible to restore and maintain public trust in the justice system. While corruption within the justice system is a significant issue that requires separate investigation and intervention, it remains a factor that undermines public confidence and, indirectly, the ability of the prosecution to function effectively.

4.7 Chapter summary

It is clear that the dawn of democracy in South Africa has brought significant change, especially with the promulgation of the new Constitution. Legislations that were in effect at the time needed to align with the Constitution as the highest law of the land. Hence, any legislation found to be inconsistent with the Constitution is declared unconstitutional and invalid. The Constitution and the CPA are both critical during the criminal justice process. The CPA serves as the primary legislation during trials. Judges must uphold the law and ensure that legal matters are decided fairly and impartially. They should always apply the law to the facts of a case, as their decisions can have a significant impact on individuals' lives.

In the case of *S v Dewani*, the defense team applied for Section 174 of the CPA to have the accused in a murder trial acquitted. There was widespread public outrage surrounding this case, but since there was no evidence linking the accused to the crime, the acquittal was granted by the judge. Bearing in mind that Mr. Dewani did not testify during the trial, his right to remain silent is protected under Section 35 of the

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287 'What Does it Mean to Prove My Guilt Beyond A Reasonable Doubt?' [2023] Legal hero < https://legalhero.co.za/2023/03/31/what-does-it-mean-to-prove-my-guilt-beyond-a-reasonable-doubt/ > accessed 2 January 2025

288 Grant J, 'Critical Criminal Law'[2018]RS 240

Constitution. This provision guarantees the accused the right not to testify in their defense, a right that the defense team exercised in the Dewani case.[289]

Some aspects of Section 35 pose challenges for the justice system. The accused has the right not to testify, meaning the court had no opportunity to hear Mr. Dewani's account of what transpired on that fateful day. What about the rights of the deceased's family? There are numerous unanswered questions that only Mr. Dewani could clarify. No one can answer these questions except Mr. Dewani himself, but Section 35 guarantees him the right not to testify in his defense.

The challenges faced by the South African Police Service (SAPS) were also discussed. The findings revealed that many of the challenges and problems faced by SAPS and the prosecution stem from various issues, including the handling of critical case documents by SAPS, as highlighted in the Dewani case. Poor police investigations often lead to weak evidence being presented in court, which, in turn, weakens the State's case. According to the judge, the evidence presented by the prosecution in the Dewani case was not credible and did not meet the threshold required for conviction. The court dismissed the main witness statement due to inconsistencies. When the credibility of a key witness is questioned, it significantly undermines the prosecution's case, as the burden of proof in criminal trials requires establishing guilt beyond a reasonable doubt.

The main witness also provided contradictory evidence. In criminal law, the burden of proof is beyond a reasonable doubt. When contradictions arise, doubt is introduced, and unless it is resolved, the prosecution cannot meet its burden. This makes obtaining a conviction extremely difficult. A conviction requires that no reasonable doubt remains. Although "beyond a reasonable doubt" does not mean eliminating all doubt, an accused person cannot be convicted based on weak or flawed evidence.

This chapter provided a detailed examination of the two cases forming the basis of this research. The next chapter will summarize the study and present conclusions based on the research findings. It will also provide recommendations based on these findings.

289 Constitution,s35

CHAPTER 5

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

5.1 Introduction

This chapter presents a consolidated overview of the research findings as analysed in the preceding chapter. The chapter commences with a summary of the study, capturing the core themes explored across all chapters. It then outlines the main conclusions derived from the research, followed by practical recommendations aimed at strengthening the South African criminal justice system, particularly the South African Police Service and the National Prosecuting Authority, in meeting the legal threshold of proof beyond a reasonable doubt. These recommendations are directed at addressing identified shortcomings and enhancing the system's effectiveness and credibility.

5.2 Summary of the study

Chapter One introduced the research by outlining the background and significance of the principle of proof beyond a reasonable doubt in the South African legal context. The chapter defined the research problem, stated the objectives, and briefly described the methodology adopted for the study.

Chapter Two traced the historical origins and evolution of the concept of proof beyond a reasonable doubt, highlighting its roots in English common law and its integration into South African jurisprudence. The principle was examined as a cornerstone of criminal justice, intended to safeguard the presumption of innocence and uphold the right to a fair trial. Although it lacks a singular definition, the chapter emphasised its critical role in ensuring justice.

Chapter Three explored the legislative framework supporting fair trial rights in South Africa, including Section 35(3) of the Constitution and Section 174 of the Criminal Procedure Act. Comparative perspectives were also considered to contextualise how other jurisdictions apply this standard of proof. The chapter reiterated that the burden of proof lies exclusively with the prosecution, which must establish guilt to the exclusion of any reasonable doubt.

Chapter Four provided a practical analysis of two controversial criminal cases, *S v Dewani* and *S v Petersen and Others,* to evaluate challenges encountered in applying the standard of proof beyond a reasonable doubt. Key issues identified included prosecutorial conduct, witness credibility, and evidentiary handling. The analysis demonstrated that deficiencies in these areas could significantly hinder the state's ability to secure convictions.

Chapter Five concludes the study by consolidating key findings, drawing evidence-based conclusions, and presenting actionable recommendations to address persistent challenges.

5.3 Conclusion

The following conclusions are drawn from the study:

- South Africa's mixed legal system, comprising Roman-Dutch law, English common law, and African customary law, has long embedded the principle of proof beyond a reasonable doubt within its criminal justice system. Originating in English jurisprudence, the principle evolved from protecting juries to becoming a constitutional safeguard for accused persons.
- The threshold of proof in criminal matters is deliberately high to minimise the risk of wrongful convictions. This threshold is not only a legal requirement but a constitutional imperative, underscored by the presumption of innocence and the right to a fair trial under Section 35 of the Constitution.
- The burden of proof rests solely with the prosecution. It must prove all elements of an offence beyond a reasonable doubt, failing which the accused must be acquitted. Any reasonable doubt as to the accused's guilt mandates a not-guilty verdict.
- In practice, the state frequently struggles to meet this evidentiary standard. The case of *S v Omotoso* illustrates this point: despite the gravity of the allegations, the accused was acquitted after eight years of pretrial incarceration due to prosecutorial failures.
- Prosecutorial challenges identified include poor case preparation, inadequate evidence handling, ineffective witness management, and systemic issues such as

resource constraints and corruption. These deficiencies collectively weaken the justice process and diminish public confidence in the system.

- Judicial commentary often points to lapses by SAPS and the NPA as critical barriers to achieving justice. These include procedural missteps, lack of accountability, and failure to present credible evidence.
- The post-apartheid legal framework has transformed South Africa's approach to criminal law, placing increased emphasis on protecting the rights of accused persons. However, this shift necessitates well-resourced institutions and skilled legal practitioners capable of upholding these rights without compromising the rights of victims and society.

5.4 Recommendations

To address the identified challenges, a coordinated approach involving government institutions, the legal profession, and civil society is essential. The following recommendations are proposed:

5.4.1 Clarify the Legal Definition of Proof Beyond a Reasonable Doubt

Although South African courts offer judicial guidance, the absence of a formal definition leads to interpretive inconsistency. A clearer statutory or judicially endorsed definition, while maintaining flexibility, could improve uniform application and assist legal practitioners in meeting this standard.

5.4.2 Strengthen Evidentiary and Document Management Systems

Persistent mishandling of physical and documentary evidence by both SAPS and the NPA necessitates urgent intervention. Improved evidence tracking systems, digitisation of case files, and standardised chain-of-custody procedures should be prioritised.

5.4.3 Improve Witness Management and Protection

Witnesses are often pivotal in securing convictions. Comprehensive preparation, consistent engagement, and safeguarding measures are essential to ensure reliable,

coherent testimony. This is particularly critical in cases involving vulnerable witnesses or complex narratives.

5.4.4 Enhance Legal Training and Capacity Building

Prosecutors and investigators require ongoing professional development to stay abreast of legal standards and courtroom practices. Training should include modules on legal ethics, trial advocacy, and forensic evidence.

5.4.5 Increase Institutional Resourcing

Budgetary constraints significantly limit the operational capacity of the NPA and SAPS. Increased funding should be allocated to recruit skilled personnel, upgrade forensic laboratories, and expand prosecutorial support services.

5.4.6 Establish Specialised Prosecution Units

The NPA should consider forming specialised units staffed by experienced prosecutors and investigators to handle complex and high-profile matters. This approach would improve case outcomes and public perception of the justice system's efficacy.

5.4.7 Promote Oversight and Accountability Mechanisms

Effective internal monitoring and external oversight are vital to ensuring that state functionaries operate within the bounds of the law. The establishment or strengthening of independent oversight bodies could serve as a check against misconduct or inefficiency.

5.5 Final remarks

The principle of proof beyond a reasonable doubt remains a cornerstone of a fair and just criminal justice system. However, its practical application in South Africa is undermined by systemic weaknesses, institutional underperformance, and limited resources. While the constitutional and legislative framework is robust, its effectiveness depends on proper implementation, accountability, and professional competence. The recommendations presented in this chapter offer a practical

roadmap towards enhancing the credibility, efficiency, and fairness of criminal prosecutions in South Africa.

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