IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT12/95

In the matter between:

THE STATE

and

BHULWANA

CASE NO: CCT 11/95

And in the matter between:

THE STATE

and

GWADISO

Heard on: 12 September 1995

Delivered on: 29 November 1995

JUDGMENT

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[1] O'REGAN J: The question referred to this court in both these cases was whether the provisions of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act, 140 of 1992 ('the Act') are in conflict with the provisions of the Republic of South Africa Constitution Act, 200 of 1993 ('the Constitution'). Section 21(1)(a)(i) of the Act provides that

> 'If in the prosecution of any person for an offence referred to -
>
> (a) in section 13(f) it is proved that the accused -
>
> (i) was found in possession of dagga exceeding 115 grams;
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> ...
>
> it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance;'

Section 13(f) refers to offences mentioned in section 5(b), which, in turn, relates to the offence of dealing in certain substances, including dagga.

[2] The basis of the attack on section 21(1)(a)(i) of the Act is that the section imposes a burden of proof on the accused, a so-called 'reverse onus' provision, which is contrary to the provisions of section 25(3) of the Constitution. Section 25(3) provides that:

> 'Every accused person shall have the right to a fair trial, which shall include the right -
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> ...
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> (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during a trial;'

[3] Mr Bhulwana was found in possession of 850g of dagga (cannabis) near Kleinmond on 20 May 1994. He was convicted of dealing in dagga on 8 September 1994 and was fined R500,00 with the alternative of six months' imprisonment and, in addition, a twelve month prison sentence was suspended for a period of five years on condition that he was not found guilty of dealing in drugs during that period. The matter then came before the Cape Provincial Division of the Supreme Court on automatic review. Marais J (in whose judgment Brand J concurred) held that the evidence before the magistrate's court would not have been sufficient to convict Mr Bhulwana of dealing in dagga, absent a reliance on the presumption contained in section 21(1)(a)(i) of the Act. Accordingly, the correctness of the conviction depended on the constitutionality of the presumption. Marais J was of the view that there were good grounds for concluding that the presumption was not constitutional. In terms of section 102(1) of the Constitution, therefore, the court referred the question of the constitutionality of the presumption contained in section 21(1)(a)(i) of the Act to this court for determination and suspended the review proceedings before it.

[4] In the other case before us, the accused, Mr Gwadiso, was found in possession of 444,7g of dagga on Main Street, Grabouw on 26 August 1994. In convicting him of dealing in dagga, the magistrate in the Caledon Magistrates' Court expressly relied upon the presumption contained in section 21(1)(a)(i) of the Act. Mr Gwadiso was fined R600,00 with the alternative of a six month prison sentence and in addition a further twelve month prison sentence was suspended for four years on condition that he not be found guilty of dealing in drugs during that period. The matter came before the Cape Provincial Division of the Supreme Court on automatic review. Traverso J (in whose judgment Conradie J concurred) held that it was clear that Mr Gwadiso's conviction for dealing could not have been sustained but for the existence of the presumption. She agreed with Marais J's conclusion in *S v Bhulwana* that the presumption was *prima facie* unconstitutional. The court accordingly also referred the issue of the constitutionality of the presumption to this court.

[5] At the request of this court, the Cape Bar Council requested Mr Josman SC and Mr Butler to prepare heads of argument on behalf of Mr Bhulwana and Mr Gwadiso. Mr Josman was not available for the hearing and the Cape Bar Council arranged for its chairman, Mr Blignault SC and Mr Butler to appear on their behalf at the hearing. Mr Slabbert of the office of the Western Cape Attorney-General argued on behalf of the State. The court wishes to express its appreciation to the Cape Bar Council and to these counsel for their assistance.

[6] Section 21(1)(a)(i) is a provision which has existed in our law since 1954. It was first introduced as section 90bis of the Medical Dental and Pharmacy Act, 13 of 1928 by section 31 of Act 29 of 1954. As both possession of dagga and dealing in dagga are offences in our law, the effect of the presumption is that, once the offence of possession has been proved, and the amount of dagga in question is shown to have exceeded 115g, the offence of dealing is presumed to have been committed. The Act provides for more substantial penalties for the offence of dealing than it does for the offence of possession and there is no doubt that a conviction for dealing is altogether a graver matter than a conviction for possession.

[7] Mr Slabbert submitted that section 21(1)(a)(i) was not a true reverse onus provision, in that it imposed on the accused not a legal burden, but merely an evidential burden. An evidential burden would require the accused, once possession in excess of 115g dagga has been shown, to adduce evidence which raises a reasonable doubt as to whether he or she was guilty of dealing in order to be acquitted of the offence of dealing. A legal burden, on the other hand, would require the accused to demonstrate on a balance of probabilities that he or she was not guilty of dealing in order to be acquitted of that offence. It cannot be accepted that the subsection imposes an evidential, not a legal, burden. Section 21(1)(a)(i) provides that, where an accused is found in possession of a quantity of dagga in excess of 115g, it shall be presumed, *until the contrary is proved*, that the accused was guilty of dealing in dagga. The clear language of the text suggests that the presumption will stand unless proof to the contrary is produced.

Presumptions phrased in such a way have consistently been held to give rise to a legal burden since the judgment of the Appellate Division in *Ex parte Minister of Justice: in re R v Jacobson and Levy* 1931 AD 466. On several occasions the Appellate Division has held that provisions in the legislation antecedent to this Act which gave rise to the presumption of facts 'unless the contrary is proved' imposed a legal burden upon accused persons. (See *S v Guess* 1976 (4) SA 715 (A) at 719 B - C; *S v Radloff* 1978 (4) SA 66 (A) at 71H.) There is no significant difference between the formulation of the earlier presumptions considered in these cases and section 21(1)(a)(i), although the formulation in the earlier legislation was 'unless' rather than 'until' the contrary is proved. In the court *a quo* in *Bhulwana*'s case Marais J was of the view that section 21(1)(a)(i) plainly gave rise to a legal burden. (See *S v Bhulwana* 1995 (1) SA 509 (C) at 510 I - J; 1995 (5) BCLR 566 (C) at 567 H - I.) I agree that there can be no doubt that section 21(1)(a)(i) is a reverse onus provision which imposes a burden of proof on the accused.

[8] The effect of the provision is that, once the state has proved that the accused was found in possession of an amount of dagga in excess of 115g, the accused will, on a balance of probabilities, have to show that such possession did not constitute dealing as defined in the Act. Even if the accused raises a reasonable doubt as to whether he or she was dealing in the drug, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal burden on the accused may therefore result in a conviction for dealing despite the existence of a reasonable doubt as to his or her guilt.

[9] Is the imposition of this burden a breach of the presumption of innocence as enshrined in section 25(3)(c)? As this court held in *S v Zuma* 1995(2) SA 642 (CC); 1995(4) BCLR 401 (CC) at para 33, the presumption of innocence is not new to our legal system. As early as 1883, in *R v Benjamin* 3 EDC 337 at 338, Buchanan J noted that:

> 'But in a criminal trial there is a presumption of innocence in favour of the accused, which must be rebutted. Therefore there should not be a conviction unless the crime charged has been clearly proved to have been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where a reasonable doubt as to his guilt exists, there should be an acquittal.'

[10] Authoritative support for the rule as a fundamental principle of our law was given by the Appellate Division in *R v Ndhlovu* 1945 AD 369. Davis AJA held that the presumption of innocence which had been endorsed by the House of Lords in *Woolmington v DPP* [1935] AC 462 (HL) was not inconsistent with Roman-Dutch law, but was indeed a fundamental principle of our law. He held accordingly that:

> 'In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The *onus* is on the Crown to prove all averments necessary to establish his guilt.' (At 386)

In *Ndhlovu*, the court went on to hold that the only common law exception to this principle is that where an accused raises a defence of insanity, he or she bears the burden of proving insanity. A similar exception had been upheld in *Woolmington*'s case.

[11] In *S v Zuma, supra,* this court was concerned with the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act, 51 of 1977 which also contained a reverse onus provision. In interpreting section 25(3)(c) of the Constitution, Kentridge AJ, speaking for the court, considered the history of the presumption of innocence, as well as the approach adopted by courts in other jurisdictions to the presumption of innocence and to reverse onus provisions.

[12] Kentridge AJ found the Canadian cases to be of particular assistance since the Canadian Charter of Rights and Freedoms is similarly structured to chapter 3 of our Constitution.(At paragraphs 21 - 25) Both require, as a general rule, a preliminary or threshold enquiry into whether a

breach of a constitutional right has occurred and thereafter a consideration of whether that breach may nevertheless be justifiable in terms of a limitations clause.

[13] Section 11(d) of the Canadian Charter of Rights and Freedoms provides that an accused person has the right

> 'to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;'.

The Canadian Supreme Court has on numerous occasions held that section 11(d) will be breached where a presumption has the effect that an accused person may be convicted while a reasonable doubt exists as to his or her guilt. (See, for example, *R v Oakes* 26 DLR (4th) 200 (1986) at 222; *R v Vaillancourt* 47 DLR (4th) 399 (1988) at 417; *R v Whyte* 51 DLR (4th) 481 (1989) at 493; *R v Keegstra* (1989) 39 CRR 5 at 13; *Downey v The Queen* 90 DLR (4th) 449 (1992) at 461; *R v Laba* 120 DLR (4th) 175 (1995) at 201.)

[14] According to the Canadian jurisprudence, once it is shown that a statutory presumption is in breach of section 11(d), the court must consider whether the presumption is nevertheless justifiable in terms of section 1 of the Charter, which provides that the rights are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The Canadian Supreme Court has held that, in particular cases, reverse onus provisions may be justifiable in terms of section 1. (See, for example, *Downey v The Queen, supra*; *R v Whyte* 51 DLR (4th) 481 (1988); *R v Chaulk* (1990) 1 CRR (2d) 1.)

[15] As was held in *Zuma*'s case, *supra,* at para 33, the presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence in section 25(3)(c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of 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. Such a presumption is in breach of the presumption of innocence and therefore offends section 25(3)(c). Section 21(1)(a)(i) is such a presumption. The answer to the threshold enquiry is therefore that section 21(1)(a)(i) clearly gives rise to a breach of section 25(3)(c) of the Constitution.

[16] Under the old constitutional order, it was clear that the legislature could depart from the principle of the presumption of innocence and impose on an accused the burden of proving the absence of some element of an offence. (See, for example, *R v Ndhlovu, supra,* at 386 - 7; *R v Britz* 1949 (3) SA 293 (A) at 302.) Statutes contain many examples of such reverse onus provisions. Under the new constitutional order, the effect of the entrenchment of the presumption of innocence is to require that, where a presumption may give rise to the conviction of an accused despite the existence of a reasonable doubt as to his or her guilt, it must be justified in terms of section 33.

[17] Section 33(1) provides that:

> 'The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation -
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> (a) shall be permissible only to the extent that it is -
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> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question,
>
> and provided further that any limitation to -
>
> (aa) a right entrenched in section ... 25 ...
>
> shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.'

Section 33 (1) requires us to consider whether section 21(1)(a)(i) is a reasonable, necessary and justifiable limitation in an open and democratic society based on freedom and equality. If it is held to be so, then section 33 requires us to consider whether the limitation of the right occasioned by section 21(1)(a)(i) negates the essential content of that right. In *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph 104, Chaskalson P held that section 33 required a proportionality assessment:

> `In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.' (see also *S v Williams* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at paragraphs 58 - 60).

[18] In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

[19] In this case, the infringement of the presumption of innocence may result in an accused person being convicted of the offence of dealing in dagga despite a reasonable doubt as to whether he or she was in fact dealing. It may be that the infringement is less invasive because the presumption only comes into operation when a person has already been shown *prima facie* to have committed an offence: in effect, it only serves to aggravate the offence. Nevertheless, the offence of dealing in dagga carries heavier penalties than the offence of possession; and the offence of dealing is viewed with much greater censure by society at large. To be convicted of

dealing where a doubt exists as to guilt of that offence is therefore no less an infringement of the presumption of innocence.

[20] Mr Slabbert argued that the purpose of the presumption was to assist in controlling the illegal drug trade. It assisted in that it ensured that heavier sentences could be imposed upon drug offenders, and offenders would be convicted who would otherwise not be convicted. There can be little doubt that the effective prohibition of the abuse of illegal drugs, particularly those which result in severe damage to the user, is a pressing social purpose. There is also little doubt that it is important for the government to take active steps to suppress trafficking in illicit drugs. It is not clear, however, that either of these purposes is substantially furthered by the presumption provided for in section 21(1)(a)(i).

[21] It cannot be said that the greater sentencing discretion provided to the court in respect of dealing is necessary to further the identified legislative objective. In terms of section 17(d) of the Act, where a court finds a person guilty of possession, the court may impose any fine it deems fit and alternatively, or in addition, it may impose a prison sentence not exceeding 15 years. Section 17(e) provides that where a person is convicted of dealing in dagga, a prison sentence not exceeding 25 years may be imposed and the court may, in the alternative or in addition, impose any fine it considers appropriate. Although the sentencing discretion granted to a court where a person has been convicted of dealing in dagga is greater than that for offences of possession, the possible penalties for possession are extremely severe. In both cases before this court, for example, in which the accused persons were convicted of dealing, the magistrates imposed far less stringent penalties than they were empowered to do even in respect of the offence of possession. It is unlikely that sentences in excess of fifteen years' imprisonment (the limit for possession) would ever be imposed in cases where the presumption would be a material factor in finding guilt. If an accused is found to have been in possession of a large quantity of dagga, it might, depending on all the circumstances and in the absence of an

explanation giving rise to a reasonable doubt, be sufficient circumstantial evidence of dealing and a justification for the imposition of a higher penalty (see *S v Sixaxeni* 1994(3) SA 733 (C)). I am not persuaded therefore that the presumption is needed to ensure adequate sentencing discretion. Even apart from that, it is not clear to me that the need for greater sentencing discretion would be sufficient to meet the requirements of reasonableness, necessity and justifiability stipulated in section 33. If there is indeed doubt that the accused is a dealer, he or she is entitled, according to our law, to the benefit of that doubt.

[22] Nor can it be said that the presumption facilitates the prosecution and conviction of drug offenders who would otherwise not be convicted. The presumption only arises once a person has in fact been proved to have committed the offence contained in subsection 4(b) of the Act, the possession of dagga. The presumption cannot operate where the possession is itself presumed; the possession must, in fact, have been proved. (See *S v Majola* 1975 (2) SA 727 (A) at 735A - B.) A person to whom the presumption applies will therefore be convicted of and sentenced for possession, even if the presumption is not relied upon. There can be no question therefore that the presumption is necessary to convict offenders. It may be necessary to secure a conviction for the more serious offence of dealing, but that is not sufficient to justify the infringement of section 25.

[23] It does not appear to be logical to presume that a person found in possession of 115g of dagga is more likely than not to have been dealing in dagga. From the evidence placed before us, it appears that 115g of dagga is equal to between 50 and 100 cigarettes. Mr Slabbert conceded that it would not be unreasonable for a regular user of dagga to possess that quantity of dagga. Indeed, the criminalisation of dagga possession may make it more likely that ordinary users will purchase large quantities because of the risks associated with purchase. The quantity stipulated in the legislation (115g) has remained constant since the presumption was first introduced in 1954, when it was expressed as 4 ounces. No explanation was proffered by the State as to why

this particular quantity was selected. It appears to be an arbitrary figure, nowadays, whatever sense, if any, it may have made in the socio-economic environment that prevailed when it was originally introduced.

[24] In my view, section 21(1)(a)(i) of the Act cannot be justified in terms of section 33(1) of the Constitution. Although the need to suppress illicit drug trafficking is an urgent and pressing one, it is not clear how, if at all, the presumption furthers such an objective. In addition, there appears to be no logical connection between the fact proved (possession of 115g) and the fact presumed (dealing). On the other hand, the presumption gives rise to an infringement of the right entrenched in section 25(3)(c), which is a pillar of our system of criminal justice. Section 21(1)(a)(i) of the Act is an unconstitutional infringement of the right entrenched in section 25(3)(c) which is not reasonable, justifiable or necessary as contemplated by section 33.

[25] Mr Slabbert argued that, if this court found section 21(1)(a)(i) to be unconstitutional, the court should 'read down' the section and rule that it should be interpreted as imposing not a legal burden but an evidential one. He relied for support upon the Canadian case of *R v Ellis-Don Ltd* 76 DLR(4th) 347 (Ont CA) (1990) where the Ontario Court of Appeal read an industrial safety statute that imposed a burden of proof on the accused to show due diligence as imposing only an evidential burden.

[26] The Canadian courts' remedial powers are not directly comparable to ours. The key provisions in our Constitution dealing with reading down are sections 35(2) and 232(3) which are similarly phrased. The key provisions regarding the court's remedial powers with relation to unconstitutional legislative provisions are sections 98(5) and (6). In determining whether it is appropriate to read down a particular legislative provision, the court must primarily be guided by those provisions and not by the approach in a foreign jurisdiction.

[27] Section 35(2) of the constitution provides that:

> 'No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.'

Sections 98(5) and (6) of the Constitution provide as follows:

> '(5)In the event of the Constitutional Court finding that any law or any provision thereof is inconsistent with this Constitution, it shall declare such law or provision invalid to the extent of its inconsistency: Provided that the Constitutional Court may, in the interests of justice and good government, require Parliament or any other competent authority, within a period specified by the Court, to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified.
>
> (6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof
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> > (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
> >
> > (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.'

[28] It is clear from sections 35(2) and 232(3) that the court must read down a provision which is 'reasonably capable' of a more restricted and constitutional interpretation. If the provision is 'reasonably capable' of being read down in a way which would be consistent with the

Constitution, the Constitution requires that it shall be read in such a way. If the provision is not reasonably capable of such an interpretation, then section 98(5) requires the court to hold the provision invalid. Thereafter the court may exercise the discretion conferred upon it by the proviso to section 98(5) or the discretion conferred by section 98(6). (For a discussion of these powers, see *Executive Council of the Western Cape and others v The President of the Republic of South Africa and others* CCT 27/95 unreported judgment of the Constitutional Court delivered on 22 September 1995, at paragraphs 102 - 108.)

[29] To read section 21(1)(a)(i) as imposing an evidential burden upon the accused rather than a legal burden would require reading the words in section 21(1)(a)(i) 'until the contrary is proved' as meaning 'unless the evidence raises a reasonable doubt'. I do not think that these words are reasonably capable of such an interpretation, both in the light of the unambiguous language of the phrase 'until the contrary is proved' and the considerable and consistent judicial *dicta* interpreting that phrase. Accordingly, the submission that section 21(1)(a)(i) be read down to give rise to an evidential and not a legal burden cannot be accepted. This suggestion was premised upon the proposition that imposing an evidential burden upon the accused would give rise to no constitutional complaint. In the light of our rejection of the suggestion, it is not necessary for the purposes of this case to decide on the constitutional validity of the premise.

[30] In the alternative, the State also argued that this court should exercise its power under the proviso to section 98(5), in the interests of justice and good government, to suspend the effect of the order of invalidity and require Parliament to remedy the defect in the legislation. However, Mr Slabbert could identify no compelling interest of good government which would require that the presumption remain in force pending parliamentary attention. He conceded that it was not necessary for the conviction of offenders, or for the furthering of the objects of the legislation. On the other hand, it is clear that, while the presumption exists, there is a risk that a person may be convicted of dealing in dagga despite the existence of a reasonable doubt as to

his or her guilt. In the absence of persuasive reasons to exercise our power in terms of section 98(5), the effect of our finding, that section 21(1)(a)(i) is inconsistent with the Constitution, must be the invalidity of that section.

[31] The effect of an order declaring invalid a legislative provision, such as section 21(1)(a)(i) of the Act, which existed when the Constitution came into force shall not, according to section 98(6)(a), invalidate anything done or permitted in terms of that provision unless the court, in the interests of justice and good government, orders otherwise. In both the cases before us, the conviction of the accused persons arose from a reliance on the presumption contained in section 21(1)(a)(i) of the Act. As the convictions took place before this court made its order of invalidity, the effect of the declaration of invalidity will not apply to it unless this court orders otherwise. In *S v Zuma, supra,* the provision under challenge had been referred to this court by the trial court before the trial had been completed. We ordered that the effect of invalidity should extend only to cases in which a verdict had not yet been reached. Such an order in this matter would not assist the applicants. In *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC), we extended the effect of the order of invalidity made in *Zuma's* case to cases in which a verdict had been reached after the 27 April 1994. In the judgment of the majority, Mahomed DP held that:

> 'Appeals arising from proceedings which were commenced and concluded after the Constitution came into operation should, in principle, be determined in the ordinary course on the basis that Chapter 3 of the Constitution was clearly of application and if the protection of that chapter had wrongly been denied to the appellant, the Court on appeal would then take that into account in making its order.' (At para 41.)

[32] Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In

principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see *US v Johnson* 457 US 537 (1982); *Teague v Lane* 489 US 288 (1989)). On the other hand, as we stated in *S v Zuma* (at para 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* 401 US 667 (1971) at 691:

> 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.'

As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity.

[33] In the light of all these considerations, it is my view that the proper order to be made in terms of section 98(6)(a) is that the order invalidating section 21(1)(a)(i) shall also invalidate any application of the presumption contained in the section in any criminal trial in which an appeal or review is pending as at the date of this judgment, or in which an appeal may yet be timeously noted.

[34] The following order is accordingly made:

1. The following provisions of the Drugs and Drug Trafficking Act, 140 of 1992 are declared to be inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and are, with effect from the date of this judgment, declared to be invalid and of no force and effect:

   (a) section 21(1)(a)(i);

   (b) the words 'dagga or' in section 21(1)(a).

2. In terms of section 98(6) of the Constitution, it is ordered that the declaration of invalidity in paragraph 1 shall invalidate any application of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act, 140 of 1992 in any criminal trial in which the verdict of the trial court was entered after the Constitution came into force, and in which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of an appeal has not yet expired.

3. The matters of *S v Bhulwana* and *S v Gwadiso* are referred back to the Cape Provincial Division to be dealt with in accordance with this judgment.

C.M.E. O'REGAN

Judge of the Constitutional Court

(Chaskalson P, Ackermann J, Didcott J, Kriegler J, Langa J,Madala J, Mokgoro J, Ngoepe J and Sachs J concur in the judgment of O'Regan J)

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CCT 12/95

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