CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/98

WILLIAM MELLO First Appellant

CONSTANINA BOTOLO Second Appellant

versus

THE STATE Respondent

Decided on : 28 May 1998

JUDGMENT

MOKGORO J:

[1] The appellants, with two other persons, stood trial in the Pretoria Magistrate's Court on charges of dealing in alternatively possession of dagga in contravention of the Drugs and Drug Trafficking Act[1] (the Act). The evidence established that several packages of dagga were found hidden in various parts of a truck driven by one of the accused and in which the other accused were passengers. The appellants and one other accused were found guilty and convicted on the alternative charge. In convicting them, the magistrate relied on the presumption created by section 20 of the Act which reads as follows:

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[1] Act 140 of 1992.

> "**20. Presumption relating to possession of drugs. -** If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug."

The appeal proceedings before the Transvaal High Court were suspended in terms of section 102(2)[2] of the interim Constitution,[3] pending the outcome of the constitutional question referred to this Court.

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2 Section 102(2) reads as follows:

> "If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court."

3 The Constitution of the Republic of South Africa Act 200 of 1993.

[2] The issue thus comes to this Court by way of referral in terms of section 102(1)[4] of the interim Constitution. The judges referred to this Court the question of the constitutionality of the presumption in section 20 of the Act, because they considered it to

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[4] The relevant provisions of section 102(1) read as follows:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

be inconsistent with section 25(3)(c)[5] of the interim Constitution.

[5] 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] The order of the High Court was made on 22 September 1997. For reasons that have not been explained this order was only brought to the attention of this Court in March 1998. In terms of Constitutional Court Rule 22(1),[6] it is the duty of the party at whose instance the referral is made or the Registrar of the High Court, if that court has referred the issue itself, to lodge the referral order with the Registrar of this Court within 15 days of such order having been made. Fortunately, the appellants were not in jail and the delay in referring the issue to this Court has presumably not resulted in material prejudice to them. It is important, however, that the obligation to lodge a referral order with the Registrar of this Court be carried out strictly in accordance with the rules and that the determination of the proceedings be not delayed by a failure to do so. In the present matter, as soon as the referral order was lodged with the Registrar, directions were given requiring the Attorney-General of Transvaal to inform the Registrar of this Court of his attitude to the issue that had been referred to us. The Attorney-General duly informed the Registrar that in the light of previous decisions of this Court he accepted

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6 Rule 22(1) reads as follows:

> "Where the issue or dispute is referred to the Court by a provincial or local division of the Supreme Court in terms of section 102(1), 102(14) or 103(4) of the Constitution, the party who requested such issue or dispute to be referred or the registrar of the provincial or local division concerned, if the issue has been referred by such court *mero motu*, shall within 15 days of such order lodge with the registrar a notice as near as may be in accordance with Form 3, to which shall be attached the order of court directing that the matter be referred."

that section 20 of the Act is inconsistent with the Constitution. This information was communicated to the Registrar in April 1998 during the recess. For the reasons given in this judgment the concession made by the Attorney-General is clearly correct and when this Court convened on 4 May 1998, it was decided that argument was not necessary.

[4] Section 20 of the Act embodies a legal presumption that infers possession of a prohibited drug on the basis merely that it was found in close proximity to an accused person. Once the presumption comes into operation it is then incumbent upon the person to prove on a preponderance of probabilities that he or she in fact did not so possess the drug. The effect of this presumption is to impose a "reverse onus" on an accused person to disprove an essential element of a criminal charge. Failure to do so, even where reasonable doubt as to guilt exists, will be followed by conviction. Whereas it is now firmly established in our law that, generally the prosecution carries the burden of proving the guilt of an accused beyond reasonable doubt, the presumption embodied in section 20, like all similar legal presumptions, places the burden instead on the accused person to prove his or her innocence.

[5] In *S v Mbatha; S v Prinsloo*,[7] this Court, in a unanimous decision, set aside section 40(1) of the Arms and Ammunition Act[8] (the Arms Act) on the grounds that it imposed on the accused a similar "reverse onus", but in relation to the possession of illegal arms. In that case, Langa J held that a presumption of this nature is in breach of the right to be

[7] 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC).

presumed innocent until proven guilty. I have no doubt that section 20 of the Act embodies a similar legal presumption which also creates a "reverse onus". Here too, the application of the section has the effect that it relieves the prosecution of the burden of proving an essential element of the offence. Similar to the presumption embodied in section 40(1) of the Arms Act, the effect of the presumption in section 20 of the Act is that it shifts the onus to the accused to prove his or her innocence.

[6] This Court has on previous occasions pronounced on the unconstitutionality of similar legal presumptions which also create a "reverse onus".[9] In *S v Bhulwana; S v Gwadiso*[10] and *S v Ntsele*[11] such presumptions were held to be in direct conflict with the presumption of innocence. Similarly, I have no difficulty in finding that the presumption created by section 20 offends against the very essence of the right to a fair trial which includes the right to be presumed innocent and is protected by section 25(3)(c) of the interim Constitution.

[7] Accordingly, section 20 of the Act can only be saved by the provisions of section 33(1) of the interim Constitution, if it constitutes a limitation which is reasonable,

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8 Act 75 of 1969.

9 *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *S v Bhulwana; S v Gwadiso* 1995 (2) SACR 748 (CC); 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *S v Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC) and *S v Ntsele* 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC).

10 Above n 9, para 15.

11 Above n 9, para 3.

necessary and justifiable in an open and democratic society based on freedom and equality.

[8] In *Mbatha*[12] this Court had found with regard to the presumption created by section 40(1) of the Arms Act that:

> "The presumption is couched in wide terms and no attempt has been made to tune its provisions finely so as to make them consistent with the Constitution and to avoid the real risk of convicting innocent persons who happen to be at the wrong place at the wrong time. It may be invoked in a wide range of circumstances and against any number of categories of persons, as long as they have been in, on or at a particular place at the relevant time."

The Court was further of the view that the presumption had a disproportionate impact in relation to the purpose for which the right in question is limited. It was found that if the purpose of the provision is to promote the legitimate law enforcement objective of separating innocent bystanders from genuine suspects, then it should be cast in terms limited to serving that function only.

> "A legislative limitation motivated by strong societal need should not be disproportionate in its impact to the purpose for which that right is limited. If restrictions are warranted by such societal need, they should be properly focussed and appropriately balanced."[13]

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12 Above n 9, para 21.

13 Id, para 24.

[9] This Court considered a similar presumption in *Ntsele*[14] and found that:

> "The fundamental rights bound up with and protected by the presumption of innocence are so important, and the consequences of their infringement potentially so grave, that compelling justification would be required to save them from invalidation. None is apparent here. On the contrary, the importance of the values in issue and the extent and nature of the risk involved in their erosion outweigh any societal interest likely to be advanced by the presumption."

[14] Above n 9, para 4.

[10] The presumption with which we are now concerned does not seem to differ in any material respect from section 40(1) of the Arms Act with which we dealt in *Mbatha*[15]. Nor does there appear to be any material distinction to be drawn between the principles set out in *Bhulwana*, *Julies* and *Ntsele*[16] on the one hand and those that are applicable in the present case on the other. Furthermore, no argument springs to mind in favour of risking false convictions by keeping alive a provision which hits at the core of the right to be presumed innocent until proven guilty; a right which protects the basic values of justice in an open and democratic society based on freedom and equality. I find section 20 to be unjustifiable. In the result it is unconstitutional.

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15 Above n 7.

16 Above n 9.

[11] Having found section 20 of the Act to be invalid it remains for this Court to make an order in terms of section 98(6)[17] of the interim Constitution that is appropriate in the circumstances taking into consideration the interests of justice and good government. In several of its judgments,[18] this Court has made it plain that the choice of an ancillary order, which includes questions of prospectivity, retrospectivity and conditional suspension of the order, depends largely on the evidence placed before it. Such evidence should shed light on what the likely impact of an order would be on the successful litigant(s) before the Court, the state machinery, e.g the administration of justice and other prospective litigants in situations similar to that of the successful litigant(s).

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17 The relevant provisions of section 98(6) reads as follows:

> "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 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
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> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof."

18 *S v Bhulwana; S v Gwadiso* above n 9; *S v Mbatha; S v Prinsloo* above n 7; *S v Julies* above n 9 and *S v Ntsele* above n 9.

[12] In *Ntsele*[19] the following observation was made with regard to the evidence which must be placed before the court:

> "Where that is so, all the relevant evidence should be received and evaluated by the court of first instance. Courts would also be well-advised, when it appears that the constitutionality of a statute is in jeopardy, to consider whether notice of the proposed invalidation should not be given to organs of State - and possibly others - concerned with the administration of the targeted provision or likely to be affected by its demise."

[19] Above n 9, para 13.

According to section 98(6) of the interim Constitution, such evidence can be broadly classified in two categories: namely, evidence pointing towards the interests of justice, and evidence pointing in the direction of good government. In this case, however, the state has elected to abide by the decision of this Court[20] and it is unnecessary to call for evidence.

[13] In *Bhulwana*[21] O'Regan J set out the principal factors which interact when considering the interests of justice and the interests of good government:

> "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 s 98(6) so as

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20 In a letter from the Attorney - General of the Transvaal, dated 6 April 1998, he stated the following at paragraph number 3:

> "Section 20 of the Drug Trafficking Act 1992 (Act 140 of 1992) is analogous to section 40(1) of the Arms and Ammunition Act 75 of 1969. It is also a legal presumption and a reverse onus provision. In view of the order made in *S v Mbatha; S v Prinsloo* 1996 (1) SACR 371 and after careful consideration of all the relevant facts, I have decided not to contest the findings made in the Transvaal Provincial Division."

21 Above n 8 at para 32.

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 everyday 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."

[14] On the question whether the declaration of invalidity should have retrospective or prospective effect, and absent any evidence that a retrospective order would be against the interests of good government, I see no reason why the above principle laid down in *Bhulwana*[22] and applied in *Mbatha,*[23] *Julies*[24] and *Ntsele,*[25] should not also be applied in this matter and a corresponding order made. The circumstances of this case fit squarely with those cases.

[15] In the result, the following order is made:

1. Section 20 of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with section 25(3)(c) of the Constitution of the Republic of South Africa Act 200 of 1993 and, from the date of this judgment, declared to be invalid and of no force and effect.
2. In terms of section 98(6) of the interim Constitution, it is ordered that the

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22 Above n 9.

23 Above n 7.

24 Above n 9.

25 Id.

declaration of invalidity in paragraph 1 shall invalidate any application of section 20 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 interim 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 case is referred back to the Transvaal High Court to be dealt with in accordance with this judgment.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Mokgoro J.