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Explanatory note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of this Court.*

In this case the Constitutional Court was called upon to consider the constitutionality of a presumption created by a section of the Drugs and Drug Trafficking Act. The section provides that if a person is being prosecuted for an offence under the said Act and it is proved that any drug was found in the immediate vicinity of the said accused, it shall be presumed, until the contrary is proved, that he or she was found in possession of such drug.

William Mello and Constanina Botolo were found guilty and convicted in the Pretoria Magistrate's Court on the charge of possession of dagga in contravention of the Drugs and Drug Trafficking Act. In convicting them, the magistrate relied upon the said presumption. Mello and Botolo appealed to the Transvaal High Court against the conviction and sentence. The Court then referred the question of the constitutionality of the presumption to the Constitutional Court, because it considered it to be inconsistent with the accused's right to be presumed innocent enshrined in the interim Constitution.

In a unanimous judgment written by Judge Mokgoro, the Constitutional Court considered other recent judgments where it unanimously set aside similar legal presumptions on the grounds that they imposed a "reverse onus" on the accused person. In the present case the Court found that the effect of this presumption is to impose a burden on an accused person to disprove an essential element of the offence. If the accused person fails to do so, even where reasonable doubt as to guilt exists, conviction would follow. The Court concluded that the presumption offends against the right of the accused person to be presumed innocent, is unjustifiable in an open and democratic society based on freedom and equality and is therefore unconstitutional.

Judge Mokgoro, with whom the other judges concurred, considered whether it would be in the interests of justice and good government to retrospectively invalidate the presumption. The effect of the Court declaring the presumption unconstitutional is that it cannot be used in any criminal trial in which the verdict of the trial court was entered after 27 April 1994 and in which an appeal or review has not been completed yet.

In *Van Nell and Another v The State* the Court was called upon to confirm an order of constitutional invalidity made by the Northern Cape High Court in respect of a self-same presumption of the Drugs and Drug Trafficking Act. In view of the fact that the presumption had already been set aside in *Mello* it was therefore considered to be unnecessary for this Court to decide on the confirmation of an order of invalidity of the same section. For that reason the case of *Van Nell* was referred back to the Northern Cape High Court to be disposed of in accordance with the order made in *Mello*.

28 May 1998.