The constitutionality of presumptions in South African law

MH Mthembu*
Vista University (Bloemfontein Campus)

Introduction
In this article we consider the legal position of presumptions, be they of fact or of law, in the light of the South African Constitution (Act 108 of 1996). Where necessary and appropriate, account is taken of the provisions of the interim constitution, the Constitution of the Republic of South Africa Act 200 of 1993.

Meaning of a presumption
In South African law presumptions are found in both civil actions and criminal cases. For present purposes we shall concentrate on presumptions operative in criminal cases, although reference to presumptions found in civil cases will be made when relevant.

The term 'presumption' is best understood when explained from the perspective of its effect. Presumptions have the following effects:

First, they shift the onus from the state to the accused. A presumption presumes the accused guilty until proven not guilty and, as such, runs counter to the presumption of innocence found in section 35(3)(h) of the 1996 constitution which reads:

Every accused person has a right to a fair trial, which includes the right — (h) to be presumed innocent, remain silent and not to testify during the proceedings.

This presumption of innocence derives from the English law principle best enunciated by Viscount Sankey where, in Woolmington v Director of Public Prosecutions1 he stated:

Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception — if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecutor must prove the guilt of the prisoner is

*BProc, LLB (University of Fort Hare).
11935 AC (HL) at 481, 1935 All ER at 8.
part of the common law of England and no attempt to whittle it down can be entertained.

Second, presumptions deny the right of equality before the law by tilting the scale in favour of the state in that they result in the parties not proceeding from the premise of equality. This means that in criminal proceedings, the case is 'loaded' against the accused from the onset. The prosecution's task is made lighter by the operation of presumptions.

Third, presumptions offend against the right of an accused to remain silent until proven guilty in that not only is the evidentiary burden affected, but a legal duty is also imposed on the accused person not to remain silent under certain circumstances.

Types of presumption
In South African law a distinction is drawn between the following types of presumption

- the irrebuttable legal presumption;
- the rebuttable legal presumption; and
- the presumption of fact.

The burden of proof
In the light of what has been said above it would be proper to discuss briefly the question of onus. In both English and South African law, the general rule in criminal cases is that the onus is on the state to prove the accused's guilt on the offence with which he/she is charged. Exceptions, in terms of which this general rule will not apply, are

Where the facts are within the knowledge of one party
Whether the facts are likely to be within the knowledge of one party is an important consideration in deciding who should bear the onus on an issue not yet determined by the court. However, in Union Government (Minister of Railways) v Sykes the plaintiff sued for damage to his land caused by a fire started by sparks from a railway engine. It was alleged that at the material time the spark arrester was not in working order. As this was a fact peculiarly within the knowledge of the defendant's servants, they bore the onus of proving that it was in fact working. The court rejected this argument, saying that it was settled law that the burden of proving negligence rested on the plaintiff and that no variation in the facts could alter this rule.

Proving a negative
The practical difficulty of proving a negative really means the difficulty of adducing or leading positive evidence to establish a negative proposition. It has been suggested, however, that this problem can be solved by placing a duty to adduce evidence upon the party who denies a negative proposition,

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25 v Ndlovu 1945 (AD 369), R v Britz 1949 (3) SA 293 at 302, Woolmington v Director of Public Prosecutions (1935) AC 462; (1935) All ER Rep 1.
3All ER 688.
without necessarily making him bear the onus as well. In the case of Pretorius v Van der Merwe⁴ the plaintiff bought a bull which turned out to be impotent. He brought an actio redhibitoria, claiming the right to rescind the sale on account of the bull’s latent defect. The defendant argued that the contract provided for the sale to be voetstoots, that is, with an express term excluding the Aedilician liability for latent defects. Following a number of earlier cases, Henning J held that the onus rested on the plaintiff to establish that the contract did not contain a voetstoots clause. On the other hand, if all the other terms were admitted, the defendant would have started with a duty to adduce evidence. The plaintiff could not be expected to produce positive evidence to negative the existence of a voetstoots clause. The significance of the onus is that if the court is finally left in doubt, the plaintiff has failed to establish his right to rescind.

The presumption of innocence

This is a general rule of policy which requires that the prosecution should ordinarily bear the onus on all issues. This is not a presumption in the usual sense.

It was acknowledged and accepted under the old order⁵ that in a criminal case, the onus of proving the accused’s guilt rested on the prosecution: the accused bore no duty to prove his innocence. For the accused to secure his acquittal, it was required that he give an explanation of the events that could, when objectively considered, could be said to be reasonably, probably true.

Presumption of innocence and the constitution

Under the old order, the presumption of innocence was not entrenched in the then constitutions. As a result, the legislature could reverse the ordinary incidence of the burden or proof by means of a statutory presumption.

Chapter 2 of the Republic of South Africa Constitution Act 108 of 1996 entrenches the fundamental rights to which every person is entitled.⁶ The presumption of innocence or the right of the accused person to be presumed innocent until proven guilty embodied in section 35(3)(h) cited above, is one of the rights so entrenched.

In terms of this section the onus in a criminal case is on the state to prove the accused guilty of the crime with which he is charged. Furthermore, no duty is placed on the accused to say anything during plea proceedings or trial, nor is he obliged to testify during his trial. The accused then, has a clear right to remain silent at his trial when he so decides and it would be to his advantage, and no adverse inference may be drawn from this by either the prosecution or the court. In such a situation the accused would be exercising a fundamental right extended to him by the constitution.

⁴ 1968 2 SA 259 (N).
⁵ This refers to the period prior to the interim constitution of 1993 and the Republic of South Africa Constitution (1966).
⁶ Under the interim Constitution these entrenched fundamental rights were embodied in Chapter 3.
Presumption of innocence under the old order and its justification

A large number of statutes creating offences under the old order contained provisions casting the onus onto the accused to prove himself innocent of the crime charged. In other words, they embodied a presumption of guilt. A few examples will be considered.

Section 40(1) of the Arms and Ammunition Act\(^7\) creates a presumption that in a prosecution for possession of any article contrary to the provisions of the Act, it is proved that such article has at any time been on or in any premises, including any building etcetera, any person who at the time was on or in charge of, or present at, or occupying such premises, shall, until the contrary is proved, be presumed to have been in possession of that article at that time.

Section 21(1) of the Drugs and Drug Traffic Act\(^8\) likewise provides:

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;
   (ii) was found in possession in or on any school grounds or within a
distance of 100 metres from the confines of such school grounds of
any dangerous dependence-producing substance; or
   (iii) was found in possession of any undesirable dependence-producing
    substance, other than dagga, it shall be presumed, until the contrary
    is proved, that the accused dealt in such dagga or substance
(b) in section 13(f) it is proved
   (i) that dagga plants of the existence of which plants the accused was aware
    or could reasonably be expected to have been aware, were found on a
    particular day on cultivated land; and
   (ii) that the accused was on the particular day the owner, occupier,
    manager or person in charge of the said land, it shall be presumed, until the contrary
    is proved, that the accused dealt in such dagga plants
(c) in section 13(e) or (f) it is proved that the accused conveyed any drug, it
    shall be presumed, until the contrary is proved, that the accused dealt in
    such drug
(d) in section 13(e) or (f) it is proved
   (i) that any drug was found on or in any animal, vehicle, vessel or aircraft;
    and
   (ii) that the accused was on or in charge of, or that he accompanied any
    such animal, vehicle, vessel or aircraft, it shall be presumed, until the contrary
    is proved, that the accused dealt in such drug.

Lastly, section 122(2) and (4) of the Road Traffic Act\(^9\) provides:

If, in any prosecution for a contravention of the provisions of subsection (2), it
is proved that the concentration of alcohol in any specimen of blood, taken from
any part of the body of the person concerned, was not less than 0,08 gram per
millilitres at any time within two hours after the alleged offence, it shall be
presumed, until the contrary is proved, that such concentration was not less than
0,08 gram per 100 millilitres at the time of the alleged offence.

(4) Where in any prosecution under this Act evidence is tendered of the analysis
of a specimen of the blood of any person, it shall be presumed, until the contrary
is proved, that any syringe used for obtaining such specimen and the receptacle
in which such specimen was placed for despatch to an analyst, were free from any
substance or contamination which could have affected the result of such analysis.

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\(^7\) Act 75 of 1969.
\(^8\) Act 140 of 1992.
Justification of the presumption
The continued retention of the presumption in our law has been based on the following grounds, *inter alia*:

- That the facts are within the knowledge of the accused and, as such, the state will be unable to prove its case against the accused without the assistance of the presumption.
- That the difficulty of proving a negative, justifies the enlisting of a presumption by the state.

These grounds are, however, not exhaustive. There is no doubt that both grounds are salutary. The realities of criminal justice in South Africa, however, call for comment. The human resources or machinery at the disposal of the state are overwhelming. When these resources are properly tapped and in place, these grounds would become insignificant, *vis-a-vis* the human right sought to be promoted by upholding the fundamental rights of citizens.

Presumptions and foreign jurisdictions

**Canada**

The first major decision by the Supreme Court of Canada, after Canada had introduced its Chapter of Rights and Freedoms\(^{10}\), is *R v Oakes\(^{11}\)*, where the Canadian Supreme Court was faced with an Act providing:

> If a person was proved to be in unlawful possession of a narcotic, he was presumed to be in possession of it for the purpose of trafficking (a more serious crime) unless he proved the contrary.

This proof was held to be inconsistent with the presumption of innocence, guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms.\(^{12}\)

Dickson CJC held at 212–13:

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence, faces grave social and personal consequences including potential loss of physical liberty, subjection to social stigma and ostracism from the community as well as other social psychological and economics harms. In (the) light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused’s guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice’. And at 222: ‘If an accused bears the burden of disproving on a balance of probabilities, an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt as to his or her innocence, but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

\(^{10}\)Schedule B of the Constitutional Act 1982.

\(^{11}\)1986 26 DLR 4th 200.

\(^{12}\)Section 11(d) of the Canadian Charter of Rights and Freedoms provides that ‘any person charged with an offence 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’. 
Another Canadian case, *R v Whyte*,\(^\text{13}\) dealt with a statute creating the offence of having care or control of a motor vehicle while one’s ability to drive was impaired by alcohol. Under the statute, upon proof that the accused occupied the driver’s seat, he was deemed to have had the care and control of the vehicle unless he established that he did not enter the vehicle for the purpose of setting it in motion. This presumption was held to be a violation of the right to the presumption of innocence. The court held that it was irrelevant that the presumption did not relate to an essential element in the offence (as required in the *Oakes* case)\(^\text{14}\).

Dickson CJC stated:

In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from *Oakes* quoted above, with its reference to an 'essential element' to support this argument. The accused here is required to disprove an element of the offence. The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence, because it permits a conviction in spite of a reasonable doubt in the mind of a trier of fact as to the guilt of the accused.

In *R v Downey*\(^\text{15}\) the Supreme Court of Canada dealt with a statutory presumption that a person who lives with, or is habitually in the company of prostitutes is, in the absence of evidence to the contrary, committing the offence of 'living on the avails, that is, proceeds of another person’s prostitution'. This presumption was also held to infringe the presumption of innocence.

The presumption of innocence embodied in section 11(d) of the Canadian Charter bears a close relationship to the presumption of innocence in the South African Constitution.

**United States of America**

In the American jurisdiction, the first case relevant to this investigation of presumptions, is *Tot v United States*,\(^\text{16}\) which concerned a federal statute

\(^{\text{11}}\)1988 51 DLR 4th 481 (SCC).

\(^{\text{12}}\)Note 11 above at 493.

\(^{\text{13}}\)1992 90 DLR 45h 449.

\(^{\text{14}}\)1943 319 vs 463.
making it an offence for a person convicted of violence to receive any firearm or ammunition which had been shipped or transported in interstate or foreign commerce. The statute provided that

the possession of a firearm or ammunition by any person, shall be presumptive evidence that such firearm or ammunition was shipped, transported or received, as the case may be, by such person ... in violation of this Act.

The Supreme Court held that while congress and state legislatures had 'power to prescribe what evidence is to be received in the courts of the United States', the due process clauses of the constitution 'set limits upon the power of congress, or that of a state legislature to make the proof of one fact, or group of facts, evidence of the existence of the ultimate fact on which guilt is predicated'.

The test of validity of such a presumption, the court said, was that there be a 'rational connection between the facts proved and the fact presumed ... But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of the courts.' On this test the presumption was struck down.

In Leary v United States where the Supreme Court had to consider a statute under which possession of marijuana was deemed to be sufficient evidence of the offence of illegal importation, unless the defendant explained his possession to the satisfaction of the jury. The presumption was held to be a denial of due process of law. Having considered Tot and some later cases, Harlan J, speaking for the court, said (at 36) that:

A criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance, that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

(Harlan J added the rider that in this assessment the congressional determination, favouring the presumption, must weigh heavily).

In County Court of Ulster County, New York, et al v Allen et al it was acknowledged that 'rational connection' is a useful screening test, but not a conclusive one. This case concerned a mandatory (that is, legal) presumption and Stevens J, giving judgment for the majority of the Supreme Court, stated at 167, that 'since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt'.

United Kingdom
It is very difficult to define the term 'constitutional law or constitution' as applied to the United Kingdom or Great Britain and Northern Ireland. Whereas, in the great majority of the nations of the civilised world, it is possible to discover a single document or collection of documents which

\[17\text{1969 395 v 6.}\]
\[18\text{1979 442 v 140.}\]
embody the constitution of the country concerned, in the case of the United Kingdom of Great Britain and Northern Ireland, there is no such document. The provisions of the constitution of Great Britain must be gleaned from the vast mass of source material which together forms the whole body of English, Scots and Northern Ireland law. This law is derived partly from custom, but mostly from written sources, namely reports of decided cases (which override conflicting legal rules) and occasionally the writings of jurists, though the latter are only called into account where other guidance for the courts is lacking. 19

Although Britain knows no written constitution embodying fundamental rights, it would be unrealistic to consider that the citizens of a democratic state such as Great Britain have no guarantees safeguarding their individual liberties. However, such individual rights and duties as do exist in the United Kingdom, are subject to the overall power of alteration or abolition by Act of parliament for the most basic of all constitutional factors in the United Kingdom is the unrestricted legislative power of parliament. The presumption of innocence is derived from the centuries-old principle of English law as forcefully restated in Woolmington v Director of Public Prosecutions,20 that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt.

In Ibrahim v Regem,21 a private in the Indian army, was convicted of the murder of a native officer. Shortly after the murder, the commanding officer went to see the appellant, who was in custody, and asked: ‘why have you done such a senseless act?’ The appellant replied: ‘Some three or four days he has been abusing me, without a doubt I killed him’. Evidence of these statements, which were made without threat or inducement, was admitted at the trial.

Before the Privy Council, it was argued that Ibrahim’s statement was inadmissible, first, as not being a voluntary statement but rather one obtained by pressure of authority and fear of the consequences; and second, as being the answer of a man in custody to a question put by a person having authority over him as his commanding officer and having custody of him through the subordinates who had made him prisoner.

In the course of his judgment, Lord Sumner stated:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice of hope of advantage exercised or held out by a person in authority.

In Smith v Director of Serious Fraud Office,22 Lord Mustill at 465c, distinguished the ‘desperate group of immunities’ denoted by the expression ‘the right to silence’. He observed the desire to minimise the risk that an accused

19 DCM Yardley Introduction to British constitutional law (7 ed 1990).
20 1935 All ER 1 at 8.
21 1914–15 All ER 874.
22 1992 3 All ER 456.
will be convicted on the strength of an untrue extra-juridical confession to which the law gives effect by refusing to admit confessions in evidence, except upon proof that they are voluntary.

The facts in the Smith case are simple. The respondent, WD Smith, was the chairman and the managing Director of Wallace Smith Trust Co Ltd. On 27 April 1991 he informed the Bank of England that the company was in financial difficulty. Events moved quickly. The police were called in, and on the following day they arrested the respondent. On 30 April, after a number of interviews, at the outset of which he was cautioned, he was charged that he, 'between 1 January 1985 and 29 April 1991 in the City of London and elsewhere was knowingly a party to carrying on of the business of a company called Wallace Smith Trust Company Limited with intent to defraud creditors of the said company ...'.

In Lam Chi-Ming and Others v R\textsuperscript{23} the sister of the first and second appellants told them and the third appellant, who was her boyfriend, that she had been raped by the deceased on a number of occasions. Shortly afterwards, the deceased was found stabbed to death. The appellants were arrested for his murder. They had all made confessions to the police and the next day reenacted the actions described in their statements. The reenactment was video taped with a sound track. The appellants then directed the police to the waterfront and each, in turn, pointed to the place where the knife, which they said they used to kill the deceased, had been thrown into the sea. That episode was also video taped with sound. A knife recovered at the place indicated by the appellants was later identified as the murder weapon. At their trial the appellants objected to the admission of both their statements and the video recordings on the ground that they had been extracted by police brutality and were not voluntary and were therefore inadmissible. The judge ruled that the appellants' statements were inadmissible, but admitted in evidence, the second video recording without sound in which the appellants had indicated the location of the murder weapon.

The appellants were convicted of murder. They applied for leave to appeal against their convictions on the ground that the second video recording should not have been admitted. The Court of Appeal of Hong Kong refused their applications and they appealed to the Privy Council. The latter held that the rule of law applicable in Hong Kong as well as England that a confession was not admissible in evidence, unless the prosecution established that it had been obtained voluntarily, was based not only on the possible unreliability of the statement, but also on the principle that a man could not be compelled to incriminate himself. Accordingly, where a confession was not made voluntarily, the fact that part of the confession was later shown to be reliable by the discovery of the evidence to which it related was not sufficient to render the statement admissible. Accordingly, the evidence of the police and the silent video recording relating to the conduct of the appellants leading to the discovery of the murder weapon, should not have been admitted since it was

\textsuperscript{23}1991 3 All ER 172.
evidence of an inadmissible confession. The appeal was allowed.

From these judgments of the high courts of Great Britain one may conclude that a presumption which casts a reverse onus on the accused person, is and would not be entertained by English courts, nor would it be valid or effective in English law.

Because the territory of South West Africa (now the Republic of Namibia) was for many years governed as a South African province and as a result came under the influence of apartheid ideology, which had become official South African policy when the National Party came into power in 1948, it is judicious to visit the Namibian Constitution briefly, to examine its application of the presumption in Namibian law. Article 12(1)(d) of the Constitution of Namibia provides:

All persons charged with an offence shall be presumed innocent until proven guilty according to law ...

Article 12, therefore, guarantees due process. The basic principle that every accused is presumed innocent until proven guilty, *inter alia*, has been statutorily enshrined in the constitution. One question is, however, now and again posed — whether the constitutional status conferred on the presumption of innocence will mean that statutory enactments, which place the onus of proof on the accused in a criminal trial, are unconstitutional?

The enforcement of fundamental rights, of which the presumption of innocence is part, is provided for in article 25. The Republic of Namibia has opted for the enforcement of these rights and freedoms by the ordinary courts rather than by a special constitutional court. Of note, is article 25(1)(a) which provides that the court may in an appropriate case refer a statute or an executive matter back, either to parliament or to the executive, as the case may be, to correct any defect in the impugned law or action rather than declare it invalid. Further, article 25(1)(b) provides that any law in force before independence, will remain in force until amended, repealed or declared unconstitutional. This means that, in respect of Namibia, the laws inherited from South Africa which conflict with the fundamental rights and freedoms enshrined in the constitution, will be dealt with by courts in terms of this article 25(1)(b) — that is, effect will be given to them in so far as they have not been amended or repealed, or do not call for a 'declaration as unconstitutional'. The other line of argument, however, is that the fundamental rights and freedoms are conferred on the individual with immediate effect, and are not subject to still operative but conflicting laws or rules. Article 140 begins with the words 'subject to the provisions of this constitution ...', such words may arguably be construed to mean that any law which is expressly contrary to any provision of the constitution, will fall away automatically. It has been submitted, however, that such a construction would give rise to the untenable situation that the validity of legal rules would be decided by the administration, thus undermining the doctrine of 'separation of powers — which doctrine is the solid anchor of democracy and forms the basis of protection of the individual against the mighty of the state in all forms'.
The South African constitutional court and the presumptions
It is hardly surprising that as soon as the Constitution was in place, the question of a presumption in need of adjudication presented itself in the case of *S v Zuma.* The facts were that Zuma was charged with two counts of murder and one count of robbery. The state, after leading some general evidence on fingerprints found at the scene, sought, in terms of section 217(1)(b)(ii), to have a confession made by the accused to a magistrate admitted into evidence. The accused alleged that they made the confessions after being assaulted by the police and in order to prevent further assaults. It was further argued on their behalf that section 217(1)(b)(ii) of the Criminal Procedure Act 1977 which provides that a confession made to a magistrate shall be ‘presumed unless the contrary is proved, to have been freely and voluntarily made ...’ was unconstitutional. This section of our Criminal Procedure Act creates the reverse onus. The traditional position in South African law has been that the prosecution bears the onus of proving that the confession was made freely and voluntarily.

The crucial issues before the court were:

- whether the reversal of the onus of proof in section 217(1)(b)(ii) of the Criminal Procedure Act violated the presumption of innocence and the right to remain silent as embodied in section 25(3)(c) of the constitution; and
- if violations of the constitutional rights were established, could the state successfully rely on the limitations clause as embodied in section 33 of the constitution?

The argument, for Zuma, was that the presumption did not merely cast an evidentiary burden upon the accused, it cast a positive onus upon the accused to prove that the confession was not free and voluntary.

The court found that the presumption imposed a positive duty of proof upon the accused with the threat or danger that a failure to discharge this duty could result in a conviction. The court thus ruled that the presumption contained in section 217(1)(b)(ii) conflicted with the presumption of innocence enshrined in the constitution.

The same point was raised in *S v Mhlungu and Others* and the reasoning in the *Zuma* case, was followed.

In *S v Bhulwana* it was expressly found that the presumption in the statute concerned amounted to a negation of the essential content of the entrenched right to be presumed innocent. Bhulwana had been charged in the main count with contravening section 5(b) of Act 140 of 1992 in that he dealt in 850mg of dagga. He was charged in the alternative with contravening section 4(b) of the Act by being in possession of the same quantity of dagga. In the end, he was

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24 1995 1 SACR 568 (CC).
25 1995 3 SA 86 (CC).
26 Note 32 below.
27 1995 5 BCLR 566 (CC).
convicted upon the main count and sentenced to a fine with an alternative of imprisonment. In analysing the evidence before court, Marais J found that it certainly would not have sufficed to prove beyond reasonable doubt that the accused intended to deal in the dagga which was found in his possession and, but for the invocation by the state of, and reliance by the court upon, the presumption contained in section 21(1)(a)(i) of the Act, he could not properly have been convicted of dealing in dagga.

Section 21(1)(a)(i) of the Act reads:

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

On the other hand, section 25(3)(c) of the interim constitution reads:

Every accused person shall have the right to a fair trial, which shall include the right:
(c) to be presumed innocent and to remain silent during plea proceedings or trial.

The court, per Marais J, ultimately found that the presumption in section 21(1)(a)(i) of the Act, is a presumption that entirely relieves the state of its constitutional duty to prove that the accused is not innocent, but is guilty of the crime with which he is charged and transfers to the accused the burden of affirmatively proving his innocence. It is noteworthy that Marais J came to the conclusion that he reached in this case without any persuasion.

Though opinion have been expressed from certain angles that Marais J exceeded his jurisdiction in this case, as he had been precluded from enquiring upon the constitutional validity of the section,24 in S v Nkosi29 the court considered that in Bhulwana’s case, no more had been done than was necessary to justify the exercise of that court’s prerogative under section 102(1) of the constitution to refer a question to the constitutional court. The court further observed30 that there were also decisions which had held that the expression of a prima facie opinion as to the validity of a provision, did not trespass on the constitutional court’s exclusive jurisdiction.

In S v Mbatia, S v Prinsloo31 the two matters (referred to the constitutional court by the Witwatersrand Local Division) concerned the constitutionality of the presumption contained in section 40(1) of the Arms and Ammunition Act 75 of 1969. Section 40(1) determines that whenever in any prosecution for being in possession of article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle, or any part thereof, any person who, at that time, was on or in charge of or

291995 5 BCLR 660 (T).
30At 661A.
311995 10 SACLR 78 (CC).
present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved. Both matters were set down for hearing at the same time, and for the sake of convenience, the court referred to the parties contesting the constitutionality of the section as the applicants. The first case involved one Mbatha who had been tried and convicted in the regional magistrate's court at Germiston for the unlawful possession of two AK47 rifles and twelve rounds of ammunition under section 32(1)(a) and 32(1)(e) of the Act respectively. For those crimes he was sentenced to imprisonment for eight years on the first count and two years on the second count. He appealed against his convictions. The appeal court referred the constitutionality of the presumption contained in section 40(1) of the Act to the constitutional court.

In the second case, Prinsloo was standing trial in the WLD together with twenty-five others in the case of *S v Le Roux and Others*. They had been indicted on ninety-six counts arising out of a series of bomb explosions which had taken place immediately prior to the National Elections in April 1994. At the close of the state's case, the court *a quo* refused an application for the discharge of all accused on all counts. The applicant and six others were acquitted on all but four counts which related to the unlawful possession of machine guns, firearms and ammunition in contravention, respectively of section 32(1)(a) and 32(1)(e) of the Act. In declining to discharge the applicant on these counts, the trial court stated that it relied solely on the presumption in section 40(1) of the Act. The court suspended the proceedings and referred the constitutionality of the presumption to the constitutional court under section 102(1) of the constitution. The applicants contended that the presumption contained in section 40(1) of the Act offended against the 'fair trial' rights in section 25 of the interim constitution and in particular, the section 25(3)(c) and 25(3)(d) right to be presumed innocent and privilege against self-incrimination respectively.

The state contested the applicants second argument on the ground that section 40(1) did not compel them to give self-incriminating, or any other form of evidence. As regards the applicant's first argument, it was common cause that the provisions of section 40 amount to a reverse onus provision and the state was unable to indicate any reason for departing from the principles expressed in the *Zuma* case in the first stage of the two-stage enquiry into whether a legislative provision infringes a fundamental right. The state contended, however, that circumstances existed which rendered section 40(1) reasonable, justifiable and necessary as contemplated by section 33(1). It characterised the objective of the presumption as being to assist in combating the escalating levels of crime and therefore as forming part of the government's duty to protect society generally. The contention was that the provision is intended to ensure effective policing, and to facilitate the investigation and prosecution of crime, as well as to ease the prosecution's task of securing convictions for contravening the Act.

The constitutional court, *per* Langa J, in whose judgment the rest of the court concurred, stated that section 25(2) and 25(3)(c) and (d) of the interim constitution entrench, as a fundamental constitutional value, the fact that it is
the duty of the prosecution to prove the guilt of an accused person in a criminal case and further, that the rights to be presumed innocent, to remain silent during trial, and not to be a compellable witness against oneself, are entrenched in section 25(3)(c) and (d).

It was common cause in casu that the presumption in section 40(1) amounted to a legal presumption: it is a reverse onus provision. The effect of the provision was to relieve the prosecution of the burden of proving the accused's possession in contravention of the Act. Rather it was for the accused to prove on a balance of probabilities that he was not in possession of the prohibited article. A presumption of this nature is in breach of the presumption of innocence since it could result in the conviction of the accused despite the existence of a reasonable doubt as to his guilt.

The court concluded that section 40(1) of the Act offended against the right of an accused person to be presumed innocent in terms of section 25(3)(c) of the interim constitution and in the circumstances was unconstitutional

It must, however, be noted that the court did not rule the presumption provision invalid in our law. In the case of S v Julies, arising from a criminal review, a provincial division referred the question of whether the provisions of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 were constitutionally valid to the constitutional court. That section provides that

in the prosecution of any person for an offence, referred to in Section 13(f) it is proved that the accused was found in possession of any undesirable dependence-producing substance, other than dagga, it shall be presumed, until the contrary is proved, that the accused dealt in such ... substance.

Section 13(f) lists various offences, including that of contravening section 5(b) rendering dealing in undesirable dependence-producing substances an offence.

In S v Bbulwana, S v Gwadiso 1995 12 BCLR 1579 (CC) the court had declared the provisions of section 21(1)(a)(i) unconstitutional. The latter provision contained a presumption in terms of which proof of possession of dagga exceeding 115 grams raised a presumption of dealing. The court observed that the reasoning adopted in Bbulwana's case applied a fortiori to the presumption in question. There was no rational connection between the proven fact and the presumed fact. Possession of, for example, a single mandrax tablet did not indicate an intention to deal in mandrax rather than possession for personal use. Saddling a possessor with such an onus did not accord with common sense, nor did such possession naturally raise an inference of an intention to deal in the substance. Whatever policy considerations underlay the provision, they were in conflict with the standards embodied in section 25(3)(c) of the interim constitution and not justifiable in terms of section 33(1). The court accordingly declared the provision of section 21(1)(a)(iii) invalid and of no force and effect.

321996 (6) BCLR 868 (C).
Conclusion

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. 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 places an onus on an accused despite the existence of a reasonable doubt as to his or her guilt, this must be justified in terms of section 36.

Section 36(1) provides that:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right;
(b) The importance of the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) Less restrictive means to achieve the purpose.

Under the old order the South African courts' approach to statutory interpretation was confusing, resting on the cardinal rule that the language used in the statute was to be given its plain grammatical meaning. Only where this was not possible, would the South African court move away from the language used in the statute, to invoke secondary aids such as the historical context etcetera. As a last resort, the court would investigate the presumptions.

The entrenchment of presumptions in the new order ensures them of a status far more significant than a last resort.

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3The period up to the advent in 1993 of the Interim Constitution.