IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 19/95

In the matter between:

The STATE
and
WELLINGTON MBATHA

and

CASE NO. CCT 35/95

In the matter between:

The STATE
and
NICOLAAS MARTHINUS PRINSLOO
Heard on: 16 NOVEMBER 1995
Delivered on: 9 FEBRUARY 1996

JUDGMENT

LANGA J:

[1] Two matters come to this Court by way of referrals from the Witwatersrand Local Division of the Supreme Court. The accused in the first case is Wellington Mbatha who was tried and convicted in the Regional Court at Germiston. Nicolaas Marthinus Prinsloo, an accused in the second matter, is standing trial in

the Witwatersrand Local Division with 25 others in the case of the *S v Le Roux and Others*. I shall refer to the two accused persons as the applicants.

[2] In the first matter, the applicant appealed against his conviction on two counts under the provisions of the Arms and Ammunition Act 75 of 1969 (the Act). The charge concerned the unlawful possession of two AK47 rifles and twelve rounds of ammunition, in contravention of sections 32(1)(a) and 32(1)(e) of the Act respectively. The sentences imposed, of eight and two years' imprisonment respectively, were ordered to run concurrently. On appeal, the matter was in turn referred to this Court by Leveson J, with MacArthur J agreeing, for a decision on the constitutionality of the presumption contained in section 40(1) of the Act.

[3] The twenty-six (26) accused in the second matter were indicted on various charges, 96 counts in all, arising out of a series of bomb explosions which took place before the national elections in April 1994. After the close of the prosecution case, Flemming DJP refused an application for the discharge of all the accused on all counts. The applicant and six others were acquitted on all but four of the counts, namely, counts 80 to 83, which relate to the unlawful possession of machine guns, firearms and ammunition, in contravention respectively of sections 32(1)(a) and 32(1)(e) of the Act. In refusing to discharge the applicant on those remaining counts, the trial Judge stated that he relied solely on the presumption in section 40(1) of the Act. He then suspended the proceedings and made the referral order in terms of section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 (the Constitution) on the basis that it was in the interests of justice that the issue be resolved at this stage of the proceedings. The case has been postponed to 16 February 1996.

[4] The issue in both matters is the validity of the presumption contained in section 40(1) of the Act in the light of the provisions of section 25(3)(c) and (d) of the Constitution. The applicants complain that the presumption offends against the 'fair trial' provisions in the Constitution, in particular, the right to be presumed

innocent and the privilege against self-incrimination. Section 40(1) of the Act provides:

> Whenever in any prosecution for being in possession of any 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 or in charge of or 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.

[5] The first comprehensive statute to regulate arms and ammunition nationally was the Arms and Ammunition Act 28 of 1937. Prior to this, each of the four provinces had their own acts regulating the possession and distribution of arms and ammunition. Section 32 of the 1937 Act provided:

> Any occupier of premises and any person who is upon or in charge of or who accompanies any vehicle, vessel or animal upon which or in which there is any article mentioned in section one or any arm or ammunition shall, until the contrary is proved, be deemed for the purposes of this Act to be the possessor of such article or arm as the case may be.

The Orange Free State (Act 23 of 1908) and Transvaal (Act 10 of 1907) had substantially similar provisions. Our courts, in an attempt to avoid obviously unintended results, interpreted the word "occupier" in the 1937 Act strictly. Thus in *S v Mnguni* 1962(3) SA 662 (NPD) at 664D-E, the word was held to mean the person "who is responsible for the premises and has the general control of them." It was held further that the word did not mean "any person who is an occupant of premises" because it was "unlikely that the legislature would have deemed every person residing on the premises to be the possessor of arms." Section 40(1) of the present Act came into operation on 1 February 1972. The terms of the presumption are clearly wider in scope than those in the antecedent legislation, and now include not only occupants of premises but also persons "on", "in" or "present at" such premises at any time when the "article" has been "on" or "in" such premises.

[6] Aspects of section 25(3)(c) and (d) of the Constitution have already been the subject of enquiry in some of the matters before this Court in which their impact on statutory presumptions in our criminal law was considered. The relevant part of the section 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 and not to testify during trial;
> (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself ...

[7] In *S v Zuma and Others* 1995(2) SA 642(CC); 1995(4) BCLR 401(CC), the issue was the constitutionality of a legal provision contained in section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 which placed a burden on the accused to rebut a presumed fact, namely, that a confession had been made freely and voluntarily. The phrase "unless the contrary is proved" which was used in the provision meant, in effect, that if the accused failed to discharge the burden of proof, that is, on a balance of probabilities, the confession would be admitted notwithstanding the existence of a reasonable doubt that it had been made freely and voluntarily. (See *Ex Parte Minister of Justice: In re: R v Jacobson and Levy* 1931 AD 466 at 471; *Ex parte Minister of Justice: In re: R v Bolon* 1941 AD 345 at 360 - 361; *S v Mphahlele and Another* 1982 (4) SA 505 (A) at 512C). Sections 25(2) and 25(3)(c) and (d) of the 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. As Kentridge AJ at paragraph 25 pointed out, "the presumption of innocence is derived from the centuries-old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in *Woolmington v Director of Public Prosecutions* (1935) AC 462 (HL) at 481, 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." The rights to be presumed innocent, to remain silent during trial and not to be a compellable witness against oneself are entrenched in sections 25(3)(c) and (d). Constitutional recognition of these rights in criminal trials means that statutory

erosion of these rights and principles can no longer be accepted without question as they were before this Constitution came into force; statutory presumptions and other legislation which adversely affect the rights entrenched in Chapter 3 of the Constitution will now have to meet the limitations criteria of section 33(1) of the Constitution. (*See S v Makwanyane and Another* 1995(3) SA 391 (CC);1995(6) BCLR 665 (CC) at paragraphs 100 and 156; *S v Williams and Others* 1995(3) SA 632 (CC); 1995(7) BCLR 861 (CC) at paragraphs 8 and 54; *S v Bhulwana; S v Gwadiso* 1996(1) SALR 388 (CC); 1995(12) BCLR 1579 (CC) at paragraph 16.) This Court held in *Zuma's* case that the presumption of innocence was infringed by the provision which imposed an onus on the accused to disprove the voluntariness of the confession.

[8] In *S v Bhulwana; S v Gwadiso supra* this Court was concerned with a provision in Section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 which required that an accused who was proved to be in unlawful possession of dagga in excess of 115 grams be presumed, "until the contrary is proved," to be dealing in such dagga. The effect of the presumption was that if the accused failed to prove on a preponderance of probabilities that he or she was not dealing or trafficking in dagga, a conviction for dealing would result, even if the evidence raised a reasonable doubt as to the innocence of such accused. O'Regan J (paragraph 15) pointed out on behalf of a unanimous court that the presumption of innocence was not new to our legal system but was in fact an established principle of our law. She referred, *inter alia*, to the general rule restated by the Appellate Division in *R v Ndhlovu* 1945 AD 369 at 386 that "[i]n 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 to establish his guilt." The only common law exception recognised was a defence of insanity which had to be proved by the accused.

[9] It is now well established that the enquiry into the constitutionality of the impugned section involves two stages. Firstly, whether the section is inconsistent with a fundamental right contained in Chapter 3 of the Constitution; if it is, then

secondly, whether the inconsistency is saved in terms of section 33(1) of the Constitution. In argument before us, the State was unable to indicate any reason for departing from the principles expressed in the first stage of the enquiry in *S v Zuma.* It was common cause that the provision amounts to a legal presumption; it is a reverse onus provision. As a presumption, it has similar features to that discussed in *Bhulwana's* case. The effect of the provision is to relieve the prosecution of the burden of proof with regard to an essential element of the offence. It requires that the presumed fact must be disproved by the accused on a balance of probabilities. (See *R v Bolon supra* at 360-1; *S v Nene and Others (2)* 1979(2) SA 521(D) at 523H; *S v Mkanzi en 'n Ander* 1979(2) SA 757(T) at 758H; *S v Mphahlele supra* 512B; *S v Zuma supra* at paragraph 4). As pointed out by O'Regan J in *Bhulwana's* case (paragraph 15), a presumption of this nature is in breach of the presumption of innocence since it could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt.

[10] No legal system can guarantee that no innocent person can ever be convicted. Indeed, the provision of corrective action by way of appeal and review procedures is an acknowledgement of the ever-present possibility of judicial fallibility. Yet it is one thing for the law to acknowledge the possibility of wrongly but honestly convicting the innocent and then provide appropriate measures to reduce the possibility of this happening as far as is practicable; it is another for the law itself to heighten the possibility of a miscarriage of justice by compelling the trial court to convict where it entertains real doubts as to culpability and then to prevent the reviewing court from altering the conviction even if it shares in the doubts.

[11] Counsel for the applicants also argued that the presumption violated the privilege or rule against self-incrimination. This was disputed by the State on the basis that the accused was not compelled to give evidence, self-incriminatory or otherwise. The Constitution does not mention a right or privilege against self-incrimination expressly, but the cluster of 'fair trial' rights guaranteed in section

25(3)(c) and (d) of the Constitution includes the right of the accused "to remain silent during plea proceedings or trial and not to testify during trial ... [and] ... not to be a compellable witness against himself or herself." In *Ferreira and Others v Levin and Others* CCT/5/95 (judgment delivered on 6 December 1995), this Court (per Ackermann J at paragraph 79 and Chaskalson P at paragraph 159) held that a right against self-incrimination is implicit in the provisions of section 25(3) of the Constitution. However, because of the view I take with regard to the decisiveness of the presumption of innocence for this enquiry, it is unnecessary, for purposes of this judgment, to canvass the precise scope of such right or privilege or its applicability to the facts of the present case.

[12] The conclusion I come to, therefore, is that section 40(1) of the Act offends against the right of an accused person to be presumed innocent, in terms of section 25(3)(c) of the Constitution. The provision can accordingly only be permissible if it is saved by the provisions of section 33(1) of the Constitution.

[13] Section 33(1) of the Constitution, in so far as it applies to section 25(3), provides as follows:

> 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 -
>
> (i) reasonable; and
>
> (ii)justifiable in an open and democratic society based on freedom and equality; and
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> (b) shall not negate the essential content of the right in question,
>
> and ... shall ... also be necessary.

[14] In *S v Makwanyane supra*, Chaskalson P (at paragraph 104) stated that the enquiry involves the weighing up of competing values and ultimately an assessment based on proportionality. He named the factors to be considered in this process as including: the wider implications which the right has for our society ('an open and democratic society based on freedom and equality'); the purpose for which the right is limited; the importance of that purpose to our society; the extent of the limitation and its efficacy and, in cases where the limitation has to be necessary, whether the objectives of the limitation could reasonably be achieved by means less damaging to the right.

[15] The State argued that the inroads which section 40(1) of the Act makes on the presumption of innocence are reasonable, justifiable and necessary and that they do not negate the essential content of the right. Relying on remarks in *S v Zuma supra* (at paragraph 41), it was argued that the reverse onus provisions in the present case are justifiable and therefore constitutionally permissible. In the passage referred to, Kentridge AJ pointed out that the effect of the judgment in that case was not to invalidate every legal presumption reversing the onus of proof as some presumptions "may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove ... Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself ..." The State contended that circumstances existed which rendered section 40(1) of the Act justifiable, regard being had to the context and the manner in which its provisions were implemented.

[16] The State characterised the objective of the presumption in the present case as being to assist in combating the escalating levels of crime as 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 contraventions under the Act. Such an objective is truly laudable and its importance, in the current climate of very high levels of violent crime, cannot be overstated. Information in papers submitted to us reveals that during the period 1990 to 1994, there was a distressing increase in crimes of violence. The common denominator in most of them is the involvement of firearms. In a discussion document titled: *Recent Crime Trends*, Dr Lorraine Glanz of the Human Sciences Research Council observed that "the face of crime is becoming increasingly violent and more serious," and that the rampant crime levels must have "a profound negative effect on the quality of life in communities. If left unchecked, a protracted increase in violent crime in particular is a threat to social stability." I could not agree more. A further ugly feature allied to the actual deeds

of violence is the incidence of illegal smuggling, sale and possession of arms. We were told that trafficking in arms and drugs from neighbouring countries into South Africa is taking place on a significant scale. There is a proliferation of illegal firearms throughout the country and this, no doubt, contributes in no small measure to the high incidence of violent crime. This state of affairs is obviously a matter of serious concern, not only for the courts, but for the legislature, the police and the entire population which is affected by it. There is no doubt that, whatever the causes, crimes of violence particularly those involving firearms have reached an intolerably high level and that urgent corrective measures are warranted.

[17] The problems which the government has to contend with in fulfilling its duty to protect society were given to us in some detail. We were informed that the detection of people in possession of illegal arms and ammunition is often very difficult. Police have to depend on informers or pure chance to trace offenders. The use of informers who infiltrate gun-smuggling networks is a helpful but often time-consuming and dangerous process. Gunrunners make extensive use of couriers to transport arms; some of the couriers, especially women and children, are used without their knowledge. Even vehicles such as ambulances and official government cars are sometimes used, without the people in control of the vehicles knowing it. Sometimes aircraft and motor vehicles equipped with false panels and compartments for storage are used in the illegal transportation of arms. The problem of policing is compounded by geographical factors; the borders of South Africa are extensive and impossible to patrol effectively 24 hours a day, making it easier for cross-border dealers and smugglers of arms to ply their trade and evade detection. The severe shortage of trained personnel has adverse effects on the capacity of the police to conduct raids and searches in places like hostels and informal settlements, to look for places used for concealment of illegal arms and to trap motor vehicles used in illegal conveyance of arms. Ordinary members of the community often withhold information because they are too terrified and intimidated by armed gangsters and traffickers in narcotic drugs and illegal arms.

[18] It is difficult not to have sympathy for representations of this nature, coming as they do from officials of the State whose task it is to deal with what has become a truly serious problem. These are real and pressing social concerns and it is imperative that proper attention should be given to finding urgent and effective solutions. The issue before us, however, is not simply whether there is a pressing social need to combat the crimes of violence - there clearly is - but also whether the instrument to be used in meeting this need is itself fashioned in accordance with specifications permitted by the Constitution. Although the relevant legislative provision was enacted before the Constitution came into force, the enquiry is whether the limitation it imposes on constitutionally protected rights is consistent with the provisions of the Constitution. This involves a consideration of the other factors referred to in *Makwanyane's* case, and in particular, the importance of the impugned right in an open and democratic society, and the extent to which that right has been limited. As O'Regan J said in *S v Bhulwana supra* (at paragraph 18), "the more substantial the inroad into fundamental rights, the more persuasive the ground of justification must be."

[19] The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If, in particular cases, what is effectively a presumption of guilt is to be substituted for the presumption of innocence, the justification for doing so must be established clearly and convincingly.

[20] It was argued that without the presumption it would be almost impossible for the prosecution to prove both the mental and physical elements of possession. I do not agree. The circumstances of each case will determine whether or not the elements of possession have been established beyond reasonable doubt. The evidence need not necessarily be direct. It may be, and often is, circumstantial and will often be sufficient to secure a conviction without the assistance of the presumption. There will no doubt be cases in which it will be difficult to prove that a particular person against whom the presumption would have operated,

was in fact in possession of the prohibited article. If that person was in fact guilty, the absence of the presumption might enable him or her to escape conviction. But this is inevitably a consequence of the presumption of innocence; this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence. After all, the consequences of a wrong conviction are not trivial. Apart from the social disapprobation attached to it, heavy penalties are attached to contraventions of the Act. In the cases before us, the sentence prescribed by the Act for the illegal possession of a firearm is imprisonment for a period not exceeding 25 years with a minimum of five years. Illegal possession of ammunition attracts a sentence of imprisonment for a period not exceeding 25 years.

[21] 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 in 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 presumption becomes operative without the prosecution being required to show any connection between the accused and the prohibited article, and between such accused and the place where the article was. “Premises” is defined in the section as including “any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof”. The provision targets “any person” who was in, on or at the premises at the relevant time, regardless of that person’s possible connection (or lack of it) with such premises. It also targets any person in charge of or occupying the premises, however remote his or her connection with the particular part thereof where the offending article is proved to have been. Indeed, it very much looks as if the intention was to override the restrictions read into that section’s forerunner in cases like *S v Mnguni supra*.

[22] The application of the presumption does not depend on there being a logical or

rational connection between the presumed fact and the basic facts proved, nor can it be claimed that in all cases covered by the presumption, the presumed fact is something which is more likely than not to arise from the basic facts proved. The mere presence of the accused in, on or at the premises at the same time as the prohibited article does not, as a matter of course, give rise to the inference of possession. There are clearly circumstances where this connection can be reasonably sustained. Circumstances may even arise where such an adverse inference would be warranted without the accused having been present in, on or at the particular premises when the firearm was found. An example is a case where it is proved beyond a reasonable doubt that a firemarm was found in the glove compartment of a locked car which had been driven by its owner and in which there had been no passengers. If the accused's exculpatory version is found to be false (also beyond a reasonable doubt), the conviction would be defensible. That would be so, not because of the presumption created by section 40(1) of the Act, but as a matter of logical inference. The problem with the provision is that it contains no inherent mechanism to exclude those who are innocent and who would otherwise be included within its reach. If, for example, a single firearm were to be found on a crowded bus, each passenger on the bus would be liable to be arrested and prosecuted, and would be presumed guilty unless he or she were able to establish innocence.

[23] Counsel for the State claimed that in practice, use of the presumption does not lead to absurd results because it is applied with circumspection by prosecutors. The contention is not convincing for a number of reasons. First, there is nothing to suggest that prosecutors in general and around the country agree with the view or, if they do, that it is invariably implemented. If a general directive to that effect has been issued, it has not been mentioned in argument. In the second instance, even if one were to accept that prosecutors adhere to such a policy there is no evidence that the police do so. On the contrary, counsel for the State submitted that the breadth of the presumption was a valuable investigative tool because it enabled the police to detain anyone found in the vicinity of an unlicensed firearm for questioning. Quite apart from the fact that the legality of

detention for questioning may be suspect, and its constitutionality the more so, the submission underscores the fact that the very breadth of the presumption is regarded by the police as warranting the blanket arrest of groups of persons without any suspicion that each of them has committed any offence. In *S v Shange and Others* 1994(1) SACR 621(N), for instance, the police actually arrested and charged the eight appellants who were passengers in a vehicle from which a firearm and ammunition were thrown out as it approached a police roadblock. The prosecution proceeded against them and they were all convicted, on the basis of the presumption, notwithstanding the fact that each one of them gave evidence denying any knowledge of the articles in question. Apart from having been attending the same tribal celebration at a certain kraal and the fact that they had all spontaneously clambered on to the vehicle simply because it was going in their direction, there was nothing connecting them with each other, nor was there any evidence of any link between each one of them and the articles concerned. It was only when the appeal was heard by the Provincial Division that the convictions were reversed on the basis that the appellants had, in fact, discharged the onus cast on them by virtue of the presumption. One can readily accept that police conducting a raid of a hostel are in a quandary when they find a firearm in a place with no apparent link with any of the hostel-dwellers; or as the State suggested in argument, when a firearm was found in a vehicle wreck in the courtyard. One must also accept, as has been done in paragraphs 16 to 18 above, that the eradication of the cancer of illegal firearms is a pressing public concern calling for vigorous and concerted effort. Nevertheless such concern cannot render the wholesale arrest of ostensibly innocent people either reasonable or justifiable in an open and democratic society based on freedom and equality. Thirdly, and in itself conclusively, it is clear that the presumption could lead to the conviction of innocent persons. Their rights are enshrined in the Constitution and do not depend on the discretion of the police or the attorney-general to prosecute only in cases where the accused are in fact guilty. If the police and the attorney-general are satisfied of the guilt of the accused, they should be able to establish this in the ordinary way.

[24] 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 focused and appropriately balanced. The foundations of effective law enforcement procedures should always be the thorough collection of evidence and the careful presentation of a prosecution case. The sweeping terms of the presumption, however, encourage dragnet searches followed by dragnet prosecutions in which innocent bystanders, occupants and travellers can be required to prove their innocence and the normal checks and balances operating at the pre-trial stage cease to operate. Immense discretionary power is given to the police, in the first instance and to the prosecuting authorities thereafter, as to whether or not to proceed with arrest and indictment. From a practical point of view, the focus of crucial decision-making on guilt or innocence thus shifts from the constitutionally controlled context of a trial to the unrestrained discretion of police and prosecutor. The possibility cannot be excluded that overworked police and prosecuting authorities would understandably be tempted to focus on merely getting sufficient evidence to raise the presumption of possession; they can then rely on a poor showing by the accused in the witness box to secure a conviction. Yet the law gives no guidance to investigators and prosecutors as to when it is appropriate to rely on the presumption to proceed with a case and when not. Innocent persons may be put to the inconvenience, indignity and expense of a trial simply because they were in a bus, on a ship, or in a taxi, restaurant or house where weapons happened to be discovered. At the same time, the objectivity and professionalism of the police and prosecution are undermined by the lack of principled criteria governing their actions. In my view, in order to catch offenders and secure their convictions, it is not reasonable and justifiable either to expose honest citizens to such open-ended jeopardy or to impose such ill-defined responsibility upon those charged with law enforcement.

[25] The presumption is not only too wide in its application with regard to persons, it also casts a heavy burden on those who are caught by it to disprove guilt. The facts in the case of *S v Mtshemla and Others* 1994(1) SACR 518 (A) give some indication of the seriousness of the task facing an accused person if he or she is to discharge the burden of proof. Of the three persons accused of possession of one firearm, in that matter, two elected to give evidence to rebut the presumption. They were both convicted, the magistrate ruling that their evidence was insufficient to dislodge the presumption. The third, who had decided to remain silent was also convicted, there being nothing in his case to gainsay the presumption. In another case, that of *S v Makunga and Others* 1977(1) SA 685 AD, the remarks of Wessels JA (at 699A) are illustrative of some of the problems inherent in the practical application of the presumption:

> ... [T]here was an *onus* on each one of the seven accused to establish by a preponderance of probabilities that *he* was not in possession of any one of the six firearms found in the hut. In my opinion, no one of the accused succeeded in discharging that *onus*. The mere fact that on the evidence it was probable that one unidentified accused was in possession of the toy pistol is wholly insufficient to discharge the *onus* which rested on each one of the seven accused.

[26] Based on the assessment of the potential effect of the provision on innocent people, I am not persuaded that the presumption, as it stands, satisfies the requirements of reasonableness and justifiability. I am fortified in this conclusion by the fact that it has also not been demonstrated that its objective, that is, facilitating the conviction of offenders, could not reasonably have been achieved by other means less damaging to constitutionally entrenched rights. Although the choice of the appropriate measures to address the need is that of the legislature, it has not been shown that an evidentiary burden, for example, would not be as effective. I should not be understood as suggesting that any provision imposing an evidentiary burden, particularly if it is framed as broadly as the presumption in the present case, would be immune from constitutional attack. But by requiring the accused to provide evidence sufficient to raise a reasonable

doubt, such a provision would be of assistance to the prosecution whilst at the same time being less invasive of section 25(3) rights. That it might impact on the right of an accused person to remain silent is true; but on the assumption that the rampant criminal abuse of lethal weapons in many parts of our country would justify some measured re-thinking about time-honoured rules and procedures, some limitation on the right to silence might be more defensible than the present one on the presumption of innocence. The accused could of course be exposed to the risk of being convicted if he or she fails to offer an explanation which could reasonably possibly be true, regarding physical association with the weapons; there would however be no legal presumption overriding any doubts that the court might have. At the end of the day and taking into account all the evidence, the court would still have to be convinced beyond a reasonable doubt that the accused was indeed guilty.

[27] I accordingly find that although the provision in question is a law of general application, it has not been shown to be reasonable as required by section 33(1) of the Constitution. It is furthermore so inconsistent with the values which underlie an open and democratic society based on freedom and equality that it cannot be said to be justifiable. In view of this finding, it is not necessary to canvass the question whether the essential content of the right is negated, nor whether the limiting provision is necessary within the meaning of section 33(1) of the Constitution. Section 40(1) of the Act is unconstitutional inasmuch as it is an unreasonable and unjustifiable violation of the presumption of innocence.

[28] During argument, some time was devoted to a question that keeps cropping up in matters before us and that is the problem of improper referrals. This Court has expressed itself on a number of occasions on the correctness or otherwise of referrals made under section 102(1) of the Constitution. Some of the remarks need to be repeated. In *Zuma's* case at paragraph 10, Kentridge AJ points out that "[e]ven if a rapid resort to this Court were convenient, that would not relieve the Judge from making his own decision on a constitutional issue within his jurisdiction." In *S v Mhlungu and Others* 1995(3) SA 867 (CC); 1995(7) BCLR

793(CC) at paragraph 59, Kentridge AJ cautioned against premature referrals to this Court and observed:

> The fact that an issue within the exclusive jurisdiction of this court arises in a provincial or local division does not necessitate an immediate referral to this court. Even if the issue appears to be a substantial one, the court hearing the case is required to refer it only
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> (i) if the issue is one which may be decisive for the case; and
> (ii) if it considers it to be in the interest of justice to do so ...
>
> ... I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

[29] It is by no means clear whether or not the conviction of Mbatha was on the basis of the presumption in section 40(1) of the Act; nor is it clear that this is a matter which could not have been disposed of without reaching the constitutional issue. The referral was therefore not a proper one. During argument, counsel for this applicant made an oral request from the bar for "direct access" in terms of Rule 17 of the Rules of this Court, read with section 100(2) of the Constitution. The application was not opposed. "Direct access" provisions have received their fair share of attention in this Court. As stated in *Zuma's* case at paragraph 11, what is contemplated is that direct access should be allowed "in only the most exceptional cases, and it is certainly not intended to be used to legitimate an incompetent reference." In terms of Rule 17(1), the special circumstances envisaged "will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government." Clarity with regard to the presumption is of immense public importance. There are any number of trials either pending or proceeding, in which the presumption is liable to be invoked. It is therefore necessary that legal certainty should be achieved as soon as possible. I am accordingly of the view that this is a matter in which direct access should be granted. Because *Prinsloo's* case was concerned with an identical issue, the two matters were set down for one date. Both sets of counsel prepared

exhaustive and very helpful argument and the two matters were argued together before us. The issue in *Prinsloo's* case is clearly decisive for the case with regard to some of the accused. Flemming DJP considered it to be in the interests of justice for the issue to be referred and cogent reasons have been furnished to support the referral. The issue in *Prinsloo's* case was, in the circumstances, properly before this Court.

[30] I now turn to consider the appropriate order. Section 98(5) of the Constitution empowers this Court to suspend a declaration of invalidity "in the interests of justice and good government" until Parliament corrects the defect in the legislation concerned. The effect of such a suspension would be to prolong the risk inherent in a reverse onus provision until the legislature intervenes. What this amounts to is that an unsatisfactory state of affairs, where accused persons could be convicted despite the existence of a reasonable doubt, would be allowed to continue until new legislation is enacted to deal with the issue. There is no knowing when this legislative intervention might come. On the other hand, should the declaration of invalidity operate with immediate effect, the prosecution would be able to deal with contraventions of the Act in the normal manner, as in all other prosecutions where there is no reliance on a presumption. There do not appear to be any compelling considerations of "justice and good government" requiring that the infringement of this constitutionally protected right should continue beyond the date of this order. On the contrary, it would be undesirable for the courts to continue applying a provision which is not only manifestly unconstitutional, but which also results in grave consequences for potentially innocent persons in view of the serious penalties prescribed.

[31] Section 98(6)(a) of the Constitution prescribes that unless this Court orders otherwise, in the interests of justice and good government, the order of invalidity shall not invalidate anything done or permitted in terms of the unconstitutional provision. In *Mbatha's* case, the matter is on appeal to the Witwatersrand Local Division and that court will be able to take this judgment and order into account when it proceeds with the matter. In *Prinsloo's* case, the trial is still in progress

and giving effect to the order should present no problems. The order made should, however, be operative in the cases of any other litigants who might be similarly placed. The general considerations set out above were present in *Bhulwana's* case *supra* and I see no reason to depart from the approach adopted by this Court in that matter. The order that I propose to make will protect not only the rights of accused persons in pending cases *(S v Mhlungu supra* at paragraph 48), but also the rights of the persons referred to in paragraph two of the Order.

[32] Flemming DJP has pointed out that a declaration of invalidity by this Court would not, in itself, entitle the trial Judge to immediately discharge those accused who would have been acquitted at the end of the case for the prosecution but for the operation of the presumption. His view is that he is *functus officio* and cannot recall his judgment; consequently, the applicant Prinsloo and the relevant co-accused would be forced to endure the unsatisfactory prospect of continuing to be part of the trial which still has a long way to go before conclusion. The Judge therefore proposed that if the presumption were found to be unconstitutional, this Court should make an appropriate order to enable the trial court to end the proceedings against those who should have been discharged. I express no opinion on whether or not the trial Judge is *functus officio* as regards the particular issue. This is a matter entirely within his jurisdiction which he must determine on a proper construction of the relevant provisions. It was not argued before us that we had the jurisdiction to set aside the judgment of the trial court refusing to discharge Prinsloo. The Attorney-General of the Transvaal, however, gave a firm undertaking during argument that should the presumption be declared unconstitutional he would stop the prosecution against the relevant accused. It therefore becomes unnecessary to take this matter any further.

[33] Finally, I wish to express the Court's appreciation to Mr M R Hellens SC and Mr P R Jammy who assisted him for preparing and presenting argument on behalf of the applicant in the first case at the request of the Court.

[34] The following order is accordingly made:

1. Section 40(1) of the Arms and Ammunition Act 75 of 1969 is inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and is, with effect from the date of this judgment, invalid and of no force or effect.

2. In terms of section 98(6) of the Constitution, this declaration of invalidity shall invalidate any application of section 40(1) of the Arms and Ammunition Act 75 of 1969 in any criminal trial in which the verdict of the trial court was or will be 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 noting such appeal has not yet expired.

3. The matters of *S v Mbatha* and *S v Prinsloo* are referred back to the Witwatersrand Local Division of the Supreme Court to be dealt with in accordance with this judgment.

PN Langa, Judge of the Constitutional Court

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Langa J.

CASE NO:	**CCT 19/95**
COUNSEL FOR APPLICANT:	M R Hellens SC P R Jammy At the request of the Court
COUNSEL FOR RESPONDENT:	J A van S D'Oliviera E Leonard E Erasmus

CASE NO:	**CCT 35/95**
COUNSEL FOR APPLICANT: INSTRUCTED BY:	L van der Walt Odendal & Kruger, Delmas
COUNSEL FOR RESPONDENT:	R J Chinner J A L Pretorius

DATE OF HEARING:	**16 November 1996**
DATE OF JUDGMENT:	**9 February 1996**