CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/97

THE STATE

versus

SIPHO ZAKELE NTSELE

Decided on: 14 October 1997

JUDGMENT

KRIEGLER J:

[1] The accused in this case was convicted by a magistrate of having dealt in dagga in contravention of the provisions of the Drugs and Drug Trafficking Act 140 of 1992. The magistrate relied on a presumption created by section 21(1)(b) of the Act[1] that in certain

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[1] The relevant provisions of section 21 read:

> "**Presumptions relating to dealing in drugs.—**(1) If in the prosecution of any person for an offence referred to—
> (a) . . . .
> (b) in section 13(f) [that is, an offence of contravening section 5(b)] 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 . . . in charge of the said land,
> it shall be presumed, until the contrary is proved, that the accused dealt in such dagga plants . . .".

circumstances a person in charge of cultivated land on which dagga plants are found is rebuttably presumed to have dealt in such plants. The constitutionality of the presumption was queried when the conviction and sentence were considered on automatic review in the Natal High Court and in due course the point was set down for argument. The court (per Combrinck J, Hurt J concurring) thereupon ordered -

> "That section 21(1)(b) of the Drug Trafficking Act Number 140 of 1992 is declared to be inconsistent with the Constitution of the Republic of South Africa and is declared invalid. In terms of section 172(2)(b) of Act 108 of 1996 it is ordered that the Accused be released on his own recognizance pending confirmation of the Order by the Constitutional Court. The order and the reasons will be forwarded to the Constitutional Court for confirmation."

Some weeks later they furnished reasons for that order and the registrar of the High Court transmitted the papers to this Court.[2]

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[2] He did so under cover of Form 3 of the Constitutional Court Rules, which refers and relates to rule 22, which governs the procedure for referrals of issues or disputes under ss 102(1), 102(14) and 103(4) of the interim Constitution.

[2] In those reasons Combrinck J cited three decisions of this Court[3] in support of the finding that the "section clearly imposes a legal burden upon an accused person which offends against the presumption of innocence contained in section 35(3)(h)" of the Constitution.[4] He formally repeated the declaration of invalidity and ordered that the judgment "be forwarded to the Constitutional Court for confirmation" in terms of section 172(2)(b) of the new Constitution.

[3] I agree with Combrinck J that the judgments to which he referred are dispositive of this case. The presumption under paragraph (b) of section 21(1) of Act 140 of 1992 with which we are concerned here does not differ in any material respect from that in paragraph (a) of that subsection, with which we dealt in the first two cases cited. Nor is there any distinction to be drawn between the principles we set out in the third case (relating to the invalidity of section 40(1) of the Arms and Ammunition Act No 75 of 1969) and those that are applicable here. In each instance one is confronted with a statutory instruction to infer guilt from circumstances that do not necessarily support such inference; and in each such instance the fundamental objection is the same: interfering thus with the ordinary processes of inferential reasoning entails a risk of a conviction despite a reasonable doubt as to guilt in the mind of the trier of fact. That is the very purpose of such a provision and, of course, the very antithesis of the presumption of innocence protected by section 25(3)(c) of the interim Constitution and section 35(3)(h) of the new

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3 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *S v Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC).

4 The references in the judgment are a little confused and confusing. The judgment refers to section 35(3)(h) of the "Republic of South Africa Constitution, Act 200 of 1993" (a misdescription of the interim Constitution, the Constitution of the Republic of South Africa, 1993), whereas the particular section cited is contained in the new Constitution, the Constitution of the Republic of South Africa, 1996. In what follows,"interim Constitution" will refer to Act 200 of 1993 and "Constitution" or "new Constitution" will refer to the Constitution of the Republic of South Africa, 1996.

Constitution.[5]

[5] Although the presumption is not identically worded in the two constitutions, their respective formulations are for present purposes indistinguishable, and what infringes the interim Constitution will likewise infringe the new Constitution.

[4] 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.[6] 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.

[5] The matter does not end with a finding of invalidity of the subsection, however. There are still some procedural questions relating to the transition from the interim Constitution to the new one that have to be considered. More specifically, it is important to decide which constitution is applicable as there are differences between the two that could have an important bearing on a case such as this. If the new Constitution applies a High Court has jurisdiction to declare an Act of Parliament invalid, subject to confirmation of the declaration by this Court.[7]

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6 In considering a possible justification of the infringement it makes no difference whether one applies section 33(1) of the interim Constitution or section 36(1) of the Constitution. Although they are worded differently and do not set identical criteria, the infringement in question goes beyond the bounds of justifiability in either case.

7 Section 172(2)(a) of the Constitution reads as follows:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[6] If, on the other hand, the interim Constitution is applicable, the matter is more complicated. The reason is that under the interim Constitution the Constitutional Court has exclusive jurisdiction to invalidate an Act of Parliament.[8] In a case such as this, where the question of the validity of a provision in an Act of Parliament is decisive, the High Court has to refer that question to this Court for determination "if it considers it to be interest of justice to do so".[9] It follows that if the interim Constitution has to be applied in this case, the proceedings adopted by the High Court were materially defective. In deliberating on and determining the validity of section 21(1)(b) of Act 140 of 1992 that Court would have assumed a jurisdiction that it did not have. The proceedings would have been abortive, the declaration of invalidity would be irregular and the consequential orders for the accused's release from prison and for the transmission of the case to this Court would likewise be irregular. Inasmuch as the finding of invalidity was clearly correct, such a turn of events would be most undesirable.

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8 Section 98(3) of the interim Constitution as amended by section 3 of Act 13 of 1994.

9 Section 102(1) of the interim Constitution reads 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 or local 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 . . . ."

[7] It is not clear from the papers before us whether the proceedings were pending when the new Constitution came into operation on 4 February 1997.[10] Although the new Constitution generally supplanted the interim Constitution with effect from that day,[11] there were a number of transitional provisions aimed at smoothing the change from the one to the other. One of the important transitional provisions, contained in item 17 of sch 6 to the new Constitution, is that "proceedings pending before a court" upon the commencement of the new Constitution must "be disposed of as if the new Constitution had not been enacted".

[8] Even on the assumption that the proceedings were pending, it does not mean that the interim Constitution necessarily has to be applied. Item 17 of sch 6 concludes with a rider which affords it flexibility: "unless the interests of justice require otherwise." Our conclusion regarding the constitutional invalidity of section 21(1)(b) of Act 140 of 1992 corresponds with that of the High Court and this is clearly a case falling within the ambit of the proviso to item 17 of sch 6 to the Constitution: the interests of justice require that we do not indulge in legal technicalities. It would be unconscionable to order the rearrest of the accused and mere pedantry to insist that the case come before us by way of referral under section 102(1) of the interim Constitution and not under section 172(2) of the new Constitution. The invalidation of the relevant subsection should be confirmed without more ado. This leaves the way clear to consider the formulation of appropriate ancillary orders.

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10 All that is known in that regard is that the offence was committed on 20 January 1997 and that the invalidation order was made on 19 June 1997.

11 See section 242, read with sch 7, and section 243(1) of the Constitution.

[9] The starting point when considering appropriate ancillary orders is that the invalidation order was made in an automatic review case where the unconstitutionality of the presumption under section 21(1)(b) of Act 140 of 1992 was of interest only to the extent that it bore on the conviction and sentence of the accused. The focus was on whether the trial proceedings had been in accordance with justice.[12] Consequently the reviewing judges could have turned to a consideration of the constitutionality of the subsection only once they had concluded that, were it not for the presumption, the conviction could not stand. In other words, it was an automatic review case, where the question of constitutionality could arise only if it were decisive for the case. The order made at the conclusion of the argument and the reasons subsequently furnished suggest that that was indeed the approach of the learned judges in the High Court.

[10] Whether or not that was their attitude, the case now has to be remitted to the High Court for its further disposal. As appears from the order of the High Court,[13] no finding was made regarding the merits of the conviction ; the accused was merely released on his own recognizance pending the confirmation of the order of invalidity by this Court. The High Court rightly refrained from interfering with the verdict - in terms of the proviso to section 172(2)(a) of the Constitution

> ". . . a High Court . . . may make an order concerning the constitutional validity of an Act of Parliament . . . but an order of constitutional invalidity has no force unless it is

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12 Sections 302 to 304 of the Criminal Procedure Act No 51 of 1977 make provision for the proceedings in certain cases in the magistrates courts to be automatically reviewed by judges of the High Court in order to establish whether such proceedings were, as section 304(1) puts it, "in accordance with justice".

13 See para 1 above.

confirmed by the Constitutional Court."

As the invalidation was inchoate it would have been premature for the High Court to make any consequential order which was dependent upon the finality of the invalidation.

[11] The High Court's order for the immediate release of the accused stands on a different footing. It was clearly expressed to be interlocutory pending the outcome of the confirmation of the invalidation and was intended to prevent the irreparable harm the accused was likely to suffer by being kept in prison pursuant to a verdict that was probably going to be voided. If, as seems to be the case, the High Court had indeed concluded that the accused's guilt stood or fell with the validity of the presumption, it was a sensible and exemplary course, consonant with section 172(2)(b) of the Constitution. That provision reads as follows:

> "A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct."

On the hypothesis that the verdict depends on the fate of section 21(1)(b) of Act 140 of 1992, the order for the conditional release of the accused was an appropriate exercise of the discretion granted by the subsection with regard to temporary relief. Now that this Court has confirmed the finding of the High Court regarding the invalidity of the subsection in question, the case falls to be remitted to the High Court for it to decide how best to dispose of it.

[12] There is an important qualification to that statement, however. The High Court did not

deal with the retrospectivity, prospectivity or suspension of the order of invalidation. Whether that was prudent is an open question. On the one hand, this Court is generally better placed to make an assessment of such issues of policy, especially as an order consequent upon such assessment would, after confirmation of an invalidation order, affect the entire country. On the other hand, section 172(1) of the Constitution confers the discretion to make such orders on all courts making declarations of invalidity:

> "(1) When deciding a constitutional matter within its power, a court -
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
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> (b) may make any order that is just and equitable, including -
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> (i) an order limiting the retrospective effect of the declaration of invalidity; and
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> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Where the relevant power is exercised by other courts it is desirable that full reasons be given for the benefit of this Court when it has to consider such ancillary orders in the confirmation proceedings.

[13] Moreover, questions of retrospectivity, prospectivity and the conditional suspension of orders of invalidity often present difficult choices, as is borne out by several judgments of this Court.[14] Those choices often depend upon factors in respect of which evidence is necessary, for example, regarding the likely impact on the administration of justice if a provision were to be

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[14] See, for example, the *Bhulwana* case cited in n 3 above, paras 30-3, and the cases there cited.

struck down with immediate effect,[15] or the financial consequences for third parties of a retrospective order.[16] 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.[17]

[14] The principal factors when considering the possibility of a retrospective order were crisply outlined by O'Regan J in the *Bhulwana* case:[18]

> "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

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15 As in *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC).

16 As in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

17 As was explained by Ackermann J in *Parbhoo and Others v Getz and Another*, CCT 16/97, 18 September 1997, as yet unreported, para 5, it is undesirable to invalidate a statute without having afforded the organ of state responsible for its administration an opportunity to be heard. In the High Court the attorney general supported the invalidation but we nevertheless regarded it as prudent to give notice of the proceedings in this Court to the Ministers of Justice and Health. Neither wished to be heard and the matter was dealt with in chambers.

18 See n 3 above, at para 32.

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

> ' No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and 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."

Those observations are directly in point here and the type of order we granted in that case is equally appropriate here.

[15] In the circumstances the following order is made:

1. The order of the Natal High Court declaring section 21(1)(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be invalid, is confirmed.

2. In terms of section 172(1)(b) of the Constitution it is ordered that the declaration of invalidity confirmed in paragraph 1 shall invalidate any application of section 21(1)(b) 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 a review is pending or the time for noting an appeal has not yet expired.

3. The case is referred back to the Natal High Court to be dealt with in

accordance with this judgment.

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