CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 36/99

THE STATE

versus

MANYONYO

Decided on : 4 November 1999

JUDGMENT

CHASKALSON P:

Introduction

[1] The accused in this matter was convicted in the Magistrate's Court of dealing in dagga in contravention of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 ("the Act") and sentenced, on 20 July 1995, to forty-two months' imprisonment of which eighteen months was conditionally suspended for five years. The matter was referred to the Supreme Court (Eastern Cape Division), for automatic review under section 302 of the Criminal Procedure Act 51 of 1977.

[2] In convicting the accused the magistrate relied on the presumptions created by sections 20, 21(1)(a) and 21(1)(c) of the Act. The reviewing judges were of the opinion

that the conviction could not be confirmed if the presumption created by section 21(1)(c) was inconsistent with the Constitution and that, as weight had also been attached by the magistrate to the presumption created by section 20, it was in the interests of justice that the constitutionality of both provisions be determined. They held that there was no need to consider the presumption created by section 21(1)(a) as it had already been declared unconstitutional by this Court.[1]

[3] The judgment on review was delivered on 5 February 1996.[2] At the time, the interim Constitution was still in force, and the court made the following order in terms of section 102(1) of that Constitution:

> "(a) the issue of whether the provisions of s 21(1)*(c)* of the Drugs and Drug Trafficking Act 140 of 1992 are inconsistent with the Constitution and are therefore to be declared invalid and of no force and effect is referred to the Constitutional Court for its decision;
> and
> (b) the issue of whether the provisions of s 20 of the Drugs and Drug Trafficking Act 140 of 1992 are inconsistent with the Constitution and are therefore to be declared invalid and of no force and effect is referred to the Constitutional Court

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1 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC).

2 *S v Manyonyo* 1997 (1) SACR 298 (E).

for its decision."

[4] It appears from the judgment of the reviewing Court that a five-months' delay had occurred before the Magistrate's Court record was referred to the Supreme Court for automatic review. Section 303 of the Criminal Procedure Act requires the clerk of the Court to forward a copy of the record of proceedings to the registrar within one week of the determination of the case. The record reached the registrar only on 20 December 1995. The reviewing judges commented adversely on the delay and drew attention to the need for officials charged with that duty to ensure that the procedures and time limits prescribed by law for bringing cases on review, are observed. I agree with these comments. Delays of this nature are highly prejudicial to accused in custody who are entitled to be released if their convictions are set aside on review. Such delays should be avoided wherever possible.

[5] In view of a perceived likelihood that this Court would declare section 21(1)(c) of the Act invalid and that the conviction for dealing would then not stand, steps were taken by the Attorney-General's office at the instance of the reviewing judges to secure Mr Manyonyo's release from custody pending further adjudication of the case. This Court has been informed by the Director of Public Prosecutions (Eastern Cape) that Mr Manyonyo was accordingly released on R10,00 bail on 13 February 1996.

Delays in referral to the Constitutional Court

[6] The delays in this matter did not end at that point. In terms of the rules of this Court the registrar of the Supreme Court was required to lodge the referral order with the registrar of this Court. The matter would then have been placed before the President of this Court to give directions as to how the referral should be disposed of.[3] For reasons that are not clear, the Supreme Court order was not lodged with this Court at the time of the referral. It was only during October 1999, when an enquiry was addressed to the Court as to the outcome of the referral, that the matter came to the attention of the Director of the Constitutional Court. Steps were immediately taken by him to secure a copy of the judgment and the order of the Supreme Court. Enquiries have also been made, as yet without success, to establish who was responsible for the omission.

[7] It is fortunate that steps were taken in this case to secure the release from custody of Mr Manyonyo at the time the referral order was made. As a result the harm that would otherwise have been caused by the further delay has been avoided.

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[3] Referrals were governed at that time by rule 22 of the rules made in terms of section 100 read with section 102(1) of the interim Constitution.

[8] Although the referral system introduced by the interim Constitution is no longer applicable, referrals continue to be a feature of our practice. The 1996 Constitution makes provision for any order declaring provisions of an Act of Parliament to be inconsistent with the Constitution, to be referred to the Constitutional Court for confirmation.[4] The Constitutional Court rules require the registrar of a court which has made an order of constitutional invalidity to lodge a copy of the order with the registrar of the Constitutional Court within 15 days.[5] It is essential that this rule be complied with and that orders that require to be confirmed are brought to the attention of this Court timeously. This is of particular importance in cases where litigants are not represented. Delays may be highly prejudicial to such persons.

[9] High Court registrars are under a duty to ensure that the rule is observed. The obligation is to lodge the order of referral with the registrar of this Court. Lodgement takes place when the order is received by the registrar. It is therefore the responsibility of the registrar of the referring court to satisfy herself or himself that this has happened, and to secure confirmation of the receipt of the order from the registrar of this Court.

The constitutional issue

[10] The Director of Public Prosecutions (Eastern Cape) has indicated that the State

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4 Section 172.

5 Rule 15(1).

does not intend to oppose any declaration of unconstitutionality that may be made by this Court in the present case. In the circumstances, and in the light of previous decisions of this Court in comparable cases, the matter can be dealt with summarily without calling for oral or written argument.

[11] The first issue relates to the validity of section 21(1)(c) of the Act, which provides as follows:

> "**Presumptions relating to dealing in drugs.**
>
> (1) If in the prosecution of any person for an offence referred to -
>
> . . . .
>
> (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;"[6]

The constitutional validity of this section was considered by the Northern Cape Division of the High Court in *S v Mjezu*[7] under the powers then vested in that Court by section 101(6) of the interim Constitution.[8] The Court ruled that the presumptions contained in section 21(1)(c) and section 21(1)(d) of the Act were in conflict with the presumption of innocence in section 25(3)(c) of the interim Constitution and that they were accordingly unconstitutional and invalid. The decision was based on judgments of this Court and is

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6 Section 13(f) refers to section 5(b) of the Act.

7 1996 (2) SACR 594 (NC).

8 Section 101(6) of the interim Constitution provides:
"If the parties to a matter falling outside the additional jurisdiction of a provincial or local division of the Supreme Court in terms of subsection (3), agree thereto, a provincial or local division shall, notwithstanding any provision to the contrary, have jurisdiction to determine such matter: ..."

clearly correct.[9]

[12] The question which then arises is whether the declaration of invalidity made in *S v Mjezu* was binding throughout the country or only in the Northern Cape Division. If it was binding throughout the country there is no need for an order declaring that the section is inconsistent with the interim Constitution to be made by this Court. But if the order was binding only in the Northern Cape, this Court would have to extend the declaration of invalidity to the whole country. In that event consideration would have to be given to the conditions to be attached to the order relating to its retrospective effect. Ordinarily the retrospective effect of such an order is limited to cases in which judgment has not yet been given or in which appeals and reviews are still pending. But *S v Mjezu* was decided in 1996. There may be cases that were disposed of between the date of the judgment in that case, and the decision in this case, in which appeals or reviews are not pending, but to which the decision in this case might be pertinent.

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9 *S v Bhulwana; S v Gwadiso* above n 1; *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC).

[13] The question whether an order made in terms of the consent jurisdiction sanctioned by section 101(6) of the interim Constitution is binding throughout the country or only within the province (or between the parties to the litigation) is a question on which argument may have to be heard. It may, however, not arise again. The interim Constitution is no longer in force, and the 1996 Constitution now requires any order declaring a provision of an Act of Parliament invalid to be confirmed by this Court.[10]

[14] It is not necessary for the purposes of the present case to decide this question. In the circumstances no good purpose would be served by further delaying the decision in the present matter in order to hear argument on a question which may be purely academic, and that question is accordingly left open. For the sake of clarity, and in order to avoid any uncertainty that might otherwise exist, I propose making an order that will have the effect of ensuring that the declaration of invalidity applies throughout the whole country. The retrospective effect of the order will be couched in the usual terms, but this will not preclude any person who might possibly be prejudiced thereby if the decision in *S v Mjezu* was binding throughout the whole country, from contending that this was so, and if that should be necessary, from applying to this Court to amplify or amend the terms of the order made in the present case.

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10 Section 172(2)(a).

[15] The second issue concerns the constitutionality of section 20 of the Act, which provides:

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

After the referral in the present case, this issue was dealt with by this Court in the case of *S v Mello and Another,*[11] in which section 20 of the Act was declared unconstitutional. Judgment was delivered in that case on 28 May 1998. The order made by this Court invalidated any application of section 20 of the Act 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 that judgment, either an appeal or review was pending.[12] That order is thus applicable to the present case.

[16] The following order is accordingly made:

1. Section 21(1)(c) of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with the interim Constitution, and accordingly to be of no force and effect.

2. Subject to paragraph 3 hereof, the declaration of invalidity made in terms of paragraph 1 of this order shall invalidate any application of section 21(1)(c)

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11 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC).

12 *S v Mello* above n 11, at para 15.

of the Drugs and Drug Trafficking Act 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 orders made in paragraphs 1 and 2 hereof shall not preclude any persons who might otherwise be adversely affected thereby, from contending that the order made in the case of *S v Mjezu* by the Northern Cape Division of the Supreme Court on 6 May 1996 is applicable to them, and in so far as that may be necessary, from applying to this Court to amplify or amend the orders made in paragraphs 1 and 2 hereof.

4. This case is referred back to the Eastern Cape High Court to be dealt with in accordance with this judgment.

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