CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/01

MALUTO SINGO Appellant

versus

THE STATE Respondent

Heard on : 12 March 2002

Decided on : 12 June 2002

JUDGMENT

NGCOBO J:

Introduction

[1] An accused person who culpably fails to comply with a warning to appear in court commits a criminal offence.[1] Such accused may be arrested and brought to court. Once in court the hearing that the accused undergoes is not an ordinary one. The proceedings are summary in nature and the presiding officer is required to determine whether failure to appear in court was due to any fault on the part of the accused. The state is not required to prove that it was his or

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[1] This also applies to a person into whose custody an accused person under the age of 18 years is released and who is warned to bring such accused to court where such an accused person has been warned to appear in court. In these proceedings we are concerned with a warning given to an accused person who is over the age of 18.

her fault. On the contrary, the accused must satisfy the court that it was not the case. If the accused fails to do so, a conviction follows and he or she may be sentenced to a fine or imprisonment of not more than three months, as the case may be.[2] That is the law as it now stands as decreed by section 72(4) of the Criminal Procedure Act, 1977 ("the CPA").

[2] Section 72(4) provides:

> "The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to

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2 Section 72(4).

imprisonment for a period not exceeding three months."[3]

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[3] Section 72(1)(a) and (b) provide that:
"(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2—

(a) release the accused from custody and warn him to appear before a specified court at a specified time on a specified date in connection with such offence or, as the case may be, to remain in attendance at the proceedings relating to the

offence in question, and the said court may, at the time of such release or at any time thereafter, impose any condition referred to in section 62 in connection with such release;

(b) in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition."

[3] The two features of section 72(4) that concern us in these confirmatory proceedings are: first, the summary manner in which an accused who fails to appear in court is tried, and second, the requirement that such accused satisfies the court that the failure to appear in court was not due to fault on his or her part. They concern us because it is these features that the Venda High Court found to be invalid for inconsistency with section 35(3) of the Constitution which guarantees a fair trial to accused persons.[4] The issue confronting us now is whether we should confirm the ensuing order of invalidity. The relevant terms of that order are:

> "2. That the words "in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months" or specifically the words "unless such accused or such person satisfies the court that his failure was not due to fault on his part" in section 72(4) of the Criminal Procedure Act 51 of 1977 are declared to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996, and accordingly invalid.
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> 3. That in terms of section 172(1)(b) of the Constitution, the orders in paragraph 2 above shall not invalidate any enquiry conducted in a summary manner or application of the reverse onus created by the words declared therein to be unconstitutional and invalid, unless:
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> 3.1 the verdict of the court a *quo* was entered after 27 April 1994; and

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4 *S v Singo* 2002 (5) BCLR 502 (V).

3.2 either an appeal against or review is pending at the time for the noting of such appeal or bringing of such review has not yet expired."[5]

Background

[4] On 1 November 1996, Mr Singo was warned by the magistrate in Dzanani to appear in court on 17 January 1997 on charges of common assault and malicious injury to property. He did not comply with that warning. The machinery provided by section 72(4) was set in motion culminating in his arrest and appearance in court on 4 January 1999, to be dealt with in terms of section 72(4). His explanation for his failure to appear in court was that he had settled the underlying dispute with the complainant and that they had become reconciled. He explained further that they had agreed that both would appear in court on 17 January 1997 in order to have the charges withdrawn. However, owing to a misunderstanding on his part, he did not appear but instead he went to work and was thereafter sent to Namibia. The magistrate rejected his explanation, convicted him and sentenced him to three months imprisonment without an option of a fine.

[5] He successfully appealed to the Venda High Court. On this occasion he was legally represented. That court upheld his appeal and set aside the conviction and sentence and advanced three grounds for doing so. First, section 72(4) contains an impermissible reverse onus

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5 Above n 4 para 50

which violates the right to be presumed innocent while the summary procedure envisaged in the section is inconsistent with the right to a fair trial guaranteed in section 35(3) of the Constitution; second, the magistrate had failed to advise the accused of his procedural rights with a resultant failure of justice; and third, the degree of culpability of the accused warranted nothing more than a caution and discharge. It is the first of these grounds that is the subject of these confirmatory proceedings.

[6] The National Director of Public Prosecutions was represented by counsel. As Mr Singo was not represented, the Johannesburg Bar, at the request of this Court, appointed counsel to advance argument in support of confirmation. Mr JG Wasserman SC together with Mr A Louw undertook that task. We are indebted to them for their assistance.

The questions presented

[7] Three questions are presented in these proceedings, and they are:

(a) whether the summary procedure envisaged in section 72(4) limits the right to a fair trial, more particularly, whether the phrase "unless such accused or such person satisfies the court that his failure was not due to fault on his part" limits the right to be presumed innocent and the right to remain silent;

(b) if the right to a fair trial is limited, whether such limitation is justifiable under section 36(1) of the Constitution; and

(c) if any of the limitations imposed by section 72(4) is not justifiable, what the appropriate relief is.

General overview of section 72(4)

[8] Read in the context of the whole of section 72, the summary enquiry procedure may be applied in a variety of different circumstances. First, it may be applied in a case such as the present where an accused who is in custody in respect of any offence is released on warning and fails to appear in accordance with the warning. Second, it may be applied to such an accused who is warned to remain in attendance at the proceedings relating to the offence and who fails to do so. Third, it may be applied to an accused who is released and warned subject to a condition in connection with the release and who fails to comply with the condition.[6] In the fourth place, it may be applied to an accused who is released on warning by a police official and who fails to appear in accordance with the police official's warning. Finally, it may be applied to a guardian in whose care an accused who is under the age of 18 years is released on warning, that the accused is to be brought to the specific court or to cause the accused to be brought before the court and who fails to comply with such warning.[7]

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6 Whether the procedure should be used where the breach of the condition is in issue, will depend on the circumstances of each case. See section 72(1) read with section 72(2)(a) and with section 72(4).

7 It should also be noted that the CPA contains a number of identical or similar procedures for a variety of analogous cases of default in relation to trial proceedings. See section 55(2) (accused on summons); section 67A (accused on bail); section 74(7) (a minor); section 170(2) (the accused after an adjournment); section 188 (a witness not attending); and section 189 (a witness not co-operating).

[9] The procedure envisaged by section 72(4) consists of two distinct yet connected enquiries. It is important to note that the court may, but need not, undertake either enquiry. The first is when the court considers whether or not to issue a warrant for the arrest of the accused person. At this stage the accused is absent and the court of its own accord establishes whether the two pre-conditions to issue a warrant of arrest exist. These conditions are that the accused person, in the first place, had been duly warned in terms of subsection (1)(a) or (b)[8] and, secondly, fails to comply with the warning. The second phase begins when the accused person is brought to court and the summary procedure is invoked. At this stage it is not necessary for the court to be satisfied afresh as to whether the two pre-conditions exist.[9] Their existence will ordinarily appear from the record and therefore be *prima facie* established in terms of section 235(1) of the CPA.[10] The court is indeed required to record in full the proceedings at which the warning is given and an extract of such proceedings, if certified as correct, is *prima facie* proof of the warning given.[11] It is therefore imperative that the warning be recorded in full. Where the warning was issued by a police official, the terms of the warning will appear from a written

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8 Above n 3.

9 *S v Du Plessis* 1970 (2) SA 562 (E) at 564H.

10 Section 235(1) provides that: "It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded." The court may often be personally aware of either or both of the *facta probanda*, having itself released and warned the accused.

11 Section 72(3)(b).

notice completed by the official in terms of section 72(3)(a).[12]

[10] It is the second phase of section 72(4) with which we are concerned. When the accused appears in court pursuant to the provisions of section 72(4) he or she may be asked by the presiding officer whether non-compliance with the warning is conceded. Depending on the response to the question, the summary procedure may continue.

[11] In order to comply with the obligation imposed by section 35(3) of the Constitution, the presiding officer implementing the 72(4) procedure must ensure that it is fair. Therefore unless the accused is legally represented the court ought, the moment it decides to pursue the matter of the ostensible non-compliance with the warning, to explain the nature, requirements and effect of the proceedings about to be commenced. The explanation should include telling the accused that it appears from the record that he or she was duly warned (the contents of the warning may have to be explained) and that there was a non-appearance or other failure to comply with the warning. It should include telling the accused that such non-compliance is an offence for which the law

[12] Section 72(3)(a) provides: "A police official who releases an accused under subsection (1) (a) shall, at the time of releasing the accused, complete and hand to the accused and, in the case of subsection (1)(b), to the person in whose custody the accused is, a written notice on which shall be entered the offence in respect of which the accused is being released and the court before which and the time at which and the date on which the accused shall appear."

allows a fine or imprisonment of up to three months; that unless the pre-conditions are cogently challenged, they may be regarded as having been established, whereupon the court will be empowered there and then to investigate the issue of culpable non-compliance and intends doing so.

[12] In addition to the above, the presiding officer is obliged to inform an undefended accused of his or her basic procedural rights - including the right to legal representation, to be presumed innocent and to remain silent and not to testify during the proceedings, to adduce evidence and to challenge the *prima facie* case against him or her, and not to give evidence that is self-incriminating. In addition, the accused should be informed of the consequences of remaining silent. At the end of this explanation, the accused should be asked whether he or she is ready to proceed.[13]

[13] The enquiry must be conducted in a fair and impartial manner. As part of the enquiry, the presiding officer must establish from the accused whether he or she disputes the fact that he or she was duly warned, giving the details of the warning as recorded, and that he or she failed to comply with the warning. If the accused does not dispute the two basic facts, the presiding officer must then establish from the accused the reason for his or her failure to appear in court. Fairness requires the presiding officer to assist an undefended accused to explain his or her

[13] It goes without saying that the record in terms of section 76(3) of the CPA should reflect all of the salient features of both enquiries.

failure to appear in court by putting questions to the accused. By its very nature, the enquiry envisaged in section 72(4) appears to contemplate that the presiding officer will play an active role in such an enquiry by putting questions to the accused. The objective of such questions is to elicit the explanation, if any, for failure to appear in court. Provided that the questioning is conducted in a fair and impartial manner, this will help an undefended accused to put forward the reason for his or her failure to appear in court.

[14] I now turn to consider the constitutionality of the summary procedure.

The constitutionality of the summary procedure

[15] It cannot be gainsaid that the person who is being dealt with in terms of section 72(4) is an accused person as contemplated in section 35(3) of the Constitution. Such a person is accused of a failure to comply with a warning, which is an offence and, upon conviction, is liable to a fine or imprisonment.[14] Once it is determined that the person who is being dealt with in terms of section 72(4) is an accused person, it follows that the provisions of section 35(3), which guarantee the right to a fair trial, are applicable to the summary enquiry. It must therefore be conducted in accordance with the notions of basic fairness and justice which are enshrined in

[14] Section 72(4).

section 35(3) of the Constitution.[15] The summary procedure envisaged in section 72(4) must be construed in a manner that is consistent with the Constitution if it is reasonably capable of such a construction.[16]

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15 In *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 para 16, this Court held that all criminal trials must be conducted in accordance with "notions of basic fairness and justice."; See also *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) para 1.

16 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 24.

[16] The High Court held that the summary procedure provided for in section 72(4) is in conflict with section 35(3) of the Constitution because it is "inquisitorial and inherently punitive and unfair." Specifically, the Court found that the summary procedure is inconsistent with the rights enumerated in section 35(3)(a), (b), (h), (i) and (j) of the Constitution.[17] In coming to this conclusion the High Court relied heavily upon the judgment of this Court in *S v Mamabolo (ETV and Others Intervening)*[18] in which we had occasion to consider, amongst other things, the constitutional validity of a summary procedure in the context of contempt of court proceedings.[19]

[17] At the very outset it is necessary to point out that *Mamabolo's* case is distinguishable from the present case. That case was concerned with allegedly contemptuous conduct that occurred outside court and after the termination of the relevant court proceedings. It did not deal with the kind of conduct which disrupts the orderly progress of judicial proceedings and which

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17 Above n 4 paras 3, 29 and 32.

18 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) paras 54 to 56.

19 Above n 4 paras 29 and 30.

usually requires swift judicial intervention.[20] By contrast we are here dealing precisely with such conduct, conduct which requires swift intervention in order to permit the administration of justice to continue unhindered.

[18] It is therefore necessary to determine whether the summary procedure envisaged in section 72(4) falls foul of the provisions of section 35(3), in particular those referred to by the High Court. I deal with each one in turn.

[20] Above n 18 para 52

[19] Section 35(3)(a) of the Constitution provides for the right to be informed of the charge with sufficient detail to answer it. Although the procedure provided for in section 72(4) is summary and does not conform to our customary adversarial trial procedure, the enquiring court is obliged, in accordance with this right, to furnish details of the alleged offence to the accused. The elements of the charge are likely to be very simple but, should the accused require particularity, the enquiring court must furnish it there and then. Therefore the absence of a formal written charge-sheet is of no consequence.[21] While the accused does not have the opportunity to make a formal written request for further particulars,[22] such accused nevertheless enjoys the right to be informed of the details of the charge against him or her. Accordingly the summary procedure does not, in this respect, limit the accused's right to a fair trial.

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21 Compare *S v Lavhengwa* 1996 (2) SACR 453 at 482b - 483d (dealing with the summary procedure envisaged in section 108(1) of the Magistrates' Court Act 32 of 1944).

22 See section 87 of the CPA.

[20] Section 35(3)(b) provides for the right to have adequate time and facilities to prepare a defence. The fact that the enquiry provided for in section 72(4) is summary does not mean or imply that this right is limited. As is customary in all criminal trials where the accused is not legally represented, the court must inform the accused of this right and of his or her other rights. If the accused asserts the right, the court must deal with that in accordance with the rights of the accused.[23]

[21] The High Court held that the right to adduce and challenge evidence[24] is breached. The fact that the court issuing the warrant was satisfied as to the existence of certain facts does not necessarily constitute proof on which the enquiring court can rely for a conviction. If the accused disputes either the warning or the failure to comply with it, the presiding officer must require those facts to be duly proved. Similarly, the record of the previous proceedings that the enquiring court may have before it does not in itself constitute proof of the facts recorded. If necessary, the record must be proved in accordance with the law of evidence.[25] How and when the enquiring court will obtain such proof depends on the facts and circumstances of each case and is in the discretion of the enquiring court. It could for instance be done, as was suggested in

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23 Compare *S v McKenna* 1998 (1) SACR 106 (C) at 113b - d (dealing with the summary procedure envisaged in section 108 (1) of the Magistrates' Court Act).

24 Section 35(3)(i).

25 See for instance section 72(3)(b) and section 235 of the CPA.

S v Du Plessis,[26] after the accused has given evidence. There is nothing in section 72(4) to the effect that the right to adduce and challenge evidence is limited.

[22] Section 35(3)(h) of the Constitution provides for the right "to be presumed innocent, to remain silent, and not to testify during the proceedings". Whether these rights are limited must be determined in the context of the purpose and effect of the summary procedure.

[23] The purpose of the summary procedure is to get the accused to explain his or her failure to comply with a warning. To achieve this purpose, the burden of proof is imposed upon the accused, which, if he or she should fail to discharge, usually results in a conviction. Thus remaining silent at the enquiry invariably invites a conviction. This is so because the fact of the warning and failure to comply with it will ordinarily become conclusive proof, and in the absence of the explanation for failure, the conviction must usually ensue. Viewed in this context, the summary procedure and the burden of proof imposed upon the accused are inseparable. The burden of proof is essential to the effectiveness of the summary procedure and the achievement of its purpose. The combined effect of the two is that the accused is compelled to break his silence by the risk of a conviction. To this extent the summary procedure envisaged in section 72 (4) limits the right to remain silent and not to testify at such an inquiry.

[24] What remains to be considered is whether such a limitation is justifiable. In view of the

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[26] Above n 9.

fact that such limitation is brought about by the nature of the burden of proof that the accused carries, it will be convenient to deal with the question of justification of such limitation when I consider the justification imposed by the burden carried by the accused.

Does the phrase "unless such person satisfies the court that his failure was not due to fault on his part" limit the right to be presumed innocent and the right to remain silent?

[25] This court has on several occasions considered provisions in statutes that impose a legal burden, which has now become known as a reverse onus.[27] A legal burden requires an accused

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[27] *S v Zuma and Others* above n 15; *S v Bhulwana ; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *S v Mbatha ; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293(CC); *S v Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC); *Scagell and Others v Attorney-General, Western Cape, and Others* 1997 (2) SA 368 (CC); 1996 (11) BCLR 1446 (CC); *S v Coetzee and Others* 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC); *S v Mello and Another* 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC); *S v Ntsele* 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC); *S v Van Nell and Another* 1998 (8) BCLR 943 (CC); *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC); *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).

to disprove on a balance of probabilities an essential element of an offence and not merely to raise a reasonable doubt.[28] It is by now axiomatic that a provision in a statute that imposes a legal burden upon the accused limits the right to be presumed innocent[29] and to remain silent.[30]

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28 *S v Zuma* above n 15 para 24 (citing with approval *R v Downey* 90 DLR (4th) 449 (1992)); *S v Mbatha; S v Prinsloo* above n 27 para 9; *S v Bhulwana; S v Gwadiso* above n 27 at paras 7 and 8; *S v Mello and Another* above n 27 para 4; *Scagell and Others v Attorney-General Western Cape and Others* above n 27 at paras 6 and 7; *S v Coetzee and Others* above n 27 paras 5 and 6; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86; 2000 (1) SACR 81 (CC) para 29; *S v Manamela* above n 27 paras 26 and 39. This must be contrasted with an evidentiary burden which requires the accused to produce evidence that raises a reasonable doubt as to the existence of the presumed facts - *S v Bhulwana; S v Gwadiso* above n 27 para 7.

29 Id.

30 *S v Manamela* above n 27 para 24 (majority judgment) and para 62 (minority judgment); *S v Zuma and Others* above n 15 para 33.

[26] A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to establish the guilt of the accused and not the accused to establish his or her innocence.[31] That fundamental principle of our law is now firmly entrenched in section 35(3)(h) of the Constitution which provides that an accused person has the right to be presumed innocent.[32] What makes a provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt.[33]

[27] What falls to be determined therefore is whether the burden imposed by section 72(4) amounts to a legal burden. Counsel for the State contended that section 72(4) imposes nothing more than an evidentiary burden. An evidentiary burden requires an accused to adduce sufficient

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31 *R v Ndlovu* 1945 AD 369 at 386; *S v Zuma and Others* above n 15 para 33; *S v Bhulwana; S v Gwadiso* above n 27 para 15.

32 *S v Zuma*, above n 15 para 33; *S v Bhulwana; S v Gwadiso,* above n 27 para 16; *S v Mbatha; S v Prinsloo* above n 27 para 12; *S v Julies* above n 27 para 3; *Scagell and Others v Attorney-General, Western Cape, and Others* above n 27 para 7.

33 *S v Zuma* above n 15 para 36; *R v Oakes* 26 DLR (4th) 200 (1986) at 222; *R v Vaillancourt* 47 DLR (4th) 399 (1988) at 417; *R v Whyte* 51 DLR (4th) 481 (1989) at 493; *R v Keegstra* (1989) 39 CRR 5 at 13; *R v Downey* above n 28 at 461; *R v Laba* 120 DLR (4th) 175 (1995) at 201.

evidence to raise an issue as to the existence or non-existence of a presumed fact.[34] The effect of such a burden is that where there is a reasonable doubt an accused person is not liable to be convicted.

[28] The answer to these contentions lies in the effect of the phrase "unless such a person satisfies the court that his failure was not due to fault on his part". Its effect is plain. Once the warning and the failure to comply with it have been established, the accused must establish that such failure was not due to his or her fault. If the probabilities are evenly balanced, the accused has failed to satisfy the court as required. Conviction and sentence must therefore follow. In effect, where there is a reasonable doubt as to whether failure to appear was due to the fault of the accused, he or she is nevertheless liable to be convicted because the court has not been satisfied as required by the provision.

[29] What therefore emerges from section 72(4) are two features that raise constitutional concerns. First, it requires the accused to disprove fault which is an element of the offence he or she faces. Second, the accused is liable to be convicted despite the existence of a reasonable doubt. These are clear limitations of the right to be presumed innocent.

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[34] *S v Zuma* above n 15 para 41; *S v Mbatha ; S v Prinsloo* above n 27 para 26; *S v Bhulwana; S v Gwadiso* above n 27 para 7; *Scagell and Others v Attorney-General, Western Cape,* above n 27 para 12.

[30] Apart from this, the accused is compelled to adduce evidence in order to avoid a conviction. The effect of the presumption therefore is to force the accused to break his or her silence. The right to remain silent, like the presumption of innocence, is primarily rooted in our common law and statutory law.[35] It is now constitutionally entrenched in section 35(3)(c) of the Constitution. It protects the right against self-incrimination and the non-compellability of an accused person as a witness in a trial. The legal burden compels the accused to produce evidence to establish the absence of fault on his or her part. The absence of such evidence will result in a conviction. Thus remaining silent inevitably invites a conviction. The imposition of the legal burden upon the accused thus limits his or her right to remain silent. Referring to the reverse onus, the Court in *S v Manamela* had the following to say:

> "The right to silence, seen broadly as an aspect of the adversarial trial, is clearly infringed. The inevitable effect of the challenged phrase is that the accused is obliged to produce evidence of reasonable cause to avoid conviction even if the prosecution leads no evidence regarding reasonable cause. Moreover, the absence of evidence produced by the accused of reasonable cause in such circumstances would result not in the mere possibility of an inference of absence of reasonable cause, but in the inevitability of such a finding. In these circumstances, for the accused to remain silent is not simply to make a hard choice which increases the risk of an inference of culpability. It is to surrender to the prosecution's case and provoke the certainty of conviction."[36] [Footnote omitted].

[31] I conclude therefore that section 72(4) limits the rights to be presumed innocent and to

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35 *Osman* above n 27 para 17.

36 Above n 27 para 24; see also para 62 (minority judgment); *S v Zuma & Others* above n 15 para 33.

remain silent. Is it justifiable?

Justification

[32] Counsel for the State contended, in the alternative, that any limitation on the rights guaranteed in section 35(3) is justifiable in terms of section 36(1) of the Constitution.[37] He submitted that section 72(4) pursues an important social goal of preventing conduct that hinders or threatens to hinder the administration of justice.

[33] The importance of effectively prosecuting conduct that hinders the administration of justice cannot be gainsaid. Failure to appear in court manifestly hinders the administration of justice. It has the potential to undermine it too. This may well result in the public losing confidence in the system of criminal justice. The ensuing consequences may be far-reaching. The State's effort to fight crime would be undermined and the public may well take the law into their hands. It is therefore essential that courts be equipped with the power to deal effectively with any conduct that threatens the smooth running of the administration of justice. In this

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[37] Section 36(1) states that: "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."

respect the impugned provision pursues a pressing social purpose.

[34] The purpose behind the provisions of section 72 is to facilitate the release of accused persons, including youthful ones. The further purpose is to induce, by way of criminal sanction, the accused who has been so released to obey the warning and to stand trial. As regards guardians of youthful accused persons, the purpose is to induce them to obey the warning and to ensure that the youthful accused does likewise. If the praiseworthy purpose of section 72(1) is not to be abused and if the smooth functioning of the courts is to be ensured and their disruption, which so often leads to injustice of another kind is to be avoided, the effectiveness of the sanction is crucial. By the same token, the procedure for imposing the sanction must be effective. In order to be effective and to avoid the very delay and disruption which the sanction is intended to prevent in the first place, the enquiry must be simple, flexible and speedy. This is achieved by authorising a summary enquiry in section 72(4).

[35] The limitation to the rights of a fair trial serve the public interest in two important respects: First, it enables an accused to be released from custody without bail pending his or her trial. This advances the human dignity and freedom of accused persons. It is further in the public interest that persons who abuse the benefit be dealt with swiftly and effectively. Second, the summary enquiry further serves the purpose of dealing with conduct which strikes at the very authority of the courts. By its nature, disobedience to a warning hinders the smooth running of the court's trial process. In order to ensure the proper administration of justice, such conduct must be dealt with swiftly and effectively.

[36] It is also important to bear in mind that the reason for failure to appear in court is ordinarily solely within the knowledge of the accused. It would be unfair to expect the State to establish this fact. Reasonable presumptions are required to assist in the effective prosecution of conduct that threatens the administration of justice. Indeed in *S v Zuma* the Court observed that:

> "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."[38]

[37] Having regard to the importance of dealing effectively with conduct that hampers the administration of justice, the incursion into the right to silence is justifiable in the present case. But the same cannot be said of the legal burden which requires a conviction despite the existence of a reasonable doubt.

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[38] *S v Zuma and Others* above n 15 para 41.

[38] Section 72(4) also limits the right to be presumed innocent. As the Court observed in *S v Zuma*, these rights "are fundamental to our concepts of justice and forensic fairness."[39] Our conception of justice and forensic fairness demands that an accused person be presumed innocent until proved guilty and that the State be required to establish his or her guilt beyond a reasonable doubt. Section 72(4) demands the opposite. It presumes the accused guilty and it requires the accused to establish his or her innocence on a balance of probabilities. It carries a risk that an innocent person may be sent to jail. That this may be a rare occurrence matters not. Once it is established that such a risk exists, a fundamental principle of our criminal justice system has been offended.

[39] It is true that the section requires the accused to prove only those facts which are within his or her knowledge. However, it is one thing to require the accused to produce evidence that raises a reasonable doubt but quite another to require the accused to establish his or her innocence on a balance of probabilities, and if he or she fails to do so, to convict the accused despite the existence of reasonable doubt. There are no particular circumstances here which suggest that the State cannot achieve its objective by imposing merely an evidentiary burden. That burden, while requiring the accused to prove facts to which he or she has access, is also faithful to the presumption of innocence. The imposition of such a burden would equally furnish the reason for failure to appear in court.[40]

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39 Id para 36.

40 As the Court observed in *S v Manamela*, above n 27 para 49.

[40] Having regard to the importance of the right to be presumed innocent in our criminal justice system and the fact that the State could have achieved its objective by using less intrusive means, the imposition of the legal burden upon an accused has a disproportional impact on the right in question. In these circumstances the risk of convicting an innocent person is too high. It outweighs the other considerations in favour of the limitation. There are no compelling societal reasons in this particular case that will justify imposing this legal burden on the accused. I conclude therefore that the limitation is not justified.

Appropriate Remedy

[41] In considering the appropriate remedy it is important to bear in mind the following considerations. First, section 72(4) pursues a pressing social concern. It is aimed at preventing conduct that hinders or threatens to hinder the administration of justice.[41] Second, the section only requires the accused to establish facts which he or she knows. Third, if the offending phrase were to be struck down, there would be no means of dealing with the kind of case that is before us. Fourth, the State can equally achieve its objective by the imposition of an evidentiary burden on the accused to raise a reasonable doubt. In these circumstances striking down the offending phrase in section 72(4) without more, is not an appropriate remedy. Some other remedy is called for.

[42] The authority of this Court to read in words in a statute as appropriate relief is now

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41 Above para 33.

settled.[42] Indeed in *S v Manamela*[43] the Court observed:

> "We would add that reading in is not necessarily confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right. Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In appropriate cases it may be necessary to delete words from a provision and read in other words to make the provision consistent with the Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution. The considerations referred to in the Gay and Lesbian Immigration case would then have to be borne in mind. But if they are met there is no reason why this should not be done."

[43] Striking down section 72(4) without more would leave a vacuum in the present legislative structure which is designed to deal with conduct that hinders the administration of justice. In this regard, it is important to bear in mind that section 72(4) deals with the case of an accused who

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42 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 paras 74 and 75; *S v Manamela* above n 27.

43 *S v Manamela* above n 27 para 57.

has failed to comply with the warning to appear in court. There is no other provision that deals with such an accused. An accused who is released on bail is dealt with under section 67 of the CPA. A witness who fails to appear in court after being subpoenaed or warned to appear in court, is dealt with under section 188 of the CPA. It is true that Parliament could remedy the situation, but as we observed in *Manamela*, that takes time and in the interim a gap will remain. In all the circumstances, I consider it appropriate to read in words necessary to establish an evidentiary burden. This is less invasive than simply to strike down section 72(4).

Order

[44] In the result the following order is made:

1. The order of constitutional invalidity made by the Venda High Court in case no. 138/99 is not confirmed.
2. The omission from section 72(4) of the Criminal Procedure Act 51 of 1977 between the words 'that' and 'his failure' of the words 'there is a reasonable possibility that', is declared to be inconsistent with the Constitution.
3. Section 72(4) of the Criminal Procedure Act 51 of 1977, is to be read as though the words 'there is a reasonable possibility that' appear therein between the words 'that' and 'his failure'.
4. The orders in paragraphs 2 and 3 shall not invalidate any application of the reverse onus created by the omission of the words declared to be unconstitutional and invalid unless:

   a) verdict of the trial was entered after 27 April 1994; and

b) either an appeal against or review of that verdict is pending or the time for noting such appeal or review has not yet expired.

Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Kriegler J, Madala J, O'Regan J, Sachs J, Du Plessis AJ, Skweyiya AJ concur in the judgment of Ngcobo J.

NGCOBO J

For the applicant: JG Wasserman SC and A Louw nominated by the Johannesburg Bar Council at the request of the Court.

For the respondent: JA van S d'Oliveira SC, AL Collopy and R Sampson, of the office of the National Director of Public Prosecutions.