

JOINT JUDGMENT BY MADALA, SACHS AND YACCOB JJ - ABRIDGED

S v Manamela and Another (Director-General of Justice Intervening)

[3] Section 37(1) [of the General Law Amendment Act 62 Of 1995] reads as follows:

“Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause, *proof of which shall be on such first-mentioned person*, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.” (Emphasis added.)

[12] In our view, there is a compelling public interest that the constitutionality of section 37(1) be determined. Continuing uncertainty in this regard may well prejudice the general administration of justice as well as the interests of the accused persons affected. As Langa J stated in *S v Mbatha; S v Prinsloo*:

“... 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.”

[14] Section 37 establishes the statutory offence of being found in possession of stolen goods. It had its genesis in pre-Union legislation which applied in the various provinces of South Africa where the legislation sought to employ evidential devices which would alleviate the prosecution's burden of proof in the common law crimes of theft and of receiving stolen goods. This was achieved by placing the burden of proof on an accused person as to the circumstances in which stolen goods were received or acquired, and the bona fide nature of his or her belief at the time of acquisition or receipt, that the goods had not been stolen. Similar legislation existed in British Bechuanaland (Botswana).

Counsel for the Convicted Persons

[22] In this Court, Mr Trengove, together with Mr Hulley, appeared on behalf of the appellants. We are indebted to them for their assistance. They argued that the imposition of a full burden of proof upon the accused infringes the right to be presumed innocent, since it creates the risk and indeed the inevitability of a conviction, despite the existence of a reasonable doubt as to the guilt of the accused. It was on this basis that Tip AJ found the phrase "proof of which shall be such first-mentioned person" unconstitutional and invalid. Counsel made no reference to the breach of the right to silence. This issue, however, was canvassed during the hearing and needs to be addressed.

[23] In our view, the challenged phrase directly implicates the right to silence as well as the presumption of innocence, and the key to the solution of the problems raised in this matter lies in unravelling the connections between them. Both are procedural rights which are central to the adversarial criminal process which was developed under the common law and subsumed into the Bill of Rights. We have concluded that, viewed in its context, and balancing all the competing factors against the background of the values of the Constitution, the challenged provision can be justified only to the extent that it infringes the right to silence. Once the objective of the statute can be met by limiting the right to silence, the core reason for breaching the presumption of innocence falls away. Our reasons for this approach and conclusion are set out below.

[24] 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.

[25] Similarly the presumption of innocence is manifestly transgressed. This Court has frequently held that reverse onuses of this kind impose a full legal burden of proof on the accused. Accordingly, if after hearing all the evidence, the court is of two minds as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt. By virtue of the same logic, a conviction must follow if the court concludes that the accused's version, even though improbable, might reasonably be true.

[26] The purpose of the presumption of innocence is to minimise the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial. The reverse onus provision relieves the prosecution of the burden of proving all the elements of the section 37 offence by effectively presuming that any person, proven by the state to be in possession of stolen property, acquired otherwise than at a public sale, did not have reasonable cause for believing at the time of acquisition or receipt that the goods had not been stolen. Where the accused is unable to persuade the court on a balance of probabilities that reasonable cause exists, which would be the case even where the probabilities are evenly balanced, he or she must be found guilty, despite a reasonable doubt in the mind of the judicial officer as to whether or not the accused is innocent. The presumption of innocence is manifestly infringed by section 37(1). Unless saved as a permissible limitation, it is unconstitutional and invalid.

Justification

- [27] It was argued by Mr Trengove, as a precursor to the limitation inquiry, that a statutory provision which introduces the certainty that innocent persons will be convicted is ethically offensive and can never be justified. However, it is clear from the wording of section 36(1) that no right enshrined in Chapter 2 of the Constitution is absolute. Although this Court has so far not found an impugned reverse onus provision to pass constitutional muster, it has been at pains to articulate that there are circumstances in which such measures may be justifiable. The effective prosecution of crime is a societal objective of great significance which could, where appropriate, justify the infringement of fundamental rights.
- [28] This Court has expressly kept open the possibility of reverse onus provisions being justifiable in certain circumstances. Ordinarily, a reverse onus could be justifiable only if the risk and consequences of erroneous conviction produced by a statutory presumption against the accused are outweighed by the risk and consequences of guilty persons escaping conviction simply because of categorical adherence to an impervious presumption of innocence.
- [29] A broad context in which the use of reverse onus provisions might be justified concerns “regulatory offences”, as opposed to “pure criminal offences”. Thus, regulatory statutes dealing with licensed activity in the public domain, the handling of hazardous products, or the supervision of dangerous activities, frequently impose duties on responsible persons, and then require them to prove that they have fulfilled their responsibilities. The objective of such laws is to put pressure on the persons responsible to take pre-emptive action to prevent harm to the public. Although censure might be acute, there is generally not the same stigma or the severe penalties as for common law offences. Similarly, there are cases involving the existence or authenticity of public documents or licences, where practicalities and common sense dictate that, bearing in mind the reduced risk of error involved, it would be disproportionately onerous for the state to be obliged to discharge its normal burden in order to secure a conviction. Traffic regulation provides a further example, such as when a statute states that the owner of a car is presumed to be the

person who parked it illegally; in the great majority of cases, there is simply no way in which the state could prove who parked the car.

[30] There is also an important area in which the common law imposes an onus on the accused, namely, in relation to proof of insanity. The long-standing practice has been to require the defence to prove insanity on a balance of probabilities. Here the consequences of an erroneous finding of guilt can be severe, for instance, a finding of guilt on a charge of murder or other serious crime. Balanced against this is the ease with which, it is contended, an accused could otherwise escape conviction by feigning insanity.

[31] It is not necessary in this case to decide whether the onus in each of the above situations would survive scrutiny under section 36. It is clear however that open and democratic societies permit the shifting of the burden of proof to the accused when it would not be disproportionately invasive of the right to silence and the presumption of innocence to do so. We now consider whether the section 37(1) reverse onus is justifiable.

[32] Section 36(1) of the Constitution provides:

“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.”

It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general

rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.

[33] Although section 36(1) differs in various respects from section 33 of the interim Constitution, its application continues to involve the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality. Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. Accordingly, the factors mentioned in section 36(1) are not exhaustive. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable.

[34] These themes are eloquently dealt with in the judgment of O'Regan J and Cameron AJ (the minority judgment). We agree with their approach and also agree that there is a pressing social need for legislation to address the evil they identify. Section 36, however, does not permit a sledgehammer to be used to crack a nut. Nor does it allow for means that are legitimate for one purpose to be used for another purpose where their employment would not be legitimate. The duty of a court is to decide whether or not the legislature has overreached itself in responding, as it must, to matters of great social concern. As the minority judgment points out, when giving appropriate effect to the factor of "less restrictive means", the court must not limit the range of legitimate legislative choice in a specific area. The minority judgment also states that such legislative choice is influenced by considerations of cost, implementation, priorities of social demands, and the need to reconcile conflicting interests. These are manifestly sensible considerations that do not provoke disagreement. Our difference with the minority judgment is not over how the

principles should be articulated, but rather as to how they should be applied in the circumstances of this case.

35] We deal first with the right to silence. This Court has said that “[t]he right to silence like the presumption of innocence, is firmly rooted in both our common law and statute” and is “inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial”

[36] Pitted against this time-honoured right is the consideration that dealing in stolen property is a scourge in our society. The practice involves massive corruption and immorality that can permeate and perversely normalise itself in every area of society. The public perception that stolen goods are easily disposed of in our country, insidiously encourages serious and often violent crimes including car-jacking, mugging, robbery and theft. These are indeed weighty considerations. Yet as this Court pointed out in *Dlamini*:

“Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of [section] 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights. It is well established that [section] 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other.”

[37] The prevalence of serious crime calls for government action, but does not provide a blank cheque for the legislature to erase all procedural safeguards. Indeed, it is precisely when public emotion is at its highest that procedural protection against possible miscarriage of justice is most necessary. Something case-specific and contextualised is required to bring the scales down on the side of limitation. In the present case, there are convincing reasons for an incursion into the right to silence, but not for a reverse onus which would unduly increase the risk of innocent persons being convicted.

[38] Mr D'Oliveira argued persuasively that in the vast majority of cases the state has no information or evidence concerning the circumstances in which, and the persons from whom, the accused acquired the goods in question. Almost always all the information relevant to the determination of reasonable cause is peculiarly within the knowledge of the accused. This makes it extremely difficult for the state to demonstrate the absence of reasonable cause unless there is evidence emanating from the accused. The appellants correctly did not dispute this. In the circumstances, there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely, that he or she had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority of the owner to dispose of them. For these reasons, then, the limitation on the right to silence contained in the challenged phrase is justified.

[39] The question that remains, however, is the standard by which that evidence must be evaluated. The reverse onus requires the accused to establish on a balance of probabilities reasonable cause for the requisite belief. As has been pointed out, this means that the court is obliged to convict even if it entertains a reasonable doubt as to the guilt of the accused. Indeed, the reverse onus goes further. It obliges the court to convict if the version of the accused is as likely to be as true as not. We have to decide, then, whether this limitation of the presumption of innocence can be justified.

[40] The presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the state proves an accused's guilt beyond a reasonable doubt, he or she cannot be convicted. The right is vital to an open and democratic society committed to fairness and social justice. Where a presumption of guilt is substituted for the presumption of innocence, the limitation of the right is extensive and "the justification for doing so must be established clearly and convincingly".

[41] The primary ground for the justification of the section 37(1) reverse onus is the ongoing legislative endeavour to put in place effective means to eradicate the market in stolen property which has a devastating effect on the maintenance of law

and order. The crimes targeted range from highly organised syndicate- and gang-related activities through corruption at various levels to those committed by people tempted by a windfall who participate, sometimes unwittingly, in the chain of disposal of stolen goods.

[42] There is little doubt that the effective prosecution of thieves and receivers dealing in stolen goods is a pressing social need. We equally accept that there are important reasons of public policy for a statutory offence that penalises those who are not dealers, but who form a link in the chain of disposal of stolen goods by deliberately or negligently failing to establish the provenance of goods they acquire outside of ordinary commercial channels. Nonetheless, the level of crime does not on its own justify any infringement of the Bill of Rights, no matter how invasive.

[43] Indeed, there are a variety of factors that point away from the conclusion that a reverse onus in this case is reasonable and justifiable. The relation between the reverse onus and the state purpose is not proportionate. Although it has been accepted that the efficacy of the section 37 offence requires it to target a wide range of people exercising physical control over stolen goods, regardless of the fact that their connection with the goods might be remote, the impugned provision is nonetheless too broadly formulated. A reverse onus proposing to criminalise the deliberate or negligent dealing in stolen goods would be easier to justify if the goods in question were confined to motor cars or expensive equipment, where members of the public could reasonably be required to document provenance, ownership and transfer. The purpose of the reverse onus in such cases would be to oblige purchasers, on pain of conviction, to keep and produce records. Yet the section 37 reverse onus applies to all kinds of goods acquired in a multitude of different circumstances and is not exclusively attracted by people and transactions where its use could most easily be justified.

[44] Because of this and also because of the manner in which “possession” has been interpreted by our courts, the section 37 net extends to a wide range of people, many of whom are poor, unskilled and illiterate. It includes persons acquiring ordinary household necessities, such as clothing, food, cooking utensils and other goods from door-to-door vendors. The practical implications of this cannot be ignored. Many of these people are not likely to keep records of the wide variety of

informal transactions that they conclude daily. They, and not the professional receivers, are the persons least in a position to discharge the onus and hence become the class most vulnerable to erroneous conviction precisely because of their disadvantaged position in society. Furthermore, because of their inability to afford legal representation, they will not be well prepared either to present their case to best advantage or to meet the cross-examination to come. The risk of people being erroneously convicted, subjected to the social stigma of conviction and unjustly sent to jail, is unacceptably high.

[45] It is true that judicial officers can be expected to appreciate South Africa's social reality when applying the section. This could curtail any promiscuous recourse to the reverse onus. Similarly, temporary custodians may have little difficulty in discharging the onus. Furthermore, when passing sentence, judicial officers should distinguish between those who know full well the implications of their action, those who deliberately turn a blind eye, and those who simply do not bother to make sufficient inquiries.

[46] The presumption, however, does not entail only an assessment of whether a particular belief was reasonable in all the circumstances. Rather, and of greater significance, it obliges the accused to establish the circumstances or the factual foundation from which a conclusion as to reasonableness or otherwise may be drawn. It accordingly covers matters where the case turns substantially on the credibility of evidence given at the trial. If the accused fails to establish on a balance of probabilities the circumstances in which he or she claims to have acquired the goods (the factual foundation) a conviction will follow without the need for any further inquiry into reasonableness. That inquiry would arise only if the relevant factual foundation had first been established in favour of the accused on a balance of probabilities. Everything therefore would depend in the first place on such a credibility finding. It must be borne in mind that the probability of the accused's version being true will be determined after cross-examination by the state which, if reasonably effected, could leave the judicial officer in a state of uncertainty as to where the truth lay.

[47] The present case illustrates the kinds of dilemmas which would face a judicial officer. It appears from rather cryptic findings that the magistrate relied heavily on

the fact that the accused had failed to discharge the onus on them on a balance of probabilities. Because of the presumption, therefore, the magistrate found the accused guilty as charged and sentenced them to seven and six years' imprisonment respectively. The situation that faced the magistrate was no different from that confronting the trier of fact in any ordinary criminal trial - was the accused telling the truth or not? There was nothing specific either in the nature of the goods or in the circumstances in which they were acquired that took the matter out of the normal forensic situation where a finding of credibility had to be made. Indeed, a reverse onus might well be easier to justify when it relates to the inference to be drawn from certain established facts than when it forces the judicial officer effectively to reject the accused's version even if it was as probable as not. This intrudes severely on the balance between the prosecution and the accused implicit in what our Constitution regards as a fair trial.

[48] The risk that innocent persons might be convicted is aggravated by the fact that section 37 permits sentences of long terms of imprisonment and it is not open to the trier of fact to attenuate the sentences on the basis that he or she might still have had a doubt as to the guilt of the accused. Even more disturbing, the judicial officer would have to convict and impose such sentence where the accused's story was just as likely to be true as not.

[49] In assessing whether the section 37(1) limitation of the right to be presumed innocent is reasonable and justifiable the state in this case has established the importance of the objectives sought to be attained by the impugned provision. Nonetheless, considering that the grounds of justification must be more persuasive where the infringement of the rights in question is extensive, the state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose. The imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of acquisition or receipt. Accordingly, there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests present in this case and

which does not raise concerns relating to additional cost, the prioritisation of social demands and practical implementation.

[50] In the light of the vital importance to our criminal justice system of the right to be presumed innocent and the cluster of fair trial rights which accompany it, the imposition of a full burden of proof in the circumstances has a disproportionate impact on the right in question. Had the reverse onus been wrought in a more focussed and nuanced way so as to eliminate or diminish these concerns, it might have passed scrutiny. Yet as it stands, its sweep is too great. The risk of people being erroneously convicted and unjustly sent to jail is too high. We acknowledge that ours is an open and democratic society facing many challenges with limited means, and that it is in this setting that the question of proportionality must be determined. Yet, the very circumstances that have made the challenge so great and left us with means so stretched, place those least capable of defending their rights in the greatest jeopardy of being victims of miscarriages of justice. We therefore cannot agree with the view expressed in the minority judgment that the limitation on the presumption of innocence is sufficiently focussed to be justifiable.

[51] In the present matter, we conclude that the main problem facing the prosecution will be met by requiring the accused to furnish evidence as to the reasonableness of her or his belief. We do not see any persuasive or compelling reason for reversing the usual onus of proof as well. The challenged phrase accordingly passes the test of section 36 insofar as it limits the right to silence, but not to the extent that it limits the presumption of innocence.