CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 42/95

GARY JOHN SCAGELL	First Applicant
CHRISTOPHER JASON MINARD	Second Applicant
CANDICE MITCHELL	Third Applicant
CHRISTOPHER JOHN SIMON	Fourth Applicant

and

ATTORNEY-GENERAL OF THE WESTERN CAPE	First Respondent
MINISTER OF SAFETY AND SECURITY	Second Respondent
MINISTER OF JUSTICE	Third Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent

Heard on: 5 March 1996

Delivered on: 12 September 1996

JUDGMENT

O'REGAN J:

[1] In this case we are concerned with the question of whether sections 6(3), 6(4), 6(5), 6(6) and 6(7) of the Gambling Act, 51 of 1965 ("the Act") are inconsistent

with the provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution"). They are challenged on the ground that they are in breach of section 25(3) of the Constitution which guarantees the right to a fair trial and, more particularly, on the ground that they are in breach of section 25(3)(c) which protects the presumption of innocence and the right to remain silent.

[2] Mr G J Scagell, Mr C J Minard, Ms C Mitchell and Mr C J Simon, the applicants, were jointly charged in the Cape Town Magistrates' Court with having permitted the playing of a gambling game in breach of section 6(1) of the Act. That section provides as follows:

> Subject to the provisions of subsection (2), no person shall permit the playing of any gambling game at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing any such game.

Three separate but related offences are created by section 6(1). The first prohibits people in control or in charge of a place from permitting the playing of gambling games at such place, the second prohibits the playing of such games at any place and the third prohibits visiting any place with the object of playing a gambling game. The applicants were charged with the first of these offences.

[3] At the commencement of the trial, the applicants feared that, in order to facilitate

the proof of the charges, the prosecution would rely upon the provisions contained in section 6(3), 6(4), 6(5), 6(6) and 6(7) of the Act. Accordingly, the applicants applied to the magistrate to postpone the criminal proceedings against them in terms of section 103(3) of the Constitution so that they could apply to the Supreme Court for a section 103(4) order permitting them to approach this Court for an order declaring the challenged provisions of the Act to be invalid for inconsistency with the Constitution. After a consideration of the provisions of the Constitution, the magistrate decided that it was in the interest of justice to grant the application and did so. The applicants then applied to the Supreme Court for an order in terms of section 103(4) of the Constitution. Farlam J granted that application and referred the challenged provisions of the Act to this Court.

[4] The first question is whether the referral of these issues to this court in terms of sections 103(3) and (4) is valid. Those sections provide that:

> (3) If in any proceedings before a court referred to in subsection (1), the presiding officer is of the opinion that it is in the interest of justice to do so, he or she may postpone the proceedings to enable the party who has alleged that a relevant law or provision is invalid, to apply to a provincial or local division of the Supreme Court for relief in terms of subsection (4).
> (4) If the provincial or local division hearing an application referred to in subsection (3) is of the opinion that a decision regarding the validity of the law or provision is material to the adjudication of the matter before the court referred to in subsection (1), and that there is a reasonable prospect that the relevant law or provision will be held to be invalid, and that it is in the interest of justice to do so, the provincial division or local division shall --

> (a) if the issue raised is within its jurisdiction, deal with such issue itself, and if it is in the exclusive jurisdiction of the Constitutional Court, refer it to the Constitutional Court for its decision after making a finding on any evidence which be relevant to such issue; and
> (b) suspend the proceedings before the court referred to in subsection (1) pending the decision of the provincial or local division or the Constitutional Court, as the case may be.

In this case it is clear that all the provisions referred do fall within the exclusive jurisdiction of the court. The second consideration is whether it can be said that the determination of the constitutionality of the referred provisions 'is material to the adjudication' of the matter before the Magistrates' Court. The referred provisions read as follows:

> Section 6
> (3) When any playing-cards, dice, balls, counters, tables, equipment, gambling devices or other instruments or requisites used or capable of being used for playing any gambling game are found at any place or on the person of anyone found at any place, it shall be *prima facie* evidence in any prosecution for a contravention of subsection (1) that the person in control or in charge of such place permitted the playing of such game at such place and that any person found at such place was playing such game at such place and was visiting such place with the object of playing such game.
> (4) If any policeman authorised to enter any place is wilfully prevented from or obstructed or delayed in entering such place, the person in control or in charge of such place shall on being charged with permitting the playing of any gambling game, be presumed, until the contrary is proved, to have permitted the playing of such gambling game at such place.
> (5) Upon proof at the trial of any person charged with contravention of subsection (1), that any gambling game was played or intended to be played, it shall be presumed, until the contrary is proved, that such game was played

or intended to be played for stakes.

(6) Any person supervising or directing or assisting at or acting as banker, dealer, croupier or in any like capacity at the playing of any gambling game at any place and any person acting as porter, doorkeeper or servant or holding any other office at any place where any gambling game is played, shall be deemed to be in control or in charge of such place.

(7) Any person found at any place where any such gambling game is played, shall be deemed, until the contrary is proved, to be playing such game at such place and to be visiting such place with the object of playing such game.

The charge levelled against the applicants by the prosecution is that they were in control or in charge of a place where they permitted the playing of gambling games. The charge sheet reads as follows:

> "the accused are guilty of contravening section 6(1) of Act 51 of 1965 read with sections 1, 6 and 8(d) of the said Act in that upon or about or during the period 07/12/94 to 12/12/94 and at or near Sea Point in the district of the Cape the accused wrongfully and unlawfully permitted the playing of a gambling game at a place under their control or in their charge to wit Highstead Casino Club."

The charge sheet suggests, and the applicants argue, that the prosecution intended relying on the evidentiary provisions contained in section 6 which are the subject of the present challenge. Each of the challenged provisions, except section 6(7), may assist the prosecution in establishing the offence with which the accused are charged. However, section 6(7) only relates to the other two offences created by section 6(1): the offence of playing a gambling game, or visiting a place where gambling games are played with the intention of playing such a game. As the

applicants have not been charged with these offences, it cannot be said that the constitutionality of this provision could be of any relevance whatsoever to the criminal proceedings pending against the applicants. In the circumstances, I am of the view that the referral of section 6(7) was not one within the terms of sections 103(3) and (4) of the Constitution. However, as the constitutionality of the other provisions referred may well be material to the criminal proceedings against the applicants, the referral of those provisions is sound.

[5] The applicants argue that all the challenged provisions assist the prosecution in various ways in proving the commission of the offence with which they have been charged. As the legal effect of the challenged provisions is different, I shall consider the provisions separately. First, I shall deal with section 6(4); thereafter I shall deal separately with section 6(3), 6(5) and 6(6).

Section 6(4) of the Act

[6] The effect of this section (which is set out in full in paragraph 4) is that, once the prosecution has established that a policeman authorised to enter a place was obstructed from entering such place and that the accused was in charge of that place, the accused will be presumed to have permitted the playing of a gambling game at such place. "Place" is widely defined in section 1 of the Act, as follows:

> "place" means any place, whether or not it is a public place, and includes any premises, building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle and any part of a place.

Accordingly, once the prosecution has established both that an authorised police officer was obstructed from gaining entry to a place and that the accused person was in charge of it, the accused will have to show on a balance of probabilities that he or she did not permit the playing of a gambling game at the place. The onus is placed upon the accused regardless of whether the accused played any role in the obstruction of the police officer. Even if the accused raises a reasonable doubt as to whether he or she permitted the playing of a gambling game on the premises, a conviction will nevertheless follow.

[7] It is clear that this provision imposes a legal burden upon the accused. Once a certain set of facts is established, an element of the offence is presumed to have been proved and the accused is required to produce evidence on a preponderance of probabilities to rebut that presumption. In a series of cases, this Court has held that provisions of this nature, which impose a legal burden upon the accused which could result in the accused being convicted of an offence despite the existence of a reasonable doubt as to the guilt of the accused, are in breach of section 25(3)(c) on the ground that they constitute a breach of the presumption of innocence. (See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *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).) There are no relevant grounds upon which the presumption contained in section 6(4) can be distinguished from the presumptions held to be in breach of section 25 in the cases mentioned.

[8] It is quite clear therefore that section 6(4) is in breach of section 25(3). The remaining question is whether it may be saved in terms of section 33(1) of the Constitution. That provision sanctions the limitation of a section 25(3) right if such limitation is, inter alia, reasonable, necessary and justifiable in an open and democratic society based on freedom and equality. It is now well established that the test imposed by section 33(1) includes one of proportionality. (*S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph 104.) The court must measure the purpose, effects and importance of the infringing legislation against the nature and effect of the infringement caused by the legislation.

[9] In this case, the State filed written evidence to establish the purpose and effects of the Act. In his affidavit, Mr C L Fismer, then Minister for General Services, pointed to the negative effects on our society of unlicensed gambling and the consequent need to control such gambling. No evidence was produced as to particular difficulties faced by the police or the Attorney-General in investigating and prosecuting people for illegal gambling. No evidence was led concerning the

need for a sweeping presumption of the sort contained in section 6(4) or for that matter any of the other presumptions. Nor was any convincing evidence provided to suggest that conventional policing tactics, such as, for example, the use of plain-clothes police officers, could not provide the necessary evidence for the prosecution of such offences. Evidence lodged to meet the requirements of section 33 needs to persuade us that the particular provisions under attack are justifiable in terms of section 33, not merely address the justifiability of the overall legislative purpose sought to be achieved by the statute.

[10] The purpose of section 6(4) does not weigh sufficiently heavily in the balance to overcome the significant infringement of the right to a fair trial which it occasions. Section 6(4) is therefore inconsistent with the Constitution and cannot be saved by section 33(1).

Section 6(3) of the Act

[11] It is clear that section 6(3) uses different language from section 6(4). (All these sections are set out in full at para 4). The finding of the identified items at a place "shall be *prima facie* evidence" that the person in charge of such place permitted the playing of a gambling game. This formulation is different to the formulation "shall be presumed, until the contrary is proved" which is used in section 6(4). In argument, the applicants' counsel submitted that subsection (3)

gave rise to an evidential burden. As a general rule in our law, the formulation "shall be *prima facie* evidence" does not impose the burden of proof on the accused, but merely gives rise to an evidential burden. (See *Ex parte The Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 478; R *v Abel* 1948 (1) SA 654 (A) at 661; *S v Veldthuizen* 1982 (3) SA 413 (A) at 416.) Although there does not seem to have been any authoritative judicial statement of the effect of section 6(3), the fact that different language is used from that in section 6(4) indicates that it does not impose a burden of proof upon the accused as section 6(4) does. The provision requires that there be some evidence before the court to discount the "*prima facie* evidence" that the person in control of such place permitted the playing of a gambling game, and that people present at such place were playing such game or visiting the place intending to play such game.

[12] It is well established in our law that, when an evidential burden is imposed upon an accused person, there needs to be evidence sufficient to give rise to a reasonable doubt to prevent conviction. (See *Pillay v Krishna and Another* 1946 AD 946 at 952-3; *S v Alex Carriers (Pty) Ltd en 'n Ander* 1985 (3) SA 79 (T) at 88 - 9.) As section 6(3) does not impose the burden of proof upon the accused, it does not give rise to the possibility that an accused person may be convicted despite the existence of a reasonable doubt as to his or her guilt. Accordingly, section 6(3) cannot be held to be inconsistent with the Constitution on the same

grounds as sections 6(4). The question remains whether it may be challenged on other grounds.

[13] The trigger which brings the evidentiary provisions in section 6(3) into operation is the proof by the prosecution that any of the items it lists were found at any place or on anyone's person. Thus once the prosecution has proved that a pack of playing cards or a pair of dice have been found, there is presumed to be *prima facie* evidence of certain elements of the offence. As described above, section 6(1) creates three offences. The first prohibits a person in charge of premises permitting the playing of a gambling game. In relation to this offence, the effect of section 6(3) is that any person who is in charge of a place where, for instance, a pack of playing cards has been found, is assumed, unless a reasonable doubt is raised, to have permitted the playing of a gambling game in breach of section 6(1). The second offence provides that a person who plays a gambling game shall be guilty of an offence. The effect of section 6(3) in relation to this offence is to assume, unless a reasonable doubt is raised, that any person who was at a place where a pack of playing cards has been found played a gambling game. The third offence provides that a person visiting a place with the object of playing a gambling game shall be guilty of a breach of section 6(1). In relation to this offence, section 6(3) establishes that, once a pack of playing cards has been found at a place where the accused was, the accused shall be assumed, unless a reasonable doubt is raised, to have visited that place with the object of playing

a gambling game.

[14] The effect of subsection (3) is extraordinarily sweeping. A person could be charged in terms of section 6(1), and required to produce evidence to dislodge the effect of section 6(3), simply on the basis that a police officer found a pack of cards in his or her home. The relationship between the presumed facts and the proven facts is, at best, only tenuous. It cannot be said that a person found in possession of a pack of playing cards or a pair of dice, in the absence of any other evidence, is likely to have been engaged in the conduct prohibited by section 6(1). Nevertheless the effect of the subsection is that any person found to be in possession of such materials may be arrested, prosecuted and required to produce evidence to avoid conviction.

[15] Counsel for the applicants argued that section 6(3) was inconsistent with the Constitution for two reasons. First, he argued that the presumption relieved the prosecution of the obligation of proving certain elements of the offence and, as such, was in breach of the presumption of innocence entrenched in section 25(3)(c). Secondly that it was in breach of an accused's right to silence as entrenched in the same subsection of the Constitution in that it indirectly compels an accused to give evidence. It is clear from the language of section 25(3) that the presumption of innocence and the right to silence are incidents of the overarching right to a fair trial which is enshrined in the opening words of the

subsection.

[16] In my view, it is not necessary in this case to consider whether the provisions of section 6(3) constitute a breach of the presumption of innocence or the right to silence. Section 6(3) of the Act is an evidential device created by the legislature which may result in persons being charged with an offence and put on their defence merely upon proof of a fact which itself is not suggestive of any criminal behaviour. The effect of such a device is that innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence. Such a provision is in breach of the right to a fair trial, entrenched in section 25(3). As Kentridge AJ noted in *S v Zuma*, above, at para 16:

> The right to a fair trial ... is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.

(See also *S v Ntuli* 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at paragraph 1.)

[17] It is not good enough to suggest, as counsel for the Attorney-General did in argument, that no reasonable prosecutor would prosecute persons merely on the basis that they were in possession of a pack of playing cards. There is nothing

on the face of the statute itself to require a prosecutor not to prefer charges in such a case. Indeed the statute appears to relieve the prosecution of the burden of proving any elements of the charge once one of the pieces of equipment mentioned in section 6(3) has been found on or in the same place as a person, unless that person discharges the evidential burden imposed by the subsection.

[18] The constitutional complaint lies in requiring innocent persons, against whom there is no evidence suggestive of criminal conduct at all, to come to court to defend themselves. The fact that it may be relatively easy for such an accused to do so does not deprive the provision of its sting. Even if an accused person is acquitted, there can be no doubt that the fact of standing trial itself has serious implications for an accused. It may cause damage to the dignity and reputation of the accused. It will require the accused to be present at court which may be time-consuming and inconvenient and, if the accused appoints a legal representative, it may give rise to considerable expense. All of these implications would of course be legitimate if the charge is based on facts which suggest criminality, but in terms of section 6(3) such a requirement is effectively dispensed with by the legislature.

[19] Section 6(3) is in breach, therefore, of section 25(3), the right to a fair trial. It may also be in breach of section 11(1), but it is not necessary to consider that possibility further here. The question arises whether it may be saved in terms of

section 33. In order to be so, the court would have to be persuaded that the provision was reasonable, justifiable and necessary in an open and democratic society. Although there may be circumstances where inherent difficulties of proof would mean that a similar provision would be held to be a justifiable limitation in terms of section 33, that is not the case here. The evidence lodged by the State (referred to in para 9) does not assist here either. No cogent reason was advanced as to why it was necessary for an evidential burden of this considerable scope to be employed, there being no explanation as to why the necessary evidence of the commission of the statutory offences created by section 6(1) of the Act could not be obtained through well-tried police methods. In the circumstances, the provision cannot be saved by section 33(1).

[20] In argument counsel for the Attorney-General argued that, if a portion of section 6(3) were severed from the provision, the remainder would not be inconsistent with the Constitution. He proposed that, after severance, the provision read as follows:

> When any ... gambling devices ... are found at any place or on the person of anyone found at any place, it shall be *prima facie* evidence in any prosecution for a contravention of subsection (1) that the person in control or in charge of such place permitted the playing of such game at such place.

'Gambling device' is defined in section 1 of the Act as follows:

> "gambling device" means any equipment or mechanical, electro-mechanical or electronic device, component or machine, used remotely or directly in connection with a gambling game and which brings about the result of a wager by determining win or loss.

The first consideration in a severability enquiry is to determine whether the proposed severance will result in a provision which is consistent with the Constitution. I cannot accept that the proposed severance will do so. Although by deleting many of the listed items the scope of the definition will be narrowed, the effect of the evidential burden is still sweeping. This is because the definition of "place" which is extremely broad remains, as does the definition of gambling device, which is also broad. With these broad definitions, it may well be that, even after the surgery proposed by the state, the provision will result in the prosecution of a person despite there being no evidence suggestive of criminality. In my view, this Court should be reluctant to embark upon an exercise of severance unless it is persuaded that the result will give rise to no constitutional complaint. I have not been so satisfied in this case.

Section 6(5)

[21] On its face section 6(5), like section 6(4), appears to impose a burden of proof upon the accused: once the prosecution has established that a gambling game was played or intended to be played, the accused will be required to persuade the court, on a balance of probabilities, that such game was not played for stakes.

However, upon further analysis the precise effect of section 6(5) seems less certain. In particular, I have not been persuaded that section 6(5) may ever result in the conviction of an accused despite the existence of a reasonable doubt as to his or her guilt.

[22] There is no definition of "stakes" in the Act. "Stake" is defined in the Concise Oxford English Dictionary as:

> a sum of money etc. wagered on an event, esp. deposited with a stakeholder; an interest or concern, esp. financial; money offered as a prize esp, in a horserace....

The effect of section 6(5) therefore appears to require the accused, once the prosecution has established that a gambling game was played, to prove on a balance of probabilities that the game played was not one played for money or value. However, the definition of gambling game in section 1 of the Act is as follows:

> "gambling game" means any game, irrespective of whether or not the result thereof is determined by chance, played with playing cards, dice or gambling devices for money, property, cheques, credit or anything of value (other than an opportunity to play a further game), including, without derogating from the generality of the foregoing, roulette, bingo, twenty-one, black-jack, chemin de fer and baccarat.

This definition makes it clear that a gambling game is one which is played for

money or anything of value. Once, therefore, the prosecution has proved that a gambling game has been played, it will have established that the game was played for a stake. It is not clear, therefore, what the purpose or effect of section 6(5) is.

[23] It may well be that section 6(5) is a remnant of the statute in an earlier form. Prior to the amendment of the Act by Act 144 of 1992 section 6(1) read as follows:

> Subject to the provisions of subsection (2), no person shall permit the playing of any game of chance for stakes at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing such game.

There was no definition of "stakes" in the Act at that time either. Section 6(5) then provided that

> Upon proof at the trial of any person charged with contravention of subsection (1), that any game of chance was played or intended to be played, it shall be presumed, until the contrary is proved, that such game was played or intended to be played for stakes.

"Game of chance" was defined in section 1 of the Act as follows:

> "game of chance" includes any game which the Minister may from time to time by notice in the *Gazette* declare to be a game of chance.

It is clear then that before the 1992 amendments, the offence created by section

6(1) contemplated proof of a game of chance and proof that it was played for stakes. Upon proof of the former fact, section 6(5) imposed the burden of proving the latter upon the accused.

[24] Whatever its history, section 6(5) remains in the Act. The question for this Court is whether it is inconsistent with the Constitution or not. The principle upon which this Court has held that the imposition of a burden of proof upon the accused to be in breach of the Constitution in the past, is that it may result in the conviction of an accused despite the existence of a reasonable doubt. It is not clear to me that section 6(5) has this effect. The burden of proof only arises once the prosecution has proved the existence of a gambling game. In such circumstances, should an accused person subsequently raise a reasonable doubt as to whether the game was played for stakes or not, but not establish the absence of a stake upon a preponderance of probabilities, the evidence led by the accused may well have the effect of dislodging the proof beyond reasonable doubt that a gambling game was played and therefore the accused may avoid conviction.

[25] Accordingly, the applicants have not persuaded me that section 6(5) may result in the conviction of an accused despite the existence of a reasonable doubt as to the guilt of the accused. Nor could the applicants point to any other constitutional right infringed by section 6(5). In the circumstances, the applicants have not succeeded in identifying any constitutional basis for a challenge to

section 6(5). The fact that section 6(5) appears to be ineffective does not automatically give rise to constitutional complaint in terms of section 25(3), as was argued in this case.

Section 6(6)

[26] Mr Marcus, for the applicants, argued that the effect of section 6(6) was to create an irrebuttable presumption. He argued that the approach adopted by this Court in *S v Zuma*, above, *S v Bhulwana*; *S v Gwadiso*, above, and *S v Mbatha; S v Prinsloo*, above, in respect of rebuttable presumptions should also apply to irrebuttable presumptions.

[27] The first matter to be considered is whether section 6(6) of the Act creates an irrebuttable presumption. On a simple reading of the text, it is clear that a person who is a banker, dealer, croupier or acts in a similar capacity, or the porter, doorkeeper or servant, or otherwise an officeholder at a place where a gambling game is being played, shall be deemed to have been in control or in charge of such place. It also appears from a reading of section 6(1) that being in charge or control of the place in question is one of the elements of one of the statutory offences created by section 6(1). The remaining elements of that offence are first, that a gambling game has been played at that place, and that the person in charge permitted the playing of such game.

[28] What is the legal effect of section 6(6)? The subsection needs to be considered in its context. It is the only provision in section 6 which uses the formulation "deemed". In our law, the phrase "deemed" can have a variety of effects; which effect it has in any particular statutory provision depends upon the context and history of the particular section. (See *R v Haffejee and Another* 1945 AD 345; *S v Rosenthal* 1980 (1) SA 65 (A).)

[29] Sections 6(4) and 6(5) use the familiar formulation for creating rebuttable presumptions of law: "until the contrary has been proved". (See *Ex parte The Minister of Justice: in re Rex v Jacobson and Levy*, above; *S v Bhulwana; S v Gwadiso*, above, at para 7.) In *S v de Sa* 1982(3) SA 941 (A), the Appellate Division was concerned with the legal effect of a portion of section 7(2) of the Act (now repealed) which provided that

> the person in control or charge of any place specified in any notice under ss (1) at which any pin-table, machine, contrivance or instrument contemplated in such notice is found, shall be presumed to have permitted the playing of games of chance for stakes at such place....

Rabie ACJ noted that:

> It is to be noted, furthermore, that presumptions are created in several sections of the Act, and that in some of these sections (viz ss 2(2), 2(3), 6(4), 6(5), 6(7) and the second half of section 7(2)(a)) it is expressly stated that the presumption shall apply "until the contrary is proved", whereas in others (viz s 6(6), the first half of s 7(2)(a) , and s 7(2)(b)) these qualifying

> words do not appear. This would seem to show that the Legislature intended to distinguish between presumptions which can be rebutted and presumptions which cannot be rebutted -- unless, of course, one were to hold that the use of the words in some sections, or parts thereof, and the absence thereof in others is merely the result of careless draftmanship. (At p 954 D - F.)

Although "presumed" was used in section 7(2) and "deemed" is used in section 6(6), the reasoning adopted by Rabie ACJ seems equally applicable to section 6(6). Adopting that reasoning in interpreting section 6(6) leads to the unavoidable conclusion that section 6(6) contains an irrebuttable presumption.

[30] The legal character of an irrebuttable presumption is not that it is a rule of evidence, but that it is a rule of substantive law. (See Schmidt *Bewysreg* 3de uitg at 132-3; Hoffmann and Zeffertt, *The South African Law of Evidence* 4th ed at 530; *Attorney General v Odendaal* 1982 Botswana LR 194 at 226-7.) Section 6(6) has the effect that once a person has been proved by the prosecution to have been a banker, dealer, croupier, porter, doorkeeper, servant or other person holding office at a place where a gambling game is played, the state need not show that such person was in charge of the place where gambling occurred. In effect, section 6(6) operates as a definition. Parliament might have provided in section 6(1) that any person acting as croupier, banker, at the playing of any gambling game, or employed as a porter, doorkeeper or servant at any place where a gambling game is played would commit an offence if he or she permitted

the playing of such game at such place. There could be no attack on such a provision in terms of section 25(3) of the Constitution: the prosecution would have the burden of proving all the elements of the offence. Parliament in fact chose in section 6(1) to describe the offence by reference to persons in control of the place where any gambling game was played. What section 6(6) does is to provide an extensive definition of that category of persons. It is to be read merely as a definitions section, not as one which imposes a burden of proof upon the accused. The effect of the provision is that the state will, however, have to prove beyond reasonable doubt the other elements of the statutory offence: namely that a gambling game was played and that the accused permitted the playing of the game.

[31] In the circumstances, the provision cannot be challenged on the same grounds as sections 6(4) and 6(7), as it does not have the same effect. There is no possibility that section 6(6) will result in the conviction of an accused despite a reasonable doubt as to his or her guilt in relation to an element of the offence.

[32] It may be in certain circumstances that the elements necessary to establish a statutory or common law offence could be challenged on constitutional grounds. For example, a statutory offence which criminalised behaviour which chapter 3 specifically protects, such as the right to freedom of movement or assembly, could well be the subject of a successful constitutional challenge. In addition,

section 11(1) of the Constitution provides that

> Every person shall have the right to freedom and security of the person which shall include the right not to be detained without trial.

It may be that, in certain circumstances, the elements of a particular criminal offence are so invasive of freedom that the offence could be challenged as an unjustifiable infringement of section 11. It is not necessary for the purposes of this case to decide whether such a challenge could be sustained for it is clear that there is no basis for such a challenge in this case.

[33] It may be thought that the inclusion of "servants" in the list of persons deemed by section 6(6) to be in charge of the premises was a legislative over-reach and that the word "servant" should be severed from the provision. Such a view would be based on the proposition that it will be rare that a servant will in fact be in control of premises, and that it will be rare that a servant will have any control of whether or not a gambling game has been played on the premises. I cannot accept this proposition. First, in the context of this subsection the word "servant" may include a wide range of people, not only those performing menial tasks. For those who are performing such tasks, the elements of the offence make it clear that the prosecution must establish that a person in charge of the premises *permitted* the playing of a gambling game. In addition, it has long been recognised by our courts that, unless there are clear and convincing indications to the

contrary in a statute, the prosecution will be required to prove the necessary *mens rea* on the part of the accused person. (See *S v Arenstein* 1964 (1) SA 361 (A) at 365; *S v De Blom* 1977 (3) SA 513 (A) at 532.) In the circumstances, the legislature has effectively established an offence which prohibits a servant at a place from permitting the playing of gambling games at that place. It cannot be said that such provision offends any of the fundamental rights contained in the Constitution.

[34] In summary, then, sections 6(3) and 6(4) have been found to be inconsistent with the provisions of the Constitution. In the circumstances, the Court must declare those provisions to be invalid. No convincing reasons were suggested for suspending the effect of an order of invalidity in terms of the proviso to section 98(5) of the Constitution.

[35] The Court must consider whether it is appropriate to exercise its discretion in terms of section 98(6)(a). In terms of that section, the effect of the declaration of invalidity will not render any act done or permitted in terms of the provisions, prior to the date of our judgment, invalid unless this Court decides in the interests of justice and good government, to order otherwise. In previous cases, the Court has taken the view that the interests of justice generally require that litigants who have been successful before this Court should obtain the relief they seek (*S v Bhulwana; S v Gwadiso*, above, at para 32). In this case, the applicants will be

assisted simply by a prospective declaration of invalidity. That is all they sought.

[36] Nevertheless there may be a considerable number of people who have already been convicted as a result of reliance upon sections 6(3) and 6(4) of the Act, but whose cases have not yet been finalised, because an appeal or review is pending. If our order is purely prospective, they would obtain no relief from it at all, although their constitutional rights will have been impaired. In *S v Bhulwana; S v Gwadiso*, above, at para 32, we held that we should exercise our powers under section 98(6)(a) of the Constitution prudently to avoid disruption in the criminal justice system. (See also *S v Zuma and Others*, above, at para 43.) On the other hand, we should also, where possible, seek to ensure that people may rely on the rights afforded to them in terms of the Constitution. In previous cases, we have exercised our discretion in terms of section 98(6)(a) to rule that a declaration of invalidity applies to all cases which have not been finalised at the date of our order. (See *S v Mhlungu; S v Bhulwana; S v Gwadiso*, above*; S v Mbatha; S v Prinsloo* , above.) In those cases, the order was made to assist litigants before this Court. However, there seems to be no reason why such an order should not also be made in this case. It would afford relief to people not before this Court whose rights have been infringed and it would cause no significant disruption in the criminal justice process. In the circumstances, I am persuaded, that it would be appropriate to make the order of invalidity applicable, not only prospectively,

but also to all cases in which, as at the date of the judgment in this matter, finality has not been reached.

[37] Neither the applicants nor the Attorney-General made any submissions regarding costs, nor do there appear to be any reasons why a costs order should be made.

Order

[38] The following order is accordingly made:

1. It is declared that subsections (3) and (4) of section 6 of the Gambling Act, 51 of 1965 are inconsistent with the Republic of South Africa Constitution Act, 200 of 1993 and are, with effect from the date of this judgment, declared to be invalid and of no force and effect.

2. In terms of section 98(6)(a) of the Constitution, it is ordered that the declaration of invalidity in paragraph 1 shall invalidate any application of the invalid sections in any criminal trial in which the verdict of the trial court was entered after the Constitution came into force, and in which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of the appeal has not yet expired.

3. The matter of *S v Scagell and others* is referred back to the Cape Provincial Division to be dealt with in accordance with this judgment.

C.M.E. O'REGAN
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

For the applicants:	GJ Marcus and J Kaplan instructed by Grant Kaplan and Friedgut Attorneys
For the respondents:	J Slabbert SC and AM Gibson instructed by the State Attorney