CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/95

THE STATE

versus

WALTER BEQUINOT

Heard on: 25 September 1996

Decided on: 18 November 1996

JUDGMENT

KRIEGLER J:

[1] The substantive and procedural requirements for a referral under section 102(1) of the interim Constitution[1] have been discussed in several judgments of this Court. Most of them are reported in both the South African Law Reports and Butterworths Constitutional Law Reports.[2] Yet, as this case demonstrates, the proper application of

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1 Section 102(1) of the Constitution of the Republic of South Africa Act 200 of 1993 in substance provides:

> "If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision ...".

2 See *S v Zuma and Others* 1995(2) SA 642 (CC); 1995(4) BCLR 401 (SA) at para 10; *S v Vermaas; S v Du Plessis* 1995(3) SA 292 (CC); 1995(7) BCLR 851 (CC) at paras 12-3: *S v Mhlungu and Others* 1995(3) SA 867 (CC); 1995(7) BCLR 793 (CC) at para 59; *Zantsi v Council of State, Ciskei, and Others* 1995(4) SA 615 (CC); 1995(10) BCLR 1424 (CC) at paras 1-8; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996(1) SA 984 (CC); 1996(1) BCLR 1 (CC)

the subsection continues to cause problems.

[2] The appellant was one of eight accused charged in the Regional Court on fourteen counts, including robbery of 7 000 pounds sterling in traveller's cheques. The appellant received all but two of the cheques at his pawnbroker's shop shortly after the robbery. The trial court, holding that the appellant could not be linked to the robbery, focused on his admitted receipt of the stolen cheques. That, so it reasoned, brought into play the provisions of section 37 of the General Law Amendment Act 62 of 1955,[3] a conviction of which is a competent verdict on a charge of robbery.[4] The regional magistrate did not consider a verdict of knowingly receiving stolen property, likewise a competent verdict.[5] He analysed section 37 in the light of the applicable authorities[6] and concluded that its effect was that the appellant had to establish on a balance of probabilities that, at the

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at paras 6-8; *Bernstein and Others v Bester and Others NNO* 1996(2) SA 751 (CC); 1996(4) BCLR 449 (CC) at para 2; *Luitingh v Minister of Defence* 1996(2) SA 909 (CC); 1996(4) BCLR 581 (CC) at para 2; *Brink v Kitshoff NO* 1996(4) SA 197 (CC); 1996(6) BCLR 752 (CC) at paras 1-8.

3 Subsection (1) thereof reads:

> "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 *thirteen* of the Stock Theft Act, 1923, 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."

4 See section 260(f) of the Criminal Procedure Act 51 of 1977.

5 See section 260(e) of the Criminal Procedure Act 51 of 1977.

6 See Hunt *South African Criminal Law and Procedure,* 2 ed, Vol 2 at 742; *S v Kaplin and Others* 1964(4) SA 355 (T); *S v Moller* 1990(3) SA 876 (A).

time he received the cheques, he reasonably believed that the person who gave them to him was legally entitled to do so. The regional magistrate rejected the evidence proffered by the appellant in exculpation of such receipt and found that he could not possibly have believed that the cheques being offered to him had been obtained honestly:

> "[He] had no reasonable belief that the person who handed cheques over was the owner or was authorized by the owner thereof. There is no doubt about that."[7]

It is more than arguable that such finding was tantamount to concluding that the appellant had received the cheques knowing them to have been stolen. The magistrate did not reason along such lines, however, but found that the prosecution had proved all the elements of section 37 on which it bore the onus and that the appellant had not established the genuineness or reasonableness of his alleged belief. The appellant's conviction of a contravention of that section followed. The sentence was a fine of R4 000 plus a wholly suspended period of imprisonment. An appeal against the conviction only was noted to the Witwatersrand Local Division of the Supreme Court (the "WLD").

[3] Counsel for the appellant lodged heads of argument in the WLD challenging the trial court's findings on a variety of grounds. In particular it was contended that the prosecution had not discharged the onus it bore under section 37 and that the appellant, for his part, had established what the section demanded of him. No word was said about

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[7] Record at 301.

unconstitutionality. On the contrary, the case was premised on the presumed constitutional validity of section 37. The heads of argument lodged by the attorney-general's representative in the WLD were likewise directed towards the facts, viewed in the framework of section 37 as it stood.

[4] When the appeal was called in the WLD the learned judge presiding, of his own volition, raised the question whether the constitutional validity of section 37 ought not there and then to be referred to this Court for its decision. After a brief debate with counsel, who had not been forewarned of the constitutional question and could understandably make little meaningful contribution, the learned judges made an order, the transcript of which reads:

> "... [O]n the question as to whether Section 37 of the General Law Amendment Act No. 62 of 1955 is in conflict with Section 3(c) [sic] of the Constitution Act No. 200 of 1993. The terms of reference are to be settled by counsel and an order will be made in due course."

The formal order of court supplements the transcription by commencing with the words "[t]hat this matter be referred to the Constitutional Court" and the section of the Constitution targeted is said to be 23(3)(c). Neither section is of course relevant, the provision intended being section 25(3)(c) of the Constitution.

[5] It took some considerable time for counsel to "settle" the "terms of reference"and for the learned judges to consider them. A document (styled "Referral of Issue to

Constitutional Court Pursuant to Rule 22(2)") was apparently typed some time in March 1996[8] but was only issued by the WLD on 9 May 1996. It was lodged with the registrar of this Court the following day under cover of a document purporting to be a notice in terms of Rule 22(1) (read with Form 3) of the Constitutional Court Rules, 1995. It bears no date, no signature, no intimation of the applicable section of the Constitution; there are no names or addresses of the legal representatives of the parties and the notice purports to emanate from the registrar of the "Johannesburg Local Division of the Supreme Court of South Africa". Be that as it may, the document signed by the learned judges reads as follows:

> "1. The Appellant was convicted of the offence of contravening Section 37 of the General Law Amendment Act, 62 or 1955.
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> 2. As a result of the 'reverse onus' contained in the aforementioned provision, it was necessary for the Appellant to prove on a balance of probabilities that he had reasonable cause for believing at the time of the acquisition or receipt that the goods were the property of the person from whom he received them or that such person had been duly authorised by the owner thereof to deal with or to dispose of them.
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> 3. Section 25(3)(c) of Act 200 of 1993 provides that:
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> > '*Every accused person shall have the right to a fair trial .... which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.*'

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[8] The appeal was heard on 9 February 1996 while Rule 22(1) of the Constitutional Court Rules, 1995 requires referral documents to be lodged with the registrar of this Court within 15 days.

4. The ruling required from the Court is whether Section 37 of the General Law Amendment Act, No. 62 of 1955, is in conflict with Section 25(3)(c) of Act 200 of 1993.

5. It is in the interests of justice that the matter be referred so that the apparent conflict between the Constitution and Section 37 of the General Law Amendment Act, 62 of 1995 may be resolved.

6. The issue of the constitutionality of Section 37 of the General Law Amendment Act, 62 of 1955 is decisive for the determination of this case.

7. This issue falls within the exclusive jurisdiction of the Constitutional Court.

8. The record to be transmitted to the Constitutional Court shall consist of:

    8.1 a complete transcript of the proceedings in the Magistrate's Court;

    8.2 the heads of argument of both parties in the Supreme Court of South Africa, Witwatersrand Local Division; and

    8.3 the order of the Supreme Court of South Africa, Witwatersrand Local Division.

[6] Quite apart from the procedural deficiencies mentioned, there are a number of substantive features of the course adopted in the court *a quo* that call for comment. The most important is that there is no identifiable ratio for the referral. Neither the cryptic transcription of the order issued in court nor the document "settled" by counsel indicates (a) why the court *a quo* regarded the constitutionality of section 37 of Act 62 of 1955 to be potentially decisive of the case before it; (b) why it was considered to be in the interest of justice to order referral of that issue; and in that context, (c) why the referral

was made at that juncture, before considering the appeal on non-constitutional grounds. As this Court has tried to make plain, a positive finding on each of those considerations is a prerequisite for a referral.[9]

[7] Indeed, in the very first reported judgment of this Court, in *Zuma*,[10] Kentridge AJ mentioned, and in the associated case of *Mhlungu*,[11] Kentridge AJ discussed the procedure under section 102(1) of the Constitution. Thereafter the Court considered and explained not only the statutory requirements of that subsection and associated provisions of the Constitution, but identified additional questions of judicial policy that come into play when referral of a constitutional issue is being considered by a provincial or local division. Thus:

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> "[T]he power and duty to refer only arises when ...
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> (a) there is an issue in the matter before the Court in question which may be decisive for the case;
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> (b) such issue falls within the exclusive jurisdiction of the Constitutional Court; and
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> (c) the Court in question considers it to be in the interests of justice to refer such issue to the Constitutional Court.
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> These conditions are conjunctive and all have to be fulfilled before the Court has the power to refer an issue to the Constitutional Court in terms of section

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9 See the judgments cited in n 2 above.

10 Cited in n 2 above, at para 10.

11 Cited in n 2 above, at para 59.

102(1)."[12]

C "[T]he subsection requires the Provincial or Local Division of the Supreme Court to be of the opinion 'that there is a reasonable prospect that the relevant law or provision will be held to be invalid.'"[13]

C "[T]he judge or judges referring to the Constitutional Court the issue of the constitutionality of an Act of Parliament are obliged to furnish written reasons why it is considered that:

(a) there is a reasonable prospect that the Act of Parliament in question will be held to be invalid; and

(b) the interest of justice requires this issue to be referred at this particular stage."[14]

C "It is only where it is necessary for the purpose of disposing of the appeal, or where it is in the interest of justice to do so, that the constitutional issue should be dealt with first by this Court. It will only be *necessary* for this to be done where the appeal cannot be disposed of without the constitutional issue being decided; and it will only be in the *interest of justice* for a constitutional issue to be decided first, where there are compelling reasons that this should be done.

This rule allows the law to develop incrementally. In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised."[15]

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12 Per Ackermann J in *Ferreira's* case, cited in n 2 above, at para 6.

13 Id at para 7.

14 Id at para 8.

15 Per Chaskalson P in *Zantsi's* case, cited in n 2 above, at paras 4 and 5 (footnotes omitted). Although dealing with the provisions of section 102(8) of the Constitution, the judgment was expressly directed at the principle that constitutional questions should be determined only as a last resort.

C "[C]onstitutional issues within the exclusive jurisdiction of the Constitutional Court will be raised formally in proceedings before the Supreme Court or other courts, and will only be referred to the Constitutional Court for its decision in circumstances where it would be appropriate to do so. It is in the first instance the responsibility of the Supreme Court to decide whether or not the circumstances are appropriate."[16]

C "[I]t is not ordinarily in the interest of justice for cases to be heard piecemeal, and ... as a general rule if it is possible to decide a case without deciding a constitutional issue this should be done."[17]

[8] The circumstances of the present case demonstrate the advisability of adhering to those principles. The record of the trial proceedings exceeds 300 pages; there were eight accused charged on fourteen counts and a number of state witnesses who testified to four distinct facets of the case. The trial court's judgment on the merits runs to over 40 pages and not only analyses the evidence in detail, but also deals with the legal issues raised by the provisions of section 37 of Act 62 of 1955 read with section 260(f) of Act 51 of 1977. The judgment contains fairly extensive factual and legal reasoning, the crucial elements of which were canvassed in the heads of argument filed by the parties in the WLD. But, because of the course adopted in the latter court, none of those issues was debated there and no views thereon were formulated - or at least expressed - by the learned judges *a quo*. Nor was any view expressed on the severability of the

16 Per Chaskalson P in *Brink*, cited in n 2 above, at para 4.

17 Id at para 9.

reverse onus provision from the remainder of section 37 and whether there was any prospect of the appeal being upheld if such provision were to be severed.

[9] In the result this Court is in the dark as to whether the learned judges endorsed the trial court's rejection of the appellant's evidence as false beyond reasonable doubt. Nor do we know if they considered whether, upon an endorsement of the trial court's credibility finding and its analysis of the probabilities, a conviction under section 37 was not warranted without applying the reverse onus. This was a crucial issue to resolve before a referral was warranted. It depended upon forming a view as to whether there was any reasonable prospect that the Constitutional Court, if it held the reverse onus provision to be unconstitutional, would find that such provision was not severable from the remainder of section 37. If there was no such prospect, a conviction under section 37, after severance, might well be justified, if the trial court's credibility finding and its analysis of the probabilities were accepted. Without deciding these issues it was not possible for the court *a quo* to determine whether the constitutionality of the reverse onus provision had any relevance at all to the conviction in question.[18] A further possibility to which the court *a quo* did not advert is whether there was scope for substituting on appeal a conviction of the common law crime of receiving stolen property knowing it to have been stolen, a verdict unaffected by the statutory reversal of onus giving rise to the constitutional issue referred to this Court. There is yet another

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[18] The reasoning of Howard JP in *Schinkel v Minister of Justice and Another* 1996(6) BCLR 872 (N) at 874F-G illustrates how, in practice, deferring the determination of constitutional issues until they prove decisive, promotes the interests of justice.

possibility not addressed by the court *a quo*. That is that the trial court should have found that the appellant had indeed discharged the onus cast on him by section 37.

[10] Obviously any of those conclusions would preclude a positive finding as to the first requirement for a referral under section 102(1) of the Constitution, namely, that resolution of the constitutional question may be decisive for the case. As Didcott J pointed out in *Luitingh*,[19] that requirement entails a finding that the constitutional ruling "may have a crucial bearing on the eventual outcome of the case as a whole or on any significant aspect of the way in which its remaining parts ought to be handled." The prospects of successfully upsetting the trial court's factual findings on appeal constituted an essential factor in evaluating the potential materiality of the incidence of the onus. Yet there is no indication on the record that the court *a quo* applied its mind to that factor and it is clear that the parties were afforded little if any opportunity to be heard on the point.

[11] There is, moreover, no indication that the desirability of interrupting the ordinary course of the criminal justice system was considered. Section 102(1) of the Constitution, as this Court has pointed out,[20] obliges a provincial or local division of the Supreme Court to consider under the rubric of interests of justice not only the whether but also the when of a referral. In a case such as this, where the appeal court's

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19 Cited in n 2 above, at paras 9 and 10.

20 See especially *Mhlungu* and *Brink* at the passages cited in n 2 above.

evaluation of the trial court's findings of fact may well dispose of the matter, there is no warrant for a referral at the outset. In the event of the incidence of the onus eventually proving decisive, and the constitutional validity of the provisions of section 37 of Act 62 of 1955 affecting the onus becoming crucial, a referral would be both necessary and timely. At this stage it is neither. Consequently the statement of the court *a quo*[21] as to the interest of justice cannot be supported. On the contrary, the interest of justice is not served by the interruption of a criminal appeal for the determination of a constitutional question which is not - and may well never become - necessary for the decision of the case.

[12] There are sound policy reasons why constitutional questions should not be anticipated. The judgment of Chaskalson P in *Zantsi's* case,[22] which all the members of this Court endorsed, was dedicated to a discussion and explanation of those reasons. The instant case illustrates the wisdom of adhering to the policy of deciding cases on constitutional grounds only if and when it is necessary to do so. The receipt of stolen goods is a vital link in the chain of gainful disposal of the spoils of criminality. It is, of course, also a powerful incentive to such criminality and statutory devices aimed at facilitating the successful apprehension and prosecution of receivers of stolen property, such as section 37 clearly is, cannot lightly be invalidated. Serious consideration will still have to be given whether such a provision, which is found to offend some or other

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21 See para 5 of the "referral" quoted in para 5 above.

22 See n 15 above.

provision of the Bill of Rights, is not saved either under section 33(1) of the Constitution or by severing the reverse onus provision from the rest of the section.

[13] A referral at the appropriate juncture, where the constitutional issue is vital to the determination of the case and has been thoroughly canvassed in one or more other courts, serves to define the constitutional issues and focus the development of our constitutional jurisprudence.[23] But a case such as this, where the parties did not raise the issue themselves and the constitutional point may well prove peripheral, is inappropriate for grappling with the difficult legal and policy issues involved in invalidating a long-standing weapon in society's war against crime.

[14] The court *a quo*, which has to deal daily with the hard realities of the criminal justice system, is better placed than this Court to evaluate not only the effect of the reversal of the onus under section 37 on the essential fairness of a criminal trial, but also of the likely consequences of striking that provision or the reverse onus it contains from the statute book. The considered views of experienced trial and appeal court judges on such matters are valuable when this Court has to perform the difficult balancing exercise demanded of it by section 33(1) of the Constitution.

[15] Nevertheless the Court intimated to counsel that it might be prepared to entertain

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[23] See *Bernstein's* case, cited in n 2 above, at para 2.

an application for determination of the constitutional question under section 100(2) of the Constitution, read with rule 17 of the Constitutional Court Rules. In the past the Court has on occasion acceded to such applications where there was a pressing public need to do so.[24] The hearing was adjourned to allow counsel to take instructions on the incidence of pending cases in which section 37 figured. In the event neither side was able to advance any cogent reason for affording direct access in this case and made no corresponding application. Nor, upon reflection, is it likely that such an application would have succeeded. Apart from the lack of any apparent urgency this Court would have had to decide the issue without the benefit of the wisdom of the court below. It has been said before[25] but needs to be restated that this Court is placed at a grave disadvantage if it is required to deal with difficult questions of law, constitutional or otherwise, and has to perform the balancing exercise demanded by section 33(1) of the Constitution virtually as a court of first instance. It certainly should not do so in circumstances in which a decision on the constitutional issue might not be decisive for the case.

[16] In drafting section 102(1) of the Constitution the lawgiver wisely made provision for the referring court to act judicially before ordering referral. Concomitantly rule 22(2) requires the judge or judges concerned to formulate both the issues on which a ruling is

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[24] See, eg, *Zuma's* case, cited in n 2 above, where the conduct of many part heard and pending criminal cases depended upon the validity of a reversal of the onus under section 217(1)(b) of the Criminal Procedure Act 51 of 1977.

[25] See, eg, *Luitingh's* case, cited in n 2 above, at para 6.

sought, and also the reason why the referral is considered to be in the interest of justice. Of course a court is entitled to rely - and often does - on the professional skill of those who have the privilege of appearing before it. That is an inherent component of our judicial system. But that is not what happened here. The possible unconstitutionality of the section formed part of neither party's case but was raised by the court *mero motu*. The formulation of the reasons for the referral of an issue to this Court is a judicial function to be exercised judicially. It cannot be delegated to counsel, as was done here.

[17] The case is remitted to the Witwatersrand Local Division of the Supreme Court to be dealt with in accordance with what is said above.

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