CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/97

MOOSA OSMAN — First Appellant
MOHAMED SHIRAZ OSMAN — Second Appellant

versus

THE ATTORNEY-GENERAL FOR THE TRANSVAAL — Respondent

Heard on : 7 May 1998

Decided on : 23 September 1998

JUDGMENT

MADALA J:

[1] This matter comes to us by way of appeal from the judgment and order of McCreath J, with Van Dyk J concurring, in the Transvaal High Court,[1] dismissing the appellants' application challenging the constitutionality of section 36 of the General Law Amendment Act 62 of 1955 (the Act).

[2] The appellants were charged in the Regional Court for the North West Province sitting at Rustenburg with a contravention of section 36 of the Act. It was alleged that they were found in possession of tyres, which were reasonably suspected to have been stolen. The appellants were allegedly unable to give a satisfactory account of such possession.

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1 The matter is reported as *Osman and Another v Attorney-General of Transvaal* 1998 (1) SACR 28 (T).

[3] At the commencement of the trial the appellants objected to the charge, contending that section 36 was in conflict with sections 25(2)(c) and 25(3)(c) of the interim Constitution.[2] Section 25(2)(c) affords an arrested person the right :

> "*(c)* not to be compelled to make a confession or admission which could be used in evidence against him or her . . . ."

In respect of trial rights, section 25(3) guarantees an accused person :

> "(3) . . . the right to a fair trial, which shall include the right-
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> . . . .
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> *(c)* to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial . . . ."

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[2] The Constitution of the Republic of South Africa Act 200 of 1993.

It was suggested during argument that the appellants might go the route of section 11 of the interim Constitution. Counsel for the appellants conceded however that this route was not open to the appellants as it had not been raised in the High Court, no notice had been given that section 11 would be raised and neither party was prepared for it. In the result, nothing further need be said about this line of attack.

[4] The appellants requested that the proceedings in the regional court be stayed to enable them to pursue their challenge. However, the need to refer the matter to this Court fell away when the appellants and the respondent agreed in terms of section 101(6) of the interim Constitution[3] to the jurisdiction of the Transvaal High Court.

[5] The High Court ruled against the appellants. It held that the impugned section was not in conflict with the constitutional provisions which enshrine the right to a fair trial and in particular it held that the section was not in conflict with the right of an accused person to remain silent at all stages of the trial and not to be compelled to testify or to become a witness against himself or herself. Following the issue of a positive certificate in terms of Constitutional Court Rule 18(e),

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[3] Section 101(6) reads as follows:

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

the appellants proceeded to seek and were granted leave to appeal by this Court.

[6] Although the alleged offence occurred during August 1993, the appellants were summoned to appear in court only on 30 August 1994. In the light of *Mhlungu*[4] and *Du Plessis v De Klerk*,[5] both parties correctly accepted that the appellants were entitled to rely on the provisions of section 25(3)(c) of the interim Constitution. The question before us is whether section 36 of the Act is inconsistent with those provisions.

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4 *S v Mhlungu and Others*, 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

5 *Du Plessis and Others v De Klerk and Another*, 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

[7] By the time the matter was heard in the High Court, the 1996 Constitution[6] had come into force. Item 17 of schedule 6 of the 1996 Constitution, dealing with transitional arrangements, reads as follows:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

Regarding this item, this Court in *S v Pennington and Another*[7] held:

> "The wording of this provision is different to that of the comparable transitional provision of the interim Constitution considered by this Court in *S v Mhlungu and Others*. It was correctly accepted by both counsel that in terms of item 17 of Schedule 6 the 1996 Constitution would not be applicable to pending proceedings unless it is 'in the interests of justice' that its provisions should be applied." [footnotes omitted]

From this it is quite apparent that the interim Constitution applies unless it can be shown that, in the interests of justice, the 1996 Constitution should displace it. No evidence was presented to this Court as to why the 'interests of justice' warranted the application of the 1996 Constitution in preference to the interim Constitution. In my view, to the extent that the court a quo entertained the possibility of the 1996 Constitution being applicable, it was incorrect. The validity of section 36 is to be evaluated only against the yardstick of

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6 The Constitution of the Republic of South Africa, 1996.

7 1997 (4) SA 1076(CC); 1997 (10) BCLR 1413 (CC) at para 29.

the interim Constitution.

[8] The impugned provision of the Act, section 36,[8] states:

> "Any person who is found in possession of any goods, other than stock or produce as defined in section *one* of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

The elements of the offence are that : (a) the accused person must actually be found in possession of goods; (b) a suspicion founded on reasonable grounds must exist in the mind of the finder (or possibly some other person) that the goods had been stolen; and (c) there must be an inability on the part of the person found in possession to give a satisfactory account of such possession. It is the last requirement - the inability to give a satisfactory explanation - which raises the challenge to section 36 in the case before us.

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[8] Section 36 can be traced back to the Stock Theft Act 26 of 1923, which has been replaced by the Stock Theft Act 57 of 1959. Section 36 almost replicates the wording of this latter Stock Theft Act. The only material difference between the two is that section 36 makes reference to goods, other than stock or produce as defined and exclusively dealt with in the Stock Theft Act.

[9] It was contended on behalf of the appellants that section 36 requires a person suspected of, detained or arrested for theft or for being in possession of stolen property to give an explanation which may amount to a confession of the crime charged or of another crime, and that such confession would at all relevant times be admissible against the accused. The accused, it was submitted, is put under pressure to react to a request to provide an explanation for the possession of goods and faces the danger, if not the probability, of a conviction should he or she fail to so react. This compulsion was said to violate the accused's rights contained in section 25(2)(c). The respondent's answer to this was that a suspect who is asked for an explanation is not "under arrest" and that section 25(2)(c) is accordingly not applicable.

[10] The right entrenched in section 25(2)(c) protects an arrested or detained person against incriminating himself or herself or against being compelled to make a confession or admission which could be used in evidence against him or her. The right is of particular significance having regard to our recent history when, during the apartheid era, the fundamental rights of many citizens were violated. It is in that context that the right of arrested persons was progressively eroded. The right was honoured more in the breach than in its observance, and our courts found themselves having to adjudicate an ever increasing number of cases where coerced confessions had become the order of the day. Police interrogations were often accompanied by physical brutality and by holding arrested persons in solitary confinement without access to the outside world - all in an effort to extract confessions from them. Our painful history should make us especially sensitive to unacceptable methods of extracting confessions. It is in the context of this history that the principle that the state should always prove its case and not rely on statements extracted from the accused by inhuman methods should be adhered to.

[11] Section 36 neither compels an arrested or detained person to do anything, nor does it constitute pressure being applied on such person to make a statement. It must be emphasised that such persons have a choice as to whether or not to provide an explanation for the possession of the goods. Arrested or detained persons suffer no prejudice at trial stage in the absence of an explanation, because they retain the express right to furnish an explanation at the trial if no explanation has previously been given. In the circumstances the attack on this ground must fail.[9]

[12] Section 25(3)(c) enshrines both the right to be presumed innocent and the right to remain silent during plea proceedings or trial. The rights contained in the subsection are both integral to the right to a fair trial. That these rights stand side by side in section 25(3)(c) is not accidental; the framers of the interim Constitution sought to demonstrate that these rights reinforce each other.

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9 In the present case we do not know from the record when the appellants were arrested, or indeed whether they were arrested at all. It is certain however, that the interim Constitution was not in force at the time the offence was committed. The appellants, nevertheless, rely on an alleged infringement of section 25(2)(c), contending that section 36 put them under pressure to answer questions concerning the provenance of the goods.

[13] This Court has dealt with the presumption of innocence at length in *Zuma*[10] and in *Bhulwana; Gwadiso*,[11] and consequently I do not propose to examine the concept in any further detail in this judgment. The principles that may be distilled from the jurisprudence set out in those cases which are of particular relevance to the case at hand are: (a) that the state bears the burden of proving each of the essential elements of the offence charged and there is no onus on the accused to disprove any of them; and (b) that the standard of proof is one of proof beyond reasonable doubt. The question that must be answered in this case is whether section 36 falls foul of these principles.

[14] Counsel for the appellant argued that the inability to give a satisfactory account is punishable in itself, and an accused runs the danger of conviction from his or her ineptitude in defending himself or herself. It was also submitted that an unwillingness to give an explanation would lead to a finding that the accused was unable to give an explanation if the other elements of the offence were established.

[15] As correctly pointed out in the court a quo, it is the inability and not the failure or unwillingness to give a satisfactory account of possession that constitutes the offence.[12] The point at which the account is given is of minor importance;[13] as long as the account is given to

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10 *S v Zuma and Others*, 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 SA.

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

12 *Osman* above n 1 at 30 G.

13 *R v May* 1924 OPD 274 at 281.

the satisfaction of the court at any time prior to or during the trial,[14] the accused is entitled to an acquittal.[15]

14 *R v Ismail and Another* 1958 (1) SA 206 (A) at 209 H - 210 B.

15 Id at 209 H - 210 B; *May* above n 13 at 281.

[16] The plain language of section 36 does not suggest that the inability to give a satisfactory account of possession is anything other than an element of the offence, and thus the burden of proving such element still rests squarely on the state throughout the trial.[16] The consequences of a failure to give evidence depend upon the strength of the state case. If the prosecution fails to discharge its onus, the accused is entitled to be acquitted. If the case is strong enough to warrant a conviction in the absence of any countervailing evidence by or on behalf of the accused, the accused cannot be heard to say that a conviction in such circumstances infringes her or his right to silence. At no point does the onus of proof shift, nor does the accused ever lose the protection of the presumption of innocence. Appellants' contention that the practical effect of section 36 is similar to that of a reverse onus provision is therefore without merit. In the light of the aforegoing analysis, I am of the view that section 36 does not violate the right to be presumed innocent.

[17] The right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute.[17] It is also 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 own trial. As Innes CJ put it in *R v Camane and Others*:[18]

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16 *S v Khumalo* 1964 (1) SA 498 (N) at 500 H - 501 E; *S v Kajee* 1965 (4) SA 274 (T) at 275 F - 276 D.

17 Section 196(1)(a) of the Criminal Procedure Act 51 of 1977.

18 1925 AD 570 at 575.

> "[I]t is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial. The principle comes to us through the English law, and its roots go far back in history."

[18] The right to silence has many facets, as pointed out by Lord Mustill, in *R v Director of Serious Fraud Office, Ex Parte Smith*[19] in the following helpful passage:

> "This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified: (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies. (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them. (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind. (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock. (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority. (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."

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19 [1993] AC 1 [HL] at 30 E - 31 A.

[19] McCreath J was of the view that the entrenchment of the right to silence in section 25(3)(c) should not detract from the meaning of the right as it has been understood hitherto. His reasoning stood on two legs. Firstly, that "[s]ection 36 does not . . . *per se* cast a duty on a person suspected of contravening the section to make any statement at all."[20] Secondly, that:[21]

> "[t]he circumstances of a particular case may of course be such that an explanation will be required of the person's possession of the goods in order to avoid a conviction under the section and that that explanation can only be given by that person himself or herself. Such person still has an election whether to give an explanation or to risk the consequences. The necessity to give a satisfactory account to avoid conviction is in that event not created by section 36 itself but by the circumstances of the particular case. Section 36 compels nothing. It is a misfortune inherent in the case. So also if the account required to be given involves an admission or confession to a crime on the part of that person. The situation is analogous to that which may arise in any criminal case at the end of the State case. Sufficient evidence may have been advanced by the prosecution at that stage to require a satisfactory explanation from the accused, which is reasonably possibly true, if he is to avoid conviction. His right to remain silent has not been impinged upon by any statutory provision in conflict with the Constitution. The circumstances of the case against him are such that he exercises his right to silence at his peril . . . "

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20 *Osman* above n 1 at 31 G - H; 168 D - G.

21 Id at 31 H - 32 A; 168 D - G.

[20] Similarly, in *S v Sidziya and Others*,[22] the court effectively held that the constitutional right to silence does not preclude the presiding officer from considering as part of the overall assessment of the case, the accused's silence in the face of a prima facie case established by the prosecution. As was so aptly put by Naidu AJ in *Sidziya*:[23]

> "The right entrenched in section 25(3)(c) means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inferences can be drawn against him."

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22 1995 (12) BCLR 1626 (Tk).

23 Id at 1648 I - 1649 B.

[21] This issue was also dealt with by the Botswana Court of Appeal in *Attorney General v Moagi*.[24] The court there had to interpret the meaning of section 10(7) of the Botswana Constitution which provides that "[n]o person who is tried for a criminal offence shall be compelled to give evidence at the trial." Maisels JP, delivering the majority judgment, held that where the prosecution had established a prima facie case, "[u]nless the accused's silence is reasonably explicable on other grounds, it may point to his guilt."[25]

[22] Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal,

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24 1981 *Botswana LR* 1. The right to silence can also be read into section 18(8) of the Zimbabwe Constitution which provides:

> "No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

However, this has to be read in conjunction with section 18(13)(e) of that same Constitution which provides that:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of . . . subsection (8) to the extent that the law in question authorizes a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person."

25 Id at 8.

the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice. The circumstances in which it would be constitutionally permissible for a court to draw an adverse inference from the failure of an accused person to testify personally is not a matter which we are called upon to decide in this case and therefore I expressly refrain from doing so.

[23] Where the prosecution has proved a reasonable suspicion that the goods are stolen, that they were found in possession of the accused, and that the accused has not satisfactorily accounted for such possession or led evidence to the contrary, this will ordinarily establish a prima facie case of a contravention of the section. Absent any evidence to the contrary, it may be possible to infer that the accused is unable to give a satisfactory account. An accused, when faced with the assembled evidence of his or her possession may find it wise to furnish a defence with or without his or her own testimony at any stage of the trial, but that is a practical impetus and not one imposed by the law. The election to testify or to lead evidence remains that of the accused. The impugned section imposes no legal compulsion on the accused. The choice to testify or not is left entirely to the accused. He or she need not testify but may call the evidence of other witnesses in his or her defence. The accused may be content to defend himself or herself by exploration of some technical defect within the indictment alone. The choice remains that of the accused. The important point is that the choice cannot be forced upon him or her.

[24] I come to the conclusion that the provisions of section 36 do not violate any of the rights

contained in section 25(2)(c) and 25(3)(c) of the interim Constitution. In the result the justification enquiry is not reached and the appeal fails.

[25] This matter was argued before ten judges of this Court, but at the time of the preparation of this judgment, my brother Didcott J had taken ill and was unfortunately unable to take part in further deliberations on the case. He has thus not been in a position to express his views, one way or the other, with regard to the judgment. The other judges concur in the judgment and order. The question that arises is whether, in the absence of Didcott J, the Court is properly constituted to deliver judgment.

[26] In terms of section 167(2) of the 1996 Constitution, a matter before the Court must be heard by "at least eight judges". In *Green v Fitzgerald and Others*,[26] an appeal had been heard by a bare quorum. After the case had been argued and after the Court had intimated that it required further argument on an exception, one of the members died, leaving his final conclusions unformulated. Innes CJ held that, as the remaining members of the Court did not constitute a quorum, it was not competent for the remaining members of the Court to deal further with the matter, save after fresh argument before a quorum. Innes CJ's reasoning was reaffirmed by the Appellate Division in *R v Price*.[27] In the present matter, the judges who remain constitute a quorum. I am satisfied that it is competent for the available judges to dispose of the appeal.

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26 1914 AD 652.

27 1955 (1) SA 219 (A) at 223.

[27] The appeal is dismissed.

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

MADALA J

For the Appellants: Mr E Bertelsmann SC and Mr K T Jordt, instructed by Werner Moolman

For the Respondents: Advocate J A van S d'Oliviera SC, Attorney-General:Transvaal and Advocate E Leonard