

Record

CCT 11/95

Reportable

IN THE SUPREME COURT OF SOUTH AFRICA  
CAPE OF GOOD HOPE PROVINCIAL DIVISION

In the matter between:

THE STATE

VS

GODZANA BHULWANA

SUPREME COURT NUMBER : 7090/94  
CASE NUMBER : C1159/94  
MAGISTRATE'S SERIAL NUMBER : 209/94

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REVIEW JUDGMENT DELIVERED AT CAPE TOWN ON 19 OCTOBER 1994.

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MARAIS, J:

This matter came before me on automatic review. The accused was charged in the main count with contravening section 5(b) of Act 140 of 1992 (the Act) in that he dealt in 850 grams of dagga. He was charged in the alternative with contravening section 4(b) of the Act by being in possession of the same quantity of dagga. In the result, he was convicted upon the main

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count and was sentenced to a fine with an alternative of imprisonment, and a further suspended term of imprisonment. He has paid his fine and is not in custody.

The evidence before the court would certainly not have sufficed to prove beyond reasonable doubt that the accused intended to deal in the dagga which was found in his possession and, but for the invocation by the State of, and reliance by the court upon, the presumption contained in section 21(1)(a)(i) of the Act, he could not properly have been convicted of dealing in dagga. His guilt upon the alternative count was plainly established. This is consequently a case in which the validity of that presumption is critical to the correctness of his conviction upon the main count. Its validity depends upon whether or not it is *intra vires* Act 200 of 1993 (the Constitution). There appear to me to be good grounds for concluding that it is not.

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Section 21(1)(a)(i) of the Act reads:

"Presumption relating to dealing in drugs - (1)

If in the prosecution of any person for an offence referred to -

(a) in section 13(f) it is proved that the accused -

(i) was found in possession of dagga exceeding 115 grams;

it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance:

The plain effect of the presumption is to burden the accused with the onus of establishing on a balance of probability that he is not guilty of the offence of dealing, once it has been proved by the State that he was in possession of more than 115 grams of dagga. That is in direct conflict with the accused's entrenched right "to be presumed innocent" of the crime of

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dealing in dagga.

Section 25(3)(c) of the Constitution reads:

"Every accused person shall have the right to a fair trial, which shall include the right -

(c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;"

The only remaining question is whether the limitation upon the presumption of innocence which the presumption in section 21(1)(a)(i) of the Act represents, is justifiable in terms of section 33(1) of the Constitution. Section 33(1) reads:

"The rights entrenched in this Chapter may be limited by laws of general application, provided that such limitation -

(a) shall be permissible only to the extent that it is -

(i) reasonable; and

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(ii) justifiable in an open and  
democratic society based on  
freedom and equality;  
and

(b) shall not negate the essential  
content of the right in question,  
and provided further that any  
limitation to -

(aa) a right entrenched in section 10,  
11, 12, 14(1), 21, 25 or 30(1)(d)  
or (e) or (2); or

(bb) a right entrenched in section 15, 16,  
17, 18, 23 or 24, in so far as such  
right relates to free and fair  
political activity, shall, in addition  
to being reasonable as required in  
paragraph (a)(i), also be necessary."

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Because the presumption of innocence is a right entrenched in section 25, in order to be valid, any limitation of that right would have to be shown to be, *inter alia*, both reasonable and necessary, and would also have to be shown not to negate the essential content of that right. In my view, the presumption in section 21(1)(a)(i) is neither reasonable nor necessary, and does negate the essential content of the entrenched right. Firstly, the presumption is triggered by the possession of a relatively small quantity of dagga. I consider the specified quantity to be unnecessarily and unreasonably small. It is a quantity which it is reasonably conceivable an accused may have acquired for his own use. Secondly, I do not regard it as necessary or reasonable to burden the accused with a burden of proof to be discharged on a balance of probability. It is inherent in so doing that cases will arise (such as the instant case) where the probabilities are evenly balanced and, as a consequence, the accused will have to be convicted of dealing, notwithstanding the existence of real doubt as to

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whether he was in fact dealing. That amounts to a form of artificially created constructive guilt which may have no foundation in fact. Making full allowance for society's understandable concern about the traffic in drugs in South Africa and its desire to curb it, that is something which I am unable to regard as either reasonable or necessary.

Moreover, I consider that such a presumption negates the essential content of the entrenched right to be presumed innocent. It is a presumption which entirely relieves the State of its constitutional duty to prove that the accused is not innocent, but guilty, of the crime with which he is charged, and transfers to the accused the burden of affirmatively proving his innocence. That is manifestly a negation of the essential content of the entrenched right. The fact that the State has first to prove beyond reasonable doubt that an accused was found to be in possession of dagga exceeding 115 grams, before the transference of the onus of proof occurs, is no answer. The

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critical point is that on proof by the State of something less than his guilt, the presumption of innocence is thrown to the winds and the accused is burdened with having to prove his innocence. That is plainly an absolute negation of the right to be presumed innocent of the particular crime which is alleged to have been committed. It may be that a less Draconian presumption might pass muster, for example, one that provides that where an accused is found in possession of a larger quantity of dagga than would appear to be reasonably required for his own use, that shall amount to *prima facie* proof of dealing. There is room for argument as to how large the specified quantity of dagga should be, but such a provision would avoid burdening the accused with a fully fledged onus of proof, and would leave the overall onus of proof of dealing where it belongs, namely, upon the State, thus respecting the presumption of innocence. If an accused found in possession of such a quantity of dagga were to give evidence that it was not intended for sale, but for his own use, and the court were to find itself unable to reject his version as not being

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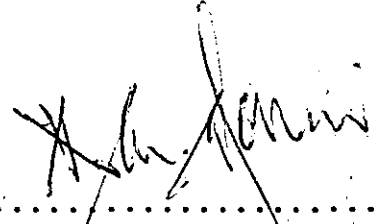


reasonably possibly true, his acquittal on the charge of dealing would result. However, I am not called upon to formulate what presumption might be permissible, nor to consider now whether or not an accused's entrenched right to remain silent, and not to testify, is inimical to the constitutional validity of presumptions which, while not negating the presumption of innocence, impel an accused to break his silence or give evidence, if he is to escape conviction. *Prima facie*, I do not think that it is. I have mentioned this particular example merely by way of illustration and to contrast it with a presumption of the kind found in section 21(1)(a)(i).

Until now, I have found it possible to confirm upon automatic review convictions for dealing in dagga without feeling the need to refer the question of the validity of this presumption to the Constitutional Court because they have been either cases in which the State had specifically declined to rely upon the presumption, or cases in which reliance upon the

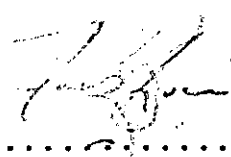
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presumption was otiose because of the huge amounts of dagga involved. However, this particular case obliges me to refer the question of the constitutional validity of the presumption in section 21(1)(a)(i()) of Act 140 of 1992 to the Constitutional Court for its consideration. It is so ordered. If that Court concludes that the presumption is indeed invalid, the conviction will require to be altered to one of unlawful possession and an appropriate adjustment of the sentence will need to be made.



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R M MARAIS

BRAND, J: I agree.



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F D J BRAND