IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter of :

CASE NO : CCT/5/94

ZUMA AND TWO OTHERS Applicants

and

THE STATE Respondent

HEARD ON **23 February 1995**

DELIVERED ON **5 April 1995**

JUDGMENT

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[1] **KENTRIDGE AJ:** This case arises from a criminal trial before Hugo J in the Natal Provincial Division. In this

Court it was heard together with the case of *Mhlungu and Four Others v The State* (Case No CCT/25/94) which also arose from a criminal trial in the Natal Provincial Division. Each of them has come to this Court by way of a referral by the judge presiding over the trial. In each case the judge referred to this Court for decision the question whether section 217(1)(b)(ii) of the Criminal Procedure Act No 51 of 1977 is inconsistent with the provisions of the Republic of South Africa Constitution, 1993. If we so find it will be our duty under section 98(5) of the Constitution to declare the provision invalid. In the *Mhlungu* case the judge also referred to us the question whether, having regard to section 241(8) of the Constitution, the provisions of Chapter 3 of the Constitution apply to the proceedings before him. Section 241(8) raises important issues which do not directly touch the *Zuma* case. Consequently, we propose to give judgment at this stage only in the *Zuma* case, and to deal with the *Mhlungu* case in due course in a separate judgment.

[2] In this case (as in the *Mhlungu* case) this Court itself has raised the issue whether the referral was competent. It is necessary to set out in some detail the circumstances of the criminal trial which led to the referral to this Court. Before doing so, however, I must outline the history and effect of the challenged sub-paragraph of section 217 of

the Criminal Procedure Act.

[3] The section deals with the admissibility in evidence of a confession made by an accused person before trial. Sub-section (1) and proviso (a) thereto read as follows -

> "(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence :
> Provided -
>
> (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice;..."

It will be seen that this sub-section requires the prosecution, if it wishes to put the confession in evidence, to prove that it was freely and voluntarily made, and was not unduly influenced. This means, at the least, proof that it was not induced by violence, or by threats or promises made by a person in authority. *R v Barlin* 1926 AD 459, 462; *R v Nhleko* 1960(4) SA 712(A); *S v Mpetha and others (2)* 1983(1) SA 576(C). This rule, which reflects a long-standing principle of the English law of criminal procedure and evidence, was embodied in the Evidence Ordinance of the Cape Colony in 1830. The rationale of the rule excluding involuntary confessions (or admissions) has been much discussed. See Hoffmann and Zeffertt, *South*

African Law of Evidence, 4th ed. pp 205, 216-7 ; *Cross on Evidence*, 6th ed pp 601-3. I shall return in due course to the historical development of the rule. At this stage it is sufficient to say that before the Union of the four provinces in 1910 it was well established in all parts of South Africa that it was for the prosecution to prove that any confession on which it wished to rely was freely and voluntarily made.

[4] Proviso (a), on the other hand, has no counterpart in English law. It was introduced into South African law by the Criminal Procedure and Evidence Act, 1917. Its general effect is that confessions made to members of the police force who are not justices of the peace are inadmissible. An accused person who has confessed, or expressed a wish to confess, to a police officer who is not a justice of the peace should be taken to a magistrate or justice of the peace who may take down the confession in writing. Even where the police officer is a justice of the peace the accused person may be taken to a magistrate who may take down the confession in writing. The magistrate ought, of course, to be satisfied that the confession is freely and voluntarily made, and should record that fact in the document containing the confession. It is at that stage that proviso (b) to section 217(1) becomes relevant. That

proviso reads -

"Provided-

...

"(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question-

(i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto.

It is sub-paragraph (ii) of this proviso that is under attack in the present case. It was introduced into the criminal procedure code in 1977. In the circumstances set out in the sub-paragraph it places on the accused the burden of proving that the confession recorded by the magistrate was <u>not</u> free and voluntary. The words "unless the contrary is proved" place an onus on the accused which must be discharged on a balance of probabilities. He does not discharge the onus merely by raising a doubt. If, at the end of the *voir dire* (or trial-within-a-trial) the probabilities are evenly balanced the presumption prevails. See *Ex parte Minister of Justice: in re R v Bolon* 1941 AD 345, 360-1; *S v Nene and Others* (2) 1979(2) SA 521(D); *S*

v Mkanzi and Another 1979(2) SA 757(T); *S v Mphahlele and Another* 1982(4) SA 505(A) 512.

[5] I add, by way of completeness, that sub-section (2) of section 217 provides that the prosecution may lead evidence in rebuttal of evidence advanced by an accused in rebuttal of the presumption under proviso (b).

[6] In the case before us the prosecution tendered confessions which had been made by two of the accused before a magistrate and reduced to writing, and invoked the presumption in proviso (b).

[7] The accused were indicted on two counts of murder and one of robbery. At their trial before Hugo J and assessors they pleaded not guilty. Two of the accused had made statements before a magistrate which counsel for the state tendered as admissible confessions. Admissibility was contested by counsel for the accused and a trial-within-a-trial ensued. At the outset defence counsel raised the issue of the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act, and counsel for both the defence and the prosecution consented (in terms of section 101(6) of the Constitution) to the trial judge's deciding that issue. The trial-within-a-trial nonetheless

proceeded. The accused testified that they had made their statements by reason of assaults on them by the police and the threat of further assaults. The policemen concerned denied this, but two women called as witnesses by the defence said that they had seen the police assaulting the accused. At the end of the evidence the court concluded unanimously that while they were not satisfied beyond a reasonable doubt that the statements had been freely and voluntarily made, the accused had failed to discharge the onus upon them under proviso (b) on a balance of probabilities. In his judgment, given on 10th August, 1994 and reported as *S v Zuma and Others* 1995(1) BCLR 49 (N), Hugo J said -

> "Had we been convinced that section 217(1)(b) of the Criminal Procedure Act was still valid and constitutional we would therefore have had little hesitation in accepting that the accused had not discharged the onus placed upon them by that section. The constitutionality therefore of section 217(1)(b) of the Criminal Procedure Act is therefore crucial to the decision of this case."

Later in his judgment he said -

> "It is quite clear from what I have said that the site of the onus will be decisive in this case, at least in so far as the admissibility of this evidence is concerned. If it is held by the constitutional court that section 217(1)(b)(ii) is unconstitutional it will lead to the most unfortunate result that two persons who have in effect admitted under oath in this Court that they indeed committed these offences may be acquitted but that may well be the effect of the constitution or the provisions of the constitution upon matters of this nature. It is also the effect of the hearing of matters of this nature in a separate trial-within-a-trial, the evidence of which is not admissible in deciding the merits of the conviction."

The reference to the admissions of the two accused that they had committed the offences arose from the evidence which they had given in the course of the trial-within-a-trial. As Hugo J fully appreciated, that evidence was given only in the context of the trial-within-a-trial, where the only issue was admissibility. To that issue the truth of the confession was irrelevant. Thus, in *S v Radebe and Another*, 1968(4) SA 410(A) 419 Ogilvie Thompson J A said-

> "It not infrequently occurs that, although the presiding Judge may think that the contents of a tendered confession are true, the circumstances whereunder the confession was made compel its exclusion".

See also *S v Gaba* 1985(4) SA 734(A) 749; *S v Talane* 1986(3) SA 196(A) 205; *S v de Vries* 1989(1) SA 228(A), 233-4.

[8] In the event, notwithstanding the consent given by the parties under section 101(6) Hugo J refrained from giving a decision on the validity of the proviso, but referred the question to this court, and adjourned the trial *sine die.*

[9] The question of the competence of Hugo J's referral arises, and has been argued before us by counsel for the accused and for the State. In addition we have received a Notice of Motion under the hand of Mr. T P McNally SC, Attorney-General for Natal, seeking direct access to the Court in

terms of section 100(2) of the Constitution on the grounds that it is in the interests of justice that a binding decision be given as soon as possible on the validity of section 217(1)(b)(ii).

[10] By reason of the consent of the parties under section 101(6) the issue of the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act no longer remained within the exclusive jurisdiction of this Court, and fell within the jurisdiction of Hugo J. For reasons which will be given in detail in the *Mhlungu* case the referral by Hugo J was wholly incompetent. That was indeed the submission of the State in its written argument, and the point was rightly conceded by counsel for the accused. Even if a rapid resort to this Court were convenient that would not relieve the judge from making his own decision on a constitutional issue within his jurisdiction. The jurisdiction conferred on judges of the Provincial and Local Divisions of the Supreme Court under section 101(3) is not an optional jurisdiction. The jurisdiction was conferred in order to be exercised. It was in these circumstances that the Attorney-General of Natal applied under section 100(2) of the Constitution for direct access to the Court. Section 100(2) reads -

> "(2) The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any

matter over which it has jurisdiction."

Rule 17, subrules (1) and (2) of the Rules of this Court provide-

> (1) The Court shall allow direct access in terms of section 100(2) of the Constitution in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.
>
> (2) The special procedure referred to in subrule (1) may be sanctioned by the Court on application made to it in terms of these rules.

[11] The Attorney-General of Natal submits in his supporting affidavit that if the matter is sent back to the trial court without our deciding the issue it would have to be referred again to this Court at the end of the trial. More important, he informs us that prevailing uncertainty as to the constitutionality of section 217(1)(b)(ii) has resulted in inconsistency in practice in Natal and elsewhere in the Republic. That uncertainty would remain unresolved until a suitable case came properly before this Court. We agree with the Attorney-General of Natal and with Mr d'Oliviera SC, the Attorney-General of the Transvaal, who appeared for the State that this state of affairs must seriously prejudice the general administration of justice as well as the interests of the numerous accused persons affected. The admissibility of confessions is a question which arises daily in our criminal courts and prolonged uncertainty would be quite unacceptable. As appears from the terms of

Rule 17, direct access is contemplated in only the most exceptional cases, and it is certainly not intended to be used to legitimate an incompetent reference. But in the special circumstances set out in the affidavit the application under rule 17 was fully justified. Mr. McNally's application is accordingly granted, so that the question of the validity of section 217(1)(b)(ii) is properly before this Court.

[12] Counsel for the accused has attacked section 217(1)(b)(ii) as being in conflict with section 25 of the Constitution. The particular provisions of section 25 relied on individually or cumulatively are the following -

> "25 (2) Every person arrested for the alleged commission of an offence shall ... have the right -
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> (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
>
> ...
>
> (c) not to be compelled to make a confession or admission which could be used in evidence against him or her ; and
>
> ...
>
> (3) 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 ;
>
> (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;

The concepts embodied in these provisions are by no means

an entirely new departure in South African criminal procedure. The presumption of innocence, the right of silence and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision. The resulting body of common law and statute law forms part of the background to section 25. The provisions of section 25 are more specific than many of the other provisions of Chapter 3. They do nonetheless give rise to problems of interpretation.

[13] The principles upon which a constitutional bill of fundamental rights should be interpreted have been the subject of numerous judicial *dicta*, in jurisdictions abroad and in Southern Africa. Many of these principles have been re-stated and applied in the judgments of Provincial and Local Divisions interpreting our own Constitution, and in judgments of other Southern African courts. The judgment of Friedman J in *Nyamakazi v President of Bophututswana*, 1994(1) BCLR 92(B) is a veritable thesaurus of international authority. *Khala v The Minister of Safety & Security* 1994(2) BCLR 89(W), 92-4; 1994 (4) SA 218(W), 222-4 per Myburgh J also contains a useful collection of citations. It is not necessary to traverse all the

relevant dicta but some of them bear repeating.

[14] The first of these is the much-quoted passage from the judgment of Lord Wilberforce in the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), 328-9. After referring to the influence of certain international conventions on the constitutions of former colonies of the British Commonwealth, he said that these called for

> "a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to,"

and that the constitution called for "principles of interpretation of its own". He went on to say -

> "This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences."

This judgment was cited with approval by the Appellate Division in *S v Marwane* 1982(3) SA 717(A), 748-9. See also the judgment of the Full Bench of the Supreme Court of Namibia in *Minister of Defence, Namibia v Mwandinghi* 1992(2) SA 355 (Nm SC), 362.

[15] In *R v Big M Drug Mart Ltd* (1985)18 DLR (4th) 321,395-6, Dickson J (later Chief Justice of Canada) said, with reference to the Canadian Charter of Rights -

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee ; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be .... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection."

Both Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions and usages of the country concerned, if the purposes of its constitution are be fully understood. This must be right. I may nonetheless be permitted to refer to what I said in another court of another constitution albeit in a dissenting judgment -

> "Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.

Attorney-General v Moagi 1982(2) Botswana LR 124,184

[16] That *caveat* is of particular importance in interpreting section 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the

sub-section. 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. In *S v Rudman and Another; S v Mthwana* 1992(1) SA 343(A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire

> "whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted".

A court of appeal, it was said, (at 377)

> "does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration'."

That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.

[17] I must also refer to *Qozoleni v Minister of Law and Order* 1994(1) BCLR 75(E); 1994(3) SA 625(E). The judgment of Froneman J. contains much of value in its approach to constitutional interpretation. The learned judge says (at

81) that the previous constitutional system of this country was the fundamental "mischief" to be remedied by the new Constitution. He says (at 80) that because the Constitution is the supreme law against which all law is to be tested,

> "it must be examined with a view to extracting from it those principles or values against which such law ... can be measured."

He adds on the same page that the Constitution must be interpreted so as "to give clear expression to the values it seeks to nurture for a future South Africa." This is undoubtedly true. South African Courts are indeed enjoined by section 35 of the Constitution to interpret Chapter 3 so as "to promote the values which underlie an open and democratic society based on freedom and equality", and, where applicable, to have regard to relevant public international law. That section also permits our courts to have regard to comparable foreign case law.

I am, however, sure that Froneman J, in his reference to the fundamental "mischief" to be remedied, did not intend to say that all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned judge intend to suggest that we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a

written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

[18] We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. If I may again quote ***S v Moagi***, ***supra***, at 184, I would say that a constitution

> "embodying fundamental rights should as far as its language permits be given a broad construction"
>
> (My emphasis),

[19] As pointed out above, section 217(1)(b)(ii) creates a legal presumption, with the legal burden of rebuttal on the accused - what has been called a "reverse onus". The legitimacy of such provisions has been considered by courts as varied as the United States Supreme Court, The Canadian Supreme Court, the Privy Council and the European Court of Human Rights (and doubtless others) in the light of

provisions entrenching, in varying language, the presumption of innocence, the right to silence and the privilege against self-incrimination - a privilege not expressly referred to in section 25. The case law of these courts - which are undoubtedly courts of open and democratic societies - indicates that reverse onus provisions are by no means uncommon and are not necessarily unconstitutional. Reverse onus provisions in our own statute law are also not uncommon. To go no further than the Criminal Procedure Act one finds, for example, the presumptions arising from entries in marriage registers on charges of bigamy (section 237), the presumption of knowledge of falsity arising from proof of a factually false representation (section 245) and the presumption of having failed to pay tax arising merely from an allegation in a charge sheet (section 249). Foreign courts have grappled with the problem of reconciling presumptions reversing the onus of proof with the constitutional presumption of innocence. The different solutions which they have suggested are illuminating.

[20] The courts of the United States have over many years attempted to enunciate a governing principle. *Tot v The United States* 319 US 463 (1943) concerned a federal statute making it an offence for a person convicted of violence to

receive any firearm or ammunition which had been shipped or transported in interstate or foreign commerce. The statute provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped transported or received as the case may be, by such person ... in violation of this Act". The Supreme Court held that while Congress and state legislatures had "power to prescribe what evidence is to be received in the courts of the United States", the due process clauses of the Constitution

> "set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." (per Roberts J at 467)

The test of the validity of such a presumption, the Court said, was that there be a

> "rational connection between the facts proved and the fact presumed ... . But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of the courts. (467-8)

On this test the presumption was struck down. Twenty-five years later a somewhat stricter test was formulated. In *Leary v United States* 395 US 6(1969) the Supreme Court had to consider a statute under which possession of marihuana was deemed to be sufficient evidence of the offence of illegal importation, unless the defendant explained his possession to the satisfaction of the jury. The presumption was held to be a denial of due process of law.

Having considered *Tot* and some later cases, Harlan J, speaking for the Court, said that

> "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (page 36)

(Harlan J added the rider that in this assessment the Congressional determination favouring the presumption must weigh heavily.)

[21] "Rational connection" is a useful screening test, but not a conclusive one. This was acknowledged in *County Court of Ulster County, New York, et al v Allen et al* 442 US 140 (1979). In relation to a mandatory (i.e. legal) presumption Stevens J giving judgment for the majority of the Supreme Court, said, at 167, that

> "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."

The "rational connection" test has been considered in the substantial jurisprudence which the Canadian courts have developed in construing their Charter of Rights. The Canadian cases on reverse onus provisions seem to me to be particularly helpful, not only because of their persuasive reasoning, but because section 1 of the Charter has a limitation clause analogous to section 33 of the South African Constitution. This calls for a "two-stage" approach. First, has there been a contravention of a

guaranteed right? If so, is it justified under the limitation clause? The single stage approach (as in the US Constitution or the Hong Kong Bill of Rights) may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage. In *Attorney-General of Hong Kong v Lee Kwong-kut*, [1993] AC 951 (PC), an appeal to the Privy Council from Hong Kong, Lord Woolf, while noting that the results of the two approaches often tend to be similar, observed (at 967 H) that the two-stage approach, in laying down specific criteria of justification, had important practical consequences. See also Cachalia & others, *Fundamental Rights in the New Constitution*, pp5-7.

[22] There are numerous Canadian cases dealing with the constitutionality of reverse onus provisions. I shall refer only to three of them. In *R v Oakes* (1986) 26 DLR (4th) 200 the Supreme Court of Canada had before it an Act of Parliament which provided that if a person was proved to be in unlawful possession of a narcotic he was presumed to be in possession of it for the purposes of trafficking (a more serious offence) unless he proved the contrary. This proof, the Court held, had to be on a balance of

probabilities. This presumption was held to be inconsistent with the presumption of innocence guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms. Dickson CJC said at 212-3 -

> "The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice."

And, at 222,

> "If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."

He held further that the "rational connection" test, while possibly useful at the stage when the State sought to justify an infringement of a guaranteed right in terms of section 1 of the Charter, was not in itself an adequate protection for the constitutional presumption of innocence.

> "A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence."

[23] ***R v Whyte*** (1988) 51 DLR (4^{th}) 481 concerned a statute creating the offence of having care or control of a motor

vehicle while one's ability to drive was impaired by alcohol. Under the statute, upon proof that the accused occupied the driver's seat he was deemed to have the care and control of the vehicle unless he established that he did not enter the vehicle for the purpose of setting it in motion. This presumption, too, was held to be a violation of the right to the presumption of innocence. The Supreme Court, again speaking through Dickson CJC, held that it was irrelevant that the presumption did not relate to an "essential element" in the offence (cf ***R v Oakes, supra*** at 222). The Chief Justice, at 493, said -

> "In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, s. 237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from ***Oakes*** quoted above, with its reference to an "essential element", to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike ***Oakes*** where the accused was required to disprove an element of the offence.
>
> The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

[24] In 1992, in ***R v Downey*** 90 DLR (4^{th}) 449, the Supreme Court

of Canada dealt with a statutory presumption that a person who lives with or is habitually in the company of prostitutes, is, in the absence of evidence to the contrary, committing the offence of "living on the avails [i.e. proceeds] of another person's prostitution". This presumption was also held to infringe the presumption of innocence (although it was held by a majority to be in all the circumstances a justifiable infringement.) The judgment of Cory J at 456 contains a useful analysis of different types of presumption. The type with which we are concerned in section 217(1)(b)(ii) is described as a legal presumption "where the presumed fact must be disproved on a balance of probabilities instead of by the mere raising of evidence to the contrary". This is what the Canadian courts refer to as a "reverse onus" clause, as I do in this judgment.

[25] Cory J at 461 summarised the principles derived from the authorities in seven propositions. I shall quote the first three-

> "I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
>
> II. If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.
>
> III. Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the

offence."

Section 11(d) of the Canadian Charter provides that any person charged with an offence has the right

"(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

This bears a close relationship to section 25(3)(a) and (c) of our Constitution. In both Canada and South Africa the presumption of innocence is derived from the centuries-old principle of English law, forcefully restated by Viscount Sankey in his celebrated speech in *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL), 481, that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt. Accordingly, I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court in particular the first two principles stated by Cory J, *supra.*

[26] Does the application of these principles in itself demonstrate a violation of the presumption of innocence in section 217(1)(b)(ii)? Mr d'Oliviera for the State contended that it did not. The admission of a confession, he said, did not conclude the prosecution in favour of the State. Thus in the present case further evidence might entitle the trial court in this case to review its finding

that the accused had not discharged the onus on them. There might also be evidence which would lead a court to find that a confession, although admissible, was untrue. Moreover, the presumption did not relate to any element of the offence charged, but merely to the voluntary character of the confession. This was no more than a question of admissibility of evidence.

[27] These arguments were persuasively presented, but in my view they cannot be accepted. A confession by definition is an admission of all the elements of the offence charged, a full acknowledgment of guilt. *R v Becker* 1929 AD 167. No doubt in some cases additional evidence (for example, that the confession is false) will lead to an acquittal notwithstanding the admission of the confession. But the validity of the presumption is not to be tested on a case by case basis. In the absence of other evidence the presumption, unrebutted, stands throughout the trial. It could therefore happen that, given proof *aliunde* of the crime itself (section 209 of the Criminal Procedure Act), a conviction could follow from an admissible confession, notwithstanding the court's reasonable doubt that it was freely and voluntarily made. The practical effect of the presumption is that the accused may be required to prove a fact on the balance of probabilities in order to avoid

conviction. *Cf. R v Whyte, supra, loc. cit. (*last paragraph).

[28] In the course of argument I asked Mr d'Oliviera whether, if there were no further evidence, the trial court in this case could properly give expression to its doubts as to the voluntariness of the confession by acquitting the accused. Mr d'Oliviera submitted that it could do so - as I understood him, by the judge's exercising a judicial discretion to reject admissible but unfairly prejudicial evidence. The authority for the existence of such a discretion is conflicting. See *R v Roets and Another* 1954(3) SA 512(A), 520; *S v Mkanzi and Another* 1979(2) SA 757(T); *S v Mphahlele supra*. Even if there is such a discretion and even if it could be exercised so as to overcome a statutory presumption (surely a doubtful proposition)[1] that gives rise to no more than a possibility of an acquittal; the possibility of a conviction remains. The presumption of innocence cannot depend on the exercise of discretion.

[29] The suggestion that the common law rule placing the onus of

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[1] In England there appears to be a judicial discretion to exclude an admissible confession, for example because the methods used to obtain it, while not unlawful, were unfair. *R v Sang* [1980] A.C. 402 (HL), 437.

proving voluntariness on the prosecution is merely a rule of evidence and can therefore be freely altered by the legislature deserves and requires fuller consideration. In part it is answered by the quotation from *Tot v United States of America, supra.* In *Tregea and Another v Godart and Another* 1939 AD 16, 32 Stratford CJ said that if a rebuttable presumption of law shifts the burden of proof it is not a mere rule of evidence but a matter of substantive law. But even if the common law rule governing the admissibility of confessions is a rule of evidence, it is, as I shall show, a rule which lies at the heart of important rights embodied in section 25, including the right to remain silent after arrest, the right not be compelled to make a confession which can be used in evidence, the right to be presumed innocent and the right not to be a compellable witness against oneself.

[30] The rule itself derives from more than 300 years of English legal history. By the latter half of the 18th century the rule was clearly stated in its modern form-

> "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it" -
>
> *R v Warwickshall (1783) 1* Leach, 263.

In I*brahim v R [1914] AC 599 (PC)* at 610 Lord Sumner said that this was a rule of policy. It would appear that the

rule derived from a determination to eradicate the oppressive and often barbaric methods of interrogation employed by the Star Chamber in 17th century England to extract confessions from accused persons. From the abhorrence of those methods there developed the privilege against self-incrimination, and the right of silence, one aspect of which is the exclusion of compelled confessions, with the onus placed on the prosecution to prove beyond reasonable doubt that any confession relied on was voluntary. In *Smith v Director of Serious Fraud Office* [1993] AC 1 (HL) Lord Mustill distinguished the "disparate group of immunities" denoted by the expression "the right to silence". At 32 Lord Mustill observed that the law relating to proof of the voluntariness of confessions was particularly important at a time when an accused was not entitled to give evidence on his own behalf - a disability removed in England only in 1898. Nonetheless, Lord Mustill said,

> "Even now, nearly hundred years after that disability has been removed, the imprint of the old law is still clearly to be seen."

It is indeed.

[31] In *Lam Chi-Ming v R, [1991]* 2 AC 212 (PC), 220, an appeal to the Privy Council from Hong Kong, Lord Griffiths said-

> "Their lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the

> importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a confession is not admissible in evidence unless the prosecution establish that it was voluntary. This, perhaps the most fundamental rule of the English criminal law, now finds expression in England in section 76 of the Police and Criminal Evidence Act 1984."

In *Wong Kam-ming v R [1980]* AC 247 (PC), 261, Lord Hailsham stated the underlying principle in memorable words-

> "any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

In South Africa, too, courts have over the years recognised the origins and the importance of the common law rule. In *R v Camane and Others* 1925 AD 570, 575 Innes CJ said-

> "Now, it 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. Wigmore, in his book on *Evidence* (vol IV, sec. 2250) traces very accurately the genesis, and indicates the limits of the privilege. And he shows that, however important the doctrine may be, it is necessary to confine it within its proper limits. What the rule forbids is compelling a man to give evidence which incriminates himself."

[32] In *R v Gumede and Another* 1942 AD 398, 412-4, Feetham JA referred to the embodiment of the rule in the Criminal Procedure and Evidence Act 1917, and noted that its first

appearance in South Africa was in Ordinance No 72 of 1830 of the Cape of Good Hope. There was no doubt, he said, that the Ordinance was intended to apply to the Cape Colony the common law of England in regard to the burden of proof resting on the prosecution when asking a criminal court to admit a confession alleged to have been made by an accused person. He cited the cases of *R v Warwickshall, supra* and *Ibrahim v R, supra,* as did Nicholas AJA, in his detailed examination of the rule in *S v de Vries, supra,* 232-4.

[33] The conclusion which I reach, as a result of this survey, is that the common law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's "golden thread" - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt (*Woolmington's case, supra)*. Reverse the burden of proof and all these rights are seriously compromised and undermined. I therefore consider that the common law rule on the burden of proof is inherent in the rights specifically mentioned in section 25(2) and (3)(c) and (d),

and forms part of the right to a fair trial. In so interpreting these provisions of the Constitution I have taken account of the historical background, and comparable foreign case law. I believe too that this interpretation promotes the values which underlie an open and democratic society and is entirely consistent with the language of section 25. It follows that section 217(1)(b)(ii) violates these provisions of the Constitution.

[34] I should add that I prefer not to consider in this judgment the meaning and scope of the right to silence during trial. It is unnecessary to decide whether section 217(1)(b)(ii) violates that right.

[35] The State submitted, in the alternative, that if the proviso in question is a violation of fundamental rights, it is one which is saved by section 33(1) of the Constitution. The proviso, it was argued, was a law of general application which was (i) reasonable, (ii) justifiable in an open and democratic society based on freedom and equality, under paragraph (a) of the sub-section and was also "necessary" in terms of paragraph (b). Much written and oral argument was addressed to us on the Canadian approach to the broadly analogous provision in section 1 of the Canadian Charter, which guarantees the

rights and freedoms set out in that document

> "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The Canadian courts have evolved certain criteria, in applying this section, such as the existence of substantial and pressing public needs which are met by the impugned statute. There, if the statutory violation is to be justified it must also pass a "proportionality" test, which the courts dissect into several components. See, e.g. *R v Chaulk* (1991) 1 CRR (2d) 1. These criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern.

[36] As to reasonableness I am prepared to assume that the presumption passes the "rational connection" test, although I am not convinced of this. But that does not in itself explain why it should be thought reasonable to undermine a long-established and now entrenched right. The tests of reasonableness, justifiability and necessity are not identical, and in applying each of them individually one will not always get the same result. But in this

particular instance reasonableness, justification and necessity may be looked at and assessed together. The State's problems here are manifold. The rights interfered with are fundamental to our concepts of justice and forensic fairness. They have existed in this country for over 150 years. A drastic consequence of the alteration to the law brought about by section 217(1)(b)(ii) is the possibility that an accused may be convicted over the reasonable doubt of the court. Nor has it been shown that it is in practice impossible or unduly burdensome for the State to discharge its onus; it has done so successfully in innumerable trials under the common law rule. The circumstances in which an accused person agreed to make a confession are not peculiarly within his or her own knowledge. What then is the rationale of the proviso? The answer, it seems (and we have been given no other) lies in the Report of the Botha Commission into criminal procedure and evidence (RP 78/1971). The extract I quote here is taken from the written submissions on behalf of the accused in this case.

> "5.31.3. It is however a disquieting phenomenon that accused persons, after having made a confession to a magistrate which was confirmed and reduced to writing in the presence of a magistrate or justice, far too frequently and sometimes under the influence of others and in spite of their contrary allegations to the magistrate or justice, allege at their trial that the confession was in fact improperly obtained from them and is therefore inadmissible in evidence with the result that, notwithstanding the accused's erstwhile allegations, the admissibility thereof has, far too frequently, to be determined at an extended hearing where the onus rests upon the State throughout. As a judicial officer a magistrate is peculiarly equipped and

> able, with the aid of his personal observation and preceding interrogation of the person who makes the confession, to come to a *prima facie* conclusion in regard to the question whether the confession was or is being made freely and voluntarily by such person in his sound and sober senses without having been unduly influenced thereto, and it is highly improbable that a magistrate would take a confession from someone unless he is convinced of the existence of the prescribed requirements for the admissibility thereof. In view of these considerations, and to give meaning to the making or confirmation of a confession to or in the presence of a magistrate, the Commission is of the opinion that, where a confession was made to a magistrate and reduced to writing, or confirmed and reduced to writing in the presence of a magistrate, it should at the trial of that person for an offence to which the confession relates, be presumed, unless that person proved the contrary (that is to say, on a balance of probabilities) that the confession was made freely and voluntarily by such person in his sound and sober senses without having been unduly influenced thereto. The Commission therefore recommends that a further proviso to this effect be added to section 244(1) with reference to a confession made to a magistrate or confirmed and reduced to writing in the presence of a magistrate. Such a provision would considerably shorten and may eliminate the extent of the so called trials within a trial."

It appears from this passage that the harm which the new proviso was intended to overcome was twofold. First, some accused attempt dishonestly to retract confessions which they have made before a magistrate. Second, this leads to unduly long trials within trials. The justification of the amendment, therefore, was that it would make it more difficult for the dishonest accused to make false allegations of duress, and that this would shorten trials.

[37] As to the first head of justification, the objective is laudable. But the reasoning of the Commission seems to overlook the interests of an accused who has in fact been subject to duress. The Commission itself, in para 5.23 of its Report, recognised that an apparently voluntary

confirmation of a confession before a magistrate "may be misleading, where the confession was in fact forced beforehand by improper interrogation or inducement by the police." There is nothing before this Court to show that the common law rule caused substantial harm to the administration of justice. The Commission points to the improbability of a magistrate taking a confession unless convinced of its voluntariness. That may well be an improbability in most cases, but why that should justify placing a burden of proof on the accused I am unable to follow. That improbability has always weighed against an accused and will continue to do so, without resort to the proviso. In any event there is nothing in the Criminal Procedure Act which obliges a magistrate to conduct any particular preliminary enquiry into voluntariness. Some Attorneys-General and magistrates have drafted helpful questionnaires for the use of magistrates or justices of the peace before recording a confession. But there is no standard form and none with statutory provenance.

[38] The reverse onus may in some cases obviate or shorten the trial within a trial. Those of my colleagues on the Court who have had considerable experience of criminal trials doubt that is so. Even if it were the case, and even if it did release police or prosecution from the inconvenience of

marshalling and calling their witnesses before the accused gave evidence, I cannot regard those inconveniences as outweighing and justifying the substantial infringement of the important rights which I have identified. The argument from convenience would only have merit in situations where accused persons plainly have more convenient access to proof, and where the reversed burden does not create undue hardship or unfairness. *Cf R v Oakes* (1983) 3 CRR 289, 304, per Martin JA in the Ontario Court of Appeal. That is not the case here.

[39] Accordingly, section 217(b)(ii) does not meet the criteria laid down in section 33(1) of the Constitution. It is inconsistent with the Constitution and in terms of section 98(5) of the Constitution, it must be declared invalid.

[40] It follows that in my opinion the ruling given by Levinsohn J in *S v Shangase and Another* 1994(2) BCLR 42(D); 1995(1) SA 425(D) was correct.

[41] It is important, I believe, to emphasise what this judgment does <u>not</u> decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some

cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of *prima facie* proof, requiring the accused to do no more than produce credible evidence which casts doubt on the *prima facie* proof. See e.g. the presumptions in section 212 of the Criminal Procedure Act. This judgment does not relate to such presumptions. Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. The provisions in section 237 of the Act (evidence on charge of bigamy) may be of this type. Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself. The presumption that a person who habitually consorts with prostitutes is living off the proceeds of prostitution was upheld on that basis in *R v Downey supra* by the Supreme Court of Canada. A similar presumption in a United Kingdom statute was upheld by the European Court of Human Rights in *X v United Kingdom* (Application No

5124/71, Collection of Decisions, ECHR 135). This is not such a case. Nor does this judgment deal with statutory provisions which are in form presumptions but which in effect create new offences. See *Attorney-General v Odendaal* 1982 Botswana LR 194, 226-7.

[42] I would also make clear that this judgment does not purport to apply to exceptions, exemptions or provisos to statutory offences, referred to in section 90 of the Criminal Procedure Act and in the extensive case law on that section and its predecessors. Nor, of course, does it deal with the factors governing the creation of offences of strict liability, discussed in *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994(3) SA 170 and 646(A), although the considerations weighed in that case may not be irrelevant to the constitutional validity of certain statutory presumptions.

[43] It is necessary, finally, to consider what order, if any, should be made under section 98(6) of the Constitution consequent upon the finding of invalidity. The terms of that sub-section are as follows -

> "(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -

> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity ;or
>
> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

Paragraph (a) of the sub-section applies in this case. Absent a specific order by this Court, any decision by a trial court admitting a confession in reliance on section 217(1)(b)(ii), given before the date of the declaration of its invalidity, would stand. This would be unfortunate for some accused persons. But if we were to give our declaration full retrospective effect in terms of section 98(6) so as to invalidate such earlier rulings on admissibility the likely result of such order would be numerous appeals with the possibility of proceedings *de novo* under sections 313 or 324 of the Criminal Procedure Act. In proceedings *de novo* the necessary evidence of voluntariness may no longer be available. Paragraph (a) of section 98(6) is intended to ensure that the invalidation of a statute existing at the date of commencement of the Constitution should not ordinarily have any retrospective effect, so as to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under that statute. This Court's power to order otherwise in the interests of justice and good government should be exercised circumspectly. In some cases (and I believe that

this is one of them) the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new. We should also take into account the fact that hitherto the police and prosecution have legitimately relied on section 217(1)(b)(ii). Cf. the approach of the United States Supreme Court in such cases as *Linkletter v Walker* 381 US 618 (1965) and *Stovall v Denno* 388 US 293 (1967).

[44] The application of section 217(1)(b)(ii) since 27th April, 1994 may well have caused injustice to accused persons, but we cannot repair all past injustice by a simple stroke of the pen. Weighing all the relevant considerations it seems to me that the proper balance can be struck by invalidating the admission of any confession in reliance on section 217(1)(b)(ii) before the date of our declaration, but in respect only of trials begun on or after 27th April, 1994, and not completed at the date of delivery of this judgment. The effect might be in those trials to require reconsideration of the admissibility of confessions already admitted, including the hearing of further evidence. Whether an order under section 98(6) may or should encompass proceedings which were pending before 27th April, 1994, depends on the proper interpretation of section

241(8) of the Constitution. As indicated at the beginning of the judgment, that issue is deferred for determination in the *Mhlungu* case.

[45] In the present case the trial judge has given no decision on the admissibility of the confessions, so that no special order need be made in respect of it.

[46] In conclusion, we should like to express our indebtedness to Mr A Findlay S.C. and his colleagues, of the Durban Bar, who appeared for the accused persons at the request of the Court.

The following order is accordingly made :-

1 It is declared that section 217(1)(b)(ii) of the Criminal Procedure Act, 1977, is invalid.

2 In terms of sub-section (6) of section 98 of the Constitution it is ordered that this declaration shall invalidate any application of the said section 217(1)(b)(ii) in any criminal trial which commenced on or after 27th April, 1994, and in which the verdict has not at the date of this order been given.

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S.KENTRIDGE
ACTING JUDGE OF THE CONSTITUTIONAL COURT

We concur in the judgement of Kentridge AJ:

Chaskalson P

Ackermann J

Didcott J

Kriegler J

Langa J

Madala J

Mahomed J

Mokgoro J

O'Regan J

Sachs J

CASE NO	**:**	**CCT/5/94**
COUNSEL FOR APPLICANT	**:**	**A. Findlay SC** **MJD Wallis SC** **PJ Olsen** **M. Mkize** **K Govender**
INSTRUCTED BY	**:**	
COUNSEL FOR RESPONDENT	**:**	**JA van S d'Oliveira SC** **JWS de Villiers** **I Stretch**

EA Erasmus
SM Galloway

INSTRUCTED BY :

DATE OF HEARING : 23 February 1995

DATE OF JUDGMENT : 5 April 1995