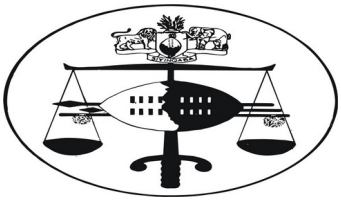

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No: 32/2017

In the matter between:

SIFISO NSIBANDE	APPELLANT
V.	
DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

In re:

Rex

And

POLYCARP DUMSANI DLAMINI	FIRST ACCUSED
MPUMELELO MAMBA	SECOND ACCUSED
SANDILE FRANCES XAVIER DLAMINI	THIRD ACCUSED
SIFISO NSIBANDE	FOURTH ACCUSED
PROTRONICS NETWORKING CORPORATION	FIFTH ACCUSED

Neutral citation: *Sifiso Nsibande v Director of Public Prosecutions In re: The King and Others (32/2017) [2017] SZHC 73 (2017)*

Coram: **M.C.B. MAPHALALA, CJ**
DR. B. J. ODOKI
S. P. DLAMINI, JA
R. J. CLOETE, JA
S. B. MAPHALALA, JA

Heard : 20 NOVEMBER, 2017

Delivered : 20 NOVEMBER, 2017

SUMMARY

Criminal Appeal – application for a discharge in terms of section 174 (4) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended – appeal against the dismissal of an application for a discharge at the end of the Crown's case - *court a quo* dismissed the application on the basis of section 338 (1) of the Criminal Procedure and Evidence Act as amended which creates a reverse onus – *court a quo* had conceded that there was no evidence linking the appellant to the commission of the offences charged;

On appeal held that section 338 (1) of the Criminal Procedure and Evidence Act as amended creates a reverse onus in terms of which the appellant has to establish his innocence on a balance of probabilities;

Held further that it is well-settled in this jurisdiction that statutory presumptions violate the right to a fair trial, the presumption of innocence as well as the right against self-incrimination which are protected by the Constitution – however, the Court acknowledged that section 21 (13) (a) of the Constitution endorses the reverse onus; and, that it is only applicable to the extent to which it is considered reasonable in an open and democratic society such as an instance involving a habitual offence which has become a source of national concern;

Held further that in the present case it would not be reasonable to invoke the reverse onus in light of the findings of the *court a quo* that (1) there is no evidence at all linking the appellant to the commission of the offences charged; (2) that the doctrine of common purpose cannot be invoked in the circumstances of this matter to link the appellant to the other co-accused in the commission of the offences charged; (3) that the

appellant did not take part in the executive functions of the fifth accused, being the Company; (4) that, the appellant could not have prevented the commission of the offences charged; and, (5) that the appellant was charged and prosecuted only on the basis of the statutory provisions of section 338 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended in the absence of any evidence linking him with the commission of the offences charged.

Accordingly, the appeal is upheld, and, the judgment of the *court a quo* is set aside and replaced with the order that the application lodged by the fourth accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act as amended is granted, and, that the fourth accused is found not guilty and is acquitted and discharged on all the charges preferred against him.

JUDGMENT

JUSTICE M. C. B. MAPHALALA, CJ:

[1] This appeal was heard on the 20th November, 2017. After submissions were made by Counsel representing the parties, the Court adjourned to consider the submissions, the evidence as well as the record of proceedings. Subsequently on the same day, the Court made an order:

a) allowing the appeal;

b) setting aside the judgment of the *court a quo* and substituting it with an order that the application by the appellant in terms of section 174 (4) of the Criminal Procedure and evidence Act as amended is granted, and, that the appellant is found not guilty and is accordingly acquitted and discharged on all charges preferred against him. The reasons for the order were reserved to be given in due course.

[2] It is common cause that the appellant, who was the fourth accused in the *court a quo* was indicted before the High Court together with four others including a company in which he was one of the Directors. The appellant was charged with several counts of fraud and money-laundering. The indictment alleged that the appellant and his co-accused had committed the offences in the furtherance of a common purpose.

[3] At the close of the Crown's case, the appellant applied for a discharge in terms of section 174 (4) of the Criminal Procedure and Evidence Act as amended.[1] That Section provides the following:-

> **"174 (4) If at the close of the case for the prosecution the Court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it may acquit and discharge him."**

[1] No. 67 of 1938 as amended

[4] The basis of the application for the discharge of the appellant is that there is no evidence upon which a reasonable man might convict on the case as it stands. The appellant's contention is that a Court cannot exercise its judicial discretion to refuse an application for a discharge under section 174 (4) of the Criminal Procedure and Evidence Act as amended where there is no evidence upon which a reasonable man might convict; according to the appellant, the Court is enjoined in such circumstances to discharge and acquit the accused.

[5] During the course of the arguments with regard to the application for the discharge, the Learned Judge a quo made the following findings:[2] Firstly, that the appellant did not take part in any of the executive functions of the Company, that he had no control over the Company and would not have prevented the commission of the offences. Secondly, that there is no evidence that the appellant was engaged in a common purpose with his co-accused in the commission of the offences. Thirdly, that the appellant was only charged on the basis of the presumption that he was the Company Director. Fourthly, that the Crown conceded that there is no evidence at all linking the appellant

[2] Pages 2, 4 and 12 of the judgment of Levinson J

with the commission of the offences charged;[3] and, that the Crown was relying on the provisions of section 338 (1) of the Criminal Procedure and Evidence Act as amended. Fifthly, that the test laid down in determining whether to discharge an accused in terms of section 174 (4) of the Criminal Procedure and Evidence Act as amended is whether there is evidence upon which a court, acting carefully might convict. Sixth, that section 338 (1) of the Criminal Procedure and Evidence Act as amended is a classical reverse onus provision wherein the onus is cast upon the accused to prove certain facts that he did not take part in the commission of the offences, and, that he could not have prevented the commission of the offences. Seventh, that section 338 (1) of the Criminal Procedure and Evidence Act as amended is constitutional in light of section 21 (2) and (13) of the Constitution. Accordingly, Levinson J dismissed the application for the discharge particularly on the basis that section 338 (1) of the Criminal Procedure and Evidence Act as amended creates a reverse onus.

[3] Page 2 of the judgment of Levinson J

[6] The appellant filed a Notice of Appeal challenging the judgment of Levinson J upon the following grounds: Firstly, that the *court a quo* should have discharged the appellant in light of the concession by the Crown that there was no evidence linking the appellant with the commission of the offence. Secondly, that the *court a quo* should not have invoked section 338 (1) of the Criminal Procedure and Evidence Act as amended and further called upon the appellant to his defence in the absence of any evidence linking the appellant with the commission of the offences charged. Thirdly, that section 338 (1) of the Criminal Procedure and Evidence Act as amended is inconsistent with sections 14 (1) (a), 16 (1) (a), 21 (2) (a) as well as 21 (9) of the Constitution; these provisions relate to the right to a fair trial, the presumption of innocence, the right to remain silence and not to be compelled to give evidence during trial as well as the right to personal liberty.

[7] The *court a quo* found that there was no evidence linking the appellant to the commission of the offences; however, the Court relied on section 338 (1) of the Criminal Procedure and Evidence Act as amended when dismissing the application by the appellant for a discharge. In coming to this conclusion the Learned Judge *a quo* held

that section 21 (2) (a) of the Constitution dealing with the presumption of innocence is qualified by section 21 (13) of the Constitution, which incorporates a proviso that, "to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts, and, that nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of section 21 (2) of the Constitution". The Learned Judge concluded that section 338 (1) of the Criminal Procedure and Evidence Act as amended was perfectly constitutional. Accordingly, he dismissed the application for the discharge of the appellant and ordered him to his defence notwithstanding his findings that the appellant did not take part in the commission of the offences, and, that he could not have prevented the commission of the offences

[8] Section 338 (1) of the Criminal Procedure and Evidence Act as amended provides the following:-

"338. (1) In any criminal proceedings under any statutes or

statutory regulation or at common law against a company, the secretary and every director or manager or chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefore, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it."

[9] The following provisions were invoked by the *court a quo* when dealing with the application for the discharge of the appellant in terms of section 174 (4) of the Criminal Procedure and Evidence Act as amended, and, to that extent, they are relevant for purposes of this judgment and equally applicable:

"14 (1) The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely:

(a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law;

. . . .

(2) The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution.

(3) A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter but subject to respect for the rights and freedoms of others and for the public interest."

. . . .

16. (1) A person shall not be deprived of personal liberty save as may be authorised by law in any of the following cases:-

(a) in execution of the sentence or order of a Court, whether established for Swaziland or another country, or of an international court or tribunal in respect of a conviction of a criminal offence;

. . . .

21. (1) In the determination of civil rights and obligations or any criminal charge, a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law

(2) A person who is charged with a criminal offence shall be:-

(a) presumed to be innocent until that person is proved or has pleaded guilty;

. . . .

(9) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

. . . .

(13) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:-

(a) subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts."

[10] There are many cases which deal with the discharge of an accused at the close of the case for the prosecution. Trollip J in S. v. Heller and Another (2)[4], had this to say:

> **"Section 157 (3) provides that, 'if, at the close of the case for the prosecution, the Court considers that there is no evidence that the accused committed the offence charged . . . , it may then . . . return such a verdict' of not guilty. The test that is usually applied is whether or not there is any evidence of the commission of the offence upon which a reasonable man might convict the accused. It seems to me that the section, and the test, apply even when the onus is cast upon the accused of proving some special defence. If, therefore, by the end of the State's case evidence has emerged which in the court's view has proved the special defence on a balance of probabilities it would then in my view be entitled to find in terms of section 157 (3) that there is no evidence upon which a reasonable man might convict the accused.**

[4] 1964 (1) SA 524 (WLD) at 541 - 542

. . . .

The decisions are conflicting as to whether the Court is obliged, or has a discretion, under section 157 (3) of the code to discharge an accused on a count on which it finds that there is at the end of the case for the prosecution no prima facie proof of the commission of any offence. I shall assume that the Court has a discretion. Generally, that discretion should be exercised in favour of the accused and his discharge should only be refused in exceptional circumstances."

[11] Kumleben J in S. v. Ostilly and Others,[5] had this to say:

"In an application of this nature, it is generally accepted that the test to be applied is: 'whether or not there is any evidence of the commission of the offence upon which a reasonable man might convict the accused." . . . . The Court, however, has a discretion and may refuse to grant

[5] 1977 (2) SA 104 (D.C.L.D) at 106

the application notwithstanding the fact that the evidence adduced by the State fails to satisfy this test . . . this is a discretion which is to be judicially exercised. It follows, in my view that if there is no evidence which might reasonably lead to a conviction, sound reasons must exist for nevertheless not granting the application. The considerations to be taken into account cannot be and ought not be circumscribed but, particularly in a trial of long duration and of some complexity with a number of accused involved, the interests of the accused are factors to be taken into account together with all other relevant circumstances in deciding which course will best serve the ends of justice."

[12] Kentridge AJ in S. v. Zuma and Others[6] dealt with the presumption of innocence as well as the reverse onus. He quoted with approval the Canadian judgment of Dickson CJC in R. v. Oakes (1986) 26 DLR (4th) 200 SCC at 212 – 13 1nd 222.

"Dickson CJC said at 212 – 13:

[6] 1995 (2) SA 642 CC at 655 para 22

‘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 guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.

. . . .

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.'

[13] Justice Kentridge further quoted with approval the judgment of the Supreme Court of Canada (SCC) in R. v. Whyte (1988) 51 DLR (4th) 481 SCC where the Learned Chief Justice Dickson CJC had this to say at 493:[7]

"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

[7] Para 23 in S. v. Zuma (supra)

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".

[14] Kentridge AJ also referred with approval to the judgment of the Supreme Court of Canada in R v. Downey (1992) 90 DLR (4th) 449 SCC where Cory J summarised the principles dealing with the presumption of innocence and the reverse onus. His Lordship adopted two of the principles:[8]

"1. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

[8] Para 25 in S. v. Zuma (supra)

11. 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."

Justice Kentridge concluded as follows:[9]

" . . . . 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) at 481 (1935)

AII ER Rep, at 8 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

[9] Para 25 in S. v. Zuma (supra)

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."

[15] His Lordship Justice Kentridge proceeded to deal with the right to remain silent upon arrest as well as the right against self-incrimination; these rights are fundamental to the criminal justice system**.** His Lordship had this to say:[10]

"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 at 575 Innes CJ said:

'31. . . . .

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

[10] para 31 and 33 of the judgment

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 '.

. . . .

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 s25 (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 s25. It follows that s217 (i)

(b) (ii) violates these provisions of the Constitution".

[16] Levinson J in S. v. Shangase[11] said the following:

"These fundamental rights, which embody the presumption of innocence and the right to remain silent, are the very pillars of a criminal justice system in an open and democratic society. Dickson CJC, delivering a judgment in the Supreme Court of Canada in the case of R. V. Oakes (1986) 26 DLR (4th) 200 (1986) 1 SCR 103), is reported to have said this at 212 of the judgment, which has been made available to me:

> **'The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s11 (d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of**

[11] 1995 (1) SA 425 D & CLD at 430 - 431

the person contained in s7 of the Charter; . . . .

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. Any 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.'

. . . .

Hand in hand with the presumption of innocence is the rule that the State in a criminal case must prove the guilt of an accused beyond a reasonable doubt. This standard of proof is ingrained in our criminal law, as well as the jurisprudence of the United Kingdom. One can say that this standard of proof is the very essence of the fundamental right to have a fair trial.

Now, standing side by side with the rights which I have just referred to and as a necessary corollary to the right to remain silent is the entrenched right that no one shall be compelled to make a confession or admission. In R. V. Camane 1925 AD 570 at 575 Innes CJ said the following:-

> **'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'."**

His Lordship Justice Kentridge in S. v. Zuma (supra)[12] embraced the judgment of Justice Levinsohn in S. v. Shangase and Another (supra) as being correct.

[12] At p. 662 para 40 of the judgment

[17] Section 18 (13 (b) of the Constitution of Zimbabwe contains a similar provision to section 21 (13) of our Constitution. Gubbay CJ in S. v. Chogugudza[13] had this to say:

> **"The presumption of innocence conferred by s18 (3) (a) of the Constitution of Zimbabwe 1980, upon every person charged with an offence lies at the very heart of criminal law. It finds expression in the fundamental and hallowed principle that the prosecution bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence) upon a standard of proof to be satisfied beyond a reasonable doubt (instead of proof on the balance of probabilities). The principle, which is reflected in the *maxim 'in favorem vitae, libertatis et innocentia omnia presumuntur'* (in favour of life, liberty and innocence all possible presumptions are made) was affirmed by Davis Ag JA in R. v. Ndlovu 1945 AD 369 at 386. The only Common law exception to it is that where the defence is one of insanity, the burden of proof rests on the accused: see R. v.**

[13] (1996) 3 LRC 683 at 687 - 690

Britz 1949 (3) SA 293 (A) at 302, S. v. Taanorwa 1987 (1) ZLR 62 (S) at 65 . . .

There is, however, a qualification in s18 (13 (b) of the Constitution. It reads as follows:

> **'Nothing contained in or done under the authority of any law shall be held to be in contravention of s18 (13) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts'.**

The immediate questions that arise are: How far does this provision go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given as to where the line should be drawn. Yet what is clear is that, read in the context of the presumption of innocence, s18 (13) (b) cannot be construed as holding valid a statutory provision that in actuality imposes upon the accused the burden of proving his innocence or disproving his guilt.

In the resolution of these questions, I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions, commonly referred to as 'reverse onus provisions', against an accused. From them the following guidelines emerge:

(1) The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be thrust upon him to prove his defence. See S. V. Broughton's Jewellers (PVT) Ltd 1971 (2) RLR 276 (AD) at 279, 1971 (4) SA 394 (RA) at 396 and S. v. Marwane 1982 (3) SA 717 (A) at 755 – 756.

(2) The presumption may relate to a state of mind, that is, an intention, where the element of the crime is a fact exclusively or particularly within the knowledge of the accused.

. . . .

(3) A presumption will be regarded as reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or difficulty; whereas such fact is well-known to the accused . . . .

(4) The presumption must not be irrebuttable

. . . . In R. v. Carr-Briant (1943) 2 All ER 156 at 158-159, (1943) KB 607 at 612 Humphrey J, renowned for his knowledge and experience of criminal law, made the point in these words:

> **‘. . . in any case where, either by statute or at Common law, some matter is presumed against an accused person “unless the contrary is proved:, the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a**

reasonable doubt; and, that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish'.

. . . .

. . . the exception to the presumption of innocence in s18 (13) (b) of the Constitution does not define the facts of proof of which may be placed on the accused. It does no more than codify or carry forward what was already allowed under the Common law, namely, that a reverse onus may be placed on the accused. In other words, what the framers of the Constitution intended to convey, without specifying the exact limits, as that it is permissible for the Legislature to enact reverse onus provisions in conformity with the guidelines developed by the Common law.

section 18 (13) (b) has no counterpart in either the Canadian Charter of Rights and Freedoms 1982 or the interim Constitution of the Republic of South Africa 1993. In both, if, as a result of a preliminary inquiry, the statutory presumption is shown to be in breach of the right to be presumed innocent, the Court must proceed to consider whether such presumption is none the less saved as being reasonably justifiable in a free and democratic society . . .

In Canada a presumption will be regarded to be constitutional if it passes a proportionality test. It must (a) be rationally connected to the objective and not arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom as little as possible, and (c) be such that its effect on the limitation of the right and freedom is proportional to the objective . . . .

The position in South Africa is similar: see S. v. Zuma (1995) 1 LRC 145 at 157, 1995 (2) SA 642 (CC) at 653 – 654 (para 21 – 25).”

[18] Kentridge AJ in S. v. Zuma[14] approved the ‘rational connection’ test developed by the Canadian Supreme Court to determine the Constitutional validity of the reverse onus provisions; the test calls for a two-stage approach, firstly, whether there has been a contravention of a guaranteed right, and if so, whether it is justified under the limitation clause.

[19] His Lordship Davies JA in R. v. Ndlovu[15] affirmed the fundamental principle of the criminal justice system reflected by the maxim *‘in favorem vitae, libertatis et innocentia omnia presumuntur’* as follows:

“. . . . In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove

[14] (supra) at 654, para 21

[15] 1945 AD 369 at 386

all the averments necessary to establish his guilt. Consequently, on a charge of murder, it must prove not only the killing, but that the killing was unlawful and intentional. It can discharge the onus either by direct evidence or by the proof of facts from which a necessary inference may be drawn. One such fact, from which (together with all other facts) such an inference may be drawn, is the lack of an acceptable explanation, if on a review of all the evidence, whether led by the Crown or by the accused, the jury are in doubt whether the killing was unlawful or intentional, the accused is entitled to the benefit of the doubt. That doubt must be one which reasonable men would entertain on all the evidence; the jury should not speculate on the possible existence of matters upon which there is no evidence, or the existence of which cannot reasonably be inferred from the evidence. The only exceptions to the above rules, as to the onus being on the Crown in all criminal cases to prove the unlawfulness of the act and the guilty intent of the accused, and of his being entitled to the benefit of any reasonable doubt thereon, are

in regard to intention, the defence of insanity, and, in regard to both unlawfulness and intention, offences where the onus of proof is placed on the accused by the wording of a statute."

[20] Nugent AJA in Michael Lubaxa v. The State[16] said the following:

"18. I have no doubt that an accused (whether or not he is represented), is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary mero motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

19. The right to be discharged at that stage of the trial does not necessarily arise, in my view from considerations relating to the burden of proof (or its concomitant, the

[16] 2001 (2) SACR 703 (SCA) at para 18 and 19

presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly, a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the Common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (Beckenstrater v. Rottcher and Theunissen 1955 (1) SA 129 (A) at 135 C – E), and the constitutional protection afforded to dignity and personal freedom (s10 and s12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights

. . . . ”

[21] Ngcobo J in S. v Singo[17] had this to say:

> **“25. This Court has on several occasions considered provisions in statutes that impose a legal burden, which has now become known as a reverse onus. A legal burden requires an accused to disprove on a balance of probabilities an essential element of an offence and not merely to raise a reasonable doubt. It is by now axiomatic that a provision in a statute that imposes a legal burden upon the accused limits the right to be presumed innocent and to remain silent.**
>
> **26. A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to**

[17] 2002 (4) SA 858 (CC) para 25

establish the guilt of the accused and not the accused to establish his or her innocence. That fundamental principle of our law is now firmly entrenched in s35 (3) (h) of the Constitution which provides that an accused person has the right to be presumed innocent. What makes a provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt."

[22] The South African Constitutional Court in S. v. Manamela[18] followed its previous decisions with regard to reverse onus. In this case the Court dealt with the constitutionality of a reverse onus in section 37 (1) of the General Law Amendment Act No. 62 of 1955; this provision relieves the prosecution of the burden of proving all the elements of the offence by presuming that any person proven by the State to be in possession of stolen property acquired otherwise than at a public sale, did not have reasonable cause for believing at the time

[18] 2000 (3) SA 1 para 23 - 26

of acquisition or receipt that the goods had not been stolen. The accused had to persuade the court, on a balance of probabilities that reasonable cause exists.

[23] Their Lordships Justices Madala, Sachs and Yacoob sitting at the South African Constitutional Court in the Manamela case wrote the judgment for the Court, five judges of the Court concurred with the judgment and three other judges dissented. Their Lordships had this to say:-[19]

> **"24. The right to silence, seen broadly as an aspect of the adversarial trial, is clearly infringed. The inevitable effect of the challenged phrase is that the accused is obliged to produce evidence of reasonable cause to avoid conviction even if the prosecution leads no evidence regarding reasonable cause. Moreover, the absence of evidence produced by the accused of reasonable cause in such circumstances would result not in the mere possibility of an inference of absence of reasonable cause, but in the**

[19] At para 24 - 26

inevitability of such a finding. In these circumstances, for the accused to remain silent is not simply to make a hard choice which increases the risk of an inference of culpability. It is to surrender to the prosecution's case and provoke the certainty of conviction.

25. Similarly, the presumption of innocence is manifestly transgressed. This Court has frequently held that reverse onuses of this kind impose a full legal burden of proof on the accused. Accordingly, if after hearing all the evidence, the court is of two minds as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of guilt. By virtue of the same logic, a conviction must follow if the court concludes that the accused's version, even though improbable, might reasonably be true.

26. The purpose of the presumption of innocence is to minimise the risk that innocent persons may be convicted and imprisoned. It does so by imposing on the prosecution

the burden of proving the essential elements of the offence charged beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment of evidence tendered in the course of a trial. The reverse onus provision relieves the prosecution of the burden of proving all the elements of the s37 offence by effectively presuming that any person, proven by the State to be in possession of stolen property, acquired otherwise than at a public sale, did not have reasonable cause for believing at the time of acquisition or receipt that the goods had not been stolen. Where the accused is unable to persuade the court on a balance of probabilities that reasonable cause exists, which would be the case even where the probabilities are evenly balanced, he or she must be found guilty, despite a reasonable doubt in the mind of the Judicial Officer as to whether or not the accused is innocent. The presumption of innocence is manifestly infringed by s37 (1). Unless saved as a permissible limitation, it is unconstitutional and invalid."

[24] The legal position in respect of a reverse onus is settled in this country. A full bench of the Judges of the High Court in Emmanuel Dumisani Hleta v. Swaziland Revenue Authority and Two Others[20] declared a statutory provision, section 274 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended, which had a reverse onus to be unconstitutional, and, the Court subsequently struck it off the statute books. In coming to this conclusion the Court considered the contention by the respondents that they would not rely on the legislative provision when prosecuting the matter; hence, the Court concluded that the provision was not important in the prosecution of tax matters in the country, and, that the provision should be struck down since it poses no prejudicial consequences to the effective prosecution of such matters. Section 274 provides the following:

> **"274. If a person is charged with any offence whereof failure to pay any tax or impost to the Government, or failure to furnish any information to any public officer is an element, he shall be deemed to have failed to pay such tax or**

[20] Civil Case No. (22/15) 2016 SZHC 22

impost or to furnish such information, unless the contrary is proved."

[25] The full bench in the Hleta case was called upon to determine the constitutionality of section 274 of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended in respect of the reverse onus. Hlophe J who delivered the unanimous judgment of the full bench had this to say:[21]

"25. A safe conclusion to draw from the S. v. Zuma and Others (supra) case and that of S. v. Mbatha; S. v. Prinsloo 1996 (3) BCLR 293 CC is that a reverse onus provision or presumption where a criminal sanction may be imposed, prima facie violates the rights of an accused to a fair trial as envisaged by section 21 (1) of the Constitution and the right to be presumed innocent as envisaged in section 21 (2) (a) of the Constitution.

. . . .

[21] Para 25 and 26

26. The argument advanced on behalf of the respondents that it is not every reverse onus that is unconstitutional can be correct but such an onus, can only avoid being declared unconstitutional if it can be shown that same is reasonable. This would, for instance be the case in a situation where there is a pressing social need for the effective prosecution of the crime. For example, in a case where the crime is very common, and, there is a need to stamp it out. It is disputable that we have reached that stage and no evidence was led in that regard. As a result this cannot be the case if it conflicts with a guaranteed right in the Constitution, which should be upheld at all times."

[26] It is apparent from a reading of section 338 (1) of the Criminal Procedure and Evidence Act as amended that this legislation constitutes a reverse onus provision in respect of a Secretary, Director, Manager or Chairman of a Company charged with a criminal offence; he is liable to be charged and punished for the offence unless he can show that he did not take part in the commission of the offence, and, that he could not have prevented the commission of the offence.

[27] The present case differs substantially from other cases with a reverse onus on the basis that the *court a quo* made an express finding that, **"The Crown had conceded that there was no evidence at all against the appellant linking him with the commission of the offences charged".** In the circumstances, it was not reasonable for the *court a quo* to dismiss the application for a discharge and call upon the appellant to his defence.

[28] The *court a quo* made a further finding that there was no evidence upon which a reasonable man might convict the appellant as required by section 174 (4) of the Criminal Procedure and Evidence Act as amended; however, the Court refused to exercise its judicial discretion to discharge the appellant purely on the basis of the reverse onus. The *court a quo* made another finding that the appellant did not take part in any of the executive functions of the company, that he had no control over the company, and, that he could not have prevented the commission of the alleged offences. Similarly, the *court a quo* made a finding that there was no evidence of a common purpose between the appellant and his co-accused to commit the offences.

[29] The Crown conceded during the criminal trial, in the *court a quo*, that the appellant was charged solely on the basis of the presumption, and, that there was no evidence linking the appellant with the commission of the offences charged. Generally, an accused person is entitled to be discharged at the close of the Crown's case if there is no evidence upon which a reasonable man might convict in the absence of self-incrimination when called to his defence. It is trite that an accused person should not be prosecuted when there is no evidence upon which he might be convicted in the absence of self-incrimination; the Common law requires that there should be reasonable and probable cause to believe that an accused is guilty of an offence before a prosecution is initiated.[22]

[30] The fundamental principle underlying the criminal justice system is that the Crown bears the onus of establishing the guilt of the accused beyond reasonable doubt. It is the Crown that initiates the prosecution of the accused; hence, it should establish the guilt of the accused beyond reasonable doubt. Where the Crown lacks the requisite

[22] Beckenstrater v. Rottcher and Another 1955 (1) SA 129 AD at 135 C

evidence against the accused, it should not initiate the criminal prosecution.

[31] The advent of constitutional justice requires that every accused person has the right to a fair trial which incorporates the presumption of innocence and the right to silence which entails the right against self-incrimination. An accused faces grave social and personal consequences including social stigma, ostracism from the community as well as loss of personal liberty. The right to a fair trial is specially entrenched in the Constitution[23], and, it is one of the rights that are prohibited from derogations[24] even during the state of public emergency.[25]

[32] The advent of statutory presumptions violate not only the right to a fair trial but the presumption of innocence as well as the right against self-incrimination. The danger inherent in statutory presumptions is that it allows for the conviction of accused persons in the face of the

[23] Section 246 of the Constitution

[24] Section 38 of the Constitution

[25] Section 37 of the Constitution

existence of a reasonable doubt that the accused committed the offence charged. Where the Crown fails to adduce evidence of the commission of the offence beyond reasonable doubt, the Crown secures the conviction of the accused by resorting to the reverse onus. Statutory presumptions violates the right to a fair trial by calling upon the accused to establish their innocence on a balance of probability that they did not commit the offences charged; hence, the possibility exist for a conviction despite the existence of a reasonable doubt.

[33] The Constitution of Swaziland endorses the reverse onus[26] as a limitation to the presumption of innocence. It is well-settled in this country that a reverse onus or a statutory presumption is enforceable only to the extent that it is reasonable, and, it is confined to deal with a habitual crime which has become a source of national concern.[27]

[34] The present appeal is bound to succeed on the basis of the following findings, which were also made by the *court a quo* that: Firstly, there is no evidence linking the appellant to the commission of the offences

[26] Section 21 (13) (a)

[27] Ibid footnote 17 Emmanuel Dumisani Hleta v. Swaziland Revenue Authority and Two Others (supra) para 25 and 26

charged; secondly, there is no evidence of the existence of a common purpose between the appellant and his co-accused in the commission of the offences; thirdly, the appellant did not take part in the executive functions of the company, he had no control over the company, and, he could not have prevented the commission of the offences; fourthly, the appellant was charged and prosecuted solely on the basis of a reverse onus under section 338 (1) of the Criminal Procedure and Evidence Act as amended in the absence of evidence linking him to the commission of the offences charged. In the circumstances, it would be a travesty of justice to invoke the statutory presumption contained in section 338 (1) of the Criminal Procedure and Evidence Act No. 67 of 1938 as amended.

[35] Accordingly, this Court makes the following order:

(a) The appeal is upheld

(b) The judgment of the *court a quo* is set aside and substituted with an order that the application made by the fourth accused in terms of section 174 (4) of the Criminal

Procedure and Evidence Act No. 67 of 1938 as amended is granted, and, the fourth accused is accordingly found not guilty and is acquitted and discharged on all charges preferred against him.

For Appellant : Attorney Ben J. Simelane

For First Respondent : Advocate Kades instructed by the Director of Public Prosecutions

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

DR. B. J ODOKI, JA

I agree

S. P. DLAMINI, JA

I agree

R. J. CLOETE, JA

I agree

S. B. MAPHALALA, JA