



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 61/2012

In the matter between:

**JOAO CARLOS VIDAL GOMES**

**APPLICANT**

and

**THE PROSECUTOR-GENERAL OF THE  
REPUBLIC OF NAMIBIA**

**1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY-GENERAL OF THE  
REPUBLIC OF NAMIBIA**

**2<sup>ND</sup> RESPONDENT**

**THE MINISTER OF JUSTICE OF THE  
REPUBLIC OF NAMIBIA**

**3<sup>RD</sup> RESPONDENT**

**THE REGIONAL COURT MAGISTRATE: SWAKOPMUND  
MARTIN NAMBALA**

**4<sup>TH</sup> RESPONDENT**

**MELGISEDEK SHEEHAMA**

**5<sup>TH</sup> RESPONDENT**

**SAKARIA SAKARIA SAPANGE**

**6<sup>TH</sup> RESPONDENT**

**7<sup>TH</sup> RESPONDENT**

**CORAM:** NDAUENDAPO J et SHIVUTE J

**Neutral citation:** *Gomes v Prosecutor-General* (A 61/2012) [2013] NAHCMD 240(9 August 2013)

**Heard:** 22 March 2013

**Delivered:** 9 August 2013

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**ORDER**

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1. The phrase '*proof of which shall be on such first-mentioned person*' contained in s 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956, is declared unconstitutional and is struck down.
2. The first respondent is ordered to pay the costs of the applicant.

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**JUDGMENT**

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**NDAUENDAPO, J**

[1] By notice of motion, the applicant seeks an order in the following terms:

- (a) Declaring section 7(1) of the General Law Amendment Ordinance, Ordinance No.12 of 1956, and/or the reverse onus provision contained therein, to be unconstitutional, invalid and of no force and/or effect.
- (b) Ordering the respondents and/or any other entity opposing this application to pay the costs of the application.

(c) Further and/or alternative relief.'

[2] The parties

The applicant is Mr Joao Carlos Vidal Gomes, a sixty one year old, male of Portuguese national who is permanently residing at third street west, No.7, Walvis Bay, Republic of Namibia. He is accused one in the criminal matter under case number Swakopmund/CRM/1461/2011, Republic of Namibia.

The first respondent is the Prosecutor-General of the Republic of Namibia.

The second respondent is the Attorney-General of the Republic of Namibia.

The third respondent is the Minister of Justice of the Republic of Namibia.

The fourth respondent is the duly appointed Regional Court Magistrate, Swakopmund who is cited herein in her official capacity as such for and in respect of any interest that she may have in this application, as well as the outcome thereof.

The fifth, sixth and seventh respondents are indicted together with the applicant as accused two, three and four in the pending criminal trial in the regional court, Swakopmund. They are cited herein for any interest that they may have in this application, as well as the outcome thereof.

[3] The first to the fourth respondents initially opposed the application. On 11 September 2012 the second, third and fourth respondents filed a notice of withdrawal of their original notice of intention to oppose. Only the first respondent filed an answering and replying affidavits.

[4] Mr Botes appeared on behalf of the applicant and Mr Small on behalf of the first respondent. Both counsel filed extensive heads of argument and the court is indebted to them for their assistance.

[5] Background

The applicant is accused number one in a criminal case pending in the regional court for the region of Swakopmund under case no. Swakopmund/CRM/1461/2011. The fifth, sixth and the seventh respondents are co-accused in that matter. In the charge sheet

the state alleges that the applicant, as an employee of Aquatic Marine Engineering CC, at Walvisbay, purchased two of the three welding machines from one of the co-accused, namely Martin Nambala, and that all three welding machines, allegedly the property of WESCO, were found in applicant's possession on the premises of his employer by members of the Namibian Police Force at Walvisbay on or about the 9<sup>th</sup> of August 2010. The Applicant was originally charged with theft, as main count, alternatively a charge of a contravention of section 7 (1) of the General Law Amendment Ordinance 12 of 1956. The applicant intends to plead not guilty and informed the prosecution accordingly. After deliberations between defence counsel and the prosecution, the prosecution decided not to proceed with the charges originally preferred against applicant. Applicant was however informed that the state intends to continue with the main charge of theft which includes all the competent verdicts as provided for in terms of section 264 of the Criminal Procedure Act 51 of 1977, as amended.

Section 264 of the Criminal Procedure Act 51 of 1977, as applicable in the Republic of Namibia, provides as follows:

**'264 Theft**

- (1) If the evidence on a charge of theft does not prove the offence of theft, but-*
- (a) the offence of receiving stolen property knowing it to have been stolen;*
  - (b) an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955);*
  - (c) an offence under section 1 of the General Law Amendment Act, section of 1956 (Act 50 of 1956); or*
  - (d) in the case of criminal proceedings in the territory, an offence under section 6,7, or 8 of the General Law Amendment Ordinance 1956 (Ordinance 12 of 1956),. 'the accused may be found guilty of the offence so proved'.*

The application before me was launched against that background.

[6] Purpose of the application

The Court is requested to adjudicate on the constitutionality of section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956 and to declare same to be unconstitutional.

[7] Locus standi

Before dealing with the constitutionality of s 7 (1) of Ordinance 12 of 1956, the first respondent denies that applicant is an aggrieved person and has locus standi to launch the application.

Counsel for applicant submits that the applicant is an aggrieved person as contemplated and as provided for in terms of Art 25 (2) of the Constitution and therefore has locus standi to bring the application. In this regard he relied on *Alexander v Minister of Justice & Others*<sup>1</sup> where Strydom AJA stated that:

*'...In my opinion, even where a party attacks an act of Parliament on the basis that it is unconstitutional and, hence, invalid from its inception, that party will still have to show that he or she has standing, i.e that a right of his or hers is infringed by the invalid act or threatened such right...'*<sup>2</sup>

*'The fact that a person is not yet convicted of an offence does not bar such person, whose rights are threatened by an invalid order, to bring the matter to court. In Transvaal Coal Owners Association and others v Board of Control 1921 TPD 447 at 452, Gregorowski J stated as follows:*

*'If they contravene the order they are liable to fine and imprisonment. If the order is invalid their rights and freedoms of action are infringed and it is not at all convincing to say you must first contravene the order and render yourself liable to fine and imprisonment, and then only can you test the validity of the order, and have it decided whether you are liable to the penalty or not'.*

*'As set out above, the standing of a party to approach a court to protect him/her against an unlawful interference with his/her rights is dependent on whether his or her rights are infringed or there is a threat of such infringement'.*

Applying the above principles to this case, it is clear that the applicant has been arrested and charged with common law theft and in terms of section 264 of the Criminal

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<sup>1</sup> 2010 (1) NR 328 (SC)

<sup>2</sup> At 349

Procedure Act 51 of 1977, as amended, an offence under s 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956 is a competent verdict and he may be found guilty of such an offence. I am satisfied that the applicant's right to a fair trial is threatened and he is therefore an aggrieved person and has locus standi to bring this application.

[8] Applicant's case

### **The impugned provision**

*Section 7 (1) of Ordinance 12 of 1956 provides: "7(1) Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than or produce as defined in section one of the stock theft Act, 1990 (Act 12 of 1990) 1935 (ordinance 11 of 1935), without having reasonable cause, proof of which shall be on such first mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receive them or that such person has been duly authorised by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen" (emphasis provided)'.*

[9] The applicant in his affidavit contends that the aforesaid section creates a 'reverse onus' relating to the onus of proof in the offence in respect of which the presumption finds application. Section 7 (1), alternatively, the reverse onus is unconstitutional as it casts a 'reverse onus on an accused person by exposing an accused person to a real risk of being convicted despite the existence of a reasonable doubt as to his or her guilt.

The presumption therefore is not consistent with what is clearly a fundamental value in our criminal system, namely that the burden of proof throughout rests on the prosecution to proof the guilt of an accused person beyond reasonable doubt. He further contends that the presumption in section 7 (1) Ordinance 12 of 1956 therefore is

not only in direct conflict with the common law rule that the burden always rests on the prosecution to prove the guilt of an accused person beyond a reasonable doubt, but also his right to be presumed innocent until proven guilty, the privilege against self-incrimination, the right not to be a compellable witness against oneself and the right to silence and as such the presumption is also inconsistent with articles 12 (1) (a), (d), (f) of the Constitution and therefore invalid. The right to a fair trial conferred by art 12 (a) is broader than the list of specific rights set out in paragraphs (b) – (f) of the subsection. These rights are not a closed list.

In the *Attorney-General of Namibia v The Minister of Justice & others*<sup>3</sup>. Shivute CJ stated that:

*'A closer reading of Art 12 in its entirety makes it clear that its substratum is the right to a fair trial. The list of specific rights embodied in art 12 (1) (b) to (f) does not, in my view, purport to be exhaustive of the requirements of the fair criminal hearing and as such it may be expanded upon by the courts in their important task to give substance to the overreaching right to a fair trial. To take but one example: the right to present written and oral argument during a hearing or trial is undoubtedly an important component of a fair trial but one searches in vain for it in article 12.'*

Equally the right to remain silent after arrest and during trial is nowhere specifically mentioned in Art 12, but undoubtedly it is an important component of a fair trial.

Applicant further contends that section 7 (1) of Ordinance 12 of 1956 does not create a permissible limitation on his constitutional rights enshrined in Art 12 of the Constitution as same in effect imperil his constitutional rights referred to hereinbefore.

[10] First respondent's case

In her answering affidavit, the Prosecutor General, Ms Imalwa states that:

'the rationale for the provision is sound in that it deals with matters which are peculiarly within the knowledge of the accused. Accordingly, the accused is in the best position to

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<sup>3</sup> Case no P.12/2009 Supreme Court judgment delivered on 4 April 2013 at 17

produce the requisite evidence that he or she had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority of the owner to dispose of them. It is self-evident that proving the state of mind of the accused presents the prosecution with particular difficulties. In these circumstances the accused is only required to prove facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. There is also a logical connection between the fact proved and the fact presumed. She further submits that the presumption is necessary if the offence is to be effectively prosecuted, and the state cannot be expected to produce the evidence itself.

She further contends that there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence that he had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority of the owner to dispose of them. It does not compel persons to give testimony against themselves contrary to the Namibian Constitution.'

She further states that 'a statutory provision which imposes an evidential burden (a presumed fact may be rebutted by evidence giving rise to a reasonable doubt does not violate the presumption of innocence because there is no possibility of being convicted despite the existence of a reasonable doubt. The statutory formulation that a proven fact shall be prima facie evidence of a presumed fact does not impose a legal burden of proof on an accused but merely gives rise to an evidential burden'.

In any event, she submits that the presumption places a permissible limitation on the rights enshrined in Article 12 (1) (d) of the Namibian Constitution. In the particular legal and social circumstances in Namibia such limitation is reasonable or justifiable, is necessary, does not negate the essential content of the right, and is of general application.'

[11] Applicant's submissions against the constitutionality of the impugned provision



Counsel for applicant submits that s 7 (1) requires the prosecution to establish the following three elements of the offence beyond reasonable doubt, to wit:

- (a) that the accused was found in possession of goods, other than stock or produce;
- (b) which were acquired otherwise than at a public sale and
- (c) that the goods had been stolen.

After the Prosecution had establish the three elements, the accused will be required to establish two further elements, namely

- (a) that the accused believed that at the time of acquiring the goods, that the persons from whom he or she received them was indeed the owner of such goods, or
- (b) that such person was duly authorised by the owner to dispose of the goods; and that the accused's belief was reasonable

Counsel further submits that s 7 (1), apart from placing a burden of proving the required *mens rea* on a balance of probabilities furthermore imposes on an accused the burden of adducing evidence in an effort to establish the reasonableness of an accused's subjective belief. As such, same introduces statutory liability for the negligent, albeit innocent, acquisition of receipt of stolen goods.

According to counsel, the effect of the reverse onus is that once the existence of the three elements have been proved by the state, the presumption of guilty knowledge comes into operation and the onus of disproving it falls on the accused.

If at the end of the day the probabilities are evenly balanced, the court is bound to convict despite the fact that it is as probable as not, that the accused is innocent.

Counsel further argues that the presumption therefore does not only fall into the class of reverse onus provisions, but also is in conflict with the long established rule of the common law that it is always for the prosecution to prove the guilt of the accused person beyond a reasonable doubt. Once it is established that the effect of a presumption is such that an accused person is exposed to the real risk of being convicted despite the existence of a reasonable doubt as to his/her guilt then it follows that same clearly is unconstitutionally impermissible as it necessarily negates an

accused's rights to be presumed innocent as well as the long established rule of the common law to prove the guilt of an accused person beyond reasonable doubt. Counsel relies heavily on the majority judgment of the Constitutional Court in South Africa in *S v Manamela & another*<sup>4</sup> where identical reverse onus provision in s 37 (1) of the General Law Amendment Act 62 of 1955, was declared invalid and inconsistent with the Constitution. The crux of the issue which the Constitutional Court had to grapple with in *Manamela* case was whether the reverse onus provision contained in section 37 (1) of the General Law Amendment Act 62 of 1955 is consistent with the constitutionally entrenched right to a fair trial, and in particular, s 35 (3) (h) of the Constitution, which guarantees the right to be 'presumed innocent', to remain silent, and not to testify during the proceeding'.

In the ***Manamela case*** the majority judgment held<sup>5</sup> that:

*'16 [24] The right to silence, seen clearly 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 inevitability of such a finding. In these circumstance, 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.'*

The Court went on and stated the reasons why the limitation on the right to silence is justified and held<sup>6</sup> that:

*'21 [38] Mr D'Oliveira argued persuasively that in the vast majority of cases the state has no information or evidence concerning the circumstances in which, and the persons from whom, the accused acquired the goods in question. Almost always all the information relevant to the determination of reasonable cause is peculiarly within the knowledge of the accused. This makes it extremely difficult for the state to demonstrate*

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<sup>4</sup> 2000 (3) SA 1 (CC)

<sup>5</sup> At 16

<sup>6</sup> At 45

*the absence of reasonable cause unless there is evidence emanating from the accused. The appellants did not dispute this. In the circumstances, there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely that he or she had reasonable cause for believing that the goods were acquired from the owner or from some other person who had the authority of the owner to dispose of them. For these reasons, then, the limitation on the right to silence contained in the challenged phrase is justified.'*

[12] On the **presumption of innocence**, the majority judgment stated<sup>7</sup> that:

[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 lays, 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.*

The majority judgment further stated that:

'[26] *The purpose of the presumption of innocence is to minimize the risk that innocent person 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 section 37 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*

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<sup>7</sup> At 16

*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 section 37 (1). Unless saved as a permissible imitation, it is unconstitutional and invalid.'*

*'[49] In assessing whether the section 37 (1) limitation of the right to be presumed innocent is reasonable and justifiable, the state in this case has established the importance of the objectives sought to be attained by the impugned provision. Nonetheless, considering that the grounds of justification must be more persuasive where the infringement of the right in question is extensive, the state has failed, in our view, to discharge the onus of establishing that the extent of the limitation is reasonable and justifiable and that the relation between the limitation and its purpose is proportional. It equally failed to establish that no less restrictive means were available to Parliament in order to achieve the purpose. The imposition of an evidential burden on the accused would equally serve to furnish the prosecution with details of the transaction at the time of acquisition or receipt. Accordingly there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests present in this case and which does not raise concerns relating to additional cost, the prioritisation of social demands and practical implementation<sup>8</sup>'*

The minority judgment in the Manamela case agreed with the majority judgment that s 37 infringes the right to be presumed innocent. O'Regan J (as she then was) who wrote the minority judgment stated<sup>9</sup> that:

*'The risk that an accused person will be convicted despite the existence of a reasonable doubt is clearly an infringement of the presumption of innocence which is a fundamental principle of our criminal justice system'.*

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<sup>8</sup> At 24

<sup>9</sup> At 42

She further stated<sup>10</sup> that:

*'If we then weigh the scope of the infringement of the presumption of innocence against the purpose, importance and effect of s 37, it is our view that the scale is tilted in favour of the constitutionality of s 37. The need to discourage improvident acquisition of stolen goods by imposing an obligation upon members of the public to take diligent care when acquiring goods and to satisfy themselves that reasonable grounds for believing that the goods are not stolen can later be shown is of cardinal importance in a society like ours, racked as it is by high levels of property-related crimes often accompanied by horrifying violence. We acknowledge that s 37 does infringe the presumption of innocence and does impose an obligation upon an accused to establish that he or she had reasonable grounds for believing goods not to be stolen. There can be no doubt that, as a general rule, it is inappropriate for an obligation to be placed upon an accused to establish innocence. However, it is our view that a limitation on the presumption of innocence that results in a duty of vigilance, coupled with an obligation to persuade a court that in acquiring goods one has acted responsibly, in order to achieve the overall purpose of smothering the market in stolen goods is justifiable.'*

I respectfully disagree with that. It is trite there is no duty upon an accused person, where the state bears the onus, to persuade the court that one acted responsibly in acquiring the goods. If the accused version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false<sup>11</sup>. In term of s 7 (1) the court is bound to convict despite the fact that it is probable as not that the accused is innocent.

[13] Submissions by counsel for first respondent in favour of the constitutionality of the impugned provision

Counsel for first respondent submits that a statutory provision which imposes an evidential burden (a presumed fact may be rebutted by evidence giving rise to a

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<sup>10</sup> At 42 para 99

<sup>11</sup> S v V 2001 (1) SACR 455 A-C

reasonable doubt), does not violate the presumption of innocence because there is no possibility of being convicted despite the existence of a reasonable doubt. The statutory formulation that a proven fact shall be prima facie evidence of a presumable fact does not impose a legal burden of proof on an accused but merely gives rise to an evidential burden.

Counsel submits that the court should find that section 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956 creates an evidential burden and that a presumed fact may be rebutted by evidence giving rise to a reasonable doubt. Counsel further submits that in the vast majority of cases the state has no information or evidence concerning the circumstances in which, and the persons from whom, the accused acquired the goods in question. Almost always all the information of reasonable cause is peculiarly within the knowledge of the accused. This makes it extremely difficult for the state to demonstrate the absence of reasonable cause unless there is some evidence emanating from the accused. In the circumstance, there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale to produce the requisite evidence, namely that he or she had reasonable cause for believing that the goods were acquired from the owner or from such other person who had the authority of the owner to dispose of them.

[14] The presumption of innocence until proven guilty is clearly infringed by s 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956.

The presumption of innocence instills confidence in the criminal justice system and also demonstrates to the accused and others, by placing the burden of proof on the state, that once an accused's guilt has been proven or disproved he or she had a fair trial.

The requirement that an accused should prove his or her innocence runs counter to the presumption of innocence, which is a cornerstone of our of criminal justice system. The purpose of the presumption of innocence is to minimize the risk that innocent person may be convicted and imprisoned. It does so by imposing on the prosecution the burden of proving the essential elements of the offence beyond a reasonable doubt, thereby reducing to an acceptable level the risk of error in a court's overall assessment

of the evidence tendered in the course of a trial. Counsel for the applicant submits that no limitation upon the presumption of innocence is authorized in the Constitution. That submission is not correct in the light of what was stated in<sup>12</sup>.

*In Attorney General v the Minister of Justice & Others* by Shivute CJ when he stated that: ‘ the expression ‘according to law’ in Art 12 (1) (d), which for all intents and purpose conveys exactly the same ordinary meaning as the phrase in accordance with law’ employed in art 13 (1), serves the same purpose: It allows by implication for the limitation of the right presumption of innocence and implies a measure of flexibility to allow the legislature to determine substantive and procedural frameworks in the public interest in terms of which a person may be proved guilty according to law. This implicit flexibility is necessary if a balance is to be struck between the rights of the individual to be presumed innocent and the state’s obligation to protect the interest of the public.

I am mindful of the objectives the impugned provision seek to achieve, but, in my view there is no reasonable and justifiable limitation on the right to be presumed innocent. The risk that an accused may be convicted despite the existence of reasonable doubt clearly infringes the presumption of innocence. And it was also not shown that the relation between the limitation and its purpose is proportional. As it was stated in *Manamela case* <sup>13</sup>,

*‘In the light of the vital importance to our criminal justice system to be presumed innocent and the cluster of fair trial rights which accompany it, the imposition of a full burden of proof in the circumstances has a disproportionate impact on the right in question.’*

I find the reasoning in the majority judgment in the *Manamela case* persuasive.

In a society where the majority of our population is illiterate and engage in informal trading as a way of making a living on a daily basis, the risk of innocent people being convicted and sent to jail is too high if the reverse onus in s 7(1) is to be retained. The reverse onus imposes a full legal burden of proof on the accused and after hearing all the evidence, there is doubt in the mind of the judicial officer as to where the truth lies, the constitutional presumption of innocence is replaced by a statutory presumption of

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<sup>12</sup> Supra at 29

<sup>13</sup> Supra at 25

guilt and a conviction will follow even though the version of the accused might reasonably be true. To safeguard against that risk, the presumption of innocence is crucial. It ensures that until the state proves the guilt of an accused person beyond reasonable doubt, he or she is innocent and that is essential in a society committed to fairness and justice. The presumption of innocence instills confidence in the judicial system and respect for the rule of law.

In my respectful view there are less invasive means to strike a balance between the rights of accused persons to be presumed innocent and the state's obligation to protect the interest of the public. In my view the presumption contained in s 7 (1) of Ordinance 12 of 1956 is unconstitutional and must be declared as such.

[15] The appropriate order in terms of Art 25 (1) (b) of the Constitution

Article 25 (1) (b) of the Constitution provides that , if a court is of the opinion that any law in force immediately before the date of independence is unconstitutional, it may either set aside the law or allow Parliament to cure any defect in such law, in which event the provisions of Art 25 (1) (a) shall apply.

Order

In the result I make the following order:

1. The phrase '*proof of which shall be on such first-mentioned person*' contained in s 7 (1) of the General Law Amendment Ordinance, Ordinance 12 of 1956, is declared unconstitutional and is struck down.
2. The first respondent is ordered to pay the costs of the applicant.



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**NG NDAUENDAPO  
JUDGE**

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**N SHIVUTE  
JUDGE**

**APPEARANCE**

**ON BEHALF OF THE APPLICANT:**

**ETZOLD-DUVENHANGE ATTORNEY,  
NOTARIES & CONVEYANCES**

**ON BEHALF OF THE 1<sup>ST</sup> RESPONDENT:**

**GOVERNMENT ATTORNEY**