REPORTABLE

CASE NO: SA 62/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL OF THE REPUBLIC OF NAMIBIA	**Appellant**
and	
JOÃO CARLOS VIDAL GOMES	**First Respondent**
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA	**Second Respondent**
MINISTER OF JUSTICE OF THE REPUBLIC OF NAMIBIA	**Third Respondent**
REGIONAL COURT MAGISTRATE: SWAKOPMUND	**Fourth Respondent**
MARTIN NAMBALA	**Fifth Respondent**
MELKISEDEK SHEEHAMA	**Sixth Respondent**
SAKARIA SAKARIA SAPANGE	**Seventh Respondent**

Coram: MAINGA JA, SMUTS JA and O'REGAN, AJA

Heard: **5 March 2015**

Delivered: **19 August 2015**

APPEAL JUDGMENT

SMUTS JA (MAINGA JA and O'REGAN AJA concurring):

[1] The central issue to be determined in this appeal concerns whether the reverse onus in the statutory offence dealing with the acquisition of stolen goods

impermissibly infringes upon the right to a fair trial entrenched in Art 12 of the Constitution. That offence is cast in s 7(1) of the General Law Amendment Ordinance, 1956.[1]

[2] The first respondent was found in possession of three welding machines on the premises of his employer by the police. He had allegedly purchased two of these machines from one of his co-accused in the prosecution which ensued.

[3] The first respondent was charged in the regional court with theft. An alternative charge of contravening s 7(1) was also preferred against him. He pleaded not guilty to all charges. His counsel informed the regional court prosecutor that he intended to challenge the constitutionality of s 7(1) on the grounds that it infringed his rights to a fair trial. The regional court prosecutor then indicated that she would not continue with the alternative charge of contravening s 7(1) but would persist with the main charge of theft.

[4] Section 7(1) reads as follows:

> 'Any person who is in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Law Amendment Ordinance, 1935 (Ord 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 receives them or that such person has been duly authorised by the owner thereof to deal with or dispose of them, shall be guilty of an offence and liable on conviction to the penalties which

[1] Ord 12 of 1956.

may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory'.

It is to be read with s 7(2) which provides:

'For the purposes of sub-sec (1) "public sale" means a sale effected –

(a) At any public market; or

(b) By any shopkeeper during the hours when his shop may in terms of any law remain open for the transaction of business; or

(c) By a duly licensed auctioneer at a public auction; or

(d) In pursuance of an order of a competent court'.

[5] In terms of s 264 of the Criminal Procedure Act, 1977,[2] (CPA) a competent verdict on the main count of theft would include a contravention of s 7(1). Given the risk that the first respondent ran of being convicted of contravening s 7(1) as a competent verdict, he brought an application to the High Court to set aside s 7(1) on the grounds that the reverse onus contained in it offends against the cluster of rights which make up the right to a fair trial embodied in Art 12 of the Constitution. The rights invoked included the presumption of innocence and the privilege against self-incrimination and more generally the right not to be a compellable witness against oneself and the right to silence contended to be inherent to the right of a fair trial even if not expressly included in Art 12.

[2] Act 51 of 1977.

[6] The first respondent explicitly relied upon the majority judgment in *S v Manamela & Another (Director-General of Justice Intervening)*[3] in which the Constitutional Court of South Africa declared invalid the reverse onus in an almost identically worded offence created in s 37(1) of the South African General Law Amendment Act, 1955.[4]

[7] The first respondent's application was opposed by the Prosecutor-General, the appellant. In her opposition to the application, the Prosecutor-General (PG) referred to the difference in wording between the provisions in the South African and Namibian Constitutions and argued that the interpretation given by the Constitutional Court to s 37(1) is to be seen within the context of the South African Constitution. The PG submitted that the meaning and import of the right to a fair trial embodied in Art 12 would need to be ascertained with regard to the text of the Namibian instrument and the intention of its founders. The PG correctly pointed out that the rights to remain silent and not to have to testify during a trial are not expressly provided for in Art 12 of the Namibian Constitution, whilst these rights are entrenched as part of the right to a fair trial in the South African Constitution.

[8] The PG also submitted that the fundamental rights entrenched in the Constitution are not absolute and unqualified and that the limitation of the right to a fair trial by virtue of the reverse onus in s 7(1) constituted a justifiable limitation upon the right to a fair trial, given the need for the effective prosecution of crime in independent Namibia.

---

[3] 2000 (3) SA 1 (CC) ('*Manamela*').
[4] Act 62 of 1955. [s 37 (1)].

[9] For the large part, the PG's opposition relied heavily upon the approach found in the closely reasoned minority judgment in *Manamela.* The PG argued that the legislature should be allowed to regulate the market in stolen goods by imposing an obligation upon members of the public to act conscientiously to avoid participation in that market by discouraging them from acquiring goods otherwise than at a public sale without first ascertaining satisfactorily that the goods have not been stolen. The effect of requiring the public to undertake the kind of inquiries imposed by s 7 would, she argued, diminish traffic in stolen goods.

[10] The PG further stated that Namibia is beset by robbery and theft which support an active market for stolen goods. She contended that it would not be unjustifiable for the legislature to exhort its citizens not to encourage a market in stolen goods because the existence of this market gives rise to crime. Given the extensive market in stolen goods, the State would be entitled to oblige its citizens to act vigilantly to ensure that they can prove that they have reason to believe that the goods they acquire are not stolen.

[11] The PG also submitted that the rationale for s 7(1) is sound in that it deals with matters which are peculiarly within the knowledge of the accused. The accused would be in the best position to 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. The PG pointed out that proving the state of mind of the accused would invariably present the prosecution with particular difficulties. In these circumstances, the accused

would only be required to prove facts to which he or she has easy access, and which it would be reasonable to expect the prosecution to disprove. The PG also contended that there is also a logical connection between the facts proven and the fact presumed.

[12] The PG also contended that the presumption was necessary to effectively prosecute the offence, and that limitation contended for would not negate the essential content of the right, and is of general application.

Judgment of the court below

[13] A full court (of two judges) heard the first respondent's challenge upon s 7. The court found that the reverse onus in s 7 infringed the presumption of innocence. Following the approach of the majority in *Manamela*, it found that the risk that an accused may be convicted despite the existence of reasonable doubt infringed the presumption of innocence and violated Art 12.

[14] The court below proceeded to strike down the phrase 'proof of which shall be on such first mentioned person' in s 7(1) as unconstitutional.

[15] Despite finding the reasoning of the majority in *Manamela* to be persuasive, the court did not however consider in its judgment whether to read in words which would instead establish an evidential presumption upon an accused which the majority in *Manamela* had done. The effect of the order of the High Court by striking down the reverse onus without more would require the prosecution to establish

beyond reasonable doubt that an accused person did not have reasonable cause to believe that the goods were not stolen. The manifest difficulties in doing so and the consequent emasculation of the offence and the vacuum in the legislative framework caused by this are not addressed by the court below. Nor is the fact that the majority in *Manamela* deliberately eschewed this approach because of these consequences and for this reason found that this vacuum would be addressed by reading in words to establish an evidential presumption.

[16] The court below further stated:

> '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 guilt and a conviction will follow even though the version of the accused might reasonably be true'.

[17] The court reasoned that the presumption of innocence, essential to a society committed to fairness and justice, would safeguard against the risk of people being convicted where there was reasonable doubt.

The appeal

[18] The PG appealed against the court's judgment.

[19] The first respondent's legal practitioner of record withdrew after the appeal was noted. At the request of the court, Mr Tjombe was appointed as *amicus curiae* to present argument on behalf of the first respondent. The court appreciates his industry in doing so.

Mootness

[20] On the day before the hearing and some time after filing his written heads of argument, Mr Tjombe filed an affidavit stating that he had eventually been able to get hold of the first respondent following his earlier unsuccessful attempts. The first respondent had conveyed to him that he had been acquitted in the regional court on the day before the hearing of this appeal and had no interest in the outcome of the appeal.

[21] The constitutional issue between the first respondent and the PG had thus become moot as far as the first respondent was concerned.

[22] Counsel for the PG requested the court to nevertheless determine the appeal. He accepted that the constitutional issue was no longer a live issue as between the first respondent and the PG. But he said that it was a matter of public interest for the issue of the reverse onus in s 7(1) to be finally determined as several prosecutions and future prosecutions would be affected. Mr Tjombe accepted that the broader public interest would be served if there were to be a final determination of the issue.

[23] As a general principle, courts would decline to hear matters in which there is no live or existing controversy. This is to avoid pronouncing upon issues which have become academic and have no practical effect. But the fact that a case has become moot between the parties should not constitute an absolute bar to the justiciability of an issue, particularly in constitutional matters. It is a matter to be decided in the court's discretion. In the exercise of a court's discretion, an important factor to be considered is whether the court's order will have any practical effect upon the parties or on others and for achieving legal certainty.

[24] This is the approach adopted both in South Africa[5] and in England. In *R v Security of State for the Home Department, Ex parte Salem*,[6] it was said by Lord Slynn of Hadley:

> 'The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'[7]

[25] Although the substantive issue is now moot between the parties, it should be noted that the question of costs remains live as the High Court made an adverse

---

[5] *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) para 29; *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) para 32; *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 11.
[6] [1999] 2 All ER 42 (HL). Followed in *Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others* 2012 (1) SA 453 (SCA) para 44.
[7] *Supra* 47d.

costs order against the PG. Ordinarily, however, a continuing dispute about a costs order will not suffice on its own for the court to exercise its discretion to determine an issue that is no longer live between the parties. In this case, there are two reasons why it is appropriate for this court to decide the issue in this appeal. First, the order made by the High Court, if permitted to stand, would have the harmful effect of leaving a 'vacuum' in the legislative framework.[8] Secondly, given the fact that there are several pending prosecutions for contravening s 7, the public interest will be served in achieving legal certainty on this issue.

Submissions on appeal

[26] Counsel for the PG argued that the High Court erred in failing to find that words should be read into s 7 in order to establish an evidential burden as had seen done by the majority in *Manamela*. Counsel also argued that the common law should be developed so that the impugned words create an evidential burden to be satisfied by evidence creating a reasonable doubt.

[27] The *amicus curiae* defended the High Court judgment and submitted that the impugned words infringed the presumption of innocence embodied as a central component of the right to a fair trial entrenched in Art 12. Counsel also argued that the approach of the majority in *Manamela* in this regard should be followed. Counsel relied upon the portion of the High Court's judgment referring to members of the community engaging in informal trade who would be at risk of conviction even if an evidential burden were to be read into s 7. He also argued that, upon a purposive

[8] As was explained by the majority in Manamela, para 58 and referred in paragraph [15] above.

approach to Art 22 of the Constitution, s 7 was unconstitutional and that an evidential burden should also not be read into s 7.

Constitutional interpretation

[28] The principles applicable to constitutional interpretation are well settled. The general approach when construing provisions of chapter 3 entrenching fundamental rights and freedoms has been held by this court to avoid narrowness and that these provisions are to be 'broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legalism'.[9]

[29] As was also recently stressed by this court in the *Attorney-General* case, close regard is to be had to the language of the Constitution itself to identify the purpose of the constitutional provision in question.[10] This is of particular importance when the provisions of the Constitution materially differ from the wording employed in other Constitutions, such as the South African Constitution. Article 12 is a case in point. There are significant differences between the wording of Art 12 and its counterparts in the interim and final South African Constitutions. For instance the right to silence is expressly referred to in the South African instruments whilst there is no reference to it in Art 12.

[9] *Government of Republic of Namibia v Cultura 2000* 1993 NR 328 (SC) repeatedly followed and most recently in the context of Art 12 in *Attorney-General of Namibia v Minister of Justice and Others* 2013 (3) NR 806 (SC) para 7. (*Attorney-General*).
[10] *Supra* para 7.

[30] This court also stressed in *Attorney-General* that caution should be exercised in having regard to foreign precedent when considering the constitutionality of provisions in a statute, emphasising:

> '. . . Ultimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the express or implicit intention of the founders of the Constitution. Furthermore, as a general proposition, whilst foreign precedent is a useful tool to determine the trend of judicial opinion on similar provisions in jurisdictions which enjoy open and democratic societies such as ours, ultimately the value judgment that a Namibian court has to make in the interpretation of the provisions of the Constitution in as much as they may impact on the impugned provisions, must be based on the values and aspirations of the Namibian society'.[11]

Article 12

[31] The right to a fair trial, entrenched in Art 12, reads thus:

> 'Fair Trial
> (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.
>
> (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
>
> (c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

[11] *Supra* para 8.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(*b*) hereof.

(2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common-law defences of previous acquittal and previous conviction.

(3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed'.

[32] After a thorough survey of authorities of this and several other jurisdictions, this court in *Attorney-General* stated of Art 12:[12]

'It appears to me that the essential content of Art 12 is the right to a fair trial in the determination of all persons' 'civil rights and obligations or any criminal charges against them' and that the rest of the subarticles, which only relates to criminal trials, expounds on the minimum procedural and substantive requirements for hearings of that nature to be fair. A closer reading of Art 12 in its entirety makes it clear that its

[12] *Supra* para 17.

substratum is the right to a fair trial. The list of specific rights embodied in Art 12 (1)(*b*) – (*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 overarching 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 Art 12. The contrary view expressed in *Van den Berg*, ie that the list is exhaustive, cannot be accepted as correct and should therefore not be followed. I am fortified in this conclusion by the *dictum* of Kentridge AJ in *S v Zuma and Other*s 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401; [1995] ZACC 1) at 651J–652A relied on by Mr Botes where the learned acting justice in interpreting s 25(3) of the South African Interim Constitution stated as follows:

> "The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraph (a) to (j) of the subsection. 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."

Kentridge AJ went on to observe at 652C–D that when the South African Constitution came into operation, s 25(3) had required criminal trials to be conducted in accordance with the "notions of basic fairness and justice" and that it was then for all courts hearing criminal trials to give content to those notions'.

[33] The true content of Art 12 is thus the right to a fair trial. Like many of the rights entrenched in chapter 3, it is not absolute and unlimited as I further explained below.

[34] The court in *Attorney-General* found that the non-derogation clause in Art 24, is of limited assistance in the interpretation of Art 12.[13] I would venture to put the proposition in even stronger terms. Art 24 only finds application during any period when a state of national defence or declaration of emergency is in force.

[13] *Supra* para 27.

[35] In considering reverse onus provisions in s 332(5) and s 245 of the Criminal Procedure Act, 1977,[14] the court in *Attorney-General* framed the context of the enquiry in these terms:[15]

> '. . . Fundamental to the enquiry is whether the Constitution authorises a limitation to the presumption of innocence entrenched in Art 12(1)(*d*). Unlike the provisions of some of the constitutions cited to us by counsel, the Namibian Constitution does not have a general limitation clause which restricts the scope of some or all of the fundamental rights and freedoms entrenched therein. The approach adopted by the founders of our Constitution is different: on the one end of the spectrum are those fundamental rights and freedoms which are inviolable, such as the rights to life and dignity entrenched in arts 5 and 8. On the other end of the spectrum are those rights and freedoms where limitations are authorised in the clearest of language and the extent of those limitations is extensively defined, such as in Art 21 entrenching fundamental freedoms. In between those rights and freedoms at either end of the spectrum, are a number of other rights and freedoms of which the scope and application is qualified by phrases such as "according to law", "in accordance with law" or "according to procedures established by law"'.

[36] The court thus identified on the one end of the spectrum rights that are expressly inviolable and on the other, rights where limitations are expressly authorised and delineated, such as in Art 21(2). Implicit in the reasoning in *Attorney-General* is that the other rights in chapter 3 between these two ends of the spectrum are not necessarily absolute. Phrases such as 'in accordance with law' and 'according to law' imply that the rights are not absolute or unlimited in their scope, but in my view, it does not follow that rights that are not expressly qualified in this way are absolute. Whether they are will depend on their nature and content as

[14] Art 51 of 1977.
[15] *Supra* para 11.

purposively construed. This is demonstrated by the fact that this court has held that rights, even without an internal limiting phrase such as "according to law", are nevertheless, in their nature, properly construed, not absolute or unlimited.

[37] For instance, this court has found that the right to property protected in art 16 is not absolute.[16] This court stated in this regard:

> 'The owner of property has the right to possess, protect, use and to enjoy his property. This is inherent in the right to own property. It is, however, in the enjoyment and use of property that an owner may come into conflict with the rights and interests of others, and it is in this sphere that regulation in regard to property is mostly needed and in many instances absolutely necessary. Such regulation may prohibit the use of the property in some specific way or limit one or other individual right without thereby confiscating the property and without thereby obliging the State to pay compensation.'[17]

[38] After proceeding to cite several statutory examples illustrating this, this court concluded:

> 'It is in my opinion inconceivable that the founding fathers of our Constitution were unaware of the vast body of legislation regulating the use and exercise of rights applicable to ownership or that it was their intention to do away with such regulation. Without the right to such control it seems to me that it would be impossible for the Legislature to fulfil its function to make laws for the peace, order and good government of the country, in the best interest of the people of Namibia (Art 63(1) of the Constitution). It therefore seems to me that, like the right to equality before the law (Art 10(1) of the Constitution), the right to ownership in property is not absolute,

[16] *Namibian Grape Growers and Exports Association and Others v Ministry of Mines and Energy and Others* 2004 NR 194 (SC) at 210J-211G. See also *Municipal Council of Windhoek v Telecom Namibia Ltd* SA 24/2013.
[17] *See Namibian Grape Growers* case, cited in previous footnote, at 210J-211B.

> but is subject to certain constraints which, in order to be constitutional, must comply with certain requirements'.[18]

[39] A similar approach was adopted with reference to the equality clause at an early stage by the High Court in *Mwellie v Ministry of Works, Transport and Communication and Another*.[19]

[40] After a thorough comparative survey of authorities, Strydom JP in his illuminating judgment in *Mwellie* quoted the following with approval:

> 'On the strength of the above quotations I think it can be said that the courts, in all the countries referred to by me, accepted that equality before the law is not absolute and that the legislature must, for good and proper government and also for the protection of those who are unequal, legislate. In this legislation reasonable classifications may be made and as long as these classifications are rationally connected to the object of the statute the courts will accept the constitutionality of such legislation.'[20]

and concluded:

> ' . . . I have therefore come to the conclusion that also in regard to the Namibian Constitution Art 10(1) thereof is not absolute but that it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognisance of "intelligible differentia" and allows provision therefor'.[21]

---

[18] *Supra* at 211G-I.
[19] 1995 (9) BCLR 1118 (Nm).
[20] *Supra* at 1131C-D, followed in *MWeb Namibia (Pty) Ltd v Telecom Namibia and Others* 2011 (2) NR 670 (SC) para 14.
[21] *Supra* at 1132F.

[41] That approach was followed in this court in *MWeb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others*.[22] This court in *MWeb* made it clear that the fundamental right to equality protected in Art 10 is not absolute.

> 'Case law has also settled the principle that legislation introducing limitations to fundamental freedoms or rights will not be struck down as unconstitutional if it makes reasonable classifications which are rationally connected to its object. It has been said that such classifications are sometimes necessary for the purpose of good governance and protection of those who are unequal'. [23]

[42] As held in the *Attorney-General* matter, the right to a fair trial is not absolute. The concept of a fair trial is flexible, requiring a balance to be struck between an individual's rights to a fair trial (including that to be presumed innocent) and the State's obligation to protect the interest of the public in effectively combating and prosecuting crime.[24]

[43] A similar approach was adopted by Strydom JP in *Freiremar SA v Prosecutor-General of Namibia and Another*[25] where he held that placing a reverse onus upon an accused would not be unconstitutional in all cases, citing both Canadian and American authorities.[26] He concluded that the 'rational connection test' should be followed in determining whether the reverse onus would pass constitutional muster as follows:

---

[22] *Supra* para 14.
[23] *Supra* para 13.
[24] *Supra* para 31.
[25] 1996 NR 18 (HC) (Full Bench).
[26] *Supra* p 25E-J.

> 'In my opinion the test as applied in these cases is a practical one which would require an accused to speak up in circumstances where an explanation would be required because of the presumption raised by the proved facts and because of the personal knowledge of the accused. However, where the proven facts are not such that an explanation is readily required the placing, in those circumstances, of an inverted onus on an accused will require an accused to prove his innocence which will be contrary to the Constitution containing a provision as that set out in Art 12(1)(*d*) of the Namibian Constitution.'

[44] This court in *Attorney-General* cited this approach[27] with approval and made it clear that reverse onus provisions and evidential presumptions are not necessarily unconstitutional.[28]

[45] In *S v Meaker*,[29] cited with approval by this court in *Attorney-General*,[30] Cameron J helpfully distilled the following (sometimes overlapping) considerations from South African Constitutional Court decisions concerning challenges on reverse onus provisions:

(a) where the use is required to prove only facts to which he or she has easy or peculiarly within his or her knowledge, and which it would be unreasonable for the prosecution to disprove;[31]

---

[27] *Supra* para 48.
[28] *Supra* para 48. The court also approved of similar pronouncements in the South African Constitutional Court in *S v Zuma* 1995 (2) SA 642 (CC), and of the Zimbabwean Supreme Court in *S v Chogugudza* 1996 (1) ZLR 28 (SC) and a closely reasoned decision by a full court in the South African High Court in *S v Meaker* 1998 (8) BCLR 1038 (W).
[29] *Supra.*
[30] *Supra* para.
[31] *S v Zuma supra* at 662 para 38.

(b) where there is a 'logical connection' between the fact proved and the fact presumed[32] and where the presumed fact is something which is more likely than not to arise from the basic facts proved;[33]

(c) where the application of the common-law rule relating to the State's *onus* causes substantial harm to the administration of justice, or where the presumption is necessary if the offence is to be effectively prosecuted, and the State shows that for good reason it cannot be expected to produce the evidence itself;[34]

(d) where generally the presumption in its terms is cast to serve only the social need it purports to address, and is not disproportionate in its impact – and specifically the extent of the danger that innocent people may be convicted;[35]

(e) where the State could adequately achieve its legitimate ends by means which would be constitutionally competent in general and consistent with the presumption of innocence in particular.[36]

[32] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) paras 23–24.
[33] *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) para 22.
[34] *S v Zuma supra* paras 37, 41.
[35] *S v Mbatha, S v Prinsloo* paras 20-24.
[36] *S v Coetzee and Others* 1997 (1) SA SACR 379 (CC) para 48.

This list, referenced to authorities, can assist and provide useful guidance to courts in Namibia in determining the circumstances in which a reverse onus will not be in conflict with Art 12 of the Constitution.

[46] This court in *Attorney-General*[37] also cited with express approval the approach of Lord Woolf in the Privy Council in *Attorney-General* of *Hong Kong v Lee Kwong-Kut.*[38] That matter concerned the compatibility of two separate provisions containing reverse onus provisions with the Hong Kong Bill of Rights. One of the provisions created an offence where a person 'having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained' and who was unable to 'give an account to the satisfaction of a magistrate, how he came by it'. The second statutory provision raised in the matter concerned a reverse onus in drug trafficking legislation creating a serious crime where persons are concerned in an arrangement whereby the retention or control of another's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the other person carried on or had carried on drug trafficking or benefited from it. The section in question created this offence – an absolute prohibition on engaging in that activity with a person who upon a belief on reasonable grounds was carrying on or benefitted from drug trafficking. It was subject to a special defence where an accused was required to establish on a balance of probabilities that he or she did not know or suspect the arrangement related to trafficking.

[37] *Supra* paras 36 – 37.
[38] [1993] 3 All ER 939 (PC).

[47] The court in *Attorney-General* referred at some length to the approach adopted by Lord Woolf for the Privy Council as follows:

> 'His Lordship went on to remark at 954g–h that while the Hong Kong judiciary should be zealous in upholding an individual's rights under the Bill of Rights, it was also necessary to ensure that disputes regarding the effect of the Bill of Rights were not allowed to get out of control. The issues arising out of the Bill of Rights should be approached with realism and kept in proportion. If that was not done, the Hong Kong Bill of Rights would become a source of injustice and would be debased in the eyes of the public. He concluded at 954j in fine – 955a as follows:
>
> > "In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime . . . It would not assist the individuals who are charged with offences if, because of the approach adopted to statutory defence by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge".'

I respectfully associate myself with the above sentiments. Lord Woolf thus acknowledged that situations may arise where the strict application of the principle that the prosecution must prove the guilt of an accused beyond reasonable doubt may be deviated from and gave an example where this may be done and why. He reasoned at 950c–h and I find it necessary to quote in extenso:

> 'There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is

> a matter of comparative simplicity for a defendant to establish that he has a licence . . . Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which Art 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in Leary v US (1969) US 395 6 at 36, "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'.

[48] The passage which immediately proceeded this extensive quotation is in my view of significance too. Lord Woolf said in the context of other constitutional instruments which protected the right to a fair trial (or equal protection before the law) without a general limitation provision of the kind found in the Canadian Charter:

> ‘Even though they are not subject to any express limitation, they are considered to have an implicit degree of flexibility . . . This implicit flexibility allows a balance to be drawn between the interest of the person charged and the state’.

[49] I respectfully agree with this court in *Attorney-General* that the approach of the Privy Council in that matter is instructive.

[50] In the application of this approach to the two offences, the Board in the *Hong Kong* matter considered that the most significant element of the offence in the first appeal (of possession of a suspected stolen item) was the onus placed on an accused person to give an explanation as his or her innocent possession of the property. Unlike s 7, the prosecution in *Hong Kong* need only establish possession and facts from which a reasonable suspicion of the property having been stolen may be inferred. The Privy Council found that offence impermissibly to contravene the right to be presumed innocent.

[51] As to the drug trafficking contravention, the Board reached a different conclusion. The substance of the offence was involvement in a transaction involving the relevant person's proceeds of drug trafficking and reasonable grounds to believe the specified facts. The failure to establish these would result in an acquittal. Turning to the reverse onus, Lord Woolf said:

> 'However, once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking, then the defendant knows he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy s 25(3) or (4). If the defendant chooses not to take the precautionary action under s 25(3) then he knows he can only safely proceed by relying on s 25(4). To be able to achieve this the defendant will have to take any steps to ensure that he does not have the knowledge or suspicion referred to. An example would be by insisting on seeing documents establishing the untainted source of the funds. If the defendant has done this then he will be aware of the relevant facts and it is reasonable that he should be required to establish them. It will be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a

defendant to bear that onus under s 25(4) is manifestly reasonable and clearly does not offend Art 11(1)'.[39]

Section 7

[52] Turning to s 7, it establishes the statutory offence of being in possession of stolen goods. It was enacted hard on the heels of s 37 of the General Law Amendment Act, 1955[40] in South Africa and is in substantially identical terms. Its statutory genesis is usefully explained in the majority judgment in *Manamela.*[41]

[53] The structure and the wording of s 7(1) require the prosecution to establish three elements beyond reasonable doubt. These are firstly that the accused was found in possession of goods, other than stock or produce; secondly that the goods were acquired other than at a public sale and thirdly that the goods had been stolen. A public sale for the purpose of this offence is defined in s 7(2) quoted in para [4] above. (This is unlike the position in the *Hong Kong* legislation where possession and a suspicion of being stolen needed to have been established).

[54] Once the prosecution has proven these elements beyond reasonable doubt, the accused then attracts the burden of showing that he or she had reasonable cause for believing at the time of acquisition of the goods that the person from whom they were received was the owner or authorised by the owner to dispose of them. This the accused must establish on a balance of probabilities.

---

[39] *Supra* at 953f-h.
[40] Act 62 of 1955.
[41] Para 14 – 15.

[55] By imposing a burden of this nature upon an accused – to establish the reasonableness of his or her subjective belief, s 7 effectively provides for statutory criminal liability for the negligent, albeit innocent, acquisition or receipt of stolen goods.[42]

[56] Both the majority and the minority in *Manamela* found that s 37(1) infringed upon the presumption of innocence entrenched in the South African Constitution. This was because the reverse onus necessarily implied that if an accused is unable to discharge it, he or she would be convicted even though there might be the existence of reasonable doubt on the part of a judicial officer trying the case. The majority thus found that it was unconstitutional for the legislature to require persons found in possession of stolen goods not acquired in a public sale to prove (and bear the onus) that they had reasonable cause for believing the goods were not stolen at the time of their acquisition.

[57] The minority, while finding that the onus infringed the presumption of innocence, however concluded that this was justifiable and constitutionally permissible to require that a person so found in possession of stolen goods to persuade a court that he or she had reasonable cause for believing that the goods were not stolen at the time of their acquisition.

[58] The approach of the minority is neatly summarised at the outset of the judgment:

---

[42] *Manamela supra* para 20.

> '[61] Where, as in our country, the market in stolen goods is extensive and the pattern of theft and robbery feeding that market is excessively violent, we consider that society has the right to oblige citizens to act vigilantly to ensure that they can prove that they have reason to believe that the goods are not stolen. This obligation has been imposed by the Legislature through the creation of a special offence which is tailored to capture the extent of culpability appropriate in these circumstances. The impact of the offence is that an accused, found in possession of stolen goods obtained otherwise than at a public sale and who is unable to establish reasonable cause for possessing such goods, is convicted, not of theft or common-law receiving, but of a special statutory offence. In our view, there can be no constitutional complaint about this offence.
>
> [62] Accordingly, we cannot agree with the majority that the reverse onus should be declared invalid. In our view, although the criminal offence established in s 37(1) of the General Law Amendment Act 62 of 1955 not only trenches upon the right to silence, but also upon the presumption of innocence, it does so in a justifiable manner. We do not differ from the majority on how the matter should be approached in relation to the justifiability of the infringements in question. Where we differ is in what answer the approach should yield. We accept, for the reasons given by the majority, that to the extent that s 37 breaches the right to silence, it is justifiable. However, we disagree with the majority in that, in our view, the section's infringement of the presumption of innocence is also justifiable. In this judgment, therefore, we consider only the latter issue - the justifiability of the breach of the presumption of innocence'.

[59] The right to remain silent is not expressly contained in Art 12 (unlike in South Africa). However, the presumption of innocence is. The question arises whether s 37 is in conflict with Art 12, to the extent that it protects the presumption of innocence.

[60] The centrality to a fair trial – the core right protected in Art 12 – of the presumption of innocence is well established. Requiring the prosecution to establish an accused person's guilt beyond reasonable doubt has been widely regarded as a

central feature of many legal systems to safeguard against convicting the innocent and the risk of error.[43]

[61] Nevertheless, as described above, under the Namibian Constitution, the presumption of innocence is not absolute. This has been established by this court in *Attorney-General* and by a full bench of the High Court in *Freiremar.* The question to be determined in this case is whether the reverse onus imposed on an accused person by s 7 is an infringement of Art 12, given that Art 12 does not prohibit all reverse onuses.

[62] As emphasised by the PG, Namibia is beset by robbery and theft. These feed an active and extensive market for stolen goods. In my view, it is justifiable for the legislature to discourage the market for stolen goods by obliging people acquiring goods otherwise than a public sale to take steps to ascertain satisfactorily that the goods are not stolen.

[63] An analysis of s 7 makes plain that an accused person will need to show, on a balance of probabilities, that he or she had 'reasonable cause . . . for believing at the time of . . . acquisition' that the goods are owned by the person from whom he or she receives them, or that the person is authorised by the owner to dispose of them. The requirement of 'reasonable cause' is an important ameliorative element in considering the effect of the presumption, one which seeks to balance the interest of the accused with the interest of the broader public. As the minority in *Manamela* reasoned:

---

[43] *Manamela (minority)* para 68 and the authorities collected there.

‘The first is that prudent application of s 37's requirement of “reasonable cause” appreciably reduces the risk of unfair convictions. The requirement of reasonable cause introduces an objective element into the analysis. An accused is required to establish that the grounds proffered for believing the goods were not stolen would have been accepted by a reasonable person as grounds for that belief. The difficulties of applying a purely objective test in a diverse society have been acknowledged by our Courts and have led some commentators to suggest that the test for *culpa* in our law should be subjective. Whatever the merits of this suggestion, it is clear that in applying the “objective” element in the determination of reasonable cause, the court does not ignore the material circumstances in which the accused found himself or herself. In *R v Mbombela*, one of the early authoritative cases establishing the objective criterion, the Court held that:

> “(a) reasonable belief, in my opinion is such as would be formed by a reasonable man in the circumstances in which the accused was placed in a given case.”[44]

and

‘The test for reasonableness, of course, remains objective. But what is reasonable will be construed in the circumstances in which the accused in a particular case finds himself or herself. The courts will therefore take into account the circumstances in which the accused acted in determining whether it was reasonable to believe that the goods were not stolen. “Reasonableness” is a legal commonplace in the courts which are required to apply it daily in determining the standard of care exacted of persons in ordinary life. Whether on the facts established an accused had “reasonable cause” will depend upon the presiding officer exercising a sound and fair judgment in regard to a number of factors including –

(a) the nature and value of the goods acquired;
(b) how they were acquired and the price, if any, that was paid for them;
(c) the person from whom they were acquired;

[44] *Supra* para 74.

(d) the manner in which trade in such goods normally occurs;
(e) the volume in which the goods in question are traded; and
(f) the social context in which the acquisition occurs'.[45]

[64] The *amicus curiae* made much of the reference in the High Court's judgment to 'the majority of our population' being illiterate and engage in informal trading as a way of living on a daily basis, with the risk of people being convicted and imprisoned being too high if the reverse onus in s 7(1) were to be retained'. There was no evidence to this effect on the papers. The court did not elaborate upon the nature of the trading referred to and the nature of goods so traded. The court would appear to have overlooked the fact that produce is excluded from the ambit of the offence. It also overlooked the requirement of reasonable cause, discussed above. Taking into account those factors, the concern raised, albeit unsupported, would in my view be addressed by the test properly applied and the further aspects set out in ameliorating the risk of innocent people being convicted.

[65] Another consideration in determining whether a reverse onus constitutes an infringement of Art 12 will be the nature of the offence concerned. The offence established by s 7 is not as serious an offence as theft, as was recognised by the minority in *Manamela* differing from the majority which had emphasised the seriousness of the offence. The minority stressed:

> 'A second important consideration in determining the justifiability of s 37's infringement of the presumption of innocence is the seriousness of the offence it creates and the accompanying question of sentence. In this regard we differ from the majority, whose analysis in our view tends to overstate the seriousness of the

[45] *Supra* para 76.

offence. Section 37 does not render a convicted accused guilty of common-law theft, nor even of common-law receiving. That the Legislature considered a contravention of this section as being less serious than either is spelt out in the provision itself, which renders an accused "liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except insofar as the imposition of any such penalty may be compulsory".

Recognising this, the Courts have already established a realm of negligent as opposed to dishonest contraventions of s 37, and marked that out as deserving special consideration in regard to punishment. In *S v Ghoor*, Holmes JA held that, where an accused subjectively believed that the goods were not stolen but was unable to prove that reasonable grounds existed for this belief, the crime committed was 'not a question of dishonesty, but more a matter of negligence'. The prison sentence imposed by the trial court was set aside on appeal and replaced with a fine and a suspended term of imprisonment. The basis upon which an accused is convicted is thus determinative, as in *Ghoor*, of the question of sentence. In the present case, the long prison sentences imposed were the result of the previous convictions of the two accused'.[46]

[66] I respectfully agree that these factors significantly reduce the risk of innocent persons being convicted.

[67] A further consideration relevant to the question whether s 7 is an impermissible infringement of Art 12 relates to the purpose of s 7. Again, the reasoning in the minority judgment in *Manamela* is of assistance in this regard -

'[82] It is important to appreciate the specific character of the offence s 37 creates. In effect, the Legislature has criminalised possession of stolen goods where an accused cannot establish reasonable cause for possessing them. The purpose of

[46] *Supra* para 78 and 79.

> the offence is clear: it is to regulate the market in stolen goods by imposing obligations upon members of the public to act diligently by avoiding participation in that market. The method s 37 uses to achieve this objective is to oblige someone caught in possession of stolen goods, acquired otherwise than at a public sale, upon pain of criminal punishment to advance a reasonable and probable explanation for their possession. In doing so, the State imposes a burden on that person in the sense that a reasonably possible explanation - in other words, a reasonable possibility of having reasonable cause - will not suffice to escape criminal conviction. The explanation must also be probable. The statutory offence of which the accused is convicted is, in effect, that of being unable so to satisfy a court'.

There is thus a logical connection between the facts to be proved and presumed.

[68] The value of discouraging people from acquiring goods other than at a public sale unless satisfied they are not stolen, is clear. The consequence will be to oblige the public to make enquiries in a manner that might help diminish traffic in stolen goods. The importance of s 7 in combatting crime, including violent crime in the form of robberies, is beyond dispute. The courts in Namibia have repeatedly stressed the prevalence and scourge of robbery and its deleterious impact upon society.[47] The need to diminish traffic in stolen goods and curtail robbery and theft in Namibia is a compelling legislative objective. If this form of crime is not combatted, that may, in the words of Lord Woolf, amount to a social injustice and debase the Constitution in the eyes of the public.[48] The flexibility inherent in the right to a fair trial in my view permits a balance between the rights of the individual and society as a whole when addressing the pressing problem of the prevalence of violent crime in the form of robbery as well as theft and the market for stolen goods which they both feed.

---

[47] *S v Immanuel Paulus* Case No CA 114/1998 unreported High Court 28/32/2001, *Gaus v State* Case No CA 26/2009 unreported High Court 10/4/2012.
[48] See *S v Van den Berg* 1995 NR 23 (HC).

[69] In my view, the means chosen by the legislature – to require accused persons found in possession of stolen property to provide a reasonable basis for believing that the goods were not stolen – is compatible with the Constitution. The effect of the presumption is to require members of the public to exercise care and take reasonable steps to establish that goods are not stolen when acquiring them otherwise than at a public sale. The provision has the salutary effect of affirming the importance of law abiding citizens taking steps to discourage criminal conduct and refraining from implicating themselves in its ambit.[49]

[70] There is a sufficiently close and rational connection between those targeted by the section, its purpose and the reverse onus embodied in it. Once a person is found in possession of stolen goods, it would ordinarily be extremely difficult for the prosecution to establish how he or she came into that possession.

[71] Section 7's purpose of requiring members of the public to be vigilant to avoid traffic in stolen goods is an eminently legitimate state objective which, in this instance, is pursued by reasonable means.[50]

[72] Given the wide prevalence of robbery and theft emphasised by the courts, it is in my view justifiable to require citizens found in possession of stolen goods obtained otherwise than at a public sale to establish reasonable grounds to believe that they were not stolen when acquiring them. For these reasons, I conclude that

[49] *Supra* para 89.
[50] *Supra* para 98.

s 7 does not constitute an infringement of Art 12 of the Namibian Constitution and accordingly the appeal must succeed.

Costs

[73] Counsel for the PG sought costs against the first respondent in the event of succeeding with the appeal. The first respondent sought to vindicate his constitutional right to a fair trial. He did so on the strength of substantial authority, cited in his application which found favour in the High Court and which was ultimately not followed in this court. The assertion of his constitutional right by the first respondent was not without some basis.

[74] There is a public interest in citizens asserting their fundamental rights entrenched in the Constitution. One of the considerations relevant to the determination of costs is that adverse costs orders should not deter the public from asserting their constitutional rights in appropriate cases, except where entirely without merit, frivolous or for an ulterior motive such as for the purpose of delay. In the exercise of the discretion governing costs orders, this would strike me to be an instance where an unsuccessful litigant should not be mulcted with costs and that no award of costs should be made.

Order

[75] The following order is made:

1. The appeal succeeds.
2. The order of the High Court is set aside and replaced with the following order:

    “The application is dismissed”.

_____
SMUTS JA

_____
MAINGA JA

_____
O’REGAN AJA

APPEARANCES

APPELLANT:	D F Small
	Instructed by the Government Attorney
FIRST, FIFTH, SIXTH AND SEVENTH RESPONDENTS:	N Tjombe
	Amicus Curiae