

**THE PRESUMPTION OF GUILT CREATED BY SECTION
235(2) OF THE TAX ADMINISTRATION ACT: A
CONSTITUTIONAL AND COMPARATIVE PERSPECTIVE**

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the degree of

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by

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DECLARATION

I, **Farai Faifi**, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Master of Commerce (Taxation).

Signed.....

Date.....

ABSTRACT

This research examined the legal nature of the presumption of guilt created by section 235(2) of the South African Tax Administration Act and considered whether or not its practical application violates the taxpayer's fundamental right contained in section 35(3) of the Constitution, which gives every accused taxpayer the right to a fair trial, including the right to be presumed innocent. The research also provided clarity on the constitutionality of this presumption because it has been widely been criticised for unjustifiably violating the taxpayer's constitutional right to a fair trial. The conclusion reached is that the presumption created by section 235(2) of the Tax Administration Act constitutes an evidentiary burden rather than a reverse onus. It does not create the possibility of conviction, unlike a reverse onus where conviction is possible, despite the existence of a reasonable doubt. Therefore, it does not violate the accused taxpayer's the right to a fair trial and the right to be presumed innocent and hence it is constitutional. Accordingly, the chances that the accused taxpayer will succeed in challenging the constitutionality of section 235(2) of the Act are slim.

Key words

- *Onus of proof*
- *Reverse burden of proof*
- *Evidentiary burden*
- *Presumption of innocence*
- *Presumption of guilt*
- *Constitutionality*

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LIST OF ABBREVIATIONS

FNB First National Bank of South Africa Ltd

RSA Republic of South Africa

SAJ CJ South African Journal of Criminal Justice

SAJHR- South African Journal of Human Rights.

SALJ- South African Law Journal.

SARS- South African Revenue Service.

UK United Kingdom

USA United States of America

CHAPTER ONE: INTRODUCTION

1.1 Context

As a point of departure, it is essential to consider the object or purpose of taxation. The main purpose of taxation by governments is to collect sufficient funds from the public for the proper functioning of the government.¹ The imposition of taxes by governments upon their citizens is also an imperative to provide the public with the necessary goods and services.² In essence, the government needs public funding which is collected in the form of tax to ensure an effective running of the state.

According to Croome,³ tax has been imposed in various countries across the world for many centuries. In Egypt, during the time of the Pharaohs, the Egyptians paid tax calculated by measuring the rise and fall of the Nile River. In the Roman Empire, the burden of taxation did not fall on Roman citizens but on those living in the provinces controlled by the Roman Empire.⁴ In South Africa, sections 3 and 4 of the South African Revenue Service Act⁵ confer the power of levying of all taxes on the South African Revenue Service (referred to as SARS). The imposition of tax upon natural and juristic persons by the government in South Africa is therefore not a new concept but is found in most countries throughout the world.

The taxpayer would usually seek to minimise the tax payable while, at the same time, the state seeks to extract the maximum amount possible from its citizens. This has been expressed by Coffield,⁶ when he stated that “the interest of the state is to tax heavily: that of the community is to be little taxed”. One of the main aims of SARS is to ensure that all income is efficiently and effectively taxed in terms of the Income Tax Act⁷ (referred to as the ‘Income Tax Act’). To achieve this end, the court in *ITC 1199*⁸ stated that the Income Tax

¹Muller, E. (2010) *A Framework for Wealth Transfer Taxation in South Africa* 37.

²Brautigam, D. A. (2006). "*Contingent Consent: Export Taxation and State Building in Mauritius* 12.

³Croome, B.J. (2010) *Taxpayers' Rights in South Africa* 1.

⁴Coffield, J. (1970) *A Popular History of Taxation, From Ancient to Modern Times* 2.

⁵Act 34 of 1997.

⁶Coffield, J. (1970) *A Popular History of Taxation* at 12.

⁷Act 58 of 1962.

⁸*ITC 1199* 36 SACT 16 at paragraph 19.

Act⁹ is framed in such a wide way to ensure that the taxpayer cannot avoid tax payment. Section 235(2) of the Tax Administration Act¹⁰ (referred to as the “Tax Administration Act”) provides that:

Where a taxpayer or any other person makes a false statement in any books of account or other records of any taxpayer, unless the person proves that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, he shall be regarded as guilty of making a false statement with the intention of evading assessment or taxation.

It is important to note that the laws governing the South African taxation system must not be looked at in isolation but must always be viewed within the body of other laws and particularly the Constitution of the Republic of South Africa,¹¹ (referred to as “The Constitution”), which is the supreme law of the land. The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa¹² (referred to as the Katz Commission) stated that the tax system is subject to the Constitution and must conform to society’s commitment to the Rule of Law. In *First National Bank of SA Ltd t/a Wesbank v C: SARS*,¹³ the court emphasized that “no matter how indispensable fiscal statutory provisions are for the economic well-being of the country, they are however not immune to the discipline of the Constitution.” In addition to this, section 195(1) of the Constitution¹⁴ provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. In this regard, it is a common cause that the Constitution is the supreme law of the land; all legislation that governs the taxation system in South Africa must therefore conform to the Constitutional rights and its normative standards.

Section 35(3) of the Bill of Rights in the Constitution¹⁵ guarantees everyone the right to a fair trial which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The presumption of innocence is not only important in South Africa, but also in many countries across the world. For example, it is protected by section 11(d) of

⁹Act 58 of 1962.

¹⁰Act 28 of 2011.

¹¹The Constitution of the Republic of South Africa, 1996.

¹²The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 73.

¹³*First National Bank of SA Ltd t/a Wesbank v C: SARS*2001 (7) BCLR 715 (C).

¹⁴The Constitution of the Republic of South Africa, 1996.

¹⁵The Constitution of the Republic of South Africa, 1996.

the Canadian Charter of Rights and Freedoms.¹⁶ The presumption of innocence is also protected in various international instruments. Article 11 of the Universal Declaration of Human Rights¹⁷ provides that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial”. The International Covenant on Civil and Political Rights¹⁸ provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. In this sense, it is clear that presumption of innocence is one of the core rights afforded to all the accused persons (including the accused taxpayer) so as to ensure that the accused persons enjoyed their right to a fair trial.

The court in *Ferreira v Levin NO and others v Powell NO and Others*¹⁹ stated that the essence of the Constitution is that it is the supreme law the country and that any law or conduct which is inconsistent with it is invalid. It was held further by the court that the obligations imposed by the Constitution must be fulfilled. This means that the taxpayer’s right to a fair trial is protected from irrational limitation. If there is any conduct or law that infringes this right, the taxpayer can make an application to the court for an order declaring such law to be invalid. However, there are no absolute rights in the Constitution. In other words, the law permits a reasonable limitation to every right embodied in the Constitution. This sentiment has been expressed in *S v Manamela*²⁰ in which the Constitutional court²¹ stated that the boundaries of all constitutional rights are set by the rights of others and by the legitimate needs of the society. In *Holomisa v Argus Newspapers Ltd*²² Cameron J²³ stated that, generally, it is recognised that the public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. In light of this, it is apparent that the South African Constitution provides for the limitation of fundamental rights, provided that the limitation is justified.

¹⁶The Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11).

¹⁷The Universal Declaration of Human Rights UN General Assembly Resolution 217A (III) of 10 December 1948.

¹⁸The International Covenant on Civil and Political Rights UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

¹⁹*Ferreira v Levin NO and others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraph 22.

²⁰*S v Manamela* 2000 (3) SA 1 (CC).

²¹*S v Manamela* 2000 (3) SA 1 (CC) at paragraph 32.

²²*Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

²³*Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at paragraph 44.

For any limitation to a Constitutional right to be justified, it must comply with the general limitation clause contained in section 36 of the Constitution. In terms of section 36 of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. The relevant factors include:

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

If the limitation complies with the above provision, the law permits such a limitation. The taxpayer must therefore not mistakenly assume that a right to a fair trial afforded by the Constitution may not be limited in any way. However, the existence of the general limitation clause in the Constitution does not mean that the rights contained in the Bill of Rights can be limited for any reason.²⁴ The reason for limiting any constitutional right needs to be exceptionally strong.²⁵ In other words, the restriction must serve a purpose that most people would regard as convincingly vital. In *S v Manamela*²⁶ the court stated that the limitation of a right will not be justifiable unless there is a very good reason for thinking that the restriction would achieve the purpose it is designed to achieve and that there is no other realistically available way in which the purpose can be achieved without restricting constitutionally protected rights.

Where the taxpayer is of the opinion that his or her constitutional rights are unreasonably and unjustifiably limited by the powers conferred upon the SARS, he or she has the right to approach the court for constitutional protection.²⁷ To succeed in seeking constitutional protection, the taxpayer must firstly prove that his right has been limited and that such right is protected by the Constitution.²⁸ If a taxpayer is able to prove that, the court will then consider whether the infringement of that right was justifiable under the limitation clause contained in

²⁴Currie, I. & De Waal, J. (2013).*The Bill of Rights Handbook* 151.

²⁵Currie, I. & De Waal, J. (2013).*The Bill of Rights Handbook* 152.

²⁶*S v Manamela* 2000(3) SA 1 (CC) at paragraph 33.

²⁷Croome, B.J. (2010) *Taxpayers' Rights in South Africa* 10.

²⁸Croome, B.J. (2010) *Taxpayers' Rights in South Africa* 16.

section 36 of the Constitution.²⁹ If the infringement amounts to a reasonable and justifiable limitation, the impediment will be permitted. In the event that the limitation is not justifiable, it will be declared unconstitutional as contemplated in terms of section 172(1) of the Constitution, which provides that:

- 1) When deciding a constitutional matter within its power, a court —
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including —
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

1.2 Problem statement

In the Republic of South Africa tax evasion by taxpayers cannot be condoned. To ensure that taxpayers do not evade the payment of tax, section 235(2) of the Tax Administration Act³⁰ provides that, where a taxpayer makes a false statement in any books of account or other records of any taxpayer, unless the person proves that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, he shall be regarded as guilty of making a false statement with the intention of evading assessment or taxation. The implication of this provision, according to Van Schalkwyk³¹, is to create a reverse onus of proof which effectively relieves the state from proving an essential element of the offence, namely that it was committed with the intention to evade assessment of taxation. This raises a question as to whether the practical application of section 235(2) of the Act³² unreasonably infringes the accused taxpayer's constitutional right to a fair trial as guaranteed to an accused person in section 35(3) of the Constitution, in particular the right, mentioned in s 35(3)(h), 'to be presumed innocent, to remain silent, and not to testify during the proceedings'.

²⁹Croome, B.J. (2010) *Taxpayers' Rights in South Africa* 16.

³⁰Act 28 of 2011.

³¹Van Schalkwyk, L. (1996). *The constitutionality of the reversed onus of proof*. Accountancy SA at 25.

³²Act 28 of 2011.

1.3 Research goals

The main goal of the research was to examine the legal nature of the presumption created by section 235(2) of the Act³³ and establish whether its practical application violates the taxpayer's constitutional right to a fair trial. If the answer to the above legal question is in the affirmative (it violates the taxpayer's constitutional right to a fair trial), this research intended to ascertain whether or not such an infringement is reasonable and justifiable in an open and democratic society. In addressing the goal of the research, a comparative analysis of the Canadian, United Kingdom, and American legislation was carried out.

1.4 Purpose of the Research

The purpose of this research is to provide clarity on the constitutionality of the presumption created by section 235(2) of the Tax Administration Act³⁴ and to shed light on the chances of the taxpayer to succeed in challenging the constitutionality of section 235(2) of the Tax Administration Act³⁵ if he or she so wishes.

1.5 Research Methodology

An interpretative research approach was adopted for the present research which sought to understand and describe.³⁶ The research methodology applied can be described as a *doctrinal* research methodology.³⁷ This methodology provides a systematic exposition of the rules governing a particular legal category (in the present case the legal rules relating to the presumption created by section 235(2) of the Tax Administration Act³⁸ and the taxpayer's right to a fair trial), analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data.³⁹ The documentary data used for the research consists of the South African Constitution and tax legislation, case law, journals, textbooks,

³³ Act 28 of 2011.

³⁴ Act 28 of 2011.

³⁵ Act 28 of 2011.

³⁶ Babbie, E., & Mouton, J. (2009). *The practice of social research: South African edition*.

³⁷ McKerchar, M. *Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation*. E-Journal of Tax Research at 1.

³⁸ Act 28 of 2011.

³⁹ McKerchar, M. *Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation*. E-Journal of Tax Research at 1.

writings of authoritative experts and other legislation such as the Criminal Procedure Act,⁴⁰ and the Customs and Excise Act.⁴¹ Canadian, United Kingdom, and American legislation was also analysed, together with court decisions and expert writings in these jurisdictions.

The research is conducted in the form of an extended argument, supported by documentary evidence. The validity and reliability of the research and the conclusions was ensured by:

- adhering to the rules of the statutory interpretation, as established in terms of statute and common law;
- placing greater evidential weight on legislation, case law which creates precedent or which is of persuasive value (primary data) and the writings of acknowledged experts in the field;
- discussing opposing viewpoints and concluding, based on a preponderance of credible evidence; and
- the rigour of the arguments.

As all the data was in the public domain, no ethical considerations arose. No interviews were conducted; opinions were considered in their written form.

1.6 Preliminary chapter outline

This research is divided into five chapters. Chapter One serves as an introduction to the research. The constitutional problem which led to this research is discussed. The chapter also set out the objectives and the importance of the research. The research methodology used in carrying out the research was explained. Chapter Two provided a critical analysis of the taxpayer's constitutional right to a free trial as contemplated in section 35(3) of the Constitution. This chapter also considered the origins, nature, scope and the importance of this right in the constitutional sphere. Chapter Three dealt with reverse burden of proof and an evidentiary burden and their constitutionality in South Africa. A brief comparative study of the constitutionality of the reverse burden of proof and evidentiary burden in other jurisdictions like Canada, United Kingdom and United States of America has also been presented.

⁴⁰Act 51 of 1977.

⁴¹Act 91 of 1964.

Chapter Four considered the practical application of the presumption created by section 235(2) of the Tax Administrative Act⁴² and investigated whether this presumption creates a reverse burden of proof⁴³ or an evidentiary burden.⁴⁴ To reach a conclusion on this matter, a strong comparative approach was adopted by looking at how South African courts have treated the presumption created by section 102(4) of the Customs and Excise Act⁴⁵ which is similar and has the same effect on the taxpayer as the presumption created by section 235(2) of the Tax Administrative Act.⁴⁶ Chapter Five summarised the research and provided the conclusion to the research.

⁴²Act 28 of 2011.

⁴³ According to Landa, J. and Ramjohn, M. (2013). *Unlocking Evidence* (2ed) at 26, the burden of proof refers to the legal obligation to prove a point in contention or a fact in issue in order to convince the judge during a trial. A reverse burden of proof in a criminal matter refers to a shift in the burden of proof from the state to the accused.

⁴⁴ According to Corbett J in *Southern Cape Corporation (Pty) Ltd v Engineering Management Services*,⁴⁴ an evidentiary burden refers to “the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent.”

⁴⁵Act 91 of 1964.

⁴⁶Act 28 of 2011.

CHAPTER TWO

AN ACCUSED TAXPAYER'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

2.1 Introduction

Central to the present research is the notion of the right to a fair trial. This chapter will provide a critical analysis of the taxpayer's constitutional right to a free trial as contemplated by section 35(3) of the Constitution.⁴⁷ While also looking at the taxpayer's constitutional right to a free trial, this chapter provides a detailed analysis of the historical origins and the scope of the right to a fair trial. Thereafter, an account will be provided reflecting on the importance of the right to a fair trial and specifically the right to be presumed innocent in foreign jurisdictions such as Canada, the United States of America and the United Kingdom.

The right to fair trial was not constitutionally entrenched in the South African law until 1994.⁴⁸ On 27 April 1994, the first Interim Constitution⁴⁹ came into force. One of its main purposes was to redefine the public values in the light of newly defined common interests by guaranteeing certain fundamental rights in the Bill of Rights⁵⁰ such as a person's right to equality, privacy and property, and access to information, justice and a fair trial.⁵¹ The right to a fair trial was embodied in section 25(3) of the Interim Constitution.⁵² The purpose of section 25(3) of the Interim Constitution⁵³ was set out by the court in *S v Nombewu*.⁵⁴ In this case, the appellant was arrested and made a pointing out⁵⁵ without being given the mandatory warning as envisaged by section 25(1)(a) of the Interim Constitution. One of the main issues faced by the court was the extent to which the appellant could rely on the protection of the

⁴⁷ The Constitution of the Republic of South Africa, 1996.

⁴⁸ Skeen, A. (2000). *The Right to a Fair Trial in the South African Law* 110.

⁴⁹ The Constitution of the Republic of South Africa Act 200 of 1993.

⁵⁰ The Bill of Rights was contained in chapter 3 of the Interim Constitution.

⁵¹ Muller, E. (2010). *A Framework for Wealth Transfer Taxation in South Africa* at 57.

⁵² The Interim Constitution was temporary measure whilst the new Constitution was being drafted.

⁵³ The Constitution of the Republic of South Africa Act 200 of 1993.

⁵⁴ *S v Nombewu*, 1996 (2) SACR 396 (E).

⁵⁵ According to Bassiouni, M. (1995). *The Protection of Human Rights in African Criminal Proceedings* at 92, a pointing out refers to where an accused person points out something to the police, and the pointing out has been considered as part of a confession of which evidence is inadmissible.

Interim Constitution⁵⁶ where his arrest and pointing out had taken place before the Interim Constitution⁵⁷ had been enacted.⁵⁸ Jones J⁵⁹, for the majority, stated that:

The purpose of section 25(3) of the Interim Constitution⁶⁰ was to reinforce and preserve the presumption of innocence, the right to silence, the right of an accused not to be compelled to be a witness against himself, and his right not to be compelled to make a confession or admission which could be used in evidence against him.

Consequently, the court held that an appellant's trial had not been unfair because he was warned in terms of the Judges' Rules of his right to refrain from making a statement and that if he did make a statement it could be used against him. In light of this judgment, it is common cause that section 25(3) of the Interim Constitution⁶¹ was the first step towards affording all accused persons a constitutional right to a fair trial.

The enactment of the Interim Constitution placed South Africa in a position in which taxation becomes a legitimate instrument of achieving national and democratic objectives.⁶² Certain discriminatory provisions in fiscal statutes were deleted or amended.⁶³ On 8 May 1996, the new Constitution was adopted.⁶⁴ This brought a major shift in the legal policies of the country.⁶⁵ One of the major significant features of the advent of the 1996 Constitution is that the scope and ambit of the right to a fair trial was further entrenched and broadened.⁶⁶ Prior to 1994, the common law⁶⁷ and the Criminal Procedure Act⁶⁸ governed the criminal procedure and the rights of the accused person to a fair trial.⁶⁹ The Constitution is now the supreme

⁵⁶The Constitution of the Republic of South Africa Act 200 of 1993.

⁵⁷The Constitution of the Republic of South Africa Act 200 of 1993.

⁵⁸Jagwanth, S. (1997). "Constitutional Application Recent Cases" SAJCI 227 vl 10 at 227.

⁵⁹*S v Nombewu*, 1996 (2) SACR 396 (E) at 403.

⁶⁰The Constitution of the Republic of South Africa Act 200 of 1993.

⁶¹The Constitution of the Republic of South Africa Act 200 of 1993.

⁶²The Interim Report of the Katz Commission (1994) at paragraph 1.4.2 (b).

⁶³Croome, B.J. (2010). *Taxpayers' Rights in South Africa* at 11.

⁶⁴The Constitution was adopted on 8 May 1996, amended on 11 October 1996, promulgated on 18 December 1996 and implemented on 4 February 1997. See the *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁶⁵Croome, B.J. (2002) "Constitutional Law and Taxpayer's Rights in South Africa – An Overview" (*Acta Juridica* 1 at 2).

⁶⁶Steytler, N. (1998) *Constitutional Criminal Procedure* at 215.

⁶⁷Common law is also known as case law or precedent. It can be defined as that law which has been developed by judges through decisions of courts and similar tribunals.

⁶⁸Act 51 of 1977.

⁶⁹Skeen, A. (2000). *The Right to a Fair Trial in the South African Law* at 110.

law.⁷⁰ The supremacy of the Constitution⁷¹ is enshrined by section 2 of the Constitution which provides that the Constitution is the supreme law of the country and that any law or conduct which is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁷² Section 39(2) of the Constitution⁷³ also provides that when interpreting any legislation, courts must promote the spirit, purport and objects of the Bill of Rights. The implication of these provisions is that the Criminal Procedure Act⁷⁴ and other fiscal statutes, including the Tax Administration Act,⁷⁵ must be tested against the provisions of the Constitution.⁷⁶ The Constitutional Court will declare any statute invalid, including a fiscal statute, if such statute is found to be inconsistent with the Constitution. In support of this submission, the Katz Commission⁷⁷ stated that:

The tax system is subject to the Constitution and must conform to society's commitment to the Rule of Law. This means not only that the system should be effective in the enforcement of all tax laws, equally and irrespective of status but also that citizens' right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.

The sentiment that the tax system is subject to the Constitution⁷⁸ has also been expressed by the court in *First National Bank of SA Ltd t/a Wesbank v C: SARS*.⁷⁹ In this case, Lauray was indebted to the Commissioner of SARS for customs duties⁸⁰ amounting to R3, 26 million.

⁷⁰ Section 2 of the Constitution provides that the Constitution is that it is the supreme law of our country and that any law or conduct which is inconsistent with it is invalid.

⁷¹ The Constitution of the Republic of South Africa, 1996.

⁷² *South African Police Service v Public Servants Association* 2007(3) SA521 (CC) at 25.

⁷³ The Constitution of the Republic of South Africa, 1996.

⁷⁴ Act 51 of 1977.

⁷⁵ Act 28 of 2011.

⁷⁶ The principle of "supremacy of the constitution" indicates that legislation should primarily abide by the principles set out in the Constitution. Any legislative provision in conflict with the Constitution may be declared unconstitutional, in which case such provision will be of no force and effect. .

⁷⁷ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa at 73.

⁷⁸ The Constitution of the Republic of South Africa, 1996.

⁷⁹ *First National Bank of SA Ltd t/a Wesbank v C: SARS* 2002 (7) JTLR 250.

⁸⁰ The Customs and Excise Act 91 of 1964 defined customs duty as any amount of tax for which any person is liable in respect of all goods imported into or exported out of the Republic or any other goods manufactured in the Republic. The primary purpose of imposing customs duty by different governments is to protect each country's economy, residents, jobs and the environment by controlling the flow of goods, especially restrictive and prohibited goods, into and out of the country.

She agreed to pay off her debts in monthly instalments. However, Lauray went insolvent⁸¹ and her estate was sequestrated.⁸² In order to collect the debt owed, section 114 of the Customs and Excise Act⁸³ allowed the Commissioner of SARS to sell goods without prior authorisation by a court. Secondly, the Commissioner may sell goods to collect the debt owed even where the goods in question do not belong to the debtor but to some third party. The Commissioner wanted to sell Lauray's car which was still owned by the First National Bank of South Africa (FNB). The FNB then launched a constitutional challenge before the Constitutional Court contending that section 114 of the Customs and Excise Act⁸⁴ constitutes an unjustified infringement of its constitutional rights to have access to the courts in the settlement of disputes,⁸⁵ to the protection of its property⁸⁶ and to its freedom to choose a trade.⁸⁷ In deciding this legal question, the court emphasized that

No matter how indispensable fiscal statutory provisions are for the economic well-being of the country, they are however not immune to the discipline of the Constitution.

Accordingly, the court held that the section 114 of the Customs and Excise Act⁸⁸ was not compatible with the Constitutional normative standards. Section 195(1) of the Constitution⁸⁹ also provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. In this regard, it is a common cause that the Constitution is now the supreme law of the land; all legislation including the Tax

⁸¹ *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) defined insolvency as a situation when debtor's liabilities (fairly valued) exceed his assets (fairly valued). It is important to note that the court in *Realizations Ltd v Ager* 1961 (4) SA 10 (D) at paragraph 11-12 held that proof of an inability to pay debts is only prima facie evidence of insolvency not necessarily insolvency.

⁸² In *Ex parte Henning* 1981 (3) SA 843 (O) at paragraph 45, the court defined sequestration as a formal order declaring that the debtor is insolvent. The main purpose of a sequestration order is to ensure the orderly and fair distribution of a debtor's assets if his assets are not sufficient to pay all his creditors in full.

⁸³ Act 91 of 1964.

⁸⁴ Act 91 of 1964.

⁸⁵ Section 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

⁸⁶ Section 25(1) of the Constitution provides that: "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

⁸⁷ Section 22 of the Constitution provides that "every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

⁸⁸ Act 91 of 1964.

⁸⁹ Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution.

Administration Act⁹⁰ must conform to the rights set out in the Constitution, which includes taxpayer's the right to a fair trial.

2.2 An Accused Taxpayer's Right to a right to fair trial

Chapter 2 of the Constitution contains the Bill of Rights, which is similar to the Bill of Rights contained in chapter 3 of the Interim Constitution. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.⁹¹ It is considered to be the cornerstone of democracy in the Republic of South Africa;⁹² it enshrines the rights of all people and affirms fundamental democratic values of human dignity,⁹³ equality⁹⁴ and freedom.⁹⁵ The state is therefore under a peremptory obligation⁹⁶ to respect, protect, promote and fulfil the rights in the Bill of rights.⁹⁷ Section 35 of the Constitution falls under Chapter 2 and deals with the rights of arrested, detained and accused persons. In terms of section 35(3) of the Constitution,⁹⁸ every accused has a right to a fair trial, which includes the right 'to be presumed innocent, to remain silent, and not to testify during the proceedings'. In essence, there is no duty placed on the accused person to say anything during plea proceedings or the trial, nor is he obliged to testify during his trial. The accused has a clear right to remain silent at his trial when he so decides and it would be to his advantage, and no adverse inference may be drawn from this by either the prosecution or the court.⁹⁹ The aspects of section 35 of the Constitution will be addressed separately in the following paragraphs.

⁹⁰ Act 28 of 2011.

⁹¹ In terms of Section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the Executive and all organs of state.

⁹² The founding provisions of the Constitution embodied in Chapter 1 section 1(a)–(d) provide that the Republic of South Africa is one, sovereign, democratic state founded on fundamental values such as human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, the supremacy of the constitution, the rule of law, universal adult suffrage, a national voters' roll, regular elections and a multi-party system of democratic government.

⁹³ See Section 10 of the Constitution which provides that everyone has inherent dignity and the right to have their dignity respected and protected.

⁹⁴ See Section 9 of the Constitution which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

⁹⁵ Section 12 of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.

⁹⁶ In *Ferreira v Levin and Vryenhoek v Powell* 1996 (1) BCLR 1 (CC) at paragraph 185, the court explained a peremptory obligation as an obligation to which the state does not have the power to exercise its discretion not to uphold it.

⁹⁷ See chapter 2(1)(B) of the South African Bill of Rights.

⁹⁸ The Constitution of the Republic of South Africa, 1996.

⁹⁹ Mthembu, MH. (1998) 'The constitutionality of presumptions in South African law', *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

2.2.1 An accused taxpayer's right to be presumed innocent

(i) A brief history of the presumption of innocence

The advent of the thirteenth century brought about major developments in European criminal law and procedure.¹⁰⁰ Some of the major developments include the adoption of inquisitorial procedures in Continental Europe and the advancements of accusatorial principles in English Criminal law.¹⁰¹ In both inquisitorial and accusatorial systems, the prosecution was required to prove the accused's guilt without a doubt, which embraced the belief that it is better to acquit a guilty person than to condemn an innocent person. This was the seed of the concept of the presumption of innocence.¹⁰²

(ii) Content of the presumption of innocence

In South Africa, the right to be presumed innocent is regarded as one of the most fundamental rights in the system of criminal justice.¹⁰³ According to Naughton,¹⁰⁴ the presumption of innocence requires the criminal justice system to presume that suspects of a crime or defendants in criminal trials did not commit the offence. This means that there is a firm burden of proof placed on the state to prove that the accused is guilty.¹⁰⁵ The requirement that the state must bear the burden of proof in a criminal trial stems from the view that the state must explain why it brings an action against the accused.¹⁰⁶ In *Woolmington v The DPP*,¹⁰⁷ Woolmington was charged with the murder of his wife. She had left him and returned to live with her mother. Woolmington went to the house with a gun. He said he intended to frighten her with the threat that he would kill himself if she did not return home. The two disagreed and Woolmington killed his wife. During the trial he admitted to the killing but he stated that he did not intend to kill her. In deciding the matter, Lord Sankey¹⁰⁸ stated that

¹⁰⁰Schwikkard, P.J. (2001). *The Presumption of Innocence* at 1.

¹⁰¹Schwikkard, P.J. (2001). *The Presumption of Innocence* at 1.

¹⁰²Schwikkard, P.J. (2001). *The Presumption of Innocence* at 1.

¹⁰³Steytler, N. (1998). *Constitutional Criminal Procedure* at 320.

¹⁰⁴Naughton, M. (2011) "How the presumption of innocence renders the innocent vulnerable to wrongful convictions" at 40.

¹⁰⁵Skeen, A. (2000). *The Right to a Fair Trial in the South African Law* at 112.

¹⁰⁶Morton, J.C. & Hutchinson, S.C. (1987). *The presumption of Innocence* at 2.

¹⁰⁷*Woolmington v. The DPP* [1935] A.C. 462 at 481.

¹⁰⁸*Woolmington v. The DPP* [1935] A.C. 462 at 481.

The threshold of evidential proof that an accused person committed the alleged criminal offence is high as the evidence to be adduced by the state against the suspect must be beyond a reasonable doubt. This burden is a 'golden thread' that ran through the common law of England.

Another authoritative support for the right to be presumed innocent as a fundamental principle of our law was expressed by the court in *R v Benjamin*¹⁰⁹ in which Buchanan J¹¹⁰ noted that

But in a criminal trial there is a presumption of innocence in favour of the accused, which must be rebutted. Therefore there should not be a conviction unless the crime charged has been clearly proved to have been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where a reasonable doubt as to his guilt exists, there should be an acquittal.

The judgment of the court in *S v Bhulwana; S v Gwadiso*,¹¹¹ is also of paramount significance in the South African law in as far as the right of presumption of innocence is concerned. The matter in this case concerned section 21 (1)(a)(i) of the Drugs and Drug Trafficking Act which provides that if an accused has been found in possession of more than 115 grams of dagga, he or she will be presumed to have been dealing in dagga and will be convicted of the offence of dealing unless that person proves that he or she has not been dealing in dagga.¹¹² The court had to consider whether or not this provision infringes upon the right of the accused to be presumed innocent as provided in terms of section 25(3)(c) of the Interim Constitution. With regard to the right to be presumed innocent, O'Regan J¹¹³ emphasised that:

The presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The

¹⁰⁹*R v Benjamin* 3 EDC 337.

¹¹⁰*R v Benjamin* 3 EDC 337 at 338.

¹¹¹*S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

¹¹² Section 21 (1)(a)(i) of the Drugs and Drug Trafficking Act provides that: if in the prosecution of any person for an offence referred to is proved that the accused was found in possession of dagga exceeding 115 grams...it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance.

¹¹³*S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at paragraph 15.

entrenchment of the presumption of innocence in section 25(3)(c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends section 25(3)(c).

Consequently, the Court found that the impugned provision imposed a legal burden on the accused person to prove on balance of probabilities that he or she has not been dealing in dagga. The court further held that the section 21(1)(a)(i) of the Drugs and Drug Trafficking Act relieves the prosecution of its legal burden to prove that the accused was “dealing in dagga” as opposed to mere possession which could result in the conviction of an accused person, despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends section 25(3)(c) of the Interim Constitution. The court went further to consider whether the breach of section 25(3)(c) of the Interim Constitution by section 21(1)(a)(i) of the Drugs and Drug Trafficking Act could be justified in terms of section 33 of the Interim Constitution. In considering whether the breach of section 25(3)(c) of the Interim Constitution was reasonable or justifiable in an open and democratic society based on freedom and equality, the court had to balance the aim of the Act (prohibition of drug abuse and trafficking) and its effects against the nature of infringement caused by the Act. The court recognised that the prohibition of drug abuse and trafficking was a demanding social resolution. However, the court remained unconvinced on whether the impugned provision substantially furthered the purpose of the Act of combatting the trafficking of illegal drugs because the court did not find any logical connection between the facts proved (possession of dagga) and the facts presumed (drug dealing). As a result, the breach of section 25(3)(c) of the Interim Constitution by section 21(1)(a)(i) of the Drugs and Drug Trafficking Act was not reasonably justifiable in terms of section 33(1) of the Interim Constitution.

The importance of the judgments of the court in *Woolmington v The DPP*,¹¹⁴ *R v Benjamin*¹¹⁵ and *S v Bhulwana; S v Gwadiso*,¹¹⁶ is that they clearly articulate that in a criminal case, the accused has the right to be presumed innocent and that the burden of proof is placed on the state to prove beyond a reasonable doubt that the crime charged has been committed by the accused. In light of this, it is a common cause that in all criminal cases it is for the state to establish the guilt of the accused, not for the accused to establish his innocence.

Where a taxpayer makes a false statement or entry in any books of account, the presumption in terms of section 235(2) of the Tax Administration Act is that the taxpayer is guilty of fraud, an act which is often punishable by a heavy criminal penalty. In this regard, the presumption of innocence requires that where a taxpayer makes a false statement or entry in any books of account, he or she must be presumed innocent until SARS¹¹⁷ has proved that the false statement was made with the intention of evading assessment.

(iii) **Rationale for the presumption**

The rationale for the presumption is wide and varied. It ranges from a concern that individual rights need to be protected from the potentially coercive authority of the state to policy concerns of maintaining the legitimacy of the criminal justice system.¹¹⁸ Despite the rationale for the presumption being wide, it has at its centre recognition that the presumption of innocence is necessary to reduce the possibility of erroneous conviction.¹¹⁹ This sentiment has been expressed by the court in *S v Manamela*.¹²⁰ The case considered section 37 of the General Law Amendment Act, which makes it an offence to acquire stolen goods otherwise than at a public sale without having reasonable cause to believe that the person disposing of them was entitled to do so. By requiring an accused to prove that he had such belief, reverses the normal criminal onus of proof. The court had to decide whether this reverse onus infringes upon the accused's constitutional right to silence and the presumption of innocence. With regard to the right to be presumed innocent, Madala, Sachs and Yacoob JJ¹²¹ stated that:

¹¹⁴*Woolmington v. The DPP* [1935] A.C. 462 at 481.

¹¹⁵*R v Benjamin* 3 EDC 337 at 338.

¹¹⁶*S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paragraph 15.

¹¹⁷Currie, I. & De Waal, J. (2013). *The Bill of Rights Handbook* at 753.

¹¹⁸Currie, I. & De Waal, J. (2013). *The Bill of Rights Handbook* at 753.

¹¹⁹Currie, I. & De Waal, J. (2013). *The Bill of Rights Handbook* at 753.

¹²⁰*S v Manamela and Others* 2000(1) SACR 414 (CC).

¹²¹*S v Manamela and Others* 2000(1) SACR 414 (CC) at paragraph 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.

Another authoritative expression of support for the view that the notion of presumption is to reduce the possibility of erroneous conviction, has been expressed by the court in the Canadian case of *R v Oakes*.¹²² In this case, Oakes was found with eight one-gram vials of hashish oil and \$619.45. He claimed that he had had ten vials for his own use, and that the money was left over from his worker's compensation cheque. He was charged with "possession of drugs for the purposes of trafficking" under section 8 of the Narcotic Control Act. The section stated that a person was presumed to be in possession for the purposes of trafficking unless the accused can "establish" that they were not in possession for this purpose. He was convicted at trial. On appeal, the court stated that it is clear that the Act creates a reverse onus on the defendant which violates the Charter right to the presumption of innocence. The section was deemed to be unconstitutional. In this case, the dictum expressed by Chief Justice Dickson¹²³ reflected on the importance of the presumption as follows:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. It offers the society assurance that people innocent of crime shall not be convicted and that it is far worse to convict an innocent man than to let a guilty man to go free. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith

¹²²*R v Oakes* (1986) 50CR (3d) 1(SCC).

¹²³*R v Oakes* (1986) 50CR (3d) 1(SCC) at 212-13.

in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

The notion of presumption of innocence is also linked to the need to “level” the scales of justice.¹²⁴ At every criminal trial, the accused starts his case with fewer resources at his disposal to pursue the case than the state. The state has enough money to afford legal representation of high quality to pursue its case. This puts the state at a better starting point than the accused person.¹²⁵ Affording the accused the right to be presumed innocent is therefore an attempt to “level” the scales of justice.¹²⁶ This view has also been supported by Schwikkard¹²⁷ who stated that:

The prosecution has the dual advantage of dictating the nature of proceedings and of being well prepared to participate in them. The state employs professional investigators to detect crime and gather evidence, utilizing offence definitions to structure the shape and direction of their inquiries.

Given the dual advantage that the state enjoys over the suspect or the accused, it is apparent that the notion of presumption of innocence is of crucial significance in our criminal law and procedure, so as to ensure that the scales of justice are balanced more equally and thereby enhance the overall accuracy of the decision making process. According to Underwood,¹²⁸ the presumption of innocence does not simply restore an accurate balance; it also introduces a deliberate imbalance, tilting the scales in favour of the defendant. In essence, it represents a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

The presumption of innocence is also concerned with the protection of the legitimacy of the justice system in that erroneous convictions will weaken the deterrent function of the criminal

¹²⁴Naughton, M. (2013) *The Innocent and the Criminal Justice System* at 123.

¹²⁵Naughton, M. (2013) *The Innocent and the Criminal Justice System* at 124.

¹²⁶Naughton, M. & Tan, G. (2010) *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged* at 133.

¹²⁷Schwikkard, P.J. (2001). *The Presumption of Innocence* at 88.

¹²⁸Underwood, B.D. (1977). *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, at 1309-10.

law. According to Kaplan,¹²⁹ ‘erroneous convictions cast doubt upon the whole legal system’. In this respect, it can be submitted that the notion of presumption of innocence gives confidence within society in the judicial system.

According to Schwikkard,¹³⁰ the presumption of innocence also serves a symbolic function. The requirement that guilt must be proved beyond a reasonable doubt signals the seriousness of criminal convictions. The reason for doing this is to enhance the moral force and deterrent effect of criminal sanctions and affirms society’s shared moral purpose.¹³¹

(iv) The scope of the right to be presumed innocent

The scope of the presumption of innocence has been clearly defined by the Constitutional court in *S v Zuma*.¹³² In this case, the accused were indicted on two counts of murder and one of robbery. The prosecution tendered confessions which had been made by two of the accused before a magistrate and reduced to writing as admissible confessions. The two accused testified that they had made their statements by reason of assaults on them by the police and the threat of further assaults. The policemen concerned denied this. In terms of section 217(1)(b)(ii) of the Criminal Procedure Act,¹³³ which provided that where a confession by an accused person has been made to a magistrate or has been confirmed and reduced to writing in the presence of a magistrate, it shall be admissible in evidence against the accused. Further provided by the sub-paragraphs of this section is that the confession shall be presumed to have been freely and voluntarily made by the accused in his or her sound and sober senses and without having been unduly influenced, unless the contrary is proved. The implication of section 217(1)(b)(ii) is that, where an accused avers that a confession is inadmissible, he or she bears the onus to show on balance of probabilities that the confession has not been freely and voluntarily made by him, in his sound and sober senses, and without having been unduly influenced to make it. The Constitutional court had to decide whether or not section 217(1)(b)(ii) of the Criminal Procedure Act¹³⁴ was in violation of the right to a fair trial embodied in the Constitution. The court stated that:

¹²⁹ Kaplan, J. (1968) 'Decision Theory and the Fact finding Process' Stanford Law Review 1065 at 1072.

¹³⁰ Schwikkard, P.J. (2001). *The Presumption of Innocence* at 90.

¹³¹ David, S. Weissbrodt, R. W. (1988). *The Right to a Fair Trial* at 89.

¹³² *S v Zuma and Others* 1995 (2) SA 642 (CC).

¹³³ Act 51 of 1977.

¹³⁴ Act 51 of 1977.

It is a longstanding principle of English and South African law of evidence that the prosecution should prove that any confession on which it wished to rely was freely and voluntarily made.

The court held further that section 217(1)(b)(ii) of the Criminal Procedure Act¹³⁵ places the burden of proving that a confession recorded by a magistrate was not free and voluntary on the accused, thereby violating the right to a fair trial.¹³⁶ The significance of the *Zuma*¹³⁷ judgment is that it clearly provides that the right to be presumed innocent will be infringed where there is a possibility that the accused will face conviction despite the existence of a reasonable doubt.

The judgment of the court in *S v Dzukuda*¹³⁸ is also of crucial significance in South African law in as far as the scope of the right to be presumed innocent is concerned. In this case, the three accused were found guilty of the rape of girls under the age of 16 years. Although the High Court in this case was concerned with the crime created by section 51 of the Criminal Law Amendment Act,¹³⁹ this case cannot be overlooked in as far as the scope of the right to be presumed innocent is concerned. Justice Ackermann¹⁴⁰ held that, “the presumption of innocence does not apply to the accused during the interrogation process or proceedings after conviction.” In this regard, it is a common cause that the judgment of the court in *S v Dzukuda*¹⁴¹ is important in South African law because it demarcates the the scope of the right to be presumed innocent, which forms part of the right to a fair trial.

2.2.2 An Accused Taxpayer’s Right to Remain Silent

The right to remain silent is a natural consequence of the presumption of innocence which applies in both criminal and civil proceedings.¹⁴² The common law rule is that the accused or a suspect cannot be compelled to give self-incriminating evidence, either before or during the

¹³⁵ Act 51 of 1977.

¹³⁶ The court also stated that the Criminal Procedure Act violates the common law rule requiring the prosecution to prove that a confession has been freely and voluntarily made by the accused.

¹³⁷ *S v Zuma and Others* 1995 (2) SA 642 (CC).

¹³⁸ *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC).

¹³⁹ Act of 1997.

¹⁴⁰ *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC) at paragraph 4.

¹⁴¹ *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC).

¹⁴² PJ Schwikkard and SE Van der Merwe *Principles of Evidence* 3 ed (2009) 123.

trial. Thus this is the reason section 196(1)(a) the Criminal Procedure Act¹⁴³ prescribes that an accused shall not be called as a witness except upon his own application. Section 35(1) of the Constitution explicitly provides that everyone who is arrested has the right to remain silent and to be informed of that right and of the consequences of not remaining silent. Evidence obtained in a manner that violates the accused's right to remain silent will not be admissible as evidence before the court if the admission thereof would render the trial unfair or otherwise be detrimental to the administration of justice. In essence, an accused's right to remain silent entails that the accused taxpayer is under no legal obligation to act as a witness against himself before the court. In this regard, the accused's right to remain silent is not important in the South African criminal and civil law only, but in the law of taxation as well.

The right to silence has been described by the court in *S v Moller*¹⁴⁴ as an aspect of the adversarial trial which entails the absence of any legal obligation on the accused to speak. According to Skeen,¹⁴⁵ the right to remain silent is an offshoot of the privilege against self-incrimination. The same view has been expressed by the court in *S v Manamela*¹⁴⁶ in which the court stated that "the right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute" and "is inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial". The same notion has been expressed in the English case of *Blunt v Park Lane Hotel Ltd*¹⁴⁷ in which Goddard LJ¹⁴⁸ stated that "the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge".

(i) The rationale of the right

The rationale for these rules is that it is repellent to public opinion to compel the accused or witness to give answers exposing them to criminal punishment and that people might not testify freely in the absence of some kind of privilege against self-incrimination.¹⁴⁹

¹⁴³ Act 51 of 1977 sec 196(1)(a).

¹⁴⁴ *S v Moller* 1990 (3) SA 876 (A) at 884.

¹⁴⁵ Skeen, A. (1993). "A Bill of Rights and the presumption of innocence" *SAJHR* 525 at 535.

¹⁴⁶ *S v Manamela and Others* 2000(1) SACR 414 (CC) at paragraph 35.

¹⁴⁷ *Blunt v Park Lane Hotel Ltd* 1942 (2) KB.

¹⁴⁸ *Blunt v Park Lane Hotel Ltd* 1942 (2) KB at 253.

¹⁴⁹ Skeen, A. (1993). "A Bill of Rights and the presumption of innocence" *SAJHR* 525 at 536.

(ii) The objects of the right

The right to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person.¹⁵⁰ This protection is important in the context of the protection of human dignity, freedom and equality.¹⁵¹

The fundamental rationale of the right to remain silent has been clearly outlined by the court in *Thebus and Another v S*.¹⁵² In this case, Mr Thebus and Mr Adams (the appellants) were convicted and sentenced by the Cape High Court on a count of murder and two counts of attempted murder. They had been part of a protesting group involved in a shoot-out with a reputed drug dealer in Ocean View, Cape Town. As a result of the cross-fire, a young girl was killed and two others wounded. The shots which killed the girl and wounded the other persons came from the group of which first and second appellant were part. However, there was no direct evidence that any of the appellants fired the shots. The appellants were convicted on the basis of the common law doctrine of common purpose and each was sentenced to a period of eight years imprisonment, suspended for five years on certain conditions. The Supreme Court of Appeal (SCA) confirmed these findings. The appellants approached the Constitutional Court on two issues: firstly, whether the SCA acted unconstitutionally in failing to develop the doctrine of common purpose, thereby violating their rights to dignity and freedom of the person as well as their right to a fair trial, which includes the right to be presumed innocent; secondly, whether the first appellant's right to silence contained in section 35(1)(a) of the Constitution had been infringed by the negative inference drawn by reason of the late disclosure of alibi defence. With regard to the rationale of the right to remain silent, the court noted as follows:

The underlying rationale of the right to remain silent is three pronged: (1) concerns for reliability by deterring improper investigation which relates directly to the truth-seeking function of the court; (2) a belief that an individual has a right to privacy and dignity which, whilst not absolute, may not be lightly eroded; (3) the right to remain silent is necessary to give

¹⁵⁰Mubangizi, J.C.(2004).*The Protection of Human Rights in South Africa: A Legal and Practical Guide* at 198.

¹⁵¹Skeen, A. (1993). "A Bill of Rights and the presumption of innocence" *SAJHR* 525 at 535.

¹⁵²*Thebus and Another v S* 2003 (6) SA 505 (CC).

effect to the privilege against self-incrimination and the presumption of innocence.

The right to remain silent is specified both in pre-trial (section 35(1)(a)) and trial procedures (section 35(3)(h)). In essence, the accused must be promptly advised of his or her right to remain silent and the consequences of not remaining silent. According to Skeen,¹⁵³ the advice must be conveyed in a language that is understood by the accused; failure to properly advise the accused about his or her right to remain silent is a breach of the constitutional right to a fair trial.

(iii) **The scope of the right to remain silent**

The scope of the right to remain silent has been clearly clarified by the court in *S v Boesak*.¹⁵⁴ In this case, Dr Allan Boesak, who had occupied a prominent position in church circles and in the anti-apartheid struggle, was convicted on one count of fraud and three counts of theft in the Cape High Court and sentenced to six years imprisonment. The fraud count and the first theft count related to R259 161 donated by an American musician to a children's trust fund controlled by Dr Boesak. The third count related to amounts totalling R147 160 he had taken for himself from another fund he controlled. On appeal the Supreme Court of Appeal (SCA) set aside one of the theft counts, altered the amount involved in another theft count and reduced the sentence to three years imprisonment. Dr Boesak then applied for special leave to appeal from the SCA to the Constitutional Court, alleging that his constitutional rights had been infringed. Langa DP,¹⁵⁵ speaking for the Constitutional Court, pointed out that:

The right to remain silent has different applications at different stages of a criminal prosecution. On arrest a person cannot be compelled to make any confession or admission that may be used against her or him; later at trial there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face

¹⁵³ Skeen, A. (1993). "A Bill of Rights and the presumption of innocence" *SAJHR* 525 at 535.

¹⁵⁴ *S v Boesak* 2001 (1) SACR 1 (CC).

¹⁵⁵ *S v Boesak* 2001 (1) SACR 1 (CC) at paragraph 24.

of such evidence, the Court may, in the circumstances, be justified to conclude that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will, of course, depend on the quality of the evidence and the weight given to that evidence by the Court.

In *Osman & another v Attorney-General, Transvaal*¹⁵⁶ the Constitutional Court considered a challenge to a provision of the General Laws Amendment Act which creates an offence where a person who is found in possession of goods which are reasonably suspected to have been stolen, is unable to give a satisfactory account of such possession. The appellants, (the Osmans) argued that the provision conflicts with: (1) the right of an arrested or detained person not to be compelled to make a confession or admission which could be used in evidence against him or her, and (2) the rights of an accused person to be presumed innocent, to remain silent and not to give evidence at trial. The court succinctly stated that:

In an adversarial legal system, once the prosecution has produced evidence sufficient to establish a prima facie case, an accused has an election to produce evidence to rebut the case or not. The court held further that an accused who fails to produce evidence to rebut the case was at risk. The fact that an accused is put to such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.

Consequently, the court held that that the provision is not in conflict with these rights under the Interim Constitution.

2.3 The right to be presumed innocent in foreign jurisdictions

The presumption of innocence is not only important in the South African law, but also in various countries across the world. For example, it is protected in Canada, China, the United States of America and the United Kingdom. It is also protected in various international

¹⁵⁶*Osman & another v Attorney-General, Transvaa* 1998 (4) SA 1224 (CC) at paragraph 22.

human rights instruments such as Universal Declaration of Human Rights,¹⁵⁷ and the European Convention on Human Rights.¹⁵⁸

(i) The United Kingdom

The case of *Woolmington v The DPP*,¹⁵⁹ is highly regarded as the landmark case on the presumption of innocence. The case highlighted the significance of the presumption of innocence in as far as the right to a fair trial is concerned. The court also stressed that the notion of presumption of innocence requires the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt. Stressed further by the court was that the notion of presumption of innocence is immutable except under the following circumstances:

- (a) Where the accused person raised insanity as his or her defence. This has also been confirmed by the court in *McNaghten*¹⁶⁰ in which the court stressed out that where the accused raised the defence of insanity, onus of proof is on the accused person to prove that, “at the time of committing the act, he was labouring under a defect of reason, from the disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”.
- (b) Where a statute provides for such an exception.¹⁶¹
- (c) In relation to statutory offences, where the burden of proof is placed on the accused person by implication.¹⁶²

Ibrahim v Regem,¹⁶³ is also another leading case in the United Kingdom in as far as the presumption of innocence is concerned. In this case a private in the Indian army was convicted of the murder of a native officer. Soon after the murder, the commanding officer

¹⁵⁷ Article 11(1) states: “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

¹⁵⁸ Article 6(2) states: “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

¹⁵⁹ *Woolmington v. The DPP* [1935] A.C. 462 at 481.

¹⁶⁰ *McNaghten* 1843 0 cl & Fin 200.

¹⁶¹ This exception has been heavily criticized by Ashworth, A and Blake, M. (1996) 'The Presumption of Innocence in English Criminal Law' at 133–173. Ashworth seem to hold the view that if the legislature is free to impose strict liability whenever it wishes, the notion of presumption of innocence becomes a fallacy.

¹⁶² Ashworth, A and Blake, M. (1996) 'The Presumption of Innocence in English Criminal Law' at 133–173.

¹⁶³ *Ibrahim v Regem* 1914-15 All ER 874.

went to see the appellant in custody and asked him why he did such an act. The appellant said that he killed the deceased because he has been abused by him in the past few days. The commanding officer wanted to appear before the court as a witness and use the ‘confession’ made by the appellant against him. Although the court had to decide on whether or not the accused made the ‘confession’ voluntarily, without fear or hope of getting the advantage held by the person to whom it was made, this case is important in that the court expressly pronounced that:

The use of presumptions and inferences to prove an element of a crime imposes draconian encroachment on the accused’s right to be presumed innocent and allows men to go to jail without any evidence on one essential ingredient of the offence. It thus implicates the integrity of the judicial system . . . In practical effect; the use of these presumptions often means that the great barriers to the protection of procedural due process contained in the bill of rights are subtly diluted.

Consequently, the court held that a provision which disregards the accused’s right to be presumed innocent is invalid and would not be entertained by any court in English law.

(ii) Canada

In Canada, just as in South Africa, the presumption of innocence has been afforded constitutional protection. Section 11(d) of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”¹⁶⁴ Section 7 of the Canadian Charter considered the presumption of innocence to be part and parcel to the right to life, liberty and security of the accused person. In terms of section 1 of the Charter, the right to be presumed innocent is subject only to reasonable limitation prescribed by law as can be justified in a free and democratic society.

¹⁶⁴Section 11(d) of the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11).

In the Canadian law, the presumption of innocence implies that before the accused person can be criminally convicted, the court must be satisfied beyond a reasonable doubt that all the elements of the crime are present. *R v Oakes*¹⁶⁵ is the first major decision by the Supreme Court of Canada, after the introduction of the Canadian Charter.¹⁶⁶ In this case, the accused was found in unlawful possession of narcotic drugs. In terms of section 8 of the Narcotic Control Act, if a person was proved to be in unlawful possession of a narcotic, he was presumed to be in possession of it for the purpose of trafficking unless he proved the contrary. The accused argued that this provision was contrary to the presumption of innocence provided for by the Canadian Charter. The Canadian Supreme Court had to decide on the constitutional implication of section 8 of the Narcotic Control Act. It was held that:

A provision which requires an accused to disprove on balance of probabilities the existence of a presumed fact, which is an element of the offence in question, violates the presumption of innocence in section 11(d). The fact that the standard required on rebuttal is only on preponderance of probabilities does not render a reverse onus clause constitutional. Section 8 of the Narcotic Control Act infringes the presumption of innocence in section 11(d) of the Charter by requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The court went further to examine whether the infringement posed by section 8 of the Narcotic Control Act can be justified in terms of section 1 of the Charter, which provides for a reasonable limitation to the right to be presumed innocent. In this regard, the court observed that the standard of proof in terms of section 8 of the Narcotic Control Act allowed the possibility that the accused person could be convicted despite the existence of reasonable doubt. Further held by the court is that there was no rational connection between basic possession and the presumption of trafficking. Consequently, section 8 of the Narcotic Control Act was held to be radically and fundamentally inconsistent with the presumption and could not be justified in a free and democratic society.

¹⁶⁵*R v Oakes* 1986 26 DLR 4th 200.

¹⁶⁶ The Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11).

In *R v Schwartz*¹⁶⁷ the Canadian Supreme Court considered the constitutionality of the provisions criminalizing possession of a restricted weapon without a registration certificate. The onus was placed on the accused to prove on balance of probabilities that they held such a certificate. In deciding this matter, the court examined the wording of the onus placed on the accused person and held that it did not require the accused person to prove or disprove any element of the offence. The court also emphasized that the onus placed upon the accused does not create any possibility that the accused could be found guilty of a crime, despite the existence of a reasonable doubt as to guilt. Consequently, the impugned provision was regarded to be in line with the Canadian constitutional values. The importance of this judgment is that it clearly demonstrates that Canadian Charter of Rights provides for the fundamental human rights. Any statute must therefore conform to it. Allied to this importance is that this judgment illustrates that the presumption of innocence embodied in 11(d) of the Charter will be infringed by a reverse onus provision or presumption of guilt which requires the accused to prove some fact on the balance of probabilities to avoid conviction. Similarly, a reverse onus provision or presumption of guilt which does not requires the accused to prove some fact on the balance of probabilities to avoid conviction will be compatible with the presumption of innocence embodied in 11(d) of the Charter.

In *R v Appleby*¹⁶⁸ the accused was charged with contravening the Canadian Criminal Code which provides that any person who drives a motor vehicle or who has the care or control of a motor vehicle whether it is in motion or not, while his ability to drive a motor vehicle is impaired by alcohol or a drug, is guilty of an offence. Section 237(1)(a) of the Criminal Code provides that:

Where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

¹⁶⁷*R v Schwartz* 1988 2 SCR 443.

¹⁶⁸*R v Appleby* (1971) 21 DLR (3d) at 325.

The Supreme Court of Canada had to decide whether 237(1)(a) of the Code breached the presumption of innocence. Ritchie J,¹⁶⁹ observed that the presumption placed an onus on the accused to prove on a balance of probabilities that he did not enter the vehicle with the intention of setting it in motion. Accordingly, the court concluded that section 237(1)(a) of the Criminal Code contravened the accused's right to be presumed innocent provided by section 11(d) of the Charter.

(iii) The United States of America

The United States of America Bill of Rights does not explicitly provide for the right to be presumed innocent, but it has been held that the Fifth and Fourteenth Amendments, which warrant a right not to be deprived of life and liberty, also includes the presumption of innocence.¹⁷⁰

Tot v United States,¹⁷¹ is the first case relevant to the investigation of presumptions in the American jurisdiction. The court had to decide a constitutional matter involving a federal statute which provided that the possession of a firearm or ammunition by any person shall be presumptive evidence that such firearm or ammunition was shipped, transported or received, as the case maybe, by such person in violation of this Act. The court looked at whether there is any rational connection between the facts proved and the facts presumed. On the basis of this test, Justice Roberts¹⁷² held that there is no a reasonable connection between the facts proved and the fact presumed. In other words, there was no any legitimate reason being served by the impugned presumption of guilt. Consequently, the presumption was invalidated.

¹⁶⁹ *R v Appleby* (1971) 21 DLR (3d) 325 at paragraph 44.

¹⁷⁰ Gray, A. (2012). "Constitutionally Protecting the Presumption of Innocence" *University of Tasmania Law Review*, at131-152.

¹⁷¹ *Tot v United States* 1943 319 All ER 463.

¹⁷² *Tot v United States* 1943 319 All ER 463.

(iv) **International law**

The presumption of innocence is also protected in various international instruments. Article 11 of the Universal Declaration of Human Rights¹⁷³ provides that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial”. Similarly, Article 14(2) of the International Covenant on Civil and Political Rights¹⁷⁴ provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” Article 6(2) of the European Convention on Human Rights¹⁷⁵ provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. According to Ashworth and Blake,¹⁷⁶ the requirement that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” envisaged by Article 6(2) of the European Convention on Human Rights¹⁷⁷ requires that the court should not start with the assumption that the accused committed the act with which he or she is being charged. In essence, onus to prove the guilt of the accused falls upon the prosecution; any legal doubt should be in favour of the accused. In this regard, it is apparent that the presumption of innocence has been accorded robust protection on international level. Article 66(3) of the Statute of the International Criminal Court also recognized the presumption of innocence as a fundamental concept in the administration of justice. It provides that: “in order to convict the accused, the court must be convinced of the guilt of the accused beyond reasonable doubt.”

The above discussion on the right to be presumed innocent in foreign jurisdictions clearly highlighted that the presumption of innocence forms the core of the right to a fair trial. The presumption of innocence will be infringed if the provision of a statutory presumption creates a possibility that the accused person may be convicted, despite the existence of reasonable doubt. According to Hoffmann and Zeffertt,¹⁷⁸ the question whether the possibility that a person may be convicted despite the existence of reasonable doubt relates to the question of

¹⁷³The Universal Declaration of Human Rights UN General Assembly Resolution 217A (III) of 10 December 1948.

¹⁷⁴The International Covenant on Civil and Political Rights UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

¹⁷⁵ Article 6 of the European Convention on Human Rights is a provision of the European Convention which protects the right to a fair trial.

¹⁷⁶ Ashworth, A and Blake, M. (1996) 'The Presumption of Innocence in English Criminal Law' at 133–173.

¹⁷⁷ Article 6(2) of the European Convention on Human Rights is also a provision of the European Convention which protects the right to a fair trial.

¹⁷⁸ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

whether the impugned presumption creates a reverse burden of proof¹⁷⁹ or an evidentiary burden.¹⁸⁰

(v) **China**

China is one of those countries which are rarely considered commendable of emulation on issues of human rights. However, Article 12 of the new Criminal Procedure in China afforded recognition of the right to be presumed innocent as a fundamental principle of criminal law. Although Article 12 of the new Criminal Procedure does not explicitly mention the word “presumption of innocence,” it however provides that “no one shall be convicted unless a verdict of a people’s court has been reached according to law.” Moreover, article 162 of the new Criminal Procedure explicitly put the burden of proof on the prosecution. By implication, it is a common cause that the new Criminal Procedure considered the presumption of innocence as a fundamental concept in the administration of justice and elevated it to the status of a constitutional guarantee.¹⁸¹

2.4 Conclusion

This chapter has demonstrated that the foundational right to a fair trial is a long standing principle at the heart of the South African criminal justice system and has explored its origins, nature and scope, as well as its significance. This right is guaranteed to every accused person in the Republic. Central to the right to a fair trial is the notion that the accused person has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The right to be presumed innocent is also enshrined in various international human rights instruments such as Universal Declaration of Human Rights,¹⁸² the European

¹⁷⁹ According to Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 538, a reverse burden of proof in a criminal trial refers to a shift in the burden of proof from the State proving its case to an accused person to disprove the State’s case.

¹⁸⁰ According to Corbett J in *Southern Cape Corporation (Pty) Ltd v Engineering Management Services* 1977 (3) SA 534 (A) at 545C-G, evidentiary burden refers to “the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent”.

¹⁸¹ Raul, S. (2001) ‘Reverse onus Clauses: A Comparative Law Perspective’ *13 Student Advocate* at 148 - 172.

¹⁸² Article 11(1) states: “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

Convention on Human Rights¹⁸³ and is enacted domestically in various countries, such as Canada, the United States of America and the United Kingdom.

The right to be presumed innocent requires the criminal justice system to be biased in favour of presuming that the accused in criminal trials did not commit the offence. The state is required to bear the burden of proving the guilt of the accused person beyond reasonable doubt. The presumption of innocence will be infringed if there is a possibility that a person may be convicted despite the existence of reasonable doubt.¹⁸⁴ The presumption of innocence will also be infringed if the provisions of a statutory presumption require of an accused to establish on a balance of probabilities either an element of an offence or his or her innocence.¹⁸⁵ The right to remain silent will be infringed if the accused or a suspect has been compelled to give self-incriminating evidence, either before or during the trial. In determining the constitutional implication of the presumption of guilt created by section 235(2) of the Tax Administrative Act,¹⁸⁶ it is therefore imperative to consider whether such presumption creates a reverse burden of proof or an evidentiary burden. This is discussed in the next chapter.

¹⁸³ Article 6(2) states: “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

¹⁸⁴ *S v Zuma* 1995 (1) SACR 568 (CC) at paragraph 25.

¹⁸⁵ *S v Bhulwana*; *S v Gwadiso* 1995 (2) SACR 748 (CC) at paragraph 15.

¹⁸⁶ Act 28 of 2011.

CHAPTER THREE

REVERSE BURDEN OF PROOF AND EVIDENTIARY BURDEN

3.1 Introduction

This chapter will deal with the reverse burden of proof and the evidentiary burden and their constitutionality in South Africa. The chapter will also focus on a brief comparative study of the constitutionality of the reverse burden of proof and evidentiary burden in other jurisdictions, such as Canada, the United States of America and the United Kingdom. This chapter seeks to provide a clear understanding of what constitutes a reverse burden of proof and an evidentiary burden because the two are distinct from each other and have different effects upon the taxpayer's constitutional right to a fair trial and particularly the right to be presumed innocent. Whether the presumption of guilt created by section 235(2) of the Tax Administrative Act¹⁸⁷ constitutes a reverse burden of proof or an evidentiary burden is important for all legal advisors to consider before advising a taxpayer to challenge the constitutionality of this provision.

3.2 Burden of proof in criminal trials

The term 'burden of proof' is sometimes known as the burden of persuasion or probative burden.¹⁸⁸ According to Landa and Ramjohn,¹⁸⁹ the burden of proof refers to the legal obligation to prove a point in contention or a fact in issue in order to convince the judge during a trial. Thayer¹⁹⁰ submitted that the term 'burden of proof' is generally agreed to have been translated from the Latin maxim *ei qui affirmat non ei qui negat incumbit probatio*, which means that he who asserts a matter must prove it, but he who denies it need not prove it.¹⁹¹ In both English and South African law, a crime is proven affirmatively.¹⁹² In other

¹⁸⁷ Act 28 of 2011.

¹⁸⁸ Landa, J. and Ramjohn, M. (2013). *Unlocking Evidence* (2ed) at 26.

¹⁸⁹ Landa, J. and Ramjohn, M. (2013). *Unlocking Evidence* (2ed) at 26.

¹⁹⁰ Thayer, J.B. (1898) *A Parliamentary Treatise on Evidence at the Common Law* at 355.

¹⁹¹ Thayer, J.B. (1898) *A Parliamentary Treatise on Evidence at the Common Law* at 355. The same position has been submitted by Viscount Maugham in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, HL at 82, in which the court clearly stated that the burden of proof lies on the party who affirms and not upon the party who denies it.

¹⁹² *S v Zuma* 1995 (1) SACR 568 (CC) at paragraph 25.

words, it is a golden rule that the person accused of a criminal act can be only convicted after the case against him has been proven beyond reasonable doubt.¹⁹³

The golden rule that the state must prove that the accused person is guilty beyond a reasonable doubt entails that the state must bear the onus of proof to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that the accused had the required intention, that the crime in question was committed, and that the act in question was unlawful.¹⁹⁴ If the state fails to prove the guilt of the accused person beyond a reasonable doubt, the accused person is entitled to acquittal.¹⁹⁵ The court in *S v T*¹⁹⁶ held that:

The state is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof is a core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse convictions based on suspicion or speculation is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.

¹⁹³In *R v Ndhlovu* 1945 AD 369 at 386 the court stated that 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 all averments to establish his guilt.

¹⁹⁴Schwikkard, PJ. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 313.

¹⁹⁵This position was set out by Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W), at 448f-g: when he expressly stated that

The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.

¹⁹⁶*S v T* 2005 (2) SACR 318 (E) at paragraph 37.

In light of the judgment of the court in *S v T*,¹⁹⁷ it is a common cause that in a criminal matter the accused person is not under any legal duty to prove his innocence or to disprove an element of an offence for which he is being charged.¹⁹⁸ Similarly, if the plaintiff fails to prove negligence on the part of the defendant in an action for damages, the judgment will be given in favour of the defendant.¹⁹⁹ However, the criminal standard of proof of guilt beyond a reasonable doubt applies only to the court's final evaluation of the accused's guilt or innocence.²⁰⁰ It does not apply piecemeal to individual items of evidence submitted by the state.

The legal burden of proof is fixed at the beginning of the trial and remains unchanged throughout the criminal proceedings and never shifts to the other party.²⁰¹ The state is always obliged to prove all the elements of the alleged crime beyond a reasonable doubt before convicting the accused person.²⁰² Similarly in civil proceedings, where the burden of proof is on the plaintiff or the defendant, the burden remains on him throughout the trial.²⁰³ However, there are well-known and recognised common law exceptions to which the general rule that the state must always bear a burden to prove its case beyond reasonable doubt (the "golden thread") does not apply.²⁰⁴ According to Viscount Stanley LC in *Woolmington v The DPP*,²⁰⁵ there are two exceptions to the "golden thread"²⁰⁶ namely, insanity and any express statutory exception.²⁰⁷ Where the accused person raises the defence of insanity,²⁰⁸ the burden is on him

¹⁹⁷ *S v T* 2005 (2) SACR 318 (E) at paragraph 37.

¹⁹⁸ In *S v Mhlongo* 1991 (2) SACR 207 (A), at 210d-f the court noted that the onus rests on the state to prove the guilt of an accused beyond reasonable doubt, no onus rests on the accused to prove his or her innocence. The same point was enunciated by Zulman JA in *S v V* 2000 (1) SACR 453 (SCA), at paragraph 3(i) when he stated that

'It is trite that there is no obligation upon an accused person, "to convince the court". If his 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 any reasonable doubt it is false. ...'

¹⁹⁹ Schwikkard, PJ. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 313.

²⁰⁰ Lord Sankey in the English *locus classicus* of *Woolmington v The DPP* [1935] A.C. 462 at 481.

²⁰¹ *Woolmington v The DPP* [1935] A.C. 462 at 240.

²⁰² *R v Difford* 1937 AD 370 at 373 and 383.

²⁰³ Schwikkard, PJ. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 315.

²⁰⁴ Bennion, F. (1988). 'Statutory Exceptions: A Third Knot in the Golden Thread?' *Criminal Law Review*, vol 31 at 44-88.

²⁰⁵ *Woolmington v The DPP* [1935] A.C. 462.

²⁰⁶ The general rule that the state must always bears a burden to prove its case beyond reasonable doubt.

²⁰⁷ Where a statute places the legal burden of proof on the defendant.

²⁰⁸ In theory, the definition of insanity means that whether a defect of reason led him or her not to know the nature or quality of his or her act, or that the act was wrong, or the defect of reason did not have that effect.

to prove this submission on a balance of probabilities.²⁰⁹ Another exception to the “golden thread” occurs where a statute provides for it.²¹⁰ Statutory provisions may expressly or by implication place the burden of proof on the accused. This normally happens through judicial interpretation of the statute. Implied statutory exceptions usually arise where legislation prohibits “the doing of an act subject to exceptions.” In this instance, the burden of proof rests on the accused person to prove that he falls within the exception.²¹¹

Although Viscount Stanley LC in *Woolmington v The DPP*²¹² only articulated two exceptions to the “golden thread”.²¹³ A third exception has been added. The third exception is that the “golden thread” will not apply where the alleged facts are within the knowledge of one party. According to Mthembu,²¹⁴ this exception does not apply in proving negligence. In *Union Government (Minister of Railways) v Sykes*,²¹⁵ the plaintiff sued the Minister of Railways for damage to his land caused by a fire started by sparks from a railway engine. It was alleged that the railway spark arrestor was not in working order. This submission was a fact which was within the knowledge of the defendant's servants only. As a result, they bore the onus of proving that it was in fact working. However, the court rejected this argument, saying that it was settled law that the burden of proving negligence rested on the plaintiff and that no variation in the facts could alter this rule. In South Africa, the only exception to the “golden thread” that has been accepted by courts is that of insanity.²¹⁶

²⁰⁹ Lord Viscount Sankey LC in *Woolmington v The DPP* [1935] A.C. 462 at 340 said:

“Where intent is an ingredient of a crime, there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity....”

²¹⁰ Zuckerman, A. (1976), 'The Third Exception to the Woolmington Rule', 92 *Law Quarterly Review* at 402-426

²¹¹ Fennell, C. (2003). *The Law of Evidence*, (2nd ed) at 45.

²¹² *Woolmington v The DPP* [1935] A.C. 462 .

²¹³ The general rule that the state must always bears a burden to prove its case beyond reasonable doubt.

²¹⁴ Mthembu, MH.(1998) ‘The constitutionality of presumptions in South African law’, *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

²¹⁵ *Union Government (Minister of Railways) v Sykes* 1913 AD 156.

²¹⁶ Mthembu, MH.(1998) ‘The constitutionality of presumptions in South African law’, *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

3.3 Reverse burden of proof

A reverse burden of proof in a criminal matter refers to a shift in the burden of proof from the state to the accused. According to Hoffmann and Zeffertt,²¹⁷ there is a significant distinction between a reverse burden of proof and an evidentiary burden. The two must therefore not be confused or used interchangeably. The difference between a reverse burden of proof and an evidentiary burden can be construed by looking at the language in which a presumption is cast.²¹⁸ In determining whether the impugned presumption creates a reverse burden of proof or a mere evidentiary burden, the words “shall be presumed unless the contrary is proved”, indicates that a reverse burden of proof has been created.²¹⁹

The effect of reverse burden of proof is that the accused will be placed under a legal obligation to prove some matter which shows that he is not guilty of an offence.²²⁰ As articulated by the court in *S v Zuma*,²²¹ the Constitutional right to be presumed innocent will be infringed by the existence of the reverse burden of proof. This has been confirmed by Ngcobo J²²² in *S v Singo*²²³ in which he pronounced that:

A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the state to 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 s 35(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.

²¹⁷ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

²¹⁸ Mthembu, M.H. (1998) ‘The constitutionality of presumptions in South African law’, *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

²¹⁹ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

²²⁰ Dennis, I. (2005). ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’, *Criminal Law Review* 901-936, at 901.

²²¹ *S v Zuma*, 1995 (1) SACR 568 (CC) at paragraph 25.

²²² *S v Singo* 2002 (4) SA 858 CC.

²²³ *S v Singo* 2002 (4) SA 858 CC.

The importance of the above judgment is that it clearly emphasizes that the reverse burden of proof has the effect of forcing the accused person to give evidence, thus impinging upon his right to remain silent as entrenched by section 35 of the Constitution.²²⁴

3.3.1 Justification for the reverse burden of proof

The court in *S v Zuma*²²⁵ and *S v Singo*²²⁶ held that the existence of reverse burden of proof in the South African law infringes the fundamental principles of the presumption of innocence and the right to remain silent, which is now firmly rooted in section 35(3) of the Constitution. However, the existence of a reverse burden of proof in the South African law has been based on two main premises:

- (i) That the facts are within the knowledge of the accused person only. In this regard, the state will not be able to prove its case against the accused without the assistance of the presumption.
- (ii) There is practical difficulty of proving a negative where the other party denies a negative proposition. It has been suggested,²²⁷ that this problem can be solved by placing reverse burden of proof upon the party who denies a negative proposition.

3.4 Evidentiary burden

As mentioned earlier, the wording of the impugned presumption is of paramount significance in determining whether or not such a presumption creates an evidentiary burden or a reverse burden of proof. The words “is *prima facie* evidence” indicates that only an evidentiary burden of proof has been created by the impugned presumption.²²⁸ According to

²²⁴ Section 25(3) of the Interim Constitution of 1993 and section 35(3)(h) of the 1996 Constitution.

²²⁵ *S v Zuma*, 1995 (1) SACR 568 (CC) at paragraph 25.

²²⁶ *S v Singo* 2002 (4) SA 858 CC.

²²⁷ Mthembu, MH. (1998) ‘The constitutionality of presumptions in South African law’, *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

²²⁸ Ashworth, A. (2006) ‘Four Threats to the Presumption of Innocence’ 123 *SALJ* 63 at 89.

Schwikkard,²²⁹ an evidentiary burden refers to the duty placed on the accused to produce sufficient ‘*prima facie*’ evidence before the court for a judge to call the plaintiff to answer. In other words, evidentiary burden encourages parties to lead enough evidence to make out a case that is sufficiently strong to create a risk for the opponent. Unlike the reverse burden of proof, an evidentiary burden does not create the possibility of conviction, despite the existence of a reasonable doubt.²³⁰ Normally, an evidentiary burden is discharged in the following ways: calling witnesses, showing video or photograph evidence, tendering documentary evidence, adducing items of real evidence or producing expert opinion evidence. If the opponent does nothing against the evidence led against them, they would lose the case.

According to Corbett J in *Southern Cape Corporation (Pty) Ltd v Engineering Management Services*,²³¹ an evidentiary burden refers to “the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent”. From the definition of an evidentiary burden provided by Corbett J, it is a common cause that the evidentiary burden can rest on either side in a trial. For example, at the onset of the trial,²³² the evidentiary burden usually rests on the party seeking to establish their case. Once that party has succeeded in establishing a case, the evidentiary burden shifts to the other party to lead enough evidence to rebut the case established against him or her. The rationale for placing the evidentiary burden on the accused is to establish whether or not sufficient reason exists to expend judicial resources on litigation in any particular case.²³³

3.5 The constitutionality of the reverse burden of proof

It is imperative to commence by providing a general analysis and discussion of the constitutionality of reverse onus provisions and presumptions as applied in other branches of

²²⁹Schwikkard, PJ. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 502 submit that where it is stated that evidence of fact constitutes ‘*prima facie* proof of’, or ‘*prima facie* evidence of’, then only an evidentiary burden is created.

²³⁰ Ashworth, A. (2006) ‘Four Threats to the Presumption of Innocence’ 123 *SALJ* 63 at 89 submits, however, that ‘discharging the evidential burden does place an obligation on the defendant, and for that reason it requires justification and should not be casually imposed. But it is much lighter than the burden of proving an issue on the balance of probabilities, and hence it is less objectionable, certainly as a means of dealing with offences to which various possible defences may be raised and where it would clearly be inappropriate to expect the prosecution to negative all of them if the defendant did not wish to rely on some of them.’

²³¹*Southern Cape Corporation Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

²³²*Southern Cape Corporation Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

²³³ Mthembu, MH.(1998) ‘The constitutionality of presumptions in South African law’, *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

law and particularly in South African criminal law and the law of insolvency. This will contribute to keeping the goals of this study in focus.

3.5.1 Reverse onus provisions and presumptions in the South African law of insolvency

The Insolvency Act²³⁴ creates several criminal offences in connection with Insolvency.²³⁵ Section 146 of the Act²³⁶ provides that:

Whenever in any criminal proceedings under this Act any liability incurred by an insolvent is in issue, proof that a claim in respect of that liability has been admitted against the estate of the insolvent in accordance with any provision of this Act shall be sufficient evidence of the existence of the liability and any such liability shall be deemed to have been incurred upon the date or at the time alleged in any document submitted in accordance with any provision of this Act in support of that claim: Provided that the accused in those proceedings may prove that no such liability was incurred or that it was incurred on a date other than the date so alleged.

In accordance with the above presumption, upon proof that there is a claim in respect of liability that has been admitted against the estate of the insolvent, that liability shall be presumed to have been incurred upon the date and at the time alleged, unless the accused insolvent can prove that no such liability was incurred or that it was incurred on a date other than the date so alleged. The implication of this presumption is that the accused insolvent is under a legal duty to prove that ‘no such liability was incurred or that it was incurred on a date other than the date so alleged’. Failure to so prove, has the consequence that the insolvent person shall be presumed to have incurred the liability in question. This provision raises a constitutional concern whether or not it unjustifiably infringes the right to a fair trial and particularly, the right to remain silent as guaranteed in terms of section 35 of the

²³⁴ Act 24 of 1936.

²³⁵ According to *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) defined insolvency as a situation when debtor’s liabilities (fairly valued) exceed his assets (fairly valued). It is important to note that the court in *Realizations Ltd v Ager* 1961 (4) SA 10 (D) at 11-12 held that proof of an inability to pay debts is only prima facie evidence of insolvency not necessarily insolvency.

²³⁶ Act 24 of 1936.

Constitution. According to Winsen JA²³⁷ in *Ensor NO v New Mayfair Hotel*,²³⁸ by placing the accused insolvent under a legal obligation to prove that ‘no such liability was incurred or that it was incurred on a date other than the date so alleged’, the impugned provision created a ‘reverse onus of proof’ which infringes upon the accused insolvent’s right to a free trial. The court went further and held that the constitutional validity of this ‘reverse onus’ presumption will depend upon whether its limitation of the accused’s right to a fair trial is regarded as reasonable and justifiable in terms of section 36(1) of the Constitution. Consequently the court held that the presumption was indeed justified in terms of section 36(1) of the Constitution. From this judgment, it can be submitted that in the case of the South African law of Insolvency the reverse onus clauses are considered to be unconstitutional unless they are saved by the limitation clause embodied in section 36(1) of the Constitution.

3.5.2 Reverse onus provisions and presumptions in the South African criminal law

The first matter involving the constitutionality of a reverse burden of proof in South Africa has been considered by the Constitutional court in *S v Zuma*.²³⁹ In this case, the court had to decide upon the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act which provides that where a confession by an accused person has been made to a magistrate or has been reduced to writing in the presence of a magistrate, it shall be admissible in evidence against the accused. Further provided by the sub-paragraphs of this section is that the confession shall be presumed to have been freely and voluntarily made by the accused in his or her sound and sober senses and without having been unduly influenced, unless the contrary is proved. The phrase “unless the contrary is proved” which was used in the provision meant, in effect, that if the accused failed to discharge the burden of proof, that is, on a balance of probabilities, the confession would be admitted notwithstanding the existence of a reasonable doubt that it had been made freely and voluntarily. In deciding the matter, Kentridge J adopted the two principles laid down by Cory J in the Canadian case of *R v Downey*.²⁴⁰

²³⁷ *Ensor NO v New Mayfair Hotel* 1968 (4) SA 462 (N) at 467.

²³⁸ *Ensor NO v New Mayfair Hotel* 1968 (4) SA 462 (N).

²³⁹ *S v Zuma and Others* 1995 (2) SA 642 (CC).

²⁴⁰ *R v Downey* 1992 90 DLR 45h at 449 where the SCA held that a statutory presumption that “a person who lives with, or is habitually in the company of prostitutes is, in the absence of evidence to the contrary, committing the offence of ‘living on the avails, that is, proceeds of another person's prostitution” was also held to infringe the presumption of innocence embodied in section 11(d) of the Canadian Charter. The presumption

namely: (1) the presumption of innocence will be infringed whenever there is a possibility of conviction despite the existence of a reasonable doubt, and (2) where the statutory presumption requires the accused to prove or disprove an element of the offence on the balance of probabilities. Consequently, Kentridge J held that the presumption created by section 217(1)(b)(ii) of the Criminal Procedure Act was unconstitutional because it breached the constitutional right to be presumed innocent. However, the court emphasized that this judgement did not establish that all statutory provisions that create a reasonable presumption of guilt in criminal matters are constitutionally invalid. In other words, each case is unique and hence it must be considered on its own facts and merits. In essence, a reverse onus or presumption of guilt provision would be constitutionally valid, especially in those matters where there is a pressing social need for the effective prosecution of a crime.

In *S v Bhulwana; S v Gwadiso*²⁴¹ the court dealt with the matter concerning the constitutionality of a reverse burden of proof. The matter in this case concerned section 21(1)(a)(i) of the Drugs and Drug Trafficking Act which provides that if an accused has been found in possession of more than 115 grams of dagga, he or she will be presumed to have been dealing in dagga and will be convicted of the offence of dealing unless that person proves that he or she has not been dealing in dagga. The court had to decide whether or not this provision infringes upon the right of an accused person to be presumed innocent in terms of section 25(3)(c) of the interim Constitution. O'Regan J²⁴² found that the effect of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act is to create a presumption which relieves the prosecution from proving that the accused has been dealing in dagga, which could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. In other words, if the accused failed to prove on a preponderance of probabilities that he or she was not dealing or trafficking in dagga, a conviction for dealing would result, even if the evidence raised a reasonable doubt as to the innocence of such accused. Consequently, the court held that the impugned provision is in breach of the presumption of innocence and therefore offends against section 25(3)(c) of the Constitution.

of innocence protected by section 11(d) of the Canadian Charter bears a close relationship to the presumption of innocence in the South African Constitution.

²⁴¹ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) .

²⁴² *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at paragraph 15.

The constitutionality of a reverse burden of proof has also been considered in *S v Mbatha; S v Prinsloo*.²⁴³ The applicants in both cases challenged the constitutionality of section 40(1) of the Arms and Ammunitions Act²⁴⁴ which provided that:

Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved.

To support its case, the state submitted two main averments. The first submission was that crime levels are constantly accelerating at an alarming rate. The high levels of crime were perpetuated by the explosion of illegal arms and ammunition. In this regard, the presumption of guilt of those found in possession of illegal arms and ammunition assisted in fighting the rising levels of crime by ensuring effective policing. The second submission by the state was that high crime levels have a deep, negative effect on the quality of life in communities and are a threat to social stability.

The court considered the wording of the presumption and acknowledged that the presumption of guilt would be a solution to the difficulties faced by the police in investigating crime of illegal arms and ammunition. However, the court emphasised that the presumption was too widely phrased. Its effect was to create a 'reverse-onus' because it shifted the burden of proof of guilt away from the state to the accused to disprove the presumed fact of 'possession' on a balance of probabilities. This meant that even if the accused established a reasonable doubt, he or she could still be convicted for failing to disprove the presumed fact on a balance of probabilities. Consequently the court came to the conclusion that impugned presumption infringed the right of an accused person to be presumed innocent.²⁴⁵ The court went further to consider whether the infringement caused by section 40(1) of the Arms and Ammunitions Act could be justified in terms of section 33 of the Interim Constitution (now section 36 of the Constitution). The court held that the state failed to show that the objective of the

²⁴³ *S v Mbatha, S v Prinsloo* 1996 (3) BCLR 293.

²⁴⁴ Act 75 of 1969.

²⁴⁵ *S v Mbatha, S v Prinsloo* 1996 (3) BCLR 293 at 386.

impugned presumption, namely to facilitate the conviction of offenders, could not be reasonably achieved by other means which are less damaging to constitutionally entrenched rights.²⁴⁶ Accordingly, Langa J²⁴⁷ held that the impugned presumption of guilt was inconsistent with the values which underlie an open and democratic society based on freedom and equality hence it cannot be said to be justifiable.

*Mello and another v S*²⁴⁸ is also an important case in as far as the constitutionality of a reverse burden of proof in criminal matters is concerned. The appellants, with two other persons, stood trial in the Pretoria Magistrate's Court on charges of possession of dagga in contravention of the Drugs and Drug Trafficking Act.²⁴⁹ The evidence established that several packages of dagga were found hidden in various parts of a truck driven by one of the accused and in which the other accused were passengers. The appellants and one other accused were found guilty and convicted. In convicting them, the magistrate relied on the presumption created by section 20 of the Act which provides that "If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug". The appellants approached the constitutional court challenging the constitutionality of the presumption created by section 20 of the Drugs and Drug Trafficking Act. The Constitutional Court held that such presumption places a reverse onus on accused to disprove an essential element of offence. Failure to do so, even where reasonable doubt exists, would result in conviction, which offends against right to be presumed innocent until proven guilty. Consequently, the court held that section 20 of the Drugs and Drug Trafficking Act is not justifiable in an open and democratic society based on freedom and equality and hence it is unconstitutional.

3.6 The constitutionality of the evidentiary burden

The matter involving the constitutionality of the evidentiary burden in the South African law was decided by the constitutional court in *Scagell v Attorney-General of the Western Cape*.²⁵⁰

²⁴⁶ *S v Mbatha, S v Prinsloo* 1996 (3) BCLR 293 at 308

²⁴⁷ *S v Mbatha, S v Prinsloo* 1996 (3) BCLR 293 at 306.

²⁴⁸ *Mello and another v S* 1998 (7) BCLR 908 (CC).

²⁴⁹ Act 140 of 1992.

²⁵⁰ *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC) at paragraph 11.

In this case, the applicants were jointly charged in the Cape Town Magistrates' Court with having permitted the playing of a gambling game in breach of section 6(1) of the Gambling Act. Section 6 of the Gambling Act provides that: no person shall permit the playing of any gambling game at any place under his control or in his charge and no person shall play any such game at any place or visit any place with the object of playing any such game. An accused is presumed to have permitted the playing of a gambling game at a place over which he or she is in control or in charge, in circumstances where a member of the police force is wilfully prevented from, or obstructed or delayed in, entering the place. The court was concerned with the question of whether not section 6 of the Gambling Act²⁵¹ was consistent with section 25(3) of the Interim Constitution which provides for the right to a fair trial and, more particularly, section 25(3)(c) which provides the accused the right to be presumed innocent and the right to remain silent. O'Regan J²⁵² held that:

The words "shall be prima facie evidence" used in section 6(3) of the Gambling Act were generally considered as imposing no more than an evidentiary burden on the accused. Such an evidentiary burden merely requires "evidence sufficient to give rise to a reasonable doubt to prevent conviction".²⁵³

It was held further by the court that, unlike the imposition of a legal burden, an evidentiary burden did not create the possibility of conviction despite the existence of a reasonable doubt."²⁵⁴ The importance of the judgment by O'Regan J in the South African law is that the evidentiary burden does not place a burden of proof on the accused to disprove an element of an offence on a balance of probabilities, hence it does not violate the accused's right to a fair trial, particularly the right to be presumed innocent and the right to remain silent.

*S v Singo*²⁵⁵ is another instructive case in as far as the constitutionality of the reverse burden of proof and evidentiary burden provisions are concerned. In this case, Mr Singo was warned by the magistrate to appear in court on 17 January 1997 on charges of common assault and

²⁵¹ Act 51 of 1965.

²⁵² *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC) at paragraph 16.

²⁵³ *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC) at paragraph 12.

²⁵⁴ *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC) at paragraph 16.

²⁵⁵ *S v Singo* (CCT49/01) [2002] ZACC 10.

malicious damage to property.²⁵⁶ He did not comply with the warning.²⁵⁷ His reason for failure to appear in court was that he had settled the underlying dispute with the complainant and that they had become reconciled. They had agreed that both would appear in court on 17 January 1997 in order to have the charges withdrawn.²⁵⁸ However, owing to a misunderstanding on his part, he did not appear before the court, he went to work. Thereafter, he was sent to Namibia.²⁵⁹ His explanation was rejected by the Magistrate who invoked the provisions of section 72(4)²⁶⁰ of the Criminal Procedure Act²⁶¹ which provides for the imposition of a fine or imprisonment if the accused person fails to appear in court at the time and on the date fixed by a warning so to appear, unless the accused can show the court that the failure was not due to his or her fault. Consequently, Mr Singo was convicted, and sentenced to three months imprisonment without an option of a fine in the High Court.²⁶² Mr Singo approached the Constitutional Court challenging the provisions of section 72(4) of the Criminal Procedure Act²⁶³ arguing that the imposition of a fine or imprisonment provided by section 72(4) limits his constitutional right to a fair trial, particularly the right to be presumed innocent and the right to remain silent.

The Constitutional Court was faced with three main legal issues namely, whether the imposition of a fine or imprisonment envisaged in section 72(4) limits the right to a fair trial, more particularly, whether the phrase “unless such accused or such person satisfies the court that his failure was not due to fault on his part” limits the right to be presumed innocent and the right to remain silent. Secondly, if the right to a fair trial is limited, the court had to decide whether such limitation is justifiable under section 36(1) of the Constitution. Lastly, if

²⁵⁶ *Scagell v Attorney-General of the Western Cape* 1996 11 BCLR 1446 (CC) para 4

²⁵⁷ *S v Singo* (CCT49/01) [2002] ZACC 10 para 4.

²⁵⁸ *S v Singo* (CCT49/01) [2002] ZACC 10 para 4.

²⁵⁹ *S v Singo* (CCT49/01) [2002] ZACC 10 para 4.

²⁶⁰ Section 72(4) provides:

The court may, if satisfied that an accused referred to in subsection (2)(a) or a person referred to in subsection (2)(b), was duly warned in terms of paragraph (a) or, as the case may be, paragraph (b) of subsection (1), and that such accused or such person has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

²⁶¹ Act 51 of 1977.

²⁶² *S v Singo* (CCT49/01) [2002] ZACC 10 at paragraph 4.

²⁶³ Act 51 of 1977.

any of the limitations imposed by section 72(4) is not justifiable, what the appropriate relief is. With regard to the first issue, the court held that section 72(4) of the Criminal Procedure Act²⁶⁴ imposes a legal burden of proof on an accused which means that the accused is required to disprove fault, which is an element of the offence charged. The implication of this is that the accused is liable to be convicted and forced to give evidence, thus impinging upon his right to remain silent. To support its case, the state submitted that the infringement imposed by section 72(4) of the Criminal Procedure Act²⁶⁵ was justifiable in terms of section 36 of the Constitution due to the need for effective prosecution of conduct that hinders the administration of justice. It was further submitted by the state that failing to effectively secure the accused's appearance in court would result in the public losing confidence in the system of criminal justice.²⁶⁶ However, the Constitutional Court held that the importance of dealing effectively with conduct that obstructs the administration of justice justified the intrusion into the right to silence, but did not justify the legal burden of proof imposed on an accused which requires a conviction despite the existence of reasonable doubt, nor the limitation of the presumption of innocence that went with it.²⁶⁷ The Court found section 72(4) to be inconsistent with the Constitution and consequently ordered words to be read into the section.²⁶⁸

From the discussion above, it is apparent that a reverse burden of proof in a criminal trial refers to a shift in the burden of proof from the state proving its case to an accused person having to disprove the state's case²⁶⁹, whilst the evidentiary burden refers to the duty placed on the accused to produce sufficient '*prima facie*' evidence before the court for a judge to call upon the plaintiff to answer. The practical implication of a reverse burden of proof or a presumption of guilt provision is that the accused person is required to prove or disprove one element of the offence. This creates a possibility that the accused could be found guilty of a crime, despite the existence of a reasonable doubt as to his or her guilt. Consequently, South African courts have regarded the reverse burden of proof and presumption of guilt provision as unconstitutional on the basis that they infringe upon the accused's a right to fair trial and,

²⁶⁴ Act 51 of 1977.

²⁶⁵ Act 51 of 1977.

²⁶⁶ *S v Singo* (CCT49/01) [2002] ZACC 10 para 37.

²⁶⁷ *S v Singo* (CCT49/01) [2002] ZACC 10 para 37.

²⁶⁸ *S v Singo* (CCT49/01) [2002] ZACC 10 para 42.

²⁶⁹ Mthembu, MH.(1998) 'The constitutionality of presumptions in South African law', *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.

particularly, the right to be presumed innocent, to remain silent, and not to testify during the proceedings. Unlike the imposition of a legal burden, an evidentiary burden does not create the possibility of conviction despite the existence of a reasonable doubt. Consequently, South African courts have regarded statutory presumptions that impose an evidentiary burden on the accused person to be constitutional.

3.7 The constitutionality of the reverse burden of proof and evidentiary burden in other jurisdictions

(iv) The United Kingdom

Unlike South Africa, the United Kingdom has no a written constitution embodying fundamental human rights.²⁷⁰ However, it would be unrealistic to consider that the citizens of a democratic state such as the United Kingdom have no guarantees safeguarding their individual liberties.²⁷¹ The European Convention on Human Rights became part of British law under the Human Rights Act²⁷² in 1998. This means that, for the first time, the presumption of innocence was expressly guaranteed by British law. As a result, it is possible for the courts to challenge the constitutionality of reverse onus clauses on the grounds that they infringe the accused's right to be presumed innocent.

*Keogh v R*²⁷³ is one of the major United Kingdom cases in which the United Kingdom Court of Appeal had to consider the constitutionality of both the reverse burden of proof and evidentiary burden. In this case, the accused acquired possession of highly confidential information from a meeting between the British Prime Minister and the President of the United States of America in relation to their political, diplomatic and defence policies in Iraq. The document containing the confidential information from the meeting subsequently found its way into the possession of a Member of Parliament. The accused was charged with breaching the Official Secrets Act, which makes it an offence to make a damaging disclosure of information, documents or articles relating to defence or international relations without lawful authority. In terms of section 2 and 3 of the Official Secrets Act, it is for the accused

²⁷⁰ Mthembu, MH.(1998) 'The constitutionality of presumptions in South African', Vol. 31 at 213-227.

²⁷¹ Mthembu, MH.(1998) 'The constitutionality of presumptions in South African', Vol. 31 at 213-227.

²⁷² The Human Rights Act 1998.

²⁷³ *Keogh v R* [2007] EWCA Crim 528.

to prove that, at the time of the alleged offence, he did not know, or had no reasonable cause to believe, that disclosure of the information would be damaging. The accused argued that this provision was of no force and effect because it infringes upon his right to be presumed innocent as envisaged by Article 6(2) of the European Convention of Human Rights²⁷⁴ which provides for the accused's right to be presumed innocent until proved guilty according to law.

In deciding this matter, the court distinguished between a reverse burden of proof and an "evidential" burden by observing that an evidential burden of proof requires the accused to adduce sufficient evidence to raise an issue before the court. As such, the court concluded that evidential burdens does not breach the presumption of innocence provided in Article 6(2) of the European Convention of Human Rights. The court also observed that the reverse burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. In this regard, the Court of Appeal noted that section 2 and 3 of the Official Secrets Act requires the accused to prove that "he did not know, or had no reasonable cause to believe, that disclosure of the information would be damaging" in order to establish that he is not guilty. Consequently, the court held that sections 2 and 3 of the Official Secrets Act conflict with the presumption of innocence required by Article 6(2) of the European Convention of Human Rights. The prosecution submitted that the infringement on the presumption of innocence was justifiable because it would be too onerous a task for the prosecutor to disprove, beyond reasonable doubt, that the accused did know or believe that the disclosure of the document would be damaging and that it was reasonable to require the accused to prove his own state of mind. The court rejected this averment and pronounced that the reverse burden of proof is not a necessary element in the effective operation of sections 2 and 3 of the Official Secrets Act and therefore placing such a burden on the appellant cannot be justified.

In light of the above case, it is a common cause that in the United Kingdom, the courts have regarded a statutory presumption that imposes an evidentiary burden on the accused to be constitutional because such presumption does not create the possibility of conviction despite the existence of a reasonable doubt. On the other hand, reverse onus clauses (presumptions of guilt provisions) have been regarded as being unconstitutional on the basis that it infringes

²⁷⁴ Article 6(2) of the European Convention of Human Rights provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

the presumption of innocence required by Article 6(2) of the European Convention of Human Rights unless they are justifiable by a legitimate purpose.

(v) Canada.

The Canadian Charter of Rights and Freedoms provides for the protection of the right to be presumed innocent until guilt has been proven by the court.²⁷⁵ *R v Downey*²⁷⁶ is one of the most celebrated Canadian cases in which the Canadian Supreme Court considered the constitutionality of a statutory presumption created by section 195(2) of Criminal Code. The accused was jointly charged with his companion, with two counts of living on the avails of prostitution. Section 195(2) of Criminal Code provides that evidence that a person lives in the company of prostitutes, in the absence of evidence to the contrary, is regarded as proof that the person lives on the avails of prostitution. The accused argued that section 95(2) of the Code was of no force because it violates his right to be presumed innocent, as guaranteed by section 11(d) of the Charter. The court examined the wording of the impugned presumption and observed that it infringes upon the right to be presumed innocent since it could result in the conviction of the accused despite the existence of a reasonable doubt in the mind of the judge as to his guilt. The court noted that the fact that someone lives with a prostitute does not lead inexorably to the conclusion that the person is living on the avails of prostitution. Consequently, it was concluded that section 195(2) was incompatible with the Canadian constitutional values, particularly the the presumption of innocence embodied in section 11(d) of the Canadian Charter.²⁷⁷ The second question addressed by the court in this case was whether or not the infringement posed by section 195(2) of Criminal Code upon the accused's right to be presumed innocent can be justified under section 1 of the Charter.²⁷⁸ In terms of section 1 of the Charter, the rights and freedoms which it guarantees are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In this regard, the court stated that section 195(2) must be viewed in the context of section 195. The court pointed out that the majority of offences outlined in section 195(1) are aimed at those who entice or encourage a person to engage in prostitution. Section 195(1)(j) is specifically

²⁷⁵ Section 11(d) of the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

²⁷⁶ *R v Downey* 1992 90 DLR 45h 449.

²⁷⁷ Section 11(d) of the Canadian Charter provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

²⁷⁸ This test was established by Dickson CJC in *R v Oakes* (1986) 26 DLR (4th) 200 at 223.

aimed at those who have an economic stake in the earnings of a prostitute along with customers. In this regard, the court held that the presumption created by 195(2) of Criminal Code plays a legitimate role in assisting in curbing the exploitive activity of pimps, in attempting to deal with a cruel and pervasive social evil. Consequently, the court concluded that the infringement posed by section 195(2) of Criminal Code upon the accused's right to be presumed innocent is justifiable under section 1 of the Charter.

R v Whyte,²⁷⁹ is another Canadian case in which the constitutionality of a reverse onus provision has been considered. The accused was arrested whilst sitting on the driver's seat in a drunken state. He was charged under section 237(1)(a) of the Criminal Code and upon proof that the accused occupied the driver's seat in a drunken state, he will be deemed to have had the care and control of the vehicle, unless he established that he did not enter the vehicle for the purpose of setting it in motion. The accused challenged this provision on the grounds that it infringes his right to be presumed innocent provided by section 11(d) of the Charter. In deciding the constitutional implication of this statute, Dickson CJC²⁸⁰ stated that:

An excuse or a defense should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of considerable doubt in the mind of the trier of fact as to the guilt of the accused.

Accordingly, the court held that the effect of section 237(1)(a) of the Criminal Code is that the accused is required on the balance of probabilities to prove lack of intention to set the vehicle in motion to avoid conviction. Failure to do so would merit a conviction of the accused in spite of a reasonable doubt in the mind of a judge as to his guilt. For that reason, section 237(1)(a) of the Criminal Code was held to be a violation of the right to be presumed innocent embodied in section 11(d) of the Canadian Charter.²⁸¹ The court went further to consider whether or not the infringement caused by section 237(1)(a) of the Criminal Code

²⁷⁹ *R v Whyte* 1988 5 1 DLR 4th 481 (SCC).

²⁸⁰ *R v Oakes* (1986) 26 DLR (4th) 200, at 223.

²⁸¹ Section 11(d) of the Canadian Charter of Rights and Freedoms (Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11) provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

on the right to be presumed innocent can be justified under section 1 of the Charter.²⁸² The court held that section 237(1)(a) of the Criminal Code was propagated to stamp out the seriousness of drinking and driving, which makes it makes it justified under section 1 of Charter.

(vi) The United States of America

Tot v United States,²⁸³ is the first case relevant to the investigation of presumptions in the American jurisdiction. In this case, Frank Tot (the accused), was convicted and sentenced for violation of section 2(f) of the Federal Firearms Act, by which it was made unlawful for any person who has been convicted of a crime of violence to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. The accused had previously been convicted of a crime of violence. The accused argued that by placing on him the burden of producing the facts which establish that a mere possession of firearms does not indicate that the acquisition was in an interstate transaction, the impugned provision violated his presumption of innocence. The court examined the impugned provision and Justice Roberts²⁸⁴ held that the presumption of guilt created by section 2(f) of the Federal Firearms Act requires the accused to prove his innocence and hence it violates the fundamental concept that a man is innocent until proved guilty. To support its case, the prosecution submitted that the infringement in question caused by section 2(f) of the Federal Firearms Act was reasonable and justifiable because this provision sought to achieve a legitimate social end. The prosecution argued that the social end sought to be achieved by this legislation was the protection of society against violent men armed with dangerous weapons, which would be fundamental for the existence of an organized nation. The court recognized the protection of society against violent armed men as a legitimate social end but questioned whether there was any rational connection between the facts proved and the facts presumed. On the basis of this, the court held that there is no a reasonable connection between the facts proved (mere possession of firearms) and the fact presumed (that firearms were acquired in an interstate transaction). In other words, the court was not convinced that the intended purpose (to protect the society against violent armed men) will be served by the impugned presumption of guilt.

²⁸² In terms of section 1 of the Charter, the rights and freedoms which it guarantees are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

²⁸³ *Tot v United States* 1943 319 All ER 463.

²⁸⁴ *Tot v United States* 1943 319 All ER 463 at 216.

Therefore section 2(f) of the Federal Firearms Act was regarded as unconstitutional and was struck down.

*Leary v United States*²⁸⁵ is another case in which the constitutionality of a reverse onus provision has been considered. In this case, Dr. Leary accompanied by his two children and another two people left New York by a car to Mexico for a Christmas vacation. Dr Leary and the four passengers drove across the international boundary into the Republic of Mexico and turned back toward the United States. Along the way, they met a United States inspector. The inspector asked the group if they had anything to declare from Mexico and was told that they had nothing. However, the inspector observed some vegetable-like material and a seed on the floor of the car which appeared to him to be marihuana. A search of the vehicle and individuals was made. Sweepings from the car floor later proved to be marihuana. Thus the five travelers were arrested. In terms of the Marijuana Tax Act, possession of marijuana was deemed to be sufficient evidence of the offence of illegal importation, unless the accused explained his possession to the satisfaction of the jury. On the basis of this provision, the court found him guilty and he was sentenced to the maximum punishment imposed on the charges. However, he appealed the decision on the ground that the Marijuana Tax Act denied him due process of law by compelling him to give evidence to prove his innocence thereby infringing his right to remain silent before the court. On appeal, the Supreme Court of United States of America reconsidered the matter. Harlan J²⁸⁶ held that the impugned presumption was an "irrational" and "arbitrary" denial of due process of law and hence unconstitutional.

3.8 Conclusion

From the discussion above, it is apparent that there is a major difference between a reverse burden of proof and an evidentiary burden in criminal matters. As a result, the two must not be confused or used interchangeably. A reverse burden of proof refers to a shift in the burden of proof from the state proving its case to an accused person disproving the state's case. On the other hand, an evidentiary burden refers to the duty placed on the accused to produce sufficient '*prima facie*' evidence before the court to enable it to call the plaintiff to answer. Another difference between a reverse burden of proof and an evidentiary burden can be construed by looking at the language in which a presumption is cast. The words "shall be

²⁸⁵ *Leary v United States* 1969 395 (6).

²⁸⁶ *Leary v United States* 1969 395 (6) at 36.

presumed unless the contrary is proved”, indicates that a reverse burden of proof has been created whilst the words “is *prima facie* evidence” indicates that only an evidentiary burden of proof has been created by the impugned presumption.²⁸⁷

The practical implication of a reverse burden of proof is that the accused person is required to prove or disprove one element of the offence which shows that he is not guilty of that offence.²⁸⁸ This creates a possibility that the accused could be found guilty of a crime, despite the existence of a reasonable doubt as to his or her guilt. Thus, South African courts have regarded a reverse burden of proof provision as unconstitutional on the basis that it infringes upon the accused’s right to a fair trial and particularly the right to be presumed innocent, to remain silent, and not to testify during the proceedings. Unlike reverse burden of proof, an evidentiary burden does not create the possibility of conviction, despite the existence of a reasonable doubt. Ashworth²⁸⁹ contends, however, that “discharging the evidential burden does place an obligation on the defendant, and for that reason it requires justification and should not be casually imposed. But it is much lighter than the burden of proving an issue on the balance of probabilities, and hence it is less objectionable, certainly as a means of dealing with offences to which various possible defences may be raised and where it would clearly be inappropriate to expect the prosecution to negative all of them if the defendant did not wish to rely on some of them.” South African courts have regarded statutory presumptions that impose an evidentiary burden on the accused person to be constitutional.

The South African courts²⁹⁰, like their Canadian, United Kingdom and United States of America²⁹¹ counterparts, have regarded statutory presumptions that impose an evidentiary burden on the accused person to be constitutional because they do not create the possibility of conviction, despite the existence of a reasonable doubt. O’Regan J²⁹² held that “the words “shall be *prima facie* evidence” used in section 6(3) of the Gambling Act 51 of 1965 were

²⁸⁷ Schwikkard, P.J. and Van der Merwe, S.E. (2009) *Principles of Evidence* (3 ed) at 502 submit that where it is stated that evidence of fact constitutes ‘*prima facie* proof of’, or ‘*prima facie* evidence of’, then only an evidentiary burden is created.

²⁸⁸ Dennis, I. (2005). ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’, *Criminal Law Review* 901-936, at 901.

²⁸⁹ Ashworth, A. (2006) ‘Four Threats to the Presumption of Innocence’ 123 *SALJ* 63 at 89.

²⁹⁰ *S v Zuma and Others* 1995 (2) SA 642 (CC) and *S v Bhulwana*; *S v Gwadiiso* 1996 (1) SA 388 (CC).

²⁹¹ For example, in *Tot v United States* 1943 319 All ER 463 and *Leary v United States* 1969 395 (6).

²⁹² In *Scagell v AG Western Cape* 1996 (11) BCLR 1543 (CC), at paragraph 11.

generally considered as imposing no more than an evidentiary burden on the accused. Such an evidentiary burden merely requires “evidence sufficient to give rise to a reasonable doubt to prevent conviction”.¹It was held further by the court that, unlike the imposition of a legal burden, an evidentiary burden did not create the possibility of conviction despite the existence of a reasonable doubt.” With regard to the constitutionality of the reverse burden of proof, South African courts, like their Canadian counterparts, have considered reverse onus clauses (presumptions of guilt) as unconstitutional unless they are saved by the limitation clause²⁹³ on the basis that they require the accused person to prove or disprove one element of the offence. This creates a possibility that the accused person could be found guilty of crime despite the existence of a reasonable doubt as to his or her guilt, thereby infringing upon the accused’s right to fair trial and particularly the right to be presumed innocent, to remain silent, and not to testify during the proceedings.

While the Canadian courts have considered reverse onus clauses (presumptions of guilt) as being unconstitutional, they appear to have adopted the same approach employed by the courts in the United Kingdom and United States of America that reverse onus provisions can be justified if it is in the interest of furthering a legitimate aim. In essence, a reverse onus provision which infringes the accused's right to be presumed innocent and the right to remain silent can be held to be constitutional on the basis that it serves a legitimate purpose or on the basis that there is a reasonable connection between the facts proved and the fact presumed by the impugned provision.²⁹⁴ In South Africa this approach was rejected by O’Reagan J in *S v Bhulwana* and *S v Gwadiso*²⁹⁵ in which it was held that section 21(1)(a)(i) of the Drug Trafficking Act,²⁹⁶ which provides that any person in possession of dagga exceeding 115 grams shall be presumed to be dealing in such substance until the contrary is proved, to be unconstitutional on the basis that it infringed the accused’s right to be presumed innocent regardless of the fact that this provision was intended to serve a legitimate purpose of preventing drug trafficking crimes. The next chapter will consider whether the practical application of the presumption of guilt created by section 235(2) of the Act constitutes a

²⁹³ Section 36 of the Constitution.

²⁹⁴ In *R v Laba* [1994] 3 (S.C.R.) 965 the Canadian Supreme Court has rejected reverse onus clauses as being inconsistent with the presumption of innocence when they are not rationally connected with or proportionate to the law's objective.

²⁹⁵ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

²⁹⁶ Act 140 of 1992.

reverse onus of proof provision or an evidentiary burden as well its constitutionality in the South African law.

CHAPTER FOUR

THE APPLICATION AND CONSTITUTIONALITY OF THE PRESUMPTION OF GUILT CREATED BY SECTION 235 (2) OF THE ACT

4.1 Introduction

This chapter will explore the practical application of the presumption of guilt created by section 235(2) of the Tax Administration Act. The chapter will also analyse and discuss whether or not the practical application of the presumption of guilt created by section 235(2) of the Tax Administration Act will pass constitutional scrutiny, if tested against the taxpayer's constitutional right to a fair trial enshrined by section 35 of the Constitution, particularly the right to be presumed innocent and the right to remain silent. Whether the presumption of guilt created by section 235(2) of the Tax Administrative Act²⁹⁷ constitutes a reverse burden of proof or an evidentiary burden is important for taxpayers seeking to challenge the constitutionality of this provision. This chapter will adopt a comparative approach in determining whether or not the practical application of this presumption will pass constitutional scrutiny.

4.2 Application of the section 235(2) presumption

Section 235 falls within Chapter 17 of the Tax Administration Act, which has the heading: "Criminal Offences". Section 235 of the Act²⁹⁸ provides that:

- (1) A person who with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act—
 - (a) makes or causes or allows to be made any false statement or entry in a return or other document, or signs a statement, return or other document so submitted without reasonable grounds for believing the same to be true;

²⁹⁷ Act 28 of 2011.

²⁹⁸ Act 28 of 2011.

- (b) gives a false answer, whether orally or in writing, to a request for information made under this Act;
 - (c) prepares, maintains or authorises the preparation or maintenance of false books of account or other records or falsifies or authorises the falsification of books of account or other records;
 - (d) makes use of, or authorises the use of, fraud or contrivance; or
 - (e) makes any false statement for the purposes of obtaining any refund of or exemption from tax,
- is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years.

(2) Any person who makes a statement in the manner referred to in subsection (1) must, unless the person proves that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, be regarded as guilty of the offence referred to subsection (1).

There are a few general observations that may be made in respect of the application to the accused taxpayer of the provisions of section 235. Firstly, “intention to evade” assessment or taxation on the part of the taxpayer is required to be present before he or she can be criminally charged for an offence as listed in sub-section (1). Secondly, the taxpayer who has been found guilty of an offence under section 235(1) of the Act,²⁹⁹ upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years. A third general observation is that, if the SARS can prove that a false statement or entry is made in the return submitted by the taxpayer, until the contrary is proved, the taxpayer is presumed to have made the false statement or entry with the intention to evade assessment or taxation. The onus to rebut this presumption of guilt is on the accused taxpayer to prove that that the statement or entry made is not false. In essence, it does not matter whether or not the false statement or entry by the taxpayer has been made innocently or in utmost good faith.³⁰⁰

²⁹⁹ Act 28 of 2011.

³⁰⁰ Section 235(2) of the Act 28 of 2011.

4.3 Prerequisites for the application

It is crucial to point out that the Act³⁰¹ does not prescribe prerequisites for the application of the section 235(2) presumption. As far as can be ascertained, there are also no judicial decisions relating to the prerequisites for the application of the section 235(2) presumption. However, Goldswain³⁰² submitted that there are two fundamental prerequisites which must be present for the application of the section 235(2) presumption. These prerequisites are as follows:

- (a) The jurisdictional facts that bring the taxpayer within the ambit of the Act or the relevant provision must first be proved by evidence provided by the SARS. It is only when the SARS prove the jurisdictional facts that bring the taxpayer within the ambit of the Act will the presumption of guilt created by section 235(2) of the Act³⁰³ become applicable. As articulated by the court in *Mpande Foodliner CC v C: SARS*,³⁰⁴ this prerequisite prevents the arbitrary exercise of power by the SARS.
- (b) The presumption of guilt created by section 235(2) of the Act³⁰⁵ only applies to matters contained in the letter of assessment issued by the Commissioner. It does not apply to any other matter not contained in the letter of assessment.

According to Goldswain,³⁰⁶ the wording of presumption of guilt created by section 235(2) of the Act³⁰⁷ appears to indicate a further prerequisite. The SARS must first prove that a false statement or entry is made in a return before the presumption of intention to evade assessment or taxation becomes applicable.

³⁰¹ Act 28 of 2011.

³⁰² G.K. Goldswain, (2009) "The application and constitutionality of the so called "reverse" onus of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage", *Meditari Accountancy Research*, Vol. 17 Iss: 2, pp.61 - 83

³⁰³ Act 28 of 2011.

³⁰⁴ *Mpande Foodliner CC v C:SARS and Others* (63 SATC 46)

³⁰⁵ Act 28 of 2011.

³⁰⁶ G.K. Goldswain, (2009) "The application and constitutionality of the so called "reverse" onus of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage", *Meditari Accountancy Research*, Vol. 17 at 61 – 83.

³⁰⁷ Act 28 of 2011.

4.4 Constitutional issues arising from the presumption created by section 235(2)

The formulation of the presumption created by section 235(2) of the Act³⁰⁸ has an effect on the burden of proof. It is apparent that this provision creates a presumption that requires proof of a basic fact. The basic fact that needs to be proved by the state is that a false statement or entry has been made in the return submitted by the taxpayer. Once this basic fact has been proved, the presumption is triggered in the criminal proceedings against the accused taxpayer. This raises a question as to whether or not the presumption created by section 235(2) unreasonably infringes the constitutional rights of the accused taxpayer to a fair trial as guaranteed to an accused person in section 35(3) of the Constitution, in particular the right, mentioned in section 35(3)(h), to be presumed innocent, to remain silent, and not to testify during the proceedings.

4.5 The Constitutionality of the section 235(2) presumption

It is of paramount significance to point out that there are no decided cases that have decided the matter involving a constitutional challenge of the presumption of guilt created by section 235(2) of the Act.³⁰⁹ The conclusion on this matter in as far as this thesis is concerned, will be based on a comparative approach. In essence, the court decisions on provisions which have similar effect on the taxpayer as the presumption of guilt created by section 235(2) of the Act³¹⁰ will play a significant role in reaching a conclusion in this thesis.

In terms of section 235(2) of the Act,³¹¹ if the SARS can prove that a false statement or entry is made in the return submitted by the taxpayer, until the contrary is proved, the taxpayer is presumed to have made the false statement or entry with the intent to evade assessment or taxation. The practical implication of this presumption is to relieve the SARS of the burden of proving that the accused made a false statement or entry in a return with the necessary intention. As a result of this, the SARS can easily secure a conviction against the accused taxpayer. At the heart of this thesis is the question whether or not the presumption of guilt

³⁰⁸ Act 28 of 2011.

³⁰⁹ Act 28 of 2011.

³¹⁰ Act 28 of 2011.

³¹¹ Act 28 of 2011.

created by section 235(2) of the Act³¹² will pass constitutional scrutiny if tested against the constitutional provisions of section 35(3) of the Constitution, in particular the right, mentioned in section 35(3)(h), to be presumed innocent, to remain silent, and not to testify during the proceedings.

According to Hoffmann and Zeffertt,³¹³ the difference between a reverse burden of proof and an evidentiary burden in a criminal matter can be construed by looking at the language in which a presumption is cast. The words “shall be presumed unless the contrary is proved”, indicates that a reverse burden of proof has been created³¹⁴ whilst the words “is *prima facie* evidence” indicates that only an evidentiary burden of proof has been created by the impugned presumption.³¹⁵ In terms of section 235(2) of the Act,³¹⁶ where a taxpayer makes a false statement in any books of account or other records of any taxpayer, “unless the person proves” that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, he shall be regarded as guilty of making a false statement with the intention of evading assessment or taxation. On the basis of the submission by Hoffmann and Zeffertt,³¹⁷ it can be concluded that section 235(2) of the Act³¹⁸ creates a reverse burden of proof rather than an evidentiary burden.

The constitutional implications of the above conclusion is that section 235(2) of the Act³¹⁹ will be considered unconstitutional because it creates a possibility that the accused taxpayer could be found guilty of a crime, despite the existence of a reasonable doubt as to his or her guilt, thereby infringing the taxpayer’s a right to fair trial, particularly the right to be presumed innocent, to remain silent, and not to testify during the proceedings. However, section 235(2) of the Act³²⁰ can still be found to be constitutional if the constitutional court

³¹² Act 28 of 2011.

³¹³ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

³¹⁴ Schwikkard, P.J. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 502 submit that where it is stated that evidence of fact constitutes ‘*prima facie* proof of’, or ‘*prima facie* evidence of’, then only an evidentiary burden is created.

³¹⁵ Schwikkard, P.J. and Van der Merwe, SE. (2009) *Principles of Evidence* (3 ed) at 502 submit that where it is stated that evidence of fact constitutes ‘*prima facie* proof of’, or ‘*prima facie* evidence of’, then only an evidentiary burden is created.

³¹⁶ Act 28 of 2011.

³¹⁷ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

³¹⁸ Act 28 of 2011.

³¹⁹ Act 28 of 2011.

³²⁰ Act 28 of 2011.

holds the view that the infringement caused by this provision is reasonable and justifiable under the limitation clause in terms of section 36 of the Constitution.

SARS³²¹ attempted to justify the constitutionality of the presumption of guilt created by section 235(2) of the Act³²² by stating that:

This does not result in a so-called “reverse onus”, but only places on the accused an evidentiary burden in relation to statements made by him. If discharged the onus would remain on the state to prove beyond reasonable doubt knowledge of, or negligence in relation to, the falsity of the statement. While it may limit the fundamental right to silence, it does so only in relation to facts which are peculiarly within the knowledge of the accused and in respect of which it would not be unreasonable to require the accused to discharge an evidentiary burden.

It is important to emphasise that although the wording of the presumption created by section 235(2) of the Act³²³ constitutes a reverse burden of proof according to the Hoffmann and Zeffertt³²⁴ test, it is possible that this presumption can constitute an evidential burden (as submitted by SARS³²⁵) in its practical application. Provided that section 235(2) of the Act³²⁶ constitutes an evidential burden in its practical application, it does not create the possibility of conviction despite the existence of a reasonable doubt. If section 235(2) creates only an evidential burden in its practical application, the South African courts³²⁷ just like their Canadian,³²⁸ United Kingdom and United State of America³²⁹ counterparts will consider such statutory presumption to be constitutional.

It must be emphasised that the wording of the presumption of guilt created by section 235(2) of the Act³³⁰ corresponds closely to the presumption of guilt created by section 104(2) of the

³²¹ Short Guide to the Tax Administration Act 13 of 2012 para 17.3.

³²² Act 28 of 2011.

³²³ Act 28 of 2011.

³²⁴ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

³²⁵ Short Guide to the Tax Administration Act 13 of 2012 para 17.3.

³²⁶ Act 28 of 2011.

³²⁷ *S v Zuma and Others* 1995 (2) SA 642 (CC) and *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC).

³²⁸ *R v Oakes* 1986 26 DLR 4th 200.

³²⁹ *Tot v United States* 1943 319 All ER 463.

³³⁰ Act 28 of 2011.

Income Tax Act³³¹ and section 102(4) of the Customs and Excise Act.³³² It is imperative to consider how South African courts have dealt with these presumptions in considering their constitutionality.

4.6 The presumption of guilt created by section 104(2) of the Income Tax Act

Section 104(2) of the Income Tax Act³³³, (which has since been deleted from the Act and replaced by section 235 of the Tax Administration Act) provided that, where a taxpayer or any other person makes a false statement or entry in any books of account or other records of any taxpayer, until the contrary is proved, the taxpayer or other person is presumed to have made such a false statement or entry with the intention of evading assessment or taxation.

In 1994, the Katz Commission Report³³⁴ recognised that the presumption created by section 104(2) of the Income Tax Act relieves the state from its legal burden of proving an essential element of the offence committed beyond reasonable doubt, namely that it was committed with intent to evade assessment or taxation. The same view has been expressed by Van Schalkwyk³³⁵ who submitted that the implication of section 104(2) of the Income Tax Act is to create a reverse onus of proof which relieves the state from proving the existence of the intention to evade taxation on the part of the accused taxpayer. By casting the onus of proof on the taxpayer to prove the contrary, the Katz Commission Report³³⁶ submitted that the section 104(2) presumption violates the constitutional right of the accused taxpayer to be presumed innocent and not to testify during a criminal trial. Consequently, the Report³³⁷ concluded that the general right to a fair trial is denied by the existence of the presumption created by section 104(2) of the Income Tax Act and hence the section 104(2) should be amended to be compatible with the Constitution.

The Katz Commission Report³³⁸ went further to consider whether or not the infringement caused by section 104(2) of the Income Tax Act of the constitutional right of an accused

³³¹ The Income Tax Act 58 of 1962.

³³² The Customs and Excise Act 91 of 1964.

³³³ Act 58 of 1962.

³³⁴ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at77-78.

³³⁵ Van Schalkwyk, L. (1996). *The constitutionality of the reversed onus of proof*. Accountancy SA 25.

³³⁶ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at77-78.

³³⁷ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at77-78.

³³⁸ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at77-78.

taxpayer to be presumed innocent and the right not to testify during trial can be justified in terms of section 33(1) of the Interim Constitution.³³⁹ In dealing with this question, the report considered the Canadian case of *R v Oakes*³⁴⁰ in which Dickson CJC³⁴¹ stated that:

An excuse or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of considerable doubt in the mind of the trier of fact as to the guilt of the accused.

On the basis of this *dictum*, the report submitted that the accused taxpayer may fail to discharge the onus on a balance of probabilities that he did not intend to make a false statement and thereby be convicted despite the existence of a reasonable doubt. In light of this, the report held that that the infringement caused by section 104(2) of the Income Tax Act of the constitutional right of an accused taxpayer to be presumed innocent and the right not to testify during trial cannot be justified. Subsequently, the report concluded that the section 104(2) of the Income Tax Act was unconstitutional.

4.7 The presumption created by section 102(4) of the Customs and Excise Act

The existence of the constitution has led to the diminishing of reverse onus provisions in South African law. However, there is a growing concern relating to the continued existence of some reverse onus provisions or ‘presumptions of guilt’ in various tax statutes. One of these reverse onus provisions is found in section 102(4) of the Customs and Excise Act. Section 102(4) of the Act provides that:

In any dispute in which the state, the Minister or the Commissioner or any officer is a party, the question arises whether the proper duty has been paid or whether any goods or plant have been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or whether any books,

³³⁹ Replaced with a similar limitation of rights clause, section 36, in the Constitution.

³⁴⁰ *R v Oakes* (1986) 26 DLR (4th) 200(SCC).

³⁴¹ *R v Oakes* (1986) 26 DLR (4th) 200(SCC) at 223.

accounts, documents, forms or invoices required by rule to be completed and kept, exist or have been duly completed and kept or have been furnished to any officer, it shall be presumed that such duty has not been paid or that such goods or plant have not been lawfully used, imported, exported, manufactured, removed or otherwise dealt with or in, or that such books, accounts, documents, forms or invoices do not exist or have not been duly completed and kept or have not been so furnished, as the case may be.

The above provision does not contain the words “is *prima facie* evidence” which indicates that only an evidentiary burden of proof has been created by the impugned presumption.³⁴² According to the Hoffmann and Zeffertt³⁴³ test, it is apparent that a conclusion that can be drawn in this regard is that section 102(4) of the Act creates a reverse burden of proof rather than an evidentiary burden. However, in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another*³⁴⁴, the court was not concerned with the wording of the presumption created by section 102(4) of the Act but with the practical effect of the presumption upon the taxpayer. The facts of the case were as follows: AMI was a subsidiary of a Belgian company and conducted business as a clearing and forwarding agent in relation to goods imported and exported to and from South Africa. During October 2000, SARS issued a letter of demand to AMI in the amount of R331 352.84 in relation to three bills of entry which it claimed were falsely acquired. In particular, SARS claimed that the stamps on the bills of entry did not conform with the stamps that were currently used by border officials.³⁴⁵ However, the AMI could not locate the acquired documents years later because it had merged with another company and its old premises had been changed and documents were lost. More so, the AMI had ceased trading in South Africa and documents had been destroyed.³⁴⁶ In March 2003 AMI instituted action for an order

³⁴² Schwikkard, P.J. and Van der Merwe, S.E. (2009) *Principles of Evidence* (3 ed) at 502 submit that where it is stated that evidence of fact constitutes ‘*prima facie* evidence of’, then only an evidentiary burden is created.

³⁴³ Hoffmann, L.H. & Zeffertt, D.T. (1988) *The South African Law of Evidence* 4 ed at 534.

³⁴⁴ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

³⁴⁵ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa & another* 2010 ZASCA 62 paragraph 7.

³⁴⁶ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa & another* 2010 ZASCA 62 paragraph 8.

declaring that it was not liable to pay SARS any of the customs duties demanded.³⁴⁷ These were in respect of the allegedly falsified documents. SARS argued that due to the provisions of section 102(4) of the Customs Act, it was AMI that bore the onus of proving that the stamps were genuine, notwithstanding the fact that SARS had raised an allegation of fraud.³⁴⁸ On the other hand, AMI argued that the ‘reverse onus’ imposed on it by section 102(4) of the Customs Act was unconstitutional because it infringes its right to be presumed innocent and not to testify during a criminal trial. Hassim AJ³⁴⁹ in the KwaZulu-Natal High Court rejected this argument finding that AMI had not proved that the stamps were genuine. AMI was given leave to appeal.

On appeal, the Supreme Court of Appeal (SCA) was faced with the question of whether the reverse onus provision contained in section 102(4) of the Customs Act extended to an allegation of fraud made by SARS. The first submission by SARS was that by virtue of section 102(4), AMI bore the onus of proving that the stamps were genuine. In deciding this matter, the SCA considered judgment of the court in *Standard Bank v Du Plooy & another; Standard Bank v Coetzee & another*³⁵⁰ and *Courtney Clarke v Bassingthwaighe*³⁵¹ in which it was succinctly expressed that the party who alleges fraud must plead and prove it. Using the judgment of the court in *Standard Bank v Du Plooy*³⁵² and *Courtney*³⁵³ as precedent on this legal question, the SCA held that:

I can see no reason why the onus of proving fraud should shift from SARS to AMI simply because s 102(4) creates an assumption of liability that AMI must disprove. Once AMI has proved acquittal the usual rule must apply: the fraud must be proved by the party making the allegation – SARS.

Consequently, the court held that since AMI successfully proved that it had removed the goods in bond as required by the Customs Act, the onus created by section 102(4) had been

³⁴⁷ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa & another* 2010 ZASCA 62 at paragraph 7.

³⁴⁸ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa & another* 2010 ZASCA 62 at paragraph 8.

³⁴⁹ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa & another* 2010 ZASCA 62 at paragraph 7.

³⁵⁰ *Standard Bank v Du Plooy & another; Standard Bank v Coetzee & another* 1999 16 SC 161 at 166.

³⁵¹ *Courtney Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm) at 689F-G.

³⁵² *Standard Bank v Du Plooy & another; Standard Bank v Coetzee & another* 1999 16 SC 161 at 166.

³⁵³ *Courtney Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm) at 689F-G.

discharged. Once the AMI successfully discharged this onus, the onus shifts to SARS, as the party alleging fraud, to provide evidence that the bills of entry had been falsified. There was no acceptable evidence adduced by SARS, either documentary or through the witnesses, that the stamps on the four bills of entry had been falsified. Accordingly, the court held that SARS could not claim duties in respect of those bills.

The importance of this judgment in the South African law of taxation is that it establishes an important precedent that the reverse onus provision should not be afforded an open ended interpretation. Having been delivered by the Supreme Court of Appeal, the judgment of the court in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another*³⁵⁴ establishes an important precedent that binds all lower courts and its own future decisions. The reverse onus in section 235(2) of the Act³⁵⁵ is very similar to section 102(4) of the Customs Act. Given the similarity of the onus provisions and their effect on the taxpayer, there does not seem to be any reason why the principle laid down in AMI should not be applicable to 235(2) of the Act.³⁵⁶ Giving a narrow rather than an open-ended interpretation to the presumption created by section 235(2) of the Tax Administration Act, it can be submitted that it only places the burden of proof on the taxpayer to show that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. Therefore, once the taxpayer has discharged the burden of proving that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, and SARS raises the issue of fraud, it is SARS which bears the onus of proving such fraud, notwithstanding the provisions of section 235(2) of the Act.³⁵⁷

³⁵⁴ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

³⁵⁵ Act 28 of 2011.

³⁵⁶ Act 28 of 2011.

³⁵⁷ Act 28 of 2011.

4.8 Conclusion

Section 235(2) of the Tax Administration Act³⁵⁸ provides that where a taxpayer or any other person makes a false statement in any books of account or other records of any taxpayer, unless the person proves that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, he shall be regarded as guilty of making a false statement with the intention of evading assessment or taxation. The implication of this presumption is that the state is relieved from its legal burden of proving beyond reasonable doubt an essential element of the offence committed, namely that it was committed with intent to evade assessment or taxation. It is submitted that, if this presumption is applied by courts in its grammatically strict sense, the accused taxpayer bears the onus to prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. In this regard, section 235(2) of the Tax Administration Act³⁵⁹ will be regarded as judicial and penal in nature, thus violating the accused taxpayer's constitutional right to be presumed innocent and the right not to testify during trial. In this legal sense, there is little legal doubt that the general right to a fair trial is denied by the existence of the presumption created by section 235(2) of the Tax Administration Act.³⁶⁰ Therefore, section 235(2) of the Tax Administration Act will be unconstitutional and should be declared invalid or amended so that it can be compatible with the Constitutional right to a fair trial.

However, if a narrow approach can be given to the interpretation of the presumption created by section 235(2) of the Tax Administration Act,³⁶¹ a different conclusion can be reached. The court in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another*³⁶² expressly stated that the party who alleges and pleads fraud must prove it. The court went on to state that the assumption of liability created by section 102(4) of the Customs Act (which is similar to section 235(2) of the Tax Administration Act both in its wording and effect upon the taxpayer) did not shift the onus of proving the existence of fraud from SARS onto the taxpayer. The court held that the accused taxpayer had to prove that it had removed the goods in bond as required by the Customs Act,

³⁵⁸Act 28 of 2011.

³⁵⁹Act 28 of 2011.

³⁶⁰Act 28 of 2011.

³⁶¹Act 28 of 2011.

³⁶²*AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

by doing so the onus created by section 102(4) of the Customs Act will be discharged. Once AMI had achieved this, it was up to SARS, as the party alleging fraud, to provide evidence that the bills of entry had been falsified. The importance of this judgment in the South African law of taxation is that it establishes an important precedent that the reverse onus provision should not be afforded an open ended interpretation. Giving a narrow interpretation to the presumption created by section 235(2) of the Tax Administration Act, it can be submitted that this provision only places the burden of proof on the taxpayer to show that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. Once the taxpayer has discharged the burden of proving that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, and SARS raises the issue of fraud, it is the SARS which bears the onus of proving such fraud. In practice, the application of section 235(2) of the Tax Administration Act³⁶³ will therefore constitute an evidentiary burden rather than a reverse onus. In this regard, the presumption created by section 235(2) of the Tax Administration Act³⁶⁴ will not create the possibility of conviction, despite the existence of a reasonable doubt. Therefore, it does not violate the accused taxpayer's the right to a fair trial and the right to be presumed innocent and hence it is constitutional.

The following chapter will provide a conclusion on whether or not the practical application of the presumption of guilt created by section 235(2) of the Act will pass constitutional scrutiny, if tested against the taxpayer's constitutional right to a fair trial enshrined by section 35 of the Constitution, particularly the right to be presumed innocent and the right to remain silent.

³⁶³Act 28 of 2011.

³⁶⁴Act 28 of 2011.

CHAPTER 5- CONCLUSION

5.1 Goals of the research

The research was aimed at examining the legal nature of the presumption of guilt created by section 235(2) of the Tax Admiration Act³⁶⁵ and to establish whether or not its practical application violates the taxpayer's fundamental right contained in section 35(3) of the Constitution, which gives every accused taxpayer the right to a fair trial, including the right to be presumed innocent.³⁶⁶ Allied to this aim was the goal to provide clarity on the constitutionality of this presumption because it has been widely been criticised for unjustifiably violating the taxpayer's constitutional right to a fair trial. The research was also intended to shed light on the chances of the taxpayer to succeed in challenging the constitutionality of section 235(2) of the Act³⁶⁷ if he or she so wishes.

The right to fair trial was not constitutionally entrenched in the South African law until 1994³⁶⁸ when the Interim Constitution³⁶⁹ came into force. The right to a fair trial was therefore embodied in section 25(3) of the Interim Constitution.³⁷⁰ The purpose of section 25(3) of the Interim Constitution³⁷¹ was expressed by the court in *S v Nombewu*³⁷² in which Jones J³⁷³ stated that “the purpose of section 25(3) of the Interim Constitution³⁷⁴ was to 'reinforce and preserve the presumption of innocence, the right to silence, the right of an accused not to be compelled to be a witness against himself, and his right not to be compelled to make a confession or admission which could be used in evidence against him’”. In light of this judgment, it is a common cause that the section 25(3) of the Interim Constitution³⁷⁵ was the first step towards affording all accused persons a constitutional right to a fair trial.

³⁶⁵Act 28 of 2011.

³⁶⁶Van Schalkwyk, L. (1996). *The constitutionality of the reversed onus of proof*. Accountancy SA 25.

³⁶⁷Act 28 of 2011.

³⁶⁸Skeen, A. (2000). *The Right to a Fair Trial in the South African Law* 110.

³⁶⁹The Constitution of the Republic of South Africa Act 200 of 1993.

³⁷⁰The Interim Constitution was temporary measure whilst the new Constitution was being drafted.

³⁷¹The Constitution of the Republic of South Africa Act 200 of 1993.

³⁷²*S v Nombewu*, 1996 (2) SACR 396 (E).

³⁷³*S v Nombewu*, 1996 (2) SACR 396 (E) at 403.

³⁷⁴The Constitution of the Republic of South Africa Act 200 of 1993.

³⁷⁵The Constitution of the Republic of South Africa Act 200 of 1993.

The new Constitution³⁷⁶ was adopted in 1996. The advent of the Constitution brought a major shift in the legal policies of the country.³⁷⁷ One of the major significant features of the advent of the 1996 Constitution is that the scope and ambit of the right to a fair trial was further entrenched and broadened.³⁷⁸ The Constitution became the supreme law³⁷⁹ of the country and any law or conduct which is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.³⁸⁰ The implication of the supremacy of the Constitution means that all legislation, including fiscal statutes such as the Tax Administration Act³⁸¹, must be tested against the provisions of the Constitution. In essence, the Constitutional Court has been empowered to declare any statute, including a fiscal statute, invalid if such statute is found to be inconsistent with the Constitution. The principle of “supremacy of the constitution” indicates that legislation should primarily abide by the principles set out in the Constitution. Any legislative provision in conflict with the Constitution may be declared unconstitutional, in which case such provision will be of no force and effect. Section 172 (1) of the Constitution provides that:

- 1) When deciding a constitutional matter within its power, a court —
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including —
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

In support of this submission, the Katz Commission³⁸² stated that:

The tax system is subject to the Constitution and must conform to society’s commitment to the Rule of Law. This means not only that the system should be effective in the

³⁷⁶ The Constitution of the Republic of South Africa, 1996.

³⁷⁷ Croome, B.J. (2002) “Constitutional Law and Taxpayer’s Rights in South Africa – An Overview” (*Acta Juridica* 1 at 2.

³⁷⁸ Steytler, N. (1998) *Constitutional Criminal Procedure* at 215.

³⁷⁹ Section 2 of the Constitution provides that the Constitution is that it is the supreme law of our country and that any law or conduct which is inconsistent with it is invalid.

³⁸⁰ *South African Police Service v Public Servants Association* 2007(3) SA521 (CC) at 25.

³⁸¹ Act 28 of 2011.

³⁸² The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at 77-78.

enforcement of all tax laws, equally and irrespective of status but also that citizens' right to be taxed strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.

Section 235(2) of the Tax Administration Act³⁸³ provides that where a taxpayer or any other person makes a false statement in any books of account or other records of any taxpayer, "unless the person proves that there is a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, he shall be regarded as guilty" of making a false statement with the intention of evading assessment or taxation. The implication of this presumption is that it creates a reverse onus provision which requires the accused taxpayer to bear the onus of proof to prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part.

This thesis presented a brief comparative study of the constitutionality of the reverse burden of proof and evidentiary burden in other jurisdictions like Canada, the United States of America and the United Kingdom. It has been observed that South African courts³⁸⁴ just like their Canadian,³⁸⁵ United Kingdom and United State of America³⁸⁶ counterparts, have regarded statutory presumptions that impose an evidentiary burden on the accused person to be constitutional because they do not create the possibility of conviction, despite the existence of a reasonable doubt. On the other hand, South African courts like their Canadian

³⁸³Section 235(2) of the Act³⁸³ provides that:

- (1) A person who with intent to evade or to assist another person to evade tax or to obtain an undue refund under a tax Act—
 - (a) makes or causes or allows to be made any false statement or entry in a return or other document, or signs a statement, return or other document so submitted without reasonable grounds for believing the same to be true;
 - (b) gives a false answer, orally or in writing, to a request for information made under this Act;
 - (c) prepares, maintains or authorises the preparation or maintenance of false books of account or other records or falsifies or authorises the falsification of books of account or other records;
 - (d) makes use of, or authorises the use of, fraud or contrivance; or
 - (e) makes any false statement for the purposes of obtaining any refund of or exemption from tax, is guilty of an offence and, upon conviction, is subject to a fine or to imprisonment for a period not exceeding five years.
- (2) Any person who makes a statement in the manner referred to in subsection (1) must, unless the person proves that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, be regarded as guilty of the offence referred to subsection (1).

³⁸⁴ *S v Zuma and Others* 1995 (2) SA 642 (CC) and *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).

³⁸⁵ *R v Oakes* 1986 26 DLR 4th 200.

³⁸⁶ *Tot v United States* 1943 319 All ER 463.

counterparts have considered reverse onus clauses as being unconstitutional (unless they are saved by the limitation clause) on the basis that they require the accused person to prove or disprove one element of the offence thereby creating a possibility that the accused person could be found guilty of a crime, despite the existence of a reasonable doubt as to his or her guilt. In the United Kingdom and United States of America, a reverse onus provision can be justified on the basis of proportionality and if it is in the interest of furthering a legitimate aim. In South Africa, this approach has been rejected by the court.

In relation to casting the onus of proof on an accused taxpayer to prove that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, the Katz Commission Report³⁸⁷ submitted that the reverse burden of proof provision relieves the state of its legal burden of proving beyond reasonable doubt an essential element of the offence committed, namely that it was committed with intent to evade assessment or taxation. In essence, if the presumption created by section 235(2) of the Act³⁸⁸ is applied by courts in its strict sense, it is common cause that it will be regarded as judicial and penal in nature, thus violating the accused taxpayer's constitutional right to be presumed innocent and the right not to testify during trial. In this legal sense, there is little legal doubt that the general "right to a fair trial" is denied by the existence of the presumption created by section 235(2) of the Tax Administration Act.³⁸⁹ Therefore, section 235(2) of the Tax Administration Act is unconstitutional and must be declared invalid or amended to be compatible with the Constitutional norm and values of a fair trial.

Adopting a narrow approach to the interpretation of the presumption created by section 235(2) of the Act,³⁹⁰ a different conclusion can be reached. The court in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another*³⁹¹ expressly stated that the party who alleges and pleads fraud must prove it. The court also stated that the assumption of liability created by section 102(4) of the Customs Act did not shift the onus of proving the existence of fraud from SARS onto the taxpayer. The court held that the accused taxpayer had to prove that it had removed the goods in bond as

³⁸⁷ The Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa 1994 at 77-78.

³⁸⁸ Act 28 of 2011.

³⁸⁹ Act 28 of 2011.

³⁹⁰ Act 28 of 2011.

³⁹¹ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

required by the Customs Act, by doing so the onus created by section 102(4) of the Customs Act will be discharged. Once AMI had achieved this, it was up to SARS, as the party alleging fraud, to provide evidence that the bills of entry had been falsified. The importance of this judgment in the South African law of taxation is that it establishes an important precedent that the reverse onus provision should not be afforded an open-ended interpretation. Giving a narrow interpretation to the presumption created by section 235(2) of the Tax Administration Act, it can be submitted that it only places the burden of proof on the taxpayer to show that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. Once the taxpayer has discharged the burden of proving that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, and SARS raises the issue of fraud, it is SARS which bears the onus of proving such fraud. In practice, the application of section 235(2) of the Tax Administration Act³⁹² will constitute a mere evidentiary burden rather than a reverse onus in a strict constitutional sense. In this regard, it is submitted that the presumption created by section 235(2) of the Tax Administration Act³⁹³ does not create the possibility of conviction despite the existence of a reasonable doubt. Therefore, it does not violate the accused taxpayer's the right to a fair trial and the right to be presumed innocent hence it is constitutional.

5.2 Purpose of the Research

Apart from providing clarity on the constitutionality of the presumption created by section 235(2) of the Tax Administration Act, this research also sought to shed light on the chances of the taxpayer to succeed in challenging the constitutionality of section 235(2) of the Tax Administration Act if he/she so wishes. It is important to point out that the success of the taxpayer in challenging the presumption created by section 235(2) of the Act depends on the interpretation afforded to this provision by the court. If the court gives this provision an open ended interpretation to mean that it requires the accused taxpayer to prove absence of fraud after discharging the burden of proving a reasonable possibility that he was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his part, then the provision will be unconstitutional. The accused taxpayer will succeed in this regard. However, based on the judgment of the SCA in *AMI Forwarding (Pty) Ltd v Government of*

³⁹²Act 28 of 2011.

³⁹³Act 28 of 2011.

*the Republic of South Africa (Department of Customs & Excise) & another*³⁹⁴ which set an important precedent that the reverse onus provision should not be afforded an open ended interpretation, there does not seem to be any reason why the principle laid down in *AMI* should not be applicable to 235(2) of the Act³⁹⁵ given the similarity of section 235(2) of the Act³⁹⁶ to section 102(4) of the Customs Act and their effect on the accused taxpayer.

By affording a narrow interpretation to the presumption created by section 235(2) of the Tax Administration Act,³⁹⁷ it can be submitted that this provision only places the burden of proof on the taxpayer to show that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part. Once the taxpayer has discharged the burden of proving that there is a reasonable possibility that he or she was ignorant of the falsity of the statement and that the ignorance was not due to negligence on his or her part, and SARS raises the issue of fraud, it is SARS which bears the onus of proving such fraud, notwithstanding the provisions of section 235(2) of the Act.³⁹⁸ In practice, the application of section 235(2) of the Act³⁹⁹ will constitute an evidentiary burden rather than a reverse onus. In other words, it does not create the possibility of conviction despite the existence of a reasonable doubt. Therefore, it does not violate the accused taxpayer's the right to a fair trial and the right to be presumed innocent and hence it is constitutional.

The judgment of the court in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another*⁴⁰⁰ has been handed down by the South African Court of Appeal. This means that this judgment forms an important precedent to all lower courts and courts on the same level regarding not affording an open ended interpretation to reverse onus provisions. Accordingly, the chances the accused taxpayer has to challenge the constitutionality of section 235(2) of the Act⁴⁰¹ are slim.

³⁹⁴ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

³⁹⁵ Act 28 of 2011.

³⁹⁶ Act 28 of 2011.

³⁹⁷ Act 28 of 2011.

³⁹⁸ Act 28 of 2011.

³⁹⁹ Act 28 of 2011.

⁴⁰⁰ *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.

⁴⁰¹ Act 28 of 2011.

Bibliography

Books

- Babbie, E., & Mouton, J. (2009). *The practice of social research: South African edition*. Cape Town: Oxford University.
- Bassiouni, M. (1995). *The Protection of Human Rights in African Criminal Proceedings*. Martinus: Nijhoff Publishers.
- Byrnes, A. (2008). *The Right to fair trial in international and comparative perspective*. University of Hong Kong.
- Currie, I. & De Waal, J. (2013). *The Bill of Rights Handbook*. Kenwyn: Juta & Co Ltd.
- Chaskalson, M *et al.* (1996). *Constitutional Law of South Africa*. Cape Town: Juta & Co Ltd.
- Coffield, J. (1970). *A Popular History of Taxation, From Ancient to Modern Times*. London: Longman Group.
- Croome, B.J. (2010). *Taxpayers' Rights in South Africa*. Cape Town: Juta & Co Ltd.
- David, S. Weissbrodt, R. W. (1988). *The Right to a Fair Trial*. London: Oxford University Press.
- Fennell, C. (2003). *The Law of Evidence*, (2nd) LexisNexis: Butterworths.
- Hoffmann, L.H. & Zeffertt, D.T. (1988). *The South African Law of Evidence* 4 ed Durban: Butterworths.
- Landa, J. and Ramjohn, M. (2013). *Unlocking Evidence* (2ed). Hodder: Arnold.
- Morton, J.C. & Hutchinson, S.C. (1987). *The presumption of Innocence*. Toronto: Carswell.
- Mubangizi, J.C. (2004). *The Protection of Human Rights in South Africa: A Legal and Practical Guide*. Lansdowne: Juta and Company Ltd.
- McKerchar, M. *Philosophical Paradigms, Inquiry Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation*. eJournal of tax Research. p1 – 21. Available: <http://www.Austrlii.edu.au/au/journals/eJTR/2008/1.html> (accessed 2/10/2013).

- Muller, E. (2010). *A Framework for Wealth Transfer Taxation in South Africa*. University of Pretoria: (Unpublished LLD Thesis).
- Naughton, M. (2011). “How the presumption of innocence renders the innocent vulnerable to wrongful convictions” *Irish Journal of Legal Studies*, 2(1): 40-54.
- Naughton, M. (2013). *The Innocent and the Criminal Justice System*. Basingstoke: Palgrave Macmillan.
- Naughton, M. & Tan, G. (2010). *Claims of Innocence: An introduction to wrongful convictions and how they might be challenged*, Bristol: University of Bristol.
- Schwikkard, P.J. (2001). *The Presumption of Innocence*. Capetown: Juta.
- Schwikkard, P.J and Van der Merwe, S.E. (2009). *Principles of Evidence* 3 ed Wetton:Juta:
- Thayer, J.B. (1898) *A Parliamentary Treatise on Evidence at the Common Law*. Boston: Little.
- Skeen, A. (2000). *The Right to a Fair Trial in the South African Law*. Strasbourg Cedex: Council of Europe Publishing Co.
- Steytler, N. (1998) *Constitutional Criminal Procedure* .Durban: Butterworths.

Journals

- Ashworth, A. (2006) ‘Four Threats to the Presumption of Innocence’ 123 *SALJ* 63 at 89.
- Ashworth, A and Blake, M. (1996) 'The Presumption of Innocence in English Criminal Law' *Criminal Law*. R.eport 306 at 133–173
- Bennion, F. (1988). 'Statutory Exceptions: A Third Knot in the Golden Thread?' *Criminal Law Review*, vol 31 at 44.
- Croome, B.J. (2002) “Constitutional Law and Taxpayer’s Rights in South Africa – An Overview” *Acta Juridica* 1.
- Dennis, I. (2005). 'Reverse Onuses and the Presumption of Innocence: In Search of Principle', *Criminal Law Review* 901-936, at 901.
- Gray, A. (2012). “Constitutionally Protecting the Presumption of Innocence” *University of Tasmania Law Review*, at 131-152.

- G.K. Goldswain, (2009) "The application and constitutionality of the so called "reverse" onus of proof provisions and presumptions in the Income Tax Act: the revenue's unfair advantage", *Meditari Accountancy Research*, Vol. 17 Iss: 2, pp.61 – 83.
- Jagwanth, S. (1997). "*Constitutional Application Recent Cases Vonnisse*" SAJCI 227 vl 10 at 227.
- Kaplan, J. (1968) 'Decision Theory and the Fact finding Process' *Stanford Law Review* 1065 at 1072.
- Mthembu, M.H. (1998) 'The constitutionality of presumptions in South African law', *The Comparative and International Law Journal of Southern Africa*, Vol. 31 at 213-227.
- Raul, S. (2001) 'Reverse onus Clauses: A Comparative Law Perspective' *13 Student Advocate* at 148 -172.
- Skeen, A. (1993). "A Bill of Rights and the presumption of innocence" *SAJHR* 525 vl 9 at 535.
- Underwood, B.D. (1977). 'The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases' 86 *YALE L.J.* 1299, at 1309-10.
- Van Schalkwyk, L. (2001). *Constitutionality and the Income Tax Act*, *Meditari Accountancy Research*, Vol. 9 2001, pp.285-299.
- Van Schalkwyk, L. (1996). *The constitutionality of the reversed onus of proof*, *Accountancy SA*, June 1996, pp.24-26.
- Zuckerman, A. (1976), 'The Third Exception to the Woolmington Rule', *92 Law Quarterly Review* at 402-426.

Articles

- Brautigam, D. A. (2006). "*Contingent Consent: Export Taxation and State Building in Mauritius*" (Paper presented at the annual meeting of the American Political Science Association, Marriott, Loews Philadelphia, and the Pennsylvania Convention Center, Philadelphia, PA) Online <PDF>. 2012-06-24 from http://www.allacademic.com/meta/p151035_index.html (accessed on 17 June 2013).
- *First Interim Report of the Katz Commission of Inquiry*. 1994. Pretoria: Government Printer.

- SARS. Short Guide to the Tax Administration Act, 2011 (Act No. 28 Of 2011). Online <PDF> available at http://www.jutalaw.co.za/media/filestore/2013/06/SARS_Guide_-_Short_Guide_to_the_Tax_Administration_Act_2011_-_External_Guide.pdf. (accessed on 10 November 2013).

Statutes

- The Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
- The Criminal Law Amendment Act 105 of 1997.
- The Constitution of the Republic of South Africa, 1996.
- The Criminal Procedure Act 51 of 1977.
- The Customs and Excise Act 91 of 1964.
- The International Covenant on Civil and Political Rights (UN General Assembly Resolution 2200A (XXI) of 16 December 1966.
- The Tax Administration Act 28 of 2011.
- The Universal Declaration of Human Rights (UN General Assembly Resolution 217A (III) of 10 December 1948.

Cases

- *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs & Excise) & another* 2010 ZASCA 62.
- *Ex parte Henning* 1981 (3) SA 843 (O).
- *Ensor NO v New Mayfair Hotel* 1968 (4) SA 462 (N).
- *First National Bank of SA Ltd t/a Wesbank v C: SARS* 2002 (7) JTLR 250.
- *Ferreira v Levin and Vryenhoek v Powell* 1996 (1) BCLR 1 (CC).
- *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).
- *Ibrahim v Regem* 1914-15 All ER 874.
- *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, HL.
- *ITC* 1199 36 SACT 16.
- *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

- *Osman & another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC).
- *R v Benjamin* 3 EDC 337.
- *R v Ndhlovu* 1945 AD 369
- *R v Difford* 1937 AD 370.
- *R v Laba* [1994] 3 (S.C.R.) 965
- *R v Whyte* 1988 5 1 DLR 4th 481 (SCC).
- *R v Keogh* [2007] EWCA Crim 528.
- *Realizations Ltd v Ager* 1961 (4) SA 10 (D).
- *R v Oakes* 1986 26 DLR 4th 200.
- *R v Downey* 1992 90 DLR 45h 449.
- *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC).
- *S v Boesak* 2001 (1) SACR 1 (CC).
- *S v Nombewu*, 1996 (2) SACR 396 (E)
- *S v Nombewu*, 1996 (2) SACR 396 (E).
- *S v Manamela and Others* 2000(1) SACR 414 (CC).
- *South African Police Service v Public Servants Association* 2007(3) SA521 (CC).
- *R v Oakes* (1986) 50CR (3d)1(SCC).
- *S v Dzukuda and Others; S v Tshilo* 2000 (11) BCLR 1252 (CC).
- *S v Moller* 1990 (3) SA 876 (A).
- *S v Manamela and Others* 2000(1) SACR 414. (CC).
- *S v T* 2005 (2) SACR 318 (E).
- *S v Mhlongo* 1991 (2) SACR 207 (A).
- *S v Singo* (CCT49/01) [2002] ZACC 10.
- *S v Sheehama* 1991 (2) SA 860 (A).
- *S v V* 2000 (1) SACR 453 (SCA).
- *S v Van der Meyden* 1999 (1) SACR 447 (W).
- *S v Zuma and Others* 1995 (2) SA 642 (CC).
- *Thebus and Another v S* 2003 (6) SA 505 (CC).
- *Tot v United States* 1943 319 All ER 463.
- *Venter v Volkskas Ltd* 1973 (3) SA 175 (T)
- *Woolmington v. The DPP* [1935] A.C. 462.