

Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 provides 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. The subparagraph further provides that the confession shall be presumed, unless the contrary is proved, to have been freely and voluntarily made by the accused in his or her sound and sober senses and without having been unduly influenced to make the confession.

The accused were indicted on two counts of murder and one of robbery. At their trial before Hugo J in the Natal Provincial Division they pleaded not guilty. Two of the accused had made statements before a magistrate which were tendered by the prosecution as admissible confessions. The question arose whether s 217(1)(b)(ii) of the Criminal Procedure Act was inconsistent with the provisions of the Constitution. Counsel for the defence and the prosecution consented in terms of s 101(6) of the Constitution to the trial judge deciding the issue. Notwithstanding the consent, Hugo J refrained from deciding on the validity of the section, referring the matter to the Constitutional Court for decision and adjourning the trial sine die. The Attorney-General of Natal sought direct access to the Constitutional Court in terms of s 100(2) of the Constitution on the grounds that it was in the interests of justice that a binding decision be given as soon as possible on the validity of s 217(1)(b)(ii).

The Court granted the application for direct access.

The Court found s 217(1)(b)(ii) to be in violation of s 25(3) of the Constitution (right to a fair trial). It held it to be 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. Section 217(1)(b)(ii) of the Criminal Procedure Act places on the accused the burden of proving on a balance of probabilities that a confession recorded by a magistrate was not free and voluntary. It is not sufficient for the accused merely to raise a doubt. The section therefore creates a legal burden of rebuttal on the accused -- a so-called 'reverse onus'.

The Court considered the common law rule requiring the prosecution to prove that a confession has been freely and voluntarily made to be inherent in the rights specifically mentioned in s 25(2), s 25(3)(c) and (d) of the Constitution and forms part of the right to a fair trial. These rights are the necessary reinforcement of the principle that the prosecution must prove the guilt of the accused beyond reasonable doubt. Reversing the burden of proof seriously compromises and undermines these rights. It followed that s 217(1)(b)(ii) violates these provisions.

The Court held that the tests of reasonableness, justification and necessity for limitation of fundamental rights set out in s 33(1) of the Constitution are not identical, and in applying each of them individually one will not always get the same result. But in the present case, it was held, reasonableness, justification and necessity may be looked at and assessed together. The rights interfered with are fundamental to concepts of justice and forensic fairness and have existed in South Africa for over 150 years. A drastic consequence of the alteration to the law brought about by s 217(1)(b)(ii) is the possibility that an accused may be convicted over the reasonable doubt of the court. It was not shown by the state that it was impossible or unduly burdensome for the prosecution to discharge its onus under the common law rule. Nor was it shown that the common law rule caused substantial harm to the administration of justice. Even if it were assumed that the reverse onus may in some cases obviate or shorten a trial within a trial on the admissibility of a confession, and released the prosecution from the inconvenience of marshalling and calling their witnesses before the accused gave evidence, these advantages do not outweigh and justify the substantial infringement of fundamental rights that are the result of the application of the subparagraph. Accordingly s 217(1)(b)(ii) does not meet the criteria laid down in s 33(1) of the Constitution. It is declared inconsistent with the Constitution and invalid.

In the absence of a specific order by the Constitutional Court in the interests of justice and good government giving retrospective effect to a declaration that a law is invalid, s 98(6)(a) provides that a declaration of invalidity shall not invalidate anything done or permitted in terms of that law before the coming into effect of the declaration of invalidity. The Court held that the likely result of ordering the declaration of invalidity of s 217(1)(b)(ii) to have full retrospective effect, invalidating earlier rulings on admissibility, would be numerous appeals with the possibility of proceedings de novo. In proceedings de novo the necessary evidence of voluntariness may no longer be available. The Court considered s 98(6)(a) to be intended to ensure that the invalidation of a law existing at the commencement of the Constitution should not ordinarily have retrospective effect, so as to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under that law. The Constitutional Court's power to order otherwise in the interests of justice and good government should be exercised circumspectly. In some cases the interests of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and the desirability of a smooth transition from the old to the new. The application of the subparagraph may well have caused injustice to accused persons, but the court cannot repair all past injustice by a simple stroke of the pen. In the present case, it was held, a proper balance could be struck by invalidating the admission of any confession in reliance on s 217(1)(b)(ii) of the Criminal Procedure Act before the date of the declaration of invalidity of the section, but in respect only of trials begun on or after 27 April 1994 and in which the verdict had not been given at the date of the declaration.

The judgment of the Court was delivered by Kentridge AJ and was concurred in by all the other members of the Court.