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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 37 of the General Law Amendment Act of 1955 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. This reverses the normal criminal onus of proof by requiring an accused to prove that he had such belief. The Court unanimously found that this infringed both the constitutional right to silence and the presumption of innocence. The Court held that knowledge that stolen goods could easily be disposed of encourages the scourge of violent crime. Courts should be careful not to unduly narrow the range of difficult policy choices available to Parliament in dealing with this problem. In most cases the state has no information of the circumstances in which the accused acquired the stolen goods. There was nothing inherently unreasonable or unduly intrusive in requiring the accused to show that he had reasonable belief that the transaction was honest. The Court unanimously held that the limitation on the right to silence was justified.

The Court was divided, however, over the question of whether the limitation on the presumption of innocence could also be justified. The majority supported a judgement written jointly by justices Madala, Sachs and Yacoob, which held that the provision was too sweeping. It was not limited to the receipt of motor cars or other items where persons could be expected to keep records. Instead, it caught in its net millions of people, frequently poor and semi-literate, who bought household necessities from door to door vendors. They, and not the professional receivers, were the persons most vulnerable to incorrect conviction resulting from application of the reverse onus. The risk of social

stigma and imprisonment was unacceptably high.

The joint judgement, however, broke new ground by exercising powers granted by the 1996 Constitution to read in words into the provision to replace the invalid reverse onus. A requirement was introduced into the provision to help the prosecution. It obliged the accused to produce evidence of belief that could reasonably be true.

Justice O' Regan and Acting Justice Cameron jointly dissented. They would have upheld the reverse onus as it stood. In their view, it was justifiable in the circumstances to require the accused to prove on a balance of probabilities that his belief as to honest acquisition was reasonable. They concluded that the section creates a special statutory offence which imposes an obligation on citizens to assist in combatting crime by acting diligently when acquiring goods otherwise than at a public sale. Where, as in our country, the market for dealing in stolen goods is extensive and where the pattern for feeding that market is excessively violent, society has the right to oblige citizens to act vigilantly to eradicate that market.

The dissent addresses the majority concern about the risk of unfair convictions by pointing out that the requirement of reasonableness takes account of the circumstances of the accused; that it is a lesser crime than common law theft and receiving stolen property; that the sentence may include fines and suspended sentences in appropriate cases and that the accused is entitled to legal representation in appropriate cases.

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