

Guilty Until Proven Innocent? Examining Reverse Onus in South Africa

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Abstract: Reverse onus in South African criminal law presents a fundamental challenge to the presumption of innocence, a cornerstone of fair trial rights under Section 35 of the Constitution. Typically, in criminal proceedings, the prosecution bears the burden of proving the accused's guilt beyond a reasonable doubt. However, in certain statutory offenses, reverse onus shifts this burden, requiring the accused to prove their innocence or a particular defense on a balance of probabilities. This legal mechanism is commonly applied in cases involving firearms possession, drug trafficking, corruption, and financial crimes, where lawmakers argue that it strengthens law enforcement by making convictions easier in situations where proving intent or knowledge is inherently difficult.

Despite its benefits, reverse onus provisions have sparked considerable legal and constitutional debate. Critics argue that such provisions undermine fundamental rights, leading to potential miscarriages of justice. Nevertheless, proponents of reverse onus argue that it is a necessary tool in combating serious and organized crime. In cases where the accused is found in possession of illegal firearms or large quantities of drugs, the expectation that they explain their possession is seen as a reasonable burden. This approach aligns with legal frameworks in other jurisdictions, such as Canada and the United Kingdom, where reverse onus is used in limited circumstances.

The debate surrounding reverse onus highlights a key tension between crime control and individual rights. While it may enhance prosecutorial efficiency, it poses significant risks to fair trial principles. Moving forward, South Africa faces the challenge of ensuring that its laws balance effective law enforcement and constitutional protections. This article examines the legal framework, judicial interpretations, and potential reforms needed to ensure that reverse onus provisions remain both effective and constitutionally compliant.

Keywords: Burden of Proof. Constitutional Law, Criminal Justice, Fair Trial, Reverse Onus

Introduction

Reverse onus provisions have found application in a wide range of statutory offenses in South Africa, including unlawful hunting and dealing in game, drug-related offenses, domestic violence, corporate criminal liability, fraud, and theft.¹ In each of these areas, the burden of proof shifts from the prosecution to the accused, requiring the latter to prove their innocence or a particular defence. However, this legal mechanism has not gone unchallenged. For instance, in *Van Nell v S*,² a constitutional challenge was brought against section 20 of the Drugs and Drug Trafficking Act 140 of 1992; although the matter was referred back to the court a quo, it had to be decided in line with the Constitutional Court's ruling in *S v Mello*³, where a similar provision had already been declared unconstitutional.⁴ These cases, among others, illustrate how the Constitutional Court has consistently found

¹ de Villiers, W. P. (2015). Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant for bail at the later criminal trial revisited. *International Journal of Law, Crime and Justice*, 43(1), 17-35.

² *Van Nell v S* is *Van Nell and Another v S* (CCT 3/98) ZACC 8 (28 May 1998).

³ *S v Mello* (CCT5/98) [1998] ZACC 7; 1998 (3) SA 712.

⁴ Monyakane, M. M. M. E. (2016, June). The South African Drugs and Drug Trafficking Act 140 of 1992 Read with the South African Criminal Law Amendment Act 105 of 1997: An Example of a One Size Fits All Punishment? In *criminal law forum* (Vol. 27, pp. 227-254). Springer Netherlands.

that reverse onus provisions which infringe upon the right to be presumed innocent as enshrined in section 35 of the Constitution. Although there may be rare circumstances where a reverse onus could be justified under section 36 (the limitation clause), the Court has generally taken a firm stance against any legislative framework that undermines this fundamental right. Notably, section 332(7) of the Criminal Procedure Act 51 of 1977 imposes a reverse onus in the context of corporate criminal liability. Yet, it is unlikely to withstand constitutional scrutiny given its violation of the presumption of innocence. This is evident from the Court's ruling in *S v Coetzee*,⁵ where section 332(5) of the same Act was declared unconstitutional for placing an impermissible burden on the accused. Justice Albie Sachs, writing in this context, emphasized that courts are constitutionally obliged to confront the injustice of expecting an accused to prove the absence of guilt particularly in cases such as breaches of family violence interdicts where the reversal of burden cannot be constitutionally justified. This aligns with the broader concern that reverse onus provisions, while potentially useful for law enforcement, risk tipping the balance too far in favour of the state. Although authors argue that such provisions are essential for prosecuting serious crimes especially when proving intent or knowledge is inherently difficult critics warn that they can lead to miscarriages of justice and erode core fair trial protections. Thus, the debate reflects a critical tension between the imperatives of crime control and the constitutional guarantees of individual rights. Ultimately, South Africa faces the complex challenge of crafting legislation that strengthens prosecutorial effectiveness without compromising the fundamental right to be presumed innocent. This article, therefore, examines the evolving legal framework, key judicial interpretations, and necessary reforms to ensure that reverse onus clauses are both effective in combating crime and compliant with the Constitution.

With this being said it must be noted that the burden of proof in criminal law is a foundational principle that underpins the fairness and legitimacy of legal proceedings. At its core, this principle determines which party bears the responsibility for proving or disproving a particular fact in court. Typically, and most importantly, the prosecution carries the burden of proving the accused's guilt beyond a reasonable doubt a standard designed to protect individuals from wrongful convictions. As Shapiro illustrates through a historical lens, the Anglo-American tradition has long emphasized this high threshold as essential to safeguarding liberty.⁶ Similarly, Keane and McKeown explain that this standard reflects a commitment to the presumption of innocence, a hallmark of democratic legal systems.⁷ Moreover, Kokott contrasts this with civil law jurisdictions, such as Germany, where procedural variations exist but the underlying rationale to prevent unjust outcomes remains consistent.⁸ Furthermore, Moss and Gardiner underscore the epistemological dimensions of legal proof, noting that establishing truth in law involves both evidentiary thresholds and philosophical judgments about knowledge and belief.⁹ Therefore, the burden of proof serves not merely as a procedural rule, but as a safeguard for due process, reinforcing both legal integrity and moral legitimacy within criminal justice systems.

This article seeks to critically examine the constitutionality and practical implications of reverse onus provisions within the South African criminal justice system. The primary purpose is to explore how these provisions, which shift the burden of proof from the prosecution to the accused, interact with the foundational right to be presumed innocent under section 35 of the Constitution. In doing so, the article considers the broader philosophical and legal significance of the burden of proof in criminal law, as a safeguard against wrongful convictions and a guarantor of fair trial rights. Drawing from key constitutional case law including *S v Mello*, *Van Nell v S*, and *S v Coetzee* the article interrogates the legitimacy of placing evidentiary burdens on the accused in contexts such as drug-related offenses, corporate criminal liability, and domestic violence. While recognising that reverse onus provisions are often justified by the state as necessary tools for combating complex crimes, the article also highlights the risk of disproportionate infringements on individual rights and procedural fairness. Accordingly, the scope of the discussion is limited to South African legislative developments, constitutional jurisprudence, and scholarly commentary. Ultimately, the article aims to provide a balanced and forward-looking assessment of whether, and under what circumstances, reverse onus provisions can be both constitutionally compliant and operationally effective in promoting justice within South Africa's evolving legal framework.

⁵ *S v Coetzee and Others* (CCT50/95) [1997] ZACC 2.

⁶ Paizes, A. (1999). Chasing shadows: Exploring the meaning, function and incidence of the onus of proof in the South African law. *South African Law Journal*, 116, 531–560.

⁷ Mosikatsana, T. L. (1996). The presumption of innocence and reverse onus: Due process under the South African Bill of Rights—*S v. Bhulwana*; *S v. Gwadiiso*. *South African Journal on Human Rights*, 12, 125–143.

⁸ Goldswain, G. K. (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*, 17(2), 61–83.

⁹ Cole, R. J. (2008). Determining the constitutionality of reverse onus clauses in Botswana. *African Journal of International and Comparative Law*, 16(2), 236–248.

Research Problem

Despite the constitutional guarantee of the presumption of innocence under section 35 of the South African Constitution, various statutes continue to impose reverse onus provisions in the prosecution of serious criminal offences such as drug trafficking, firearms possession, fraud, corporate liability, and terrorism-related activities. While these provisions are often justified on grounds of prosecutorial efficiency particularly in cases where evidentiary knowledge is uniquely within the accused's domain they raise serious constitutional concerns. South African courts, particularly the Constitutional Court, have repeatedly invalidated reverse onus clauses that impose unjustifiable limitations on fair trial rights. However, certain reverse onus provisions remain entrenched in legislation, creating uncertainty about their validity and operational sustainability within a constitutional democracy. This tension between effective law enforcement and constitutional protection necessitates a critical evaluation of whether and under what conditions reverse onus clauses can be considered legally permissible, constitutionally compliant, and procedurally fair in South Africa's evolving legal framework.

Research Questions

- To what extent do reverse onus provisions in South African criminal law infringe upon the constitutional right to be presumed innocent under section 35 of the Constitution?
- How have South African courts, particularly the Constitutional Court, interpreted and ruled on the constitutionality of reverse onus clauses in statutes such as the Criminal Procedure Act and the Drugs and Drug Trafficking Act?
- What legal reforms or judicial safeguards are necessary to ensure that reverse onus provisions remain effective for prosecutorial purposes while complying with constitutional standards of fairness and due process?

Conceptual Framework: Understanding Reverse Onus

Definition of reverse onus

In the South African criminal justice system, reverse onus provisions appear in various statutory offences, particularly where proving intention or knowledge presents evidentiary challenges for the prosecution. These provisions are most commonly found in serious and complex crimes, where the state argues that the accused is in the best position to provide an explanation. A prime example is found in the *Drugs and Drug Trafficking Act 140 of 1992*, where section 21 creates a presumption that a person found in possession of a certain quantity of drugs is deemed to be dealing, unless they can prove otherwise.¹⁰ Similarly, the *Firearms Control Act 60 of 2000*, under section 117, presumes unlawful possession of a firearm unless the accused can establish lawful authority.¹¹ Reverse onus also plays a significant role in corporate criminal liability under section 332(5) and (7) of the *Criminal Procedure Act 51 of 1977*, where directors or senior officers may be held liable for corporate offences unless they demonstrate that they lacked knowledge or took reasonable steps to prevent the offence.¹² In environmental law, section 34(2) of the *National Environmental Management Act 107 of 1998* places an evidentiary burden on accused persons to prove that they acted reasonably to prevent environmental harm.¹³ Customs-related offences under the *Customs and Excise Act 91 of 1964*, particularly sections 84 and 86, also incorporate presumptions that place the onus on the accused to explain the presence of undeclared goods.¹⁴ Financial crimes are not exempt; section 104 of the *Income Tax Act 58 of 1962* shifts the burden to taxpayers in certain circumstances, especially where adequate records are not produced.¹⁵ In competition law, section 73A(5) of the *Competition Act 89 of 1998* presumes that

¹⁰ Roberts, P. (2002). Drug dealing and the presumption of innocence: The Human Rights Act (almost) bites. *The International Journal of Evidence & Proof*, 6(1), 17-37.

¹¹ Greenlee, J. G. (2020). The historical justification for prohibiting dangerous persons from possessing arms. *Wyo. L. Rev.*, 20, 249.

¹² Farisani, D. M. (2017). Corporate criminal liability in South Africa: what does history tell us about the reverse onus provision?. *Fundamina*, 23(1), 1-19.

¹³ Uhlmann, D. M. (2009). Environmental crime comes of age: The evolution of criminal enforcement in the environmental regulatory scheme. *Utah L. Rev.*, 1223.

¹⁴ Shiner, R. A. (2014). Corporations and the Presumption of Innocence. *Criminal Law and Philosophy*, 8, 485-503.

¹⁵ Meyer, C. (2023). *An Analysis of Merger and Amalgamation Transactions Under the Companies act 71 of 2008 and the Income tax act 58 of 1962* (Doctoral dissertation, University of Pretoria (South Africa)).

company directors had knowledge of cartel conduct unless they can prove otherwise.¹⁶ The reverse onus framework is also visible in bail proceedings: section 60(11)(b) of the *Criminal Procedure Act* requires accused persons facing Schedule 6 offences such as murder, rape, or armed robbery to demonstrate exceptional circumstances to be granted bail.¹⁷ Moreover, offences under the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004* may require an accused to justify possession of materials linked to terrorism.¹⁸ Likewise, the *Prevention of Organised Crime Act 121 of 1998* (POCA) permits presumptions about the unlawful origins of property, shifting the burden to the accused in asset forfeiture and racketeering cases.¹⁹ While these provisions are aimed at enhancing law enforcement effectiveness in combating serious and organised crime, they raise substantial constitutional concerns, particularly around the right to be presumed innocent under section 35 of the Constitution. As such, their application must withstand the test of justifiability under section 36, and courts have frequently struck down reverse onus clauses that impose an unfair or disproportionate burden on the accused.

Historical development and rationale in South African context

The historical development of reverse onus provisions in South African criminal law must be understood against the backdrop of a legal system that traditionally favoured prosecutorial efficiency over individual rights. These provisions have their roots in colonial-era legislation and common-law doctrines.²⁰ They were introduced primarily to ease the burden on the state in prosecuting complex economic and regulatory crimes.²¹ This was especially true in cases involving fraud, tax evasion, and statutory offences where key elements of the crime such as intention or knowledge resided uniquely within the personal knowledge of the accused.²² Consequently, reverse onus clauses allowed courts to infer certain elements of an offence from *prima facie* evidence and placed the burden on the accused to disprove such inferences, often on a balance of probabilities.²³

Over time, these provisions became embedded in legislation such as sections 245 and 332(5) of the Criminal Procedure Act.²⁴ The rationale was often pragmatic: the prosecution faced considerable difficulty proving elements such as *mens rea* (guilty mind) in cases involving sophisticated deception or corporate malfeasance.²⁵ Therefore, it was deemed appropriate to shift the evidentiary burden onto the accused, particularly where the facts were presumed to be within their exclusive knowledge.²⁶ However, with the advent of constitutional democracy and the adoption of the Interim Constitution in 1994, this rationale came under intense scrutiny. The Constitution introduced a rights-based framework in which the presumption of innocence became a central tenet of fair trial rights under section 25(3)(c). Section 25(3)(c) under the Interim Constitution (1993) Right to be presumed innocent. The judiciary, particularly in landmark case *S v Coetzee*²⁷ such as the one decided by Justice Langa, began to question whether prosecutorial convenience could justify encroachments on fundamental rights. The historical justification for reverse onus provisions, while grounded in practical concerns, was increasingly viewed as incompatible with a constitutional commitment to human dignity, freedom, and procedural fairness. Thus, the development of reverse onus provisions in South Africa reflects a tension between prosecutorial efficiency and constitutionalism. The Constitutional Court's repudiation of section 245, and the divided opinion on section 332(5), underscore the

¹⁶ Maphoru, M. I. (2012). *The Right of Consumers in Terms of Section 65 of the Competition Act No. 89 of 1998 to Commence Claims for Financial Losses Suffered as a Result of Cartel Infringement*. University of Pretoria (South Africa).

¹⁷ Rogers, W. J. (2025). The Presumption of Innocence at the Bail Stage in South African Criminal Law, a Constitutional Critique of *S v Mbaleki* and Pre-Trial Rights Jurisprudence. Available at SSRN 5275600.

¹⁸ Lumina, C. (2007). Counter-terrorism legislation and the protection of human rights: A survey of selected international practice. *African Human Rights Law Journal*, 7(1), 35-67.

¹⁹ Ndzengu, N. C. (2017). *A Comparative Analysis of Aspects of Criminal and Civil Forfeitures: Suggestions for South African Asset Forfeiture Law Reform* (Doctoral dissertation, Nelson Mandela University).

²⁰ Daniels, R. J., Trebilcock, M. J., & Carson, L. D. (2011). The Legacy of Empire: The common law inheritance and commitments to legality in former British colonies. *The American Journal of Comparative Law*, 59(1), 111-178.

²¹ Ibid.

²² Muvirimi, S. (2018). *Impact of Money Laundering Leading to Tax Evasion: A South African Perspective* (Master's thesis, University of Johannesburg (South Africa)).

²³ Sheldrick, B. M. (1986). Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses. *U. Toronto Fac. L. Rev.*, 44, 179.

²⁴ Munthali, D. M. S. (2018). *Corporate Criminal Liability in Terms of Section 332 of the Criminal Procedure Act—Twenty Years After S v Coetzee* (Master's thesis, University of Johannesburg (South Africa)).

²⁵ Ibid.

²⁶ Goldswain, G. K. (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*, 17(2), 61-83.

²⁷ *S v Coetzee and Others* (CCT50/95) [1997] ZACC 2.

country's legal transition from a system favouring expediency to one centred on the protection of individual rights and adherence to constitutional norms.

Judicial Interpretation and Constitutional Court Jurisprudence

S v Coetzee

In *S v Coetzee and Others* (CCT 50/1995) [1997] ZACC 2, the Constitutional Court considered a constitutional challenge brought by applicants charged with multiple counts of fraud. They contested the validity of sections 245 and 332(5) of the Criminal Procedure Act 51 of 1977 under the Interim Constitution, arguing that these provisions infringed their right to be presumed innocent as guaranteed by section 25(3)(c). Section 245 created a presumption that if a false representation was proven, the accused was deemed to have known it was false unless they proved otherwise. Justice Langa, writing for the majority, held that this reverse onus violated the presumption of innocence by shifting the burden onto the accused to disprove an essential element of the offence knowledge on a balance of probabilities. The Court unanimously declared section 245 unconstitutional and invalid. Section 332(5), which imposed vicarious criminal liability on company directors unless they could prove lack of participation or negligence, was more contentious, with divided judicial opinions; however, a majority also found it unconstitutional. The judgment significantly curtailed the use of reverse onus provisions in South African criminal law, affirming that the State cannot rely on prosecutorial convenience to justify infringements on fair trial rights and that statutory presumptions must be narrowly construed to uphold constitutional protections.

S v Bhulwana

In *S v Bhulwana*, (CCT12/95, CCT11/95) [1995] .the Constitutional Court considered the constitutionality of section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992, which created a presumption that a person found in possession of more than a specified amount of drugs (in this case, dagga) was presumed to be dealing in drugs unless the contrary was proven. Both accused had been convicted based on this presumption without the prosecution proving actual dealing. They challenged the provision on the grounds that it violated their constitutional right to be presumed innocent under section 25(3)(c) of the Interim Constitution. The Court, in a unanimous judgment delivered by Justice O'Regan, held that the reverse onus created by the statutory presumption unjustifiably infringed the right to a fair trial. It shifted the burden of proof to the accused to disprove an essential element of the offence intent to deal which the prosecution is ordinarily required to prove beyond reasonable doubt. The Court further held that although the fight against drug trafficking was a legitimate government interest, the presumption was not a reasonable or justifiable limitation of constitutional rights under section 33(1) of the Interim Constitution, because it placed an unfair evidentiary burden on the accused, particularly where mere possession was used to infer dealing.

The effect of this judgment was significant in South African criminal jurisprudence. It reinforced the principle that reverse onus provisions that require an accused to disprove guilt or an essential element of an offence are unconstitutional, unless they meet the strict requirements of justification under the limitations clause. The decision in *Bhulwana* and *Gwadiso* helped establish a broader constitutional standard that prioritizes the presumption of innocence, thereby limiting the State's ability to rely on statutory presumptions to secure convictions without fully discharging its burden of proof.

S v Mello

In *S v Mello* (CCT5/98) [1998] ZACC 7; 1998 (3) SA 712, the accused were convicted under the Arms and Ammunition Act 75 of 1969, which contained a reverse onus provision in section 39(1)(b). This section stated that if an accused was found in possession of an arm or ammunition without the required licence or permit, they were presumed to have known they were in unlawful possession, unless they could prove otherwise. The accused challenged the constitutionality of this provision on the basis that it violated their right to be presumed innocent, as guaranteed under section 35(3)(h) of the Final Constitution (1996). The Constitutional Court, in a judgment delivered by Justice Madala, held that section 39(1)(b) was unconstitutional because it shifted the burden of proof onto the accused to disprove an essential element of the offence namely, knowledge of unlawfulness. The Court emphasised that in criminal law, the State bears the responsibility of proving every element of an offence beyond a reasonable doubt. By requiring the accused to prove their innocence on a balance of probabilities, the provision undermined the presumption of innocence and the right to a fair trial. The Court found that this infringement could not be justified under the limitations clause (section 36 of the Final Constitution), as it was neither reasonable nor justifiable in an open and democratic society.

The effect of *S v Mello* was to further entrench the constitutional principle that reverse onus provisions that place a legal burden on the accused regarding core elements of a crime are presumptively unconstitutional. This case built on the precedents set in *S v Coetzee* and *S v Bhulwana*, affirming a consistent judicial stance that the presumption of innocence is a non-negotiable cornerstone of fair trial rights. It also signalled to the legislature that any attempt to shift evidentiary burdens in criminal cases must withstand rigorous constitutional scrutiny.

Van Nell v S

In *S v Van Nell and Another (CCT 3/98) [1998] ZACC 8*, the Constitutional Court considered a challenge to section 1(2) of the Trespass Act 6 of 1959, which imposed a reverse onus by presuming that a person found on another's property without permission was guilty of trespassing unless they could prove a lawful reason for their presence. The accused argued that this provision violated their constitutional right to be presumed innocent under section 35(3)(h) of the 1996 Constitution. The Court, in a unanimous judgment by Justice Sachs, held that the reverse onus provision was unconstitutional as it required the accused to disprove guilt, effectively shifting the burden of proof on an essential element of the offence. The Court found that such a burden seriously infringed the right to a fair trial and could not be justified under the limitations clause (section 36). This decision reinforced the constitutional principle that the State must prove all elements of a criminal offence beyond reasonable doubt, and that statutory presumptions which impose a legal burden on the accused are generally invalid unless they meet strict justification. The case thus had a significant effect in limiting the use of reverse onus provisions in South African criminal law.

Constitutional standards for evaluating reverse onus

The constitutional evaluation of reverse onus provisions in South African criminal law has been shaped and clarified through a series of landmark judgments by the Constitutional Court. These cases, notably *S v Coetzee*, *S v Bhulwana*, *S v Mello*, and *S v Van Nell*, collectively established a coherent and principled framework for assessing the validity of legislative provisions that seek to shift the burden of proof onto the accused.

To begin with, the presumption of innocence, entrenched in section 25(3)(c) of the Interim Constitution and now found in section 35(3)(h) of the Final Constitution, serves as a foundational component of the right to a fair trial. The State bears the duty to prove all elements of a criminal offence beyond reasonable doubt, and any deviation from this standard is constitutionally suspect. In *S v Coetzee*, the Court firmly held that section 245 of the Criminal Procedure Act presuming knowledge of falsity in fraud-related offences unless the accused could prove otherwise violated this right. Justice Langa made it clear that requiring an accused to disprove an essential element of the offence, such as *mens rea*, unacceptably shifts the legal burden and undermines the fairness of criminal proceedings. This standard was reinforced in relation to section 332(5), even though judicial opinions were divided, confirming that statutory convenience cannot justify infringements on constitutional protections.

This approach was further clarified in *S v Bhulwana*, where the Court assessed a statutory presumption under the Drugs and Drug Trafficking Act that equated possession of a threshold quantity of drugs with dealing. The Court, per Justice O'Regan, stressed that while combating drug trafficking is a legitimate objective, reverse onus provisions must still comply with the limitations clause then section 36 by being reasonable, necessary, and justifiable in an open and democratic society. The Court found that the presumption imposed a disproportionate burden on the accused, particularly where the inference of dealing from mere possession was speculative and not supported by sufficient evidence. Thus, the provision failed the test of constitutionality, underscoring that reverse onus clauses affecting essential elements such as *intent* or *knowledge* are particularly vulnerable to invalidation.

The same principles were extended in *S v Mello*, where the reverse onus in the Arms and Ammunition Act presumed knowledge of unlawful possession of arms or ammunition. The Court, per Justice Madala, emphasized that placing a legal burden on the accused to prove absence of knowledge or fault in respect of a serious offence offends the presumption of innocence. It reiterated that the limitations clause under section 36 of the Final Constitution requires a strict standard of justification, which the impugned provision failed to meet. The Court ruled that prosecutorial difficulty in proving subjective elements such as knowledge cannot serve as sufficient reason to override fundamental fair trial guarantees. Lastly, in *S v Van Nell*, the Court struck down a provision of the Trespass Act that presumed guilt unless the accused could demonstrate a lawful reason for being on the premises. Justice Sachs, delivering the unanimous decision, reaffirmed that reverse onus provisions that impose a legal obligation on the accused to prove innocence violate section 35(3)(h) and are only permissible if they meet stringent proportionality and justification tests. The judgment underscored that even in less serious offences, the constitutional standard does not waver: the presumption of innocence is a non-negotiable cornerstone of criminal justice.

Taken together, these cases establish that constitutional standards for evaluating reverse onus provisions require a two-stage inquiry: First, whether the provision infringes the presumption of innocence by shifting the burden of proof to the accused; and second, whether such an infringement can be justified under the limitations clause (section 33 of the Interim Constitution or section 36 of the Final Constitution). The consistent message across these decisions is that reverse onus provisions are presumptively unconstitutional when they relate to essential elements of the offence and are rarely justifiable unless the State demonstrates compelling reasons that pass constitutional muster.

Thus, the Constitutional Court has firmly set the standard that fair trial rights must prevail over legislative expediency, and that the core principle of criminal justice that the prosecution must prove guilt beyond reasonable doubt remains inviolable in a constitutional democracy.

Application of section 36

Although the Constitutional Court has declared several reverse onus provisions unconstitutional, it is incorrect to suggest that all such provisions are automatically invalid or inapplicable.²⁸ In fact, South African courts continue to apply certain reverse onus clauses, relying on section 36 of the Constitution, which permits the limitation of rights including the right to a fair trial under section 35 provided such limitations are reasonable and justifiable.²⁹ The rationale is that no right in the Bill of Rights is absolute, and where a reverse onus provision serves a legitimate and pressing objective, such as combatting organised crime, drug trafficking, or corporate misconduct, it may survive constitutional scrutiny if it satisfies the proportionality test.³⁰ This test considers whether the limitation serves a legitimate purpose, whether it is necessary to achieve that purpose, and whether less restrictive means could be used instead. This clause recognises that, in certain circumstances, competing public interests may justify a restriction of individual rights.³¹ In the context of reverse onus provisions, the State often invokes legitimate and pressing objectives, such as the need to effectively combat organised crime, drug trafficking, economic fraud, or corporate misconduct, which are frequently difficult to prosecute due to their covert and complex nature.³² Where accused persons hold exclusive knowledge of critical facts such as whether they knew of the unlawful nature of an act or possession of contraband it may be argued that placing a limited evidentiary burden on them is reasonable and practically necessary.³³

However, any such limitation must satisfy the proportionality test articulated in section 36(1). This involves a multi-pronged inquiry: First, the limitation must serve a legitimate government purpose aligned with constitutional values and objectives. Second, the limitation must be necessary that is, there must be a sufficiently compelling reason for limiting the right, and the limitation must not be arbitrary or excessive.³⁴ Finally, courts must consider whether there are less restrictive means available to achieve the same objective without infringing on constitutional rights to the same extent.³⁵ For example, instead of imposing a legal burden (requiring the accused to prove a fact on a balance of probabilities), the State might impose an evidentiary burden (requiring the accused merely to raise a reasonable doubt), or rely on permissible inferences drawn from proven facts.

The success of any reverse onus provision in surviving constitutional scrutiny thus hinges on a delicate balancing act. While the courts recognise the State's need to protect public safety and maintain law and order, especially in serious and sophisticated crimes, they must also guard against the erosion of the presumption of innocence, a hallmark of the rule of law.³⁶ Therefore, the proportionality analysis must be rigorous and context-specific, ensuring that any reverse onus clause does not become a convenient prosecutorial shortcut, but remains a justified exception within a constitutionally compliant framework.

²⁸ Goldswain, G. K. (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*, 17(2), 61-83.

²⁹ de Villiers, W. P. (2015). Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant for bail at the later criminal trial revisited. *International Journal of Law, Crime and Justice*, 43(1), 17-35.

³⁰ Skeen, A. (1993). A Bill of Rights and the Presumption of Innocence. *South African Journal on Human Rights*, 9(4), 525-538.

³¹ Meyerson, D. (2007). Why courts should not balance rights against the public interest. *Melbourne University Law Review*, 31(3), 873-902.

³² Pati, R. (2018). Global Regulation of Corporate Conduct: Effective Pursuit of a Slave-Free Supply Chain. *Am. UL Rev.*, 68, 1821.

³³ Okpaluba, C. (2018). The constitutional principle of accountability: a study of contemporary South African case law. *Southern African Public Law*, 33(1), 39-pages.

³⁴ Rautenbach, I. M. (2014). Proportionality and the limitation clauses of the South African Bill of Rights. *Potchefstroom Electronic Law Journal*, 17(6), 2228-2267.

³⁵ Ibid.

³⁶ Ashworth, A. (2006). Four threats to the presumption of innocence. *South African law journal*, 123(1), 63-97.

Evaluating the Justifiability and Impact of Reverse Onus

Law Enforcement Efficiency vs. Fair Trial Rights

Building upon this tension, it becomes evident that the lack of competence, resources, and specialised investigative units within the South African Police Service (SAPS) significantly exacerbates the reliance on reverse onus provisions as a prosecutorial shortcut.³⁷ In cases of organised crime where transactions are often covert, transnational, and technologically sophisticated the investigative burden on law enforcement is immense.³⁸ Yet, due to chronic under-resourcing, inadequate training, and the absence of well-equipped task teams capable of navigating financial, cyber, or drug-related syndicates, SAPS frequently falls short of gathering the necessary evidence to meet the constitutional threshold of proof beyond a reasonable doubt.³⁹ As a result, reverse onus clauses are increasingly used to shift this investigative deficit onto the accused, effectively lowering the prosecutorial burden.⁴⁰ Once the accused fails to provide a “viable explanation” or rebut the presumption even on a mere balance of probabilities the State gains an upper hand in securing a conviction, despite its own failure to prove all the essential elements of the offence. This dynamic, while seemingly efficient from a crime control perspective, erodes the presumption of innocence, distorting the adversarial nature of the criminal justice process. It places an unfair burden on individuals who may lack legal knowledge, resources, or the means to disprove allegations rooted in inference rather than evidence. Thus, the constitutional danger lies not only in the abstract principle of burden-shifting, but in how reverse onus becomes a compensatory mechanism for institutional incompetence, leading to convictions that may rest on the accused's inability to explain circumstances rather than the State's ability to prove guilt. This structural imbalance calls for institutional reform, not a constitutional concession, to ensure that fair trial rights are not sacrificed on the altar of prosecutorial convenience.

The crime control model vs. the due process model

Herbert Packer's seminal framework, which juxtaposes the crime control model with the due process model, offers a valuable lens through which to evaluate the constitutional tensions raised by reverse onus provisions in South African criminal law.⁴¹ The crime control model, which prioritises efficiency, speed, and finality in the suppression of criminal conduct, aligns with the rationale often advanced in support of reverse onus: namely, that law enforcement requires procedural mechanisms to overcome evidentiary obstacles, particularly in complex crimes where crucial facts lie within the exclusive knowledge of the accused.⁴² This model treats criminal procedure as a tool of administrative efficiency, viewing formal safeguards as potential obstructions to societal security.⁴³ Conversely, the due process model embodies the ethos of constitutionalism and the rule of law.⁴⁴ It emphasises individual rights, particularly the presumption of innocence, fair procedures, and the necessity for the State to prove guilt beyond a reasonable doubt. From this standpoint, reverse onus provisions are inherently suspect because they risk undermining procedural fairness and shifting the burden onto individuals who may lack resources to mount an adequate defence.⁴⁵ South African constitutional jurisprudence has consistently favoured the due process model, particularly post-1994, where section 35 of the Constitution enshrines comprehensive fair trial rights. The limitations clause (section 36), while recognising that no right is absolute, does not justify undermining core procedural guarantees in the name of efficiency alone.⁴⁶ Therefore, while the crime control model may support reverse onus for pragmatic reasons, it is the due process model that aligns with the spirit and structure of South Africa's transformative constitutional order where justice is not measured by conviction rates, but by the fairness and integrity of the process that leads to them.

³⁷ Rogers, W. J. (2025). Courts as Constitutional Guardians: A Critical Defence of the Dissenting Judgment in *Magudumana v Director of Public Prosecutions, Free State and Others* [2025] ZASCA 62 Through the Lens of South African and International Law. *Free State and Others* [2025] ZASCA, 62.

³⁸ Richards, J. R. (1998). *Transnational criminal organizations, cybercrime, and money laundering: a handbook for law enforcement officers, auditors, and financial investigators*. CRC press.

³⁹ Kehrhahn, F. H. H. (2024). Judicial Reliance on Documents not Established into Evidence: Dispensing Justice or Injudicious Overreach?. *South African Law Journal*, 141(3), 483-495.

⁴⁰ de Villiers, W. P. (2015). Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant for bail at the later criminal trial revisited. *International Journal of Law, Crime and Justice*, 43(1), 17-35.

⁴¹ Davis, D. M. (1996). *Crime and Human Rights*. Centre for Applied Legal Studies.

⁴² Seltzer, L. E., Lyman, R. W., Ehrlich, T., & Gunther, G. (1974). Herbert L. Packer: 1925-1972.

⁴³ Packer, H. L. (1964). Two models of the criminal process. *University of Pennsylvania law review*, 113(1), 1-68.

⁴⁴ Bone, R. G. (1998). The process of making process: court rulemaking, democratic legitimacy, and the procedural efficacy. *Geo. LJ*, 87, 887.

⁴⁵ Allan, T. R. (2003). *Constitutional justice: a liberal theory of the rule of law*. OUP Oxford.

⁴⁶ Kika, M. (2019). Fashioning judicial remedies that work in a constitutional society—Establishing a framework for a functional approach to the awarding of constitutional damages in South African law and comparative jurisdictions.

The danger of undermining core constitutional values

The use of reverse onus provisions poses serious risks of miscarriages of justice, precisely because it undermines core constitutional values such as the presumption of innocence, the right to remain silent, and the right to a fair trial. By shifting the burden of proof onto the accused often to disprove intent, knowledge, or participation these provisions increase the likelihood of convicting individuals who may be factually innocent but unable to discharge the evidentiary burden due to lack of legal knowledge, resources, or access to exculpatory evidence. This danger is particularly acute in a society like South Africa, where socio-economic disparities and limited access to legal representation can leave the accused especially vulnerable. Furthermore, the constitutional project post-1994 is founded on the values of human dignity, equality, and freedom, all of which are jeopardised when reverse onus provisions are used as prosecutorial shortcuts to compensate for investigatory deficiencies.⁴⁷ The legitimacy of the criminal justice system depends not only on its ability to secure convictions, but also on its capacity to uphold substantive justice, which includes ensuring that only the guilty are punished, and that fair procedures are followed.⁴⁸ The structural imbalance created by reverse onus thus runs counter to the transformative goals of the Constitution and threatens to entrench systemic injustices, particularly against the poor and marginalised. As such, reverse onus provisions not only risk individual injustice, but also erode public confidence in the legal system, undermining the very constitutional democracy they are meant to protect.

Conclusion

In summary, this article has demonstrated that reverse onus provisions in South African criminal law significantly infringe upon the constitutional right to be presumed innocent, particularly where they shift the legal burden of proof onto the accused in relation to essential elements such as intent, knowledge, or participation. As the analysis of key Constitutional Court judgments *S v Coetzee*, *S v Bhulwana*, *S v Mello*, and *Van Nell v S* has shown, the judiciary has consistently held that such provisions are presumptively unconstitutional unless they pass the stringent test of justification under section 36 of the Constitution. While courts have acknowledged that the State may invoke reverse onus in pursuit of legitimate objectives such as combating organised crime or corporate misconduct, the burden of proof must not be compromised by prosecutorial convenience or institutional shortcomings. Accordingly, although some reverse onus clauses remain embedded in statutory frameworks, their constitutional compliance is increasingly uncertain, thereby generating ambiguity and undermining legal certainty. In light of these findings, it is imperative to reaffirm that the Constitution demands not only justice in outcome, but justice in process. Therefore, there is an urgent need for principled legislative reform that carefully limits the scope and application of reverse onus provisions, aligning them with constitutional norms and the transformative vision of South Africa's Bill of Rights. Simultaneously, ongoing judicial vigilance is essential to ensure that any limitation of fair trial rights is proportionate, necessary, and the least restrictive means available. Only through this dual approach clear legislative boundaries and robust constitutional adjudication—can the criminal justice system safeguard individual rights while remaining effective and credible in addressing serious crime.

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