# Adverse pre-trial publicity and the presumption of innocence under South African law*

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**OPSOMMING**

**Ongunstige voorverhoorpublisiteit en die vermoede van onskuld in die Suid-Afrikaanse reg**

Voorverhoorpublisiteit rakende 'n hangende strafsaak, welke publisiteit in die vorm van óf mediadekking van die saak, óf 'n voorafgaande beslissing in parallelle geregtelike-verrigtinge (wat uit wesenlik dieselfde feite as die strafsaak voortspruit) kan voorkom, mag tot die beskuldigde se nadeel wees. Sodanige mediadekking of bevindings in 'n parallelle geregtelike uitspraak mag die beskuldigde in die pleging van 'n misdryf, waarop hy of sy teregstaan, impliseer. Die publisiteit mag suggereer dat die beskuldigde aan die misdaad waarop hy teregstaan "skuldig" is of dat hy of sy van swak inbors is en 'n geneigdheid het om misdaad te pleeg. In 'n aansoek om 'n permanente interdik teen vervolging, deur Beskuldigde 5 in *S v Prinsloo* (beter bekend as die "*Krion*" saak) gebring, is daar beweer dat ongunstige bevindings en opmerkings teen die beskuldigdes in vroeëre uitsprake in parallelle siviele verrigtinge, welke verrigtinge uit wesenlik dieselfde feite as die hangende strafsaak voortgespruit het, sowel as 'n persverklaring deur die Hoogste Hof van Appèl ten opsigte van een van sodanige beslissings, die beskuldigdes se grondwetlike reg om onskuldig geag te word geskend het. In hierdie verband is daar namens Beskuldigde 5 aangevoer dat voormelde bevindings en opmerkings kriminele optrede aan die beskuldigdes toegedig het wat op hul beurt die waardigheid, goeie naam en reputasie van die beskuldigdes ondermyn en 'n "vermoede van skuld" daar gestel het. Die strafhof sou gevolglik, so lui die argument, by die aanvang van die verhoor die skuld van die beskuldigdes veronderstel het of die verhoor begin het met 'n vooropgestelde mening dat die beskuldigdes die misdade waarvoor hulle aangekla was gepleeg het. In

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* This article is based on the first author's doctoral thesis titled *An analysis of pre-trial publicity and the accused's right to a fair trial: A deconstruction of the Krion case* (LLD thesis UP 2019). The thesis was completed under supervision of the second author. For a fuller discussion of the aspects dealt with in this article, the reader is referred to the first author's thesis. In the main, this article constitutes a summary of aspects canvassed in the thesis. The first author is indebted to his colleague, Arno Rossouw, and the second author for their invaluable assistance with the Afrikaans summary.

hierdie artikel word die vraag of ongunstige voorverhoorpublisiteit, in welke vorm ook al, enige impak op die vermoede van onskuld, soos grondwetlik en ingevolge die gemenereg van Suid-Afrika uitgelê of vertolk, kan hê ondersoek. Die artikel oorweeg verder of die mantra wat gereeld deur verdagtes uitgespreek word, naamlik, "Ek is onskuldig tot ek skuldig bewys is", 'n akkurate weerspieëling van die vermoede van onskuld is.

## 1 INTRODUCTION

During 1998, Maria Johanna Prinsloo, commonly known as "Marietjie", started an illegal Ponzi or multiplication scheme in the Vaal Triangle area. This scheme was operated until May 2002. The scheme spread countrywide and grew to a nationwide network of agents and investors. During the four years of its existence, approximately R1.5 billion was invested in the scheme and upon its demise scores of investors had lost their money and were left destitute. The scheme had some 14 000 investors. Deposits were taken from investors (effectively the business of a bank was operated) and an average interest rate of 10% per month was offered on investments. This means that the effective interest rate was 120% per annum if the interest was paid out monthly and more if the interest was "capitalised". Because the interest rate was 20% and more above the repurchase rate, it constituted a multiplication scheme in contravention of Notice 1135 of 1999 issued in terms of the Consumer Affairs (Unfair Business Practices) Act.[1] Although Ms Prinsloo initiated the scheme, her six co-accused (accused 2 was at a stage married to Ms Prinsloo and the rest of the accused were family members) subsequently became involved at different times and in different capacities. Ms Prinsloo was the main role player throughout the operation of the scheme and was at the forefront of the criminal enterprise. While various entities were used to run the scheme, the scheme and the nature of the investments remained the same. The matter ultimately became known as the *Krion* case, because the last entity through which investments were solicited was Krion Financial Services Ltd.

The scheme was insolvent *ab initio*. There was never sufficient underlying business to generate enough income to pay the outlandish and unsustainable returns due to investors. Thus, the capital of new investors constantly had to be used to pay the interest commitments to old investors; typical of a get-rich-quick Ponzi scheme where the proverbial Peter is robbed to pay Paul.[2]

When the scheme was ultimately closed by the authorities during May/June 2002, the total value of active investments was approximately R965 million. This meant that the accused had to generate more than R90 million per month to pay

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1 71 of 1988.

2 "Ponzi scheme" is named after an Italian immigrant, Charles Ponzi of Boston, Massachusetts, United States of America (hereafter "USA"), who in 1919 devised a scheme by which he enticed some 11 000 Bostonians to invest approximately USD 20 million with him, promising exceptionally high returns on their investments within a short period, by purchasing international reply coupons from other countries and thereafter redeeming them in the USA for postage stamps. Initially, he was able to pay these exorbitant returns to early investors by simply drawing from the capital investments received from subsequent investors. However, seeing that the scheme was not based upon any viable underlying economic enterprise, it eventually had to collapse when no more investors could be persuaded to make further investments.

the interest of investors. However, as at 4 June 2002 there was only R3.7 million remaining in the Krion bank account.

Ms Prinsloo (accused 1) and her co-accused were arrested during July 2002. They were subsequently arraigned in 2009 on no less than 218 683 counts. At the time when the trial commenced, the matter was the biggest Ponzi scheme case to have been prosecuted in South Africa. The accused were charged with, among others, racketeering, money laundering, operating the business of a bank without being registered as such, unlawfully operating or conducting a multiplication scheme, fraud, theft and a range of tax offences. The trial commenced at the end of July 2009 and in 2010 the accused were convicted on a large number of the counts and sentenced to long terms of imprisonment, save for accused 5 (Ms Prinsloo's son, whose role in the scheme was minor), who was sentenced to a shorter period of imprisonment, and accused 7, who received a suspended sentence. In fact, Ms Prinsloo received an effective sentence of 25 years' imprisonment.[3] Ms Prinsloo and accused 2 to 6 appealed their convictions and sentences. However, on 4 December 2015, the Supreme Court of Appeal dismissed their respective appeals.[4]

While the criminal case was being investigated and an auditor of PricewaterhouseCoopers (PwC) was compiling his forensic audit report in relation to the scheme operated by the accused (for purposes of the pending criminal trial), the activities forming the substance of the charges against the accused fell to be considered by various courts in civil cases, which courts included the Supreme Court of Appeal and the Income Tax Special Court. Judgments by these courts were reported.[5] In these judgments, several pronouncements were made imputing criminal wrongdoing directly or indirectly to the accused persons, as operators of the scheme. The gist of these pronouncements or findings was that the activities forming the substance of the criminal indictment were deemed to be fraudulent and unlawful. Moreover, in a media summary issued by the Registrar of the Supreme Court of Appeal pertaining to the findings of the court in one of the civil judgments, it was stated that[6]

> "[p]yramid scheme swindlers must pay tax on their takings. This is the conclusion reached by the Supreme Court of Appeal. The case before it involved an illegal and fraudulent scheme operated by Marietjie Prinsloo through various corporations in the tax years 2000 to 2002 in Gauteng and neighbouring provinces. The scheme made its money by illegal means. That was its income. The operators took the money for their own benefit, not with the intention to comply with supposed contracts with the investors. The scheme never had that contractual intention in any of the tax years."

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3 See *S v Prinsloo* GNP 8 June 2010 case no CC384/2006; *S v Prinsloo* 2010 JDR 0725 (GNP); and *S v Prinsloo* 2010 JDR 1234 (GNP).

4 See *S v Prinsloo* 2016 2 SACR 25 (SCA).

5 See *Fourie v Edeling* 2005 4 All SA 393 (SCA); *MP Finance Group CC (In Liquidation) v Commissioner, South African Revenue Service* 2007 5 SA 521 (SCA); *Janse van Rensburg v Myburgh* 2007 6 SA 287 (T); *Van Eeden v Engelbrecht* (2590/2002) 2002 ZAFSHC 21 (3 December 2002); and *Income Tax Case No 1789* 67 SATC 205 (Natal Tax Court – 2 February 2005).

6 Media summary of judgment delivered in the Supreme Court of Appeal in the matter of *MP Finance Group v CSARS* (31 May 2007) https://bit.ly/2Tx6Ocs (accessed on 9 February 2020).

Subsequent to these judgments having been given, one of the cited accused in the pending criminal case, filed an application in 2008 for a permanent stay of prosecution.[7] The application was premised on the so-called pronouncements of guilt, or the findings of criminal conduct and criminal liability, contained in the civil judgments and the press release, as aforesaid. In essence, the applicant averred that the accused would not receive a fair trial, principally because the trial court in the criminal case would be biased against the accused in the adjudication of the case on account of the civil judgments and the press release. Also, their right to be presumed innocent was violated by the findings of criminal liability expressed in the said decisions and the media statement, which findings related to alleged illegal activities forming the substance of the criminal indictment. As to the allegation that the accused's right to be presumed innocent was violated, the accused argued that the judicial findings and media statement imputed criminal conduct to the accused, which undermined the dignity, good name and reputation of the accused and which created a so-called "presumption of guilt": The criminal court would accordingly presume the guilt of the accused at the inception of their trial or start with a preconceived idea that the accused had committed the crimes with which they were charged. Further, the accused contended that the presumption of guilt would also violate the accused's right to remain silent and not to testify in the criminal trial proceedings, because a failure to gainsay or rebut the presumption of guilt, so to speak, could result in such presumption hardening into "conclusive proof of guilt".

*In casu*, the court which heard the application for a stay of prosecution, per Ngoepe JP, dismissed the application, holding that the criminal trial had to proceed. However, the court did not expressly deal with the question of whether the presumption of innocence was violated by the impugned judicial pronouncements or findings in the civil matters. Instead, the court focused on the question of whether the criminal trial court would be influenced by such pronouncements and therefore fail to adjudicate in the case objectively, with an open mind and with the necessary impartiality and on the question of whether the civil findings could have any binding effect, as it were, on the criminal case (in other words, whether such findings could be held against the accused in the criminal trial and would pre-empt factual findings that would be made in the criminal matter).[8] The court added that the application was "ill-conceived": An accused person could not apply for a permanent stay of prosecution on the ground that he or she was likely to be prejudiced by external factors, such as (in the present case) pronouncements in civil matters. This is because such an argument would assume that the trial court would commit an irregularity by allowing itself to be unduly influenced by such factors.[9]

Pre-trial publicity relating to a pending criminal case may be in the form of media reports, statements, comments, or, as seen above, in the form of findings or pronouncements made in parallel judicial proceedings arising from substantially the same facts as the pending criminal matter. Such publicity may be adverse to an accused: It may indicate or suggest that the accused is "guilty" of

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7 See *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T). The first author handled this matter on behalf of the State, which matter forms the basis of his doctoral thesis.

8 *Idem* paras 8–10.

9 *Idem* para 11.

the crime with which he or she has been charged, or it may suggest that the accused is of bad character, so much so that the accused had the propensity to commit the crime in question.

This article explores the question whether adverse pre-trial publicity, as aforesaid, would have any impact on the presumption of innocence on a proper construal of the presumption under South African law. To answer this question, a critical analysis is given of the narrow and wide meaning of the presumption of innocence and of where, on this spectrum, the South African construal of the presumption lies. This article considers whether jurisprudence of the European Court of Human Rights ("ECtHR" or "Strasbourg Court"), which espouses a broad reading of the right to be presumed innocent and which holds that pronouncements of guilt in parallel judicial proceedings to a pending criminal case may violate such right, would find application, or gain traction, as it were, in South Africa's legal system. The article also briefly outlines related aspects of the function, scope and vital application or import of the presumption of innocence in South Africa. Moreover, this article examines whether the mantra often expressed by suspects: "I'm innocent until proven guilty", is a correct or accurate reflection of the meaning of the presumption of innocence.

It should be pointed out at the outset that the meaning, scope, function and application of the presumption of innocence have been the subject of exhaustive academic analysis worldwide.[10] Therefore, this article simply outlines or gets to the heart of such aspects in the context of pre-trial publicity, which is detrimental to an accused. It does this from a South African perspective. In light of the constraints relevant to this article, the said aspects cannot be explored at much greater depth here.

This article posits that adverse pre-trial publicity would not affect or impinge on the presumption of innocence in South Africa's legal system.

## 2 NARROW MEANING OF THE PRESUMPTION OF INNOCENCE

> "While we want the guilty to be convicted, it pains us more to convict an innocent person. Hence, we presume the accused innocent, and deliver an acquittal so long as guilt is not established beyond reasonable doubt."[11]

A "central feature" of a criminal trial is the presumption of innocence.[12] It is said that the presumption of innocence "is among the small handful of doctrines in criminal law that are ubiquitous across a very broad spectrum of legal systems",[13] no less than in common-law jurisdictions – the presumption that an accused is innocent until proven guilty is one of several characteristics

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10 In a South African context, Schwikkard *Presumption of innocence* (1999) is a definitive work on the subject.

11 Ho "The presumption of innocence as a human right" in Roberts and Hunter (eds) *Criminal evidence and human rights: Reimagining common law procedural traditions* (2012) 279–280.

12 *Idem* 271.

13 Laudan "The presumption of innocence: Material or probatory?" 2005 *Legal Theory* 333. See also, eg, Stumer *The presumption of innocence: Evidential and human rights perspectives* (2010) xxxvii, noting that the presumption "is universally recognised as a core principle in the administration of criminal justice".

commonly associated with the adversary criminal process.[14] One commentator observes that

> "[i]t is a mark of the adversary system that the accused, entering the courtroom to undergo ordeal by trial, is perceived as cloaked in the presumption of innocence for 'all persons shall be assumed, in the absence of evidence, to be freed from blame'".[15]

The presumption of innocence is "at the heart of an accusatorial system"[16] because, in the words of one court, an "accused is entitled to adopt an adversarial attitude to the prosecution" and he or she "is not obliged to give assistance to the prosecution".[17] Before an accused can be placed on his or her defence, the prosecution must establish a *prima facie* case against the accused in evidence (that is, with substantive proof of guilt). An accused need not aid those who seek a conviction against him or her.[18] The presumption of innocence is integral to the rule of law or justice.[19] Moreover, the presumption of innocence is not only a common-law rule of evidence, but also a human right – "the presumption is widely recognised in national constitutions and bills of rights, and in regional and international human rights documents";[20] the presumption "finds a place in every known human rights document".[21] The presumption of innocence is "one of the most widely known and adhered to safety mechanisms in the criminal process".[22] This "makes it a normative principle in determining the rules of 'fair play' in criminal trials".[23] The presumption of innocence is a fundamental part of due process and is thereby instrumental in upholding the rule of law; the presumption emerges from an umbrella of evidential and procedural rules that are recognised as essential components of a democratic society and that are designed to restrain the power of the State to interfere in the lives of individuals while continuing to facilitate the punishment of crime.[24] The presumption of innocence "is bombarded with the expectations of ensuring equality within the criminal process".[25]

Despite such "laudatory rhetoric associated with the presumption of innocence" that affirms that the presumption enjoys wide acceptance both nationally and internationally as a fundamental principle of criminal justice and

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14 See Damaška in Dressler (ed) *Encyclopedia of crime & justice: Vol 1* (2002) 25.
15 Wilson "Shifting burdens in criminal law: A burden on due process" 1981 *Hastings Constitutional Law Quarterly* 731.
16 Goldstein "Reflections on two models: Inquisitorial themes in American criminal procedure" 1974 *Stanford LR* 1017.
17 *Phato v Attorney-General, Eastern Cape; Commissioner of South African Police Services v Attorney-General, Eastern Cape* 1994 2 SACR 734 (E) 758e–f.
18 Goldstein 1974 *Stanford LR* 1017. See also, eg, Damaška "Evidentiary barriers to conviction and two models of criminal procedure: A comparative study" 1973 *University of Pennsylvania LR* 528–530.
19 See Beinart "The rule of law" 1962 *Acta Juridica* 119. See also Van der Berg *Bail: A practitioner's guide* (2014) 19.
20 Ho in Roberts and Hunter (eds) 259 fn 1.
21 Ashworth "Four threats to the presumption of innocence" 2006 *The International J of Evidence & Proof* 243.
22 Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994) 176.
23 *Idem* 176–177.
24 Summers "Presumption of innocence" 2001 *The Juridical R* 38.
25 *Idem* 38.

notwithstanding judicial declarations that indicate that the presumption is "undoubted law", "axiomatic" and "elementary" and that its "enforcement lies at the foundation of the administration of [the] criminal law", there is a good deal of "definitional ambiguity" as to the presumption or little consensus about precisely what the presumption means, when and where it applies in criminal proceedings, who is bound by it and what relations it has to other key doctrines and precepts of the law, such as reasonable doubt, the burden of proof, the benefit of the doubt, and due process generally. There is little agreement regarding the presumption's contents and scope "leading to considerable variation in respect of its normative value".[26] Summers remarks as follows in this regard:[27]

> "Asserted frequently and applied to substantiate countless different arguments, the presumption [of innocence] has attained an almost mythical status and consequently, has become practically indefinable. As such it has been the target of much criticism, which by concentrating on its rhetorical capacity, has failed to adequately determine its true function or to assess its value to the perception and the practice of the criminal law."

Summers goes on to note that the presumption of innocence is difficult to define and even harder to enforce, as the "doctrine is both asserted and applied in a number of different ways, and is as such relied upon as the principle behind other more tangible rules".[28] Schwikkard asserts that definitional ambiguity surrounding the presumption of innocence has arisen from the conflation of the presumption with Packer's concept of "legal guilt" ("for which due process or the right to a fair trial are sometimes used as synonyms"), according to which a person is to be found "legally innocent", irrespective of factual guilt, "unless the factual determinations were made in a procedurally regular fashion". The concept of "legal guilt" means that an accused is to be treated as innocent, unless guilt is established in a procedurally regular and fair fashion before a competent court.[29] Packer opined that the presumption of innocence

> "means that until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons

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26 Schwikkard "The presumption of innocence: What is it?" 1998 *SACJ* 396 ff; Schwikkard *Presumption of innocence* 29–39; Laudan 2005 *Legal Theory* 334. See also, eg, Ashworth 2006 *The International J of Evidence & Proof* 243; Ashworth *Human rights, serious crime and criminal procedure* (2002) 14; Hamilton *The presumption of innocence in Irish criminal law: "Whittling the golden thread"* (2007) 1 ff; and Laufer "The rhetoric of innocence" 1995 *Washington LR* 340: "Even with near universal support and endorsement of the presumption of innocence, there has been a longstanding scholarly controversy over its exact meaning."

27 Summers 2001 *The Juridical R* 38.

28 *Idem* 56–57.

29 Schwikkard *Presumption of innocence* 30; Schwikkard 1998 *SACJ* 396–397, with reference to Packer *The limits of the criminal sanction* (1968) 161 166. Packer 166 defined the doctrine of "legal guilt" as follows:

> "According to this doctrine, a person is not to be held guilty of crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect."

> that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question".[30]

Schwikkard[31] points out that Packer described the relationship between the presumption of innocence and legal guilt thus:

> "[B]y forcing the state to prove its case against the accused in an adjudicative context, the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual".[32]

Schwikkard shows that conflating the presumption of innocence with other procedural rights and regarding the presumption as a "broad policy consideration" in terms whereof "the subject of a criminal investigation must be treated as innocent at all stages of the criminal process irrespective of the probable outcome of the trial" (that is, "as a policy directive as to how persons should be treated prior to conviction",[33] render "an extremely unwieldly definition" of the presumption. This definition is one which is too wide and difficult to apply and which runs the risk of undermining other associated rights (which have different rationales and policy considerations that apply in determining when a limitation of any one right is reasonable and justifiable), as well as the normative value of the presumption itself.[34]

Thus, while the presumption of innocence is difficult to define, because it is often used to denote different things,[35] it would be preferable for the presumption to be contained within manageable boundaries for it to have practical value and to thereby enhance its enforceability. The presumption ought not to be banished to the realms of rhetoric or to become an illusory protection on account of having too wide a construal.[36]

Also, it should be mentioned that the meaning of the presumption of innocence is largely dependent on the jurisdiction in which it is applied or on the scheme of the human rights documents in which it is enshrined,[37] as will become evident below.

Several commentators and academics have identified two facets to the presumption of innocence, namely a narrow and a broad construction.[38] The broad

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30 Packer *The limits of the criminal sanction* 161.

31 Schwikkard *Presumption of innocence* 30 and Schwikkard 1998 *SACJ* 397.

32 Packer *The limits of the criminal sanction* 167.

33 Schwikkard *Presumption of innocence* 36 and Schwikkard 1998 *SACJ* 403.

34 See Schwikkard *Presumption of innocence* 29–39 and Schwikkard 1998 *SACJ* 396–406.

35 Hamilton *The presumption of innocence in Irish criminal law* 1.

36 Summers 2001 *The Juridical R* 56–57.

37 See, eg, Hamilton *The presumption of innocence in Irish criminal law* 7–9, noting that a broad or expansive view of the presumption of innocence resonates with Irish case law and with jurisprudence of the ECtHR, in light whereof Irish law on the aspect is required to be interpreted by Irish courts.

38 See, eg, Stumer *The presumption of innocence* xxxviii and the authorities the author refers to; Schwikkard *Presumption of innocence* 35–36; Owusu-Bempah *Penalising defendant non-cooperation in the criminal process and the implications for English criminal procedure* (PHD thesis University College London 2012) 97; Owusu-Bempah "Defence participation through pre-trial disclosure: Issues and implications" 2013 *The International J of Evidence & Proof* 196; Dennis "The Human Rights Act and the law of criminal evidence: Ten years on" 2011 *Sydney LR* 354; Ashworth *Human rights, serious crime and criminal procedure* 14; Choo *The privilege against self-incrimination and criminal justice* (2013) 25. See also the discussion in Ho in Roberts and Hunter (eds) 259–279; Hamilton *The*

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meaning of the presumption is discussed in the next part of this article. In this part, the article considers how the presumption is narrowly construed.

Schwikkard indicates that

> "[n]arrowly formulated the presumption of innocence contains two components: (1) a rule requiring the state to bear the burden of proof and (2) a directive that the burden will only be discharged when guilt has been proved beyond reasonable doubt".[39]

This conception of the presumption of innocence is a more familiar reading of the presumption in common-law jurisdictions.[40] Ho points out that there

> "are three salient features of the common law understanding of the presumption of innocence: first, the presumption is described in terms of the burden and standard of proof, as a general rule that places on the prosecution the burden of proving guilt to the standard of beyond reasonable doubt; secondly, this rule regulates verdict deliberation and shapes the conduct of the trial; thirdly, it is free-standing, a standard of fair trial that is conceptually separate from other such standards".[41]

The narrow common-law meaning of the presumption of innocence was given definitive articulation in England in the well-known House of Lords decision of *Woolmington v The Director of Public Prosecutions*, where indeed it was famously described as the "golden thread" running "[t]hroughout the web of the English Criminal Law".[42]

Summers argues in effect that the narrow notion of the presumption of innocence is preferable in that it renders the presumption easier to apply in practice and would reflect the reasons for the origin of the presumption, as well as the affinity of the presumption in relation to the burden of proof and the standard of that burden.[43] Indeed, Summers[44] opines that to determine the true role of the presumption of innocence, it is instructive to look to Allen's essay on the presumption.[45] In this insightful work, Allen traced the history of the presumption of innocence in England and concluded that the presumption amounts to little more than "a reminder that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made".[46] Nevertheless, Summers posits that the presumption of innocence is closer in nature to the requirement of a set standard of proof, that is beyond reasonable doubt, than to a rule espousing the location of the burden of proof: "[T]he presumption of innocence is less concerned with the concept that the burden of proof rests on the

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*presumption of innocence in Irish criminal law* 1–9; Kitai "Presuming innocence" 2002 *Oklahoma LR* 257; Quintard-Morénas "The presumption of innocence in the French and Anglo-American legal traditions" 2010 *The American J of Comparative Law* 107; and Ferguson "The presumption of innocence and its role in the criminal process" 2016 *Criminal Law Forum* 131.

39 Schwikkard *Presumption of innocence* 29 and Schwikkard 1998 *SACJ* 396.

40 See, eg, Stumer *The presumption of innocence* xxxviii.

41 Ho in Roberts and Hunter (eds) 260.

42 (1935) AC 462 481–482.

43 Summers 2001 *The Juridical R* 56.

44 *Idem* 52.

45 Allen *Legal duties and other essays in jurisprudence* (1931) (reprint 1977) 253.

46 *Idem* 293–294.

prosecution, and more with how that burden is discharged".[47] For Summers, this representation of the presumption of innocence would appear to resonate with the notion suggested by Allen, namely that the presumption originated in conjunction with the concept of reasonable doubt: "The debate surrounding the level of proof required to satisfy the court that the prosecution had discharged their burden may have been relevant to the creation of the presumption of innocence".[48] The corollary of this conception of the presumption of innocence is that the presumption "was traditionally created and intended to be a concept which was *restricted in scope and exercisable only within the confines of the criminal trial*".[49]

As briefly indicated above, Schwikkard gives compelling reasons as to why an expansive reading of the presumption of innocence ought to be avoided.[50] The writer also makes the cogent point that the notion that the subject of a criminal investigation must be treated as innocent at all stages of the criminal process is undoubtedly "a logical consequence" of the description of the presumption of innocence as "a rule regulating the location and standard of the burden of proof", for "if it is stipulated that guilt is dependent on the prosecution proving its case beyond a reasonable doubt it follows that a person must be treated as if innocent until the state has discharged its burden of proof".[51] In the premises, Schwikkard argues that "a definition of the presumption of innocence as a rule placing the burden on the prosecution to prove the guilt of an accused person beyond reasonable doubt, is to be preferred".[52] Schwikkard further opines that this conception of the presumption of innocence "provides an adequate means for expressing" the central rationale underlying the presumption, namely to reduce the possibility of erroneous convictions:

> "The presumption of innocence formulated as the fundamental principle that the prosecution bear the burden of proving guilt beyond a reasonable doubt serves to keep the frequency of erroneous convictions within tolerable parameters".[53]

Morton and Hutchison observe that "[i]t *is by the rationale of preventing erroneous convictions that we must judge any purported definition of the presumption of innocence*".[54] Schwikkard states that "[t]he rationale for the presumption of innocence finds expression in the reasonable doubt standard".[55] This can be said to be by reason of the fact that both the presumption of innocence and the reasonable doubt standard have as their fundamental aim reducing the possibility of erroneously convicting an innocent accused.[56]

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47 Summers 2001 *The Juridical R* 37 53–54.
48 *Idem* 50 54.
49 *Idem* 54 (emphasis added).
50 Schwikkard *Presumption of innocence* 29–39 and Schwikkard 1998 *SACJ* 396–406.
51 Schwikkard *Presumption of innocence* 35–36 and Schwikkard 1998 *SACJ* 403.
52 Schwikkard *Presumption of innocence* 39 and Schwikkard 1998 *SACJ* 406.
53 Schwikkard 1998 *SACJ* 406–408. See also Schwikkard *Presumption of innocence* 16.
54 Morton and Hutchison *The presumption of innocence* (1987) 6 (emphasis added).
55 Schwikkard *Presumption of innocence* 16.
56 *Ibid*; Schwikkard 1998 *SACJ* 407–408; Sheldrick "Shifting burdens and required inferences: The constitutionality of reverse onus clauses" 1986 *University of Toronto Faculty of LR* 180; Morton and Hutchison *The presumption of innocence* 5–6; Hamer "A dynamic reconstruction of the presumption of innocence" 2011 *Oxford J of Legal Studies* 420; *In re Winship* 363–364 372; *S v Manamela (Director-General of Justice intervening)* 2000 1 SACR 414 (CC) para 26 and *S v Baloyi* 2000 1 SACR 81 (CC) para 15.

It is clear in the circumstances that in practical terms, the presumption of innocence is realised through the allocation of the burden of proof and that the reasonable doubt standard is "the operational form" of the presumption.[57] Indeed, the requirement that proof of a criminal charge must be to the standard of beyond reasonable doubt "provides concrete substance for the presumption of innocence".[58]

Then, if the presumption of innocence is simply a so-called "proxy" for the incidence and standard of the burden of proof in a criminal trial, the question arises whether the presumption cannot be said to be a superfluous, rhetorical or redundant doctrine. Neither the incidence nor the standard of the burden of proof is dependent on a presumption for its existence and application. The cardinal principle of the onus of proof, namely, that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made, ensures already that the prosecution bears the burden of proof. And a policy, evidential rule guarantees that the higher standard of proof beyond a reasonable doubt applies in a criminal trial.[59] Laudan suggests that to prevent the presumption from thus being a redundant or a derivative principle, its function should be construed as making it entirely explicit that the accused begins a trial without prejudice, that is to say, with a "clean slate" (in other words with no evidence of guilt); such being an "element of the [presumption] that is not already present, at least not explicitly, in the standard of proof and the burden of proof".[60] Insofar as the presumption of innocence has an exclusive identity or independent content and thus a non-derivative role in a trial, the doctrine of the presumption "is embodied in the thesis that the defendant begins the trial with a clean slate".[61] This is somewhat similar to a further feature of the presumption of innocence identified by Wigmore, namely that the presumption conveys a special and perhaps useful hint to the arbiter over and above the rule relating to the burden of proof, in that it cautions the arbiter to put away from his or her mind all the suspicion that may arise from the arrest, the indictment and the arraignment of the accused (in other words, the pre-trial indicators of guilt) and to reach his or her verdict solely from the legal evidence adduced at trial.[62] In a South African context, the presumption of innocence is a common-law principle, which is entrenched specifically – and separately enumerated – as a fair *trial* right in section 35(3)(h) of the Constitution of the Republic of South Africa, 1996.[63]

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57 Sheldrick 1986 *University of Toronto Faculty of LR* 180. Some commentators observe that the presumption of innocence "is in reality not a presumption", but "merely a statement of the prosecution's burden of proof", a "tactical rule" aimed at "the proper allocation" of the burden of proof "at the trial in respect of issues raised"; see Rothblatt *Handbook of evidence for criminal trials* (1965) 177, as endorsed in Van der Merwe "Die grondwetlike passiewe verdedigingsreg versus die bewysregtelike gevolge van swye aan die einde van die staatsaak" 1997 *SACJ* 268; Dlamini "Proof beyond a reasonable doubt: An analysis of its meaning and ideological and philosophical underpinnings" 1998 *SACJ* 425.

58 *In re Winship* 358 363.

59 See Schmidt and Rademeyer *Bewysreg* (2000) 157.

60 Laudan 2005 *Legal theory* 358.

61 *Idem* 360.

62 Wigmore *A treatise on the Anglo-American system of evidence in trials at common law including the statutes and judicial decisions of all jurisdictions of the United States and Canada* (1940) Vol 9 § 2511.

63 Hereinafter referred to as "the Constitution".

Since at trial, the presumption of innocence "creates a procedural and evidentiary rule that the prosecution must prove the guilt of the accused beyond reasonable doubt",[64] it would seem that the important task that the right to be presumed innocent fulfils in South Africa is to *constitutionally enshrine* (or "entrench as a fundamental constitutional value") the allocation of the burden of proof on the prosecution and the attendant reasonable doubt standard; in other words, the presumption makes it a constitutional imperative that the prosecution bears the onus of proving the accused's guilt beyond a reasonable doubt,[65] because such a rule accords with substantive fairness and is aimed at minimising an erroneous conviction.[66]

## 3 WIDE MEANING OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence is also seen as pointing in a different direction, namely to the logistics of proof in criminal cases: It is regarded as having reference to the treatment of suspects and accused persons before and during the trial, insisting that such treatment must be consistent with respect for their "legal status of innocence" before conviction – one example is that the presumption applies to the question of bail.[67] Thus, a broad view of the presumption of innocence

64 De Villiers "The burden of proof and the weighing of evidence in criminal cases revisited" 2003 *THRHR* 635.

65 See *S v Mbatha; S v Prinsloo* 1996 1 SACR 371 (CC) para 7; *S v Singo* 2002 2 SACR 160 (CC) para 26.

66 Morton and Hutchison *The presumption of innocence* 6. See also *S v Zuma* 1995 1 SACR 568 (CC); *S v Shangase* 1994 2 SACR 659 (D) 665*c–d* (describing the reasonable doubt standard as "the very essence of the fundamental right to have a fair trial"); *In re Winship* 363–364; *Speiser v Randall* 357 US 513 525–526 (1958); *Leland v Oregon* 343 US 790 802–803 (1952); De Villiers 2003 *THRHR* 635; Dlamini 1998 *SACJ* 423–424, noting that one of the ingredients of the right to a fair trial not expressly mentioned in the Bill of Rights, but which is deemed to be a part of such right by virtue of the common law, is that the accused is entitled to have the case against him or her proved beyond a reasonable doubt.

67 See, eg, Ashworth *Human rights, serious crime and criminal procedure* 14; Owusu-Bempah *Penalising defendant non-cooperation in the criminal process and the implications for English criminal procedure* 97; Jackson and Summers *The internationalisation of criminal evidence: Beyond the common law and civil law traditions* (2012) 205–207; Ferguson 2016 *Criminal Law Forum* 131; Van der Berg *Bail* 19–25; Van der Merwe "Bail" in Du Toit *et al Commentary on the Criminal Procedure Act* (2018) 9-5–9-8; Mokoena *A guide to bail applications* (2012) 37 ff. However, Schwikkard correctly argues that the presumption of innocence, which as a rule requires proof of guilt beyond a reasonable doubt "cannot be applied at bail proceedings, because these proceedings are not concerned with the determination of guilt"; Schwikkard *Presumption of innocence* 35 75–84 and Schwikkard 1998 *SACJ* 402. The writer reiterates in this respect that "[a] logical consequence of the presumption of innocence is that persons are not to be treated as guilty until the state has discharged its burden of proving all the elements of the offence charged beyond a reasonable doubt" – Schwikkard *Presumption of innocence* 79. It follows that all pre-trial processes must take the "legal innocence" of a person into account – *ibid* 79. Thus, the presumption of innocence is distinguishable from the notion that suspects and accused must be treated as innocent at all stages of the criminal process before conviction. For similar observations (in this regard) as that of Schwikkard, see Steytler *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa, 1996* (1998) 133–134 321 (stating among others that the presumption of innocence "merely establishes the process by which guilt is to be determined"); De Villiers *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and*

*continued on next page*

incorporates both pre-trial protections and evidential rules at trial.[68] As well, the presumption is understood as a general doctrine, which underpins other procedural rights (or which encompasses a number of other procedural safeguards), such as the right to silence or the privilege against self-incrimination.[69] Used in this broader sense, the presumption of innocence underpins a whole range of rules intended to ensure fairness of accused persons.[70] Indeed, Ho asserts that the presumption of innocence as a human right is not a discrete sub-right or element of the right to a fair trial, conceptually separate from all other elements or standards of a fair trial; "it is not merely one of many other qualities that a trial must have to be considered fair".[71] Instead, the presumption is "the general right to due process [or a fair trial]": It mandates that the state cannot convict someone of a crime, unless and until the prosecution demonstrates his or her guilt in a process that bears the defining features, including rights and protections, of a fair trial.[72] Stumer points out that the ECtHR "in interpreting the right to be presumed innocent enshrined in article 6(2) of the European Convention on

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*proposals for reform* (LLD thesis UP 2000) 237–244. See De Villiers "The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 2)" 2002 *De Jure* 195–199, who among others observe that those who, after the advent of the fundamental rights era, have understood the presumption of innocence to apply outside the trial context, have not always appreciated that it is only the effect of the presumption at trial that is entrenched in s 35(3)(h) of the Constitution, which effect is limited to an understanding that the presumption is violated if a conviction is possible, despite the existence of reasonable doubt about guilt – this procedural and evidentiary rule only applies at trial, where the innocence or guilt of the accused is decided. Implicit in the Constitutional Court's remarks in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 2 SACR 51 (CC) paras 11 78, are that the presumption of innocence does not apply in bail applications: The court, per Kriegler J, drew attention to the fundamental distinction between bail proceedings and proceedings of a trial. The latter are concerned with the question of guilt, while the former are concerned with the question of possible guilt only to the extent that it may have a bearing on where the interests of justice lie with regard to bail. Kriegler J found that the onus on an accused to establish exceptional circumstances that would permit his or her release on bail does not carry the risk of a wrong *conviction* or a conviction despite the existence of a reasonable doubt. Such onus merely places a burden on the accused, in whose knowledge the relevant factors lie, to establish such circumstances "in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses". Schwikkard comments, in relation to *Dlamini*'s decision, that "[a]s a result of the distinction drawn by the court between bail and trial proceedings the constitutional right to be presumed innocent was not in issue" – Schwikkard *Presumption of innocence* 79. See also *S v Mbaleki* 2013 1 SACR 165 (KZD) para 14; *S v Shabangu* 2014 JDR 2171 (GP) para 20, where, pertaining to the question of bail, it was said that: "The issue of guilt or innocence of the appellants will be dealt with by the trial court. Therefore the reliance by the appellants on the appellants' right to be presumed innocent until proven guilty does not have a bearing on the bail application proceedings."

68 Hamilton *The presumption of innocence in Irish criminal law* 8.

69 *Idem* 8–9; Choo *The privilege against self-incrimination and criminal justice* 25; Owusu-Bempah 2013 *The International J of Evidence & Proof* 196; and Summers 2001 *The Juridical R* 42. See also the comments on this aspect in Schwikkard *Presumption of innocence* 29–39 and Schwikkard 1998 *SACJ* 396–406.

70 Stumer *The presumption of innocence* xxxviii–xxxix.

71 Ho in Roberts and Hunter (eds) 266.

72 *Ibid.*

Human Rights ("ECHR"),[73] treats the presumption of innocence "as an equivalent to the general principle of fair trial".[74] Stumer observes that the ECtHR

> "equates the presumption of innocence with a range of fair trial rights: it requires that adverse inferences not be drawn from silence unless the evidence calls for an explanation, that the court be independent and impartial, that the defendant be informed of the charge, and that the defendant be entitled to the privilege against self-incrimination".[75]

On this construal of the presumption of innocence, the presumption is a general, integrated right to a fair trial; it effectively summarises the procedural rights, or signifies the bundle of rights, which an accused should have in order to have a fair trial.

However, Stumer argues, and in our view correctly so, that

> "[b]y conflating each of these fair trial rights with the presumption of innocence, the Strasbourg Court has lost sight of the sense in which *the presumption is a distinct principle requiring the prosecution to prove its case to a sufficient standard of certainty*".[76]

Moreover, equating the presumption of innocence with an overall or general right to a fair trial, is tantamount to conflating the presumption with Packer's concept of "legal guilt" (that is, treating the accused as innocent unless guilt is established in a procedurally regular and fair fashion before a competent court), which, as considered above, has led to definitional ambiguity surrounding the presumption. This is precisely what Ho does when he posits that implicit in the presumption of innocence, as a human right, is that it requires guilt of an accused to be proved in a manner that satisfies certain minimum requirements, or in a particular fashion, namely according to law, which includes fundamental rules of natural justice.[77] Schwikkard makes the observation that

> "[t]he danger of conflating the presumption of innocence and other separately enumerated rights, is that those rights become vulnerable to the argument that in situations where the presumption of innocence is not applicable, or where the burden imposed by the presumption of innocence has been discharged, then those rights no longer apply".[78]

A broad construction of the presumption of innocence conflates the presumption with impartiality of the arbiter. Ho opines in this respect that "'[a]n independent and unbiased tribunal' is not a discrete fair trial standard to be placed alongside the presumption of innocence; it is itself an aspect of the presumption".[79] Trechsel similarly indicates that "[t]he presumption of innocence is, insofar as it requires that the judge maintain an open mind, closely linked to the right to an impartial tribunal".[80] According to Trechsel, "a central element in the protection

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73 "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
74 Stumer *The presumption of innocence* 95. See also Ho in Roberts and Hunter (eds) 268.
75 Stumer *The presumption of innocence* 96 (footnotes omitted).
76 *Ibid* (emphasis added).
77 Ho in Roberts and Hunter (eds) 268.
78 Schwikkard *Presumption of innocence* 37 and Schwikkard 1998 *SACJ* 404.
79 Ho in Roberts and Hunter (eds) 268; see also *idem* 268.
80 Trechsel *Human rights in criminal proceedings* (2006) 164.

of the presumption of innocence lies in ensuring the impartiality of the judge".[81] Summers points out that the ECtHR "has noted the importance of the requirement of judicial impartiality to the presumption of innocence".[82] The conflation of, or correlation between, the presumption of innocence and judicial impartiality has been articulated as follows by the ECtHR:[83]

> "[Article 6(2) of the ECHR] embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused."[84]

In this regard, Trechsel sees no justification for drawing a distinction between the protection afforded by the presumption of innocence under article 6(2) of the ECHR and that of the overall or general right to a fair trial under article 6(1) of the Convention,[85] with the latter provision among others providing that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In a South African context, the right to be tried by an impartial court is guaranteed in sections 34 and 165(2) of the Constitution. Although not expressly included as a sub-right or element of the right to a fair trial under section 35(3) of the Constitution, the constitutional requirement of judicial impartiality is also closely linked to, or "inherent in", the right of an accused person to a fair trial.[86] However, judicial impartiality is a distinct, unspecified element of a fair trial separate from the specified, discrete sub-right of the presumption of innocence, the latter of which merely denotes that the onus is on the prosecution to prove the

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81 *Idem* 174.

82 Summers 2001 *The Juridical R* 55. See also Stumer *The presumption of innocence* 96.

83 *Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360 para 77.

84 See also *Austria v Italy* (1963) 6 Yearbook of ECHR 740 782, where a similar finding was made:

> "This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged."

Also see *X v The Federal Republic of Germany* ECmHR (13 July 1970) application no 4124/69; *Telfner v Austria* (2002) 34 EHRR 7 para 15; *Lavents v Latvia* ECHR (28 November 2002) application no 58442/00 para 125; Trechsel *Human rights in criminal proceedings* 164–165 174; Summers 2001 *The Juridical R* 54–55; Leach *Taking a case to the European Court of Human Rights* (2011) 295–296; Fletcher "The presumption of innocence in the Soviet Union" 1968 *UCLA LR* 1214 1222; Reid *A practitioner's guide to the European Convention on Human Rights* (2004) 156 para IIA-149; Stavros *The guarantees for accused persons under Article 6 of the European Convention on Human Rights: An analysis of the application of the Convention and a comparison with other instruments* (1993) 49–50; and Steytler *Constitutional criminal procedure* 318.

85 Trechsel *Human rights in criminal proceedings* 174.

86 *S v Basson* 2007 1 SACR 566 (CC) paras 23–26; *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 2 SACR 222 (CC) para 35. See also *S v Jaipal* 2005 1 SACR 215 (CC) paras 30–31; *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 48; *S v Le Grange* 2009 1 SACR 125 (SCA) para 21; *S v Van der Sandt* 1997 2 SACR 116 (W) 132c; and Steytler *Constitutional criminal procedure* 266.

guilt of the accused beyond a reasonable doubt.[87] A preconceived notion or idea that an accused is guilty of the crime with which he or she has been charged, would constitute clear impugnable *bias*, which interferes with or materially affects *impartiality*,[88] *not* the presumption of innocence. In the premises, Mokoena's assertion, albeit in the context of bail, that

> "[t]he presumption of innocence, in ordinary criminal proceedings, demands that the presiding officer should, as a rule, empty his or her mind of any prejudices, preconceptions and biases which he or she might harbour regarding the applicant and/or the merits of the matter",[89]

cannot, with respect, be supported. It is the constitutional imperative of judicial impartiality that would require such.

Moreover, an expansive reading of the presumption of innocence encompasses what Trechsel identifies as the "reputation-related" aspect of the presumption.[90] Trechsel observes that this facet of the presumption of innocence

> "is quite far removed from the issue of conviction/acquittal, but aims to protect the image of the person concerned as 'innocent', i.e. not guilty of a specific offence. In other words, it protects the good reputation of the suspect."[91]

Owusu-Bempah notes that this feature of the presumption of innocence

> "should protect the accused from any official insinuation that he is guilty [before the accused is convicted by a competent court] and can be infringed by public figures as well as by judges and courts".[92]

Thus, the presumption of innocence means that "a person who has not been convicted in criminal proceedings must not be treated or referred to by persons acting for the state as guilty of an offence".[93] This aspect is a trite principle and indeed features prominently in jurisprudence of the ECtHR. For instance, in a fairly recent reiteration of the principle, the court stated as follows:[94]

> "[T]he principle of presumption of innocence prohibits public officials from making premature statements about the defendant's guilt and acts as a procedural guarantee to ensure the fairness of the criminal trial itself. However, it is not limited to a procedural safeguard in criminal matters: its scope is broader and requires that no representative of the State should say that a person is guilty of an offence before his guilt has been established by a court . . . The Court has previously held in this context that the presumption of innocence will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before his guilt has been proven according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards that person as guilty . . . The scope of the protection . . . of [the] presumption of innocence therefore extends to all statements made by a public authority regardless of whether they have been pronounced

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87 Schwikkard *Presumption of innocence* 29–39 83–84 and Schwikkard 1998 *SACJ* 396–406.

88 See, eg, the definition of "bias" in Dukelow and Nuse *The dictionary of Canadian law* (1991) and in *Black's law dictionary* (1979). See also, eg, Nugent "Judicial bias" 1994 *Cleveland State LR* 2 fn 4 5.

89 Mokoena *A guide to bail applications* 38–39.

90 Trechsel *Human rights in criminal proceedings* 164.

91 *Ibid.*

92 Owusu-Bempah *Penalising defendant non-cooperation in the criminal process and the implications for English criminal procedure* 97.

93 Trechsel *Human rights in criminal proceedings* 164.

94 *Kemal Coşkun v Turkey* ECHR (28 March 2017) application no 45028/07 paras 41–42.

> in the confines of the criminal trial, in a different public setting or in other parallel judicial proceedings."

Therefore, according to the Strasbourg Court, the presumption of innocence prevents the police, politicians, prosecutors and judicial officers, or any other state official, from making prejudicial public or media statements and comments concerning a suspect or accused person, which indicate or imply his or her guilt or that he or she is responsible for a criminal act, before a competent court reaches such a conclusion.[95] In short, the Strasbourg Court not only regards the presumption of innocence as placing the burden of proving the accused's guilt on the prosecution and allowing the accused the benefit of doubt, but it also extends to protecting the accused against a biased adjudicator and a pronouncement of guilt without a proper hearing on the charges (or "premature expressions, by the trial court or by other public officials, of a defendant's guilt").[96] Article 6(2) of the ECHR also imposes "an obligation to respect the presumption of innocence on courts which are not involved in the determination of criminal charges in the particular case".[97] The ECtHR has held that

> "the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."[98]

The ECtHR has found that statements implying a person's guilt in the course of "related judicial proceedings", while criminal proceedings are pending, may violate the presumption of innocence.[99] The presumption of innocence

> "may be infringed not only in the context of the criminal trial, but also in separate civil, disciplinary or other proceedings that are conducted simultaneously with the criminal proceedings".[100]

The presumption of innocence excludes a finding of guilt outside criminal proceedings, before the competent trial court, in other "parallel judicial proceedings", "irrespective of the procedural safeguards in such parallel proceedings and notwithstanding general considerations of expediency".[101] The ECtHR has even

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95 See, eg, Leach *Taking a case to the European Court of Human Rights* 297–298 and Stavros *The guarantees for accused persons under Article 6 of the European Convention on Human Rights* 49–50 68–69.

96 See, eg, Stavros *The guarantees for accused persons under Article 6 of the European Convention on Human Rights* 49–50; *Allen v The United Kingdom* ECHR (12 July 2013) application no 25424/09 para 93.

97 Stavros *The guarantees for accused persons under Article 6 of the European Convention on Human Rights* 49.

98 *Minelli v Switzerland* (1983) 5 EHRR 554 para 37. According to Steytler *Constitutional criminal procedure* 318, this means that the presumption of innocence in terms of a 6(2) of the ECHR requires that an accused's guilt should be based on evidence adduced in court through a process in which he or she can participate.

99 See, eg, Leach *Taking a case to the European Court of Human Rights* 297.

100 *Kemal Coşkun v Turkey* para 41.

101 *Idem* para 42. See similarly, *Böhmer v Germany* ECHR (3 October 2002) application no 37568/97 para 67. In Reid *A practitioner's guide to the European Convention on Human Rights* 156 para IIA-149 it is noted in this regard that "[t]he presumption of innocence excludes a finding of guilt outside the criminal proceedings before the competent trial

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held that the presumption of innocence may be infringed by premature expressions of a suspect's guilt made within the scope of a judgment against separately prosecuted co-suspects.[102] Here, the ECtHR has emphasised that, if facts in such a judgment have to be introduced relating to the criminal involvement of a suspect not yet tried, "the court should avoid giving more information than necessary for the assessment of the legal responsibility of those persons who are accused in the trial before it".[103] The test is whether inferences of guilt of a person are drawn from criminal proceedings in which he or she has not participated.[104] The question is whether the criminal court's reasoning is worded in such a way as to prejudge the suspect's guilt, who must still be tried, and thus to jeopardise the fair examination of the charges against him or her in separate proceedings.[105]

However, a distinction is drawn between statements reflecting the opinion that the person is guilty and statements that merely describe a "state of suspicion", the latter being unobjectionable when made prior to the final determination by the court.[106] In *Krause v Switzerland*, the European Commission of Human Rights[107] found that authorities may inform the public about "criminal investigations" and that such notice does not offend the presumption of innocence.[108] The Commission held that the right to be presumed innocent is not violated if the authorities publicly "state that a suspicion exists, that people have been arrested, that they have confessed etc".[109] According to the Commission, "[w]hat is excluded, however, is a formal declaration that somebody is guilty".[110]

In terms of European human rights law and in line with the "reputation-related" aspect of the presumption of innocence, the presumption can subsist after an acquittal in criminal proceedings. In this respect, Ferguson points out that the Strasbourg Court has "reiterated that the presumption protects those who have been acquitted of a criminal charge from being treated by public officials and authorities as though they are in fact guilty".[111] The ECtHR has observed in

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court and it is irrelevant to a finding of breach that procedural safeguards apply in parallel proceedings which prejudge the matters at trial."

102 See, eg, *Karaman v Germany* ECHR (27 February 2014) application no 17103/10 para 42. See also *Vulakh v Russia* ECHR (10 January 2012) application no 33468/03; and Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights* (2014) 465.

103 *Karaman v Germany* para 64.

104 *Idem* para 65.

105 *Idem* paras 65 70.

106 See, eg, Reid *A practitioner's guide to the European Convention on Human Rights* 156 para IIA-149.

107 The Commission was the erstwhile, so-called filtering body, which decided on the admissibility of applications to the ECtHR.

108 ECmHR (3 October 1978) application no 7986/77 DR 13 73 76.

109 *Idem* 76. See also *Ensslin, Baader & Raspe v The Federal Republic of Germany* ECmHR (8 July 1978) application nos 7572/76, 7586/76 and 7587/76 DR 14 64 112–113, holding that the authorities are not precluded from making pre-trial statements, not about the guilt of the accused persons, but about an accused person's dangerous character where uncontested information is available to the authorities.

110 *Krause v Switzerland* 76.

111 Ferguson 2016 *Criminal Law Forum* 156, citing *Cleve v Germany* ECHR (15 January 2015) application no 48144/09 paras 35–36:

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this regard that what is at stake "once the criminal proceedings have been concluded is the person's reputation and the way in which that person is perceived by the public".[112]

As alluded to above, the ECtHR conflates the presumption of innocence with the effects of adverse pre-trial publicity.[113] However, Summers notes that to succeed with such a point, it would have to be demonstrated that the publicity had a detrimental effect on the trial, which resulted in the accused's conviction, and that it has proven to be extremely difficult to show such causal link.[114] Summers suggests that the presumption of innocence has too wide a construal, where the ECtHR

> "appears to be extending its viability without the scope of the criminal trial in order to include events leading up to trial including the possibility that adverse media publicity affecting the outcome of the case may contravene the presumption".[115]

For present purposes, the question arises whether, as international law,[116] the jurisprudence of the ECtHR ascribing a very wide meaning or scope to the presumption of innocence should be taken into account when interpreting the right to be presumed innocent under the South African Bill of Rights, as is suggested by Van der Berg in his treatise on the law of bail in South Africa. Incorporating the European understanding of the presumption into South African law would, for instance, comport with Van der Berg's argument that the presumption should be "extensively interpreted and applied so as to embrace all pre-trial procedures or proceedings that are capable of impacting on the fairness of the ultimate trial".[117] Also, it would resonate with the applicant's contention in the *Krion* pre-trial motion for a stay of prosecution, as aforesaid, that the so-called pronouncements of guilt in the parallel civil judgments violated the accused's right to be presumed innocent in the criminal case. It should not be forgotten that a *purposive* approach to interpreting constitutional rights is favoured by the Constitutional Court.[118] In essence, this entails that the meaning of a right or freedom guaranteed by the Constitution must be ascertained through an analysis of the purpose of such a guarantee. In other words, it must be

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> "The Court, thus, considers that once an acquittal has become final – be it an acquittal giving the accused the benefit of the doubt ... – the voicing of any suspicions of guilt, including those expressed in the reasons for the acquittal, is incompatible with the presumption of innocence."

See also, eg, Leach *Taking a case to the European Court of Human Rights* 296.

112 *Cleve v Germany* ECHR para 35.

113 See, eg, Summers 2001 *The Juridical R* 55; Trechsel *Human rights in criminal proceedings* 177–178; Harris, O'Boyle and Warbrick 466; Loucaides "Questions of fair trial under the European Convention on Human Rights" 2003 *Human Rights LR* 39; *Allen v The United Kingdom* 93; *Włoch v Poland* ECHR (30 March 2000) application no 27785/95 20; *Shuvalov v Estonia* ECHR (29 May 2012) application numbers 39820/08 and 14942/09 para 82, citing *Ninn-Hansen v Denmark* (1999) 28 EHRR CD96 111; and *Anguelov v Bulgaria* ECHR (14 December 2004) application no 45963/99 15.

114 Summers 2001 *The Juridical R* 55.

115 *Idem* 57.

116 Steytler *Constitutional criminal procedure* 318–319.

117 Van der Berg *Bail* 21–22.

118 See, eg, *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 51; *S v Williams* 1995 2 SACR 251 (CC) para 51; and Ackermann "Constitutional comparativism in South Africa" 2006 *SALJ* 502.

understood in light of the interests it is meant to protect.[119] A purposive interpretation, then, "tells us that once we have identified the purpose of a right in the Bill of Rights we will be able to determine the scope of the right".[120] Moreover, a right is to be read in the context of the Bill of Rights and the Constitution as a whole; a determining factor being how the right fits into the *scheme* of the Bill of Rights and the Constitution.[121] Therefore, if, as the Constitutional Court has found, the *purpose* of the right to be presumed innocent "*is to minimise the risk that innocent persons may be convicted and imprisoned*", which it does "*by imposing on the prosecution the burden of proving the essential elements of the offence charged beyond a reasonable doubt*"[122] and given the specified association of the presumption of innocence with the accused's right to a fair *trial* in the Constitution and not outside the trial context in relation to other rights in the Bill of Rights, then the very wide meaning ascribed to the presumption by the ECtHR would not apply or be apposite under South African law. From the said underlying purpose or rationale of the presumption of innocence, it is patently clear that the narrow formulation of the presumption, as considered above, applies in South Africa's legal system, and not the expansive notions thereof. In our view, Schwikkard correctly notes that this much is also clear from the *structure* of section 35(3) of the Constitution, which sets out as prerequisites for a fair trial a number of separately enumerated rights, which include the presumption of innocence, the right to remain silent and not to testify during the proceedings, the privilege against self-incrimination and the right to legal representation.[123] Schwikkard argues that "there would be no need to enumerate these rights separately if they were merely components of the presumption of innocence".[124] In addition hereto, one may underscore that the right to be presumed innocent "is specified in relation to the right to a fair trial. It therefore does not apply to proceedings outside the definition of a criminal trial."[125] Implicit in the purpose or rationale of the presumption of innocence of preventing erroneous convictions, in terms whereof the definition of the presumption is to be assessed,[126] is that the presumption is only operative in a criminal trial where the guilt or innocence of the accused has to be determined.[127]

Moreover, in terms of the scheme of the South African Constitution, the right to a good name and reputation is encompassed in or protected by the constitutional right to dignity,[128] and not in or by the presumption of innocence as a fundamental element of a fair trial, insofar as an accused person is concerned.

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119 *R v Big M Drug Mart Ltd* (1985) 18 CCC (3d) 385 (SCC) para 117 (Westlaw), as endorsed in, eg, *S v Zuma* para 15; *S v Makwanyane* 1995 2 SACR 1 (CC) para 9; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* para 51; and by Ackermann 2006 *SALJ* 502–503.

120 Currie and De Waal *The Bill of Rights handbook* (2013) 137 para 6.3(b).

121 Steytler *Constitutional criminal procedure* 8.

122 *S v Manamela (Director-General of Justice intervening)* para 26 (emphasis added).

123 Schwikkard *Presumption of innocence* 38; Schwikkard 1998 *SACJ* 405.

124 *Ibid.*

125 Schwikkard *Presumption of innocence* 84.

126 Morton and Hutchison *The presumption of innocence* 6.

127 Schwikkard *Presumption of innocence* 35; Schwikkard 1998 *SACJ* 402; De Villiers *Problematic aspects of the right to bail under South African law* 238–239 243–244; De Villiers 2002 *De Jure* 196 199; and Steytler *Constitutional criminal procedure* 134 321.

128 *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1216I–1217B and *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27.

Consequently, the law of defamation lies at the intersection of the right to freedom of speech and the right to human dignity.[129] While human dignity is a foundational value of the South African Constitution,[130] which informs the interpretation of other fundamental rights,[131] including the right to be presumed innocent,[132] the presumption of innocence protects the dignity of an accused by imposing on the prosecution the burden of proving the accused's guilt beyond a reasonable doubt, thereby minimising the risk of an erroneous conviction or reducing to an acceptable level the risk of error in the court's overall assessment of evidence tendered in the course of the trial.[133] In *S v Manamela (Director-General of Justice intervening)*, the Constitutional Court held in this respect that

> "[t]he presumption of innocence protects the fundamental liberty and human dignity of every person accused of criminal conduct. It ensures that until the State proves an accused's guilt beyond a reasonable doubt, he or she cannot be convicted".[134]

Perhaps Healy sums it up best where he opines that a broad notion of the presumption of innocence, which sees the presumption as a reason of policy or principle that is indeterminate in scope and could be invoked as a reason for any decision or rule that seeks to control the jeopardy of the accused by minimising the risks of prejudice, unfairness, error or miscarriage of justice,

> "would transform the presumption of innocence into a vaporous euphemism for fairness in the administration of criminal justice, and as such it would lose any practical utility or coherence".[135]

As such, the presumption would have an "amorphous meaning".[136]

## 4 MEANING, SCOPE, AND APPLICATION OF THE PRESUMPTION OF INNOCENCE IN SOUTH AFRICAN LAW

What may be gleaned from the above considerations, is that under South African law, both constitutionally and in terms of the common law, the presumption of innocence has a narrow construction. Simply put, the presumption is confined to procedural and evidential issues in a criminal trial, burdening the prosecution with the onus of proving the guilt of the accused beyond a reasonable doubt.[137]

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129 Currie and De Waal *The Bill of Rights handbook* 256 para 10.3.

130 See s 1 of the Constitution.

131 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35. See also *S v Makwanyane* para 144.

132 *S v Dzukuda; S v Tshilo* 2000 2 SACR 443 (CC) para 11; *S v Bogaards* 2013 1 SACR 1 (CC) para 51; and *Bothma v Els* 2010 1 SACR 184 (CC) para 33.

133 *S v Manamela (Director-General of Justice intervening)* paras 26 40.

134 *Idem* para 40.

135 Healy "Proof and policy: No golden threads" 1987 *Criminal LR* 365.

136 *Idem* 364.

137 Schwikkard "A constitutional perspective on statutory presumptions" in Schwikkard and Van der Merwe (eds) *Principles of evidence* (2016) 554 para 29 2; Schwikkard *Presumption of innocence* 29–39; Schwikkard 1998 *SACJ* 396–408; Schwikkard "Arrested, detained and accused persons" in Currie and De Waal (eds) *The Bill of Rights handbook* (2013) 754–755 paras 32.3(a)(i)–(ii); Lansdown *et al Gardiner and Lansdown: South African criminal law and procedure: Vol 1: General principles and procedure* (1957) 459–460; De Villiers *Problematic aspects of the right to bail under South African law* 237–244; De Villiers 2002 *De Jure* 195–199; Steytler *Constitutional criminal procedure* 134 321; *R v Benjamin* 1883 EDC 337 338; *R v Du Plessis* 1924 TPD 103 121–124; *R v Ndhlovu* 1945 AD 369 386 and *S v Boesak* 2001 1 SACR 1 (CC) para 16.

While the South African case-law shows that the presumption of innocence is used to describe two different phenomena, namely a rule regulating the location and standard of the burden of proof and a policy directive that the subject of a criminal investigation must be treated as innocent, at all stages of the criminal process, irrespective of the probable outcome of the trial, "*it is clear that it is only the former which has been given constitutional protection*".[138] The said policy directive should be seen as a corollary of the presumption.[139] The presumption of innocence under South African law functions in a specific sense within the criminal process and not in a multitudinous of ways: "[T]he scope of the right to be presumed innocent has been restricted to the criminal trial"; the presumption is specified in relation to a fair trial.[140] Also, the presumption of innocence has "an exclusive identity" and is not to be conflated with other separate rights necessary to uphold the constitutional right to a fair trial (even those rights with which the presumption is closely associated or with which it coheres). Further, its normative value lies in the rule regulating the burden and standard of proof.[141] Such a conception of the presumption of innocence best accords with the trite underlying rationale of the presumption, which is to reduce the risk of an erroneous conviction; indeed, the rationale for the presumption "also flows from the reasonable doubt standard".[142]

Importantly for present purposes, it needs to be stressed that the presumption of innocence is infringed "whenever there is the possibility of a conviction despite the existence of a reasonable doubt"; this is particularly so in the case of reverse onus provisions.[143] Indeed, "[t]he arena in which the presumption of innocence has found greatest application is in that of reverse onus provisions".[144] If a provision "relieves" the prosecution of its burden of proving all the elements

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138 Schwikkard "Arrested, detained and accused persons" in Cheadle *et al South African constitutional law: The Bill of Rights* (2018) 29–33 (emphasis added). See also De Villiers *Problematic aspects of the right to bail under South African law* 239 244; De Villiers 2002 *De Jure* 196 199. However, there does appear to be a lack of uniformity in South African jurisprudence as to whether the presumption of innocence represents *both* the burden of proof and the reasonable doubt standard (see, eg, *S v Boesak* para 16; *S v Zuma* para 25), whether it is merely a tactical rule aimed at the proper allocation of the burden of proof (ie "merely establishes the process by which guilt is to be determined"; see Van der Merwe 1997 *SACJ* 268; Dlamini 1998 *SACJ* 425; Steytler *Constitutional criminal procedure* 321; and Zeffertt *Hoffmann and Zeffertt's The South African law of evidence* (1988) 513) or whether it is a rule regulating the standard of proof (see Schwikkard op cit 29–33 and Schwikkard "Presumption of innocence" 2000 *SACJ* 240).

139 Schwikkard *Presumption of innocence* 36 and Schwikkard 1998 *SACJ* 403.

140 Schwikkard "A constitutional revolution in South African criminal procedure?" in Roberts and Hunter (eds) 31 and Schwikkard *Presumption of innocence* 83–84.

141 Schwikkard *Presumption of innocence* 37–39 and Schwikkard 1998 *SACJ* 404–406.

142 *S v Manamela (Director-General of Justice intervening)* para 26; Schwikkard *Presumption of innocence* 16; Schwikkard 1998 *SACJ* 406–408; and Schwikkard in Cheadle *et al* 29-32–29-33.

143 Schwikkard "A constitutional perspective on statutory presumptions" in *Principles of evidence* 554 para 29 2 1 ff; *S v Zuma* para 25; *S v Baloyi* para 15; *S v Singo* paras 29 38–39.

144 Schwikkard "Arrested, detained and accused persons" in *The Bill of Rights handbook* 755 para 32.3(a)(ii).

of a crime, the presumption of innocence will be infringed.[145] Schwikkard notes that "[t]he *sole determinant* of constitutional compliance [with the presumption of innocence] *is whether there is the possibility of a conviction despite the existence of a reasonable doubt*".[146] Such, according to the Constitutional Court, is the "*nub*" of the protection provided by the presumption of innocence.[147]

In the premises, the suggestion by Van Rooyen, writing from a South African perspective, that the presumption of innocence may be violated by adverse pre-trial publicity cannot, with respect, be supported.[148] It is unclear how the right to be presumed innocent would be applied or enforced in the context of negative pre-trial publicity. If what is meant is that an accused is to be treated or regarded as innocent by the media and the public before conviction,[149] it does not fall within the protection or purview of the constitutional and common-law construal of the presumption of innocence. It is submitted that, if the media "convicts" an accused before he or she is found guilty in a court of law, it may fall foul of or offend the law of defamation or the *sub judice* rule, but not the presumption of innocence. The presumption of innocence does not bind society.[150] It constitutes a procedural and an evidential rule at trial.[151]

The salient import of the presumption of innocence is that it requires the State to establish the guilt of the accused and not the accused to establish his or her innocence perhaps by having to disprove an element of the offence charged with on a balance of probabilities.[152] Moreover, before the accused can be placed on his or her defence, the State is required to make out a case against the accused *through the production of admissible evidence.* In *S v Lavhengwa*, it was affirmed that "[t]he presumption of innocence entails at least that a criminal trial should conform to the following rules":[153]

> "1. The State has the duty to begin. It has to make out a case against the accused before he needs to respond, whether by testifying, adducing evidence or otherwise.
>
> 2. The State bears the burden of proof. It is required finally to satisfy the court of the guilt of the accused in order to secure a conviction.
>
> 3. The required standard is proof beyond reasonable doubt."[154]

Also, an accused is entitled to be discharged at the close of the State's case, if the prosecution fails to adduce evidence on which a reasonable person may

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145 Schwikkard 2000 *SACJ* 240.

146 Schwikkard in in Roberts and Hunter (eds) 31 (emphasis added).

147 *S v Coetzee* 1997 1 SACR 379 (CC) para 189 (emphasis added).

148 See Van Rooyen "Challenges to the *sub judice* rule in South Africa" 2014 *HTS Teologiese Studies/Theological Studies* 1 9.

149 Cf *Sanderson v Attorney-General, Eastern Cape* 1998 1 SACR 227 (CC) paras 23–24.

150 De Vos "No, the Constitution does not guarantee a right to be presumed innocent by everyone until proven guilty" 2 November 2017 Constitutionally Speaking, available at https://bit.ly/2VwJWHd (accessed on 9 February 2020).

151 Steytler *Constitutional criminal procedure* 134; De Villiers *Problematic aspects of the right to bail under South African law* 239; and De Villiers 2002 *De Jure* 196.

152 See, eg, *S v Singo* paras 26 38–39.

153 1996 2 SACR 453 (W) 485c–e.

154 See also, eg, Schwikkard and Van der Merwe "The standard and burden of proof and evidential duties in criminal trials" in Schwikkard and Van der Merwe (eds) 602–603 para 31 2. Cf *R v Dubois* (1986) 22 CCC (3d) 513 (SCC) paras 41–42 (Westlaw).

convict.[155] It is in the circumstances evident that adverse pre-trial publicity would have no impact on the effect of the presumption of innocence.

## 5 MANTRA: "I'M INNOCENT UNTIL PROVEN GUILTY"

> "In our country and throughout the British world, as far as I know, and in the jurisprudence of many civilised countries, a person is regarded as innocent until he is convicted."[156]

In the Supreme Court of Canada decision of *R v Oakes*, it was held that the presumption of innocence "ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she *is* innocent".[157] This is perhaps an unfortunate rendering of the presumption of innocence, in that it seems to imply or suggest that, unless an accused is found guilty, he or she is *factually* or *actually* innocent (or materially innocent). However, the trite rule is that "we *presume* the accused innocent, and deliver an acquittal so long as guilt is not established beyond reasonable doubt".[158] This principle is captured best in the following maxim: "*quivis praesumitur bonus donec probetur contrarium*" – "everyone is *presumed* innocent until the contrary is proved".[159] That we *presume* the accused innocent, is reinforced by the notion that an acquittal does not mean that the accused is factually innocent, but merely demonstrates a lack of proof beyond a reasonable doubt. A trial court does not find an accused factually innocent of a crime, but finds an accused *not guilty* because the State failed to discharge its onus of proving its case against the accused beyond a reasonable doubt – the State failed to meet the standard or quantum of proof necessary for a conviction.[160] Although some commentators do not regard the presumption of innocence as a presumption in the usual sense, but merely as a statement of the prosecution's burden of proof,[161] the court in *S v Strauss* observed that the presumption of innocence remains a presumption, which may be rebutted by the State with evidence or proof to the standard of beyond reasonable doubt.[162] Schwikkard similarly observes that: "The presumption of innocence as a rule regulating the burden of proof is generally only rebutted once the state has discharged its burden of proving guilt beyond a reasonable doubt".[163] Therefore, a person is not simply innocent until the contrary is proven, but is *presumed* innocent until guilt is established beyond a reasonable doubt. Consequently, the mantra often expressed by suspects that "I'm innocent until proven guilty", is a misstatement of the presumption of innocence and spurious at best.

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155 S 174 of the Criminal Procedure Act 51 of 1977; *S v Lubaxa* 2001 2 SACR 703 (SCA).

156 Crwys-Williams *In the words of Nelson Mandela* (2013 – Reprinted edition) 67–68.

157 Para 32 (emphasis added).

158 Ho in Roberts and Hunter (eds) 279–280 (emphasis added).

159 Hiemstra and Gonin *Trilingual legal dictionary* (1992, reprint 2016) 270 (emphasis added).

160 See, eg, Laudan 2005 *Legal Theory* 343–350; *United States v Isom* 886 F2d 736 738 (1989); and *United States v Lawing* 703 F3d 229 241 paras 26 27 (2012).

161 See, eg, Rothblatt *Handbook of evidence for criminal trials* (1965) 177; Van der Merwe 1997 *SACJ* 268; and Zeffertt *The South African law of evidence* 513.

162 1995 5 BCLR 623 (O) 628I.

163 Schwikkard *Presumption of innocence* 34 and Schwikkard 1998 *SACJ* 401.

## 6 CONCLUSION

It has been seen that the presumption of innocence under South African law means that the onus rests on the State to prove the guilt of the accused beyond a reasonable doubt and for this reason the presumption is not affected by adverse pre-trial publicity. The sole determinant of constitutional compliance with the presumption of innocence is whether there is the possibility of a conviction despite the existence of a reasonable doubt, particularly in relation to reverse onus provisions and not in relation to pre-trial publicity. The presumption of innocence merely constitutes a procedural and an evidential rule in a criminal trial. It does not bind society or the media. The presumption of innocence under South African law is not an amorphous concept or a vaporous euphemism for general procedural fairness, does not encompass broad notions or aspects (as for instance espoused by the ECtHR) and is not to be conflated with other rights, safeguards, judicial impartiality and the right to a good name and reputation (the latter of which is guaranteed by the right to dignity). Further, the presumption is not to be equated with a general right to a fair trial, which underpins other rights, but which is a discrete (separately specified) sub-right or element of a fair trial. The presumption of innocence remains a presumption and is not correctly reflected in the commonly heard phrase: "I'm innocent until proven guilty".