An Interpretation and Application of Section 73A(5) of the Competition Act 89 of 1998, South Africa

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Abstract: The object of this article is to argue that section 73A(5) of the Competition Act of 1998 is constitutional. Some commentators have argued that this provision creates reverse onus offence and is therefore unconstitutional. The article argues against this view, necessarily because section 73A(5) does not implicate any of the definitional elements of the offence created by section 73A, which relates to the malfeasance committed by the director of the firm in causing the firm to engage in prohibited practice, and it is for this malfeasance that the director is criminally charged. The fact that the firm had been found guilty of involvement in prohibited practice in different proceedings would not per se lead to the director's conviction at the criminal trial. The state would still be required to prove beyond reasonable doubt that the director was involved in causing the firm to engage in prohibited practice. It is asserted that if section 73A(5) creates a reverse onus, such does not relate to the elements of the offence with which the director has been charged but such onus is evidentiary in nature. Furthermore, if this provision creates a reverse onus offence and limits the director's right to be presumed innocent, such limitation is constitutional.

Keywords: Presumption of innocence; reverse onus; burden of proof; beyond reasonable doubt, evidentiary burden

JEL Classification: K10

1. Introduction

In light of the unmitigated involvement of firms in cartel activities, parliament decided to pass legislation criminalising conduct of the directors personally involved in causing the firms to engage in cartel activities. This is in addition to administrative fines imposed on the firms. However, during the parliamentary hearings leading to the promulgation of the Competition Amendment Act 1 of 2009 a number of commentators such as Briscoe, (2009, p. 9) argued that section 73A(5)

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of this Act is unconstitutional in that it creates a 'reverse onus' offence against an accused. This Act has since been inserted in the Competition Act 89 of 1998 (the Competition Act). Although it has been signed into law by the President and some of its provisions have come into operation, section 73A(5) is not as yet operational. Despite the President returning the Bill to Parliament before signing it for reconsideration owing to concerns raised regarding the reverse onus issue as it is the President's prerogative in terms of the Constitution of the Republic of South Africa, 1996 to do so, Parliament has since passed this provision without alteration whatsoever as Parliament is not convinced that this provision is unconstitutional (Boniwell & Ostrovsky, 2009, p. 19). Briscoe (2009, p. 9) has argued that section 73A(5) violates an accused's right to be presumed innocent. Section 73A(5) provides that:

"*In any court proceedings against a person in terms of this section, an acknowledgement in a consent order contemplated in section 49D by the firm or a finding by the Competition Tribunal or the Competition Appeal Court that the firm has engaged in a prohibited practice in terms of section 4(1)(b, is prima facie proof of the fact that the firm engaged in that conduct" (for the sake of brevity, in this note reference to the "Competition Tribunal" (the Tribunal) must be read to include "or the Competition Appeal Court"*).

This article seeks to critically analyse the impact section 73A(5) would have on an accused right to a fair trial, in particular the right to be presumed innocent. It is organised into six parts: (ii) rationale for and methodology of the study; (iii) an overview of the definition of the concept of reverse onus; (iv) the analysis of whether section 73A(5) creates a reverse onus offence; (v) and whether the provision limits the right to be presumed innocent, and if so whether the limitation passes the constitutional muster.

2. Rationale and Methodology

The objective of this contribution is to analyse the constitutionality of section 73A(5) of the Competition Act, to ascertain whether it creates a reverse onus offence. In principle, the purpose of section 73A is to hold directors of firms that have been found to have engaged in prohibited practices personally criminally liable. This is geared towards deterring future cases. Before the introduction of section 73A, liability for engaging in prohibited practice stopped at the firm's door step in a form of administrative fine. Section 73A(5) in particular, is meant to avoid

the leading of evidence with regard to the guilt of the firm at the administrative proceedings in the director's criminal case. In other words, the criminal court has to admit as a proven fact that the firm is guilty of prohibited practice. It is argued by some that this creates a reverse onus offence. Reverse onus offences offends against the constitutionally protected right to be presumed innocent and the right to remain silent among others.

The ultimate goal of this article is to illustrate that section 73A(5) has been carefully crafted as to not impinge on any of the rights of the accused person. The worst that the provision does is to allow a criminal court to admit as a proven fact the proceedings at the Tribunal regarding the guilt of the firm. This has no potential of reflecting on the accused person as having being involved in the causing of the firm to engage in prohibited practice. The accused person is not criminally charged for the misdeeds of the firm per se but for the role that s/he personally played in causing the firm to engage in prohibited practice. The method adopted in this paper is qualitative. Legislation, case law and other secondary sources such as books and journal articles have been used as instruments of analysis.

3. An Overview and Definition of Reverse Onus

Section 35 of the Constitution guarantees the right of an accused to be presumed innocent until proven otherwise. The effect of this fundamental principle is that the prosecution is bound to prove beyond a reasonable doubt all the essential elements of the offence in question. Failure by the prosecution to prove beyond a reasonable doubt any of the elements of the offence in question an accused must be acquitted. There is no procedural duty on an accused to rebut the allegations of that accused's guilt or even of establishing a defence (Joubert, 2009, p. 18). The presumption of innocence doctrine is embodied in the notion that it is the duty of the state to prove each and every element of a crime with which an accused is charged beyond a reasonable doubt. The case of *S v Manamela* 2000 (3) SA 1 (CC) para 26, serves the purpose of illustrating that this doctrine is a safeguard against the risk of innocent persons being wrongfully convicted. The rationale for burdening the state with the duty of proving the guilt of an accused beyond a reasonable doubt is founded in the understanding that it is inexcusable to convict the innocent than it would be to let the guilty go free (Schwikkard, 1999, p. 1). In *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) and *S v Zuma* 1995 (2) SA 642 (CC), the Constitutional Court has held that as a general rule reverse onus presumptions lead

to an accused being convicted despite the existence of a reasonable doubt as to that accused's guilt and, therefore, unreasonably infringes an accused right to be presumed innocent.

In *S v Zuma* (supra para 41), the Constitutional Court held that not all offences based on presumptions amount to an unreasonable limitation of the right to be presumed innocent. However, such offences have to meet the strict constitutional prescription that the state bears the onus of proving beyond a reasonable doubt all elements of the offence in question. This was emphasized in *Osman v Attorney-General for the Transvaal* 1998 (4) SA 1224 (CC) para 13. According to Dlamini (2002, p. 7), South African law presupposes that the usual effect of a presumption is either to assist a party in discharging an onus or to place an onus or duty to adduce evidence on his opponent. Clearly, therefore, the application of a presumption affects the "incidence of the onus" or creates "an artificial duty" to adduce evidence on certain issues.

In other words, the duty to prove a fact in the proceedings is removed from a party which (ordinarily) ought to bear it to another (Dlamini, 2001, p. 556). Presumptions have been found to defy any precise definition and, as a result, are classified according to the effect they may have on the incidence of the onus of proof (Schwikkard, 2009, pp. 498-502). Zeffertt and Paizes (2009, p. 181) also share this view. They intimate that "[t]he adoption of different categories [of presumptions], could, perhaps, have been beneficial – for instance, to emphasise that a rebuttable presumption of law may affect either the onus in its true sense or the evidentiary burden." By "onus in its true sense" these authors simply refer to a situation in which "[o]nce a certain set of facts is established, an element of the offence is presumed to have been proved and the accused is required to produce evidence on a preponderance of probabilities to rebut that presumption". This was emphasized in *Scagell v Attorney-General of Western Cape* 1997 (2) SA 368 (CC) para 7 and *Bhulwana* (supra, para 7).

In other words, the prosecution is relieved of the onus of proving the presumed fact. Such a presumption operates as conclusive proof of the presumed fact against an accused unless an accused produces evidence sufficient to rebut the presumption on a balance of probabilities. A conviction of an accused may, therefore, hinge on the presumed fact. This may lead to a conviction of an accused even where the evidence presented before court is insufficient to justify a conviction. "Evidentiary burden" on the other hand calls for an accused to adduce sufficient evidence to disprove a prima facie case established by the state against that accused (*see*

Scaggell, supra, paras 11-12; *Zuma,* supra, para 41). It does not automatically follow that an accused who fails to rebut a presumption that establishes an evidentiary burden would be convicted – the prosecution will still need to prove the presumed fact beyond a reasonable doubt (*Bhulwana* supra, para 7). It was in this context that the Constitutional Court cautioned against the possibility of an accused being convicted despite the existence of a reasonable doubt as to that accused's guilt, due to a reverse onus presumption which relieves the state of part of its duty. That would be a breach of the right to be presumed innocent (*Bhulwana* supra, para 15).

The criteria upon which the presumption of innocence are premised can be summed up as follows: (a) The state bears the onus of proof; (b) such proof must be beyond a reasonable doubt; (c) an accused remains legally innocent unless and until the state has discharged its onus (Schwikkard, 1998, pp. 396-397). It is therefore against these criteria that the analysis of whether or not s 73A(5) breaches the right to be presumed innocent must be undertaken.

4. Does Section 73A(5) Create a Reverse Onus Offence?

The unconstitutionality argument of section 73A(5) stems from the mischaracterisation of this provision as setting out (at least one of) the definitional elements of this offence. This view seem justified when section 73A(5) is read with section 75A(3). In terms of the latter section it is a prerequisite that the firm has to be found guilty by the Tribunal of involvement in a prohibited practice for an accused to be criminally prosecuted. This section provides that: *'Subject to subsection (4), a person may be prosecuted for an offence in terms of this section only if–*

a) The relevant firm has acknowledged, in a consent order contemplated in section 49D, that it engaged in a prohibited practice in terms of section 4(1)(b); or

b) The Competition Tribunal or the Competition Appeal Court has made a finding that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b).'

This section seems to suggest that an accused is prosecuted for the malfeasance of the firm. However, a careful reading of the entire section 73A indicates otherwise. The conviction of the firm for involvement in a prohibited practice is not the basis for the prosecution of an accused. Rather, an accused is prosecuted for that accused own individual indiscretion. It is noteworthy that section 73A does not create a

strict or vicarious liability offence. A strict liability offence implies that the prosecution need not prove the mental guilt of an accused. If it could be proven that an offence had been committed by an accused, despite an accused culpability, that accused would be convicted for the offence (Snyman, 2008, p. 245). A vicarious liability offence on the other hand refers to an offence where an accused is liable for a crime despite the fact that that accused did not commit it but the offence was committed by someone who has a legal relationship with an accused. In this context the liability of an accused would emanate from the relationship an accused has with the actual wrongdoer. Like in the strict liability offence, culpability is not a requirement for a conviction (Snyman, 2008, p. 250).

The presumption of the firm's involvement in a prohibited practice does not and will not, without more, be sufficient to lead to an accused's conviction. The prosecution is still burdened with the duty of proving that an accused had the requisite mens rea and was actually involved in the firm's commission of a prohibited practice. This is made clear by section 73A(1) which provides that, in order to secure a conviction of an accused, the prosecution must prove beyond a reasonable doubt that (a) *Whilst* an accused was a director of the firm or was engaged in a position with managerial authority; (b) *s/he has caused the firm to engage or has knowingly acquiesced in the firm engaging in anti-competitive behaviour* (Kelly, 2010, p. 331). For the sake of convenience, in this note "has caused the firm to engage..." must be read to include "has knowingly acquiesced in the firm engaging...". These are what constitute the definitional elements of the section 73A offence. Snyman (2008, p. 30) describes the definitional elements of an offence as '[t]he concise description of the *type of conduct proscribed* by the law and the *circumstances in which it must take place* in order to constitute a crime. Neither does section 73A(3) nor (5) (read singly or together) describe the conduct or the circumstance which are proscribed by s 73A. The criminalised conduct and the circumstances under which such conduct would have to take place are spelled out in section 73A(1).

It is trite that the yardstick for measuring the constitutionality of a presumption is whether such a presumption operates against an accused on a definitional element of the offence in issue. In other words, where a presumption lessens the standard which the prosecution is generally expected to meet as regard a definitional element of an offence, such a presumption is unconstitutional. In *S v Meaker* 1998 (2) SACR 76 (W) p. 84, Cameron, J., writing in a different context, observed that where the purpose of a presumption is "not to lock the accused into the crime by

associating him or her, through a fact presumed with the commission of the offence" then such presumption is not unconstitutional. The only effect that section 73A(5) would have in the case against an accused is that the prosecution is relieved of a duty to prove that the firm was engaged in a prohibited practice and to forestall an accused from raising as a defence that the firm was not involved in a prohibited practice. However, the prosecution will still have to prove beyond a reasonable doubt the definitional elements of the offence in question (Kelly, 2010, p. 331). This provision was carefully crafted to ensure that no accused could be convicted despite the existence of a reasonable doubt as to that accused's guilt, despite the firm having being engaged in prohibited practice. Why border charge the director for having caused the firm to engage in anti-competitive behaviour when the firm was actually never engaged in a prohibited practice in the first place? That would be ludicrous to say the least. It would be disingenuous to maintain that once the prosecution has been relieved of the duty to prove that the firm was engaged in a prohibited practice that would automatically result in the conviction of an accused despite a court entertaining a reasonable doubt as to whether that accused caused the firm to engage in such a practice.

It should be borne in mind that the proceedings against the firm in terms of the Competition Act are administrative in nature and the standard of proof is one on a balance of probabilities compared to the stricter criminal standard of proof beyond a reasonable doubt with which the accused case would have to be adjudged (Kelly, 2010, p. 328). It would be unfair that a criminal court would accept a record of proceedings which have been proven on a lesser standard as evidence against an accused in the latter's criminal trial for breaching section 73A(1). This is not the case here. None of the elements envisaged by section 73A(1) is implicated by section 73A(5). What section 73A(5) does is to direct a criminal court to accept an acknowledgement by the firm or the proceedings from the Tribunal as prima facie proof *against the firm* that the *firm itself* was engaged in a prohibited practice – not the accused. The Constitutional Court has held that '[a]s a general rule in our law, the formulation "shall be *prima facie* evidence" does not impose the burden of proof on an accused, but merely gives rise to an evidential burden' (*Scagell*, supra, para 11). However, such prima facie proof is not without consequences. Failure to rebut this prima facie proof with credible evidence becomes conclusive proof of the issue at hand as propounded in *S v Tandwa* 2008 (1) SACR 613 (SCA) para 53. It is illuminating that the prejudicial consequences, if any, which might flow from the 'presumption' in this case would not operate against the accused.

The proponents for the unconstitutionality of section 73A(5) will do well to heed O'Regan J counsel in *S v Coetzee* 1997 (3) SA 527 (CC) para 162, that; "*The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the actus reus and mens rea). ... [T]he requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart*."

All these factors (unlawful conduct and blameworthiness) have to be proven by the state beyond a reasonable doubt before an accused could be convicted. The proof of the firm's engagement in prohibited practice falls short to satisfy this standard. It warrants mention that the unlawful and blameworthy conduct for which an accused is charged is that of the accused and not the firm. Section 73A does not automatically ascribe the firm's malfeasance to an accused. According to Boniwell and Ostrvsky (2009, p. 20), "[t]he presumption created by this provision relates to the conduct of the company without a corresponding inference as to any element of guilt on the part of the director".

At best for those who argue that section 73A(5) creates a reverse onus that onus is evidentiary. Even this assertion rests on shaky grounds. If regard is had to the effect of this provision on the case of an accused, it becomes patently clear that the provision does not even create an evidentiary burden as against that accused. Indeed, in the absence of evidence to the contrary (that the firm has engaged in prohibited activity, which will, in all likelihood, never be forthcoming) the court will accept as conclusive proof that the firm to the exclusion of an accused was involved in a prohibited practice. This is an issue that does not implicate an accused.

Section 73A(5) does not, neither expressly nor by reasonable implication, compel an accused to offer any explanation with regard to the firm's conviction with the result of a conviction should there be failure to do so. This ineluctably leads to the conclusion that the proponents of the unconstitutionality argument disregard the gravamen of section 73A(5). The mischief of section 73A(5) is to eliminate the possibility of an accused raising flimsy defences (or arguments) against irrefutable facts already proven at the administrative proceedings (Kelly op cit at 330-31). The target of this provision, therefore, is not the directors of the firm that has been involved in a prohibited practice, but those directors who have played an active part in the firm's engagement in anti-competitive behaviour (see *Coetzee,* supra, para 59). The offence is not dependent on one being a director of the 'convicted'

firm but, in addition, on one causing the convicted firm to engage in anti-competitive behaviour *(Coetzee* (supra, para 203).

In *Bhulwana,* (supra, para 8), the Constitutional Court stated that the effect of a reverse onus provision is that an accused may be convicted despite the existence of a reasonable doubt of that accused's guilt. Section 73A(5) does not lend itself to this criterion. Even if, as it would mostly happen when criminal proceedings are initiated in terms of section 73A, the accused does not dispute the admittance of the proceedings from the administrative tribunal that the firm was engaged in a prohibited activity as prima facie proof *against the firm,* the accused runs no risk of conviction at all. Put differently, section 73A(5) does not engender a position where an accused could be convicted despite the existence of a reasonable doubt as to that accused's guilt. Section 73A(5) does not allocate risk in any form to an accused should that accused fail (or rather elect not) to persuade the court that the presumed fact (engagement of the firm in a prohibited practice) did not take place (Schwikkard,p. 18).

On the contrary section 73A(1) requires that the prosecution prove beyond a reasonable doubt that whilst the director of the firm an accused caused the firm to engage in anti-competitive behaviour. Section 73A(5) does not assist the state in the presentation of its case against an accused (Dlamini, 2001, p. 545). The rule created by section 73A(5) does not directly relate to the material elements of the offence with which an accused is charged. Even at the most benign of interpretations of this provision in favour of the prosecution the provision fails to, at the very least, establish the evidentiary onus that needs to be rebutted by an accused (Schwikkard op cit at 19). It is hard to comprehend how a rule created exclusively against a third person who is not even party to the proceedings and not implicating the party engaged in such proceedings could be said to create a reverse onus against the latter. Section 73A(5) fails the reverse onus test articulated by the Constitutional Court in *Bhulwana* (supra, paras 8 and 13): Given the evidence before court would the court be in the position to convict but for the presumption against an accused. That is not the effect of section 73A(5). To argue otherwise would be to conflate issues and tarring the accused and the firm with the same brush. This clearly goes against both the text and the context of this provision.

5. Would Section 73A(5) Pass the Limitation Test?

Even if s 73A(5) impinges on the accused right to be presumed innocent, this provision is constitutional for another reason. Section 36(1) of the Constitution provides for the limitation of the rights enshrined in the Bill of Rights in the following terms:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including,

a) the nature of the right;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relation between the limitation and its purpose; and

e) less restrictive means to achieve the purpose.'

This provision indicates that no right in the Bill of Rights is absolute. However, this does not imply that rights could be limited at the whims of the powers that be. Section 36 of the Constitution provides for the "justifiable infringement" of rights. In other words, rights must be limited for cogent and compelling reasons which are constitutionally sound (Currie & de Waal, 2005, p. 164).

The gambit in the limitation analysis is the allegation that a fundamental right of an applicant has been impinged by "law of general application". Indisputably, section 73A(5) satisfies the requirement of law of general application. Once this has been satisfied the state bears a duty to prove that the infringement is in accordance with the values and ethos entrenched in the Constitution – that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom..." In order to determine whether a limitation of a right passes the constitutional muster the drafters of the Constitution delineated five factors that have to be taken into account in the limitation analysis. It is noteworthy however that this list is not numerus clausus. In other words, they are a guide of what the courts have to consider in the limitation exercise. The constitutional drafters envisioned that, in the limitation analysis, a delicate balance would have to be struck between the "conflicting rights and interests of the individuals" on the one hand and the "broader social costs and benefits" on the

other (Woolman & Botha, 2010, pp. 67–70). Put in a different way, "[t]his enquiry involves a weighing up of competing values and ultimately an assessment based on proportionality" (*Coetzee* (supra) para 11).

Although the Constitutional Court has, at times, considered these factors sequentially, sight should not be lost that of importance in the limitation analysis is the overarching notion that the limitation must promote the values and ethos underlying the constitutional edifice and these factors are therefore not individually definitive. This was emphasized in *Beinash v Ernst and Young* 1999 (2) SA 116 (CC) paras 16-21. According to Currie and de Waal (2005, p. 178), these factors are not 'a checklist of requirements'. Thus, a court seized with the limitation analysis need not necessarily scrutinise each and every factor listed in section 36 of the Constitution to come to a conclusion that a right has been reasonably and justifiably limited. This was highlighted in *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (6) SA 1 (CC) para 36-40.

The importance of the right to be presumed innocent cannot be gainsaid. However, like all other rights in the Constitution there comes a moment when it has to yield to the benefit of the broader constitutional scheme. The purpose sought to be fulfilled by this provision is an important one. Failure to admit, at the criminal proceedings of an accused, the record of proceedings that the firm was found guilty of involvement in malfeasance would be so unreasonable as to be ridiculous (Davids, 1968, p. 74). It would serve to undermine the administration of justice. Why border rehash evidence against the firm already given at the Tribunal's hearing when its impact on the trial of an accused is inconsequential.

The balancing act required by section 36 of the Constitution of necessity calls for an analysis of "why" and "how" a right has been limited. These are the two most important questions in the limitation test. First, the "why" must pass the constitutional muster before the "how" could be considered. It is only when both these questions have passed the constitutional hurdle could a right be said to have been reasonably and justifiably limited. It is therefore legitimate for a party claiming the limitation of a right to state that the benefits that derive from the limitation would be enormous (the "why') and that the right would be insignificantly infringed (the "how"). The limitation of the right to be presumed innocent designed by section 73A(5) fits snugly with the purpose for which it was designed to achieve. Moreover, this right has not been limited more than is necessary. In other words, the means justify the ends (see *Beinash*, supra, paras 19-20).

Furthermore, the operation of this provision does not heighten for a moment the risk of an innocent accused being convicted. The court would still have to satisfy itself that an accused is guilty beyond a reasonable doubt for it to convict. That the firm has been convicted is not conclusive of the issues before the criminal court. The effect of section 73A(5) is not to procure a conviction or evidence against an accused, but rather to prove that the firm had been convicted at administrative proceedings. A fact that, as already stated, is unlikely to be disputed at the criminal proceedings. This fact alone is sufficient to render the limitation of the right to be presumed innocent in this case constitutional. The apposite test for a justifiable limitation of rights has been succinctly set out by Currie and de Waal in the following terms:

"*To satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law*)" (p. 176).

Moreover, section 235 of the Criminal Procedure Act 51 of 1977 already allows a criminal court to admit the record of judicial proceedings as prima facie proof that any matter purporting to be recorded thereon was correctly recorded. This provision makes the objection of section 73A(5) futile. Even without section 73A(5) the Tribunal proceedings would in any event find their way into the criminal trial. As stated already it is unlikely that the accused would dispute the correctness of the guilty verdict of the firm at the Tribunal's hearing.

6. Conclusion

This article has illustrated that spiralling cases of cartel activity, despite the existence of administrative fines for the firms found guilty of involvement in this activity, propelled the legislature to consider burdening individuals with criminal charges. Although this was not a novel invention, it faced a stiff resistance from those who argued that it would not be worthwhile. The major point of contention was that this provision is unconstitutional because it creates a reverse onus offence. It is argued that section 73A(5) has been drafted to maintain a delicate and necessary balance between the right of the accused person to be presumed innocent and the state responsibility to effectively prosecute those individuals involved in causing the firms to engage in prohibited practices. There are no suggestions that the accused may be charged for having caused the firm to engage in prohibited

practice when the firm had actually not engaged in such a practice. It also seems far-fetched that the accused charged with having caused the firm to engage in prohibited practice will dispute that the firm has been found guilty by a Tribunal, a neutral factor as to his guilt. Thus, it is submitted that section 73A(5) does not impinge on the accused right to be presumed innocent.

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