**[1991–92 Gib LR 295]**

## R. v. DO CARMO

SUPREME COURT (Kneller, C.J.): May 6th, 1992

*Criminal Law—drugs—possession with intent to supply—burden of proof—under Drugs (Misuse) Ordinance, s.7B(1) and (3), accused possessing 2g. or more of cocaine to show that intended for own use—s.7B not against presumption of innocence in Constitution, s.8(2)(a), since purpose of possession is "particular fact," within meaning of s.8(11), which accused may be required to prove—not "compelled to give evidence" personally for purposes of s.8(7)*

The accused was charged with possession of cocaine with intent to supply.

The accused pleaded guilty to possessing 17.2g. of cocaine but not guilty to possession with intent to supply. The Crown relied on the provisions of s.7B(1) of the Drugs (Misuse) Ordinance, namely that a person proved to be in possession of a commercial quantity of the drug was presumed to be in possession for the purpose of supplying it to others. A commercial quantity was defined in s.7B(3) as 2g. or more.

The accused submitted, *inter alia*, that (a) s.7B was not applicable to the offence of possession with intent to supply, since it did not purport to impose a presumption as to *intent*, but rather as to the *purpose* for which the drugs were to be used, and introduced an element of commercial trafficking where none existed before; (b) the section was incompatible with s.8(2)(*a*) of the Constitution, since it shifted the burden of proof in respect of *mens rea* from the Crown to the defence; (c) proof of intent did not fall within the meaning of "proving particular facts" for the purposes of the proviso contained in s.8(11) restricting the scope of s.8(2)(*a*); (d) further, the requirement to disprove guilty intent was in breach of s.8(7) in that it effectively imposed a duty on the accused to call evidence in his defence at his trial; (e) ambiguity in penal legislation such as this should be construed strictly against the Crown; and (f) similar provisions in English legislation were not comparable in the absence of a written constitution there by which to judge them.

The Crown submitted in reply that (a) being in possession with *intent* to supply was the same as being in possession of drugs for the *purpose* of supplying them, and reference to a commercial quantity did not necessarily imply trafficking for profit; (b) the accused bore the burden of adducing evidence to prove on the balance of probabilities that the quantity of drugs found in his possession was not for supply to others;

(c) this did not offend against s.8(2)(*a*) of the Constitution, since the Crown still retained the ultimate burden of proving the accused's guilt beyond reasonable doubt; (d) under s.8(11) of the Constitution, the purpose for which the drugs were in the accused's possession was a fact, like any other, which the legislature might properly require a person charged to prove; (e) s.7B did not impose a requirement to call evidence, and the presumption it raised could be dispelled by cross-examination of the prosecution witnesses; and (f) English legislation contained several examples of similar presumptions which had not been declared unlawful.

**Held,** making the following preliminary ruling:

Section s.7B would be unconstitutional if it ran contrary to the principle that a person charged with an offence was guilty until proven innocent, if it compelled him to give evidence at his trial or if it imposed more than the burden of proving particular facts. The section, however, did not offend against any part of s.8. The Crown had still to prove beyond reasonable doubt that the accused had the relevant quantity of drug in his possession unlawfully, and if it failed, the presumption in s.7B would not arise. The accused could disprove the presumed intent by calling evidence of his own or by his counsel's submissions to the jury. He was under no compulsion to give evidence himself. The issue of whether the drug was for his own use or that of others was a particular fact which he could legitimately be required to prove, for the purpose of s.8(11)(*a*), so removing s.7B from within the ambit of sub-s.(2)(*a*). Although intention could only be inferred by the jury from facts proved, the accused had only to prove the matter on the balance of probabilities (paras. 13–17).

**Cases cited:**

(1) *R.* v. *Budhrani*, 1991–92 Gib LR *N* [4], referred to.
(2) *R.* v. *Martin*, [1983] T.L.R. 460, referred to.
(3) *Selvanayagam* v. *R.*, [1951] A.C. 83, applied.

**Legislation construed:**

Drugs (Misuse) Ordinance (1984 Edition), as substituted by the Drugs (Misuse) (Amendment) Ordinance, 1989, s.7(3): The relevant terms of this sub-section are set out at para. 4.

s.7B(1): The relevant terms of this sub-section are set out at para. 3.
(2): The relevant terms of this sub-section are set out at para. 3.
(3): The relevant terms of this sub-section are set out at para. 3.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8(2)(*a*): The relevant terms of this paragraph are set out at para. 5.

s.8(7): The relevant terms of this sub-section are set out at para. 5.
(11)(*a*): The relevant terms of this paragraph are set out at para. 6.

*P. Dean, Senior Crown Counsel*, for the Crown;
*C. Finch* for the defendant.

1 **KNELLER, C.J.:** The defendant has pleaded guilty to being in unlawful possession of a preparation weighing 17.2g. containing cocaine, which is a controlled Class A drug specified in Part I of the First Schedule to the Drugs (Misuse) Ordinance, on December 12th, 1991 in Gibraltar, contrary to s.7(1) and (2) of the Ordinance. He has pleaded not guilty to being in unlawful possession of it with intent to supply another or others with it contrary to s.6(1) and 7(3) of the Ordinance.

2 Mr. Finch, for the defendant, submitted that the particulars of each count should be amended by substituting "cocaine hydrochloride, a salt of cocaine" because that is what the Public Analyst found the preparation to be, and Mr. Dean, for the Crown, agreed. Any salt of a substance for the time being specified in any of paras. 1–3 in Part I, Schedule 1 of the Ordinance is a controlled Class A drug, and cocaine is included in para. 1. The amendment will be allowed, and the first count put to the defendant again in the absence of the jury.

3 Mr. Finch then submitted that the provisions of s.7B of the Ordinance should not apply in cases where the defendant pleads not guilty to being in unlawful possession of a controlled drug with intent to supply it to another, and certainly not in this case. Section 7B, so far as it is relevant, reads thus:

> "(1) Any person who is proved to have had in his possession a commercial quantity of a controlled drug of a kind specified in subsection (3) below shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of supplying it to another.
>
> (2) The presumption provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the controlled drug.
>
> (3) In this section 'commercial quantity' in relation to a controlled drug specified in the table set out at the end of this subsection means the weight specified in that table opposite that drug.
>
> | 1. Name of Drug | Weight in grams |
> |---|---|
> | Cocaine | 2.00 |
>
> 2. The weights specified in paragraph 1 above include the weight of the substance either alone or contained in a preparation, mixture, extract or other material.

3. The substances specified in paragraph 1 above include:

. . .

(c) any salt of a substance for the time being specified in any of the paragraphs 1 to 3 of Parts I, II and III of Schedule 1."

This section was imported from Hong Kong and became part of the Ordinance on August 1st, 1989.

4 Mr. Finch points out that it includes the phrase "a commercial quantity," which goes beyond the ingredient of the offence expressed to be "supplying it to another," which may or may not be done "commercially." It taints it with suggestions of a trafficking offence. It does not specify where lies the onus of proving that, on the contrary, the controlled drug was not to be supplied to another, and it does not set out the standard of proof. The offence, he says, is defined in s.7(3) as being in unlawful possession of the controlled drug "with intent to supply it to another," but this s.7B sets up a presumption that the unlawful possession of a certain quantity of a controlled drug, until the contrary is proved, is for the *purpose* of supplying it to another and, therefore, not with the *intent* to do so. There is no offence known as being in possession of a controlled drug for the *purpose* of supplying it to another. It would also seem to apply only when the defendant is in unlawful possession of 2g. of the controlled drug.

5 If those submissions do not prevail, Mr. Finch submits that s.7B is incompatible with some provisions of the Constitution of Gibraltar. He began with s.8(2), which says that—

"every person who is charged with a criminal offence—

(*a*) shall be presumed innocent until he is proved or has pleaded guilty . . ."

He goes on to s.8(7), which reads thus: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial" which, Mr. Finch, points out, is not limited to *giving* evidence himself, but would extend to his not being compelled to *call* evidence at his trial.

6 He continues by referring to s.8(11)(*a*), which is this:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—

(*a*) subsection 2(*a*) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts . . ."

But he emphasizes that the burden of proving *particular facts* is different from proving, to the contrary, that possession of a quantity of a controlled

drug is not for the purpose of supplying it to another or that possession of that quantity is not possession with intent to supply it to another. There are facts, he readily concedes, which the Crown, with all its resources, may be unable to prove, such as whether or not a driver of a vehicle has a valid insurance policy, and so the defendant has to prove he has one. When it comes to an intention to commit a crime, however, the Crown has to prove it beyond a reasonable doubt in all criminal cases, whereas s.7B reverses that, and requires the defendant to prove the lack of intent.

7 There was no such provision, he said, in the legislation of the United Kingdom concerning controlled drugs. There, Parliament is supreme and the courts could not erase the effect of any enactment on the ground that it was against the Constitution, because the United Kingdom has no Constitution. There were Acts in the United Kingdom in which the defendant had to prove a lack of *mens rea*, but they were irrelevant in Gibraltar, which had a Constitution that provided safeguards against the erosion of the rights of the subject. The provision related to a penal offence and should therefore, as is the rule, be construed strictly and against the Crown if there were alternative interpretations.

8 Mr. Dean's replies were these: "A commercial quantity" was not a phrase that necessarily implied trafficking but it was right to say the supply could be otherwise than by sale. The onus of proving that the possession of that amount of the controlled drug was not for the purpose of supplying it to another lay on the defendant, and the standard of proof for the defendant was the usual lesser one of proving it on the balance of probabilities. Being in possession of it with *intent* to supply it was the same as being in possession of it with the *purpose* of supplying it. Alcantara, A.J. had said, *obiter*, in *R.* v. *Budhrani* (1), in referring to Mr. Dean's question whether the presumption operates when the weight of the drug in the defendant's possession is more than 2g., say, 3g. or 2.1g.: "The answer might well be that the greater includes the lesser."

9 Mr. Dean emphasized that s.7B did not expressly or impliedly compel the defendant to give evidence personally at his trial or proffer it by calling a witness, though the Crown's submission was that s.8(7) of the Constitution did not preclude the defendant giving evidence or calling a witness, or dispelling the presumption by his own or his counsel's cross-examination of the prosecution's witness.

10 The presumption was not, in his submission, inconsistent with or in contravention of sub-s. (2)(*a*) of s.8 of the Constitution (which, for anyone momentarily forgetful of its wording, declares that "everyone who is tried for a criminal offence is presumed to be innocent until he is proved or has pleaded guilty") for, at the end of the trial, the Crown had to prove the defendant guilty of the alleged offence beyond a reasonable doubt, and that was a matter for the jury.

11 Mr. Dean pointed to UK legislation which enacted analogous presumptions, such as "unless the contrary is proved." For example, on a charge of an offence against a girl under the Sexual Offences Act 1956, if the girl appears to the court to have been under the age of 16 at the time of the offence charged, she shall be presumed for the purposes of that section to have been so, unless the contrary is proved: see s.28(5). Similarly, a man who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary. And, again, under s.2 of the Prevention of Corruption Act 1916, unless the contrary is proved, any money, gift or other consideration paid or given to a person in Crown or Government department employment for a contract or seeking to obtain one was deemed to be paid or given and received corruptly.

12 The court's answer to these submissions is this: The court must rule that a provision contained in an Ordinance is inconsistent with or in contravention of the presumption that anyone charged with an offence is presumed innocent until he is proved or has pleaded guilty, if that provision is to the contrary, or compels the defendant to give evidence at his trial or imposes on him more than the burden of proving particular facts.

13 What do we have here in s.7B? My reading of it is that if the Crown proves beyond a reasonable doubt the defendant had unlawfully in his possession two or more grams of cocaine, or any salt of cocaine, alone or in a preparation, mixture, extract or other material, he is to be presumed to have had it in his possession for the purpose of supplying it to another. Failure to prove this beyond reasonable doubt would not set up the presumption. The reasonable doubt could arise from the inherent weakness of the Crown's evidence or revealed by cross-examination of its witnesses by the defendant or his counsel. If the presumption emerges, however, the defendant may succeed in proving the contrary on the balance of probabilities, by calling evidence or by his own or his counsel's submissions to the jury that the presumption should be dispelled or not applied. There is no compulsion here and there would be none by the court for him to give evidence at his trial.

14 And what would have to be proved on the balance of probabilities by any means, including by the defendant giving evidence at his trial? According to s.7B, in my view, that he did not have in his possession two or more grams of cocaine or its salts in a preparation, mixture, extract or other material, for the purpose of supplying it to another. Quite simply, the issue is: Was that for your own use or for you to supply it to another?

Now, I deem that to be a particular fact, and so covered by the terms of s.8(11)(*a*) of the Constitution, which exempts any law from being inconsistent with or in contravention of the provision of s.2(*a*) of the Constitution (which—once more I recall—declares that "every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty . . .").

15 But I have not overlooked the ingredient of the alleged offence which alleges that the unlawful possession of that amount of the controlled drug was "with intent" to supply it to another. Proof of intent or otherwise is a matter for the verdict of the jury. The learned authors of *Phipson on Evidence*, 12th ed., para. 422, at 176 (1976), state:

> "Formerly it was supposed, perhaps in view of the then incompetency of parties as witnesses, that intention was a matter incapable of proof, but it is recognised that the state of a man's mind is as much the subject of evidence as the state of his digestion."

And in *Selvanayagam* v. *R*. (3), which was not cited by either counsel, the Judicial Committee of the Privy Council declared ([1951] A.C. at 87) that "intention, which is a state of mind, can never be proved as a fact: it can only be inferred from facts which are proved." This was the Committee's opinion in an appeal from the Court of Appeal in Ceylon on the local provisions of the Trespass Ordinance, including the phrase "with intent to annoy."

16 I acknowledge, with respect, that definition of intent as being a state of mind and incapable of proof as a fact, and only capable of inference from facts as proved. Nevertheless, I reiterate that the defendant here, and in similar cases, only has to prove on the balance of probabilities—including, but not necessarily, by his own evidence—that the cocaine salt of which he was, beyond a reasonable doubt, in unlawful possession was not for the purpose of supply to others.

17 So, on all that, I repel Mr. Finch's submissions that the provisions of s.7B of the Ordinance are inconsistent with or in contravention of any section of the Constitution in this case.

18 Mr. Finch also submitted that some questions and answers in the record of Det. Sgt. Massias's interview with the defendant should be deleted as being improper, irrelevant or scandalous. I can deal with them briefly. They are:

"*Q*.: What has he advised you to do?

*A*.: No comment.

*Q*.: Why don't you want to answer that?

*A*.: Because I have called my lawyer.

*Q.*: Look, if it is for your own use, say so and that is it.

*A.*: And if I say that, will you give me bail?

*Q.*: I cannot give you bail.

*A.*: It doesn't matter. Finch told me that tomorrow he will get me out on bail."

19 These remarks must be deleted. The advice of the defendant's lawyer is irrelevant. Failure to answer questions put to him or the giving of the answer "no comment" after being cautioned is of no probative value: see *R.* v. *Martin* (2). The whole purpose of the caution is for the defendant to consider whether to give an explanation or to remain silent, and after caution he has the right to be silent. "Look, if it is for your own use, say so, and that is it" is in the nature of an inducement, as the answer: "If I say so, will you give me bail?" indicates. The other questions and answers to which Mr. Finch objects will not be edited out of the record.

20 The officers taking part in the interview will be allowed to refer to the edited record if it is proved it was made contemporaneously. Whether or not the jury is shown the edited record is a matter on which I shall rule at the appropriate time.

21 At this juncture, though the Crown has not produced any evidence as to who wrote the figures on the cardboard slips or what they refer to, they will not be ruled out as inadmissible because they are said to have been discovered at the same time as other relevant admissible evidence, and were the subject of alleged questions and answers between the police and the defendant.

*Ruling accordingly.*

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