R. v. REINA and PERALTA

SUPREME COURT (Kneller, C.J.): March 7th, 1995

Criminal Law—drugs—possession with intent to supply—burden of proof— Drugs (Misuse) Ordinance, s.7B(1) placing burden on accused to disprove intent to supply commercial quantity of controlled drug invalid under Gibraltar Constitution, s.8(2)(a) enshrining presumption of innocence

The accused were charged with possession of a controlled drug with intent to supply it to others.

The accused were found in possession of 3 kg. of cannabis resin, allegedly for delivery to a supplier. Under s.7B(1) of the Drugs (Misuse) Ordinance, any person found in possession of a commercial quantity of a controlled drug (in the case of cannabis, 20g. or more) would be presumed to be in possession for the purpose of supplying it to others.

The accused challenged the validity of s.7B, submitting that it was contrary to s.8(2)(a) of the Constitution, which provided that every person charged with a criminal offence should be presumed innocent until proved guilty. The presumption of intention to supply constituted a shift in the burden of proof of a significant element of the offence and not merely a shift in the evidential burden requiring the accused to prove a particular fact or establish a statutory proviso.

The Crown submitted in reply that (a) s.7B was validated by s.8(11)(a) of the Constitution, which provided that an enactment did not contravene s.8(2)(a) merely because it placed a burden on the accused to prove a particular fact—in this case that the drugs were for personal use only; (b) in any event, the accused were required to prove this only on the balance of probabilities; and (c) since their intentions were a matter solely within their knowledge, it was reasonable that they should do so.

Held, ruling that the provision was unconstitutional:

(1) The common law principle that a person charged with a criminal offence was presumed innocent until proved guilty was enshrined in the Constitution. There could be statutory exceptions to the principle to the extent that an accused might be required to prove, on the balance of probabilities, a particular fact, or to establish the existence of a defence stated in a proviso, but the ultimate burden of proving the offence lay with the Crown (page 6, lines 23–31; page 8, lines 4–20).

(2) Section 7B of the Drugs (Misuse) Ordinance was not one of those statutory exceptions, since it placed the onus on the accused to disprove

the most serious element of the offence, namely, the intention to supply (albeit only on the balance of probabilities). Accordingly, it went beyond the scope of s.8(11)(a) and was unconstitutional as infringing s.8(2)(a) of the Constitution (page 5, lines 28–32; page 10, lines 5–32).

Cases cited:

(1) *Att.-Gen. (Hong Kong)* v. *Lee Kwong-Kut*, [1993] A.C. 951; [1993] 3 All E.R. 939, followed.
(2) *R.* v. *Carr-Briant*, [1943] K.B. 607; [1943] 2 All E.R. 156; (1943), 29 Cr. App. R. 76, *dicta* of Humphreys, J. applied.
(3) *R.* v. *Edwards*, [1975] Q.B. 27; [1974] 2 All E.R. 1085, considered.
(4) *R.* v. *Hunt*, [1987] A.C. 352; [1987] 1 All E.R. 1, considered.
(5) *R.* v. *Jenkins* (1923), 39 T.L.R. 458; 87 J.P. 115; *sub nom. R.* v. *Evans-Jones*, 17 Cr. App. R. 121.
(6) *R.* v. *Oakes*, [1987] LRC (Const) 477; [1986] 1 S.C.R. 103, applied.
(7) *R.* v. *Sin Yau-Ming*, [1992] LRC (Const) 547; [1992] 1 HKCLR 127, followed.
(8) *Woolmington* v. *D.P.P.*, [1935] A.C. 462; [1935] All E.R. Rep. 1, applied.

Legislation construed:

Drugs (Misuse) Ordinance (1984 Edition), s.7B, as substituted by the Drugs (Misuse) (Amendment) Ordinance, 1989: The relevant terms of this section are set out at page 2, line 39 – page 3, line 7.

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 page 3, lines 39–41.

s.8(11)(a): The relevant terms of this paragraph are set out at page 3, line 43 – page 4, line 2.

P. Dean, Acting Attorney-General for the Crown;
K. Azopardi for the accused.

KNELLER, C.J.: On March 2nd I ruled that s.7B(1) of the Drugs (Misuse) Ordinance ("the Ordinance") was inconsistent with s.8(2)(a) of the Gibraltar Constitution Order, 1969 ("the Constitution"). Section 7B(1) of the Ordinance reads thus:

> "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."

Section 7B(3) defines "commercial quantity" in that section as the weight in grams of, for example—

"Name of Drug	Weight in grams
Amphetamine	2.00
. . .	
Cannabis or Cannabis Resin	20.00
Cocain	2.00
. . .	
Lysergic Acid Diethylamide	0.002"

Section 7B(1), and maybe the whole of s.7B, is said to have been modelled on a similar section in the legislation of Hong Kong, to which I return later, and Australia, to which I cannot refer because it was not cited in this trial and I do not have time to research it.

The phrase "commercial quantity" is intriguing, since supplying a controlled drug can surely be by gift and untainted by commercial considerations? Also, the quantity specified for the drugs seems to be low, especially as, by s.7B(2), those specified weights include the weight of the substance either alone or contained in a mixture, extract or other material. All this, and more, is to be found in the Drugs (Misuse) (Amendment) Ordinance, 1989.

So anyone who is proved to have had in his possession, say 20g. of cannabis resin—20g. in weight in a mixture, extract or material—shall, until the contrary is proved, be presumed to have had that cannabis resin, a controlled Class B drug, in his possession for the purpose of supplying it to another (or others). That is "a presumption."

"Until the contrary is proved" is what s.7B(1) provides. Proof by whom? It does not specify. An "own-goal" could be scored, of course, by a witness for the prosecution testifying to the 0.002g. of lysergic acid diethylamide or 20g. of cannabis resin or 2g. of cocaine being just what the defendant would consume. A witness for the defence could also prove the contrary. However, in all other trials, and they would be the majority, the defendant would have to prove that the drug of that weight which he was proved to have in his possession was not for the purpose of supplying it to another (commercially or otherwise). He would have to do it only on the balance of probabilities. The prosecution would still have to prove he had it in his possession to supply it to another—prove it so that a jury would be sure of his guilt, which is the same as the jury being satisfied beyond reasonable doubt of his guilt.

Now I move to s.8(2)(a) of the Constitution. Here it is:

> "Every person who is charged with a criminal offence—
>
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty . . . ."

Let me set forth next s.8(11) of the Constitution, which says this:

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

The Attorney-General alights on s.8(11)(a) and submits that anyone proved to be in unlawful possession of a "commercial quantity" of the controlled drug set out in s.7B(3) is burdened only with the proof of a particular fact, namely, "prove to the jury or the court that you were going to use it all yourself."

I pause here. If a person is proved to have had in his possession "a commercial quantity," or, I must add, any quantity of a controlled drug for which he has a licence, or he is delivering it up to someone in authority to confiscate or destroy, or has no idea what it is, he cannot be in possession of it for the purpose of supplying it unlawfully to another. What is the law on this? The Attorney-General begins with passages from Williams, *The Proof of Guilt*, 3rd ed., at 184–186 (1963):

> "When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt is upon the prosecution. This golden thread, as Lord Sankey expressed it, runs through the web of the English criminal law. Unhappily, Parliament regards the principle with indifference—one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts have enunciated principles that have the effect of shifting the burden in particular classes of case.
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> The sad thing is that there has never been any reason of expediency for these departures from the cherished principle; it has been done through carelessness and lack of subtlety. What lies at the bottom of the various rules shifting the burden of proof is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. This idea is perfectly defensible and needs to be expressed in legal rules, but it is not the same as the burden of proof. There is a clear if subtle difference between shifting the burden of proof, or risk of non-persuasion of the jury, and shifting the evidential burden, or burden of introducing evidence in proof of one's case. It is not a grave departure from traditional principles to shift the evidential burden, though such a shifting does take away from the accused the right to make a submission that there is no case to go to the jury on the issue in question, and it may in effect force him to go into the witness-box. Where the law shifts the evidential burden to the accused, the prosecution need not give any evidence, or need give only slight evidence, on that issue, in the sense that they are not liable on that issue to be met with a submission of 'no case to answer,' even though they have failed to give the evidence usually required. This means that the accused must for his own safety, make some answer.

> But the shifting of the evidential burden does not necessarily mean that the burden of persuasion or burden of proof proper passes to the defendant. When all the evidence is in, the jury will be directed that the burden of proving all the issues remains with the Crown, so that if they are not satisfied on any of the issues they must find for the defendant. All that the shifting of the evidential burden does at the final stage of the case is allow the jury to take into account the silence of the accused or the absence of a satisfactory explanation appearing from his evidence. Hence if his evidence is consistent with his innocence which may reasonably be true, even though the jury are not satisfied that it is true, the defendant is entitled to be acquitted, for the burden of proof remains on the prosecution. A clearer recognition of this difference between the evidential burden, on the part of both Parliament and the courts, would enable the rule resting the burden of persuasion on the Crown to be restored to its full vigour."

And, the Attorney-General pointed out, some English statutes shift the evidential burden to the defendant. Such statutes provide that certain facts shall be deemed to exist until the contrary is proved. Thus, on a charge under the Prevention of Corruption Act 1906, a consideration is deemed to be given corruptly unless the contrary is proved according to s.2 of the Prevention of Corruption Act 1916. This means that if the jury are in doubt as to whether they should accept the defendant's explanation for a gift to a public officer, they must convict: see *R.* v. *Jenkins* (5). The defendant's burden of proof is discharged "by evidence satisfying the jury of the probability of that which the accused is called upon to establish": see *R.* v. *Carr-Briant* (2) ([1943] K.B. at 612, *per* Humphreys, J.).

Parliament places the proof of the stated fact upon the defendant, it is said, because only he would know it. It is unreasonable to expect the prosecution to negative in advance the stated fact. But the phrase in s.7B(1) of the Ordinance is "until the contrary is proved" and not "until some evidence to the contrary is produced." The Attorney-General submits that what the defendant intended to do with the commercial quantity of the controlled drug—to supply it to another or others—is a fact, and one which only he would know.

Mr. Azopardi began with Viscount Sankey, L.C.'s speech in *Woolmington* v. *D.P.P.* (8) in which he said ([1935] A.C. at 481):

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

Lawton, L.J. in *R.* v. *Edwards* (3) ([1975] Q.B. at 39–40) explained that a line of authorities from the 17th century—

> "establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the

> community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception."

In *R.* v. *Hunt* (4) Lord Griffiths said of the formulation of the exception by Lawton, L.J. in *R.* v. *Edwards* ([1987] A.C. at 375): "[T]he occasions upon which a statute will be construed as imposing a burden of proof on a defendant which do not fall within this formulation are likely to be exceedingly rare." The House of Lords in *R.* v. *Hunt* held that there was no rule of law that the burden of proving a statutory defence lay on the defendant only where the statute specifically so provided, since a statute could place the burden of proof on the defendant by necessary implication and without doing so expressly.

Each case turns on the construction of the particular legislation but the court should be very slow to infer from the statute that Parliament intended to impose an onerous duty on the defendant to prove his innocence in a criminal case. The occasions on which a statute would be construed as imposing a burden of proof on the defendant were generally limited to offences arising under enactments which prohibited the doing of an act save in specified circumstances, or by persons of specified classes, or with specified qualifications, or with the licence or permission of specified authorities.

The Supreme Court of Canada, consisting of Dickson, C.J. and six judges, in *R.* v. *Oakes* (6) dismissed an appeal by the Crown from the decision of a provincial court judge's refusal to convict Oakes on a charge of possessing narcotics for the purpose of trafficking, because under s.8 of the Narcotic Control Act, R.S.C. 1970 ("the Act") if the defendant were found in possession of narcotics the onus rested on him to establish that he was not in possession for the purpose of trafficking, and this violated the guarantee to Oakes of the presumption of innocence in s.ll(*d*) of the Canadian Charter of Rights and Freedoms ("the Charter"). Before the case reached the Supreme Court the provincial court had dismissed the Crown's appeal, holding that s.8 constituted a "reverse onus" clause and violated the presumption of innocence.

Section 8 was complicated but, put simply, it provided that if the court found the defendant was in possession of the narcotic, "he shall be given

an opportunity of establishing he was not in possession of the narcotic for the purpose of trafficking" and if he "fails to establish he was not in possession of the narcotic for trafficking, he shall be convicted of the offence as charged and sentenced accordingly."

Section 11 of the Charter is in almost the same terms as s.8(2)(a) of our Constitution, guaranteeing the right to be presumed innocent until proven guilty. Section 1 of the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court held, among other things, that s.8 imposed a legal burden on a defendant to prove, on a balance of probabilities, that he was not in possession of the narcotic for the purpose of trafficking. No law of Canada, according to s.2(f) of the Canadian Bill of Rights, shall be construed or applied so as to deprive a person charged with a criminal offence of the right to be presumed innocent. The *Woolmington* case was decided in the context of a legal system with no entrenched constitutional human rights document. In *R.* v. *Oakes* (6), Dickson, C.J. went on to say ([1987] LRC (Const) at 492):

> "In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter. . . . Section 8 of the Narcotic Control Act is not rendered constitutionally valid simply by virtue of fact that it is a statutory provision."

He continued (*ibid.*, at 494):

> "Any infringements of this right [to be presumed innocent] are permissible only when, in the words of section 1 of the Charter, they are reasonable and demonstrably justified in a free and democratic society."

Further, he said (*ibid.*, at 496):

> "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.
>
> The fact that the standard is only the civil one does not render a reverse onus clause constitutional."

The learned Chief Justice then referred to a passage in Sir Rupert Cross's Rede Lecture at the University of Toronto: "*The Golden Thread of English Criminal Law: The Burden of Proof*," at 11–12 (1976):

> "The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt."

Dickson, C.J. went on to say ([1987] LRC (Const) at 498):

> "Mr. Oakes is compelled by section 8 to prove he is *not* guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse and is directly contrary to the presumption of innocence enshrined in section 11(*d*)."

This decision of the Supreme Court of Canada is not binding on this court but is, of course, to be held in high regard, not least because it is, in my respectful view, good law.

Mr. Azopardi's next authority was *R.* v. *Sin Yau-Ming* (7) from the Court of Appeal of Hong Kong, made up of Silke, V.-P., Kempster and Penlington, JJ.A. Sin Yau-Ming was arraigned upon an indictment containing two counts to which he pleaded not guilty. The Crown asked the judge to reserve for the Court of Appeal a question of law and the application was successful. He had been charged with, and pleaded not guilty to, two counts of possession of dangerous drugs for the purpose of unlawful trafficking. Mr. Wong, sitting at the time as a deputy judge of the district court, ruled that the presumption of possession for the purposes of trafficking under s.46(d) of the Hong Kong Dangerous Drugs Ordinance arising from possession of more than 0.5g. of morphine failed the tests of reasonableness and proportionality. The Court of Appeal decided the learned deputy judge was right. The decision is not binding on this court.

The provisions of the Hong Kong Dangerous Drugs Ordinance (Cap. 134) include these in ss. 47(1)(c) and (d) and 47(3):

> "(1) Any person who is proved to have had in his possession or custody or under his control—
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> . . .
>
> (c) any place or premises or the part of any place or premises in which a dangerous drug is found;
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> (d) the keys of any place or premises or part of any place or premises in which a dangerous drug is found,
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> shall, until the contrary is proved, be presumed to have had such drug in his possession.

(3) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug."

And a decision of the Privy Council, on appeal from the Court of Appeal of Hong Kong in *Att.-Gen. (Hong Kong)* v. *Lee Kwong-Kut* (1) dealt with the presumption of innocence set out in art. 11(1) of the Hong Kong Bill of Rights Ordinance 1991, which came into operation on June 8th, 1991.

Lee Kwong-Kut was charged with having in his possession cash reasonably suspected of having been stolen or unlawfully obtained. The magistrate dismissed the information because Lee Kwong-Kut was required to give a satisfactory explanation of how he came to be in possession of the cash according to s.30 of the Summary Offences Ordinance 1989 and that was inconsistent with art. 11(1) of the Bill of Rights Ordinance 1991, which provided: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Section 30 had been repealed by s.3(2) of the Hong Kong Bill of Rights Ordinance 1991, which came into operation on June 8th, 1991, by which all pre-existing legislation which did not admit of a construction consistent with the Bill of Rights Ordinance was, to the extent of the inconsistency, repealed. The Privy Council dismissed the Crown's appeal from the Court of Appeal of Hong Kong, which had dismissed the appeal by the Attorney-General from the magistrate's decision.

Lee Kwong-Kut's appeal was consolidated by the Privy Council with that of Lo Chak-Man and Tsoi Sau-Ngai. Those two defendants were each charged on indictment with one count of assisting another to retain the benefit of drug trafficking and Gall, J. in the High Court of Hong Kong quashed the indictments against them.

Lee Kwong-Kut was alleged to have had HK$1.76m. reasonably suspected of having been stolen, or unlawfully obtained. Lee Kwong-Kut had to establish that he was able to give an explanation as to his innocent possession of the property. This placed the onus on him to establish an exception as to his innocent possession of the cash. It reduced the burden on the prosecution to prove the most significant element of the offence.

Lo Chak-Man and Tso Sau-Ngai were alleged to have been concerned in an arrangement whereby the retention or control of another's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the other person carried on or had carried on drug trafficking or had benefited from drug trafficking. All that was covered by the essential ingredients of the offence under s.25(1)(a) of the Drug Trafficking (Recovery of Proceeds) Ordinance 1989. The burden was on the prosecution to prove that Lo Chak-Man and Tsoi Sau-Ngai had been involved in an arrangement relating to another person's proceeds of drug trafficking, knowing or having reasonable grounds to believe that that person was connected with drug trafficking. Then the defendants had to

prove on a balance of probabilities special defences, *i.e.* that they did not have the knowledge or suspicion, the rationale being that they should have insisted on seeing documents showing that the source of the funds was untainted.

Att.-Gen. (Hong Kong) v. *Lee Kwong-Kut* (1) is Privy Council advice to Her Majesty and binding on this court. Lee Kwong-Kut's inability to give a satisfactory explanation as to how he came to be in possession of the cash was not concerned with a special defence, but the most important element of the offence. Lo Chak-Man and Tsoi Sau-Ngai had to prove one or more special defences on a balance of probabilities and that onus on them was justifiable in the context of the war against drug trafficking.

I hold that each defendant in this trial, under s.7B(3) of the Ordinance, is required to prove an element or ingredient of the alleged offence and not a proviso, exemption or licence. Each is required to prove, albeit on a preponderance of probabilities, that if he is proved to have been in unlawful possession of these 3 kg. of cannabis resin, he did not intend to supply them to another or others in Gibraltar. If it is proved to the jurors' satisfaction that he was in unlawful possession of 20g. in weight of this cannabis resin that requirement is inconsistent with the presumption of innocence until proved guilty in favour of anyone in Gibraltar charged with any criminal offence. It is unconstitutional.

The defendants are not, in my judgment, given the burden of establishing a proviso or exception. Each is required to disprove a limb, the weightier limb, of a most serious offence. This, in my judgment, is not covered by s.8(11) of the Constitution. It is not a statutory exception or proviso. It is not a defence. It is an essential, and the more important, limb of an offence. The defendants should not have to disprove this limb by any standard. The prosecution must prove it beyond any reasonable doubt as before.

These, in the short time available to me in this trial, are the reasons why I ruled at the outset that the presumption in s.7B of the Ordinance is inconsistent with the relevant provisions of the Constitution.

Ruling accordingly.
