MALTA

CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)

HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO

Sitting of the 12 th October, 2004

Rikors Number. 14/2004/1

Republic of Malta

Versus

Gregory Robert Eyre and Susan Jayne Molyneaux

These proceedings originated from a reference made by the Criminal Court under art. 46(3) of the Constitution of Malta ["the Constitution"] and under art. 4(3) of the European Convention Act[1] for this court to determine whether a provision of the Dangerous Drugs Ordinance[2] ["the Ordinance"] is in breach of the provisions of art. 39 of the Constitution and of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ["the Convention"] concerning the guarantees

1 Chapter 319 of the Laws of Malta.

2 Chapter 101 of the Laws of Malta.

for a fair trial, in particular, the presumption of innocence and the benefit of equality of arms. The provision in question is that of art. 26(2) of the Ordinance:

26. (2) When the offence charged is that of possession of, or of selling or dealing in, a drug contrary to the provisions of this Ordinance it shall not be a defence to such charge for the accused to prove that he believed that he was in possession of, or was selling or dealing in, some thing other than the drug mentioned in the charge if the possession of, or the selling of dealing in, that other thing would have been, in the circumstances, in breach of any other provision of this Ordinance or of any other law.

The reference by the Criminal Court was made in the following terms:

… … … the court, having seen sections 46(3) of the Constitution of Malta and 4(3) of Chapter 319, refers the issue raised in the fourth and fifth pleas of accused Susan Jayne Molyneaux, in so far as they can be construed to imply that section 26(2) of Chapter 101 of the Laws of Malta is in breach of section 39 of the Constitution of Malta and article 6 of the European Convention of Human Rights, to the Civil Court, First Hall to be determined according to law.

The relevant facts, in brief, are as follows:

Susan Jayne Molyneaux [“the accused”] was charged, together with Gregory Robert Eyre, under Bill of Indictment number 3/2004 with being guilty of: (1) “having, with another one or more persons in Malta, and outside Malta, conspired for the purpose of committing an offence in violation of the provisions of the Dangerous Drugs Ordinance (Chapter 101 of the Laws of Malta) and the Medical and Kindred Professions Ordinance (Chapter 31), and specifically of importing and dealing in any manner in cocaine and Ecstasy Pills, and of having promoted, constituted, organised and financed such conspiracy”; (2) “meaning to bring or causing to be brought into Malta in any manner whatsoever a dangerous drug (cocaine), being a drug specified and controlled under the provisions of Part I, First Schedule, of the Dangerous Drugs Ordinance, when neither was in possession of any valid and subsisting import authorisation granted in pursuance of said law”; and (3) “meaning to bring or causing to be

brought into Malta in any manner whatsoever a dangerous drug (Ecstasy), being a drug restricted and controlled under the provisions of Part A, Third Schedule, of the Medical and Kindred Professions Ordinance, when neither was in possession of any valid and subsisting import authorisation granted in pursuance of said law".

The Bill of Indictment also states that the accused "did not specifically know that drugs were to be imported illegally into Malta, but merely thought and was convinced that something against the law was to be imported into Malta [such as money in order to evade tax on currency]".

In her defence the accused raised the following pleas, *inter alia*:

… … …

4. In view of the fact that the Attorney General in the narrative part of the first count of the Bill of Indictment excludes the accused Susan Jayne Molyneaux from any responsibility, partially since it is therein stated that she did not specifically know that the drugs were to be imported illegally into Malta, but states that she "merely thought and was convinced that something against the law was to be imported into Malta [such as money in order to evade tax on currency]", should the Attorney General be contending that such tantamounts to criminal liability and responsibility, any such disposition which may be quoted by the Attorney General in this regard is null and void as it runs counter to the basic principles of justice and the provisions of the Constitution of Malta and the European Convention on Human Rights.

5. That for reasons mentioned in plea number 3 *supra*[3], the plea mentioned in paragraph 4 *supra* is also applicable to the second and third counts of the Bill of Indictment.

The accused is complaining that the provisions of art. 26(2) of the Ordinance breach her right to a fair trial by depriving her of the benefit of the presumption of innocence and of equality of arms with the prosecution guaranteed under the Constitution and under the

[3] *i.e.* "Though the second and third counts do not contain the text [referring to the accused's lack of specific knowledge about the importation of drugs] there is no doubt that the Attorney General is referring to the dangerous drugs referred to in the first count of the Bill of Indictment."

Convention. The relevant provisions are art. 39(1) and 5 of the Constitution:

39. (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

… … …

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this sub-article to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

and art. 6 of the Convention:

ARTICLE 6

(1) 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. … … …

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The accused claims that the provisions of art. 26(2) of the Ordinance deprive her of the right to a fair hearing because:

Such a provision, in itself, leaves the accused in a situation where, even if he is fooled or has no knowledge that he is carrying the substance he is charged of possessing, he would still be found guilty of the charge. From the wording of the law it would appear that, even if a third party had to admit on oath that he was responsible for the deception and that the person accused was totally oblivious, such evidence would not be admissible or have any probative value under section 26(2) of the Ordinance. The person charged would be found guilty nonetheless.

Under this situation the accused finds himself not only in the situation that the *onus probandi* lies on him to exculpate himself from the offence against the Ordinance (in this case possession/selling/dealing of [*sic*] a drug

against the Ordinance), but he is also being denied a defence which would, otherwise, if believed, lead to his acquittal.[4]

The accused is also complaining that the above-quoted provisions of the Ordinance deprive her of "equality of arms" with the prosecution. She argues that art. 26(2) of the Ordinance "is clearly denying her the possibility of a defence which, if believed, will slightly present a different scenario which would secure her acquittal. This section of the law does not afford the accused a reasonable opportunity to present her case, including her evidence"[5].

Finally, the accused is also claiming that, in creating an irrebuttable "presumption of guilt", the provisions of art. 26(2) of the Ordinance deprive her of the benefit of the presumption of innocence:

Accused hereby makes reference to the proviso to section 39(5) of the Constitution of Malta. This proviso makes it constitutionally legitimate for the *onus probandi* to be shifted onto the accused as is the case with section 26(1) of Chapter 101 of the Laws of Malta. This peculiar departure from the rule is possible as long as the shift in the *onus probandi* leads to a rebuttable presumption of fact and not of guilt. If it is a shift in the presumption of guilt then it will not be in conformity with the Constitution.[6]

The question therefore is whether art. 26(2) of the Ordinance deprives the accused of the protection of the law by creating an irrebuttable presumption of guilt, thus depriving her of the presumption of innocence and giving the prosecution an unfair advantage.

In the view of this court, art. 26(2) of the Ordinance creates the offence of being in possession of, or of selling or dealing in, a drug, knowing that one is in possession of, or selling or dealing in, an object, not being necessarily a drug, the possession or sale whereof, or the dealing in which, is prohibited by law. Therefore, it is not correct to state that the offence is one of strict liability, or one where the proof of *mens rea* is not required. Such proof is required to secure a conviction, and the burden thereof is

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4 *Fol*. 30.

5 *Fol*. 34.

6 *Foll*. 34 *et seq.*

still on the prosecution, because it is for the prosecution to prove that the accused knew that he was possessing or selling, or dealing in, an object when such possession, selling or dealing is prohibited by the law. It is true that the fact of possession or sale of, or dealing in, the prohibited object creates a presumption that the illegal act was done knowingly, but such presumption is rebuttable by the accused who is certainly not deprived of the defence of proving that, for instance, unknown persons had placed the prohibited object in his pocket without his knowledge. What he cannot do is to show that, although he had guilty knowledge because he knew that he was *e.g.* in possession of a prohibited object, he did not know that the prohibited object was a drug.

In other words, whoever knowingly possesses or sells or deals in an object knowing that that object is a prohibited object, is knowingly taking the risk that such object may be a drug, with all the consequences which that fact entails.

Therefore, the principle established in the decided cases quoted in the accused's note of submissions before the Criminal Court[7] — namely, that "although the law does not appear to require intent for the offence of possession to take place, logical interpretation of the law requires it, as it is an essential element of a criminal offence"[8] — still stands, and it is not correct to say that "the wording of section 26(2) does away with the mental element of the offence".[9] The mental element, namely, the intention of possessing, selling or dealing in a prohibited object, is still required, and any presumption of knowledge created by the fact of possession, sale or dealing, is rebuttable.

It may indeed be argued that proof of such intention may be construed as creating a further irrebuttable presumption of a more specific intention of possessing, selling or dealing in drugs. This argument may not be refuted by answering that art. 26(2) of the Ordinance merely defines the constituent elements of the offence, and defines the mental element as being the knowledge

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7 *Fol*. 31.

8 *Fol*. 31.

9 *Fol*. 32.

of possessing or selling, or dealing in, any prohibited object. In **the Salabiaku Case**[10], the European Court of Human Rights ["the European Court"], observed as follows:

27. As the Government and the Commission have pointed out, in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (Engel and Others judgment of 8 June 1976, Series A no. 22, p. 34, para. 81) and, accordingly, to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.

… … …

28. This shift from the idea of accountability in criminal law to the notion of guilt shows the very relative nature of such a distinction. It raises a question with regard to Article 6 para. 2 (art. 6-2) of the Convention.

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider (paragraph 64 of the report), paragraph 2 of Article 6 (art. 6-2) merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1 (art. 6-1). Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of Article 6 (art. 6), which, by protecting the right to a fair trial and in particular the right to be

[10] **Salabiaku *v.* France**, 14/1987/137/191.

presumed innocent, is intended to enshrine the fundamental principle of the rule of law (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 34, para. 55).

Article 6 para. 2 (art. 6-2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

Essentially, therefore, the question is twofold: (i) whether a presumption of guilty knowledge based on proof of possession, *etc.* constitutes a breach of the presumption of innocence; and (ii) whether requiring knowledge of possessing or selling, or dealing in, any prohibited object rather than knowledge of possessing or selling, or dealing in, drugs constitutes a breach of the presumption of innocence. With regard to the second limb of the question, it is indifferent whether a conviction is achieved by defining the mental element as requiring a less specific knowledge or by providing that proof of a less specific knowledge creates an irrebuttable presumption of a more specific knowledge: the final result will be the same.

The European Court, as the extract from the Salabiaku Case reproduced above makes clear, does not regard such presumptions as automatically in breach of the Convention: regard must be had to whether they are confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence". In order to determine whether art. 26(2) of the Ordinance passes this test, one must analyse and identify the nature of the presumptions and, for this purpose, reference may usefully be made to the classification adopted by the House of Lords in **the Kebeline case**[11]:

It is necessary in the first place to distinguish between the shifting from the prosecution to the accused of what Glanville Williams[12] at pp. 185-186 described as the

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[11] **R.** ***versus*** **Director of Public Prosecutions,** ***ex parte*** **Kebilene**, [1999] 3 WLR 972, 998-999. [http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd991028/kabel-1.htm]

[12] *The Proof of Guilt*, 3rd ed., 1963.

"evidential burden", or the burden of introducing evidence in support of his case, on the one hand and the "persuasive burden", or the burden of persuading the jury as to his guilt or innocence, on the other. A "persuasive" burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An "evidential" burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.

Statutory presumptions which place an "evidential" burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence. They are not incompatible with article 6(2) of the Convention. … … ... They are a necessary part of preserving the balance of fairness between the accused and the prosecutor in matters of evidence. … … …

Statutory presumptions which transfer the "persuasive" burden to the accused require further examination. Three kinds were identified … … … First, there is the "mandatory" presumption of guilt as to an essential element of the offence. As the presumption is one which must be applied if the basis of fact on which it rests is established, it is inconsistent with the presumption of innocence. This is a matter which can be determined as a preliminary issue without reference to the facts of the case. Secondly, there is a presumption of guilt as to an essential element which is "discretionary". The tribunal of fact may or may not rely on the presumption, depending upon its view as to the cogency or weight of the evidence. If the presumption is of this kind it may be necessary for the facts of the case to be considered before a conclusion can be reached as to whether the presumption of

innocence has been breached. In that event the matters cannot be resolved until after trial.

The third category of provisions which fall within the general description of reverse onus clauses consists of provisions which relate to an exemption or proviso which the accused must establish if he wishes to avoid conviction but is not an essential element of the offence.[13]

The first presumption, namely, the presumption of guilty knowledge arising from the fact of possession, *etc.*, is rebuttable and, therefore, "discretionary", because it is up to the tribunal of fact to decide whether or not to rely upon it, depending on its view of the evidence. The question remains whether it is "persuasive", *i.e.* requiring the accused to disprove it on a balance of probabilities, or merely "evidential", in which case it would be sufficient for the accused to raise a reasonable doubt, thereby shifting back on the prosecution the burden of proving guilty knowledge beyond reasonable doubt.

The matter was discussed in the judgment delivered by the Court of Criminal Appeal *in re* **Il-Pulizija *versus* Martin Xuereb**[14]:

Għalkemm il-leġislatur, f'din id-disposizzjoni, bħalma f'diversi disposizzjonijiet oħra ta' l-Ordinanza, ma jużax il-kelma "xjentement", hu evidenti li hawn *si tratta* ta' reat doluż u mhux sempliċement ta' reat kolpuż. Fi kliem ieħor, il-leġislatur ma riedx jikkolpixxi lil min, per eżempju, ad insaputa tiegħu, jitqegħedlu xi droga fil-bagalja tiegħu u dan jibqa' dieħel biha Malta. Mill-banda l-oħra, u b'applikazzjoni ta' l-artikolu 26(1) ta' l-Ordinanza, persuna li tkun materjalment daħħlet droga f'Malta hi preżunta li daħħlitha xjentement, jiġifieri meta kienet taf bl-eżistanza ta' dak l-oġġett, li dak l-oġġett hu droga, u għalhekk kienet taf li qed iddaħħal id-droga, salv prova (imqar fuq bażi ta' probabilità) kuntrarja u salv il-limitazzjoni għal tali prova skond is-subartikolu (2) ta' l-imsemmi artikolu 26.

Since the burden on the accused is to disprove guilty knowledge on a balance of probabilities, the conclusion must be that the first presumption, albeit discretionary, is of a "persuasive" nature. Although such presumption

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13 Opinion of Lord Hope of Craighead.

14 20 September 1996, Vol. LXXX-IV-285.

does reverse the burden of proof, it is not necessarily in conflict with art. 39 of the Constitution or with art. 6 of the Convention; what is required is that such presumptions are confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence". Inroads into the presumption of innocence require justification, and, according to the principle of proportionality, must not be greater than is necessary. Again following the Kebeline case, the following three questions are to be considered in order to determine whether a reasonable balance between the rights of the accused and the general interest in the repression of crime has been achieved:

… … … in considering where the balance lies it may be useful to consider the following questions: (1) what does the prosecution have to prove in order to transfer the onus to the defence? (2) what is the burden on the accused — does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or … … … to which he readily has access? (3) what is the nature of the threat faced by society which the provision is designed to combat?[15]

The fact of possession must be proved by the prosecution. Once that is proved, it is up to the accused to show that he was unaware of such possession. To require the prosecution to prove knowledge would make such proof practically impossible, especially considering that drug smugglers usually seal drugs in containers, thereby enabling the person in possession of the container to say that he was unaware of the contents. It is a matter of common sense that possession of an incriminating object requires a full and satisfactory explanation, and no one is better placed than the accused to supply such an explanation. Unless the burden is shifted, it would become practically impossible to prosecute such offenders with success. Indeed, it may be said that, in such cases, the presumption may be required to redress an imbalance of arms which otherwise would shift to an unreasonable degree against the prosecution.

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15 *Ibid.*

The problem however arises if the accused adduces evidence which, while raising a reasonable doubt as to his guilty knowledge, is not sufficient to persuade the tribunal of fact on a balance of probabilities. In such a situation the presumption of innocence will indeed be undermined, and the guarantees under the constitution and the Convention breached, because the accused would be convicted although a reasonable doubt as to his guilt exists.

This, however, is not a matter which can be resolved at this stage of the proceedings, because it depends upon the nature and cogency of the evidence which is still to be produced. In the words of Lord Hope, as expressed in his opinion in the Kebeline case, "it may be necessary for the facts of the case to be considered before a conclusion can be reached as to whether the presumption of innocence has been breached. In that event the matters cannot be resolved until after trial". This was also the view of the European Court of Human Rights in the Salabiaku Case when it stated that the test whether the presumption has been confined within reasonable limits which maintain the rights of the accused "depends upon the circumstances of the individual case".

On the third question, there is no doubt that the threat posed by drugs is a serious menace to society and the legislator is fully justified in applying proportionate means which are necessary to combat the sophisticated and cunning methods employed by those who deal in dangerous drugs. This is not to say that the protection of the law should not be allowed also to those charged with such offences: indeed, the need to keep constantly in mind the requirements of the rule of law become more sensitive in such cases, as was eloquently pointed out by the South African Constitutional Court in **State *versus* Coetzee**[16]:

There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the

[16] [6 March 1997] 2 LRC 593 http://www.concourt.gov.za/judgment.php?case_id=11973&PHPSESSID=2bf3fb042bdcf8a3edcb029ab7cd0133

more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption … the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

This is indeed a vital *caveat* to be kept constantly in mind by the tribunal of fact; however, it is not the same as saying that presumptions which encroach upon the presumption of innocence, so long as these are kept within reasonable limits which balance all legitimate interests, are *a priori* not compatible with the guarantees for a fair trial under the Constitution and the Convention.

For these reasons, it is the view of this court that it cannot be said *a priori* that the first presumption, namely, the presumption of guilty knowledge arising from the fact of possession, *etc.*, is in breach of the provisions of the Constitution or the Convention.

We now move on to consider the second limb of the question before this court, namely whether it is legitimate under the Constitution and the Convention for a conviction to be secured upon proof of a generic guilty knowledge, without requiring further proof of knowledge that the object possessed, sold or dealt in is, specifically, a dangerous drug proscribed under the Ordinance. We have already

seen that this is a different way of saying that proof of a generic guilty knowledge raises an irrebuttable presumption of knowledge that the object possessed, *etc.*, is a dangerous drug. In this instance the presumption is mandatory, and evidence to the contrary is not allowed.

On a first analysis, such a presumption may indeed appear to be in breach of the provisions of the Constitution and of the Convention; however, in the view of this court, other relevant factors have to be taken into consideration.

In the first place, one must keep in mind that this presumption arises only if the accused is shown to have guilty knowledge because he is aware that he is in possession of, or selling or dealing in, a prohibited object. Moral blameworthiness already attaches to him and his position is different from that of one who unknowingly has dangerous drugs slipped into his pockets. As has been pointed out above, whoever knowingly possesses or sells or deals in an object knowing that that object is a prohibited object, is knowingly taking the risk that such object may be a drug, with all the consequences which that fact entails, and the accused, who already knows that he is handling a prohibited object, is therefore made responsible for ensuring that such object is not a prohibited drug. There is nothing objectionable or, indeed, in conflict with the provisions of the Constitution or of the Convention in putting such a burden on the accused.

In the second place, allowing a person with guilty knowledge to escape conviction because he did not know the nature of the prohibited object in his possession would make it ludicrously easy to circumvent the provisions of the Ordinance. Indeed, it would be easy to conceive of a scheme whereby various couriers are each given possession of sealed packages all of which, except for one, contain drugs. Each courier knows that he is participating in an illegal scheme but, like the shooter in a firing squad who does not know whether his rifle is the one loaded with the blank cartridge, the courier does not know whether his package is the one which does not contain drugs. Common sense dictates that if his

package turns out to contain drugs, then he should not avoid conviction.

In the view of this Court, therefore, the second presumption, *viz.* the one arising from art. 26(2) of the Ordinance, also is not in conflict with the provisions of the Constitution or of the Convention; indeed, not only is it justified by the need to prevent the provisions of the law from being sidestepped by crafty schemes, but is also necessary to preserve an equality of arms for the prosecution.

The accused in the present case is complaining that, by not allowing her to prove that she did not know the nature of the objects in her possession, the law is depriving her of a defence which otherwise would have been available to her. This statement is correct, but it avoids the relevant question of whether, assuming that she know that she had a prohibited object in her possession (which, as we have seen, is a condition which must be satisfied before the prosecution may rely on art. 26(2) of the Ordinance), she should be allowed such a defence. In such circumstances, she had a duty to ensure that the prohibited object was not a drug; if she failed in such duty, she should not be allowed the defence the loss whereof she laments.

For the above reasons, this court is of the view that the provisions of art. 26(2) of the Dangerous Drugs Ordinance are not in breach of the provisions of art. 39 of the Constitution and of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the guarantees for a fair trial, in particular, the presumption of innocence and the benefit of equality of arms.

The records of the proceedings are to be referred back to the Criminal Court which is to continue hearing the case against the accused.

< Final Judgement >

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