MALTA

CONSTITUTIONAL COURT

THE HON. CHIEF JUSTICE
VINCENT DE GAETANO

HON. MR. JUSTICE
JOSEPH D. CAMILLERI

HON. MR. JUSTICE
JOSEPH A. FILLETTI

Sitting of the 1 st April, 2005

Civil Appeal Number. 14/2004/1

The Republic of Malta

v.

Gregory Robert Eyre and Susan Jayne Molyneaux

The Court:

Introduction

1. This is an appeal from a decision delivered by the First Hall of the Civil Court on the 12 October, 2004 pursuant to

a reference made by the Criminal Court in terms of Section 46(3) of the Constitution and Section 4(3) of the European Convention Act (Cap. 319). The terms of the reference are clearly set out in the judgement of the first Court, which is being reproduced hereunder as part of this judgement. This Court, however, is of the opinion that it is appropriate even at this stage to point out something which appears to have been ignored by the first Court, namely that in terms of the European Convention Act the substantial provision of Article 6(2) of the European Convention must be applied subject to the reservation made by Malta when signing the Convention in 1966. This stems from Section 3(3) of Cap. 319 which provides that *"The Human Rights and Fundamental Freedoms shall be enforceable subject to the Declaration and Reservations made by the Government of Malta on the signing of the Convention on the 12th day of December, 1966, which Declaration and Reservations are reproduced in the Second Schedule to this Act."* Item 1 of the "Declaration and Reservations" states: *"The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts."* As will be explained further on this judgement, this declaration is not really of such fundamental importance for the purpose of the question under examination in this particular case, since even without this declaration the Strasbourg case-law has in general admitted the possibility of reverse onus provisions and presumptions, subject, however, to certain overriding considerations.

2. The essence of the question under examination is whether subsection (2) of Section 26 of the Dangerous Drugs Ordinance (Cap. 101) is in violation of Section 39 of the Constitution and of Article 6 of the European Convention in so far as it is alleged that it deprives the person accused – in this case, Susan Jane Molyneaux – of the benefit of the presumption of innocence and of the general procedural requirement of "equality of arms" which is an essential requisite of a "fair trial".

The judgement of the first Court

3. The First Hall of the Civil Court, in an elaborate judgement, came to the conclusion that Section 26(2) of Cap. 101 is not in breach of Section 39 of the Constitution or of Article 6 of the Convention. The text of the entire judgement is reproduced hereunder:

"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 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 or 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

[1] Chapter 319 of the Laws of Malta.
[2] Chapter 101 of the Laws of Malta.

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 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

[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."

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

[4] *Fol*. 30.

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 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

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5 *Fol.* 34.

6 *Foll.* 34 *et seq.*

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 of possessing or selling, or dealing in, any prohibited

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7 *Fol.* 31.
8 *Fol.* 31.
9 *Fol.* 32.

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

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

right to a fair trial and in particular the right to be 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]:

[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]

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 "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

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

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

[13] Opinion of Lord Hope of Craighead.

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

li tkun materjalment daħħlet droga f'Malta hi <u>preżunta</u> 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 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

[15] *Ibid.*

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.

"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 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

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

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."

The appeal

4. Susan Jane Molyneaux appealed from this judgement by an application filed on the 22 October, 2004. Basically her grievances are two:

"On the one hand she respectfully submits that Section 26(2) of the Dangerous Drugs Ordinance is in violation of her right to a fair trial since it violates the right to be presumed innocent until proven guilty; while on the other hand she also complains that the same Section 26(2) is in violation of her right to a fair trial since it violates the principle inherent in such a right, that is the principle of equality of arms." [17]

5. Before examining the relevant law and the grievances in more detail, it is pertinent to point out that appellant raised the issue of the compatibility of Section 26(2) with the provisions of the Constitution and of the European Convention in her preliminary pleas before the Criminal Court. In other words, the actual trial by jury of the said Molyneaux has not yet commenced. The "question" raised

[17] Page 105 of the record of proceedings.

by her before the Criminal Court implies, therefore, not that the provisions of Section 39 and of Article 6 have been or are being contravened, but that they are "likely to be contravened" in relation to her[18].

The Dangerous Drugs Ordinance

6. In the Bill of Indictment preferred against her by the Attorney General, Molyneaux stands charged with (i) conspiracy to import into Malta, and to deal in any manner in, cocaine and Ecstasy pills, (ii) importation of cocaine into Malta, and (iii) importation of Ecstasy pills into Malta. Cocaine falls to be regulated under the Dangerous Drugs Ordinance already referred to, whereas Ecstasy pills fall to be regulated under the Medical and Kindred Professions Ordinance (Cap. 31). Although the original reference made by the Criminal Court as well as the judgement of the first Court refer only to Section 26(2) of the Dangerous Drugs Ordinance, what has been said by the first Court and what will be said by this Court applies equally to the provision found in Cap. 31 which is identical to subsection (2) of Section 26, namely subsection (2) of Section 121A. It will however be convenient to continue to refer solely to the Dangerous Drugs Ordinance and to Section 26(2) of that Ordinance and to the offences of possession of, and of selling or dealing in, a drug contrary to Cap. 101, on the understanding that all that is said applies equally to the offences of possession of, and of selling or dealing in, a drug contrary to the provisions of Cap. 31. Under both laws, "dealing", with reference to a drug, includes "importation in such circumstances that the court is satisfied that such importation was not for the exclusive use of the offender"[19].

7. Now, there is no doubt that the offences of possession of, and of selling or dealing in, a drug contrary to the provisions of the Dangerous Drugs Ordinance, as well as the offence of conspiring "for the purposes of selling or dealing in a drug in these Islands contrary to the

[18] See Section 46(1) of the Constitution and Section 4(1) of the European Convention Act.
[19] See Section 22(1B) of Cap. 101 and Section 120A(1B) of Cap. 31.

provisions of this Ordinance"[20] are wilful offences requiring the appropriate formal element known as "dolo". They cannot be committed "negligently", nor are they offences of strict liability requiring no criminal intent. As with all other offences falling in this category, therefore, the constituent elements of the offence are the material element and the formal element. Leaving aside the offence of conspiracy – the examination of this offence would lead us into complications unnecessary for the limited purposes of this constitutional case – and limiting oneself, therefore, to the offences of possession, and physical importation into Malta, of a prohibited drug, the prosecution must in the first place prove beyond reasonable doubt the material element. The prosecution must, in other words, prove that the substance in question was in fact a prohibited drug and not something else (even if the accused thought that it was a prohibited drug, but in actual fact it turns out to be something else, the material element would not have been proved); and it must also prove that the substance was in the possession (actual or constructive) of the accused and, with regard to importation, that it was in fact brought into Malta. The present case does not raise any issues as to the material element. As to the formal element, this Court has examined the various judgements of the Court of Criminal Appeal referred to by learned counsel for the defence before the Criminal Court[21]. From these judgements it would appear that the position at law with regard to this formal element has, over the years, been regarded to be the following:

(1) if a person is found to be in possession of a prohibited drug, or if a person has brought into Malta a prohibited drug, he is presumed to have been knowingly in possession of that drug and to have knowingly brought it into Malta;

[20] Section 22(1)(f) of Cap. 101. See the corresponding Section 120A(1)(f) of Cap. 31.

[21] See the note of submissions of the 14 May 2004, and in particular page three thereof (page 31 of the record): ***P. v. Charles Clifton*** Court of Criminal Appeal 5 July 1982; ***P. v. Martin Xuereb*** CCA 20 September 1996; ***P. v. Seifeddine Mohamed Marshan et*** CCA 21 October 1996; ***P. v. John Borg*** CCA 23 June 1997; and ***P. v. Marzouki Hachemi Beya bent Abdellatif*** CCA 16 February 1998.

(2) this presumption, rather than a mere presumption of fact[22], has been ascribed to subsection (1)[23] of Section 26 of the Dangerous Drugs Ordinance, which subsection is not in issue in this case;
(3) this presumption, therefore, is a rebuttable presumption of law;
(4) this rebuttable presumption, however, must be read in conjunction with subsection (2) of section 26, and to that extent some of the said judgements have referred to a "limitation" imposed as to what the accused can prove in order to discharge the burden resulting from the said subsection (1)[24];
(5) in view of the said "limitation", the word "knowingly" means as a minimum (i) knowledge of the existence or presence of the substance, and (ii) if the accused believed that the substance was something other than a prohibited drug, awareness that the said substance is possessed, or has been brought into Malta, in violation of the law – in other words, "knowingly" does not necessarily mean or imply knowledge that the substance is in fact a prohibited drug or the prohibited drug that the accused was actually found to be in possession of or that he actually brought into Malta (obviously if the accused knew that the substance was a drug, it is immaterial whether he knew that possession of that substance, or its importation into Malta, was in violation of the law, ignorance of the law being no excuse).

General principles and considerations

8. There is no doubt that the presumption of innocence is a cardinal principle of criminal justice. As was stated by

[22] That is, a form of a frequently recurring variety of circumstantial evidence – evidence of relevant facts from which the existence of some fact which is in issue may be inferred – as, for example, when a person is found in possession of property so shortly after it was stolen that the court may, in the absence of a credible explanation, come to the conclusion that the person in question actually stole that property.
[23] Section 26(1): *"In any proceedings against any person for an offence against this Ordinance, it shall not be necessary to negative by evidence any licence, authority or other matter of exception or defence, and the burden of proving any such matter shall lie on the person seeking to avail himself thereof."*
[24] It is interesting to note that subsection (2) of Section 26 was only introduced in 1994 by Section 17 of Act VI of that year.

the then Lord Chancellor, Viscount Stankey, in ***Woolmington v. DPP*** [25]

"…throughout the web of English criminal law one golden thread is always to be seen, that is that it is the duty of the prosecution to prove the prisoner's guilt."

However, it has always been accepted, both in English and in Maltese law, that there may be circumstances where it is only fair that the onus of proving certain facts, especially facts which lie within the particular knowledge of the accused, should rest on the accused himself: we have already seen the proviso to subsection (5) of Section 39 of the Constitution, and how this has been transposed, by way of a declaration, to the interpretation of Article 6(2) of the Convention under the European Convention Act. This Court does not believe that it is necessary to go into a detailed analysis of the distinction between the "legal burden" and the "evidential burden" as understood in English law (and to a certain extent also in Scots law)[26] – in practice Maltese courts have steered clear of the subtle distinctions that go into such a detailed analysis. The principles applied by Maltese Courts of Criminal Justice in this field are quite clear: (**i**) it is for the prosecution to prove the guilt of the accused beyond reasonable doubt; (**ii**) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (**iii**) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (**iv**) to determine whether the prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must

[25] [1935] A.C. 426 at 481.

[26] One may refer in connection with this matter to **Blackstone's Criminal Practice – 2004**, (OUP) paras. F3.1 to F3.15, pages 2033 to 2047; Sir Richard Eggleston's **Evidence, Proof and Probability**, Weidenfeld & Nicolson (London) 1978, pp. 89 to 92; David Field and Fiona Raitt **Evidence**, W. Green / Sweet & Maxwell (Edinburgh) 1996, pp. 12 to 16.

be taken of all the evidence and of all the circumstances of the case; (**v**) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence.

Further considerations

9. This court has had the benefit not only of extensive arguments by learned counsel on both sides, but also the benefit of reading several judgements of the European Court of Human Rights and of the Court of Appeal of England and Wales and of the House of Lords to which learned counsel also referred. Now there is no doubt that, apart from Malta's declaration referred to above, Article 6(2) of the Convention does not in principle prohibit presumptions of fact or of law and "reverse onus provisions". As Ben Emmerson and Andrew Ashworth observe in their book **Human Rights and Criminal Justice** [27]:

"The European Court of Human Rights has held that, whilst Article 6(2) does not automatically prohibit all presumptions of fact or law, neither does it regard such presumptions 'with indifference'. Rules which transfer the burden to the defence to disprove specific facts or matters must be confined 'within reasonable limits' which respect the rights of the defence, and ensure that the prosecution bear the overall burden of proving the defendant's guilt. As the Court has observed [in *Salabiaku v. France* (1991) 13 E.H.R.R. 379]: *'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 the criminal law…Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to*

[27] Sweet & Maxwell (London) 2001.

***confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.*"** [28]

10. Of particular relevance is also the general guidance given to lower courts by the Court of Appeal (Criminal Division) of England and Wales in the judgement delivered on the 29 April 2004 in the matter of ***Attorney General Reference no. 1 of 2004 and R. v. Edwards and others*** [29]. In this case the Court had this to say:

"The common law (the golden thread) and the language of Article 6(2) have the same effect. Both permit legal reverse burdens of proof or presumptions in the appropriate circumstances.

"Reverse legal burdens are probably justified if the overall burden of proof is on the prosecution i.e., the prosecution has to prove the essential ingredients of the offence, but there is a situation where there are significant reasons why it is fair and reasonable to deny the accused the 'general' protection normally guaranteed by the presumption of innocence.

"Where the exception goes no further than is reasonably necessary to achieve the objective of the reverse burden (i.e. it is proportionate), it is sufficient if the exception is reasonably necessary in all the circumstances. The assumption should be that Parliament would not have made an exception without good reason. While the judge must make his own decision as to whether there is a contravention of Article 6, the task of a judge is to 'review' Parliament's approach…

"If only an evidential burden is placed on the defendant there will be no risk of contravention of Article 6(2).

[28] *Op. cit.* p. 258, para. 9-09.
[29] The Court was composed of The Lord Chief Justice (Lord Woolf), Lord Justice Judge, and Justices Gage, Elias and Stanley Burnton.

"When ascertaining whether an exception is justified, the court must construe the provision to ascertain what will be the realistic effects of the reverse burden. In doing this the court should be more concerned with substance than form. If the proper interpretation is that the statutory provision creates an offence plus an exception that will in itself be a strong indication that there is no contravention of Article 6(2).

"The easier it is for the accused to discharge the burden the more likely it is that the reverse burden is justified. This will be the case where the facts are within the defendant's own knowledge. How difficult it would be for the prosecution to establish the facts is also indicative of whether a reverse legal burden is justified.

"The ultimate question is: would the exception prevent a fair trial? If it would, it must either be read down if this is possible; otherwise it should be declared incompatible.

"Caution must be exercised when considering the seriousness of the offence and the power of punishment. The need for a reverse burden is not necessarily reflected by the gravity of the offence, though, from a defendant's point of view, the more serious the offence, the more important it is that there is no interference with the presumption of innocence.

"If guidance is needed as to the approach of the European Court of Human Rights, that is provided by the *Salabiaku* case at para 28 of the judgement where it is stated that: 'Article 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 maintains the rights of the defence'."

11. More recently in the House of Lords[30], in ***Attorney General's Reference no. 4 of 2002 and Sheldrake v. DPP*** [31], Lord Bingham of Cornhill, who delivered the main opinion after reviewing the case-law of the European Court of Human Rights, had this to say:

"From this body of authority certain principles may be derived. The overriding concern is that the trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or of law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to the defendant must be examined, and must be reasonable. Relevant to any judgement on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns [32] do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

12. It would at this stage be appropriate to consider the purpose and purport of subsection (2) of Section 26 of the Dangerous Drugs Ordinance. Again this Court must stress

[30] Lord Bingham of Cornhill, Lord Steyn, Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry and Lord Carswell.
[31] Opinions delivered on the 14 October 2004.
[32] The case involved, among other things, a reference concerning Section 11(2) of the Terrorism Act 2000.

that the exercise that it is at the moment carrying out is totally unrelated to the evidence which may eventually be produced at the trial. In other words, this Court is simply considering whether it can be said *a priori* that subsection (2) of Section 26 of Cap. 101 is incompatible with Section 39 of the Constitution and Article 6 of the Convention.

13. It is clear to this Court that the general purpose of this provision is to avoid a situation, in matters concerning drug possession and drug trafficking, where a person, who deliberately refrains from enquiring about the nature of the substance that he has bought or otherwise obtained, or that he has been given, but who knows or reasonably suspects (and therefore is aware) that he has bought or obtained or been given something which is illegal, can avoid the rigours of the law if it turns out that that substance is in fact a prohibited drug. This is clearly borne out by the debate in committee stage in the House of Representatives when Section 26 was being amended with the introduction of subsection (2) [33]. The first Court in its judgement said that it would be "ludicrously easy to circumvent the provisions of the Ordinance" if a person were simply to refrain from enquiring about the true nature of the substance if all the circumstances indicate to him that he has, or that he has been given, something which is illegal. It would seem that for this reason subsection (2) of Section 26 places a "limitation" in the form of a "redefinition" of the formal element of the offence of possession of, or selling or dealing in, a drug contrary to the provisions of the Ordinance: rather than requiring that the accused should know that what he has in his possession or what he has brought into Malta is a prohibited drug, guilt attaches even if he is merely aware that what he has in his possession or what he has brought into Malta is something illegal – what the first Court in its judgement referred to as "generic guilty knowledge". Of course the Court before which an accused is brought may come to the conclusion, after considering all the evidence, that he was perfectly aware that he had in his possession, or that he had brought into Malta, a prohibited drug; but if

[33] See Parliamentary Debates, Sitting number 221, 25 January 1994.

it comes to the conclusion that he was merely aware that he had in his possession, or that he had brought into Malta, something which was illegal, then, as the law stands at present, the accused must be convicted. The question which this Court has now to consider is whether the combined effect of the shifting of the burden of proof together with the said "limitation" can, in realistic terms, be said to be reasonable and proportionate to the aim sought to be achieved, in such a way that the "rights of the defence" can be said to be substantially mantained[34]. After careful and lengthy deliberation this Court must give a negative answer to the question. While this Court fully appreciates the reasons behind subsection (2) of Section 26, the absolute way in which this provision is drafted not only effectively and substantially deprives an accused person of the possibility of any reasonable defence to a charge of possession of, and trafficking in, a dangerous drug but, more importantly, deprives the court of the power to assess the evidence and to tailor the punishment according to the moral blameworthiness of the accused. In fact, if an accused, indicted before the Criminal Court, proves to the satistaction of that Court that he genuinely believed that he was importing, for instance, a pornographic film in cassette form, but the cassette turns out (unbeknown to him) to be packed with heroin, he nontheless faces a term of imprisonment ranging from a minimum of four years to a maximum of life imprisonment (and, if a determinate sentence of imprisonment is imposed – which may be of up to thirty years – there is the addition of a fine ranging from a minimum of one thousand liri to a maximum of fifty thousand liri). The punishment under the Customs Ordinance (Cap. 37) for the importation of such a pornographic cassette is a fine not exceeding twenty-five liri or such fine together with imprisonment not exceeding two years[35]; and the punishment for such importation under Section 208 of the Criminal Code is of imprisonment for a term not exceeding six months or a fine not exceeding two hundred liri or both such fine and imprisonment. The expressions "it shall not be a defence to such charge" and "or of any other law" in

[34] See ***Salabiaku v. France***, judgement of the 7 October 1988, para. 28.
[35] Section 62 of the Customs Ordinance.

subsection (2) of Section 26 have the cumulative effect that, in the example given, the accused has to be treated by the court as if he "knowingly" imported into Malta the amount of drug found in the cassette, irrespective of what the accused actually believed to be in the cassette. This clearly places the accused at a great, indeed disproportionate, disadvantage *vis-à-vis* the prosecution, a disadvantage that he has absolutely no chance of redressing whatever the evidence he adduces with regard to the formal element of the offence. Such an imbalance strikes against the very foundations of the fairness of any criminal trial. The situaton would, of course, be different if the accused knew, or reasonably suspected, that he was carrying some form of prohibited drug, even though not necessarily the drug or type of drug actually found in his possession – the presumption of knowledge in this case, even if irrebuttable, would be perfectly reasonable (this, indeed, appears to be the position in England under Section 28(3)(a)(b) of the Misuse of Drugs Act, 1971 [36]). Although the Legislature has every right to pass the laws it thinks fit and although there is a general presumption that Parliament legislates in conformity with the provisions of the Constitution and of the European Convention, in a state governed by the Rule of Law it is ultimately always the task of the courts – in our case of this Court – to review such laws and to determine finally whether or not

[36] Section 28(**3**)(a): *"Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused...shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but…he shall be acquitted thereof…if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug…"*. Subsection (**2**) of this Section 28 provides: *"Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is neccesary for the prosecution to prove if he is to be convicted of the offence charged."* In this connection it has been held that *"If the defence raises the issue sufficient to satisfy the evidential burden 'that he did not know that the bag or other container which he was carrying contained a controlled drug and believed it contained a different type of article such as a video film, this defence arises under section 28(2) and not under section 28(3)' (per Lord Hutton in* ***Lambert*** *at [181], applying* ***Salmon v. HM Advocate*** *[1998] Scot HC 12"* – **Blackstone's Criminal Practice – 2004** (OUP), para. B20-19, page 779.

Parliament's approach is in conformity with the Constitution and/or the European Convention[37].

14. As has already been observed, the case against appellant Molyneaux has not yet commenced before a jury. Consequently one cannot determine with certainty how the trial judge will ultimately direct the jury as to the formal element of the offences with which she stands charged, or, indeed, how he will interpret subsection (2) of Section 26[38]. This Court can only assume that the Criminal Court will interpret this provision as it has heretofore been interpreted by the Court of Criminal Appeal. Consequently, in the instant case, it would appear that it would be sufficient for this Court to direct the Criminal Court to ignore that part of subsection (2) of the said Section 26 which creates the imbalance referred to above.

15. For these reasons, the Court allows the appeal, revokes the judgement of the First Hall of the Civil Court of the 12 October 2004 and instead declares that, in the instant case, the fundamental right to a fair trial as guaranteed by Section 39(1) of the Constitution and by Article 6(1) of the European Convention is likely to be contravened in relation to appellant Susan Jane Molyneaux by the application of subsection (2) of Section 26 of the Dangerous Drugs Ordinance (Cap. 101) as at present in force; consequently sends back the record of the proceedings to the Criminal Court with a direction that that Court, and any other Court of Criminal Justice which may subsequently deal with the case, is to ignore the words "or of any other law" in subsection (2) of the said Section 26 if called upon to apply or interpret that subsection. In view of the novelty and difficulty of this case, each party is to bear its own costs (including those of first instance), if any. Finally the Court orders that a certified true copy of this judgement be forthwith

[37] See ***Attorney General Reference no. 1 of 2004 and R. v. Edwards and others***, *supra.*

[38] The position was different in the case of ***Pham Hoang v. France***, decided by the European Court of Human Rights on the 25 September 1992, and to which reference was made by appellant. In that case the French Court of Appeal had already expressed its views and interpreted certain provisions of French law, and applied them to the concrete facts of the case, before the matter was brought before the Strasbourg Court.

transmitted by the Registrar to the Speaker of the House of Representatives in accordance with Section 242 of the Code of Organisation and Civil Procedure (Cap. 12).

< Final Judgement >

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