

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 57 of 2020
High Court Civil Case No. HBC 22 of 2019

BETWEEN : **LAND TRANSPORT AUTHORITY**

Appellant

AND : **PASIFIKA ENTERPRISE**

Respondent

Coram : (Dr) Almeida Guneratne, P
Jitoko, VP
Dayaratne, JA

Counsel : Mr V. Chand and Ms N. Prasad for the Appellant
Mr R. Singh and Ms A. Swamy for the Respondent

Date of Hearing : 13 July, 2023

Date of Judgment : 28 July, 2023

JUDGMENT

(Dr) Almeida Guneratne, P

[1] I am in complete agreement with the judgment of His Lordship Justice Dayaratne.

Jitoko, VP

- [2] I have had the advantage of reading the draft judgment of Dayaratne JA in this appeal and I express my entire agreement with his reasoning, conclusions and orders proposed.

Dayaratne, JA

- [3] This is an appeal from the judgment of the High Court of Lautoka dated 06 July 2020.

The case in the High Court

- [4] The Respondent instituted this action in the High Court against the Appellant by way of Originating Summons seeking the following orders:
- (a) A declaration that Traffic Infringement Notice No. 3589118 issued on 5 March 2019, is in breach of Section 14(1) and 15 of the Constitution of the Republic of Fiji and therefore null and void.
 - (b) That the Traffic Infringement Notice (TIN) No. 3589118 be declared null and void
 - (c) Costs on client solicitor on indemnity basis

Facts in brief

- [5] The Respondent was the owner of the truck bearing registration number IY 967.
- [6] On 5 March 2019, the Respondent was issued with a TIN bearing No. 3589118 for the alleged offence of permitting another person to drive the said truck on the road with a non-confirming mass plus load, namely permitting the driver of the said truck to carry a load over the permitted load as regulated. The plaintiff was fined \$13,000.00 as being the fixed penalty.
- [7] The solicitor for the Respondent has by his letter dated 17 May 2019, challenged the TIN on the following grounds:
- a) That the charging officer did not give any notice and did not request the driver to off load the excess weight before charging and issuing the TIN.

- b) That the procedure used or the way the scale was used by the defendant to weigh the truck was incorrect.
- c) That the plaintiff did load the truck to the limit it usually loads
- d) That no certificate or printed reading was issued by the defendant from the scale used to ascertain the alleged overloading.
- e) That the TIN issued to the plaintiff is illegal and an abuse of process and thus it should be withdrawn and any money paid under the said TIN be refunded and any conviction noted against our client to be removed from the system.

The legal basis on which the Respondent sought the declaration in the High Court

- [8] In the High Court, the Respondent asserted that the TIN is unconstitutional as it does not allow an opportunity for the TIN to be challenged in a court of law. It was further contended that the TIN itself provides that the onus is on the Respondent to institute proceedings in court to dispute the notice. On that premise, the Respondent took up the position that there is a 'reverse onus' on the Respondent to prove its innocence.
- [9] The Appellant took up the position that the TIN does not violate the provisions contained in the Constitution of Fiji since the TIN emanates from the Land Transport Act (LTA) and its Regulations. It also raised certain objections regarding the maintainability of the Originating Summons and also raised the issue of the Respondent's failure to join the Attorney General's Office in the said proceedings.

The Grounds of Appeal urged by the Appellant

- [10] In its appeal before this court, the Appellant has raised seven grounds of appeal. They are;

"Ground 1

The learned Judge erred in law when he held that the Learned Transport (Traffic Infringement Notice) Regulations 2017 has a reverse onus provision in that it shifts the burden of proof to the accused or applies a presumption of fact or it operates against the accused.

Ground 2

The learned Judge erred in law when he held that regulation 6(c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a

reverse onus in that it requires a person issued with the Traffic Infringement Notice to prove his innocence. On the contrary, the words elect to dispute the fixed penalty in court” simply mean that if a person issued with the Traffic Infringement Notice disagrees with the said Notice, he or she has the option to dispute the notice in court however, he or she retains the presumption of innocence as it is the Appellant’s responsibility to establish.

Ground 3

The Learned Judge erred in law and in fact when he held that regulation 6(c) of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the right of presumption of innocence guaranteed under section 14(2) of the Constitution without adopting a reasonable interpretation of the law which is consistent with the Constitution as required under section 3(2) of the Constitution.

Ground 4

In applying section 2(2) of the which states that any law that is inconsistent with the Constitution of the Republic of Fiji (‘Constitution’) is invalid to the extent of the inconsistency, the Learned Judge erred in law and in fact when he held that Regulation 6 (c)of the Land Transport (Traffic Infringement Notice) Regulations 2017 is in violation of section 14(2) of the Constitution.

Ground 5

The Learned Trial Judge erred in law and in fact when he held that the deeming provision of a conviction under regulation 9 of the Land Transport (Traffic Infringement Notice) Regulations 2017 violates the Respondent’s rights under section 14(2)(a) and 15(1) of the Constitution.

Ground 6

By determining that Regulation 6 of the Land Transport (Traffic Infringement Notice) Regulations 2017 has the effect of a reverse onus, the Learned Judge incorrectly held that the Appellant ought to have made submissions on the purpose of introducing a reverse onus in the said regulation.

Ground 7

The Learned Judge erred in law and in fact when he heard and determined the Respondent’s Originating Summons dated 15 October 2020 which relates to section 14(2) and 15 under the Bill of Rights Chapter of the Constitution, without firstly satisfying itself as to whether the Attorney General was provided notice of the matter, and thereby denying the Attorney General its constitutional right to consider intervening in the matter, pursuant to section 44(7) and (8) of the Constitution.

[11] Grounds 1 – 6 overlap with each other and I will therefore consider them together.

The Regulations in terms of which the TIN was issued

- [12] What is central to the determination of this matter will be an interpretation of the Regulations in terms of which the TIN was issued. They are the Land Transport (Traffic Infringement Notice) Regulations 2017 and have come into force on 26 September 2017 upon being published in the Gazette. These Regulations have been made in terms of Section 92 of the Land Transport Act 1998 as amended by Land Transport (Amendment)(No.3) Act 2017.
- [13] Part 2 of the Regulations are titled '*Proceedings for traffic Infringement Notices*'. These Regulations become relevant to the determination of this matter.
- [14] Regulation 5 has the heading '*Issuance of Traffic Infringement Notices*' and deals with the manner in which TIN are to be issued, time periods, manner of service etc.
- [15] Regulation 6 has the heading '*Fixed Penalty*' and it spells out that a person issued with a TIN is liable to a fixed penalty and goes on to stipulate what a person issued with a TIN is entitled to do.
- [16] Regulation 7 under the heading '*Failure to pay fixed penalty*' spells out the consequences if a person has not undertaken any of the actions as stipulated in Regulation 6.
- [17] Regulation 9 bears the title '*Failure to take action within 12 months*' and spells out the consequences of not taking any steps as provided for under Regulation 7 within a period of 12 months.

The findings of the High Court Judge

- [18] The ultimate conclusion arrived at by the learned High Court Judge was as follows:
'For all the reasons, I conclude that the plaintiff is entitled to relief it seeks. I accordingly declare that the Traffic Infringement Notice No. 3589118 issued on 5 March 2019 is in breach of sections 14(2) and 15 of the Constitution and therefore null and void. The plaintiff is also entitled to summarily assessed costs of \$1000.00'. Accordingly, he has granted a declaration that the TIN concerned is *null and void*.

- [19] At paragraph 22 of his judgment he states that *'The principal issue is whether the TIN issued against the plaintiff violates the plaintiff's bill of rights guaranteed under sections 14(2) and 15 of the Constitution'*. This in my view is an accurate summation of the issue that the Respondent called upon the High Court to determine.
- [20] Then at paragraph 23 of the judgment, he states that *'Section 14(2) of the Constitution guarantees that every person charged with an offence has the right to be presumed innocent until proven guilty according to law while section 15 the right to a fair trial before a court of law'*. This was a proper assessment of the provisions contained in the said Sections of the Constitution.
- [21] The learned High Court Judge has then formed the view that *'The regulation in question has reverse onus provisions. It shifts the burden of proof to the accused or applies a presumption of fact or it operates against the accused'*. (paragraph 26 of the judgment) and that *'R6(c) that elect to dispute the fixed penalty in court clearly, in my opinion, has the effect of reverse onus meaning the person issued with a TIN must prove his innocence while the Constitution guarantees the presumption of innocence as a fundamental human right'* (paragraph 33 of the judgment)
- [22] These are the findings that this court ultimately will have to pronounce upon.

Submissions of the Appellant and the Respondent in brief

- [23] The learned counsel for the Appellant submits that the learned High Court Judge erred in law and in fact when he decided that Regulation 6 of the Land Transport (Traffic Infringement Notice) Regulations 2017 has cast a *reverse onus* upon a person who has been served with a TIN.
- [24] He submits that Regulation 6 (c) neither shifts the burden nor denies an accused person his or her presumption of innocence as guaranteed under Section 14(2) of the Constitution. His position is that by misconstruing that the said Regulation has a reverse onus, the learned High Court judge incorrectly held that the said Regulation is unconstitutional since it violates Section 14(2) of the Constitution.

[25] The learned counsel for the Respondent on the other hand contends that a presumption against the innocence of the person on whom a TIN has been issued is brought upon by the said Regulation. He submits that a *reverse onus* has been cast on the Respondent to prove its innocence. He states further that at all times the onus of proving the guilt of the Respondent rests on the prosecution/State in terms of the standard of proof which is beyond reasonable doubt and that there cannot be a shifting of this burden. He states that the Crimes Act amplifies this position.

Does the Regulation create a presumption or impose a reverse onus?

[26] It must be borne in mind that prior to engaging in an adventurous expedition as to whether the TIN or in effect, Regulations 6 and/or 9 violate the protection afforded by the Constitution to a person, it is important to first determine the exact nature and the effect of these regulations. As asserted by the Respondent and as determined by the High Court, can they be classified as provisions that imposes a *reverse onus*?

[27] I will first look at Regulation 6.

It reads as follows;

"A person to whom a Traffic Infringement Notice is issued, is liable to a fixed penalty and must, within 90 days from the date the Traffic Infringement Notice is issued, undertake one of the following actions –

(a) pay the fixed penalty in a single payment or by instalments;

(b) make a statutory Declaration to the Authority in accordance with section 85(3) or 85(a) of the Act; or

(c) elect to dispute the fixed penalty in court". (emphasis added)

[28] A reading of the above Regulation makes it clear that a person who is issued with a TIN is given the right of exercising three options. In terms of (a), if he pays the fixed penalty the matter comes to an end. The second option (b) is to cater to certain situations as morefully provided for in the sections of the LTA mentioned therein. Needless to say, the third option (c), confers a right on a person issued with a TIN to contest it. This right invariably will be exercised by a person who does not admit the commission of the 'offence' as alleged in the TIN. That would be the literal meaning of the words '*elect to dispute*' and thus opens up a path to the person who has been served with a TIN to challenge its contents.

- [29] In fact, does the Regulation infact contain any *presumption* or cast a *reverse onus* on the person who '*elects to dispute the fixed penalty in court*'?

What form does provisions which contain a presumption or reverse onus take?

- [30] It is not uncommon for laws to contain provisions regarding certain presumptions. Criminal laws, mostly governing illicit drugs, contain provisions with regard to certain presumptions in respect of an accused. The rationale for inclusion of such presumptions is that it would otherwise be near impossible for the prosecution to prove a charge beyond reasonable doubt, taking into consideration the peculiar nature of certain offences.
- [31] For purposes of illustration I would like to look at some laws which contain presumptions/reverse onus provisions in both in Fiji and elsewhere.
- [32] Section 32 of the Illicit Drugs Control Act 2004 of Fiji contains a factual presumption in respect of an accused. It reads as follows;

"Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment."

- [33] In terms of Section 8 of the Narcotic Control Act of Canada, where court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and if he is unable to establish the contrary, he must be convicted for trafficking.
- [34] Section 20 of the Drugs and Drug Trafficking Act 140 of 1992 in South Africa provides that;

'Presumption relating to possession of drugs – If in the prosecution of any person for an offence under this Act it is proved that any drug was found in the immediate vicinity of the accused, it shall be presumed, until the contrary is proved, that the accused was found in possession of such drug'.

[35] Section 21 (1)(a)(i) of the same Act provides that;

'If in the prosecution of any person for an offence referred to –

(a) in section 13(f) it is proved that the accused was found in possession of dagga exceeding 115 grams; it shall be presumed, until the contrary is proved, that the accused dealt in such dug or substance'.

[36] Section 40(1) of the Arms and Ammunition Act 28 of 1937 in South Africa provides that;

'Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at the time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved'.

[37] Section 20(1) of the Firearms and Ammunition Ordinance of Hong Kong provides that a person who is in possession of an imitation firearm commits an offence punishable with imprisonment. However, section 20(3) goes on to provide that he does not commit an offence if he satisfies the court of one or more of the matters stated in sub section 20(3).

[38] A perusal of the above would demonstrate that Regulation 6 does not contain any of the features contained in the above provisions and hence certainly cannot be construed as one which contains a *presumption* or imposing a *reverse onus*. The only requirement contained therein is for a person on whom a TIN has been issued, to move court. That by itself cannot be categorized as a *reverse onus* provision.

[39] The effect of Regulation 6 (c) is that it requires the person issued with a TIN to take the first step if such person elects to dispute the matters stated in the TIN and in particular the imposition of the fixed penalty contained in the TIN. This step would be to move court. As pointed out by learned counsel for the Respondent and as observed by the learned High Court Judge, the Regulation is silent as to what the 'court' is and the manner in which the jurisdiction of such court is to be invoked. No procedure has been laid down. That however is a different matter. I will revisit that issue later in this judgment.

- [40] Further, there cannot be any doubt upon a plain reading of this Regulation that once the TIN is disputed by moving court in whatever manner, either by filing a motion, filing an affidavit or by any other communication, it is incumbent on court to notice the Appellant to appear in court. Once the Appellant is before court, it will be the responsibility of the Appellant to establish that the 'offence' as described in the TIN has been committed. Learned Counsel for the Appellant submitted that at present that is how proceedings in court are conducted.
- [41] Since the Regulation identifies the contravention as an 'offence' for all intents and purposes, the proceedings will invariably take the form of criminal proceedings and the Appellant will have to prove the commission of the offence 'beyond reasonable doubt'. The general rules of procedure and evidence in respect of criminal proceedings would come into play.
- [42] It has been stated in the written submissions filed on behalf of the Respondent *'that the TIN issued by the Appellant does not allow the Respondent to challenge the allegation against it in that the TIN casts the onus on the Respondent to institute proceedings in a court of law to dispute the TIN'*. It is also stated that *'The wording of the TIN therefore reverses the onus in that the Respondent has to move the court to prove its innocence. The Respondent would be required to file an application in court by motion to seek that the TIN be dismissed and in support provide evidence of its innocence/grounds of objection to the TIN'*.
- [43] I find it difficult to comprehend the basis upon which this submission has been made. Nowhere in the Regulation has such matters been stated. The Respondent cannot read into the Regulations what they do.
- [44] Needless to say, there is no onus/burden cast on him to 'disprove his guilt' or to 'prove his innocence' by any standard of proof, be it beyond reasonable doubt, balance of probability or even on an evidentiary standard.
- [45] Regulation 9 is as follows;

"If a person to whom a Traffic Infringement Notice is issued does not undertake any of the actions provided in regulation 7 within 12 months from the date the Traffic

'Infringement Notice is issued, the Traffic Infringement Notice takes effect as a conviction and the Authority may –

- (a) suspend the person's licence; and*
- (b) seek from the court a sentence providing for the issuance of demerit points and maximum penalties for the offence."*

[46] It must be borne in mind that this provision comes into play as a last resort. The Appellant must have recourse to a remedy if a party on whom a TIN has been issued does not act in terms of the rights conferred on him. Regulation 7 spells out what the consequence will be if steps as contained in Regulation 6 are not taken. This Regulation has been amended by Land Transport (Traffic Infringement Notice) (Amendment) Regulations 2017 by the insertion of certain provisions where amongst others, it becomes necessary for the person who has been issued a TIN to pay the penalty notwithstanding the fact that he has elected to dispute the TIN in court. It is to be refunded in the event such person succeeds in court.

[47] The effect of Regulation 9 is to bring finality to the process. Provisions as contained in Regulations 6 are applicable within the first 90 days from the date of issue of the TIN and thereafter the provisions as contained in Regulation 7 become applicable. The provisions as contained in Regulation 9 kicks in at the end of 12 months from the date the TIN is issued. This is only an enabling provision to bring in sanctions for non-compliance with certain remedies that have been made available in the preceding Regulations.

[48] If a person issued with a TIN neither pays the fixed penalty nor exercises the right to dispute the TIN in court, the matter is brought to an end by way of a 'deeming provision'. The legal fiction thus adopted is for the TIN *'to take effect as a conviction'* (emphasis added) and the Appellant is able, in its discretion, *'to suspend the person's licence and seek from the court a sentence providing for the issuance of demerit points and maximum penalties for the offence'*.

[49] This does not mean that a person is 'convicted by the Authority without a trial' as wrongly contented by learned counsel for the Respondent and the learned High Court Judge. It happens through a deeming provision which is a legislative tool oft used as a mechanism to bring about finality.

[50] In the case of **Silbert v Director of Public Prosecutions for Western Australia** [2004] HCA 9, the High Court of Australia examined almost identical provisions contained in the Crimes (Confiscation of Profits) Act 1988 (WA). In this case the applicant had contended that Section 15 (1) (a) of the Act was invalid in view of the deeming provision contained therein, whereby it was argued that a person was taken to have been convicted of a serious crime without first having the guilt established by a court established under the Constitution.

[51] The High Court of Australia having considered a large number of authorities, held that;

“First the terms of the Act evince an actual purpose to make a provision in relation to property. Arguably that is its primary character.....

Secondly, the Act does not, in fact or law, provide that the deceased is ‘convicted’ of a criminal offence, serious or otherwise. On its face, the Act does not involve an impermissible determination of criminal guilt or liability to criminal punishment as such; nor an invalid legislative direction to a court concerning its fact-finding functions in such matters. If it did, it might indeed enliven considerations of constitutional invalidity.

No criminal consequence could, or do, apply to the deceased or to the executor of his estate by reason of the provisions complained about. The conviction is not entered on the person’s criminal record, if any. Instead the expression has been used solely as a legal fiction, a shorthand expression of statutory drafting. So much appears in the language of the Act. As the statutes of other Australian jurisdictions show, a different formula might have been used. However, this is not alone a sufficient reason to attract the serious consequence of constitutional invalidity to the way in which the Parliament of Western Australia has chosen to express its statute.

Thirdly, that the provisions complained of are solely a legislative fiction is made clear by the use of the words ‘is to be taken to have been’. The Act make it plain that the fiction is limited. It is only ‘for the purpose of this Act’. It is not a conviction for larger and different purposes of criminal justice and punishment. Of its nature, a legal fiction usually involves acceptance that, in truth and for other purposes, what ‘is to be taken to have been’ the case is not in fact so. Accordingly, the limited operation of the impugned provisions is plain. They do not oblige a court, contrary to the truth, to find facts or to adjudicate a person criminally guilty on the basis of a legislative conclusion that is not judicially examinable

... Fourthly, as the majority in the Full Court found the deeming provisions in the Act, of which the applicant complains, are no more than devices used to identify persons of a class against whom applications under the Act may be made. They have no other effect.

... In sum, the legislation bears numerous normal hallmarks of judicial assessment, discretion, judgment and reconsideration. It has judicial substance. It does not impose on judges functions that make them effectively the agents of the other branches of government. The suggested flaw, in the particular and limited reference to a deemed conviction of a serious offence emerges, upon closer inspection of the Act, to be no more than a device of legislative drafting.

... The fictional deemed 'conviction', understood in the context of the entire Act, interpreted to give effect to its limited purpose, would not occasion public concern about the independence and impartiality of the Supreme Court, or the courts of Australia more generally, assuming (contrary to my view) that this is a separate constitutional consideration in such cases." (emphasis added)

[52] This judgment I am confident lends support to the observations made by me above.

Are the Regulations inconsistent with Sections 14(2) and 15 of the Constitution?

[53] It can be seen that the Respondent has, upon a misapprehension of the provisions contained in the said Regulation, ventured to submit that these Regulations are inconsistent with Section 14(2) and 15 of the Constitution and hence invalid in terms of Section 2 of the Constitution.

[54] Section 2 (1) of the Constitution states that the *'This Constitution is the supreme law of the State'*. The effect or consequence of any provision in any law which is inconsistent with the provisions contained in the Constitution is to be determined in terms of the provisions contained in Section 2(2) and Section 3(2) of the Constitution.

[55] Section 2 (2) states that *'Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency'*.

[56] Section 3(2) of the Constitution states that *'If a law appears to be inconsistent with a provision of this Constitution, the court must adopt a reasonable interpretation of that law that is consistent with the provisions of this Constitution over an interpretation that is inconsistent with this Constitution'*.

[57] What is relevant in this examination are the Land Transport (Traffic Infringement Notice) Regulations 2017 and have come into force on 26 September 2017 upon being published

in the Gazette. These Regulations have been made in terms of Section 92 of the Land Transport Act 1998 as amended by Land Transport (Amendment)(No.3) Act 2017.

- [58] Section 2(2) of the Constitution refers to 'any law' while Section 3(2) refers to 'a law' and therefore it becomes necessary to find out if a 'Regulation' made in terms of any law also falls into the definition of 'law' as referred to in these sections.
- [59] Part B, Chapter 12 of the Constitution is titled 'Interpretation' and the interpretation given to law '*includes all written law*'. Written law in turn '*means an Act, Decree, Promulgation and subordinate law made under those Acts, Decrees or Promulgations*', 'subordinate law' in turn includes '*any instrument made in exercise of a power to make the instrument conferred by an Act, and includes regulations, rules, orders, by-laws or declarations*'. Therefore it is clear that the Regulations under consideration fall within the definition of 'law' as referred to in the above Sections of the Constitution.
- [60] As stated earlier, the contention of the Respondent was that the aforesaid Regulations were inconsistent with Sections 14(2) and 15 of the Constitution.
- [61] I will only quote here, the salient provisions as contained in these Sections that become relevant for a proper determination of the issue at hand. Section 14(2) of the Constitution states that '*Every person charged with an offence has the right – (a) to be presumed innocent until proven guilty according to law*'. Section 15 (1) of the Constitution states that '*Every person charged with an offence has the right to a fair trial before a court of law*'.
- [62] The mound of case law cited by the Respondent is with regard to 'reverse onus' provisions which are found in laws pertaining to criminal offences. The laws which were examined by court in the cases cited infact contained 'reverse onus' provisions and there was no ambiguity about the nature of those provisions. They clearly spelt out that the burden of proof in respect of certain aspects of those offences shifted to the accused.
- [63] Having analyzed the content of the Regulations, I have concluded that they are not provisions that contain a *presumption* or *reverse onus*. As such, an examination as to whether they are inconsistent with Sections 14 (1) and 15 of the Constitution and if so what effect they would have in terms of Sections 2 (2) and 3 (2) does not arise.

- [64] I have carefully gone through the cases cited by the Respondent, in particular the famous case of R v Oakes [1986] 1 S.C.R 103 which has discussed in great detail the reverse onus provisions contained in laws, their impact on the presumption of innocence as well as the extent of the burden that has been cast on persons accused of such offences. They have aided me in arriving at a conclusion that the Regulations under consideration do not contain any 'reverse onus' provisions. However, it must be emphasized that in view of the above determination of mine, the ratio of those cases do not become relevant.
- [65] The debate as to whether reverse onus provisions violate the 'presumption of innocence' of an accused which lies at the very heart of the criminal law and if so whether such provisions have to be struck down altogether or whittled down by lessening the burden of proof cast on the accused to one of an evidentiary burden as opposed to one of balance of probability has gone on for a considerable period of time. There is no shortage of jurisprudence in this area.
- [66] In the case of Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019), the Court of Appeal of Fiji pronounced on the presumption and the resultant burden cast on an accused in terms of Section 32 of the Illicit drugs Act 2004 but did not go so far as to consider its impact on the 'presumption of innocence' as contained in the Constitution. Although the Supreme Court on appeal, was invited to make a pronouncement on that aspect, the Supreme Court was not inclined to do so on the basis that a direction favourable to the accused had been given in the High Court.
- [67] In view of the matters as discussed by me above, I hold that the learned High Court Judge fell in to error when he held that the regulation in question casts a *reverse onus*. I also note that he has misguided himself in holding that the Regulations are inconsistent with the Constitution without a proper appreciation of the provisions contained in Sections 2(2) and 3 (2) of the Constitution.
- [68] It was therefore not open to the High Court to grant a declaration that the Traffic Infringement Notice No. 3589118 issued on 5 March 2019 was in breach of sections 14(2) and 15 of the Constitution and hence *null and void*. I answer Grounds of Appeal 1-6 in the affirmative. The judgment of the High Court is accordingly set aside.

Was it necessary to serve notice on the Attorney General to intervene in the proceedings before the High Court?

- [69] Ground 7 concerns the failure of the Respondent to serve Notice on the Attorney General in the proceedings before the High Court. This requires the examination of the provisions contained in Sections 44 (7), (8) and (9) of the Constitution.
- [70] Section 44 (8) of the Constitution states that *'If the proceedings before the High Court relate to a matter concerning a provision of this Chapter, the High Court must not proceed to hear and determine the matter until it is satisfied that notice of the matter has been given to the Attorney General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorney General of the question of intervention in the proceedings'*.
- [71] Section 44 (9) states that *'A notice under sub section (8) is not required to be given to the Attorney General if the Attorney General or the State is a party to the proceedings'*.
- [72] The Appellant submits that the Respondent has failed to comply with the requirements as laid down above, in that no notice had been served on the Attorney General prior to the hearing before the High Court.
- [73] In response, the Respondent has submitted that by not raising such objection before the High Court, the Appellant has waived its right to take up this objection and has further submitted that the LTA is part of the State and as such in terms of Section 44(9) there is no requirement to give such Notice to the Attorney General. In support of its contention that the LTA is part of the State, the Respondent has pointed out that the Appellant had sought and obtained a waiver of paying security of costs in this matter on the basis that it was part of the State.
- [74] In its written submissions, the Appellant has submitted that it is a Statutory Authority and part of the State. On that premise, it has gone on to point out that the Respondent was obliged to serve the documents pertaining to the High Court case on the Attorney General's Office in terms of Section 13 of the State Proceedings Act and that the Respondent has failed to do so.

- [75] Section 13 of the State Proceedings Act must necessarily be read together with Section 12 which states that civil proceedings by or against the State shall be instituted by or against the Attorney General. The service of documents on the Attorney General as required under Section 13 has to be understood in that context and not as submitted by the Appellant.
- [76] I wish to emphasize that on this issue, the Appellant cannot approbate and reprobate. If on its own admission it is part of the State, there arises no requirement to serve notice on the Attorney General in view of the provisions contained in Section 44 (9) of the Constitution.
- [77] Ground 7 therefore has no merit and has to fail.
- [78] Before I depart, it is necessary for me to make some observations with regard to the Regulations under consideration.
- [79] Although Regulation 6 (c) provides that a person issued with a TIN can *'elect to dispute the fixed penalty in court'*, as to what that court would be, has not been expressly spelt out. Neither has a procedure been spelt out as to how the jurisdiction of such court can be invoked. Although Section 5 (2) of the Criminal Procedure Act spells out that *'When no court is prescribed in any law creating an offence or summary offence, it may be tried in the Magistrate's Courts in accordance with any limitations placed on the jurisdiction of classes of Magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Court'* it is best that such lacuna or uncertainty be taken away by making express provisions through a suitable amendment to such Regulations.

Conclusion

- [80] Due to the reasons as stated by me, I hold that the Land Transport (Traffic Infringement Notice) Regulations 2017 do not violate the provisions contained in Sections 14(2) and 15 of the Constitution and hence the resolution of any inconsistency in the manner provided for under Sections 2 (2) and 3(2) of the Constitution does not arise.
- [81] I also hold that the Traffic Infringement Notice bearing No. 3589118 issued on 5 March 2019 was not in breach of Sections 14(2) and 15 of the Constitution and hence it is not *null and void*.

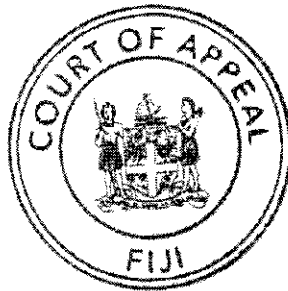
[82] Accordingly I set aside the Judgment of the High Court dated 06 July 2020. The Respondent is free to exercise any right available to it in terms of the said Regulations as far as Traffic Infringement Notice bearing No. 3589118 issued on 5 March 2019 is concerned.

Orders of Court

- (1) Appeal allowed.
- (2) Judgment of the High Court dated 06 July 2020 is set aside.
- (3) Respondent to pay the Appellant costs in a sum of \$2500.



Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL



Hon. Justice Filimone Jitoko
VICE PRESIDENT, COURT OF APPEAL



Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL

Solicitors:

LTA Legal for the Appellant

Patel Sharma Lawyers for the Respondent