TI'A SI'OMIA v POLICE

Supreme Court Apia
23 March 1970; 26 March 1971
Spring CJ

CRIMINAL LAW (Burden of proof) - Presumption of innocence - s 25 of the Police Offences Ordinance 1961 (added by s 4 of the Police Amendment Act 1965) placing onus on accused charged with possession of an offensive or dangerous weapon to "prove" his possession was for a lawful purpose - Enactment casting onus on accused to adduce evidence of lawful purpose, an evidential as opposed to a legal onus of proving his innocence - Legal burden of establishing guilt beyond reasonable doubt remaining on the prosecution throughout proceedings - Enactment not in contravention of the presumption of innocence guaranteed by Article 9(3) of the Constitution:

Woolmington v DPP [1935] AC 462, R v Lobell (1957) 41 CAR 100, R v Ward (1915) 85 LJKB 483, Cooper v Slade (1858) 6 HL Cas 746 considered and applied.

Attygale v R [1936] 2 AER 116, Leary v United States (1969) 395 US 6, United States v Turner (1968) 404 F 2d 782, United States v Sussman (1969) 409 F 2d 219, People v Mingoa 92 Phil 856, People v Livara 94 Phil 771, US v Catimbang 35 Phil 367, Ramos v Diaz Phil L-24521 11 December 1967 considered.

CONSTITUTIONAL LAW (Legislative power) - Enactment by Legislature inconsistent with Constitution to be declared void to extent of inconsistency: vide Article 2 - s 25 of Police Offences Ordinance 1961 (added by s 4 of Police Offences Amendment Act 1965) casting an evidential onus of proving lawful purpose on accused charged with possession of an offensive or dangerous weapon - Section does not contravene the presumption of innocence guaranteed by Article 9(3) of the Constitution and is therefore intra vires the Legislature.

STATUTES (Interpretation) - Penal enactments - Acts Interpretation Act, 1924 (NZ) s 5(j) requiring "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act" - Application to s 25 of the Police Offences Ordinance 1961 (added by s 4 of the Police Offences Amendment Act 1965) casting an evidential onus of proving lawful purpose on accused charged with possession of an offensive or dangerous weapon - Unreasonable to interpret enactment as intended to violate the presumption of innocence guaranteed by Article 9(3) of the Constitution.

Accused was charged and convicted under s 25 of the Police Offences Ordinance 1961 (added by s 4 of the Police Offences Amendment Act 1965) of being armed with a dangerous weapon, namely, a .22 calibre repeating rifle, for an unlawful purpose. At trial in the Magistrates' Court accused, who was represented by counsel, elected to testify in his own behalf and to call defence witnesses. Thereafter, counsel for the defence submitted that s 25 was ultra vires and void as being a violation of the presumption of innocence. Accused appealed by way of case stated to determine the question of whether s 25 contravened Article 9(3) of the Constitution.

Held: Following an extensive review of the authorities, that the question

should be answered in the negative and the enactment was intra vires the Legislature. Conviction affirmed.

APPEAL by way of case stated on a question of law for determination by the Supreme Court.

Clarke for appellant.
Slade for respondent.

Cur adv vult

SPRING CJ. The appellant was convicted in the Magistrates' Court at Apia, Western Samoa, on the 1st October 1969 on a charge laid under the provisions of section 25 of the Police Offences Ordinance 1961 added by section 4 of the Police Offences Amendment Act 1965. The information as laid reads:-

> That Ti'a Si'omia was on the 3rd day of January 1969 at Solosolo armed with a dangerous weapon namely a .22 calibre repeating rifle not so armed for a lawful purpose.

In the Magistrates' Court the accused was represented by counsel and the learned Magistrate, after hearing evidence called by the prosecution and evidence called by the defence consisting of the evidence from the accused himself and five other defence witnesses, convicted the accused and ordered him to appear for sentence on that charge if called on to do so within one year.

The appellant filed a Notice of Appeal to the Supreme Court of Western Samoa asking that a case be stated for the consideration of this Court, namely, that the determination by the learned Magistrate in deciding that the Legislature was not breaching the Constitution of Western Samoa when it enacted section 4 of the Police Offences Amendment Act 1965 was erroneous in law. Article 2 of the Constitution of Western Samoa reads:-

> (1) This Constitution shall be the supreme law of Western Samoa.
> (2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Article 9(3) of the said Constitution provides:-

> Every person charged with an offence shall be presumed innocent until proved guilty according to law.
> (The underlining is mine).

Counsel for the appellant submitted that the provisions of section 25 of the Police Offences Ordinance 1961 is inconsistent with Article 9(3) of the Constitution and should therefore be declared void.

Section 25 of the Police Offences Ordinance 1961 states:-

> Every person who is armed with any offensive or dangerous weapon, instrument or thing and who cannot prove (the onus being on him) that he was so armed for a lawful purpose commits an offence and is liable to imprisonment for a term not exceeding one year.

The presumption of innocence in favour of an accused referred to in Article 9(3), supra, is not a new innovation. The presumption attends all the proceedings against the accused from the initiation thereof to rendition of a verdict, the finding being either guilty or innocent of the crime charged. When it is said that an accused person is presumed to be innocent all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt. This is the funda-

mental rule of our criminal procedure.

As Viscount Sankey L.C. said in Woolmington v. D.P.P. [1935] A.C. 462:-

> It is not till the end of the evidence that a verdict can properly be found and . . . at the end of the evidence it is not for the prisoner to establish his innocence but for the prosecution to establish his guilt . . . But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

C.K. Allen in his article, "The Presumption of Innocence" in "Legal Duties", says:-

> Historically and logically, we are led to a conclusion which has the sanction of that great master of evidence - Wigmore - namely that the presumption of innocence amounts to little more than a caution to the jury not to arrive at hasty inferences and a reminder that affirmative allegations must be proved by those who make them, not disproved by those against whom they are made.

The expression burden of proof in criminal matters has two distinct and frequently confused meanings: firstly, the burden of proof as a matter of law and establishing the guilt of an accused person beyond reasonable doubt. Secondly, the burden of proof in the sense of introducing evidence.

In the former sense of the burden of proof rests on the prosecution and it never changes and the guilt of an accused person must be proved by the prosecution beyond reasonable doubt. Consequently if, on the whole of the evidence, there remains such a doubt the accused must receive the benefit thereof and be acquitted.

It is in the second sense that Thayer says at page 355 of his work, A Preliminary Treatise on Evidence at Common Law:-

> The burden of proof means the duty of going forward in argument or in producing evidence whether at the beginning of a case or any later moment throughout the trial.

Professor Cross in his work on Evidence at page 94 of the New Zealand Edition says:-

> When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt. This is the fundamental rule of our criminal procedure, and it is expressed in terms of a presumption of innocence so frequently as to render criticism somewhat pointless; but this practice can lead to serious confusion of thought, as is shown by the much discussed decision of the American Supreme Court in Coffin v. The United States (1895) 156 U.S. 432. The accused had been convicted of misappropriating the funds of a bank after the jury had been told that they should acquit him unless satisfied of his guilt beyond reasonable doubt, and a new trial was ordered because the Judge did not enumerate the presumption of innocence among the items of evidence favourable to the accused. In other words, the Supreme Court considered that the presumption was something different from the rule concerning the onus of proof on a criminal charge, for they regarded it as an instrument of proof an item of evidence which had been withheld from the jury. This decision has been universally condemned; it could hardly have been pronounced if the Court had not been misled by the verbal dissimilarity between the rule that the prosecution bears the legal burden of proof, and the presumption of innocence.

It is pertinent to note that in the lower Court hearing counsel for the appellant, at the close of the case for the prosecution, elected to call the accused and other defence witnesses. He made no submission at that stage that section 25 of the Police Offences Ordinance 1961 was in breach of Article 9(3) of the Constitution. In fact, this point was not raised until all the evidence for the defence had been given. According to the record, counsel for appellant called the accused to give evidence, and I cannot find in the record anything to support the submission that the accused was forced to give evidence. In my view, the position was just the contrary. The accused had a constitutional right to remain silent, but by his act in voluntarily electing to give evidence he waived this right to remain silent. Since the accused elected to give and call evidence it was in my view necessary and proper for the Court to consider the whole of the evidence. The Court of Criminal Appeal in R. v. Lobell (1957) 41 C.A.R. 100 at page 104 says:-

> The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be Not Guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence, which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal or it may and sometimes does strengthen the case for the prosecution.

It was argued before the learned Magistrate at the close of the defence case that by virtue of the provisions of section 25, supra, the accused was not presumed innocent until proved guilty according to law.

I am required to consider therefore whether the Government of Western Samoa in enacting section 4 of the Police Offences Amendment Act 1965 breached the provisions of Article 9(3) of the Constitution.

It is not uncommon in England, Australia and New Zealand for Statutes to provide that some matter is presumed "unless the contrary is proved" and the onus of proving this matter is cast upon the accused. As Taylor in the Law of Evidence (8th Edition) says at page 348:-

> The Legislature has in many instances interfered, sometimes by re-describing the offence, and omitting all mention of the negative matter, but generally, by expressly enacting, that the burden of proving authority, consent, lawful excuse, and the like, should be on the defendant. Thus, if a party be indicted for being found by night, having in his possession any picklock key, crow, jack, bit, or other implement of housebreaking; in all these, and in several other cognate offences, the defendant, by the express language of the statutes relating to them, is bound to protect himself, by showing the existence of some lawful authority or excuse.

Therefore, burden of proof may mean the burden of introducing some evidence - evidential burden of proof, and it becomes possible to read statutes where there is a burden of proof cast upon an accused as referring to the evidential burden rather than the legal burden.

In R. v. Ward (1916) 85 L.J.K.B. 483, Lord Reading at page 484 said:-

> The appellant was convicted at the Middlesex Quarter Sessions of having been found by night in the possession of certain implements of housebreaking. The deputy chairman directed the jury that it was for the appellant to establish to their satisfaction that his possession of the implements at the time in question was lawful . . . But the deputy chairman, notwithstanding that the appellant was a bricklayer and that the tools found upon him were bricklayers' tools, directed the jury that the burden lay upon the appellant of satisfying them that he was lawfully in possession of the tools, and that he had no intention of using them for a felonious purpose. We think that direction was wrong and cannot be supported. The

jury should have been directed that *prima facie* a sufficient excuse had been given by the appellant for his possession of the tools, and that therefore the burden lay upon the prosecution of satisfying them, from the other circumstances in the case, that the appellant had no lawful excuse for being in possession of these tools at that particular time and place, notwithstanding that he was a bricklayer, and that the tools were bricklayers' tools.

In this case the accused had given *prima facie* evidence of a lawful excuse, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury that he had not got the implements for a lawful purpose. In other words "proof" meant evidence on which a jury would be entitled to base a verdict, and the section only placed the evidential burden of proving a lawful excuse on the accused, the legal burden remaining on the Crown.

The difficulty that often arises is undoubtedly due to the fact that the word "proof" like the term burden of proof is susceptible of more than one meaning.

The learned authors of *Wills' Principles of Circumstantial Evidence* say at page 3:-

> Proof is a word often loosely used almost as a synonym for evidence. A more accurate use indicates the amount and quality of evidence which brings home conviction to the mind. When the result of evidence is assent to the proposition or event which is the subject-matter of enquiry such proposition or event is said to be proved.

The word "proved" in Article 9(3) of the Constitution should in my view be given this meaning.

Section 3 of *The Indian Evidence Act* reads:-

> A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable, that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

In *Attygale v. R.* [1936] 2 A.E.R. 116, the Privy Council considered the *Ceylon Evidence Ordinance No. 14* (1895) section 106, which provided that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The headnote to *Attygale's case* reads:-

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The accused were charged in respect of an illegal operation performed upon a woman while she was under chloroform. The defence was that no operation took place but merely an examination. The learned Judge directed the jury that, the facts being specially within the knowledge of the accused, the burden of proving the absence of any operation was upon them:
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> Held: (1) the direction was an incorrect statement of the law, and the onus that there was a criminal operation was upon the prosecution.

At page 117 Viscount Hailsham L.C. said:-

> Their Lordships are of opinion that that direction does not correctly state the law. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed.

No authorities were cited to me as to the position in other countries where the fundamental rights of an accused in criminal cases are protected by a Constitution or a Bill of Rights.

I am somewhat reluctant to call in aid decisions of American Courts on constitutional issues as a reading of some of the decisions indicates that the American Courts have possibly gone too far, and unduly emphasize the judicial powers at the expense of the Legislative. As Mr Justice Stewart in Leary v. United States 395 U.S. 6 1969 said:-

> I have before now expressed my conviction that the Fifth Amendment guarantee against compulsory self-incrimination was originally intended to do no more than confer a testimonial privilege in a judicial proceeding. But the Court through the years has drifted far from that mooring; the Marchetti and Grosso cases are simply the most recent in a long line of decisions marking the extent of the drift. Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in the light of the original constitutional meaning.

It is interesting to note that In United States v. Turner, 404 F. 2d 782 (1968) it was decided that the statutory shift in the burden of going forward with the evidence does not infringe the Fifth Amendment's protection against self-incrimination.

Again, in United States of America v. Sussman, 409 F. 2d 219 (1969), the Court held that:-

> A statute providing that possession of narcotics shall be deemed sufficient evidence to authorize conviction unless defendant explains possession to satisfaction of the jury, does not, in shifting burden of going forward with evidence, infringe the Fifth Amendment's protection against self-incrimination.

Further, in the Philippines where the rights of an accused person in criminal cases are governed by provisions in their Constitution similar to the provisions appearing in the Constitution of Western Samoa, Chief Justice Conception, the Chief Justice of the Philippines, in a paper on "The rights of the accused in Philippine Jurisprudence" says:-

> Right to be presumed Innocent - The Constitution provides Section 1 Article III that in all criminal prosecutions the accused shall be presumed to be innocent until the contrary is proved. The presumption of innocence in favour of the accused and the requirement that guilt be established beyond reasonable doubt are not innovations introduced by General Orders No. 52 and the Philippine Bill. They were embodied even in the Spanish Law, or the "Siete Partidas" and, for centuries, had been part of the Philippine Laws: United States v. Navaro 3 Phil. 143, 163.
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> Nature and Effect of Right - The State has the burden of proving all essential elements of such crime and must establish guilt beyond reasonable doubt. The accused may stand on the presumption of innocence, and withhold all proof until the prosecution has established a complete case.
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> Silence cannot be used as presumption of Guilt - In criminal prosecutions, the accused has a perfect right to remain silent. This silence cannot give rise to a presumption of guilt. He cannot be required to give proof that may extenuate or aggravate the punishment. Neither can the sentence be increased by reason of the fact that the accused has failed to give proof in favour of, or against, his culpability; he cannot be convicted of a higher offence than that alleged in the complaint simply because he fails or refuses to testify.
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> [P]esumption of Innocence may be overcome by a contrary Presumption - [T]ere is no constitutional objection, however, to the passage of a [la]w providing that the presumption of innocence may be overcome [by] a contrary presumption founded upon human experience, and [de]claring what quantum of evidence shall be sufficient to overcome [su]ch presumption of innocence. Thus, Art. 217 of the Revised Penal

Code creates a presumption of guilt once certain facts have been proven. It makes the failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, despite appropriate demand, prima facie evidence that he has put such missing funds or property to personal use. This presumption has been held to be valid: Vide People v. Mingoa, 92 Phil. 856; People v. Livara, 94 Phil. 771.

As to the possession of recently stolen goods this Court said in U.S. v. Catimbang, 35 Phil. 367, 371-372:-

It has sometimes been said that the unexplained possession of stolen property creates a presumption of law that the possessor committed the larceny, and casts the burden of proving the innocent character of the possession upon the accused. The inference of guilt is one of fact and rests upon the common experience of men. But the experience of men has taught them that an apparently guilty possession may be explained so as to rebut an inference and an accused person may therefore put witnesses on the stand or go on the witness stand himself to explain his possession, and any reasonable explanation of his possession, inconsistent with his guilty connection with the commission of the crime, will rebut the inference as to his guilt which the prosecution seeks to have drawn from his guilty possession of the stolen goods.

Recently, in Ramos v. Diaz L-24521, Dec. 11, 1967, it was held that the presumption of innocence is not violated by withholding, during the pendency of criminal charges, the retirement benefits of a compulsory retiree. The reason advanced was that said pendency puts in issue the satisfactoriness of his services, so that this point has to be resolved first, before retirement benefits can be paid him.

At the hearing of the appeal counsel for the appellant conceded that he had not argued in the lower Court the question as to whether the provisions of the said section 25 were ultra vires the provisions of Article 9(5) of the Constitution which reads:-

No person accused of any offence shall be compelled to be a witness against himself.

This point was not argued before me on the appeal, nor before the learned Magistrate, and I say no more thereon.

In considering whether section 4 of the Police Offences Amendment Act 1965 offends against Article 9(3) of the Constitution, I remind myself of the provisions of section 5(j) of the Acts Interpretation Act, 1924 (N.Z.), which states:-

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.

Section 25 of the Police Offences Ordinance 1961 is a penal enactment and requires to be construed in accordance with section 5(j) of the Acts Interpretation Act, 1924 in the light of what will "best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit."

Maxwell on Interpretation of Statutes, 10th Ed. 284, in considering what constitutes the modern trend of construction of a penal statute says:-

The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and beneficial construction. All statutes are now construed with a

> more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the Legislature, than formerly.

I am satisfied that in a prosecution under section 25 the prosecution has "at the end of the day" to satisfy the Court that he has discharged the onus of proving that the accused is guilty beyond reasonable doubt.

I am satisfied that under section 25, supra, there is no onus placed on the accused to prove his innocence. The presumption of innocence remains extant right up to the time of the rendition of the verdict, and it is for the prosecution to prove or establish the guilt of the accused beyond reasonable doubt. As Wills J. said in Cooper v. Slade (1858) 6 H.L. Cas. 746:-

> In criminal matters the persuasion of guilt must amount to such moral certainty as convinces the mind of the tribunal, as reasonable men, beyond all reasonable doubt.

I agree with the learned Magistrate when he said:-

> The section under consideration puts an onus on accused, not of proving his innocence, but of proving not beyond reasonable doubt but to a lesser degree, viz., on the balance of probabilities, that he was so armed for a lawful purpose. The presumption of innocence still stands until accused is proved guilty according to law . . . These legislative provisions do not require the defendant to prove his innocence.

For the reasons I have given I therefore answer the question in the negative and affirm that section 4 of the Police Offences Amendment Act 1965, which added section 25 to the Police Offences Ordinance 1961, does not contravene Article 9(5) of The Constitution of the Independent State of Western Samoa. The conviction of the appellant is therefore affirmed.