

**IN THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS  
CRIMINAL APPEAL NO. 36 OF 2012**

**BETWEEN:**

**GEORGE YOUNG**

**APPELLANT**

**And**

**REGINA**

**RESPONDENT**

Before:

The Right Honorable Mr. Zacca, President

The Honorable Mr. Justice Mottley, Justice of Appeal

The Honorable Mr. Justice Forte, Justice of Appeal

Appearances:

Mr. Oliver Smith for the Appellant

Mr. Clement Joseph of the Office of the Director of Public Prosecution

Heard January 20<sup>th</sup> 2014, Delivered September 11<sup>th</sup> 2014

Mottley J.A.,

1. George Young, the Appellant, had been convicted on 24 August 2012 following a trial before the Chief Justice and a jury of the offence of possession of a controlled drug with intent to sell or transfer it and was sentenced to a term of imprisonment for 10 years.
2. He was charged on an information which contained two counts. In count one, it was alleged that on 10 September 2011 he was in unlawful possession of controlled drugs, namely cannabis, with intent to supply it to another, contrary to section 6(3) of the

Controlled Drug Ordinance Cap 3.14 (“the Ordinance”). In the second count, it was stated that on the same date he unlawfully had in his possession a controlled drug, namely cannabis, with intent to sell or transfer it to another, contrary to section 7(1) of the Ordinance. At the end of the case for the prosecution, the judge accepted a no case submission made on behalf of the Appellant on the ground that.... The judge however ruled that there was a case to answer of the second count. He was convicted on this account and now seeks leave to appeal against his conviction. He sought leave on a number of separate grounds, but in view of the court’s decision of the first ground, the court did not deem/think it necessary to consider any of the other grounds. In so doing, we mean no disrespect to counsel.

3. Sections 7(1) and (2) of the Control of Drug Ordinance Cap 3.15 (“the Ordinance”) provides as follows:

7 (1) Without prejudice to any liability for the commission of an offence under this Ordinance or any other law, a person shall be guilty of an offence who has in his possession or under his control any controlled drug with intent to sell or transfer such controlled drug to any other person in contravention of this Ordinance or for the purpose of the commission of any other crime.

(2) For the purpose of subsection (1) where any controlled drug is found in any ship, vessel, aircraft, vehicle or other means of conveyance within the Islands or the Islands’ waters –

(a) the ship, vessel, aircraft, vehicle or other means of conveyance may be seized by an officer of customs or police officer; and

(b) the master or any person in control of such ship, vessel, aircraft, vehicle or other means of conveyance, as the case may be, shall be deemed guilty of an offence under subsection (1) unless he proves that the controlled drug was in the ship, vessel, aircraft, vehicle or other means of conveyance without his consent, knowledge or connivance and that he exercised all due diligence to prevent the commission of the offence.

4. Section 7(2) of the Ordinance makes it clear that the master of a ship, in this case the appellant, is deemed to be guilty of the offence of having possession or control of a drug with intent to sell the drug to another person in contravention of the Ordinance. The Appellant may escape liability if he proves that the controlled drug was in the shop without his consent, knowledge or connivance. In addition, the Appellant must also prove that he exercised all due diligence to prevent the commission of the offence.
5. The effect of section 7(2) of the Ordinance is that where the controlled drug is found on the ship, the Appellant is deemed to be guilty unless he expressly brings himself within the provision of section 7(2) of the Ordinance. All that the prosecution is required to prove is that the controlled drug was found in the ship, the burden of proof is shifted to the captain to prove that he is not guilty. The first question which this Court has to determine is whether the provision under section 7(2) of the Ordinance offend the provision of section 6 (2)(a) of the Turks and Caicos Islands Constitution Order 2011 ("the Constitution"). If the provision of section 7(2) does offend the Constitution a second question arises - does the provision of section 6(2)(a) of the Constitution come within the limitation provided for in section 1 of the Constitution?
6. Section 6(2)(a) of the Constitution provides:

“6(2) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he or she is proved guilty according to law.”

This provision of section 6 (2) (a) does no more than to enshrine in the Constitution one of the basic tenants of the common law in respect of the criminal law, that is, in a criminal case the burden of proof shall be on the prosecution. This was eloquently stated in the often quoted passage by Viscount Sankey in *Woolmington v Director of Public Prosecution* [1935] A.C. 462

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of

insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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.”

7. In *Her Majesty the Queen v David Edwin Oakes* [1986] SCR 103, Dickson CJ in the Supreme Court of Canada, speaking of the importance of the presumption of innocence to the fundamental rights of an individual charged with a criminal offence, observed at para 29:

“ 29. The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter (see *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.”

8. In the South African Constitutional Court in *State v Coetzee* [1992] 2 LRC 593, Sach J explained the significance of the 'presumption of innocence' at pp 677-678, para 220:

"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 inquiry 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."

9. In *R v. Oakes* supra, the respondent had been convicted by a Magistrate in Ontario of unlawful possession of narcotic drugs for the purpose of trafficking. He brought a motion challenging the constitutional validity of section 8 of the Narcotic Control Act which he alleged imposed a burden on an accused to prove that he was not in possession for the

purpose of trafficking and this violated the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights and Freedoms.

Sections 3 and 4 of the Narcotic Control Act, provides *inter alia*:

3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) No person shall have in his possession a narcotic for the purpose of trafficking.

(3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

Section 8 of the Narcotics Control Act provides *inter alia*:

8. "... but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking..."

10. Section 11 of the Canadian Charter of Rights and Freedoms provides:

11. Any person charged with an offence has the right:

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Section 1 of The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

11. Dickson C.J. concluded at para 57:

"57. In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question,

violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance probabilities that the presumed fact was untrue.”

12. In this case section 7 (2) provided that for the purposes of subsection (1) where any controlled drug is found in any ship, the master of the ship shall be deemed guilty of an offence under subsection (1) unless he proves that the controlled drug was in the ship without his consent, knowledge or connivance and that he exercised all due diligence to prevent the commission of the offence. Section 7(1) makes it an offence for a person to be in possession or under his control a controlled drug with intent to sell it.
13. In our view, the provisions of section 7(2) of the Controlled Drug Ordinance which deems the master of the ship guilty once the drug was found on the boat offends the provisions of section 6(2)(a) of the Constitution. However, the provisions of section 6(2)(a) are not absolute. This provision is based on many international conventions.
14. The protection afforded by section 6(2)(a) that everyone charged with a criminal offence shall be presumed innocent until he is proved guilty according to law is not absolute and is subject to the limitation of the public interest. Section 1 of the Constitution provides:

1. Whereas every person in the Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, sexual orientation, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for his or her private and family life, the privacy of his or her home and other property and from deprivation of property save in the public interest and on payment of fair compensation,

the subsequent provisions of this Part shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

15. Section 1 makes it clear that the provision of section 6 (2) (a) is “subject to respect for rights and freedoms of other and for the public interest.” Section 1 also makes clear that section 6(2) (a) is “subject to such limitation of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said protected rights and freedoms by an individual does not prejudice the rights and freedom of others or public interest.”
16. However, the question that arises for the Court to determine is whether the provision of section 7 (2) which deems the master of the ship guilty once the controlled drug is found on the ship is required in the public interest. The issue which this Court has to consider is whether the passing of section 7 (2) is justified in the public interest.
17. The Court is mindful that in construing the provisions of Part 1 of the Constitution regard must had to section 21 (7) of the Constitution. Section 21(7) states:
  - (7) In determining any question which has arisen in connection with the interpretation or application of any of the foregoing provisions of this Part, every court shall take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights;
- (b) decision of the European Commission of Human Rights (“the Commission”) given in a report adopted under Article 31 of the Convention;
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention;
- (d) decision of the Committee of Ministers of the Council of Europe (“the Committee of Ministers”) taken under Article 46 of the Convention;
- (e) judgment, decision or declaration of a superior court in the United Kingdom on the interpretation or application of the Convention, whenever made or given, so far as, in the opinion of the court, it is relevant to the proceedings in which that question has arisen.

18. In *Regina v Lambert*, Lord Steyn observed:

“It is nevertheless right to say that in a constitutional democracy limited inroads on the presumption of innocence may be justified. The approach to be adopted was stated by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379, 388, para 28:

"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 ... 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 maintain the rights of the defence."

This test depends upon the circumstances of the individual case. It follows that a legislative interference with the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.”

19. In deciding whether section 6(2)(a) is subject to the limitation specified in section 1 as being subject to respect for the rights and freedoms and for the public interest, it is necessary to determine two issues: does section 7(2) of the Ordinance violate section 6(2)(a) of the Constitution, and, if it does, is section 7(2) required in the public interest?. We have determined at paragraph 13 contained herein that section 7(2) does offend the provisions of section 6(2)(a) of the Constitution.
20. The issue to be determined is whether the imposition of a reverse burden in respect to section 7(2) of the Ordinance was in the public interest. In dealing with the issue of whether section 8 of the Narcotic Control Act demonstrably justified limits pursuant to section 1 of the Canadian Charter, Chief Justice Dickson stated:

“69. I do not think that it is surprising that Parliament made that choice in view of the difficulties which the prosecution would face if it had to prove in every case that the accused knew that the thing was a controlled drug. Taken to its logical conclusion, a requirement to prove mens rea as to the gravamen of the offence would extend to proof of knowledge that it was a controlled drug of the class alleged, as different penalties apply to each class. The legislation has clearly not gone that far, as section 28(3)(a) shows. As it is not a defence for the accused to prove that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged, it is plain that this is not something that the prosecution need establish. Proof of possession of the substance or product is sufficient. Strict liability follows, subject to the defences which are provided for by the statute.

70. In most cases possession of a container such as a bag or a tin will enable the inference to be drawn that the accused was in possession of its contents, and in most cases where the substance or product is out in the open such as where it is found on the accused's mantelpiece or at his bedside there will be other facts and circumstances from which that inference can be drawn. The problem arises in regard to proof that he knew that the thing in the container, on the mantelpiece or at his bedside was a controlled drug. The fact that the tablet or powder was a controlled drug may be capable of being proved only after careful examination and analysis. Inferences can be drawn if it is found in the company of other material which is used in connection with the supplying or use of controlled drugs. But if it is found on its own and its appearance is all that there is to go by, it may be very difficult for the prosecution to prove that the accused knew that it was a controlled drug.

21. The Court recognized that certain difficulties will arise if the burden of proof is placed on the prosecution to prove that any controlled drug found on the boat was there with the knowledge of the defendant. The Ordinance attempts to overcome this problem by providing in section 7(2) that once the controlled drug was found on the ship the burden shifts to the captain to prove that the controlled drug was on the ship without his consent, knowledge and connivance and that he exercised all due diligence to prevent the commission of the offence.
22. In this case, the burden of proving that the limitation is required in the public interest is on the prosecution who is asserting it. (See Lord Steyn in *Regina v Lambert* and Chief Justice in *R v Oakes*).
23. In *Oakes* case, Dickson C.J. having posed the question whether the reverse onus provision in section 8 of the Narcotic Control Act is a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society set out his answer in the subsequent paragraphs. The Chief Justice stated:

“73. The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the Narcotic Control Act. According to the Crown, s. 8 of the Narcotic Control Act is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

74. At the international level, on June 23, 1953, the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The Single Convention on Narcotic Drugs, 1961, was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,..."

75. At the national level, statutory provisions have been enacted by numerous countries which, inter alia, attempt to deter drug trafficking by imposing criminal sanctions.

76. The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of

s. 1, to a large extent, self evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

77. The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.

78. In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the Narcotic Control Act is over inclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.”

24. Lord Hope of Craighead, many years later in *Brown v Stott* [2001] 2 WLR 817, stated at pp 851-852:

"I would hold therefore that the jurisprudence of the European Court tells us that the questions that should be addressed when issues are

raised about an alleged incompatibility with a right under article 6 of the Convention are the following: (1) is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute? (2) if it is not absolute, does the modification or restriction which is contended for have a legitimate aim in the public interest? (3) if so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised? The answer to the question whether the right is or is not absolute is to be found by examining the terms of the article in the light of the judgments of the court. The question whether a legitimate aim is being pursued enables account to be taken of the public interest in the rule of law. The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realisation of that aim and the protection of the fundamental rights of the individual."

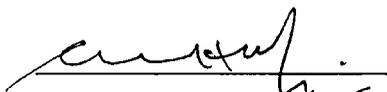
25. Based on this, the following questions arise: (1) Whether the right to be presumed innocent is absolute? (2) Is the deeming of guilt created by section 7(2) directed towards a clear and proper public objective? (3) Is the creation of the deeming provisions a reasonable measure for Parliament to take? Further, is there a reasonable relationship of proportionality between the means employed and aim sought to be realized?
26. As stated earlier, the right to be presumed innocent is not an absolute right but is in fact subject to the limitation of public interest (see Section 1 of the Constitution).
27. The taking of controlled drugs is an evil which is a scourge on the society in the Turks and Caicos. Possession of such drugs is to be prevented in the society. The Legislature in its wisdom has decided to enact the provisions of section 7(2) of the Ordinance which provides that once controlled drugs are found on the ship, the master is deemed to be guilty unless he proved his innocence.

28. The limitation on the right to be presumed innocent is the deeming of the master if the ship guilty on the mere finding of the controlled drug on the ship unless the master proves that the controlled drug was on the ship without his consent, knowledge or connivance and that he exercised all due diligence. The mere finding of the drug makes him guilty. It does not require any evidence that the drug was in his possession or under his control. Further, it does not require any knowledge on his part that the drugs were onboard the ship.
29. The enacting of the provision deeming the master guilty and placing on him the burden to prove his innocence is not, in our view, reasonable and does not bear a reasonable proportionality between the provisions of section 7(2) and the need to control drugs. The mere finding of the controlled drug on the ship, without more, deems the captain to be guilty whether or not he is in possession. Lord Steyn observed that “a transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence...”
30. Section 6(7) of the Constitution provides that “No person who is tried for a criminal offence shall be compelled to give evidence at the trial”. This provision incorporates into the Constitution the ancient maxim of the Common Law, that no person shall be compelled in any criminal trial to be a witness against himself. Lord Scarman observed that “No man is to be compelled to incriminate himself; *nemo tenetur se ipsum prodere*. No man is to be convicted save upon the probative effect of legally admissible evidence (R v Sang [1980] 2AC 402) By deeming the master of the ship guilty, and, by transferring on him the burden of proving his innocence, the master loses the protection given to him under section 6(7) of the Constitution and by the Common Law. This, in the opinion of the Court out of proportion to the necessity to prevent drug dealing in these Islands.
31. As stated earlier, the draconian effect of the provisions of section 7 (2) of the Ordinance is seen by a close examination of the provision which shows that all the prosecution is required to prove is that the controlled drug was found on the ship. The prosecution does not have to prove that it was in his possession or under his control.

32. It was for these reasons that we allowed the appeal, quashed the conviction and set aside the sentence and directed that a verdict of not guilty be entered.



**Zacca, P**



**Mottley, J.A.**



**Forte, J.A.**