

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL

No 798 of 2008

VERA MOMCILOVIC

– and –

THE QUEEN

SUBMISSIONS ON BEHALF OF THE VICTORIAN EQUAL OPPORTUNITY &
HUMAN RIGHTS COMMISSION, INTERVENING

A. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Victorian Equal Opportunity & Human Rights Commission (the **Commission**) intervenes in this proceeding as of right pursuant to section 40(1) of the *Charter of Human Rights and Responsibilities 2006* (the **Charter**).
2. The Commission's intervention is confined to the effect of s 32 of the Charter on the interpretation of s 5 of the *Drugs Poisons and Controlled Substances Act 1981* (the **Act**). That section provides:

Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, **unless the person satisfies the court to the contrary**. (emphasis added)
3. This Court has previously held that s 5 of the Act imposes a legal burden of proof on the person to whom it applies. That burden is discharged by proof on the balance of probabilities that the person was not in possession of the relevant substance.¹
4. The Commission submits that s 32 of the Charter requires the Court to depart from existing authority,² and to interpret s 5 as imposing only an evidential burden.

B. SECTION 32 OF THE CHARTER

5. Section 32(1) of the Charter provides: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights". It creates a mandatory rule of interpretation for all Victorian statutes.
6. There is a debate as to whether s 32 requires legislation to be interpreted in a way which is compatible with civil and political rights in their primary form, or whether it requires legislation to be interpreted in a way that is compatible with civil and political rights as reasonably limited after the application of s 7(2).
7. The Commission contends that there is no single, universal approach to the interpretative obligation that is imposed by s 32 of the Charter. It is, however, generally desirable to keep

¹ *R v Georgiou* [2009] VSCA 57, [3], [30]; *R v Hiep Tan Tran* [2007] VSCA 19; *R v Clarke and Johnstone* [1986] VR 643, 647-648; *R v Tragear* (2003) 9 VR 107.

² The Charter both permits and requires such an approach: see *RJE v Secretary, Department of Justice* [2008] VSCA 265, [114]-115; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72 [75]; *R v A (No 2)* [2002] AC 45, 68 [44].

“analytically distinct”³ the interpretation of a section, on the one hand, and the question whether that section involves a reasonably justifiable limit on rights, on the other. On that approach, the question whether a provision can be re-interpreted in a manner consistent with rights ordinarily arises only if the effect of a section on its ordinary or natural interpretation interferes with rights in a way that is not reasonably justifiable in a democratic society.⁴

8. The four steps identified by Bell J in *Kracke v Mental Health Review Board*⁵ (**Kracke**) are of assistance in approaching the task required under s 32 of the Charter. Those steps are:
 - (1) **Engagement:** Interpret the statutory provision in question according to ordinary principles of interpretation,⁶ interpret the right in issue so as to identify its scope, and then compare the two. If the ordinary interpretation does not limit the right in issue, adopt that interpretation.
 - (2) **Justification:** If the statutory provision does limit human rights, ask whether that limitation is reasonably justifiable having regard to section 7(2) of the Charter.
 - (3) **Reinterpretation:** If the limitation is not justifiable in accordance with s 7(2) of the Charter, reinterpret the statutory provision in a manner that it compatible with human rights, provided that it is possible to do so consistently with the purpose of the provision.
 - (4) **Declaration of inconsistent interpretation:** If it is not possible to reinterpret the provision in a rights-compatible manner, consider whether the Court should make a declaration of inconsistent interpretation.

B1: Engagement

9. Identifying the ordinary meaning of s 5 is straightforward, because this Court has held on several occasions that s 5 imposes a legal reverse onus of proof on an accused.⁷
10. On that interpretation, s 5 of the Act clearly infringes the presumption of innocence that is protected in s 25(1) of the Charter. That is demonstrated by many international cases of high authority in relation to comparable provisions.⁸ Further, it appears to have been accepted by Parliament, which recently passed legislation that converted many Victorian reverse onus provisions into evidential onuses in order to ensure compatibility with the Charter.⁹ The Statement of Compatibility that accompanied that amendment acknowledged that provisions that impose a legal onus on the defendant may limit the right to be presumed innocent under s 25(1) of the Charter.

³ *R v Oakes* [1986] 1 SCR 103, 134.

⁴ See *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, [54]; *R v Oakes* [1986] 1 SCR 103, 114; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [29]; *Hansen v The Queen* [2007] 3 NZLR 1.

⁵ [2009] VCAT 646 at [65]. See also *RJE v Secretary, Department of Justice* [2008] VSCA 265, [106], [115]. See also *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [84] per Mason NPJ; *Hansen v The Queen* [2007] 3 NZLR 1, 37 [93] and 27 [59].

⁶ Including the presumption that the legislature did not intend to infringe civil right unless it does so expressly or by necessary intentment (e.g. *Coco v The Queen* (1993) 179 CLR 427 at 437-438) and that statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international law (e.g. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [97]).

⁷ *R v Georgiou* [2009] VSCA 57, [3]; *R v Clarke and Johnstone* [1986] VR 643.

⁸ See, e.g., *R v Oakes* [1986] 1 SCR 103, 121, 129, 132; *Hansen v The Queen* [2007] 3 NZLR 1; *R v Lambert* [2002] 2 AC 545, [34]; *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, [47]; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [25].

⁹ See *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009* (Vic). See also the Statement of Compatibility for that Act in *Hansard*, Assembly, 12 March 2009, p 780.

B2: Justification

11. It follows that the critical issue is whether s 5 of the Act involves an infringement of the presumption of innocence that is “demonstrably justified in a democratic society”. That question requires a global judgment.¹⁰ It should not be approached mechanically by reference only to the five matters identified in s 7(2) of the Charter.
12. Whether any restriction on human rights is “demonstrably justified in a democratic society” is a question that must be answered in the context of the specific legislative regime in question. The question whether a particular reverse onus provision is justifiable depends upon the form of the provision, the statutory and social context in which it appears (including the nature and severity of the offence, and the ease with which the matters to which the reverse onus applies could be disproved).¹¹
13. The Respondent bears the onus of establishing that the limitations on rights caused by s 5 of the Act are reasonable limits demonstrably justified in a free and democratic society.¹² That onus should ordinarily be discharged by reference to evidence.¹³

Nature of the right

14. The nature of the right in issue is foundational to the proportionality analysis that is required by s 7(2) of the Charter. It is not a “balancing factor”.¹⁴ The more fundamental the values inherent in the right, and the more serious the impact upon those values, the greater the justification that is required.
15. The presumption of innocence enshrined in s 25 of the Charter is fundamental to the criminal justice system.¹⁵ Consistently with that view, in *Azzopardi v R*,¹⁶ Gaudron, Gummow, Kirby and Hayne JJ said “The fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt”.
16. In the same vein, in *R v Oakes* the Canadian Supreme Court recognised the presumption of innocence is “a hallowed principle lying at the very heart of criminal law”.¹⁷ It “confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise”.¹⁸ The presumption of innocence provides a crucial assurance that a person is innocent of a crime until the State can prove guilt beyond reasonable doubt. Such a protection is an integral aspect of the criminal justice system, and serves to maintain confidence in the integrity of the legal system.¹⁹
17. The United Nations Human Rights Committee has likewise confirmed that “The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be

¹⁰ *Kracke* [2009] VCAT 646 at [133]-[135]; *State v Manamela* [2000] 5 LRC 65, [32], [49] (CC).

¹¹ See Evans and Evans, *Australian Bills of Rights* (2008) [5.14]-[5.15].

¹² *Kracke* [2009] VCAT 646 at [108]; *R v Oakes* [1986] 1 SCR 103, 136-137; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283.

¹³ *R v Oakes* [1986] 1 SCR 103, 138; *Hansen v The Queen* [2007] 3 NZLR 1, [9], [50], [132]-[133], [229]-[232]; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 61 [30]; *Kracke* [2009] VCAT 646 at [148].

¹⁴ *Kracke* [2009] VCAT 646 at [137].

¹⁵ See *Woolmington v DPP* [1935] AC 462, 481.

¹⁶ (2001) 205 CLR 50, [34]. See also *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

¹⁷ [1986] 1 SCR 103, 119.

¹⁸ [1986] 1 SCR 103, 120.

¹⁹ *S v Coetzee* (1997) 3 SA 527, [220] (CC).

presumed until the charge has been proved beyond reasonable doubt, [and] ensures that the accused has the benefit of the doubt”.²⁰

Purpose of the limitation

18. The purpose of the Act generally is “to strengthen the law as it relates to illicit trade in drugs”²¹, and generally, to deter drug trafficking in Victoria. That purpose is clearly pressing and substantial. This case is not, however, directly concerned with that general purpose, but with the specific purpose of s 5.
19. As originally enacted, the Act did not contain s 5 in its present form. It was amended by s 3 of the *Drugs Poisons and Controlled Substances (Amendment) Act 1983* (Vic) which, amongst other things, amended s 5 into its present form. The Second Reading speech that accompanied that amendment made no mention of the imposition of a reverse onus requirement. The purpose of that provision was therefore neither explained nor justified. It appears, however, intended to facilitate the proof of a central element of some drug related offences that it may otherwise be difficult to prove.

Nature and extent of the limitation

20. The limitation on the presumption of innocence that is caused by s 5 of the Act is profound. The effect of that section is that a person may be convicted of a criminal offence because they are unable to disprove a fact that is a central element of the crime charged. Its purpose and effect is to permit convictions even in the face of a doubt as to the guilt of the accused.²² That result is fundamentally at odds with the presumption of innocence. Further, the statutory context in which s 5 appears is such that the result of the reverse onus may be a very lengthy sentence of imprisonment.²³ Conviction of those offences also carries the potential for social stigma, ostracism, and other social, psychological and economic harms.²⁴
21. The fundamental nature of the limitation that s 5 imposes on the presumption of innocence is such that a compelling justification is required before that limitation could be held to comply with s 7(2) of the Charter.²⁵ It is not enough to satisfy s 7(2) of the Charter that s 5 is a “rational” way of overcoming problems in drug prosecutions.²⁶ Instead, as the House of Lords has accepted, “for a reverse burden of proof to be acceptable there must be a compelling reason why it is fair and reasonable to deny the accused person the protection normally guaranteed to everyone by the presumption of innocence”.²⁷
22. There is no doubt that there is an important public interest in controlling drug offending. However, it does not follow from the importance of that public interest that limitations on rights are justified, because the very magnitude of the problem, and the consequent

²⁰ United Nations Human Rights Committee, General Comment 30 (21 August 2007). See also UNHCR, *ICCPR General Comment 13: Article 14: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, A/39/40 (1984) at [7].

²¹ Explanatory Notes to Drugs, Poisons and Controlled Substances Bill, p 1.

²² See *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, [50]; *R v Whyte* (1988) 51 DLR (4th) 481, 493; *R v Lambert* [2002] 2 AC 545, [35], [38], [89], [156]; *R v Oakes* [1986] 1 SCR 103, 132-134; *HKSAR v Wa and Asano*, FACC No 1 of 2006, [80]; *HKSAR v Wai* FACC No 4 of 2005, [41].

²³ See, e.g., *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ss 71A, 71AC, 73. This consideration weighed heavily on the Court in *R v Lambert* [2002] 2 AC 545, [38], [154]; *R v Oakes* [1986] 1 SCR 103, 134; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [50].

²⁴ See *R v Oakes* [1986] 1 SCR 103, 119-120; *S v Coetzee* (1997) 3 SA 527, [220] (CC).

²⁵ *Kracke* [2009] VCAT 646 at [150]-[152].

²⁶ Cf Respondent’s submissions, para 2.14.

²⁷ *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, [49]; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [44] per Sir Anthony Mason NPJ.

seriousness of the offences that are created, gives rise to the inherent tension identified by Justice Sachs in *S v Coetzee*:²⁸

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 the constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book ... 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.

Relationship between the limitation and its purpose

23. There is no doubt that s 5 makes it easier to obtain convictions in relation to offences under the Act, by assisting in the proof of an element that may otherwise be difficult.²⁹ The means employed in s 5 are rationally connected to the objective of the limitation.³⁰

Any less restrictive means reasonably available to achieve the purpose

24. This limb of s 7(2) embodies the “minimum impairment principle”.³¹ The Respondent asserts that no less restrictive means is available, because an evidential onus would not achieve the objective of s 5. It claims such an onus could be readily discharged.
25. The Respondent has not advanced any evidence to support its assertion that an evidential onus would be ineffective. That assertion is contrary to the conclusion reached by the House of Lords and the Court of Appeal in Hong Kong. Those courts consider that an evidential burden should not be regarded as illusory. “What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence.”³² In that context, “[t]he burden of showing that *only* a reverse legal burden can overcome the difficulties of the prosecution in drugs cases is a heavy one”.³³
26. Ultimate appellate courts in the United Kingdom, Canada and Hong Kong have accepted that reverse onus provisions in drug legislation unjustifiably interfere with the presumption of innocence.³⁴ This Court should reach the same conclusion.

B3: Reinterpretation

27. It may be conceded that the natural meaning of s 5 is not merely to require the person to raise an issue or a doubt (i.e. to discharge an evidential onus) in order to “satisfy the court” under that section. However, the very purpose of s 32 is to require the Court to reach an interpretation that departs from the interpretation that would otherwise have been reached. Interpretation provisions have long had that effect. For example, s 15A of the *Acts Interpretation Act 1901* (Cth), which requires courts to read legislation in a way that renders it valid, has long been regarded as empowering courts to read legislation in a manner in

²⁸ *S v Coetzee* (1997) 3 SA 527 (CC) at [220], quoted with approval in *R v Johnstone* [2003] UKHL 28; [2003] 3 All ER 884, [49]; *R v Lambert* [2002] 2 AC 545, [34].

²⁹ See *HKSAR v Wa and Asano*, FACC No 1 of 2006, [76].

³⁰ *Kracke* [2009] VCAT 646, [153]-[154]; *R v Oakes* [1986] 1 SCR 103, 141.

³¹ *Kracke* [2009] VCAT 646 at [158].

³² *R v Lambert* [2002] 2 AC 545, [90]; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [26].

³³ *R v Lambert* [2002] 2 AC 545, [38]. See also *HKSAR v Wa and Asano*, FACC No 1 of 2006, [81].

³⁴ *R v Lambert* [2002] 2 AC 545, [41], [157]; *R v Oakes* [1986] 1 SCR 103, 142; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [84]; *HKSAR v Wa and Asano*, FACC No 1 of 2006, [77]-[85]; cf *Hansen v The Queen* [2007] 3 NZLR 1, [31], [39], [49], [96], [165], [200], [256], [283].

which it would not otherwise have been read in order to preserve validity (by using, for example, techniques such as severance, reading in and reading down).³⁵

28. Section 32 of the Charter creates an interpretive obligation that is “very strong and far reaching”.³⁶ It was enacted with full knowledge of, and with an apparent intention to replicate, the approach taken by the House of Lords in *Ghaidan*.³⁷ In that case, a majority of the House of Lords held that s 3(1) of the *Human Rights Act* was a prime remedial measure,³⁸ with the incompatibility declaration a “measure of last resort”. The interpretative obligation requires focus on the substance of a provision rather than the precise language used, so as to avoid a “semantic lottery”.³⁹
29. Section 5 of the Act does not expressly impose a burden on the accused to prove any fact on the balance of probabilities. In that respect, it should be contrasted with s 72C and s 73(1) of the Act. Given that Parliament has used express language in some provisions to impose a legal onus on the accused, the words “unless the person satisfies the court to the contrary” in s 5 are capable of being read as requiring the accused only to satisfy the court that there is material capable of raising a reasonable doubt as to possession.
30. In *HKSAR v Wai and Man*, Sir Anthony Mason NPJ held that provisions in a firearms ordinance to the effect that a person did not commit an offence if he “satisfies the [court]” of one or more matters imposed only an evidential onus.⁴⁰ In another case decided on the same day, his Honour applied the same reasoning to a reverse onus provision in drugs legislation, finding that a section that provided that a person who was proved to have had anything containing a drug “shall, until the contrary is proved, be presumed to have had such a drug in his possession” imposed only an evidential onus.⁴¹ That conclusion is strongly supported by the judgment of the House of Lords in *R v Lambert*, where it was held that the words “it shall be a defence for the accused to prove” in the *Misuse of Drugs Act 1971* (UK) imposed only an evidential burden. The words “unless the contrary is proved” were held to mean “unless sufficient evidence is given to the contrary”,⁴² because that was necessary to render the section consistent with the presumption of innocence.⁴³

C. CONCLUSION

31. In light of the above, the Commission submits that s 32 of the Charter requires s 5 to be re-interpreted as imposing only an evidential burden, and that such a re-interpretation is “possible” consistently with the purpose of s 5 of the Act.
32. If the Court concludes that it is not possible to re-interpret s 5 so that it imposes only an evidential burden, it should consider making a declaration of inconsistent interpretation pursuant to s 36 of the Charter.

Dated: 3 June 2009

STEPHEN DONAGHUE
Douglas Menzies Chambers

³⁵ See, e.g., *Pidoto v Victoria* (1943) 68 CLR 87, 109; *DCT v Richard Walter Pty Ltd* (1995) 183 CLR 168. See also *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [71] per Mason NPJ.

³⁶ *Kracke* [2009] VCAT 646 at [202], [218]-[219]. See also *R v Lambert* [2002] 2 AC 545, [79]-[81]; *Sheldrake v DPP* [2005] AC 264, 303-304.

³⁷ See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 82-83, endorsing the approach in *Ghaidan*.

³⁸ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [46].

³⁹ *Ghaidan* [2004] 2 AC 557 at [31]-[32]; *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [65].

⁴⁰ *HKSAR v Lam Kwong Wai* FACC No 4 of 2005, [22], [34], [84].

⁴¹ *HKSAR v Wa and Asano* FACC No 1 of 2006, [43], [86].

⁴² *R v Lambert* [2002] 2 AC 545, [42], [84], [94], [157]; cf [198].

⁴³ *R v Lambert* [2002] 2 AC 545, [17], [42], [94].