Privy Council Appeals Nos. 59 and 60 of 1992

The Attorney General of Hong Kong *Appellant*

v.

Lee Kwong-kut *Respondent*

and

The Attorney General of Hong Kong *Appellant*

v.

(1) Lo Chak-man and
(2) Tsoi Sau-ngai *Respondents*

FROM

THE COURT OF APPEAL AND THE HIGH COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MAY 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD LANE
LORD BRIDGE OF HARWICH
LORD BROWNE-WILKINSON
LORD WOOLF

*[Delivered by **Lord Woolf**]*

These appeals illustrate the effect on existing legislation of adopting a Bill of Rights. On 8th June 1991 the Hong Kong Bill of Rights Ordinance, Cap. 383, Laws of Hong Kong, ("the Hong Kong Bill") came into force.

After a hearing on 2nd September 1991, at which no evidence was called, a magistrate dismissed an information preferred against Lee Kwong-kut ("the first respondent") under section 30 of the Summary Offences Ordinance, Cap. 228, Laws of Hong Kong ("section 30") on the ground that section 30 had been repealed by section 3(2) of the Hong Kong Bill. The Attorney General of Hong Kong appealed against that decision and on 18th June 1992 the Court of Appeal of Hong Kong dismissed that appeal.

On 4th August 1992 Gall J. quashed an indictment against Lo Chak-man and Tsoi Sau-ngai ("the second respondents"), charging each of the second respondents with one count of assisting another to retain the benefit of drug trafficking contrary to section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap. 405, Laws of Hong Kong ("section 25"). Gall J. quashed the indictment as a result of his ruling that section 25(1) and section 25(4)(a) and (b) had been repealed by section 3(2) of the Hong Kong Bill.

In relation to the rulings in both cases, the Attorney General sought special leave to appeal and this was granted on 17th November 1992. In both cases the rulings were made on the grounds that the respective sections were inconsistent with section 8, Article 11(1) ("Article 11(1)") of the Hong Kong Bill, which provides:-

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

Both appeals were heard together. This was a convenient course to adopt on what is the first appeal to come before the Board as to Article 11(1) since it has enabled the Board to consider a wide ranging argument about section 30 and section 25 which have very different structures. It was not however necessary for their Lordships to call upon counsel for the first respondent since, having heard the argument on behalf of the Attorney General in relation to the appeal in his case, their Lordships were satisfied that the appeal could not succeed. Their Lordships have humbly advised Her Majesty accordingly.

It is desirable at the outset to explain the different structure of the two offences before turning to consider the possible effects of the Hong Kong Bill.

The structure of section 30.

The terms of section 30 are:-

> "Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of $1,000 or to imprisonment for 3 months."

The way in which the present information was worded shows how a charge under section 30 is approached in practice. What is alleged is that the first respondent had on 17th November 1990 (at a named place) in his possession cash $1.76 million Hong Kong currency, reasonably suspected of having been stolen or unlawfully obtained. The failure to give an account to the magistrate is not mentioned.

In his judgment in the Court of Appeal relating to the first respondent, Kempster J.A. points out that section 30's source, like similar provisions in the laws of each of the States of Australia and of a number of former British Colonies in Africa, was the former offence under section 24 of the Metropolitan Police Courts Act 1839 (which was repealed by the Criminal Law Act 1977) and that its history in Hong Kong goes back to section 36 of the Summary Offences Ordinance 1845.

For a proper understanding of section 30 it is useful to have in mind the powers given to the Hong Kong Police by section 55 of the Police Force Ordinance, which is comparable to part of what was section 66 of the Metropolitan Police Act 1839. Section 55 of the Police Force Ordinance states:-

> "It shall be lawful for any police officer to stop, search and detain any vessel boat, vehicle, horse or other animal or thing in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having or conveying in any manner anything stolen or unlawfully obtained ..."

As has been decided in England in *Hadley v. Perks* (1886) L.R. 1 Q.B. 444 and in Hong Kong in *Attorney General v. Chiu Man-lun* [1989] 1 H.K.L.R. 99, section 30 and section 24 of the Metropolitan Police Courts Act 1839 are to be regarded as supplemental to the powers of arrest given respectively by section 55 of the Police Force Ordinance and section 66 of the Metropolitan Police Act 1839. Construed in this way section 30 created an offence with which a person could be charged after he was stopped and arrested by a police officer in circumstances where there was a suspicion that he had committed an offence but where it was not possible to establish that he was guilty of what were the more serious offences of larceny or receiving. The nature of that offence was made clear by Lush J. in *Hadley v. Perks* when he said of section 24 (at page 462):-

> "It makes it an offence for a person to have in his possession, or convey in any manner, anything which may be reasonably suspected of being stolen or unlawfully obtained, without being able to give a satisfactory account of how he came by it."

Section 30 is therefore an offence which contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession.

The third element is not a special defence as is contended by Mr. Bratza Q.C. in his extremely persuasive argument, on behalf of the Attorney General,

but an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.

This third ingredient is the most important element of the offence since, were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law. He could, for example, be in possession of the property without having any knowledge of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him. Section 30 therefore does not create an offence of the class identified in *R. v. Edwards* [1975] Q.B. 27 by Lawton L.J. when, in giving the judgment of the court, he said (at page 39/40) after examining a line of authority dating from the 17th century:-

> "... this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception."

This does highlight the very special nature of section 30 since, as Lord Griffiths said in *R. v. Hunt* [1987] 1 A.C. 352 at page 375 of the formulation of the exception by Lawton L.J. in *R. v. Edwards*, "the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare".

On this point section 30 can be compared with the approach adopted by the majority of the Board in *Mok Wei-tak v. The Queen* [1990] 2 A.C. 333 concerning section 101(a) of the Prevention of Bribery Ordinance, Cap. 201 where in the words of Lord Roskill (at page 349), "the offence is maintaining a standard of living which cannot be satisfactorily explained". Here the offence is being in possession of the suspicious property without being able to give a satisfactory explanation. In adopting this approach to the nature of section 30 it is also not intended to cast

any reflection on the correctness of the decision in *Attorney General v. Lo Man-cheuk* (1980) H.K.L.R. 687 that it was not necessary to make any reference to the failure of the accused to give an account to the satisfaction of the magistrate of his possession of the property reasonably suspected of being stolen or unlawfully obtained in a charge under section 30. The correctness of this decision was not in issue before their Lordships.

The structure of section 25.

The respective counts of contravening section 25(1)(a) on which the second respondents were to be tried were identical; the particulars of each count alleged that between 6th and 20th December 1989 they had respectively been concerned in an arrangement whereby the retention or control of another's proceeds of drug trafficking was facilitated, knowing or having reasonable grounds to believe that the other person carried on or had carried on drug trafficking or had benefited from drug trafficking.

The relevant provisions of section 25 are as follows:-

" (1) Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby -

(a) the retention or control by or on behalf of another ('the relevant person') of the relevant person's proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) the relevant person's proceeds of drug trafficking -

(i) are used to secure that funds are placed at the relevant person's disposal; or

(ii) are used for the relevant person's benefit to acquire property by way of investment,

knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, commits an offence.

(2) In this section, references to any person's proceeds of drug trafficking include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of drug trafficking.

(3) Where a person discloses to an authorized officer a suspicion or belief that any funds or investments are derived from or used in connection with drug trafficking or any matter on which such a suspicion or belief is based -

(a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if the disclosure is made in accordance with this paragraph, that is -

(i) it is made before he does the act concerned, being an act done with the consent of the authorized officer; or

(ii) it is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it;

(b) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by rules of professional conduct; and

(c) he shall not be liable in damages for any loss arising out of -

(i) the disclosure;

(ii) any act done or omitted to be done in relation to the funds or investments in consequence of the disclosure.

(4) In proceedings against a person for an offence under this section, it is a defence to prove -

(a) that he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking; or

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of the relevant person of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1); or

(c) that -

(i) he intended to disclose to an authorized officer such a suspicion, belief or matter as is mentioned in subsection (3) in relation to the arrangement; but

(ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a).

(5) A person who commits an offence under this section is liable -

(a) on conviction upon indictment to a fine of $5,000,000 and to imprisonment for 14 years; ..."

The only significant difference between section 25 and section 24 of the (United Kingdom) Drug Trafficking Offences Act 1986 is in relation to the knowledge which is required of the status of "the relevant person" before an offence is committed. Section 25(1) refers to "knowing or having reasonable grounds to believe" whereas the United Kingdom legislation refers to "knowing or suspecting".

The language of section 25 makes the purpose of the section clear. It is designed to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. Once a person has knowledge or has reasonable grounds to believe that a relevant person carries on or has carried on drug trafficking or has benefited from drug trafficking, then it will be an offence to become involved with "the relevant person" in any of the wide-ranging activities referred to in the section, unless the activity is reported in accordance with subsection (3) or the person who engages in the activity is in a position to establish the defence provided for in section 25(4). The section therefore creates an offence, which involves an absolute prohibition on engaging in the activities referred to in the section with someone whom you know or have reasonable grounds to believe is a person who carries on or has carried on or has benefited from drug trafficking, subject to an exception contained in section 25(3) and a special defence contained in subsection (4). Section 25 is an offence which falls within the classes referred to by Lawton L.J. in the passage cited from his judgment in *Edwards*.

As was held in *R. v. Colle* (1992) 95 Cr.App.R. 67, in relation to that special defence, the legal or persuasive burden of proof is on a defendant, the standard required being proof on a balance of probabilities. Furthermore the only "mens rea" which the prosecution is required to establish, if mens rea is an appropriate description of the necessary mental element, is that the defendant should know or have reasonable grounds to believe that the relevant person is connected with drug trafficking. This mental element can exist, even if the defendant does not have the required belief, if there are reasonable grounds for his holding the belief. The offence is therefore a draconian one.

The application of Article 11(1) of the Hong Kong Bill.

The Hong Kong Bill was enacted by the Governor of Hong Kong, with the advice and consent of the Hong Kong Legislative Council. Its provisions are for the time being entrenched under the Hong Kong Letters Patent 1991 (No. 2). The Ordinance is designed to achieve "the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong; ..." ("the International Covenant"). Section 3 of the Hong Kong Bill provides:-

"3. Effect on pre-existing legislation

(1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

(2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed."

"Pre-existing legislation" means legislation enacted before the commencement date of the Hong Kong Bill so both section 30 and section 25 are pre-existing legislation.

The close link between the Hong Kong Bill and the International Covenant is emphasised by section 4 which states:-

"4. Interpretation of subsequent legislation

All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong."

Part II of the Ordinance consists of section 8 which contains the 23 Articles which constitute the Hong Kong Bill. Each of those Articles refers in terms to the equivalent Articles of the International Covenant. Article 11(1), the terms of which have been referred to earlier, is to be compared with Article 14 of the International Covenant and it should be considered together with that part of Article 10 of the Hong Kong Bill which provides that:-

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Article 11(2) is also of relevance since it provides:-

"(2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ...

(g) not to be compelled to testify against himself or to confess guilt".

The decision of the Court of Appeal in the case of the first respondent was not the first appeal heard by that court which involved Article 11(1) of the Hong Kong Bill. In *R. v. Sin Yau-ming* [1992] 1 H.K.C.L.R. 127 the Court of Appeal (Silke V.-P., Kempster and Penlington JJ.A.) gave admirably clear judgments which were intended to provide guidance to the Hong Kong courts as to the proper approach to the application of Article 11(1) of the Hong Kong Bill.

The judgment was in relation to offences of possession of dangerous drugs for the purpose of unlawful trafficking. In their decision, the Court of Appeal decided that certain of the provisions of sections 46 and 47 of the Dangerous Drugs Ordinance (Cap. 134) were repealed as being inconsistent with Article 11(1).

Although this is the first appeal in which the Hong Kong Bill has been considered by the Board, the Board has had from time to time to consider earlier constitutional orders which contain similar provisions and in his judgment, Kempster J.A. referred to the general approach to the interpretation of constitutions and bills of rights, indicated in the previous decisions of the Board in *Minister of Home Affairs v. Fisher* [1980] A.C. 319 and *Attorney General of The Gambia v. Jobe* [1984] A.C. 689. In the former case, in relation to the Bermuda Constitution Order 1968, Lord Wilberforce (at page 328) stated of instruments of this nature, that they "call for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". In the latter case Lord Diplock said (at page 700):-

> "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

Lord Diplock's comment was as to the Constitution of the Republic of The Gambia but, as in the case of the statement of Lord Wilberforce, the approach indicated is equally applicable to the Hong Kong Bill.

Reference was also made in the judgments in the *Sin Yau-ming* case to decisions in other common law jurisdictions, including the United States and Canada and of the European Court of Human Rights in relation to the European Convention on Human Rights. Such decisions can give valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill, particularly where the decisions in the other jurisdictions are in relation to an article in the same or substantially the same terms as that contained in the equivalent provision of the Hong Kong Bill. However, it must not be forgotten that decisions in other jurisdictions are persuasive and not binding authority and that the situation in those jurisdictions may not necessarily be identical to that in Hong Kong. This is particularly true in the case of decisions of the European Court, as Silke V.-P. recognised. The European Court is not concerned directly with the validity of domestic legislation but whether, in relation to a particular complaint, a State has in its domestic jurisdiction infringed the rights of a complainant under the European Convention; whereas, in the case of the Hong Kong Bill, the Hong Kong courts,

and on appeal the Board, have to determine the validity of domestic legislation having regard to the entrenched provisions of the Hong Kong Bill.

Of the various authorities to which the Court of Appeal were referred in the *Sin Yau-ming* case and on the appeal in the case of the prosecution of the first respondent, the Court of Appeal in Hong Kong found that the decisions of the Supreme Court of Canada provided the most assistance, in particular on the interpretation of Article 11(1). In the *Sin Yau-ming* case all three judges and, on the Attorney General's appeal in the case of the first respondent, Kempster J.A. relied heavily on the judgment of Dickson C.J.C. in the Supreme Court of Canada in *R. v. Oakes* (1986) 26 D.L.R. (4th) 200, while on that appeal Sir Derek Cons, A.C.J.,and Bokhary J. followed the subsequent judgment of Dickson C.J.C. in *R. v. Whyte* (1988) 42 C.C.C. (3d) 97. When giving his ruling in the second respondents' case, Gall J. also applied the approach which was identified by Dickson C.J.C. in *R. v. Whyte*. In both cases the Chief Justice of Canada was applying section 11(d) of the Canadian Charter of Rights and Freedoms which is the equivalent of Article 11(1) of the Hong Kong Bill. In *Whyte* a stricter approach was adopted to section 11(d) than that which had been adopted in the earlier case of *Oakes*. Mr. Bratza accepts that the approach in *Whyte* now represents the accepted approach in Canada, as is confirmed by later decisions of the Canadian Supreme Court (for example in *R. v. Downey* (1992) 72 C.C.C. (3d) 1). However on behalf of the Attorney General he submits that it is not desirable for the Hong Kong courts to follow that approach in relation to Article 11(1) as it is more intrusive in its effect on existing legislation than the approach adopted in other jurisdictions.

So far as the present appeals are concerned, their Lordships are of the opinion that, whether what can be described as the *Whyte* approach or the less intrusive approach adopted in other jurisdictions is applied, the outcome would be the same. However in order to assist the Hong Kong courts in the future and in view of the carefully reasoned decisions of the Court of Appeal already referred to, the Board feel it is necessary to give some assistance as to the correct approach for the courts to adopt in relation to Article 11(1) and in particular as to whether it is appropriate to adopt the *Whyte* approach in Hong Kong as a matter of course.

Before examining the approach adopted in Canada it is helpful to consider the language and objectives of Article 11(1) and the approach adopted in other jurisdictions apart from Canada to similar provisions.

Article 11(1) of the Hong Kong Bill is part of a group of provisions contained both in that Article and in Article 10 which are designed to ensure that, before an individual is convicted of a criminal offence, he will have a fair trial and that justice will be done. Article 11(1) would be described

in the United States as a due process provision. In his case the first-named of the second respondents draws attention to the fact that Article 11(1) is not subject to any express limitation. Reference is also made to the comments by the United Nations Human Rights Committee at its 21st session on Article 14 of the International Covenant, which include the statement that:-

> "The burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond all reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".

However, it should not be assumed from this statement that the comparable Article in the International Covenant to Article 11(1) does not permit the degree of flexibility which is normally assumed to be implicit in any provision of general application which is of the same nature as Article 11(1) of the Hong Kong Bill. Placing to one side for the moment the decisions in Canada, all of the many decisions in different jurisdictions, to which their Lordships were referred, recognise that provisions similar to Article 11(1) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial. In the common law jurisdictions, Viscount Sankey L.C.'s famous statement in *Woolmington v. D.P.P.* [1935] A.C. 462 at page 481 that:-

> "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."

is regularly treated as a starting point for the approach to provisions equivalent to Article 11(1). If that statement is taken together with the comments of Lawton L.J. and Lord Griffiths, referred to earlier, and if it is also remembered that it is the substance rather than the letter of the language of the statute which is important when considering whether there is an exemption or proviso, this statement is also a useful starting point when considering the effect of Article 11(1) itself.

Mr. Bratza relied on the decision in the United States Supreme Court in *Patterson v. State of New York* (1977) 53 L.Ed. 2d 281 as showing that that court had rejected an argument that the "due process" clause of the Fourteenth Amendment required a state to disprove beyond reasonable doubt every fact constituting any offence and all affirmative defences relating to the culpability of the accused. He also relied upon the cases before the European Court of Human Rights which were

referred to in the judgments in the *Sin Yau-ming* case. Here reference can be usefully made to the decision of the European Court in *Salabiaku v. France* (1988) 13 E.H.R.R. 379, where the judgment, which has been followed in later cases in the European Court, contains the following statement as to the equivalent provisions to Article 11 of the Hong Kong Bill (at page 388):-

> "Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law.
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> 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 statement provides a valuable illustration of the collective effect of the decisions in other jurisdictions, apart from Canada, to which their Lordships have been referred on equivalent provisions to Article 11(1) in other constitutional documents. Even though they are not subject to any express limitation they are considered to have an implicit degree of flexibility. The situation is the same in relation to Article 11(1).

This implicit flexibility allows a balance to be drawn between the interest of the person charged and the State. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position is the same with regard to

insanity, which was one of the exceptions identified by Lord Sankey in the passage of *Woolmington v. D.P.P.* which has already been cited. The other qualification which Lord Sankey made as to statutory exceptions clearly has to be qualified when giving effect to a provision similar to Article 11(1).

Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which Article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v. United States* (1969) 23 L.Ed. 2d 57, 82 "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".

Turning to the recent decisions of the Canadian Supreme Court, they contain remarks of considerable value. In particular the majority judgment of Dickson C.J.C. in *R. v. Oakes* (1986) 26 D.L.R. (4th) 200 contains a number of helpful statements.

His general conclusion, after examining the authorities in various other jurisdictions, was in the following terms (page 222) with which, with its reference to "important element" and "essential element", their Lordships would respectfully agree:-

> "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 .... 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 of probabilities that the presumed fact was untrue."

It is, however, important when considering the decision in *Oakes* and the cases in which it has been followed, to remember that prior to the adoption of the Canadian Charter, Canada had a Bill of Rights and that while the Bill of Rights did not have an express limitation on the effect of its specific provisions, the Charter does have such a limitation in Article 1:-

> "1. 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."

Having regard to this express limitation, it is understandable that Dickson C.J.C. in *Oakes* (at page 223) considered that "it is highly desirable to keep sections 1 and 11(d) (of the Canadian Charter) analytically distinct". Having adopted a two-stage process, it is again understandable that the Canadian Supreme Court has adopted a strict approach as to when there had been a contravention of section 11(d). This is in contrast to the flexible approach which had been adopted by the Canadian Supreme Court in *R. v. Appleby* (1971) 21 D.L.R. (3d) 325, to section 2(f) of the Canadian Bill of Rights which is the equivalent provision to section 11(d) of the Canadian Charter. Dickson C.J.C. in *Oakes* (at page 224) regarded section 1 of the Charter as stating "explicitly the exclusive justificatory criteria ... against which limitations on those rights and freedoms (set out in the Charter) must be measured". Having come to this conclusion, in *R. v. Whyte* (1988) 42 C.C.C. (3d) 97 the Canadian Supreme Court, as already indicated, applied a stricter approach to the application of section 11(d) of the Charter than had been adopted not only in *Oakes* but in the subsequent case of *R. v. Holmes* (1988) 50 D.L.R. (4th) 680. In the passage of his judgment in *Oakes* cited above, Dickson C.J.C. regarded presumptions in relation to "an important element" or "an essential element" as offending section 11(d) of the Canadian Charter. In *R. v. Whyte* his approach was not confined to these elements as appears from the following passage of his judgment (at page 109):-

> "In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from *Oakes* quoted above, with its reference to an 'essential element', to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike *Oakes* where the accused was required to disprove an element of the offence.
>
> The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that

an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

It was the approach reflected in this passage of Dickson C.J.C.'s judgment ("the *Whyte* approach") which was followed in these cases, in the Court of Appeal by Sir Derek Cons, Acting C.J. and Bokhary J., in the first respondent's case, and by Gall J., in the second case.

Applying the *Whyte* approach, even to place the onus on a defendant to prove insanity as a "defence" to murder has now been held to contravene the presumption of innocence guaranteed by section 11(d) of the Canadian Charter (*R. v. Chaulk* (1990) 62 C.C.C. (3d) 193). However, the Supreme Court was able to justify the conventional position in relation to insanity under section 1. This result illustrates the fact that, applying the two-stage approach, the courts in Canada in the end tend to come to the same conclusion as would be reached in other jurisdictions.

This does not mean that the adoption of a two-stage as opposed to a single stage approach does not have practical consequences. In relation to the second stage, the section 1 of the Charter stage, formal criteria which need to be satisfied have been established. In *Chaulk supra,* at page 216, Lamer C.J.C., Dickson C.J.C. concurring, described the reasoning to be followed when there is an attempt to rely on section 1 of the Canadian Charter in the following terms:-

"1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as 'little as possible', and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective."

In applying these tests, the Canadian Supreme Court has injected a degree of flexibility. In particular in *Chaulk* it was made clear that reliance on section 1 would not be prevented because Parliament had failed to search out and adopt the least possible intrusive means of attaining its objective as long as it has chosen from a range of means which impairs section 11(d) as little as is reasonably possible.

Notwithstanding this, it is their Lordships' opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning. The application of a test along the lines suggested by Lawton L.J. in *Edwards (supra)* in the manner already indicated will often be all that is required. The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton L.J. If this is the situation Article 11(1) is not contravened.

In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty. This is particularly true in relation to what was said in *Chaulk* about proportionality since it is the need to balance the interests of the individual and society which are at the heart of the justification of an exception to the general rule.

The application of Article 11(1) to sections 30 and 25.

So far as the first issue in the present appeals is concerned, that is whether the Hong Kong Bill has repealed the statutory provisions, their Lordships regard the answer as being straightforward once the substance of the offences has been identified. In the case of the first respondent the substantive effect of the statutory provision is to place the

onus on the defence to establish that he can give an explanation as to his innocent possession of the property. That is the most significant element of the offence. It reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It therefore contravenes Article 11(1) of the Hong Kong Bill in a manner which the Attorney General could not justify.

This is by contrast to the situation in relation to the second respondents' case and section 25. It is not important whether section 25(4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. The substance of the offence is contained in section 25(1) as to which the onus is on the prosecution. Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person's proceeds of drug trafficking (within the wide terms of section 25(2)) as set out in section 25(1) and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts the defendant is entitled to be acquitted. However once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking, then the defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy section 25(3) or (4). If the defendant chooses not to take the precautionary action under section 25(3) then he knows he can only safely proceed by relying on section 25(4). To be able to achieve this the defendant will have to take any steps necessary to ensure that he does not have the knowledge or suspicion referred to. An example would be, by insisting on seeing documents establishing the untainted source of the funds. If the defendant has done this then he will be aware of the relevant facts and it is reasonable that he should be required to establish them. It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the war against drug trafficking, for a defendant to bear that onus under section 25(4) is manifestly reasonable and clearly does not offend Article 11(1). Indeed section 30 and section 25 can be regarded as examples of situations close to the opposite ends of the spectrum of what does and does not contravene Article 11(1).

It was argued on behalf of the Attorney General that, as the first respondent's alleged offence was committed prior to the coming into force of the Bill of Rights, section 3 should not be invoked so as to repeal retrospectively section 30. In support of this argument Mr. Bratza relied on section 23 of the Interpretation and General Clauses Ordinance, Cap. 1 Laws of Hong Kong

which corresponds closely to section 16(1) of the Interpretation Act 1978. However, quite independently of section 3, section 8 and Article 11(1) established a defendant's right "to be presumed innocent until proved guilty according to law". That right came into existence on the coming into force of the Hong Kong Bill and so it would apply in any trial taking place thereafter. It is not the date of the offence but the date of trial which is conclusive. If it had been necessary to do so, the same result could have been achieved by saying that in this context a contrary intention appears, so section 23 of the Interpretation and General Clauses Ordinance does not apply. (See section 2 of the Ordinance).

The Attorney General did not contend that it was possible to save section 30 by treating it as being only partly repealed.

Having come to the conclusion that section 25(4) does not offend Article 11(1), the appeal of the Attorney General in respect of the proceedings against the second respondents must inevitably be allowed. However, it is desirable that their Lordships indicate that if they had not come to that conclusion, then, contrary to the judgment of Gall J., they would have regarded only the words "to prove" as being repealed by section 3(2) of the Hong Kong Bill. Section 3(2) repeals existing legislation "to the extent of the inconsistency" and if the words "to prove" are removed from section 25(4) the second respondents would be no longer under a legal or persuasive burden of proof to establish the defence contained in section 25(4). Instead they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene Article 11(1).

The final matter to which reference should be made is that Gall J. was of the view that the Crown had failed to adduce the necessary evidence to establish that the interference with the interests of the individual for the benefit of the State contained in section 25 was justified. As to this he was in the difficulty that the issues before him were presented on the basis that he was required to adopt the two-stage process laid down in the *Whyte* case in circumstances where the Crown was conceding before him that there had been a *prima facie* contravention of Article 11(1). This concession having been made, on the basis of the Canadian authorities, the burden on the Crown was a heavy one and his conclusion that the evidence which was available to him was not sufficient to enable him to be satisfied has to be understood in this context. However as was apparent from his judgment, Gall J. had ample knowledge to hold the balance appropriately between the individual and the Government in relation to section 25 without any evidence being called. The need to prevent the laundering of the proceeds of drug trafficking is common knowledge. He was entitled to have regard to the policy which the legislature had made clear by enacting section 25. He was in a position to assess the extent of the burden

which section 25(4) imposed upon the second respondents. If he had adopted, as he should have done, a broad unified approach to the application of Article 11(1) to section 25, he should have had no difficulty on the material which was before him in coming to the conclusion that the section did not contravene the Article. The fact that he found this process as complex as he did illustrates the disadvantage that can flow from seeking strictly to emulate the current approach of the Canadian Supreme Court. While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature. (See *R. v. Downey* (1992) 72 C.C.C. (3d) 1 at page 18 and *Chaulk (supra)* at page 222). It would not assist the individuals who are charged with offences if, because of the approach adopted to "statutory defences" by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge.

For these reasons, their Lordships have humbly advised Her Majesty that the appeal of the Attorney General in the case of the first respondent ought to be dismissed and they will humbly advise Her Majesty that the appeal of the Attorney General in the case of the second respondents ought to be allowed and the order of Mr. Justice Gall set aside. The Attorney General must pay the costs of the first respondent before their Lordships' Board. There will be no order as to costs in the case of the second respondents.