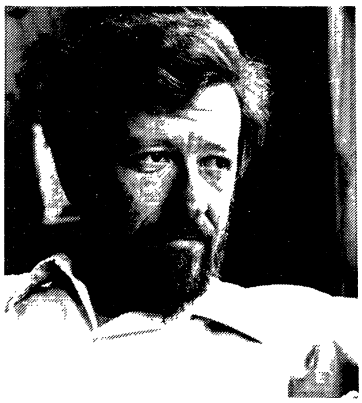

REVERSE BURDENS OF PROOF IN DRUG OFFENCES

By Robert Richter

Whilst it may not exist as a presumption of law in the technical sense, the 'presumption' of innocence is a traditionally accepted short-hand formulation expressing the principle that the party alleging an offence must prove each ingredient of such offence beyond reasonalbe doubt.

To the lay person, the existence of that 'presumption of innocence' represents at once the hallmark and glory of our system of criminal justice. The Englishman's home, Magna Carta, the Bill of Rights, trial by ones "peers"—all representing as they do semi-mythological and semeiological conceptions of how good it is to live in a system governed by the Rule of Law—do not and never did represent the full theoretical and practical fragility of the layman's notion of guaranteed liberty in the face of parliamentary and judicial law-making. These processes are of course ultimately subject to current political forces. A hysterical and consistent campaign in the media may prevail upon politicians to use their numbers to pass into law the most draconic and sweeping enactments. Similarly, such campaigns may prevail upon judges to give a broad reading to what might otherwise have been strictly construed penal provisions in the name of necessity to fight a public menace.

In recent years we have witnessed a number of serious and wide-ranging invasions by legislatures (both State and Federal) into traditional halloed spheres. The weapon used in these assaults has been for the most part, the notion of a reversed burden of proof tagged onto a deeming provision of one kind or another.

We are all familiar with the concept of a reversed burden of proof relating to non-indictable offences such as one found in the Victorian Summary Offences Act 1966 e.g. section 26(1) (possession of property suspected of being stolen or unlawfully obtained) and in various other enactments like the Vagrancy Act (Vic) 1966. Not many lawyers find kind words for this type of departure from ordinary principles. The judicial response to them varies from a literalist onslaught narrowly circumscribing their operation on the one hand, to a wider approach designed to meet the requirements of particular cases. We have lived with such summary offences for a long time and they have by and large withstood attacks by civil libertarians and others if only because the consequences which flow from them a) affect a section of the public who find it difficult to get their grievances across where it counts and b) because the potential sentences are confined within 'short' temporal bounds.

Over the last few years we have, for the first time (other than war-time measures) seen a burgeoning of indictable statutory offences of the utmost seriousness which include or call in aid deeming provisions and rely upon formally shifting the burden of proof to an accused. It is one thing for the judiciary to interpret some situations as in effect creating an 'evidentiary' burden upon an accused; it is quite another matter for the ultimate burden to be shifted with respect to some vital element of an offence. Who would have thought that an offence carrying a maximum of $100,000 fine and/or 15 years of imprisonment (S32(2) Poisons Act 1962 Victoria) could be proved relying upon a sequence of legislative presumptions and a reversed burden of proof? Who would have thought that a drug addict in possession of 2 gm of Heroin on two occasions may face life imprisonment unless he proves to the satisfaction of a judge that the heroin was not intended for any purpose related to sale or other commercial dealing?

I propose, in this article, to deal with some aspects of the Poisons Act (Vic) 1962 and the Commonwealth Customs Act pointing out some of the drastic ways in which traditional concepts have been erroded. I do so on the basis that it is assumed that our system was designed to afford protection to all rather than only to those without prior convictions or the misfortune of being addicts, prostitutes and life-style deviants.

The arguments which support draconic legislation of the kind dealt with generally rely upon the propositions that a) The offences are difficult to detect and prove and b) that society is in a 'state of war' on drugs. As to these propositions one simply says that if these were legitimate, they ought to result in deeming provisions for all serious offences. No one has ever suggested that murder be deemed to have been committed upon proof that A killed B and that the burden of proving an absence of malice aforethought should lie upon the accused.

The Poisons Act 1962 (Victorian)

At the heart of this enactment—as with all other enactments dealing with drug offences—stands that most difficult and elusive concept of 'possession'. Simple possession of a non-trafficable quantity is of course a purely summary offence. It is also, however, the key to the far more serious indictable offences of selling (via the extended definition of 'sell' in S.3 (1) of the Act which includes interalia 'keeping or having in possession for sale') and trafficking via S.32(5).

The Common Law meaning of 'possession' is extended by S28 as follows:

" . . . a substance shall be deemed for the purposes of this Part to be in the possession of any 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 whatever unless it be shown that he had no knowledge thereof."

Whilst at common law certain propositions of common sense were implicit in the action of 'possession' which led to factual rebuttable inferences e.g. if you hold a box in your hand you can as a matter of common sense be said to possess

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its contents, yet the tribunal of fact must still find beyond reasonable doubt that you knew it had contents (leaving aside the vexed question of whether you had to know exactly what those contents were); the statutory extended definition makes it a *presumption of law* and provides only one defence, namely, that you had no knowledge 'thereof'.

It should be noted that whilst the rationale for S.28 is that it was intended to overcome the problem of proving knowledge, the section goes far beyond this modest and, some might say, reasonable range: the section deems 'possession' and not merely 'knowledge'. Thus it is arguable that a father, who is the occupier of his house, whose son brings home some cannabis and places it on the kitchen table is therefore deemed to be in possession because he is the occupier of premises where the substance is found. Moreover, he has, it might appear, no defence in law because he can not prove that he had 'no knowledge thereof' since he knows it is there.

The question of who is an 'occupant' for the purposes of S28 has not been authoritatively determined and recent 'dicta' in the unreported decision of *R. v. Ditroia and Tucci* (Full Court 29.8.80) seems to indicate a mood in favour of construing the section to cover joint occupants. (cf. the position in NSW as indicated in *F. V. Fillippetti* (CCA 9.11.78).

It is in fact quite extraordinary that no authoritative exposition of the scope of S28 exists even though it appears riddled with difficulties. For example, a grammatical reading of the section makes it quite clear that the words 'used enjoyed or controlled' do not refer to the 'land or premises' but to the substance itself. As to what the word 'occupier' means one is forced to look to other jurisdictions (e.g. *R. v. Tao* [1976] 3 All ER 65) or other contexts (*Fox V. Warde* [1978] VR 362).

When possession is 'deemed' pursuant to S28, there is then a burden cast upon the defendant to prove on a balance of probabilities that he had no knowledge thereof. Most people would be familiar with the problems involved in seeking to prove a negative state of mind. Prosecuting authorities may complain about difficulties of proving intent but in practice, the circumstancial evidence will requently give rise to an inferrence. As far as a defendant is concerned, the circumstances will almost never give rise to a *positive* inference of *lack* of knowledge. A defendant would therefore be reduced to the assertion 'I didn't know it was there' and he will almost invariably be a person whose associations or life-style at any rate give rise to a suspicion, however unjustifiable, that he knows something about drugs. With credit slightly shaken, it is not frequent to find a defendant discharging a positive burden of proof.

Had this been the limit of the deeming provisions in the Act, one could say that objectionable as it is, it can be tolerated. The major impact of S28 is felt, however, when its effect is combined with a reading of S32(5) which provides that:

(5) Where a person (other than a person authorized by or licensed under this Act so to do) has in his possession—
a) the fresh or dried parts of any plant of the genus cannabis in whatever form;
b)
c) Opium or any other drug of addiction or specified drug in any form

in a quantity which is more than the quantity specified in column 2 of Sehedule Eleven . . . the finding in his possession of these drugs . . . shall be *prima facie* evidence that the person had those parts or that extract or drug in that quantity in his possession for the purpose of trafficking therein.

Thus, through one deeming provision lumped upon another deeming provision with a reversed onus of proof, a person can be convicted of Trafficking in a drug of addiction without it ever being proved that he even knew he had a drug in his possession. For such a result to be possible in the case of one of the most seriously regarded offences is, in my submission, appalling.

Certainly, it can now safely be asserted that S32(5) *does not* create a situation where a person in possession is deemed to be trafficking (see the Unreported Judgement in *R v. Elem* Full Court Vic. 27.7.79). Yet what of the situation in which the accused has in his hand a container (box or suitcase) in which there is found a quantity of Heroin greater than 2gms. Assuming that he has just picked up the container and is taking it home, it having been addressed to him to give to someone else, when he is arrested. Upon being interrogated, he maintains that he had no idea that the container bore within it any drugs at all. He is charged with trafficking pursuant to S32 (2).

The Crown relies upon S.28 which deems him to be in possession. If he asserts that he knew nothing of the contents of the container, he must prove it positively on a balance of probablilities. He can not do so other than by saying it and he is thus saddled with the possession of which an essential element *is* knowledge. How does he then go about attempting to rebutt the *evidentiary* presumption in S32(5)? The jury must surely be expected to perform a feat of mental gymnastics of which many lawyers are incapable. They must compartementalize away the fact that they *disbelieve* the accused when he says he didn't know (on the issue of possession) and then still he expected to give fair consideration to the notion that he didn't know when he asserts this on the issue of Trafficking! This is surely an impossible thing to ask of a jury in a trial of a most serious offence yet this is what in fact happened in *R v. Elem*.

The jury convicted the accused and the Victorian Full Court upheld the conviction albeit expressing some dissatisfaction with the Trial Judge's charge to the jury. In *Elem* there was an additional factor, namely that in the container there was also found a sum of money so that the Court was able to say that to the extent to which a commercial element might be required, the presence of the money furnished such element.

Clearly, in my submission, the confluence of a presumption of possession and a presumption of trafficking purpose together with the shifting of a substantive burden of proof as well as of an evidentary burden is likely to produce situations where wrong convictions are bound to occur. A person may be perfectly innocent of the particular charge but may yet be convicted because his credibility is attached and he cannot establish the negative proposition. The conviction of the innocent (albeit drug addicts or the associates of people who use drugs) is too great a price to pay in the Criminal Justice system. If it is too great a price to pay in the field of Homicide, it is too great a price to pay in a field where it is notorious that the people charged are in one way or another also victims of the drug trade.

The Customs Act 1901—1979

The position with respect to the *Customs Act* is in a sense somewhat more complex than that under the *Poisons Act* (Vic) in that the principal occurance of a reversed burden of proof has come about through judicial interpretation rather than by any explicit words in the Act. Here I refer of course to the string of authorities which construe the words "without any reasonable excuse (proof whereof shall lie upon him)" in S233B(1) a, c and ca to mean that an absence of knowledge by an accused of the fact that he has in his physical control a narcotic substance is a 'reasonable excuse'. See *R v. Bush* 5ALR 387, *R. V. Rawcliff* (1977) 1 NSW LR 219, *R v. Router* (1977) 14ALR 365 *R v. Males* (1978) 21 ALR 225 and *R v. Kennedy* (1979) 25 ALR 367. Moreover, views expressed in *R. v. Ditroia and Tucci* by way of 'dicta' appear to open the

way for a further exclusion of the doctrine in *Bush* in that the Victorian Full Court seems to suggest that the *Bush* doctrine is not confined to cases of actual physical possession in 'container' cases.

The doctrine in *Bush* has not, contrary to the belief held by some, received the imprimatur of the High Court. In the cases (*Rawcliff, Kennedy*) which sought to challenge it, special leave to appeal was refused but this was not on the basis that the High Court necessarily endorsed the validity of the doctrine. It was rather on the basis that whatever test was applied, the applicants were said to have been clearly guilty and their applications were not the proper vehicles for a review of the law. It seems unfortunate that the High Court has not yet taken the opportunity of passing on this matter and it is possible that by the mere effluxion of time, *Bush* may receive the status of accepted principle notwithstanding a great deal of criticism amongst academic and practising lawyers and judges.

What one finds difficult to accept with *Bush* itself and the other 'container' cases, is the notion that it was necessary for the judiciary to read a reverse burden into a concept where at common law, an inference would have flowed in any event that the accused had 'knowledge' because of the circumstances. The position, as it was assumed to be, in *R v. Van Swol* [1975] VR61 is clearly preferable in my submission..

One might also draw attention to the absurd position created by the decision in *Bush* when considering that the offences of importation or of being knowingly concerned in the importation of narcotic instances (S233B(1) b and d) remain offences requiring full proof of all elements (including knowledge in so far as it applies) by the Crown beyond reasonable doubt. The difficulties created by the joinder of counts of possession and importation or of being knowingly concerned in the importation are adverted to in *R v. Router* and have led to a situation where although a charge of importation is clearly the proper one, the Crown will proceed on a count of possession because it considers it easier to obtain a conviction upon a reversed burden of proof and the two offences carry the same penalty.

The other major area in which a reversed burden of proof is important appears in S235(3)b which, where the quantity of the narcotic substance exceeds the traffickable limit, casts a positive burden upon the accused to prove on a balance of probabilities that the offence:

"was not committed by the person charged for any purposes related to the sale of or other commercial dealing in those narcotic substances."

Leaving aside any question relating to who determines the issue (it seems clear that it is the trial judge) or any other technical matters, the practical problem confronting anyone who defends clients charged with possession of a traffickable quantity is that they are usually drug addicts. In order to discharge the burden, they must give evidence and be cross-examined. Once they are cross-examined, it appears quite clearly that in order to support their 'habit' they *must* have been committing offences (whether theft, robbery, prostitution or dealing in drugs). That being so, even if they did not intend to deal with the *particular* quantity involved, their credibility is almost invariably such that a trial judge will at best be left unable to determine the matter one way or the other and the accused therefore fails to discharge the burden.

Whilst one must appreciate that given the aims and aspirations of our society in attempting to suppress the drug trade and the illicit use of drugs, the result of these efforts is on the whole that the victims of what is usually described as 'this vicious trade' and those most deserving of a rehabilitative approach by sentencing judges, usually end up serving harsh and punitive sentences so that the undeterrables may be deterred.

Once again, one is compelled to ask the question: Is this the price we are prepared to pay in this unwinnable war? I say 'unwinnable' because the law and the politics of its enforcement do not offer the proper framework for stemming the tide. A different approach is essential.