IN THE SUPREME COURT OF NEW ZEALAND

SC CRI 8/2004

FISO TOVIO SILOATA

v

THE QUEEN

Hearing: 17 November 2004

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: R Lithgow for Appellant
S P France for Crown

Judgment: 16 December 2004

JUDGMENT OF THE COURT

A The appeal is dismissed.

REASONS

Elias CJ and Keith J [1]

Gault, Blanchard and Tipping JJ [15]

ELIAS CJ AND KEITH J

(Given by Elias CJ)

[1] Fiso Tovio Siloata was found guilty by a jury of having cannabis in his possession for the purposes of supply, an offence under s6(1)(f) of the Misuse of Drugs Act 1975. Under s6(6) of the Act, proved possession of 28 grams or more of cannabis plant raises a rebuttable presumption that possession is for the purposes of supply. The burden of rebutting the presumption is on the accused. He must satisfy the jury (or the judge, in a trial by judge alone) on the balance of probabilities that it is more likely than not that he was in possession of the drug for other, less culpable, purposes. The verdict of guilty in the present case necessarily entailed rejection of the defence contention that Mr Siloata was in possession of cannabis plant for his own use and to give to friends over the age of 18 years.

[2] Mr Siloata appealed to the Court of Appeal on the grounds that the trial judge's summing up to the jury was ambiguous and carried the risk that the jury may not have appreciated it had to be unanimous in rejecting the defence explanation rebutting the presumption. Crown counsel in response maintained that the directions were not ambiguous and clearly required the jury to be unanimous in any verdict returned. But, in addition, the Crown argued that, once the presumption was invoked (through the accused's acknowledged possession of 28 grams or more of cannabis plant), the jury were properly to be instructed that a guilty verdict should be returned unless unanimously they were of the view that it was more likely than not that the possession was for a less culpable purpose.

[3] The Court of Appeal (Anderson P, Paterson and Doogue JJ) considered that the trial judge's direction on the possible verdicts available to the jury might have been more clearly put, but was adequate. More importantly, it accepted the alternative argument put forward by the Crown. It held:

> [16] The effect of the legislative presumption is that once the Crown has proved that an accused is in possession of a controlled drug of the specified quantity, then absent a special defence such as compulsion, a guilty verdict must be returned unless the accused should prove that possession is not for a prohibited purpose. An accused will not have so proved unless the jury is unanimously satisfied that it is more likely than not that such is the case.

> [17] It cannot be tenable that if only some of the members of the jury should be satisfied that the possession was more likely than not for other than a proscribed purpose, an accused will escape conviction through a disagreement. That would negate the effect of the statutory presumption. It would mean that the Crown would first have to satisfy the jury, unanimously and beyond reasonable doubt of the facts which involve the presumption, and would then have to satisfy the jury unanimously and on the balance of probabilities that such possession was for a proscribed purpose. An accused could never be convicted if the Crown should fail on the second limb of this hypothesis.
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> [18] The correct position is that the Crown has to prove the facts which invoke the presumption and if it does an accused must be convicted unless the accused proves to the unanimous satisfaction of the jury that it was more likely than not that such possession was not for a proscribed purpose.

[4] The effect of this statement of principle is that, once the presumption is engaged on proof beyond reasonable doubt of possession of 28 grams of cannabis plant, the jury must enter a conviction unless unanimously satisfied that the presumed purpose is rebutted. On such approach, failure to agree on the rebuttal would not lead to a mistrial, as is the case where a jury is otherwise unable to agree on a verdict. It would lead to conviction by default, as the judge would be bound to direct. That is an outcome which, measured against long-accepted principles of criminal proof and jury responsibility, is startling. In an extreme case it could lead to a conviction when 11 of the jurors are satisfied that the accused is innocent of the charge (because persuaded that the possession was not for the purposes of supply) but one juror is not persuaded that the statutory presumption has been rebutted. Whether it is a correct approach is the basis upon which leave to appeal to this Court has been granted.

[5] Where possession of more than the minimum quantity is proved beyond reasonable doubt or (as here) is admitted, the effect of the presumption is that the appropriate verdict is guilty if the jury is unanimous in the view that the presumption has not been rebutted, even where it is not carried to the point that it is affirmatively satisfied the possession is for the purposes of supply. It is proper to direct the jury that the appropriate verdict is one of guilty if it is not of the view that the presumption has been rebutted. Nor is it in doubt that if the jury is unanimous that the presumption has been rebutted, it is proper to direct it that the appropriate verdict is one of not guilty. The question raised by the appeal, rather, is the consequence of a jury failure to agree on the rebuttal of the presumption where it is unanimous on

proof of the facts which raise the presumption. The Court of Appeal decision was that in such circumstances the presumption requires a verdict of guilty.

[6] In this Court, Mr France does not maintain the submission made on behalf of the Crown in the Court of Appeal. The Crown accepts that, if a jury is in disagreement, no verdict can be returned. If the jurors cannot reach a unanimous verdict, they must be discharged. Usually, a new trial would then be sought. Mr France did not therefore support the statements of the Court of Appeal set out in paragraph [3] above.

[7] In our view, the concession was fair and appropriate. The charge required a single verdict. It is essential to trial by jury that the individual members of the jury be of the same mind in the verdict. Thus in *Thomas v The Queen* Turner J remarked:

> It is of course inherent in the process of conviction by jury that the jury must be convinced as a whole, and each member must be convinced individually, beyond reasonable doubt of the guilt of the accused. [1]

[8] The requirement of jury unanimity is fundamental to our system of criminal justice; see, for example, *Winsor v The Queen.*[2] Blackstone notes that the "necessity of a total unanimity seems to be peculiar to our own constitution":

> But that the life, and perhaps the liberty and property of a subject, should not be affected by the concurring judgement of a less number than twelve, where more were present, was a law founded in reason and caution; and seems to be transmitted to us by the common law, or from immemorial antiquity.
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> Hence this may be suggested as a conjecture respecting the origin of the unanimity of juries, that, as less than twelve, if twelve or more were present, could pronounce no effective verdict, when twelve only were sworn, their unanimity became indispensable. [3]

That system of criminal justice is the background against which Parliament legislates. It is part of the wider context in which s6(6) is applied.

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1 [1972] NZLR 34, 41.
2 (1866) LR 1 QB 289, 303 per Cockburn CJ.
3 William Blackstone *Commentaries on the Laws of England* Book 3, 376.

[9] The requirement of unanimity is not affected by the statutory burden of proof cast on an accused under s6(6) of the Misuse of Drugs Act to persuade the jury that the possession is not for the purposes of supply. Section 6(6) addresses the completely distinct matter of the burden of proof of the purpose of possession. By the statute it is removed from the prosecution and placed on the accused. That statutory burden establishes a rebuttable presumption of fact, not a default verdict as a matter of law once an accused is proved to be in possession of 28 grams of cannabis plant. Those members of the jury who believe the accused has rebutted the presumption of possession for supply are required to find him not guilty. Those who do not consider that the presumption has been rebutted (including those who are left unconvinced or undecided as to whether the possession was for another purpose) are obliged to find the accused guilty. If they are not in agreement, the jury cannot deliver a verdict.

[10] These propositions seem to us to follow inevitably from the requirement of jury unanimity. As Glanville Williams points out in dealing with persuasive presumptions:

> When it is said that "the accused must be convicted," this only means that the jury should be directed that the accused must be convicted. The jury is the constitutional tribunal for returning a verdict of guilty, and if it fails to do so, for whatever reason, the judge cannot enter this verdict. Hence, if the jury fail to agree, even on a matter the proof of which rests on the accused, no verdict of guilty can be received.[4]

[11] Just as the failure of the Crown to discharge the onus of proof to the satisfaction of a unanimous jury does not result in acquittal,[5] so failure of the accused to rebut the presumption upon him to the unanimous satisfaction of the jury does not result in conviction. Authority can be found in *Sparre v the King,*[6] where the High Court of Australia held that if the jury could not agree on a defence in which the onus of proof lay on the accused, no verdict could be given. Otherwise, as

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4 Glanville Williams *Criminal Law The General Part* (2ed, 1961) para 288, page 884.

5 See *Winsor v the Queen* (1866) LR 1 QB 390, 395 per Erle CJ, delivering the judgment of the Court comprising himself, Pollock CB, Martin, Bramwell and Pigott BB, and Byles and Montague Smith JJ.

6 (1942) 66 CLR 149.

Williams J pointed out,[7] the party upon whom an onus lies would lose the case in the event of disagreement. That is not the law. The same view was taken in respect of jury disagreement about an affirmative defence of entrapment in *State of Hawaii v Miyashiro*.[8]

[12] It follows that we do not see the question for this Court as turning on the interpretation of s6(6). It is a matter of applying it in the wider context of the criminal law, including the unanimity requirement. As Williams J said in *Sparre v The King*:

> Where the jury disagree on an issue of fact which must be determined in order to dispose of the proceedings, the trial fails because the tribunal of fact has been unable to fulfil its function.[9]

[13] For these reasons, we consider that the Court of Appeal was wrong in the view that jury failure to agree required a verdict of guilty once the statutory presumption came into play. The correct result of disagreement in respect of the defence case rebutting the presumption would be discharge of the jury for failure to reach a verdict.

[14] We agree with Tipping J, whose judgment we have had the advantage of reading in draft, that the judge's directions were not misleading on the requirement of jury unanimity. Like him, we consider that the tripartite direction (which attempted to deal with the case where the jury is not carried over the onus of proof and is undecided) is unhelpful. What needed to be conveyed to the jury is that if they were not convinced on the balance of probabilities that the presumption had been rebutted, the defence had not discharged the onus and a conviction should be entered. The possible outcomes were in reality only two: that the persuasive burden had or had not been discharged. In context, however, we are satisfied that the complication did not obscure the choice to be made. And since we are of the view that the jury can have been in no doubt that its task was to come to one of the two possible verdicts unanimously, we would dismiss the appeal.

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[7] At 160.
[8] 979 P 2d 85 (1999).
[9] At 160.

GAULT, BLANCHARD AND TIPPING JJ

(Given by Tipping J)

Background

[15] Fiso Tovio Siloata was found guilty by a jury in the District Court on one count of possessing cannabis for supply contrary to s6(1)(f) of the Misuse of Drugs Act 1975. As the weight of the cannabis admittedly in Mr Siloata's possession exceeded 28 grams, to secure an acquittal he had to prove that his possession was not for supply. This is the effect of s6(6)(e) which, adapted to present circumstances, provides that, for the purposes of paragraph (f) of subs(1):

> A person shall until the contrary is proved be deemed to be in possession of [cannabis plant] for [supply] if he is in possession of 28 grams or more [thereof].

[16] Mr Siloata appealed to the Court of Appeal (Anderson P, Paterson and Doogue JJ) against his conviction. His appeal was dismissed and he now appeals to this Court, leave having been given to argue the following question:

> Where a jury is not unanimous as to whether an accused has proved possession was not for the purposes of supply within the terms of s6 of the Misuse of Drugs Act 1975, is the proper outcome a guilty verdict or a "hung jury"?

[17] The issue represented by that question was sparked by the jury asking Judge Jaine to explain again the three possible conclusions to which he had earlier referred in his summing-up. The Judge gave the following answer, which effectively repeated what he had earlier said:

> I said to you that there are three possible conclusions you might come to in considering the evidence. The first is that you might accept the defence contention as being more likely than not to be true. If that is so, he has rebutted the presumption and should be found not guilty. The second possible conclusion, is that you do not accept the defence contention as being more likely than not to be true, and if that is so, he has not rebutted the presumption and he should be found guilty. The third possible conclusion is that you cannot decide one way or the other whether the defence contention is more likely than not to be true. If that is so, then again he has not rebutted the presumption and he should be found guilty. That is all I want to say in relation to the note.

[18] The trial Judge understandably did not in his answer make any reference to the question of unanimity. Nor had he expressly done so when speaking of the three possible conclusions in his summing up. He had, at an earlier stage, given the conventional direction about unanimity, saying simply that the verdict the jury gave "is to be the unanimous verdict of all twelve of you".

Argument in Court of Appeal

[19] The argument for Mr Siloata in the Court of Appeal on the point at issue was described by Anderson P, who wrote the Court's judgment, in these terms:

> [9] In counsel's submission the way the question was answered, including the absence of reinforcement of the need for unanimity, carries the risk that the jury may not have been unanimous in the view that the appellant had not discharged the statutory onus. In the absence of a unanimity direction in connection with the examination of possibilities, she said, there is an inherent ambiguity. The standard direction could convey to the jury that unless they all agree with a possessor's attempted rebuttal the possessor must be convicted, whereas there could be another situation, namely a disagreement as to the verdict because the jury is not unanimously of the same view in relation to the cogency of rebuttal. In short, she submitted, the usual direction is unsafe. And in the circumstances of this case and if the correct position is that the appellant ought not to have been convicted unless the jury unanimously rejected the probability of his explanation there will have been a miscarriage of justice.

[20] The Crown's argument was summarised by Anderson P as follows:

> [11] As to any ambiguity of the direction about unanimity in respect of an attempted rebuttal of the statutory presumption of possession for an unlawful purpose, the Crown submitted that this could not have been a matter that caused the jury any difficulty. The Judge's directions emphasised the need for a unanimous verdict and the verdict must be taken to have been unanimous. There was no reason to think that the jury was not asked the routine and inevitable question, after delivery of verdict, "is that the verdict of you all".
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> [12] In any event, in counsel's submission, the correct legal principle is that once the presumption is invoked a guilty verdict must be returned unless the jury unanimously considers it more likely than not that the drug possessed by an accused is not for a proscribed purpose.

Court of Appeal's conclusion

[21] The simplest way to describe the Court of Appeal's conclusion is to set out the relevant paragraphs in its judgment:

> [16] The effect of the legislative presumption is that once the Crown has proved that an accused is in possession of a controlled drug of the specified quantity, then absent a special defence such as compulsion, a guilty verdict must be returned unless the accused should prove that possession is not for a prohibited purpose. An accused will not have so proved unless the jury is unanimously satisfied that it is more likely than not that such is the case.
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> [17] It cannot be tenable that if only some of the members of the jury should be satisfied that the possession was more likely than not for other than a proscribed purpose, an accused will escape conviction through a disagreement. That would negate the effect of the statutory presumption. It would mean that the Crown would first have to satisfy the jury, unanimously and beyond reasonable doubt of the facts which involve the presumption, and would then have to satisfy the jury unanimously and on the balance of probabilities that such possession was for a proscribed purpose. An accused could never be convicted if the Crown should fail on the second limb of this hypothesis.
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> [18] The correct position is that the Crown has to prove the facts which invoke the presumption and if it does an accused must be convicted unless the accused proves to the unanimous satisfaction of the jury that it was more likely than not that such possession was not for a proscribed purpose.
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> [19] The Judge's direction adequately conveyed the correct legal position, and of course it must be the case that the jury was unanimous in its conclusion of guilt. But we question the desirability of expressing the position in terms of three possibilities, as the direction in fact given did. It is unnecessary and as the jury question shows is less than clear.
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> [20] A more appropriate direction would put the position in terms of two, not three, possibilities. It would say that if, and only if, the Crown satisfies the jury unanimously, and beyond reasonable doubt, that an accused was in possession of the alleged controlled drug, and that it was of the quantity referred to by the Act, the jury must return a guilty verdict unless it is then satisfied, unanimously, that it is more likely than not that the accused was in possession for a purpose other than those prohibited by the Act. Such a direction would, of course, be articulated in terms of the actual drug, amount, and alternative purpose suggested by an accused.

Argument in this Court

[22] In this Court Mr Siloata was represented by Mr Lithgow and the Crown by Mr France. Neither of them appeared below.

[23] Mr Lithgow's argument was broadly the same as the argument rejected by the Court of Appeal. He submitted that the reasoning of the Court of Appeal was flawed and that the most disturbing product of that reasoning was its result, namely that an accused could be convicted of possession for supply even if one or more members of the jury were satisfied his possession was not for supply. A vivid

manifestation of this argument is that if the Court of Appeal is right, the accused would still have to be found guilty even when 11 of the 12 jury members were satisfied he had rebutted the presumption and was therefore not in possession for supply. Mr Lithgow argued that, absent unanimity, there was no verdict. Thus, if the jury were not unanimous on the reverse onus issue, no verdict at all could be delivered. This would result in a hung jury and a new trial would then ordinarily follow.

[24] Counsel contended that the Court of Appeal had been wrong to say that to secure a conviction the Crown would have to satisfy the jury unanimously that the accused's possession was for a proscribed purpose. The essential flaw in the Court of Appeal's reasoning lay, he suggested, in its observation that an accused could never be convicted if the Crown should fail to prove possession for a proscribed purpose on the balance of probabilities.

[25] In Mr Lithgow's submission this reasoning confused onus and standard of proof and the need for unanimity. Counsel accepted that if the jury were unanimously of the view that they could not decide whether the accused had satisfied them that his possession was not for supply, he would have failed to prove that contention, and a conviction for possession for supply should follow. But a conclusion unanimously to that effect was not the same as the lack of unanimity inherent in some jury members considering he had proved the comparative innocence of his possession and others considering he had not.

[26] Mr Lithgow expressly indicated he was not challenging the propriety of reverse onus provisions nor was he attempting to dilute the difference between an evidential onus and a legal onus. In *R v Phillips*[10] the Court of Appeal held that the onus created by s6(6) of the Misuse of Drugs Act was a legal (or persuasive) onus not just an evidential one. As no argument was raised in this Court on that issue, we do not need to examine it and recent cases in England such as *R v DPP ex parte Kebilene*.[11] There the now Lord Cooke of Thorndon expressed a different view,

10 [1991] 3 NZLR 175 (Cooke P, Casey and Thorp JJ, per Cooke P).
11 [2000] 2 AC 326.

based in part on a perceived difference of substance between s3 of the Human Rights Act 1998 (UK) and s6 of the New Zealand Bill of Rights Act 1990.

[27] The essence of Mr Lithgow's argument, expressed in differing forms but to the same general effect, was that lack of unanimity on whether the reverse onus had been satisfied must lead to a hung jury on the ultimate issue, ie whether the accused was in possession for supply.

[28] In his submissions Mr France suggested that the appeal gave rise to two issues which should be kept conceptually distinct. The first concerned what should happen if the jury found itself collectively undecided as to the purpose of possession. Counsel called this the standard of proof issue. The second (the unanimity issue) concerned what should happen if the jury was in disagreement over the purpose of possession. The Crown's answer on the first issue (standard of proof) was that as the jury were unanimous and the effect of that unanimity was that the accused had not satisfied the standard of proof required of him, a verdict of guilty was appropriate. However, on the second issue (unanimity), as the jury was not unanimous (some considering the onus on the accused satisfied and some not) there could be no verdict. This answer to the second issue was, as Mr France acknowledged, different from that proposed by the Crown in the Court of Appeal.

[29] There the Crown had argued, and the Court of Appeal accepted, that lack of unanimity meant that as the accused had not satisfied all members of the jury his possession was not for supply, he should be found guilty on the basis of his deemed possession for supply. The Crown did not wish to support in this Court the stance it had taken below nor the Court of Appeal's acceptance of that stance. The Crown nevertheless contended that the trial Judge had not erred in his directions.

[30] In spite of the Crown's preferred position being the same as that advocated by Mr Lithgow, Mr France did suggest that the Court of Appeal's decision could be supported by the need to give effect to the presumption in s6(6) and its literal terms. Mr France submitted, however, that the difficulty with that approach lay in its failure to give sufficient weight to the context. Mr France also submitted there was nothing in s 6(6) which suggested an intent to do away with the need for jury unanimity on

an issue on which the jury must reach a decision before it could deliver a verdict. Counsel submitted that the possibility of a guilty verdict, when 11 jury members were satisfied possession was not for supply, gave rise to concern.

[31] The example can be and was extended to one in which 11 members of the jury are satisfied the accused's possession was not for supply and the 12th member cannot decide either way. In that case a verdict of guilty would follow, although no member of the jury was satisfied, even on the balance of probabilities, that the accused's possession was for supply. Mr France was inclined to accept the legitimacy of the Court of Appeal's concern about the potential for undesirable complexity in jury directions in this field if the position was not as it held it to be. But counsel suggested there was no undue complexity and what complexity there was tended to centre around the unlikely circumstance of unanimous inability to decide either way.

[32] Although the Crown did not consider it appropriate to seek to uphold the conclusion adopted by the Court of Appeal, it is proper to recognise that the argument presented by the Crown in the Court of Appeal and the Court's conclusion can be said to reflect what Frankfurter J described as "the fair spontaneous reading" of a cognate provision in the United States Criminal Code. In *Andres v United States*[12] the Court was concerned with a paragraph of the Code which provided that every person guilty of murder in the first degree should suffer death, unless the jury qualified its verdict "without capital punishment". A question arose concerning whether the qualification had to be unanimous in order to be made part of the verdict. The Court held that the accused could be sentenced to death only if the jury unanimously decided not to qualify the verdict. Frankfurter J confessed to having had greater doubts than the other members of the Court, doubts which had not been "wholly dissipated". His conclusion in the end was that the literal words of the enactment had to give way to matters of policy and principle.[13]

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[12] 333 US 740 (1948).
[13] At 752.

Discussion

[33] The need for a jury to be unanimous before it can return a verdict has its origins in the mists of time. It is a fundamental tenet of the common law which has general application, except as modified by legislation. In the middle of the 19th century Lord Cockburn CJ said in *Winsor v The Queen*[14] that the common law had long insisted on unanimity "as the very essence of the verdict". The traditional common law view has always been that without unanimous agreement there is no verdict: see for example the decision of the Privy Council in *Shoukatallie v The Queen*.[15] The need for unanimity applies of course whether the verdict be for guilty or not guilty. A comparatively modern New Zealand recognition of the longstanding need for unanimity in jury verdicts can be found in the decision of the Court of Appeal in *R v Patterson*,[16] from which it is unnecessary to make any citation.

[34] The presumption of innocence is also a longstanding tenet of the criminal law. Associated with it is the fundamental common law rule that it is for the Crown to prove all elements of the crime charged beyond reasonable doubt: *Woolmington v Director of Public Prosecutions*.[17] Section 25(c) of the New Zealand Bill of Rights Act affirms the presumption of innocence as a minimum standard of our criminal procedure. The rule is of course subject always to statutory modification by Parliament. Similarly, in the absence of statutory modification, a common law rule governs the standard of proof in reverse onus cases. That standard is the balance of probabilities: see *R v Carr-Briant*.[18] In that case the Court of Criminal Appeal in England adopted the approach of the Privy Council in the Australian case of *Sodeman v Regem*.[19] *Sodeman* concerned the standard of proof required of an accused seeking to rebut the presumption of sanity.

[35] The question raised in the present case concerns the proper effect of s6(6) of the Misuse of Drugs Act when read in the light of those common law principles. For the reasons which follow we consider the statutory concept of being deemed to be in

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14 (1866) LR 1 QB 289, 305.
15 [1962] AC 81.
16 [1980] 2 NZLR 97.
17 [1935] AC 462.
18 [1943] KB 607, 612.
19 (1936) 55 CLR 192, 233.

possession for supply until the contrary is proved can and should properly be read as being concerned with and confined to circumstances in which the contrary is either unanimously proved or unanimously not proved. We add, for completeness, that this latter circumstance includes unanimous inability to decide either way, and of course unanimity on the basis of a combination of jurors who either regard the contrary as not proved or cannot decide either way.

[36] The effect of s6(6) is that if someone has possession of 28 grams or more of cannabis plant, they are deemed to be in possession for supply until the contrary is proved. The two key words are "deemed" and "proved", albeit the composite expression is what must ultimately count. The word "deemed" is designed to create a rebuttable presumption of fact. If fact A is established, fact B is rebuttably presumed to be established also. Fact A is possession of 28 grams or more of cannabis plant. Fact B is that the purpose of the possession was for supply. The Crown must prove fact A beyond reasonable doubt. If successful in doing so, the Crown has thereby rebuttably proved fact B to the required standard. If the Crown proves fact A, the jury must regard fact B as established until the accused has "proved" the contrary.

[37] That leads to an examination of what s6(6) means by proved. This is where the question of jury unanimity enters the arena. In conventional terms to prove something means to satisfy the tribunal of fact to the required standard that the fact asserted is true. In order to prove an essential fact the Crown must satisfy all members of the jury to the required standard of the existence of that fact. The same obligation to satisfy all members of the jury must be regarded as resting on the accused when the responsibility for proving a fact is placed on him. Hence, to prove his possession was not for the purpose of supply, so as to be found not guilty of the charge of possession for supply, the accused must satisfy *all* members of the jury on the balance of probabilities that his possession was not for supply. The question which we must answer is whether a failure to satisfy all members of the jury to this effect means that the accused must be found guilty, even though, to take the most extreme case earlier noted, 11 jurors consider he has rebutted the presumption and the remaining juror cannot decide either way. In that situation no juror would be satisfied, even on the balance of probabilities, that the accused's possession was for

supply. Only unavoidably clear statutory wording could mandate such an outcome as that.

[38] In creating the presumption, s6(6) is silent upon what is involved in proving the contrary. That is left to the common law, as are the requirements for overcoming the presumption of innocence. The principles of the common law require that an accused person is presumed innocent until guilt is proved beyond reasonable doubt to the unanimous satisfaction of the jury. The presumption of innocence does not require a verdict of not guilty when the jury cannot agree. Before they can deliver a verdict they must unanimously find that guilt has, or has not, been proved. There can be no reason to approach the presumption in s6(6) differently. Proof to the contrary (the burden falling on the accused) must be on the balance of probabilities to the unanimous satisfaction of the jury. If the jury cannot agree, a verdict of guilty would be inconsistent with the requirement of unanimity. Such a verdict can be returned only if all members of the jury are satisfied the presumption has not been rebutted. A disagreement on that issue means that no verdict can be given. The presumption places the burden of proof on the accused but it does not negate the principle of unanimity.

[39] In a case like the present, the presumption and any evidence in rebuttal are directed to a specific element of the offence namely the purpose of the accused's possession. It is therefore appropriate to focus on that element and the means by which it is proved, rather than to think in terms of a default, ie presumptive, outcome. As the burden of proof falls on the accused, he must prove, to the unanimous satisfaction of the jury, that he did not possess the drug for supply. Unless all members of the jury are so satisfied, the accused has not discharged the burden and the presumption has not been rebutted. But until the jury unanimously decides whether or not the burden on the accused has been discharged there can be no finding on the purpose element and the requirement for unanimity dictates a hung jury.

[40] The Court of Appeal said that if it concluded that lack of unanimity led to a hung jury rather than a verdict of guilty that would negate the effect of the statutory presumption, and would effectively require the Crown to satisfy the jury on the

balance of probabilities that the accused's possession was for a proscribed purpose in order to obtain a guilty verdict. The latter proposition is of course not strictly correct because a finding of equal probabilities leads to a verdict of guilty. And even if there is some de facto onus on the Crown, as the Court of Appeal suggested, that is an available outcome which is preferable to one which is capable of having the accused found guilty when no juror affirmatively considers him guilty, even on the balance of probabilities. The statutory presumption is not negated. It continues to have effect. The accused will be found guilty if the jury unanimously concludes that the presumption has not been rebutted.

American/Australian jurisprudence

[41] The Court was not referred to any authority in the common law world directly touching on the issue before it. We are, however, supported in the conclusion we have reached by certain American decisions to which the Court drew counsel's attention prior to the hearing and by an Australian case which we have subsequently discovered. It is mentioned in *Criminal Law The General Part* by Glanville Williams.[20]

[42] The most directly relevant of the American cases is the decision of the Intermediate Court of Appeals of Hawaii in *State v Miyashiro*.[21] Entrapment was an affirmative defence to the charge faced by the accused. The onus lay on him to establish entrapment on the balance of probabilities. The Court held that if the jury was not unanimous as to whether that onus had been satisfied, the proper result was a hung jury, not a verdict of guilty. The trial Judge's direction that a failure by the accused to persuade the jury unanimously of entrapment should result in a guilty verdict was held to be erroneous. The primary basis for that conclusion was that the Judge's direction constituted an infringement of the accused's constitutional right to have the jury unanimously convinced of the validity of the Crown's case before it could find him guilty. That right applied to the reverse onus just as much as to the situation where the Crown had the onus.

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20 At para 288, page 884.
21 979 P 2d 85 (1999).

[43] The Hawaiian Court relied on a number of cases from which it is not necessary to cite. The American cases stand for the general proposition that statutory language should not be construed so as to produce an unconstitutional result or a result which conflicts with basic common law rights, unless that construction is unavoidable. Such common law rights can be taken away only by express words or by clear and necessary implication.

[44] The Australian case is the decision of the High Court in *Sparre v The King*.[22] It was a defence to a charge of unlawful carnal knowledge of a girl aged between 10 and 16 years, that the complainant was over the age of 14 and the person charged had reasonable cause to believe she was of or above the age of 16. The High Court held that if the jury were unable to agree whether the defence was made out no verdict could be given. The trial judge had directed the jury that if they could not agree whether the accused had the necessary reasonable cause to believe they must find him guilty, as he had not established his defence. It was common ground that the onus was on the accused to satisfy the jury of his asserted belief. In his judgment Starke J said that if the jury could not agree upon the issue, it was not determined either in favour of or against the accused.[23] He added that the question whether the accused had the necessary reasonable cause to believe was then "still open and undetermined". The trial judge's direction was therefore erroneous.

[45] McTiernan J said that it was necessary for the jury "to find unanimously either that the appellant sustained the defence or did not sustain it before they could find any verdict".[24] Williams J, agreeing with the other members of the Court, said:[25]

> It was for the jury to say whether the accused at the time had reasonable cause to believe and did in fact believe the girl was of or above the age of sixteen years. The onus lay on the appellant to establish these facts, but the failure of the jury to agree whether he had done so or not does not mean that the appellant failed on this issue. Otherwise, whenever the jury disagreed, the party on whom the onus lay would lose the case. This would generally be the plaintiff in a civil case or the Crown in a criminal case. Where the jury disagree on an issue of fact which must be determined in order to dispose of the proceedings, the trial fails because the tribunal of fact has been unable to

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[22] (1942) 66 CLR 149.
[23] At 154.
[24] At 157.
[25] At 160.

> fulfil its function. But, whenever a new trial can be granted, a fresh jury can be empanelled to try the facts again.

Clearly this decision of Australia's highest court provides strong support for the view to which we would have come without reference to it.

The alleged misdirection in this case

[46] Whether there was a misdirection in this case depends on whether the Judge gave the jury the impression that if they were unable to agree whether the accused had discharged the burden of proof which rested on him, their verdict should be guilty. The appellant contends that the third of the three possibilities to which the Judge referred carried the potential to deliver that message. The three possibilities, as the Judge explained them, are set out in full in paragraph [3] above. They are that acceptance of the defence contention leads to a verdict of not guilty; rejection leads to a verdict of guilty; and,

> the third possible conclusion is that you cannot decide one way or the other whether the defence contention is more likely than not to be true. If that is so, then again he has not rebutted the presumption and he should be found guilty.

[47] The Judge had earlier given the standard direction about the need for unanimity. That carried with it the clear implication that, without unanimity, a verdict could not be returned. Earlier in his summing-up the Judge had also said:

> There is no simple one step formula that I can give you to apply in the process of assessing the evidence. The most useful thing I can say about it is that at the end of the day what is required is the application of robust common sense. Working collectively as a team you should sift out the evidence you think you can rely upon and at the end of that task you ask yourselves, are we satisfied applying our collective common sense to everything we have heard, that the Crown has proved guilt.

[48] We can see no basis for concluding that the jury might have thought that the Judge's general directions about unanimity and working collectively together did not apply when they were considering whether the accused had satisfied the reverse onus. The words the Judge used in explaining the third possibility do not in themselves give rise to any real risk the jury might have been misled. They are directed to an inability to decide, not to an inability to agree. That is the position

whether the words are construed as addressed to individual jurors or to the jury as a whole or are read as carrying both connotations.

[49] The Judge was focusing the attention of the jury on the possibility that they could not decide "one way or the other". The decision he was speaking about concerned "whether" the accused had rebutted the presumption. There was, in terms of this language, and in the context of the summing-up as a whole, no realistic possibility that the jury or any member of it might have thought the Judge was talking about lack of unanimity as opposed to an inability to decide whether the accused had satisfied the onus resting on him. There was no real risk that a juror favouring a not guilty verdict would have construed the Judge's direction as requiring him or her to fall in with the view of other jurors that the accused was guilty.

[50] The Judge was correct in law when he indicated that a failure by the accused to rebut the presumption should result in a guilty verdict. It does not matter whether that failure is by the narrow margin of an inability to decide either way or by a much wider margin. For these reasons we are unable to accept the argument presented by Mr Lithgow that there was a miscarriage of justice as a result of what the Judge said about the third possibility.

The summing-up : general observations

[51] Like the Court of Appeal, however, we do not regard it as helpful for a summing-up in a case of this kind to focus on three so-called "possible conclusions". The direction used by the trial Judge appears to have been adapted from a guideline direction concerned with "three possible conclusions you might come to in considering [the accused's] evidence".

[52] The Judge's adaptation of this guideline direction to a case where the accused had not given evidence was not the best way to go about the task. We consider the appropriate direction can be achieved rather more shortly and simply. The premise on which the direction is based is that the Crown has already proved enough, beyond reasonable doubt of course, to invoke the presumption. The jury has also already

been directed on what is meant by the accused having to rebut the presumption on the balance of probabilities. On that basis all that needs to be said, by way of summary, is first to remind the jury of the need for unanimity and second to indicate that the accused must rebut the presumption on the balance of probabilities to be found not guilty; and his failure to do so will result in a verdict of guilty.

[53] The Judge should bring home to the jury that they cannot return a guilty verdict unless the accused has failed to carry all jury members over the probability line. Nor can the jury return a not guilty verdict unless the accused has succeeded in carrying all jury members over (not merely up to) that line. If the accused has carried some members of the jury over the line but has failed to carry others no unanimous verdict has been reached.

[54] We add the following observations about the Judge's general direction on balance of probabilities. Rightly, no specific challenge was made to it, but we think it can be improved. The Judge said:

> …. the standard of proof required of an accused person is not as high as that imposed on the Crown. The standard required of an accused is what is known as the balance of probabilities. He has to satisfy you that it is more probable than not that he had all the drugs for his own use. …

[55] In this case there were only two possible factual situations, ie possession for supply or not. The Judge's reference to "more probable than not" was all he directly said about the balance of probabilities standard at any point in his summing-up. The reference to a third possibility was intended to assist but was too oblique to be an ideal way of achieving the purpose.

[56] What is really at issue in a case such as the present is which of the two factual contentions put to the jury is the more probable. It is helpful if the jury is told clearly that equal probability, ie an inability to decide that one is more probable than the other, means that the onus of showing that the accused's version of events is the more probable has not been met.

[57] It is appropriate for us to emphasise, finally, the general proposition that summings-up should, wherever possible, adapt standard or specimen directions to

the particular case. That can be done in a supplemental way or by adapting standard directions in the first place. Failure to make standard directions case specific often gives rise to claims of misdirection or inadequate direction which could so easily be avoided.

Disposition of appeal

[58] For the reasons given the appeal is dismissed. While the Court of Appeal erred in law, the trial Judge's summing-up and his answer to the jury's question did not mislead the jury. No miscarriage of justice resulted from what the Judge said.

Solicitors:
Crown Law Office, Wellington