

***The Presumption of Innocence: Evidential and Human Rights Perspectives,*
Andrew Stumer, Hart Publishing, Oxford and Portland, 2010
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I ought to have started by asking you what kind of acquittal you want. There are three possibilities, namely actual acquittal, apparent acquittal, and postponement. Actual acquittal is, naturally, the best, the only thing is I haven't the slightest influence on that kind of verdict. In my opinion there isn't a single person who could influence a verdict of actual acquittal. The deciding factor there is probably the innocence of the accused. As you're innocent, it really might be possible for you to rely solely on your innocence. But, then you wouldn't need help either from me or anybody else. (Titorelli, the painter, in Kafka 1977:175)

Why should the criminal justice system protect the rights of the accused? This hackneyed question often asked of defence lawyers at social functions has taken on new significance in Australia thanks to a confluence of three factors—the human rights debate, the current political climate and the recent Victorian case of *R v Momcilovic* [2010] VSCA 50. How far should we encroach upon the protections afforded to the accused to secure a conviction? What is at stake in doing so? Andrew Stumer's book suggests some answers to these questions and is a timely reminder of why we should care about the rights of the accused in a liberal democracy.

We are reminded daily by the media to be afraid of crime. State elections and atypical criminal incidents fuel the law and order auction amongst our politicians. 'Penal populism' surrounding the enactment of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) provoked Andrew Haesler SC, as he then was, to formulate the broccoli principle of law reform: 'You can't have any new powers until you use up the ones you've got!' (Haesler 2006). And yet Parliament continues, unabated, to enact new criminal laws. A recent example was the *Crimes (Criminal Organisations Control) Act 2009* (NSW), a reaction to the 'bikie'-related murder at Sydney Airport, which encroaches upon the right to freedom of association.¹ In addition to creating more law the legislature employs tactics in its war against crime such as creating strict liability offences and reversing the burden of proof. We are led to believe that we live in extraordinary times and therefore extraordinary measures are required. However, this claim is spurious and carries the risk that these 'extraordinary measures' become normalised and seep into the general criminal law, potentially eroding rights and liberal democratic values (Bronitt 2004).

Alongside the law and order auction, the criminal process of the last three decades has been characterised by an increasing concern for victims' rights. Whilst sometimes also reacting to extraordinary criminal incidents, victims' advocates have nevertheless raised awareness of the plight of victims in the criminal justice system. This awareness has been the catalyst for changes to the criminal law and practice aimed at giving victims a voice and protecting them against undue humiliation². But what of the unsympathetic characters in the criminal drama: those accused of breaking the law? Such changes to criminal law and procedure and penal populism are beginning to encroach upon the rights of the defendant.

¹ Loughnan observed '[w]ith its unquestioned assumption that new laws are required, and that "more law equals more order", the reaction of the NSW legislature to the recent "bikie" violence seems to reinforce the dominance of penal populism in the State.' (Loughnan 2009:462).

² For example, the not uncontroversial restrictions on cross-examination of complainants and other provisions relating to sexual assault proceedings in Parts 5 & 6 of the *Criminal Procedure Act 1986* (NSW).

Is the dilemma solved by weighing the interests of the community against the rights of the defendant, otherwise known as the 'proportionality approach'? Stumer suggests it is not a zero-sum game. His book joins a growing chorus of voices singing out in defence of the rights of the accused.

Stumer's focus is, as the title suggests, the presumption of innocence. The context is the UK and Europe. It is only possible within the space of this short review to give a brief overview of Stumer's careful analysis, but it is worth drawing out some of his key points to assess the relevance of his book in Australia. He begins with the argument that '...there is a dual rationale for the presumption of innocence: protecting the innocent from wrongful conviction and promoting the rule of law.' (Stumer 2010: xxxix). Rights such as the presumption of innocence are at risk because there is a '...fundamental tension in a liberal state between the need to protect citizens through the criminal law and the need to protect rights of defendants' (Stumer 2010:43). Stumer's aim is to provide a 'proper understanding' of the presumption of innocence to the Courts and legislature who are trying to resolve this tension. In pursuit of his aim he performs a critical analysis of the English and Strasbourg jurisprudence on Article 6(2) of the *European Convention on Human Rights* (ECHR) to see how these Courts have reconciled the tension. In a meticulous analysis and comparison, Stumer distils both the benefits and pitfalls of the approach of each Court. He then proposes an alternative approach which he suggests would better protect the rights of the defendant whilst still safeguarding the interests of the community.

Stumer criticises the balancing exercise at the core of the proportionality approach on the basis that it is built upon a false premise and is too simplistic. Casting the issue as a conflict between the rights of the victim (or community) and the defendant is not helpful because differing rights cannot be measured in a 'common currency and therefore cannot be weighed against each other...' nor are they of equal value (Stumer 2010:143). Further, he points out that restricting the presumption of innocence is not the only means of safeguarding the community interest (Stumer 2010:47). Rather than performing a balancing exercise, the more revealing inquiry is whether the restriction is necessary. In contrast, the Strasbourg Court asks whether the restriction is reasonable. In doing so it almost always allows considerations of community interest to 'trump' the rights of the defendant (109). At this point it is worth noting that the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') employs a 'reasonable limits' test in Section 7. This test, Stumer argues, carries the risk of unacceptable incursions into an important human right. He prefers a 'more nuanced' two-step process. First, does the provision threaten the values underpinning the presumption of innocence? This will occur where there is a risk that an innocent person could be convicted or when the consequences of conviction are severe. Secondly, does the provision threaten the rule of law? Will it cause a loss of confidence in the criminal justice system?

After a thorough analysis of the various justifications used for reverse burdens, Stumer concludes that there are three situations where attenuation of the presumption of innocence may be justified: '...where the penalty for the offence is non-custodial...where the defendant could prove his or her innocence with relative ease [e.g. proof of holding a licence]...and where the prosecution has proved sufficient facts to establish that the conduct of the defendant is wrongful' (Stumer 2010:189). Examples of the third category are: (a) there is no question that the defendant committed the act but he or she claims a defence such as duress or provocation; and (b) a defendant is found to be in possession of a package containing drugs (Stumer 2010:49). I will discuss scenario (b) later in relation to the case of

Momcilovic. According to Stumer, the risk of undermining the values underlying the presumption of innocence and the rule of law is minimal because the wrongfulness of the accused's act is not in issue, so there is a low risk of wrongful conviction. Stumer questions the ready assumption that the only means of protecting the interests of the community is to reverse the legal burden. Placing an evidentiary burden on the defendant will often suffice. *Momcilovic* is a case in point and is a useful measure of the relevance of Stumer's work to the human rights debate in Australia.

R v Momcilovic [2010] VSCA 50 was the first case to consider a reverse onus under the Victorian Charter. The applicant in that case, *Momcilovic*, was convicted of trafficking in a drug of dependence under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*DPCS Act*') and sentenced to two years and three months imprisonment with a non-parole period of eighteen months. To understand the relevance of Stumer's argument in the Australian context, it is necessary briefly to outline the facts of the case. The following facts have been extracted from the sentencing remarks of the trial Judge and a case note by Jeremy Gans (*Momcilovic* appendix 1; Gans 2010).

On the 14th of January 2006 the applicant, Vera *Momcilovic*, a patent lawyer, opened the front door of her apartment to police officers who had a warrant to search her premises. At the time she was living in the apartment with *Markovski*, who she had been in a relationship with since 1990. The officers searched the apartment and found the following: in a bar-fridge, a plastic bag containing 64.6 grams of methylamphetamine; in the crispier dish of the fridge a plastic Tupperware container containing 394.2 grams of methylamphetamine; and above the sink in a kitchen cupboard was a Moccona coffee jar containing 325.8 grams of methylamphetamine, the latter of an unknown purity. Elsewhere in the unit they found two sets of electronic scales, a bag of material which *Markovski* described as 'artificial sugar' to be used to cut the methylamphetamine and another coffee jar containing white powder.

At trial, due to the operation of s5 of the *DPCS Act*, *Momcilovic* found herself in the position of having to convince the jury, on the balance of probabilities, that she had no knowledge of these items. Section 5 of the *DPCS Act* states:

Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

Momcilovic gave evidence to this effect and *Markovski* testified that the drugs were his alone. *Markovski*'s evidence was corroborated by the fact that only his DNA was found on the items. Although possession was not an element of the offence of trafficking, the Court proceeded on the basis that s5, in combination with the trafficking provision, effectively placed a legal burden on the applicant to prove that she had no knowledge of the substances (Gans 2010:255-6). *Momcilovic* asked the Court of Appeal to read this provision as imposing only an evidentiary burden to render it consistent with s25(1) of the Charter which contains the presumption of innocence. There are two steps in the process: (1) does the provision in question limit the presumption of innocence? The Court answered this resoundingly in the affirmative. (2) Can the provision be read consistently with the Charter? The Court found that Parliament's intention was clearly to impose a legal rather than an evidentiary burden on the defendant. As the Charter did not permit the Court to depart from the clear intention of Parliament it concluded that s5 could not be read consistently with the Charter.

The next step is where Stumer's insights are illuminating. Once the Court found that the provision cannot be read consistently with the Charter, it was required to apply s7(2) to determine whether the limitation is justified. Proportionality was the central inquiry here (*Momcilovic* [147]). Two considerations were particularly persuasive. The first was the necessity for the provision; the test preferred by Stumer. In submissions on this point, the Chief Prosecutor conceded that if the provision were to impose an evidentiary burden rather than a legal one, it would make little difference to the prospects of a successful prosecution. (*Momcilovic* [145]).

The second persuasive consideration was the 'paradox at the heart of the criminal law', namely that the more serious the offence and the harsher the penalty, the greater the community interest in convicting perpetrators and yet the greater is the need to protect the rights of the defendant (*Momcilovic* [149]). As he acknowledges, this paradox is central to Stumer's argument (Stumer 2010:156). The Court concluded that the Crown did not come close to justifying the provision. It was '...not so much an infringement of the presumption of innocence as a wholesale subversion of it.' (*Momcilovic* [152]).

Elements of Stumer's approach can be seen in the Court of Appeal's reasoning, but Stumer proposes an additional step which provides the opportunity for an interesting thought experiment in this review. Does the offence in *Momcilovic* fall within any of Stumer's three categories listed above where attenuation of the presumption is permissible? If not, the risk is that s5 of the *DPCS Act* undermines the values underpinning the presumption of innocence and the rule of law. The offence of trafficking in a drug of dependence carries a maximum penalty of 15 years so it does not fall within the first category ('the penalty for the offence is non-custodial'). Proving innocence in the circumstances of this case, if indeed she is innocent, leaves the defendant in the Kafkaesque position of having to rely on her innocence and the corroborating evidence of a partner who has been convicted of the very offence she is defending. Convincing the jury of innocence in such a situation is not what Stumer contemplated in the second category ('where the defendant could prove his or her innocence with relative ease'). The third category ('where the prosecution has proved sufficient facts to establish that the conduct of the defendant is wrongful') is less straightforward. In proving that there were large quantities of drugs in her apartment has the Prosecution proved that the defendant's conduct was wrongful? This scenario must be distinguished from the one given by Stumer where a person is found with a package of drugs on their person. If that person then claims to have been unaware of its contents the claim may fall within what Stumer describes as 'the realm of inherently improbable defences.' (Stumer 2010:50). In such cases the risk of wrongful conviction is minimal whereas one could imagine scenarios captured by s5 of the *DPCS Act* which would carry a high risk of wrongful conviction. In between the two extremes lies a large grey area.

The trial Judge in his sentencing remarks said to *Momcilovic*:

I must approach this matter on the basis that the jury disbelieved you, and also disbelieved the exculpatory evidence of Markovski.

Would the outcome have been different had the Prosecution borne the burden of proving knowledge beyond reasonable doubt? That is hardly the point, although it certainly would have affected the tactical decisions of the defendant. Raising a doubt in the mind of the jury differs vastly from proving a lack of knowledge on the balance of probabilities.

Notwithstanding the differences between the operation of the *Human Rights Act 1998* (UK) and the Victorian Charter, Stumer's book may be a useful resource for those charged with interpreting the Charter and considering future law reform. However, perhaps the most important aspect of Stumer's book for an Australian audience is that it forces us to ask: 'At what cost have we secured this conviction?' The High Court has granted Momcilovic leave to appeal. It will be interesting to see how they approach the issue.

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Legislation

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Crimes (Criminal Organisations Control) Act 2009 (NSW)

Drugs, Poisons and Controlled Substances Act 1981 (Vic)

European Convention on Human Rights

Human Rights Act 1998 (UK)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Cases

R v Momcilovic [2010] VSCA 50