

The Presumption of Innocence

A second look

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In 1997, I had a first look at the jurisprudence¹ of the European Court of Human Rights and I published a monograph entitled *The Presumption of Innocence on the matter in the Mediterranean Journal of Human Rights*.²

On examining the judgements of the Strasbourg Court relative to the interpretation of that Court of Article 6(2) of the European Convention on Human Rights, I summarised that interpretation to comprise six propositions which can consistently be repeated here for ease of reference. Article 6(2) of the Convention states that

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

This principle is based on the need of assuring a fair trial by an impartial court. It is crystal clear that for a tribunal to be impartial it cannot prejudicially hold a view against the accused by deeming him guilty before he is so pronounced after a fair trial.

The Court, interpreting that fundamental principle and right in criminal proceedings, in examining concrete cases where this article was invoked, arrived at these conclusions:

(a) A person who, without undergoing a proper trial, is nevertheless considered by a judicial authority to have been in criminal proceedings at fault, albeit trivial and inconsequential, cannot claim that his right to be presumed innocent has been violated.³

This negative judgement followed a practical rather than a juridical path owing to the 'triviality' of the matter involved as no harm was suffered by the victim concerned.

(b) The right to a presumption of innocence can be breached even indirectly or by implication when the consequential juridical decision is based on the residual

¹ I never use the term 'case law' except when dealing with English Courts judgments. These are bound by the doctrine of Precedence. This is not so in other European Jurisdictions where that term is used, which I consider to be misleading.

² Giuseppe Mifsud Bonnici, 'The Presumption of Innocence' [1997] 1 *Mediterranean Journal of Human Rights* 121.

³ *Adolf v Austria* App No 8269/78 (ECHR, 26 March 1982)

suspicious or suppositions following criminal proceedings, which were terminated by other causes other than absolution.

This proposition was reached in the *Minelli Case*.⁴ However it was pointed out that the presumption of innocence must always be preceded by first establishing that there were in fact criminal proceedings at stake. Moreover the Court appears to have been inconsistent in holding that the presumption of innocence is not breached in certain cases where a German Court based its decision on 'a state of suspicion', in which cases it did not amount to a guilty verdict. The Court arrived at this negative decision by a strong majority and it is surprising that it could find its way to condone these flat pronouncements against a respect of the presumption of innocence.⁵

Five years later the Court found its way back to correct what it had held in the three German cases and in the *Sekanina Case*.⁶ A violation of the fundamental right was found when the victim *Sekanina* was acquitted of the crime of homicide but was denied compensation because of 'suspicion' when the acquittal judgement declared in its verdict that there was 'no question of that suspicion being dispelled.'

- (c) A third proposition arrived at by the Court refers to the interpretation of the clause 'criminal charge'⁷ and here the conclusion was reached that disciplinary charges and proceedings do not automatically qualify as criminal charges and every case has to be examined on its own merits in order to establish whether the person charged was protected by the presumption. This in fact means that the matter is still wide open.
- (d) The fourth statement following an interpretation of Article 6 (2) is that when the accused is expected to depose on certain proved facts which taint him with liability, this does not imply that he has suffered a violation of his presumption of innocence. This however does not cover the case where the accused is expected to answer mere suspicions and to provide proof against those suspicions.
- (e) The fifth proposition states that the right to the presumption of innocence has to be upheld and enforced in a practical and efficient manner. This statement applies in almost all the cases where a violation of a fundamental right is found and an efficient and practical remedy is to be enforced. However, in the particular instance of the right of presumption of innocence the latter limb of the statement, i.e. the practical and efficient remedy, has been found to be quite difficult to ensure. This is of course over and above what a national authority is bound to ensure following a finding of a violation in accordance with Article 13 of the Convention.
- (f) The sixth and last proposition, which I identified from the Court's judgements for the period ending in 1997, is that this fundamental right of the presumption of innocence can be breached not only by a judge or a court but also by any other public authority. This came out clearly in the judgement following the examination of the facts in the *Case of *Allet de Ribemont v France** of 1995.⁸

It is this sixth proposition, coupled with the fifth one, which is the focal and principal matter dealt with in this essay.

⁴ *Minelli v Switzerland* App No 8660/79 (ECHR, 25 March 1983)

⁵ *Lutz v Germany* App No 9912/82 (ECHR, 25 August 1987)

⁶ *Sekanina v Austria* App No 13126/87 (ECHR, 25 August 1993)

⁷ European Convention on Human Rights 1950 art 6 (1)

⁸ *Allet de Ribemont v France* App No 15175/89 (ECHR, 10 February 1995).

The facts that gave rise to this last mentioned important judgement were that, following the assassination of Mr Jean de Broglie, a Member of Parliament and former Minister, Mr de Ribemont was arrested. As it happened, on the same date of the arrest, the Minister of the Interior accompanied by the Director of the Paris Criminal Investigation Department and the Superintendent Head of the Criminal Squad, on questioning by the Press during a Press Conference on the Police Budget for the following years inter alia said, a propos the murder of the Minister, that 'The instigator, Dr De Varga and his acolyte, Mr de Ribemont were the instigators of the murder.'

Mr de Ribemont was never formally charged in a court of law and he sought a remedy for what he alleged to be a violation of his presumption of innocence in the Strasbourg Court after repeated rejections of his claim in the French Courts. The Court reached its decision by the overwhelming majority of six against one dissension by the undersigned, who at that time was a judge in the Strasbourg Court.

That dissension was based on the argument that if, besides judges and jurors, even other public authorities can be found to have violated the fundamental right of the presumption of innocence, it is not possible to expect that the right can be upheld in a practical and efficient manner. This on the contrary is sufficiently and clearly possible when the violation is committed by a judge or a juror. Subsequent experience has shown that this is a valid objection as will be explained later in this essay.

In the de Ribemont case it is also rather difficult to understand how that casting of the net to include all public authorities 'as being expected to respect the presumption of innocence' is to include, for instance, the Director of Criminal Investigation who is presumably responsible for forming an idea of probable guilt before he orders the arrest of the suspect of a crime. If Mr Ducret considered that Mr de Ribemont was one of the instigators of the crime and therefore ordered his arrest and said so after the fact, I find it to be in line with his public justification for what he had done.

Over and above this argument is the salient fact that de Ribemont was never subjected to trial proceedings and therefore the lack of respect of his presumption of innocence could never contaminate the fairness of a trial which never took place. What the public authorities did was in reality a case of gross defamation, injury, and insult to de Ribemont's reputation but the presumption of innocence does not come into it at all.

The Court returned to the de Ribemont position in the *Daktaras* case of 2000, where it exemplified this sixth proposition by holding that even prosecutors in criminal cases are liable to be considered as having violated the presumption of innocence, especially when they perform 'a quasi-judicial function when ruling on an applicant's request to dismiss the charges at the stage of the pre-trial investigation of which he (the prosecutor) has full procedural control.'⁹

It is common in many jurisdictions for Public Prosecutors in fact to have the power to declare even a complete 'nolle prosequi', let alone diminish the gravity of the initial charges in criminal proceedings.

However the Court did conclude that the prosecutor had not violated the presumption because he was not referring to the applicant's guilt, but to whether that guilt had been established by the evidence collected up to that stage, as the ultimate guilt of the accused was clearly not one for determination by the prosecutor.

⁹ *Daktaras v Lithuania* App No 42095/98 (ECHR, 10 October 2000), para 42

It can be safely considered that the Court, after repeating what I consider to be the untenable sixth proposition enunciated in the de Ribemont case, appears to have suddenly realised that a prosecutor cannot but have an opinion which does not respect the presumption of innocence of the accused. This position does not prejudice in any way an impartial trial but rather it is one of the necessary positions which every trial has to have.

In the case of *Butkevicius v Lithuania*¹⁰ the facts were even more strident than those of the previous *Daktaras* case just mentioned. Here the victim concerned was a Member of Parliament. He was charged and convicted of bribery. Before his trial, the Prosecutor General publicly affirmed that he had enough evidence of the guilt of the Minister. On this the ECHR in para 52 of its judgement held that the statement gave some cause for concern but accepted that it could be interpreted as a mere assertion by the Prosecutor General that there was sufficient evidence to support a finding of guilt by a court and thus to justify the application to Parliament for permission to bring criminal proceedings against its member, the Minister of Defence Mr Butkevicius.

Once again by now it should have been clear that the formula which holds that the presumption of innocence can be breached not only by a judge or a court but also by any other public authority, does not apply to Public Prosecutors who are engaged with the formulation of criminal charges leading to a trial.

In this same case however, another public authority was accused of breaching the presumption of innocence – the Chairman of the Parliament, Seimas, who in an interview with a journalist said, ‘on the basis of the material in my possession, I entertain no doubt’ in reply to the question as to whether he doubted that Mr Butkevicius had accepted a bribe. This remark could, in the Court’s view, be interpreted as confirming the Chairman’s view that the applicant had committed the offence of which he was accused. The Court therefore reached the conclusion that this violated the applicant’s presumption of innocence because it ‘served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority’, as stated in para. 53 of the judgement.

However this reasoning has nothing to do with the impartiality of the Court which had to try the criminal proceeding. The prejudging by the Chairman of the Parliament cannot prejudice the impartiality of the Court if the latter is worth its salt. It does not have any direct bearing on the impartiality of the court, which is not presided over by the Parliament’s Chairman. Worse still is the Strasbourg Court’s observation that ‘what was said encouraged the public to believe him guilty’. If the public is so gullible as to believe whatever is said by a public authority which is not even a judicial authority, so be it. All the media could have joined in casting the accused as guilty but this, once again, although not commendable in any way, still does not amount to a breach of the presumption of innocence. as it is presumed at least *juris tantum* that an independent and impartial Court cannot be taken out of its path of dealing and conducting the trial in a fair and impartial manner.

It is certainly not at all clear why any statement by any public authority, except of course, those who have the responsibility of judging, can affect the impartiality and fairness of a criminal trial. What is on the contrary, quite clear is that what the Chairman of the Lithuanian Parliament did say, i.e. what his opinion as to the guilt of one of the members of his parliament was, should have had no bearing on the trial

¹⁰ *Butkevicius v Lithuania* App No 48297/99 (ECHR, 26 March 2002)

judge who was charged with finding according to law whether Butkevicius was innocent or guilty.

A further illustration by a Maltese case is as follows.¹¹ On 1 August 2002, the Maltese Prime Minister called a Press Conference in which inter alia he said:

I regret that I have to inform the public that today two judges are being investigated by the police in connection with serious offences.

On 5th July, judgement was delivered by the Court of Criminal Appeal presided by Chief Justice Noel Arrigo, Judge Patrick Vella and Judge Joseph Filletti ... Days before the judgement of the Appeal Court, it became known that contacts were being made on behalf of the accused with Judge Patrick Vella and the Chief Justice so that the prison term to which he had been condemned [in the lower court] be reduced by four years from sixteen to twelve years and that these two judges were promised amounts of thousands of Liri each ... On the Government side, I want to assure everyone that this case will continue to be investigated to the end and that steps will be taken according to law.

The accused raised the question of a breach of the presumption of innocence before the Magistrate Court of Criminal Inquiry, which, in line with the Constitutional provision of Maltese Law referred the plea to the Civil Court. This Court considered that what the Prime Minister had said could not be taken as a statement of guilt and therefore there was no breach of the presumption of innocence.

On appeal to the Constitutional Court this court, on 29 October 2003, revoked the Civil Court's decision and declared that there had been a violation of the applicants' rights to a fair trial and right to be presumed innocent. The Court leaned heavily on the de Ribemont, Daktaras and Butkevicius decisions of the European Court of Human Rights that had repeatedly stated that statements by a public official, in this case the Prime Minister, had to respect the right to the presumption of innocence. In spite of this finding however, the Constitutional Court ordered that the Criminal Enquiry should continue as there was no reason to halt those proceedings. The Court finally considered that its finding to be upheld and enforced in a practical and efficient manner (in accordance with proposition (e) above) its judgement, is to be included in the file of the ongoing proceedings against the accused.

It is no wonder that the accused considered that the insertion of the copy of that favourable judgement on the violation they had suffered, could not reasonably satisfy the requirement that their right was to be upheld by a practical and efficient remedy for that violation.

The accused accordingly sought recourse with the European Court of Human Rights complaining that because of this verdict, their right to be presumed innocent under Article 6 (2) had been breached and it also undermined their right to a fair trial by an impartial tribunal under Article 6 (1). However above all, they complained that they had not been accorded an effective remedy by a national authority notwithstanding that the violation had been committed by a person who was acting in an official capacity – Article 13.

On 10 May 2005, the Chamber of the Court considered the application, which had been lodged on 28 January 2004.¹² After detailing the facts as they have been set out above, the Chamber approved what the Constitutional Court had done, saying:

¹¹ *Arrigo and Vella v Malta* App No 6569/04 (ECHR, 10 May 2005)

The Constitutional Court adopted measures aimed at providing redress for the violation of the presumption of innocence and of the right to a fair trial. It also sought to place the applicants, as far as possible in the position they would have been in had the requirements of Article 6, not been disregarded.

But how can this be accepted? The measure, not measures, adopted to provide redress for the violation, that of ordering the insertion of its judgement in the record of the trial, cannot really be called 'a measure' and it is completely unrealistic to state that the accused were placed in the same position they would have been had the right under Article 6 (2) not been violated. This is a deceptive sentence as the reality of the violation of the presumption of innocence is there and clearly irreversible.

Whatever any public official might say violating the presumption of innocence of the accused, indeed, what the general hue and cry of the public is in all the media forms, has absolutely no relevance as ultimately the decision lies with the impartial tribunal which judges the case. In fact the Constitutional Court said, 'The domestic legal system provided effective safeguards and guarantees ...' to ensure that an objectively independent and impartial court conducts a fair trial. This clearly indicated that as the Court said 'even assuming that the presumption of innocence had been violated, this would not imply that the criminal proceedings could not be determined by an objectively independent and impartial court.'¹³

This should have opened the eyes of all concerned to the fact that the violation of the presumption of innocence by the Prime Minister was completely irrelevant to the question of a fair trial. Indeed this insistence on the proposition that every public official is liable to violate the presumption of innocence is at the root of all this travesty of truth and reality. This insistence reflects a fear or suspicion that any public official or the general public can violate the presumption of innocence by influencing or even pressuring the judge to go out of his way and instead of applying the strictness, impartiality, and fairness of the law, will make him go along with what the public official or the general public have expressed. It is this which is surreptitiously implied by the insistence that public official statements violate the presumption of innocence. It is symptomatic of the reality of the situation that what the public media says in violation of the presumption of innocence is and has to be rightly ignored.

The European Court of Human Rights' Chamber wrapped up this Maltese case by declaring it inadmissible as manifestly ill founded and therefore rejected it in accordance with Article 35 (3) and (4) of the Convention. This meant that the Chamber had merely shoved the dust under the carpet.

Of course, the applicants remained without an effective remedy for the violation they had suffered.

In the recent complicated case of *Virabyan v Armenia*,¹⁴ one of the alleged violations involved the presumption of innocence. In accordance with Armenian law, the former Article 37(2) (2) authorised the Public Prosecutor to decide to terminate the proceedings on the ground that the accused had 'redeemed the committed act through his sufferings.' This was a very unhappy formula and it was in fact later abolished. The Court found that the Prosecutor had thereby violated the presumption

¹² Strangely enough the seven judges chamber which considered the application did not have as one of its members the Maltese Judge, apparently not in conformity with Rule 26 (1)(a) of The Rules of Court.

¹³ Para 3 of the Chamber's judgement.

¹⁴ *Virabyan v Armenia* App No 40094/05 (ECHR, 2 October 2012).

of innocence. The applicant turned to the domestic Courts for a remedy against what the prosecutor had done but in para 190 of the judgement the European Court of Human Rights noted that:

Both the Court of Appeal and the Court of Cassation upheld this decision (that of the prosecutor) and in substance did not disagree with it. Moreover both courts found it to be established that the applicant's claim that he had acted in self-defence was unfounded. It should be mentioned that the proceedings before the courts did not determine the question of the applicant's criminal responsibility but the question whether it was necessary to terminate the case on the ground provided by the prosecutor. Thus it cannot be said that these proceedings resulted or were intended to result in the applicant being proved guilty according to law.

Of course, the Public Prosecutor's unfortunate wording to justify his action cannot be condoned but still it is doubtful whether these words had any direct bearing on the trial which, in fact, never took place. Once again what the public official did was reprehensible and is to be otherwise condemned but it did not quite qualify as a violation of the presumption of innocence.

Considering what the Strasbourg Court has once again reiterated on this wrong principle of the liability of public officials to breach the presumption of innocence, I am quite sceptical on there being a courageous turn around in the future and succeeding in dismantling this dangerous principle.