NUS Law Working Paper No 2025/002

Revisiting the Constitutionality of Presumptions in the Misuse of Drugs Act 1973

Ho Hock Lai

lawhohl@nus.edu.sg

[February 2025]

Revisiting the Constitutionality of Presumptions in the Misuse of Drugs Act 1973

(Forthcoming in Ho and Low (eds), A *Gentleman of the Law – Essays in Memory of Professor Tan Yock Lin*)

Ho Hock Lai
lawhohl@nus.edu.sg

ABSTRACT

The Misuse of Drugs Act 1973 (MDA) provides for several rebuttable presumptions of law. They are principally the presumption of *possession* of controlled drug, the presumption of *knowledge of the nature of the controlled drug* that is in one's possession, and the presumption that the possession of controlled drug was for the *purpose of trafficking*. These presumption provisions are burden-shifting devices. They relieve the prosecution of the burden of proving certain elements of drug offences and impose on the defence the burden of disproving the same. The constitutionality of these provisions has been upheld in several cases. However, as I will argue, the reasoning behind them is not wholly satisfactory and the matter deserves further consideration. This chapter unfolds as follows. Part (2) explores the basic structure of a rule that provides for a rebuttable presumption of law. Part (3) analyses the nature of this type of presumption and highlights three characteristics of the MDA presumptions. Part (4) explains the conflict between the MDA presumptions and the presumption of innocence. Part (5) considers the bearing this conflict has on the constitutionality of the presumption provisions in the MDA. Part (6) concludes by identifying points in the analytical framework that are under-developed and in need of deeper engagement with comparative jurisprudence.

Keywords

Presumption of innocence; Misuse of Drugs Act; Legal and Evidential Presumptions of Law; Fundamental Rules of Natural Justice; Constitutionality; Article 9

Revisiting the Constitutionality of Presumptions in the Misuse of Drugs Act 1973

(Forthcoming in Ho and Low (eds), A *Gentleman of the Law – Essays in Memory of Professor Tan Yock Lin* (NUS Press))

Ho Hock Lai*

1. Introduction

The Misuse of Drugs Act 1973 (MDA)[1] provides for several rebuttable presumptions of law. They are principally the presumption of *possession* of controlled drug,[2] the presumption of *knowledge of the nature of the controlled drug* that is in one's possession,[3] and the presumption that the possession of controlled drug was for the *purpose of trafficking*.[4] These presumption provisions are burden-shifting devices. They relieve the prosecution of the burden of proving certain elements of drug offences and impose on the defence the burden of disproving the same. The constitutionality of these provisions has been upheld in several cases. However, as I will argue, the reasoning behind them is not wholly satisfactory and the matter deserves further consideration. While Yock Lin did not take a definite position on this matter, he endorsed a general principle expressed by the House of Lords, namely, that 'a fair balance must be struck between the demands of the general interest of the community and the protection of the fundamental rights of the individual'.[5]

This chapter unfolds as follows. Part (2) explores the basic structure of a rule that provides for a rebuttable presumption of law. Part (3) analyses the nature of this type of presumption and highlights three characteristics of the MDA presumptions. Part (4) explains the conflict between the MDA presumptions and the presumption of innocence. Part (5) considers the bearing this conflict has on the constitutionality of the presumption provisions in the MDA.

* I am most grateful to Chan Wing Cheong and Kumaralingam Amirthalingam for their valuable comments. They are not responsible for any errors in this chapter.
[1] Misuse of Drugs Act 1973 (2020 Rev Ed).
[2] MDA, s 18(1).
[3] MDA, s 18(2).
[4] MDA, s 17.
[5] Tan Yock Lin, *Criminal Procedure*, vol II (LexisNexis 2010) [2756]–[2800], footnote 1, quoting from *R v DPP, ex p Kebilene* [2000] 2 AC 326 (HL) 384.

Part (6) concludes by identifying points in the analytical framework that are under-developed and in need of deeper engagement with comparative jurisprudence.

2. Basic Structure of a Rule providing for a Rebuttable Presumption of Law

A rule providing for a rebuttable presumption of law has two components, consisting of two propositions of fact; they are commonly known as the 'basic fact' and the 'presumptive fact'. Let us call the basic fact 'A' and the presumptive fact 'B' and refer to the party seeking to raise the presumption as the 'proponent' and the party seeking to oppose the presumption as the 'opponent'.

Under section 18(1) of the MDA, if the prosecution (the proponent) succeeds in proving that an accused person (the opponent) had in his possession a bag or a key to a flat (A^1), the person is presumed to be in *possession* of any controlled drug that is found in the bag or flat (B^1). This presumption may be combined with the further presumption in section 18(2) of the MDA; under the latter provision, anyone who is either proved or presumed under section 18(1) to be in possession of a controlled drug (A^2) is presumed to *know of the nature of the drug* (B^2). While the presumption in section 18(1) can be stacked onto the presumption in section 18(2) (in that presumptive fact B^1 can also serve as the basic fact A^2), neither of them can be combined with the presumption of *purpose of trafficking* in section 17.[6] To use section 17 against an accused person, the prosecution must prove (and not rely on any presumption) that the person was in possession of more than the stipulated quantity of one or more of the types of drugs listed in that section. For example, if it is proved (and not merely presumed) that the person was in possession of more than 2 grammes of diamorphine, the presumption arises that the person had that drug in possession for the *purpose of trafficking*.

A rule providing for a rebuttable presumption takes the following conditional form:

(i) Upon proof of A and

(ii) in the absence of sufficient evidence of not-B,

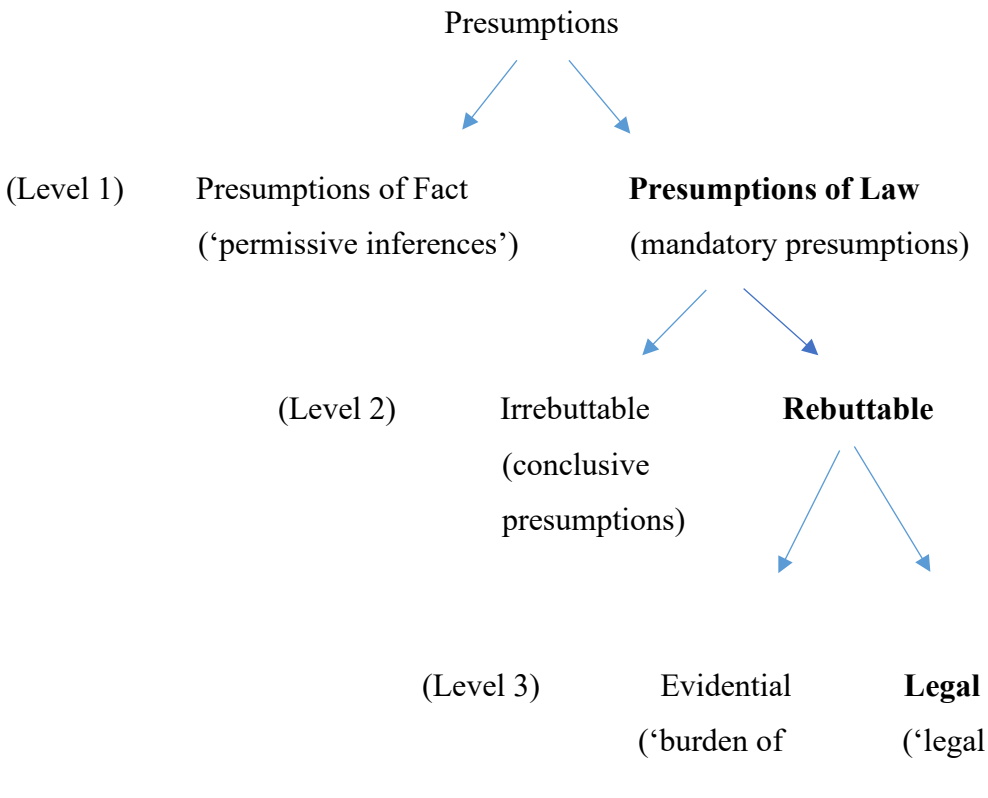
[6] eg *Zainal bin Hamad v PP* [2018] SGCA 62, [2018] 2 SLR 1119 [52].

➔ the fact-finder must find that B.

The antecedents (i) and (ii) set out the two conditions that must be met for the rule to apply and the consequent is the arising of a legal obligation to find that B. The application of a presumption rule involves a *modus ponens* inference to the conclusion that there is a *legal obligation to find that B*. It is common to describe the 'presumption that B' as an 'inference that B'. But this is inaccurate. What is inferred is the legal obligation to find that B, and the court must make the finding of B because of that legal obligation; it matters not whether there is sufficient evidential basis for inferring B in the sense of believing that B is true.

3. Nature of Rebuttable Presumptions of Law that Impose a Legal Burden

The MDA presumptions are rebuttable presumptions of law of a specific type. The diagram below sets out the traditional classification. Courts have construed the MDA presumptions as belonging to the right side of the diagram. They are of the nature of a presumption *of law* (level 1) that is *rebuttable* (level 2) and that imposes a *legal* (also known as *persuasive*) *burden* of proof on the opponent (level 3). I will discuss these three characteristics in turn.



production') persuasive burden')

A. Level 1: Contrasting a Presumption of Law *with a Presumption* of Fact

First, the MDA presumptions are presumptions of law. They are different from presumptions of fact. The term 'presumption of law' can be misleading. It is not about presuming a proposition of law; what is presumed is a proposition of fact. It is a presumption of law in the sense that the presumption is *required by law*. If a presumption of law, like a presumption of fact, is about presuming a proposition of fact, how are they different?

(i) Discretionary vs mandatory

The difference is commonly conceived as follows: presumptions of fact are discretionary whereas presumptions of law are obligatory. In the case of a presumption of fact, upon proof of A, and in the absence of countervailing evidence, the factfinder *may* find that B. The court has discretion and how the discretion is exercised depends on the facts of the case. On the other hand, if the presumption is one of law, upon proof of A, and in the absence of contrary evidence, the factfinder *must* find that B.[7]

(ii) Theoretical vs practical reasoning

I suggest that there is a deeper way of understanding the difference between a presumption of fact and a presumption of law. Presumptions of fact are based on 'theoretical reasoning' – essentially reasoning about what to believe. B may be inferred from A where, in the circumstances of the case, A justifies the inference that B is true, and this inference is drawn as a matter of ordinary, extra-legal, principles of factual reasoning. A is a reason – an epistemic reason – for the fact-finder to *believe* that B.

[7] cf ss 4(1) and 4(2) of the EA.

An instance of this is set out in illustration (*a*) to section 116 of the Evidence Act 1893 (EA).[8] A person is found in possession of stolen goods soon after the theft and cannot account for his possession. In the absence of any other plausible hypothesis pointing to a different conclusion, those facts are, as a matter of ordinary factual reasoning, sufficient to justify the inference that the person is the thief: they provide a *prima facie* reason for believing that he had stolen the goods.

Ordinary factual inferences of this sort are of a defeasible nature. The essential idea is that the addition of further information may render the inference no longer justifiable. This is highlighted in counter-illustration (*a*) to section 116 of the EA: adding to the facts in illustration (*a*) as set out just above, we are now further told that what was stolen was a marked dollar and it was found soon after the theft in the till of a shopkeeper. The shopkeeper 'is continually receiving dollars in the course of his…business' and cannot account specifically for how the marked dollar came to be in his till. Given this expanded set of information, it is entirely plausible that he had received it innocently from a customer. Since this hypothesis cannot be ruled out, we are not justified in inferring or believing that he is the thief.[9] Whether a presumption of fact may be drawn is a matter of applying our background beliefs about the world; it depends on our understanding of, as it is put in section 116 of the EA, 'the common course of natural events, human conduct, and public and private business'. This sort of evidentiary reasoning is one that courts normally use and are expected to employ when making findings of fact. Introducing a 'presumption of fact' into the discussion adds nothing of significance.

Presumptions of law work differently. They are based on practical reasoning – essentially reasoning about what to *do*, as opposed to what to believe. Upon proof of A, and in the absence of sufficient evidence of not-B, B must be presumed. It matters not whether B can be inferred from A; that is to say, it matters not whether A justifies the belief in B. Here, A is a practical reason, in the sense of a reason for action; it is a reason for the fact-finder to act *as if* B is true whether or not the fact-finder believes or would be justified in believing that B is true. The propositional attitude in question is not *belief that B is true* but something like *taking B for true*

[8] Evidence Act 1893 (2020 Rev Ed).
[9] On a relevant alternative theory of knowledge.

or *holding B as true*.[10] This is a deviation from the normal reasoning that courts employ when making findings of fact.

B. Level 2: Contrasting a Rebuttable *Presumption with a* Conclusive *Presumption*

The second characteristic of the MDA presumptions is that they are *rebuttable*. Recall the structure of a rule providing for a rebuttable presumption. The presumption of B is drawn only if two conditions are satisfied: (i) A is proved and (ii) there is a lack of sufficient evidence that B is false. The presumption can be rebutted by adducing sufficient evidence against B. For a conclusive presumption rule, condition (ii) is removed; it does not matter whether there is evidence against B. Once A is proved, the fact-finder must find that B. No further evidence is to be entertained.[11]

An example of a conclusive presumption is the former section 115 of the EA.[12] It stated: 'It shall be an irrebuttable presumption of law that a boy under the age of 13 years is incapable of committing rape.' This provision gave boys under the age of 13 a defence – in the nature of an exemption – to the offence of rape. It is a rule of substantive criminal law. As we will see, the fact that the MDA presumptions are rebuttable has been used as a factor in favour of upholding the constitutionality of the MDA provisions. However, this fact is unremarkable since conclusive presumptions are rare and, in any case, they are not evidentiary devices and thus not true presumptions.

C. Level 3: Contrasting a Legal *(or* Persuasive*) Presumption with an* Evidential *Presumption*

The third characteristic of the MDA presumptions is that they *impose on the opponent a legal or persuasive burden of disproving the presumptive fact*. This feature concerns the second condition for a presumption: the presumption of B is drawn only in the absence of *sufficient* evidence that B is false. But how strong must the evidence be to defeat the presumption? The more it takes to defeat a presumption, the stronger it is. The strongest presumption is a conclusive or irrebuttable presumption. As for rebuttable presumptions, they fall into either

[10] Edna Ullman-Margalit and Avishai Margalit, 'Holding True and Holding as True' (1992) 92 *Synthese* 167.
[11] See EA, s 4(3).
[12] Repealed vide s 8 of the Evidence (Amendment) Act 1996.

one of two categories, one of which shifts the legal burden of proof to the opponent (who now has the legal burden of disproving B) whereas the other does not.

The latter is sometimes called an evidential presumption, so named because the burden placed on the opponent is merely an evidential burden. Instead of having to disprove B, the opponent needs only to produce or point to some evidence against B that is sufficient to make it a live issue whether B is true. Once this light evidential burden is discharged, the presumption drops out of the picture and the proponent carries the normal legal burden of proving B. Since the presumption does not shift the legal burden of proof to the opponent, a rule providing for an evidential presumption against the accused is easier to reconcile with the presumption of innocence than the next category that we shall now turn to.

The stronger category of rebuttable presumptions is often labelled as 'legal' or 'persuasive'. To defeat the presumption, the opponent must disprove B. It is not enough to produce or point to some evidence to put the existence of B in issue. In Singapore, courts have consistently read rebuttable presumptions of law, including those in the MDA, as imposing on the opponent the legal or persuasive burden of disproof, and where the opponent is the accused, the standard of disproof is the balance of probabilities. Where B is an element of a crime, the effect of triggering the presumption is a reversal of the normal allocation of the legal burden of proof: instead of the prosecution having to prove B beyond reasonable doubt, as is required by the presumption of innocence, it is now for the accused to disprove B. While the law on this point is viewed as settled, it is controversial as a matter of principle. As the next Part explains, the rule providing for a legal presumption against the accused, especially with respect to an element of the offence, is difficult to reconcile with the presumption of innocence.

4. Conflict between Presumption of Innocence and Presumption Rules in the MDA

The presumption of innocence is widely identified as (or associated with) the rule that places on the prosecution the burden of proving guilt, or at least the elements of the offence, beyond

reasonable doubt.[13] This rule may be viewed as an instruction to the court on how to decide on the verdict. It may be broken down into two sub-rules:

(i) the court must convict if guilt is proved beyond reasonable doubt.

(ii) the court must acquit if guilt is not proved beyond reasonable doubt

That guilt is not proved does not mean that guilt is disproved – it does not mean that innocence is therefore proved. Under section 3(5) of the EA: 'A fact is said to be "not proved" when it is neither proved nor disproved.'[14]

Sub-rule (ii) above involves a presumption. Guilt is not proved so long as there is reasonable doubt that the accused is guilty. When the court is in doubt, it does not know where the truth lies. The court is in a state of uncertainty or ignorance: it cannot tell whether the accused is in fact innocent or guilty. What is the court to do? There is an impasse and the court has to either convict or acquit the accused person. The presumption of innocence extricates the court from this difficulty. Sub-rule (ii) instructs the court to *presume* – act on the basis, or take it for true – that the accused is innocent so long as it is not proved that he or she is guilty. The presumptive component is therefore implicit in sub-rule (ii).[15] The court must acquit the accused person if guilt is not proved beyond reasonable doubt *because* he or she must be presumed to be innocent so long as guilt is not proved beyond reasonable doubt.

It is a fundamental rule in criminal cases that the prosecution carries the burden of proving all elements of the offence with which the accused person is charged. The person is guilty only if every element is instantiated by the facts of the case. Proof of those facts requires evidence. A preliminary threshold must first be crossed: if the prosecution fails to lead evidence 'which is not inherently incredible and which satisfies each and every element of the charge', [16] the accused does not even have a case to answer and the trial ends with an acquittal without the

[13] *Woolmington v DPP* [1935] AC 462 (HL) 481. Proving 'guilt' involves more than proving the 'elements of the offence'; under English common law, it also requires disproof of any defence that has been put into issue. One might argue that making the accused person disprove an offence element more clearly violates the presumption of innocence than shifting the burden of proof for defences (which is the effect of EA, s 107). Space constraint does not permit exploration of the point.
[14] See *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2009] SGCA 47, [2010] 1 SLR 286 [18]–[22].
[15] See Edna Ullman-Margalit, 'On Presumption' (1983) 80(3) *The Journal of Philosophy* 143.
[16] Criminal Procedure Code 2010 (2020 Rev Ed), s 230(1)(j).

accused having to be called to enter his or her defence. So, in addition to the two sub-rules above which instruct the factfinder on how to decide on the verdict, there is the following rule that regulates the trial process:

> (PT) The prosecution must adduce evidence of every element of the crime that is strong enough to cross the preliminary threshold, failing which the accused will not be called to enter his defence and must be acquitted.

Assuming that the preliminary threshold is crossed, the following rules (which expands on (i) and (ii) above) instruct the court on how to make findings on the elements of the offence:

(a) Having considered all of the evidence adduced at the trial, the court must find that an element obtains in the case if it is not in reasonable doubt that it obtains.

(b) Conversely, having considered all of the evidence adduced at the trial, the court must not find that an element obtains in the case if it is in reasonable doubt that it obtains.

We are now placed to locate the conflict between the presumption provisions in the MDA and the presumption of innocence. For example, one element of the offence of drug trafficking is that the drugs in the accused's possession must be for the purpose of trafficking. If the accused person was in possession of the drugs only for personal consumption, the person is not guilty of drug trafficking. Under section 17 of the MDA, if it is proved that the accused person was in possession of, say, more than 2 grammes of diamorphine, the court must presume that the possession was *for the purpose of trafficking*, unless he or she proves on the balance of probabilities that the possession was not for that purpose. This presumption, when it comes into play, by-passes or modifies two of the three rules stated above:

> Contrary to (PT), the prosecution does not have to adduce any evidence, or evidence that is strong enough to cross the preliminary threshold, of the fact that the accused's possession of the drugs was for the purpose of trafficking.
>
> Contrary to (b), the court may be required to find that the possession was for the purpose of trafficking even where it is reasonable to doubt that this is true.

For illustration, let it be that the prosecution fails to adduce any evidence that the possession of diamorphine was for the purpose of trafficking. However, it manages to prove the basic fact of possession of diamorphine exceeding two grammes. Under section 17 of the MDA, the defence now has the burden of defeating the presumption of trafficking. For purposes of discussion, it may be helpful, though artificial, to use probability value as a heuristic device. Suppose the accused succeeds in establishing a probability of 0.3 that the drugs were for his personal consumption. This falls short of the standard of balance of probabilities and is insufficient to defeat the presumption. But a 0.3 probability of personal consumption is sufficient to raise a reasonable doubt as to whether the possession was for the purpose of trafficking. As such, section 17 requires the court to deliver a guilty verdict despite having reasonable doubt as to whether a necessary element of the offence is satisfied. While I have used section 17 as an example, similar reasoning applies to the other presumption rules in the MDA.

5. Constitutionality of the MDA Presumption Provisions

In 1980, a challenge to the constitutionality of a predecessor version of section 17 of the MDA failed before the Privy Council in *Ong Ah Chuan and another v PP*.[17] More than two decades later, in 2022, an attempt to challenge the constitutionality of other presumption provisions in the MDA – namely, section 18(1) on the presumption of possession and section 18(2) on the presumption of knowledge of the nature of the drug in one's possession – was made in *Jumaat bin Mohamed Sayed v Attorney-General* (hereinafter '*Jumaat*').[18] This challenge was unsuccessful before the High Court, and failed again when the case reached the Court of Appeal. In *Jumaat*, the High Court observed that the arguments raised by the appellants in *Ong Ah Chuan* 'closely resembled those of the claimants' in *Jumaat*.[19] When the case went on appeal, the Court of Appeal similarly observed that the argument raised by the appellants was 'neither new nor novel' and had already been rejected by the Privy Council in *Ong Ah Chuan*.[20] This conclusion was, with respect, drawn too quickly. Different provisions of the MDA were

[17] [1980] SGPC 6, [1979–1980] SLR(R) 710.
[18] *Jumaat bin Sayed v AG* [2022] SGHC 291; *Jumaat bin Sayed v AG* [2023] SGCA 16, [2023] 1 SLR 1437.
[19] *Jumaat* (HC) (n 18) [42]. See also [47] noting that the claimants were seeking to 'return to the argument in *Ong Ah Chuan*'.
[20] *Jumaat* (CA) (n 18) [28].

called into question in the two cases. As noted earlier, the presumption in section 18(1) may be stacked onto the presumption in section 18(2). In *Ong Ah Chuan*, the Privy Council did not have to consider, and set aside consideration of, the constitutionality of a presumption upon a presumption.[21] More importantly, the arguments advanced in *Ong Ah Chuan* were different from those advanced in *Jumaat*.

A. Decision in Ong Ah Chuan

Ong Ah Chuan involved two conjoined appeals before the Privy Council arising from two factually unrelated cases that raised similar issues of law. The two appellants, Ong and Koh, were each convicted at separate trials for the offence of trafficking by transporting of substances that contained heroin under section 3 of the MDA as it then stood; this provision was in all material respects similar to section 5 of the present MDA.[22] In each of the two cases, it was proved that the appellant was driving a vehicle with a sizeable quantity of heroin in it. Both appellants denied intention to traffic. Ong claimed that the drug was for his personal consumption while Koh denied knowledge of the drug, suggesting that it must have been planted in his car by police informers. However, as it was proved that they were in possession of more than 2 grammes of diamorphine, they were presumed under section 15 of the then MDA, which is the precursor of section 17 of the present MDA, to have had the drugs in their possession for the purpose of trafficking.

The appellants appealed against their respective convictions. Only one of their arguments before the Privy Council is relevant for our purposes. It rested on article 9(1) of the Singapore Constitution which states: 'No person shall be deprived of his life or liberty save in accordance with law'. The appellants claimed that section 15 was unconstitutional as it offended article 9(1). The argument for this claim may be broken down into the following steps of reasoning, with four premises (P1–4) leading to a conclusion (C):

> P1: The term 'law' in art 9(1) includes fundamental rules of natural justice.
>
> P2: The presumption of innocence is a fundamental rule of natural justice.

[21] *Ong Ah Chuan* (n 17) [20].

[22] As the law stood then, merely having a controlled drug in one's possession for the purpose of trafficking did not constitute the offence of trafficking. But it does now due to the introduction of s 5(2) vide Misuse of Drugs (Amendment) Act 1993 (No 40 of 1993).

P3: The presumption of innocence is therefore incorporated into art 9(1).

P4: Section 15 of the MDA is in derogation of the presumption of innocence.

C: Hence, section 15 violates article 9(1) and is, for that reason, unconstitutional.

The appeal was dismissed. What we know is that the Privy Council rejected C and upheld the constitutionality of section 15. But the reasoning is extraordinarily vague, making it difficult to extract the *ratio decidendi*. While it is clear that the Privy Council accepted P1, it is unclear what position it took on P2, P3 and P4. The Privy Council was disappointingly vague on the meaning or import of the presumption of innocence, and, as an upshot of that, it was vague on whether the presumption of innocence is a fundamental rule of natural justice (P2), whether the presumption is incorporated into article 9(1) (P3), and, whether section 15 is in derogation of the presumption of innocence (P4).

At common law, and as already noted, the presumption of innocence is widely understood as requiring the prosecution to carry the legal burden of proving the elements of the offence beyond reasonable doubt. (Hereafter, references to the 'presumption of innocence' should be understood as such.) It is unclear whether the Privy Council in *Ong Ah Chuan* had the presumption of innocence in mind when it cautioned against the perpetuation of 'technical rules of evidence';[23] if it did, the statement would be disconcerting since the presumption of innocence, far from being a mere technicality, is widely recognised as being fundamental to the administration of criminal justice.[24]

On one reading of *Ong Ah Chuan*, the Privy Council gave the presumption of innocence an insubstantial meaning (on which, more later) and it was only in the insubstantial sense that the Privy Council was prepared to treat the presumption as a fundamental rule of justice. On this reading, the premises would have to be recast as follows:

P^1: The term 'law' in art 9(1) includes fundamental rules of natural justice.

P^2: The presumption of innocence is a fundamental rule of natural justice only in the insubstantial sense.

[23] *Ong Ah Chuan* (n 17) [27].

[24] eg, *Jagatheesan s/o Krishnasamy v PP* [2006] SGHC 129, [2006] 4 SLR(R) 45 [59]; *XP v PP* [2008] SGHC 107, [2008] 4 SLR(R) 686 [90]; *AOF v PP* [2012] SGCA 26, [2012] 3 SLR 34 [314]–[315]; *PP v GCK* [2020] SGCA 2, [2020] 1 SLR 486 [126].

P^3: The presumption of innocence is incorporated into art 9(1) only in the insubstantial sense.

P^4: Section 15 of the MDA is not in derogation of the presumption of innocence understood in the insubstantial sense.

The insubstantial reading of the presumption of innocence may arguably be gleaned from the following passage in the Privy Council's opinion:[25]

> 'One of the fundamental rules of natural justice in the field of criminal law is that *a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal's being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused.* To describe this fundamental rule as the "presumption of innocence" may, however, be misleading to those familiar only with English criminal procedure…. *What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged*.' (Emphasis added.)

In the first italicised portion of this passage, the Privy Council emphasised that it is a fundamental rule of natural justice that no one shall be punished for an offence unless the court is 'satisfied' that he committed it. One who is 'familiar with English criminal procedure' would think that the court should not be 'satisfied' unless it is persuaded beyond reasonable doubt on the evidence brought before the court that the accused committed the offence. But the Privy Council steered clear of stating as much, suggesting instead (as seen in the second italicised portion of the above passage) that it is enough to have 'material before the court that is logically probative of facts sufficient to constitute the offence'. 'Facts sufficient to constitute the offence' refer to the essential elements of the offence, or the 'facts in issue' as the term is defined in the EA.[26] What is necessary, then, is that the evidence must be logically probative of all of those facts. But evidence is logically probative so long as it increases or decreases the

[25] *Ong Ah Chuan* (n 17) [27].
[26] EA, s 3(1).

probability of the fact which the evidence is adduced to prove. It would be extraordinary if what the Privy Council meant was that the court may be 'satisfied' of the existence of fact constituting an element of an offence so long as there is some evidence that is 'logically probative' of that fact. The insubstantial reading is implausible. Surely what matters is not whether the evidence is 'logically probative' of the material facts (which is a low threshold to cross) but whether the probative value of the evidence is so high that it renders beyond reasonable doubt the truth of the material facts. Surprisingly, not once did the Privy Council refer to 'beyond reasonable doubt' in its opinion.[27]

B. Arguments and reasoning in Ong Ah Chuan

The lack of reference to 'reasonable doubt' in *Ong Ah Chuan* is less surprising when one peruses the summary of counsel's arguments in the report on the case in *Appeal Cases*.[28] It seems that the conflict between the MDA presumptions and the presumption of innocence identified in Part 4 of this paper – that the presumptions permit conviction despite reasonable doubt – was never brought up by counsel for the appellants. Instead, the following three arguments were advanced, all of which were rejected by the Privy Council.[29]

(i) Connection between basic fact and presumptive fact

The first argument was that section 15 was contrary to the rule of law because the connection between the basic fact and the presumptive fact was 'so slender as to be arbitrary',[30] there being 'no natural connection in common experience between the fact proved and the conclusion presumed therefrom'.[31] Under section 15, proof of possession of two grammes of heroin was sufficient to trigger the presumption of trafficking. But this quantity, so it was argued, was too

[27] cf *Yong Vui Kong v PP* [2011] SGCA 9, [2011] 2 SLR 1189 [107] (Chan CJ): 'the accused can be convicted of the offence charged only if the ingredients of the offence have been proved by the Prosecution according to the standard of proof applicable to criminal proceedings (*ie*, the standard of beyond reasonable doubt).' See also Chan Sek Keong, 'Equal Justice under the Constitution and Section 377A of the Penal Code' (2019) 31 SAcLJ 773 [115]: 'the accused can be convicted of the offence charged only if the ingredients of the offence have been proved by the Prosecution according to the standard of proof applicable to criminal proceedings (*ie*, the standard of beyond reasonable doubt).'
[28] *Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] AC 648 (hereafter *Ong Ah Chuan* (AC)).
[29] See *Ong Ah Chuan* (AC) (n 28) 652–654.
[30] ibid 652.
[31] ibid 653.

small to justify the 'automatic assumption' of trafficking since the amount was no more than the normal supply that an addict would obtain for personal consumption.[32]

The Privy Council rejected this argument. There is 'no conflict with any fundamental rule of natural justice and so no constitutional objection' to a rebuttable presumption that the accused's 'possession of controlled drugs *in any measurable quantity*' was for the purpose of trafficking.[33] The Privy Council pointed out that section 10 of the Canadian Narcotic Control Act 1960–1961 allowed such a presumption to be drawn without specifying any minimum quantity. While the Privy Council saw no constitutional objection to the Canadian provision, six years later, the Canadian Supreme Court held in *R v Oakes*[34] that the provision violated the presumption of innocence enshrined in the Canadian Charter of Rights and Freedoms.

According to the Privy Council, there was even less reason to object to the Singapore provision. In contrast to the Canadian provision, section 15 permitted the presumption of trafficking only where the quantity of heroin in the accused's possession was two grammes or more and this minimum quantity was 'many times greater than the daily dose taken by typical heroin addicts in Singapore'. Curiously, the Privy Council stated that this point was 'not disputed'. But the summary of counsels' arguments shows that its denial was a central plank of the appellants' case. On the basis that the minimum quantity far exceeded the daily dosage of an addict, the Privy Council went on to observe that a person who was in possession of more than two grammes of heroin was likely to have had the drug for the purpose of trafficking. There was therefore some rational connection between the basic fact and the presumptive fact. While that may be so, it remains that the effect of the presumption is to permit conviction despite the presence of reasonable doubt; this was the basis on which the Canadian Supreme Court struck down the presumption in *R v Oakes* and this was not considered by the Privy Council in *Ong Ah Chuan*.

(ii) Justification for presumption rule

[32] See ibid 653: 'the amount in possession ought to be a commercial quantity and more than merely the necessary supply for an addict.'
[33] ibid 672. Emphasis added.
[34] (1986) 26 DLR (4th) 200, [1986] 1 SCR 103.

The second argument advanced by the appellants was that there was 'no compelling reason' to justify the existence of section 15.[35] '[C]onvenience of the prosecution is not enough; there must be a compelling state interest'; 'the government must show that it is difficult or impossible for the police to prove that possession is for the purpose of trafficking by any other means than the use of a presumption' and this was not shown to be the case.[36]

The Privy Council evaded this argument. Instead, it observed that '[p]resumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.' While it is pertinent that drug addiction and trafficking present danger to society, this alone falls short of addressing counsel's argument; that an activity poses a social danger does not in itself justify casting aside the usual rules of burden and standard of proof.[37] The point made by counsel was that it must further be shown that, without the statutory presumption, it would be difficult or impossible to prove the 'purpose of trafficking' element. The Privy Council failed to address this point. Ironically, the Privy Council acknowledged that the evidence led by the prosecution in *Ong Ah Chuan* was sufficient to establish the guilt of both accused persons without the aid of any presumptions. The situation was the same in *Tan Kiam Peng v PP*[38] where the Court of Appeal, after vigorously defending the MDA presumption provisions, noted at the end of the judgment that there was no need for the prosecution to invoke the presumption of knowledge as the prosecution was able to prove the accused's guilt beyond reasonable doubt without having to rely on the presumption.[39] These cases are not exceptional. It certainly possible to prove drug offences without the benefit of any of the MDA presumptions. As Michael Hor has argued, it is not self-evident that, without those presumptions, proof of drug offences would be much more difficult as compared to other serious crimes.[40] It may further be noted that the proof of guilt in Singapore has already been greatly facilitated by the erosion of the right of

[35] *Ong Ah Chuan* (AC) (n 28) 652.
[36] ibid 653.
[37] cf *State v Coetzee* [1997] 2 LRC 593 [220] (Sachs J), South African Constitutional Court: 'The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, …nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.'
[38] [2007] SGCA 38, [2008] 1 SLR(R) 1.
[39] ibid [182].
[40] See Michael Hor, 'Criminal Justice in the Chan Court – Change, Contestation and Conservatism in the Court of Appeal' in Yeo Tiong Min, Hans Tjio and Tang Hang Wu (eds), *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010 – Trends and Perspectives* (Academy Publishing 2011) [32].

silence and privilege against self-incrimination, the introduction of statutory power to draw adverse inferences from silence, and the ability to use one accused's confession against another.

(iii) Fairness

Another argument raised by counsel for the appellants was that the presumption operated unfairly. It absolved the prosecution from proving its case while placing 'on a defendant the burden of proving a negative on the balance of probabilities in circumstances where it will be almost impossible for him to rebut the presumption.'[41]

The Privy Council found no unfairness in the presumption. It alluded to several factors. The first was that the presumption was rebuttable.[42] This is unremarkable; as explained earlier, all presumptions, truly so called, are rebuttable. The problem with the rebuttable presumptions in the MDA is that they reverse the legal burden of proof and are in conflict with the presumption of innocence in the manner described in Part 4 above. It is not much of an argument to defend a bad situation (in having a rebuttable presumption) by pointing out that it could have been worse (as it would be had the presumption been irrebuttable).

Secondly, the Privy Council observed that the presumption may be drawn only from unauthorised possession of a controlled substance and the latter is itself an unlawful act.[43] Perhaps the reasoning was that the accused lacked standing to complain about being prejudiced by an adverse presumption (of purpose of trafficking) because the prejudice was occasioned by his own unlawful conduct (of unauthorised possession of controlled drug). This reasoning is less than convincing. That one has done some wrong does not mean that one should therefore be deprived of all rights. It is not obvious why the fact that a person has committed one offence (unlawful possession) should, *ipso facto*, justify depriving the person of the right to be presumed innocent of a different, and far more serious, offence (drug trafficking).

Thirdly, the Privy Council seemed to suggest that it was easy for the accused to rebut the presumption when it observed that '[t]he purpose with which he did an act is peculiarly within

[41] *Ong Ah Chuan* (AC) (n 28) 654.
[42] ibid 671.
[43] ibid.

the knowledge of the accused.'[44] But there is a stream of authorities denying that the possession of peculiar knowledge, without more, reverses the burden of proof on an element of an offence; if the law were otherwise, the accused will always have to disprove *mens rea*.[45] In any case, there is a logical gap between ease of proof and knowledge. Knowledge of a fact does not entail ease in proving it. It may not be easy for the accused person to find credible evidence to prove that his or her possession was not for the purpose of trafficking. Independent and objective evidence may not be available. While the accused person has the option of taking the witness box and testifying that the possession was not for the purpose of trafficking, the denial is usually seen as self-serving and dismissed as unreliable.

Fourthly, and returning to an earlier point, the Privy Council stressed that the minimum quantity of heroin (which is two grammes) that the accused must possess to trigger the presumption of purpose of trafficking is many times greater than 'the daily dose taken by typical heroin addicts in Singapore'.[46] One would have to agree with the Privy Council to this extent: the fact that the accused was transporting more than two grammes of heroin raises a significant probability that he was doing so for the purpose of trafficking.[47] But that fact alone does not put the inference beyond reasonable doubt; if it did, the presumption provision would be redundant. The concern remains that the presumption, construed as one that places on the accused a legal burden of disproof on the balance of probabilities, permits conviction despite reasonable doubt about his guilt. While we may agree with the Privy Council that the circumstances are such that it is fair to require the accused to account for his possession of such a large quantity of drug,[48] why is it not sufficient to impose an evidential burden on the accused? This option would leave substantially intact the presumption of innocence and, as we will see, it is the option taken in many jurisdictions. Indeed, the result in *Ong Ah Chuan* would have been the same had only an evidential burden been imposed; as the court found, neither of the accused persons was able to produce sufficiently strong evidence to raise any reasonable doubt as to their respective guilt.[49]

---

[44] ibid.
[45] Notwithstanding s 108 of the EA. See eg *Mary Ng v R* [1958] AC 173 (PC) 180–181; *PP v Chee Cheong Hin Constance* [2006] SGHC 9; [2006] 2 SLR(R) 24 [95]. On the common law, see *R v Edwards* [1975] 1 QB 27, 40.
[46] *Ong Ah Chuan* (AC) (n 28) 672.
[47] ibid.
[48] ibid.
[49] In the case of the first appellant, Ong, the Privy Council noted (*Ong Ah Chuan* (AC) (n 28) [663]): 'His explanation that he was carrying it for his own consumption only and the reasons that he gave why it was necessary for him to transport so large a quantity from his own dwelling to another place were unsupported by any corroborative testimony, defied credulity and were disbelieved by the trial judges.' And in relation to the second

C. Jumaat

The opportunity to revisit the constitutionality of the MDA presumptions arose in *Jumaat.* In this case, the four applicants had been convicted separately and sentenced to the mandatory death penalty for various acts of drug trafficking. At their respective trials, the prosecution had relied on the presumptions in sections 18(1) and 18(2). Having lost their appeals against conviction and sentence, and in an attempt to avoid execution of the death sentences, the applicants applied for judicial review before the High Court seeking (i) a declaration that the presumptions in section 18 'should be read down and given effect as imposing an evidential burden only' in order to be in compliance with the Constitution, and, in the alternative, (ii) a declaration that the presumptions were unconstitutional. I will focus on the arguments based on article 9 of the Constitution.

One of the requirements for leave to commence judicial review proceedings is that there must be 'an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought'.[50] The High Court held that this requirement was not satisfied and dismissed the application. A subsequent appeal to the Court of Appeal was also dismissed.

Curiously, the High Court embarked on an extensive discussion of cases on the approach to evaluating evidence and determining whether there exists reasonable doubt, cases in which the courts have noted that merely raising a reasonable doubt was insufficient to rebut the MDA presumptions, and cases in which the accused person succeeded in rebutting the presumptions on a balance of probabilities. It is difficult to see the relevance of these cases as the constitutionality of the relevant MDA presumptions was not raised or addressed in them.

Both the High Court and the Court of Appeal relied on *Ong Ah Chuan* in holding that the applicants did not even have an arguable case against the constitutionality of the MDA presumptions. This conclusion was, with respect, reached too quickly. In *Jumaat*, the applicants argued 'that the existence of a legal burden on an accused makes it possible for a conviction to

appellant, Koh, the Privy Council stated (ibid [663]): 'His denial of all knowledge of it and his explanation that it must have been planted there by the police informers after his arrival in Singapore were disbelieved by the trial judges who gave cogent reasons for their disbelief.'

[50] *Jumaat* (HC) (n 18) [15].

occur despite the existence of a reasonable doubt on an element of the offence'[51] and this argument was never explicitly made or considered in *Ong Ah Chuan*.

In *Jumaat*, the applicants cited judgements from the highest court in Hong Kong, Canada and England in support of their application. They were considered by the High Court which did not find them to be persuasive; it appears that this was due to some unexplained differences in 'societal values' and in the respective legal frameworks (to which I will return). The foreign cases were not considered by the Court of Appeal which simply proceeded on the basis that the issue of constitutionality has already been settled in *Ong Ah Chuan*.

6. Missed Opportunities and Comparative Reflections

If the presumption of innocence is as fundamental to the administration of criminal justice as Singapore judges have consistently proclaimed it to be,[52] and, secondly, given that Singapore is a signatory to the ASEAN Human Rights Declaration[53] article 20(1) of which proclaims that '[e]very person charged with a criminal offence shall be presumed innocent until proved guilty according to law', and, thirdly, since it is a well-accepted principle that constitutional provisions on fundamental liberties must be given 'a generous interpretation… suitable to give to individuals the full measure of their fundamental rights and freedoms',[54] there should not be any hesitation in acknowledging the constitutional status of the right to be presumed innocent.

Singapore is out of step with developments in other parts of the common law world. What might be standing in the way of alignment? It might be pointed out that the presumption of innocence is not expressly mentioned in the Singapore Constitution whereas it is entrenched in

[51] ibid [50].
[52] See n 24.
[53] *ASEAN Human Rights Declaration* (adopted 18 November 2012) <https://asean.org/asean-human-rights-declaration/> accessed 9 January 2024. Adopted by the Heads of State of ASEAN at Phnom Penh, Cambodia, on 18 November 2012.
[54] *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) 329; endorsed in word though arguably not fully in spirit in *Ong Ah Chuan* (n 17) [23].

Hong Kong,[55] Canada[56] and England.[57] But the presumption of innocence is also not expressly mentioned in the Constitution of the United States where it has, nevertheless, been held to be a component of the right to due process guaranteed under the Fifth and Fourteenth Amendments. In Malaysia, the presumption of innocence has been read into article 5(1) of the Federal Constitution which is identical to article 9(1) of the Singapore Constitution.[58] It is textually open to incorporate the presumption of innocence into the term 'law' in article 9 of the Singapore Constitution on the reasoning that it is a fundamental rule of natural justice. Unfortunately, as we saw, *Ong Ah Chuan* is disappointingly vague on the meaning or import of the presumption of innocence and on its constitutional status in Singapore.

A rebuttable presumption of law that places on the accused person the legal burden of disproving an element of an offence on the balance of probabilities infringes the right to be presumed innocent. This is because the court is permitted to convict the accused person despite reasonable doubt about the presence of that offence element, and hence, reasonable doubt as to his or her guilt. Courts in other jurisdictions have faced up squarely to the logic of this reasoning.[59]

It does not follow from recognising the constitutional status of the right to be presumed innocent that any statutory provision that provides for a rebuttable presumption of law against the accused person must be struck down. Entrenched protection of the presumption of innocence is, so far as I am aware, universally qualified. In Canada, the qualification is express. While the presumption of innocence is guaranteed under section 11(d) of the Canadian Charter of Rights and Freedoms, section 1 thereof provides that this is 'subject to … to such reasonable

[55] In Hong Kong, the presumption of innocence is explicitly entrenched in art 11(1) of the Hong Kong Bill of Rights Ordinance 1990 (Cap 383), art 87 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1997, and art 14(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 as applied by art 39 of the Basic Law.

[56] In Canada, the right to be presumed innocent is explicitly protected under s 11(d) of the Canadian Charter of Rights and Freedoms 1982.

[57] The presumption of innocence under English common law is subject to statutory exceptions: *Woolmington v DPP* (n 13). But this case was decided in the context of a legal system which then did not have a constitutionally entrenched human rights document: *R v Oakes* (n 34) 217; *Alma Nudo Atenza v PP* [2019] 4 MLJ 1. The situation is now different. In the United Kingdom, the rights set out in the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR), are incorporated into domestic law under the Human Rights Act 1988, and art 6(2) of the ECHR guarantees that '[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

[58] *PP v Gan Boon Aun* [2017] 3 MLJ 12 [9].

[59] eg *R v Oakes* (n 34) (Canada); *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; [2006] 3 HKLRD 808 (Hong Kong); *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545 (UK).

limits prescribed by law as can be demonstrably justified in a free and democratic society.' There is no similar explicit restriction of the rights protected under article 9 of the Singapore Constitution. In contrast, other articles such as articles 14(2) and (3) are expressly qualified.[60] There might be the worry that incorporating the presumption of innocence into article 9 would result in an unqualified or absolute right to be presumed innocent and that this would go too far. This fear is misplaced. The right to be presumed innocent in Hong Kong and England are also not expressly qualified in their respective human rights texts.[61] The judiciary has nevertheless allowed derogations of the presumption of innocence in exceptional circumstances. In Hong Kong, the reversal of the onus of proof is justified where (a) it has a rational connection with a legitimate societal aim (the rationality test), and (b) it is no more than necessary to achieve that legitimate aim (the proportionality test).[62] In England[63] and Malaysia,[64] some sort of proportionality approach is also taken.

It is therefore possible for the Singapore Court of Appeal to impose limits on the right to be presumed innocent. One way of achieving this is to reason that fundamental rules of natural justice do not go so far as to demand an absolute right to be presumed innocent. Just as the right is not absolute, Parliament does not have the absolute right to take it away. It was decided in *Ong Ah Chuan* that a legislative provision for a rebuttable presumption of law is not shielded from constitutional challenge under article 9 merely because it was properly passed in Parliament. According to the Privy Council, the argument that there are no limits to the legislative power to enact such presumptions 'involves the logical fallacy of *petitio principii*'.[65] This raises the key question: what is the test for constitutional review of legislative encroachment on the right to be presumed innocent?[66] Unfortunately, *Ong Ah Chuan* is vague on the limits to the power of the legislature to reverse the legal burden of proof and the implications of conviction despite reasonable doubt were not fully considered by the Privy Council. The opportunity to revisit the issue was unfortunately not well utilised in *Jumaat*.

---

[60] A parallel may be drawn with the UK where art 6(2) of the ECHR (n 57), which entrenches the right to be presumed innocent, is not explicitly qualified unlike art 6(1) and arts 8–11. This has not prevented courts in the UK from imposing restrictions on the right.
[61] See n 55 and n 60 above.
[62] *HKSAR v Lam Kwong Wai* (n 59); *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614; [2005] 3 HKLRD 291 [39].
[63] eg *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264, 297.
[64] eg *Alma Nudo Atenza v PP* (n 57).
[65] *Ong Ah Chuan* (n 17) [25].
[66] See generally Mark Tushnet, 'Is There a Doctrine of Proportionality in Asia (or Anywhere)?' in Yap Po Jen (ed), *Proportionality in Asia* (CUP 2020).

Another missed opportunity was the chance to examine the existence of judicial power in Singapore to 'read down' a statutory provision that impermissibly transgresses the presumption of innocence. Where, on an ordinary construction, a provision unjustifiably reverses the legal burden of proof, judges in the United Kingdom are required under section 3(1) of the Human Rights Act 1988, to read the provision and give it effect in a way that is compatible with the presumption of innocence 'so far as it is possible to do so'.[67] A method of attaining compatibility is to 'read down' the provision as having the effect of placing only an evidential burden on the accused person. There is no specific provision in Hong Kong that is similar to section 3(1). Nevertheless, the Court of Final Appeal has held that the same power of 'reading down' a statutory provision – by adopting a 'remedial interpretation' – is implied in the concept of 'judicial power' which is vested in the courts under the Basic Law.[68]

The power to construe modifications, etc, into laws to bring them into conformity with the Singapore Constitution is provided in article 162. Cases have taken conflicting positions on whether this article applies to legislation enacted or brought into force after the commencement of the Constitution.[69] The MDA was enacted after the commencement of the Constitution. Unfortunately, article 162 was not brought to the attention of the Privy Council in *Ong Ah Chuan.*[70] It was also, surprisingly, not alluded to in *Jumaat.* Even if the view prevails that article 162 does not apply to the MDA because it was enacted after the commencement of the Constitution, a further issue that could have been considered in *Jumaat* was whether Singapore should follow the approach taken in Hong Kong and recognise that the power to read down a reverse onus provision is implied in the concept of 'judicial power' vested in the courts under article 93 of the Singapore Constitution.

Due to the lack of space, the above reflections had to be cursory. But it is sufficient, I hope, to suggest this much: whereas a rich and sophisticated body of caselaw has evolved in many regions of the common law world, judicial analysis on the constitutionality of provisions that

[67] Similarly see s 6 of the New Zealand Bill of Rights Act 1990.
[68] *HKSAR v Lam Kwong Wai* (n 59) [72]–[73].
[69] The view that it does not was taken by the Court of Appeal in *Prabagaran a/l Srivijayan v PP* [2016] SGCA 67, [2017] 1 SLR 173 but the contrary view was expressed by the Court of Appeal in *Yong Vui Kong v PP* [2009] SGCA 64, [2010] 2 SLR 192 [27]; cf *Tan Eng Hong v AG* [2012] SGCA 45, [2012] 4 SLR 476 [57]–[64].
[70] As noted by the Court of Appeal in *Yong Vui Kong v PP* (n 69) [27].

reverse the legal burden of proof, such as those found in the MDA, remains under-developed in Singapore.