REVERSING THE BURDEN OF PROOF IN PAPUA NEW GUINEA: CONSTITUTIONAL PRESCRIPTION AND JUDICIAL EXPOSITION**

By

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I INTRODUCTION

Under the Constitution of Papua New Guinea, every person has a right to the protection of the law. In this context, s.37(4)(a) of the Constitution provides that:

> "A person charged with an offence -
>
> > shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge."

This is the so-called presumption of innocence, which, generally speaking, requires that in a liberal democratic society an individual's personal liberty should not be interfered with by government until there is just cause for doing so, and that it is for the government to demonstrate that just cause exists. That such a vital area of any accusatorial or adversary system of criminal justice should be clear to, and understood by, every person would not appear to be a matter for serious debate. Unfortunately, the interpretation put on section 37(4)(a) of the Constitution by the Supreme Court of Papua New Guinea does not promote clarity. The Court appears to have endowed the provision with a variety of meanings.

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** This article first appeared in 1984 LAWSIA Vol.3 No.1, and is reprinted here with the kind permission of the Editors of that journal.

In a series of Constitutional references, the Supreme Court has had occasion to consider the effect of S.37-(4)(a) of the PNG Constitution, and in particular the proviso to the said section. One would be justified in expecting the result to be a well-defined and clear exposition of the limits of the burden of proof that can by law be imposed upon an accused person. But alas, any one who entertained such hopes can only be disappointed, for a closer study of the cases reveals not one but three competing judicial interpretations of the import of S.37(4)(a) of the Constitution.

The purpose of this article has been to seek to isolate the three competing judicial interpretations of the section and to suggest which one best accords with the intention of the framers of the Constitution. It is also suggested that the confusion and controversy surrounding this important matter have arisen because insufficient attention has been paid (both by the Supreme Court and by counsel appearing before it) to the purpose of the constitutional provision, and in particular to the role which it plays in the general framework of the liberal and "autochthonous" constitutional arrangement consciously adopted by the people of Papua New Guinea. Traditions die hard, and the courts do not appear to believe that the common law of England is an exception. It is submitted that it is the Supreme Court's attempts to marry S.37(4)(a) of the PNG Constitution to common law principles which have obfuscated this vital area of the law. In doing the latter, the majority of the Supreme Court appears to equate an entrenched constitutional provision with ordinary statutory provisions and the common law rules of evidence.

The fate of s.37(4)(a) of the Constitution in the hands of the Supreme Court also illustrates the dangers that lie in wait for the all too tempting inclination to employ familiar common law terms to describe what may in all probability be unique concepts.

In suggesting which one of the three competing judicial interpretations of S.37(4)(a) best accords with the intention of the PNG Constitution, this article also argues against the current move to amend the proviso to section 37(4)(a) by the deletion of the words "...which are or would with the exercise of reasonable care be peculiarly within the [the accused's] knowledge", an amendment whose intent is to "make it easier for the prosecution in a criminal matter before a court to require a defendant to the charge to prove particular facts". (See Appendix "F" to **General Constitutional**

Commission Final Report 1983 at p.77). There is also a certain irony in the move to amend the proviso, for, if the analysis undertaken in this article is correct, the proposed amendment will be attempting to achieve by constitutional amendment what the majority of the Supreme Court has already achieved through interpretation.

It is probably necessary to state at the outset that this article is not concerned with the evidential burdens that the accused person bears of raising such issues as provocation, self-defence, sane automatism, drunkenness, necessity, etc. This is because s.47(4)(a) of the Constitution is not addressed to evidential burdens. It could not have been so addressed since the evidential burden is quite clearly a tactical one and its incidence is not determined by substantive law.

II CONSTITUTIONAL REFERENCE 3 OF 1978 RE INTER-GROUP FIGHTING ACT.

In Constitutional Reference No.3 of 1978 re Inter-Group Fighting Act 1977, [1978] PNGLR 421) a a request was addressed to the Supreme Court in terms of Section 18 of the Constitution for a determination of the question whether S.11(3) of the Inter-Group Fighting Act contravened S.37(4)(a) of the Constitution. Section 11(3) of the Inter-Group Fighting Act provided that:

> "A person charged with an offence against this section is guilty of that offence unless he proves, to the satisfaction of the court, that he did not take part in the actual fighting."

The Inter-Group Fighting Act is expressed to be an Act to provide for the suppression of inter-group fighting and the creation of offences in relation to intergroup fighting and for related purposes. Section 11 of the Act created the offence of taking part in an unlawful assembly that becomes involved in inter-group fighting.

By majority decision, the Supreme Court held that S.11(3) of the Act was invalid because it placed upon an accused person the burden of proving that he did not take part in the actual fighting when that particular fact was not peculiarly within his knowledge, but was likely to be common knowledge amongst participants, and thus contravened the provisions of s.37(4)(a) of the Constitution. En route to this holding, the Supreme Court had to examine the ambit of s.37(4)(a) of the Constitution. In particular, the Court had to determine

whether the proviso to the constitutional provision limits the extent to which legislation may legitimately place the burden of proving particular facts on the accused. The general import of the majority judgment was that the constitution does envisage situations in which legislation may place such a burden on the accused. That is, however, subject to the limitation contained in the proviso to s.37(4)(a) of the Constitution, namely the particular facts must be "fact which are, or would with the exercise of reasonable care, be peculiarly within his knowledge". In other words, the majority reasoned that the only permissible departure from the State's duty to prove a person's guilt is confined to cases where the particular facts are peculiarly within the accused's knowledge.

Having so held, the majority considered that the issue resolved itself into one of determining whether what S.11(3) of the Inter-Group Fighting Act sought to require the accused to prove constituted a particular fact peculiarly within the accused's knowledge.

In his dissent, Prentice C.J. was of the view that the proviso to s.37(a) of the Constitution was not at issue in the matter. This was because, on a proper construction of the constitutional provision, the proviso will apply only where the accused is being called upon to prove an ingredient of the offence. Consequently, the learned Chief Justice was of the view that where an Act of Parliament defines the ingredients of an offence and then proceeds to provide a defence, then the constitutional provision is not infringed if the Act places the burden of proving that defence on the accused.

The majority and the minority in Constitutional Reference No.3 of 1978 were therefore split on the issue of the scope of section 37(4)(a) of the Constitution. The majority was of the view that no matter, whether a constituent element of the offence or in the nature of a defence thereto, should be required to be proved by the accused unless such matter is a "fact which [is], or would with the exercise of reasonable care be, peculiarly within [such accused's] knowledge". The dissenting judge argued that that section of the Constitution is limited to preventing the burden of proof being placed on the accused with regard to a constituent ingredient of the offence unless such consitutent ingredient is one which is, or could with the exercise of reasonable care be, peculiarly within the accused's knowledge. If the dissenting opinion correctly reflects the law, then where an Act defines the constituent elements of an

offence and requires the prosecution to prove those elements, then the accused may be called upon to prove any other matters (by way of defence or otherwise) without the "peculiar knowledge" limitation. The accused can therefore be called upon to prove any defence(s) created by the statute.

How did the majority and the minority arrive at these two differing conclusions? The answer lies in their differing attitudes about the extent to which the constitutional provision could be said to reflect the English common law. The majority (Saldanha and Andrew JJ) was of the view that the founding fathers made a conscious decision in entrenching the right contained in S.37(4(a) of the PNG Constitution, and that in their wisdom they made the enjoyment of that right subject only to the "peculiar knowledge" limitation - and none other. That excluded the applicability of any other common law exceptions to the presumption of innocence. Saldanha, J. in shoring up this line of argument, traced the history of the constitutional provision in the following terms:

> 'The history of s.37(4)(a) of the **Constitution** is as follows. It started with the **Human Rights Act,** 1971 s.16(3)(a) of which provided that:
> "16(3) A person charged with an offence (a)shall be presumed innocent until proved guilty according to law".
>
> The Final Report of the Constitutional Planning Committee Pt. 1 at p.5/1/24 par.6(3) (a) recommended that the following provision should be incorporated in the **Constitution,** that:
> "6(3) A person charged with an offence (a) shall be presumed innocent until proved guilty according to law, provided that a law may place upon a person charged with an offence the burden of proving particular facts."
>
> The provision ultimately incorporated in s.37(4)(a) of the **Constitution** is in the following terms:
>
> "37(4) A person charged with an offence (a) shall be presumed innocent until proved guilty according to law, provided that a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge,"

> It will be noticed how the Human Rights Act provided for just the presumption of innocence, that the Constitutional Planning Committee elaborated on that by recommending that a proviso should be added to the effect that the burden of proving particular facts should be placed on the accused and s.37(4)(a) of the Constitution narrowed down the proviso by allowing this burden to be placed upon the accused only in cases where particular facts were peculiarly within his knowledge. It is necessary therefore to be strict in the interpretation of s.37(4)(a) of the Constitution and particularly careful not to assume that there are facts peculiarly within the knowledge of the accused when this may not be so.' ([1978] PNGLR 421, 428.)

His Honour concluded by stating that the court was dealing with a substantive constitutional right, and that the Supreme Court "should be vigilant to ensure that there is not the slightest infringement of any of these rights and freedoms". In similar vein Andrew J said:

> 'As I have already indicated there are many cases where a statute shifts onus from prosecution to defence. They must be read however in the light of S.37(4)(a) of the Constitution which has adopted the common law concept of 'facts peculiarly within his knowledge ...
>
> The narrowness of its application in the past in the common law must be construed in the context of the whole of S.37(4)(a). The importance of the section is seen by the fact that it is contained in Division 3 (Basic Rights) of the Constitution and in Sub-division B thereof (Fundamental Rights). The presumption of innocence until proof of guilt according to law is therefore a basic and fundamental right and the proviso in the remainder of the section shows that this right may only be varied in exceptional circumstances.' ([1978] PNGLR 421, 434-5.)

The Chief Justice, in his dissenting opinion, appeared to be clearly of the view that the proviso was not intended to operate to exclude the other exceptions to the general common law concept of presumption of innocence.

In the opinion of Prentice CJ, therefore, the other situations e.g. defence of insanity and the gamut of statutory 'reversals'of the onus of proof, in which the

common law recognised the reversal of the onus of proof, were left intact by the proviso to section 37(4)(a). Consequently, even if the provisions of s.11(3) of the Inter-Group Fighting Act could not be validated by reference to S.37(4)(a) of the Constitution, they were nevertheless valid as coming within the "statutory" exception recognised at common law. The learned Chief Justice was not impressed by the suggestion that the Constitution intended to sweep aside the other common law exceptions and thereby to recognise only the "peculiar knowledge" exception. The learned Chief Justice's arguments may be summarised thus:

(a) S.37(4)(a) of the PNG Constitution only envisages the situation where the accused is being called upon to prove a constituent ingredient of an offence. In other words, the Constitution enables Parliament to require an accused person to prove a constituent ingredient of an offence, but limits this to only those facts of a constituent ingredient which are peculiarly within the knowledge of the accused.

(b) Other matters which do not form constituent ingredients of an offence fall outside the scope of the proviso to S.37(4)(a) of the Constitution, and are governed by English common law.

(c) At common law, it has always been settled law that a statute can by express provision, impose the burden of proving any matter on the accused. This is not subject to the "peculiar knowledge" test.

(d) The result was that S.11(3) of the Inter-Group Fighting Act 1977 did not contravene S.37(4)(a) of the Constitution since it did not require the accused to prove a constituent ingredient of the offence. Additionally, or alternatively, the section was valid under the common law exception which allows statute, by express provision, to require an accused person to prove any matter notwithstanding that such matter is not peculiarly within the accused's knowledge.

III SUPREME COURT REFERENCE No.1 OF 1980 POLICE OFFENCES ACT.

Chief Justice Prentice's view of the scope of S.37(4)(a) received a clearer exposition in the judgment of Greville-Smith J., in Supreme Court Reference No.1 of 1980, ([1981] PNGLR 28) in which the constitutionality of s.22A(b) of the now repealed Police Offences Act (Papua) 1912 was at issue. The Supreme Court was unanimously of the view that the legislation in question was not unconstitutional because it required proof of a matter that was peculiarly within the accused's knowledge. The Court was, however, divided on the issue of the significance of the proviso to S.37(4)(a) of the Constitution. Greville-Smith J. reasoned along lines similar to those adopted by Prentice CJ in Constitutional Reference No.3 of 1978 (above). He said:

> 'The purpose of the insertion of Section 37(4)(a) of the Constitution of the words "according to law" could not have been to vacate expressly, subject to the proviso contained therein, this fundamental and highly important field to the ordinary or other law; and its presence could not have been intended merely to preclude a "literal" interpretation of the preceding words without providing anything else in its place. It seems clear to me that the intention of the Legislature must have been, subject to the proviso contained in the section, to adopt for the purposes of the Constitution the concept of the so-called presumption of innocence as it stood in the common law of England at the time of coming into force of the Constitution, a concept with which, in its generality, the framers of the Constitution, and the people of this country were familiar, and which had in its generality been in force in this country for a very long time. In my opinion "according to law" means in the context of Section 37(4)(a) according to the common law in England which embodied that concept, and it was appropriate to use the expression "according to law" because the relevant law, was part of the common law in England which simultaneously with the coming into effect of Section 37(4)(a) (together with the rest of the Constitutional) became part of the "underlying law" of this country by way of Section 20(2) of the Constitution and Schedule 2.2(1) thereto. It is not that that part of the "Common Law in England" of which I speak became "the law" by way of Section 20(2) and Schedule

> 2.2(1), it became so directly by way of Section 37(4)(a) of the Constitution. In the absence of Section 37(4)(a) it would have become so by way of Schedule 2.2(1) ... It will be seen that Section 37(4)(a) was thus designed implicitly to accommodate and also expressly to accommodate certain shifts in the onus of proof of factual ingredients of offences or, putting it somewhat differently, in the persuasive proof of ultimate facts. In my view it was not the intention or effect of the proviso of Section 37(4)(a), that part of the section commencing with the words" ... but a law may place ...", to cut down the law so as to confine such shifts in the onus of proof as have been discussed herein to shifts in relation to the onus of proof of the sorts of facts described in the proviso.' **([1981] PNGLR 28, 32, 37.)**

His Honour then reviewed the English cases dealing with the common law concept of presumption of innocence, and concluded that:

> 'In my opinion, as a result of Section 37(4)(a) the law in Papua New Guinea relating to the proof of guilt in criminal cases is that the onus is on the prosecution to prove each element of the offence charged beyond reasonable doubt, subject to the following exceptions; namely;
>
> (a) In the case of a defence of insanity, where there is a presumption of sound mind until the contrary is proved;
>
> (b) Where an enactment prohibits the doing of an act save in special circumstances, or by persons of special classes, or with special qualification or with the licence or persuasion of specific authorities, then once the prosecutor has proved beyond reasonable doubt the doing of the act the burden is on the person charged to bring himself within the exception or proviso, that is, to prove that he was entitled to do the prohibited act, independently of whether the facts he must prove to do so are, or would with the exercise of reasonable care be, peculiarly within his knowledge.

(c) In the case of an enactment which places upon the person charged the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge.

In the case of each exception the burden that rests on the accused is the legal , or as it is sometimes called the persuasive burden, not an evidentiary burden, and it is a burden of satisfying the court on a balance of probabilities, of persuading the court, on the probabilities, of the matter alleged by way of defence.' ([1981] PNGLR 28, 38- 9.)

In his judgment, Miles J (with whom Andrew J agreed) pre-ferred to rest his conclusion that the provision in question was valid on the narrower grounds.

(1) that what the statute required the accused to prove was matter peculiarly within his knowledge, and

(2) additionally or alternatively, that "where the offence is defined without reference to the matter on which the accused bears an onus, there will simply be no room for the application of the proviso to S.37(4)(a) ([1981] PNGLR 28, 47.)

However, Justice Andrew position on the interpretation of constitutional provision has been vacillating, for, as will be seen later, he also subsequently agrees with Miles J in the later's interpretation which, it is to be submitted later, is not the same as Saldhana J's.

Miles J emphatically rejected the proposition, first adumbrated by Prentice CJ in Constitution Reference a No.3 of 1978 and adopted more explicitly by Greville-Smith J in the instant case, that it was the intention of the founding fathers to adopt for the purposes of the Constitution the concept of the socalled presumption of innocence as it stood in the common law of England at the time of the coming into force of the Constitution. According to Miles J that proposition would be untenable because:'

'It would not be a fair and liberal interpretation of the proviso to s.37(4) to say that it is mere surplusage, that it merely makes explicit what was implied in any event without the proviso. The history of the section as outlined by

> Saldhana J. in **Constitutional Reference No.3 of 1978** is sufficient answer to that.' **([1981] PNGLR 28, 46.)**

Miles J appeared, however, to be unwilling to pursue the argument to what would seem to be its logical conclusion, that the framers of the **Constitution** made a conscious and deliberate decision to secure to the accused the substantive right to be presumed innocent until proved guilty by the prosecution **with only one class of exception**, that is in the case of particular facts that are peculiarly within his knowledge. [We shall return to this line of reasoning later in this article]. His Honour was concerned that this result would be undesirable.

'A literal interpretation of the proviso to s.37(4)(a) of the Constitution would yield results which the makers of the Constitution could hardly have intended. Suppose that a law established a curfew and provided that any person found in a public place between sunset and sunrise is guilty of an offence. (Leave aside posible constitutional objection under Constitution Ss.47 and 52). Suppose further that the harshness of this hypothetical curfew law were reduced by a proviso that a person should not be guilty of the offence if he proved that the date on which he was found in the public was a date on which the operation of that law was suspended by the Minister. The fact of the suspension would not be a matter peculiarly within the knowledge of the person charged. Yet it would be strange indeed if s.37(4)(a) which is part of a section broadly intended to confer an unqualified right to protection of the law for all people - where to allow the legislation in its absolute form but to strike it down where it provided for a defence, on the ground that the defence involved the proof of a fact not peculiarly within the knowledge of the person charged.' **([1978] PNGLR 28, 46.)**

The answer which suggested itself to Miles J was phrased thus:

> 'The way out of this impass may be found by giving proper weight to the words "offence ... according to law" as they appear in S.37(4)(a). The word "law" here encompasses all the laws of Papua New Guinea as set out in **Constitution** s.9 and includes the underlying law. As already indicated, it is a principle of the underlying law that the presumption of innocence continues until a court is satisfied beyond reasonable doubt of the guilt of the accused. The court

> must be so satisfied in relation to all those elements or matters which to go constituting the offence charged. The effect of sub-s.(2) of Constitution s.37 is that every offence (except contempt of court) must be defined by a written law. Thus a person is presumed innocent until the prosecution has proved against him beyond reasonable doubt the elements of the offence as defined in a written law. If the proviso to s.37(4)(a) is taken to apply only to the essential ingredients of the offence as they are defined and required to be proved according to law, the difficulty...Where the offence is defined without reference to the matter on which the accused bears an onus, there will simply be no room for the application of the proviso to s.37(4)(a).'([1981] PNGLR 28, 47.)

As has been noted, Andrew J agreed with Miles J in this interpretation of the import of s.37(4)(a) of the Constitution. At first glance, this interpretation appears to be similar to that of Prentice CJ in Constitutional Reference No.3 of 1978. On closer examination, however, nothing could be further from the truth, for they lead to two different legal consequences:

> First Approach: Prentice CJ.
>
> the approach of Prentice CJ postulates that where the proviso to S.37(4)(a) does not apply (i.e. matters that do not form constituent ingredients of an offence) the accused can be required to prove only those matters that by operation Constitution Sch. 2.2, the English common law recognized. These would be those referred to by Greville-Smith J in Supreme Court Reference No.1 of 1980 [15]

> '(i) in the case of a defence of insanity, where there is a presumption of sould mind until the contrary is proved; and
>
> (ii) where an enactment prohibits the doing of an act save in specified circumstance, or by persons of specified classes, or with special qualification or with the licence or persuasion of specified authorities, then once the prosecutor has proved beyond reasonable doubt the doing of the act the burden is on the person charged to bring himself within the exception or provisio,

> that is, to prove that he was entitled to do the prohibited act, independently or whether the facts he must proves to do so are, or would with the exercise of reasonable care be, peculiarly within his knowledge.
>
> Second Approach: Miles and Andrew JJ.
>
> What Miles J (with the concurrence of Andrew J) was gesturing towards would widen the dragnet by granting to Parliament an unfettered power to place the burden of proof on the accused person, in cases not falling within the ambit of the proviso to the Constitution S.37(4)(a) (i.e. matters that do not form constituent ingredients of an offence). This is so because according to this line of reasoning, to determine whether a matter falls outside the scope of the proviso to S.37(4)(a), the test is "whether the enactment against which it is measured calls for a finding of guilt of the accused when, at the conclusion of the case, and upon the evidence, if any, adduced by Crown and by accused, who has also satisfied any intermediate burden of adducing evidence, there is reasonable doubt of culpability..." ([1981] PNGLR 28, at p.48, quoting with approval Lasking J (as he then was) in Regina v. Appleby (1971), 21 DLR (3d) 325 at 337.)

This clearly provides for a wider incidence of the burden of proof on the accused person than the English common law recognized. (It also, incidentally, tends to confuse the ultimate burden of proof with the burden of proof on particular issues which the proviso to S.37-(4)(a) appears to be aimed at). It also begs the question at issue because the problem of interpretation is not directed at the ultimate burden (which is adequately catered for by the main part of S.37(4)(a)) but at what exceptions to it are permissible in view of the proviso to S.37(4)(a).

IV SUPREME COURT REFERENCE No.2 OF 1981 SUMMARY OFFENCE ACT.

In Supreme Court Reference No.2 of 1980, ([1981] PNGLR 50,) reasserted his earlier interpretation with the concurrence of Kearney Dep. CJ and Andrew J. It may be observed in passing that this Reference represents the

only one in the line of cases interpreting S.37(4)(a) in which the Supreme Court was unanimous in its interpretation of the section. Kearney Dep. CJ said-:

> 'The main thrust of Constitution s.37(4)(a) is to place upon a prosecutor the burden of providing the guilt of a person charged with an offenc. In my opinion the phrase "according to law" refers to the whole body of law in the country, as exhaustively defined in Constitution s.0; it includes both the statute law and the underlying law.
>
> By the underlying law that burden on the prosecutor is discharged only when he proves beyond a reasonable doubt that the defendant is guilty; that is, that the defendant is criminally responsible for the offence charged.
>
> Constitution s.37(2) requires every offence (except contempt of court) to be define by a written law. To define an offence is to specify its elements.
>
> A prosecutor must therefore prove against a defendant beyond a reasonable doubt every element of the offence charged, as defined by the law creating that particular offence... but it is clear, I think, that the proviso is intended to ensure that, as regards laws which place an onus of proof on a person charged with an offence, only such of those laws as meet the requirements of the proviso are valid, and are "law" within the phrase "according to law". In my opinion, such a law cannot require a defendant to prove against hemself facts which establish any element of the offence as defined, because that would be inconsistent with the presumption of innocence which is the main thrust of Constitution s.37(4)(a). But if such a law provides an excuse of justification or defence, which assumes the existence of the facts which establish the elements of the offence as defined, and is established by proof of additional facts" particular facts" - of a special character, that is, facts peculiarly within the defendant's knolwdge, the reverse onus is valid by virtue of the proviso.

It is clear from the underlying law that the defendant discharge ssuch a burden of proof, by proof upon the balance of probabilities.' ([1981] PNGLR 50, 53-4.)

V SUPREME COURT REFERENCE No. 1A OF 1981 MOTOR TRAFFIC ACT.

The Supreme Court had an opportunity a year later, even if obiter, to assist to tidy up the law on the point in Supreme Court Reference No.1A of 1981, ([1981] PNGLR 122) when S.37(4)(a) was again at issue. However, the Court's main concern in that case with S.37(4)(a) related to the first part, not the proviso. Greville Smith and Kapi JJ concluded that the proviso really adds nothing to the main part of the section; Kidu CJ simply quoted from the reported judgments of Greville-Smith, Miles and Kearney without comment; and Greville-Smith did not allude to or discuss the various interpretations of s.37(4)(a). Kearney D-CJ expressed disapproval of the Prentice/ Greville-Smith interpretation of the phrase "according to law". Justice Kapi also made remarks obiter on s.37(4)(a) which were similar to those of Miles J and which suggest that the Prentice and Saldanha approaches did not find favour with him. Andrew J simply agreed without comment with the judgments of the Chief Justice and Deputy Chief Justice, although it may be assumed that he still adhered to his earlier view which supports Miles J's approach.

VI WHAT IS THE LAW? THREE APPROACHES.

Eight judges have had occasion in four different references to the Supreme Court between 1978 and 1982, to grapple with the meaning and scope of s.37(4)(a). The result unfortunately is a maze of confusing expositions of the meaning of the section. I have endeavoured to isolate these and the outcome is that the Supreme Court has given **three** differing interpretations of the section.

Briefly stated, the three approaches are:

(1) Saldhana J's view (expressed in **Constitutional Reference No.3 of 1978**)) that **no matter,** whether a constituent element of the offence or in the nature of a defence thereto, should be required to be proved by the accused **unless**

such matter is a "fact which [is], or would with the exercise of reasonable care be, peculiarly within [the accused's] knowledge";

(2) Chief Justice Prentice's view (first outlined in Constitutional Reference No.3 of 1978, and given a clearer exposition by Greville-Smith J in Supreme Court Reference No.1 of 1978), that the proviso only prevents Parliament from calling upon the accused person to prove a constituent element of any offence unless the facts relating to that element are, or would with the exercise of reasonable care be, pecululiarly within such accused person's knowledge. According to this view, other matters which do not form constituent elements of an offence fall outside the scope of the proviso to S.37(4)(a) of the Constitution, and are governed exclusively by English common law by operation of Schedule 2.2 of the PNG Constitution.;

(3) The view of Miles J that only the constituent ingredients of offences are governed by the proviso to S.37(4)(a), with the result that any other matters that do not involve proof of constituent elements of an offence fall outside the scope of the constitutional provision. With regard to matters falling outside the scope of the proviso to S.37(4)(a), this view holds that Parliament's competence to place the burden of proof on an accused person is not limited to the exceptions recognised by English common law. Indeed, Kapi J gave an indication of the breadth of this view when he said:

> 'The expression "according to law" in section 37(4)(a) ... simply means "according to the laws of Papua New Guinea". One has to go to these laws, which are set out under Section 9 of the Constitution' ([1981] PNGLR 265 at 285-6.) (see also Supreme Court Reference No.4 of 1980 re Somare ([1981] PNGLR 265 at 285-6.)

The Laws of Papua New Guinea, according to Section 9 of the Constitution, include Acts of Parliament and the underlying law. Underlying law embodies principles established under Schedule 2 of the Constitution; so it includes

adoption of custom under Schedule 2.1, adoption of common law principles under Schedule 2.2, creation of new principles under Schedule 2.3 and the development of these principles under Schedule 2.4.

It will be noticed that according to this view, the accused is exposed to a greater incidence of the burden of proof than under either of the other two views outlined above.

VII THE SOLUTION.

The presumption of innocence as embodied in S.37(4)(a) of the Constitution is a vital pillar of Papua New Guinea's criminal justice system. Lord Sankey described it as the "golden thread" that runs throughout the web of the criminal law Woolmington v DPP [1935] A.C. 462 at 482. Together with the right to silence or privilege against self-incrimination, the presumption of innocence reflects a number of fundamental values and aspirations which have been consciously built into the Constitution by the people of Papua New Guinea. Adopting what Justice Goldberg of the United States Supreme Court said in Murphy v Waterfront (378 U.S. 52 at 55 (1964)), these include:

- a preference for an accusatorial system of criminal justice;

- a sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him;

- a sense of fair state-individual balance requiring the government in its contest with the individual to shoulder the entire load because the government ought to have at its disposal the investigatory and prosecutorial apparatus of the state;

- a respect for the inviolability of the human personality, thus assuring that even persons suspected of crime are treated in a manner consistent with basic respect for human dignity.

For these foregoing reasons, it is crucial that the law on so vital a right should be susceptible of clear exposition. This means that the present situation in which there are no less than three competing judicial

interpretations of s.37(4)(a) of the PNG Constitution is a matter for serious concern. Which of these three interpretations correctly reflects the spirit of the law? It is to this question that this last part of the paper shall be devoted.

The two approaches of Prentice CJ and of Miles J, it is respectfully submitted, do not reflect the spirit of the Constitutional provision and would render the right to a presumption of innocence nugatory. At least eight reasons can be advanced in support of this submission:

(1) it is not immediately apparent, both from the wording of S.37(4)(a) and the Final Report of the Constitutional Planning Committee, that the proviso to the section was intended to have application only in cases where the accused is called upon to prove facts relating to the constituent ingredients of an offence.;

(2) in respect of Prentice CJ's view, at English common law statutory "reversals" of the burden of proof were not subject to challenge because of the supremacy of parliament. In Papua New Guinea, parliament is not supreme - the Constitution is. In this context it is important to remember the cautionary words of Prentice D CJ (as he then was) himself, in Constitutional Reference No.1 of 1977, where he said: "one reminds oneself that the Constitution neither relies upon nor springs from any source but the will of the people of Papua New Guinea, and that every effort should be made to avoid the intrusion into its interpretation of extraneous ideas or vestigial paternalism from the preceding colonial period", ([1977] PNGLR 362, 273 emphasis mine). Therefore, in the PNG context, even if the English common law had a role to play in the matter, it could not be an unfettered role - it would have to be one that is not inconsistent with an express constitutional provision;

(3) the history of the provision clearly demonstrates a deliberate decision to subject all "reversals" of the burden of proof to the "peculiar knowledge" test. As Saldanha J remarked in **Reference No.3 of 1978**, it will be noticed how the Human Rights Act 1971 provided for just the presumption of innocence, that the Constitutional Planning Committee elaborated on that by recommending that a proviso should be added to the effect that the burden of proving particular facts should be placed on the accused and S.37(4)(a) of the Constitution narrowed

down the proviso by allowing this burden to be placed upon the accused only in cases where particular facts were peculiarly within his knowledge;

(4) Miles J's view would interpret the right out of existence, because that view begins by limiting the proviso to ingredients of an offence, and then concludes by asserting that the accused can be called upon to prove matters in a wider variety of circumstances than even the English common law permitted;

(5) either of those views would undermine the accused's right to silence;

(6) Miles J's proposed test blurs the distinction between the ultimate burden of proof which undoubtedly lies on the prosecution and the burden of proof on particular facts which may be placed by law on an accused person. The proposed test is relevant only to the main part of S.37(4)(a), but is not only inappropriate but also irrelevant to a consideration of the proviso;

(7) both views would equate a supreme constitutional provision with ordinary statutory provisions and the common law rules of evidence, although it is clear law in PNG that where either of the latter is inconsistent with the provisions of the constitution, the constitutional provisions prevail;

(8) the Supreme Court has been appointed the guardian of the people's fundamental rights and freedoms as defined in the Constitution. It should be vigilant to ensure that there is not the slightest infringement of any of these rights and freedoms. If either of these interpretations prevailed, it would serve as the thin end of the wedge in the erosion of those rights and freedoms.

This writer is of the opinion that Saldanha J's interpretation best accords with the intention of the PNG Constitution.[1] Mr Saldanha J's view is that S.37(4)(a) of the Constitution requires the prosecution to shoulder the burden of proof in all criminal trials, and that the section permits the burden of proving particular matters to be placed on the accused only in cases where particular facts are peculiarly within his knowledge. All other "reversals" of the burden of proof, including the ones recognised under English common law, are therefore

permissible to the extent that they satisfy the "peculiar knowledge" test. This interpretation of S.37(4)(a) is to be preferred for a number of reasons:

(1) It is in accord with the plain meaning of the words used in the Constitution.

(2) It does not compel the drawing of the inference that the proviso to the section is mere surplusage, a proposition which is not supported by the canons of interpretation or by any policy considerations.

(3) It gives effect to the fundamental values and aspirations embodied in the Constitution.

(4) By making a clean break with English common law, it reflects the autochthonous character of the PNG Constitution.

(5) It is consistent with the other rights which the Constitution guarantees to an accused person, particularly the right to silence, a right which is buttressed by the rule that even where an accused person makes a confession of guilt to counsel the latter is under no duty to withdraw from the case and is entitled to put the prospection to the proof of its case. (See Nai'u Limagwe v The State ([1976] PNGLR per Frost CJ at p.397, and per Prentice D.C.J. p.403).

(6) The relevance of this approach to the circumstances of Papua New Guinea lies in the facts that for the bulk of the population the law is a mystery and few if any suspects do not know the intricacies of the law sufficiently to appreciate what it is that certain statutes may require them to prove.

A further support, for Saldhana J's interpretation, which the records indicate was not canvassed either by counsel or the court, was the climacteric effect of the Eleventh Report of the English Criminal Law Revision Committee, (comnd. 4991) a report which was published in 1972, before the Constitution came into force. The thrust of s.37(4)(a) suggests that members of the Constituent Assembly and the draftsman were familiar with the contents of that report and that that report's recommendations regarding the incidence of the burden of proof on the accused person found favour with those concerned with hammering out the Constitution. In their Report (para.140), the English Criminal Law Revision

Committee "strongly" recommended that, "both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only", and that all such burdens should be limited to matters peculiarly within the knowledge of the accused. The Committee reached this conclusion on the grounds:

(a) that "in the typical case where the essence of the offence is that the offender has acted with blameworthy intent, and the defence which the accused has the burden of proving implies that he had no such intent but acted wholly innocently, it seems... repugnant to principle that the jury or the court should be under a legal duty, if they are left in doubt whether or not the accused had the guilty intent, to convict him", (para. 140(i));

(b) that the course suggested by the Committee would be in accordance with what Viscount Sankey L.C. in **Woolmington** called the "golden thread" of the criminal law that "it is the duty of the prosecution to prove the the prisoner's guilt; and

(c) that "the real purpose .. of casting burdens on the defence in criminal cases is to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation. This applies especially to cases ... where the defence relates to a matter peculiarly within the knowledge of the accused", (para. 140 (iv)).

The recommendations of the English Criminal Law Revision Committee would therefore have limited the incidence of the burden of proof on the accused to only those matters that are peculiarly within the knowledge of the accused. Furthermore, all such burdens would be evidential only, which would mean that:

> 'The accused, either by cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes [the matter] **a live issue fit and proper to be left to the jury.** But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot

> be absolved on the grounds of the alleged [matter].' (Per Edmund Davies J (as he then was) in R v Gill [1963] 2 All E.R. 688 p.691.

In this sense, what would be required of the accused by the evidential burden would be some evidence in support of the alleged matter before the tribunal can consider it - the only burden laid upon the accused in this respect is to collect from the evidence enough material to make it possible for a reasonable tribunal to acquit.

It is the opinion of this writer that the framers of the Constitution were familiar with the contents of this Report, that they considered that the Report's recommendations regarding the burden of proof coincided with the liberal Constitutional framework they proposed to adopt for PNG, and that they therefore effected a consequential change to the original proposals of the Constitutional Planning Committee to give effect to what they assumed was the direction in which English law was going to move. This finds support in the history of the provision as traced by Saldanha J in Reference No.3 of 1978. ([1978] PNGLR 421, 428. Frurther support is provided by the decision of the General Constitutional Commission not to support current moves to amend Sections 37(4)(a) by the deletion of the words "which are, or would with the exercise of reasonable care be, peculiarly within his knowledge" (See General Constitutional Commission Final Report' 1983, pp. 77-80, Appendix "F"). The GCC Report is opposed to any attempts to alter the Basic Rights provisions of the Constitution, including S.37(4)(a).

The expressed motive behind the current move to amend the section is stated to be to "make it easier for the prosecution in a criminal matter before a court to require a defendant to the charge to prove particular facts". The argument that the proposed amendment would make the prosecution's job easier is not only unconvincing but also serves to undermine the adversary system of criminal justice by reducing one of its main pillars to a pile of builders' debris.

It cannot be too strongly urged that a system of criminal justice that trusts habitually not to the independent proof of an accused person's guilt but to increasingly requiring the accused to establish matters relevant to the subject-matter of his trial can only suffer morally thereby. For reasons advanced above, any such incipient erosion of the constitutional right to be

presumed innocent should be discouraged. The result of such erosion may well be to render many of the guarantees built into Section 37 worthless, not to mention the resultant incongruity with the system of constitutional guarantees of rights which the people of Papua New Guinea have chosen to adopt.

ENDNOTES

1. In expressing preference for this interpretation of s.34(4)(a), the present writer is fully cognisant of the fact that there is considerable room for debate as to the propriety of limiting Parliament's power in this manner, but that question is not only outside the scope of this paper but also cannot be adequately dealt with here for reasons of space. See, on the general issue of the desirable limits for reversing the burden of proof, JBK Kaburise, "On Transferring the Burden of Proof To The Accused: A Comparative Analysis". (Paper read at the 1984 New Zealand Triennial Law Conference, Rotorua, New Zealand, April 1984, in New Zealand Law Conference Proceedings 1984. Vol.2 p.109). In that paper, the point is argued that the choices available to a society are legion and those choices are influenced by a number of factors. It is also argued in that paper that it is now a jurisprudential commonplace that there is no satisfactory test for allocating the burden of proof on any given issue, but that the best way of shoring up the right to be presumed innocent is to completely remove the power to require the accused person to carry the burden of proof (properly so called) on any matter, and that the evidential (or tactical) burden borne by all parties to litigation is sufficient to meet any concerns of those who would have the accused bear the burden of proof (properly so called) on certain matters.