THE COURT OF APPEAL

[2014 No. 80]

The President
Birmingham J.
Sheehan J.

BETWEEN

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
PROSECUTOR/RESPONDENT

AND

FRED FORSEY

APPELLANT

JUDGMENT of the Court delivered by the President on 29th July 2016

Background and Issues

1. The appellant, Mr. Fred Forsey, was convicted on six counts of corruption by jury verdict at Waterford Circuit Criminal Court on 18th May 2012. The charges were brought under the Prevention of Corruption Acts 1906 to 2001. On 27th June 2012, he was sentenced to six years' imprisonment on each count, to run concurrently, but with the final two years suspended in respect of each count. The court of trial had refused leave to appeal but, having changed his legal advisers, Mr Forsey successfully applied to the Court of Criminal Appeal on the 20th October 2014 for an extension of time in which to appeal and the matter ultimately came on for hearing before this court. By the time the appeal came for hearing, Mr. Forsey had been released after serving the full sentence less remission.

2. The prosecution case against Mr. Forsey was that between late August 2006 and the end of that, year Mr. Forsey, as an elected member of Dungarvan Urban District Council in County Waterford, corruptly received a series of three payments totalling €80,000 from Mr. Michael Ryan, a person interested in a planning application for development of land at Ballygagin, County Waterford. The lands were situated in the functional area of Waterford County Council, so it had responsibility for the application. Dungarvan UDC's administrative area was close by, but it had no role in relation to the planning application. The criminal conduct alleged was that he behaved corruptly in trying to persuade officials and councillors in Waterford County Council to grant permission for the proposed development, and when that was refused, to alter the zoning of the land in the County Development Plan. The prosecution also charged that Mr. Forsey sought to get his own Council, Dungarvan UDC, to bring into its control the Ryan lands that were to be developed, a process that would have required consent from Waterford County Council, but first, Dungarvan UDC would have to seek to achieve that result. He was indicted on two charges each in respect of the three payments that Mr. Forsey received from Mr. Ryan, reflecting his endeavours first with Waterford County Council and then with Dungarvan UDC.

3. The charges were laid under s. 1 of the Prevention of Corruption Act 1906, as inserted by s. 2 of the 2001 Act. It provides that an agent or any other person who corruptly accepts any gift consideration or advantage as an inducement to doing any act in relation to his office or position shall be guilty of an offence. Mr. Forsey was an agent within the meaning of the 2001 Act, because he was the holder of a public office within the meaning of the Public Bodies Corrupt Practices Act 1889. Another provision of the 2001 Act that is central to the appeal is s. 4 which provides for a presumption of corruption in proceedings against the holder of a public office, as above defined, when it is proved that he received any gift, consideration or advantage from someone having an interest in the discharge by the office holder of specified functions. The benefit is deemed to have been received – and given – corruptly as an inducement or reward "unless the contrary is proved." The section applies to any functions of a member of a body that is part of the public administration of the State under the Planning and Development Act, 2000: section 4(2).

4. The prosecution relied on the presumption at the trial, contending that it imposed on the accused, Mr. Forsey, an obligation to disprove corruption if the jury were satisfied beyond reasonable doubt that Mr. Ryan had a relevant interest in the discharge of the accused's functions; that he made the payments to Mr. Forsey and that Mr. Forsey was an agent within the meaning of the Acts. This last point was not in dispute and neither were the payments disputed. Mr. Forsey's defence may be summarised as being that: (a) he did not have a function in the planning decisions; (b) he was a supporter of the proposed development; and (c) the money that Mr. Ryan gave him was a loan or a series of loans which he had agreed to repay and which were the subject of a written agreement signed by him and Mr. Ryan.

5. Mr. Forsey appeals on two grounds. First, he argues that he ought not to have been convicted because the development that he was accused of corruptly promoting was not within the jurisdiction or administrative zone of his own Council, Dungarvan UDC, but in the area controlled by Waterford County Council. His role as an elected member of Dungarvan UDC did not give him any function in relation to a planning application made to Waterford County Council for a proposed development in its area of responsibility. The other ground of appeal is that the trial judge misdirected the jury as to the burden of proof that arose under s. 4 of the 2001 Act. Mr. Forsey says that the prosecuting counsel made the same error in his closing address to the jury.

6. Mr. Forsey's case is that the judge was wrong in charging the jury that the accused carried the burden of proof, when the statutory factual foundation was laid, of proving a non-corrupt motive or disproving the statutory presumption of corruption on the balance of probabilities. This question of the reverse burden of proof has been the subject of a great deal of discussion in judicial and academic circles in recent years and it is the principal issue on this appeal. The point now advanced on Mr. Forsey's behalf was not raised at his trial. Prosecution and defence counsel proceeded on the basis that the statutory presumption applied in the manner expressed by the trial judge in charging the jury.

7. The Director of Public Prosecutions responds to the appeal first by rejecting the grounds now put forward. She submits that the trial judge correctly instructed the jury in regard to s. 4 and that the activities of the accused that were proved in evidence were

within the behaviour proscribed by section 1. Counsel argues in addition that it is not permissible at this stage to introduce entirely new grounds that were not even mentioned during the trial, relying on Cronin's case in that regard - DPP v. Cronin (No.2) [2006] IESC 9, [2006] 4 I.R. 329. Alternatively, or in addition, Counsel proposes that this is a proper case in which to apply the proviso in the event that the court is of the view that one or other point advanced by the appellant may be correct in law.

8. The questions arising on the appeal are as follows:

> (1) Was the trial judge correct in his interpretation of section 4?
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> (2) If so, was that interpretation in conformity with the Constitution, established Irish and/or common law or the European Convention on Human Rights?
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> (3) Were the activities of the accused as pleaded in the indictment and proven at trial acts done by him in relation to his office or position as a member of Dungarvan UDC?
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> (4) Is the appellant entitled to make these points on appeal when they were not mentioned at the trial?
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> (5) If the court is satisfied that the appellant is or may be correct in either of the submissions he makes, is it a proper case for the application of section 3 (1) (a) of the Criminal Procedure Act, 1993 to affirm the conviction nevertheless, if it considers that no miscarriage of justice has actually occurred?
>
> (6) If the answer to any of these questions is No, what consequences follow?

Appellant's Submissions

Ground 1: Misdirection on the Reverse Burden

10. It is not suggested that the prosecution were not entitled to rely upon the presumption of corruption in this case (save for the argument set out in relation to the second ground of appeal). Rather, it is submitted that both the trial judge and the prosecution misdirected the jury in relation to same. The most pertinent authority in this regard is *DPP v. Smyth* [2010] 3 I.R. 688. The reasoning of the Court Criminal Appeal in Smyth was endorsed and adopted by this Court in *DPP v. Tuma* [2015] IECA 63. Smyth was substantially about the same issues as the earlier case of *DPP v. Byrne, Healy & Kelleher* [1998] 2 I.R. 417 which related to the reverse burden provision in s. 29 of the Misuse of Drugs Act 1977. The difference was that on this appeal, there was a body of authority from the European Court of Human Rights and the UK to suggest that a reverse burden which cast an obligation on an accused to disprove a factual matter which was an essential part of the offence with which he was charged might amount to an unwarranted violation of the presumption of innocence.

11. In short, the logic underpinning those decisions might be summarised as a concern on the part of the European Court of Human Rights that a person could be convicted of an offence where there was actually a doubt that some element of the offence had been proven. Typically, such reverse burdens touched on questions of knowledge or intent. The courts in Europe and the UK had come to the view that there was something profoundly disquieting about a judge or jury having to convict somebody, even where they harboured doubts as to their criminal intent. This might, most obviously, occur where the accused bore the burden of proof on an essential ingredient of the offence on the balance of probabilities.

12. Whilst the Court of Criminal Appeal in Smyth noted that "much of the argument before the court was centred on whether a reverse burden of proof could be compatible with article 6(2) of the European Convention on Human Rights and Fundamental Freedoms 1950", it did not care to elaborate on the nature or extent of this argument. Instead, it opted to invoke domestic constitutional principles and in particular Article 38.1 of the Constitution:

> "The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s. 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist."

13. The Court went on to deliver its conclusion:

> "In consequence, the court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt."

14. Whilst the dicta in DPP v. Smyth would appear to permit, in theory at least, of the creation of a reverse burden on the balance of probabilities that could only be said to exist on foot of clear statutory language or by reason of necessary inference. By way of

example, limited provision is made by s. 3(3) of the Competition Act 2002 for a reverse burden on the balance of probabilities. No such express provision is apparent or arises by way of necessary implication from Section 4. It might also be noted that in *DPP v. Egan* [2010] 3 I.R. 561, the Court of Criminal Appeal left open the possibility that the reverse burden created by s. 3(5) of the Criminal Law (Sexual Offences) Act 2006 might have to be discharged on the balance of probabilities.

15. In effect, it was submitted that the Court of Criminal Appeal implicitly applied the double construction rule and interpreted the reverse burden in the only constitutional manner possible – namely, that it created a bare evidential burden.

16. It is submitted that it is difficult to see why a similar conclusion would not also be available in relation to s. 4 of the Prevention of Corruption (Amendment) Act 2001.

17. Such a view is reinforced by the subsequent case of *DPP v. PJ Carey (Contracting) Limited* [2011] IECCA 63, where the Court of Criminal Appeal considered that the reverse burden created by s. 50 of the Safety Health and Welfare at Work Act 2005 only gave rise to a burden to raise a reasonable doubt on the accused.

18. There is also apposite authority from England and Wales in relation to a practically identical reverse burden that was inserted into the same anti-corruption legislation applicable in that jurisdiction. In *R. v Webster* [2010] EWCA Crim 2819 [2011] 1 Cr. App. R. 16, the Court of Appeal considered the reverse burden created by s. 2 of the Prevention of Corruption Act, 1916 which is set out in the judgement as follows:

> "2. Where in any proceedings against a person for an offence under the.Public Bodies Corrupt Practices Act 1889, it is proved that any gift has been.given to a person in the employment of a public body by a person holding or seeking to obtain a contract from.any public body, the.gift shall be deemed to have been given corruptly as such inducement or reward as is mentioned in the Act unless the contrary is proved."

19. The court concluded that whilst the understanding of the provision theretofore had been that it created a legal burden on the accused to disprove a corrupt intent on the balance of probabilities, it should now be "read down" in accordance with the European Convention on Human Rights. At the risk of oversimplifying the manner in which the Convention applies in the UK, it might be said that "reading down" a provision to accord with the Convention is broadly similar to the double construction rule of statutory interpretation that applies here.

20. The Court of Appeal considered that whatever the historical reasons behind the creation of such a reverse burden, it was difficult to justify them objectively. This was particularly so given that the making of a gift to a public official could not be regarded as an inherently criminal act of itself. It also considered that the various inroads into the right to silence that had occurred in more recent years mean that it could not be contended that it was particularly difficult for a prosecution to establish the requisite corrupt intent. In the circumstances, the Court of Appeal considered that the reverse burden created by s. 2 should be "read down" as creating a bare evidential burden to raise a reasonable doubt only.

21. Whilst the decision in Webster is informed by somewhat more diffuse considerations than those apparent from the decision of the Court of Criminal Appeal in Smyth, it is striking that the English courts have considered it necessary to apply such an interpretation to achieve concordance with the European Convention on Human Rights. An identical argument might be made here, although a clearer and considerably more straightforward argument leading to the same conclusion is available pursuant to domestic constitutional jurisprudence.

22. It is submitted that there is nothing in s. 4 of the Prevention of Corruption (Amendment) Act 2001 that could justify an interpretation that it created a legal burden to disprove corrupt intent on the balance of probabilities as opposed to a bare evidential burden.

23. The presumption only applies against an agent. It did not apply in the separate trial of Mr. Ryan, the developer who paid the money to Mr Forsey. In Mr. Ryan's case, there was no presumption and he was acquitted by unanimously verdict of the jury even though the evidence was the same. It is clear, therefore, that the presumption was very important in this case.

24. The statutory definition does not have a de minimis requirement. It is potentially an offence to buy a bottle of wine for one's councillor if one has a planning application.

25. The balance of probabilities may apply to presumptions historically, but there is nothing in s. 4 that expressly provides for that standard. Two special defences require it, namely, insanity and diminished responsibility, but the modern tendency is to lean away from that reading. Because corruption is a core element of the offence, unlike a special defence, it can only apply as a bare evidential burden.

26. The expression "until the contrary is proved" does not imply a legal burden on the accused on the balance of probabilities.

27. A jury might be in a position where they were satisfied of the prosecution case except for the core issue of corruption on which they were not satisfied beyond reasonable doubt, but since it was for the accused to satisfy them, then even though they were not really sure about it they felt they had to convict. That is the logical effect of a burden on the balance of probabilities and that is repugnant to the Constitution. The Oireachtas is not entitled to take a core element of an offence and say that it is up to the accused to prove that as a matter of probability. Smyth says no, unless it is a special defence or a non-core element. There is a clear indication from the courts as to how this presumption should be approached.

28. While the traditional view in the cases is that rebutting a presumption is on the balance of probabilities, circumstances have now changed. The Court of Appeal in England held that in light of the European Convention on Human Rights, the presumption must be read down. The English Law Commission had found that it would not be compatible.

29. If the Oireachtas took the step of imposing that obligation on an accused in a trial of the core element one would expect them to expressly say so.

Ground 2: The Scope of "Office or Position"

30. Section 2(2) of the Prevention of Corruption Act, 1906 as amended provides:

> "2(2) A person who—

(a) corruptly gives or agrees to give, or

(b) corruptly offers,

any gift or consideration to an agent or any other person, whether for the benefit of that agent, person or another person, as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to his or her office or position or his or her principal's affairs or business shall be guilty of an offence." (Emphasis added).

31. It is submitted that it must be a necessary and fundamental proof in every case to show that the person's office or position actually encompasses the act complained of. To put it in the simplest of terms, it is not an offence for a person to make a payment to his local TD if he is also a GP and the person attends his clinic for treatment – this is because the payment is not in relation to his office or position as a TD.

32. As a matter of law, a member of Dungarvan Town Council has no function in relation to a planning permission that falls within the bailiwick of Waterford County Council. They are two entirely separate, albeit contiguous, planning authorities. One might well ask whether it is an offence to pay a member of Kerry County Council to make representations to Donegal County Council in respect of a planning permission.

33. The office must be capable of objective definition. The scope of the office is set out in statute: see HMS Advocate v. Dick. Penal statutes must be construed narrowly. The scope of the office is set out in the statute. Legal certainly requires that a person is entitled to know what his office is and from who he is or is not entitled to receive gifts. If the prosecution is correct, juries could take differing views of the scope of the office or position of a member of Dungarvan Town Council.

34. Both points that are now argued were not taken up at trial. Neither side at trial addressed their mind to the Smyth case. A number of affidavits were filed for the application for enlargement of time. The Court of Criminal Appeal, in its ex tempore judgment on 20th October 2014, indicated that it would be unjust for Mr. Forsey not to be allowed to appeal.

Respondent's Submissions

35. The Director submitted that the prosecution case was overwhelming and the evidence was such as enabled the jury comfortably to come to a unanimous view, beyond a reasonable doubt, that the accused had committed each of the offences with which he was charged. The defence that the monies paid to the accused were a loan was based on accounts from the accused during interview and in evidence, which were contradictory and lacked credibility and on a purported loan agreement the provenance and veracity of which were entirely undermined by the prosecution evidence.

36. The direction given by the trial judge on the statutory presumption was at no point challenged or disputed by the defence during the course of the trial. No issue was taken with that part of the judge's charge at any stage in the court below. It was not raised in the requisitions.

37. The burden of proof in relation to the statutory presumption was outlined correctly to the jury. The "balance of probabilities" was the correct standard of proof in relation to the reverse burden contained in the relevant statutory provision. It is submitted that the relevant case law on the test "until the contrary is proven", namely, the line of authority in *R. v. Carr Briant* [1943] K.B. 607*, R. v. Braithwaite* [1983] 1 WLR 385 and *Convening Authority v. Private William Doyle* [1996] 2 ILRM 213, set out the appropriate law on provisions of the type at issue in this case. Therefore, when considered in the context in which it was given in this case and set in the context of the totality of the judge's charge, the manner of the direction on the statutory presumption was appropriate when taken as a whole before the jury. It did not have the profile or impact which the accused now contends before this Court.

38. If the judge's direction in relation to the statutory presumption was inappropriate or wrong in law (and this is not conceded), then the impact of same, if any, has to be seen in the context of the evidence of this case as a whole and the prosecution relies on the proviso in that regard.

39. In respect of the second ground, the DPP submitted that the applicant spoke in the Chamber as a member of Dungarvan Town Council in favour of the proposed development at Ballygagin. He did so, and could only do so, because he held the office and position of being a member of Dungarvan Town Council. The applicant proposed a motion before Dungarvan Town Council, calling on the County Council and the Minister for Environment to extend the boundary of Dungarvan town, the effect of which would have been to include the Ballygaggin lands and thereby alter its rezoning status. The applicant moved and spoke in favour of this motion at a meeting of Dugarvan Town Council on 18th December 2006. He did so and could only do so because he held the office and position of being a member of Dungarvan Town Council.

40. The applicant's support and promotion, both privately and publicly for the Ballygagin development, and in particular, his representations to councillors and officials in relation to the granting of planning permission had particular standing and potential impact by reason of his office and position as a member of and Vice Chairman of Dungarvan Town Council. This was the case in particular because the proposed development was just outside and in the hinterland of Dungarvan town.

41. As someone holding the office and position of a member of Dungarvan Town Council, the accused had particular access to officials of Waterford County Council, especially in relation to a proposed development in the Dungarvan area. As someone holding the office and position of a member of Dungarvan Town Council, the accused had particular access to and standing with the members of Waterford County Council, especially those who were also members of his own political party and those who were also simultaneously members of Dungarvan Town Council.

42. In doing each of the above (and each of the activities to promote the granting of planning permission for the Ballygaggin lands further particularised below), the applicant was acting in a manner, which he had told his wife beforehand was required of him by reason of the receipt of the monies from the developer in question.

43. It was submitted that the appropriate test in respect of monies paid to a person acting in the capacity of public officer is AG for Hong Kong v. Ip Chiu [1980] AC 663. The test is not whether or not the office holder achieved or could have achieved the payer's objectives. The test of whether or not an advantage has been solicited or accepted is whether the gift would have been given if the person were not the kind of official he in fact was.

44. The relevant phrase used in the statute "in relation to his office or position" encompasses a broad range of activities arising from the position or office in question and is not confined to the exercise of actual powers or functions of the office itself.

Case Law
45. In *R v. Carr Briant* [1943] K.B. 607, it was held that in any case where, either by statute or common law, some matter is presumed against an accused person "unless the contrary is proved", the jury should be directed that it is for them to decide whether the contrary is proved, and that the burden of proof may be discharged by evidence satisfying the jury of the probability of that which the accused person is called on to establish.

46. In *Attorney General of Hong Kong v. IP Chiu & Anor*. [1980] 2 W.L.R. 332, [1980] A.C. 663, the Judicial Committee held that "capacity" in s. 4 (2)(a) of the Prevention of Bribery Ordinance was not the equivalent of "duty"; that the true text of whether an advantage had been solicited or accepted by a person in the capacity of a public servant was whether the gift would have been given or could have been effectively solicited if the person in question was not the kind of public servant that he in fact was and if the answer to that question was in the negative, then the person had taken the gift in his capacity as a public servant, provided that the embarrassment sought to be avoided by the gift could not equally easily have been caused by any person not holding that office.

47. In *O'Leary v. Attorney General* [1995] 1 I.R. 254, the plaintiff was convicted by a Special Criminal Court of possession of incriminating documents and, on foot of such possession, of membership of an unlawful organisation, namely, the I.R.A. The plaintiff's claim was dismissed by the High Court. The Supreme Court held that the presumption of innocence in a criminal trial was implicit in the requirements of Article 38.

48. *Convening Authority v. Private William Doyle* [1996] 2 ILRM 213 concerned an offence under s. 135 of the Defence Act 1954 of desertion. The Courts Martial Appeals Court applied the test in *R v. Carr Briant* [1943] K.B. 607, that is, the balance of probabilities.

49. In *DPP v. Byrne*, *David Healy and Patrick Kelleher* [1998] 2 I.R. 417, the Court of Criminal Appeal held, in refusing leave to appeal, that, the prosecution was obliged to prove that an accused had, and knew that he had, a package in his control and that that package contained something. Further, it must prove that the package contained the drug alleged. Once these matters were proved, the onus of proof was cast on the accused to bring himself within the defence provided by s. 29(2) of the Misuse of Drugs Act 1977.

50. *DPP v. Smyth* [2010] IECCA 34 was a case in which the trial judge mistakenly ascribed the criminal standard to the defence. The Court of Criminal Appeal took the opportunity to give general guidance to trial courts in relation to the effect of s. 29(2) of the Misuse of Drugs Act 1977 which provides, *inter alia*, that it shall be a defence to prove that the accused did not know and had no reasonable grounds for suspecting that he had a controlled drug in his possession. The applicants were convicted of possession of drugs for sale or supply pursuant to ss. 15 and 15A and also of simple possession. The judge told the jury that the burden of proving the guilt of the accused rested with the prosecution, and that burden, notwithstanding the relevant statutory provision, never shifted to the defence. The judge, however, went on to state, "If you believe, for example, that Mr. Smyth Senior, in your opinion knew nothing about this, if you're satisfied about that beyond reasonable doubt, or if you have a doubt, then you must give him the benefit of that and, similarly, you must look at Mr. Smyth Junior and apply the same principles". The Court of Criminal Appeal held that it was no part of the reverse burden carried by either of the applicants for them to prove beyond reasonable doubt that they did not know and had no reasonable grounds for suspecting that what was in their possession was a controlled drug.

51. Therefore, the direction of the learned trial judge was in error. An evidential burden of proof is cast on the accused by s. 29 of the 1977 Act, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. In directing the jury on this issue, trial judges should in future, in the view of this court, give the ordinary direction as to the burden and standard of proof and the presumption of innocence. In stating the burden and standard of proof, however, a trial judge should point out that the prosecution are obliged to prove the elements of possession of the substance, and that the substance is a controlled drug, beyond reasonable doubt. A trial judge should then tell the jury that the burden of proof shifts to the defence to prove the existence of a reasonable doubt that the accused did not know and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. It should be clearly stated that this burden cast on the accused is discharged if the defence prove a reasonable doubt, and no more than that, on that issue.

52. In *DPP v. Egan* [2010] 3 IR 561, [2010] IECCA 28, the applicant was convicted in 2009 in the Central Criminal Court of engaging in a sexual act with a child under the age of 17 years contrary to s. 3 Criminal Law (Sexual offences) Act 2006. The Court of Criminal Appeal, per Fennelly J. held that the jury convicted the applicant on the basis of a ruling more favourable than the burden of proof on the balance of probabilities. The court would not decide whether a higher burden of proof was appropriate.

53. In *R. v Webster* [2010] EWCA Crim 2819 [2011] 1 Cr. App. R. 16, the defendant conducted a business which supplied educational aids to, among others, local authorities. The defendant gave cash as a Christmas gift to a local authority employee who was responsible for processing orders placed by schools for the supply of educational aids. He was charged with corruptly giving a gift to a servant of a public body as an inducement or reward contrary to s. 1(2) of the Public Bodies Corrupt Practices Act 1889. By s. 2 of the Prevention of Corruption Act 1916, the defendant was required to prove that the gift had not been given corruptly as an inducement or reward. The defendant was convicted. He appealed on the ground that s. 2 of the 1916 Act was incompatible with his right to a fair trial under Article 6 of the European Convention on Human Rights, in that the presumption of innocence had not been applied.

54. In allowing the appeal, the court held that it was understandable that when the Prevention of Corruption Act 1916 was enacted, it was believed that the prosecution would face, in many cases, almost insuperable difficulties in proving the corrupt motive for a gift. The imposition of the reverse burden was a necessary, reasonable and proportionate response to the circumstances in which it was introduced. However, in the current legal landscape, the jury could draw appropriate inferences if no explanation for a gift was tendered by the defendant or was tendered suspiciously late. The imposition on the defendant of the legal burden of disproving guilt was no longer necessary and the means of imposition was unreasonable and disproportionate, in that the presumption applied with full rigour to all gifts made by a person having or seeking a contract with a public body whatever the other circumstances might have been. Accordingly, s. 2 of the Prevention of Corruption Act 1916, as applied to s. 1(2) of the Public Bodies Corrupt Practices Act 1889, unjustifiably interfered with the Article 6(2) presumption of innocence. However, it was possible to read down s. 2 so as to place a burden on the defendant to raise in evidence an issue whether a gift was corruptly made and a legal burden on the Crown to prove to the criminal standard that the gift was corruptly made. Had the jury been so directed, there was a real possibility that the jury's verdict would have been not guilty. Accordingly, the conviction was unsafe.

Discussion
55. The appellant was convicted on 18th May 2012 and sentenced on 27th June 2012. By order of the Court of Criminal Appeal, the time for appealing his conviction was enlarged and he lodged grounds of appeal on 31st October 2014. He challenges his conviction on two grounds. The first is that the trial judge misdirected the jury regarding the burden of proof arising out of s. 4 of the Prevention of Corruption (Amendment) Act 2001. Secondly, that as a member of Dungarvan Urban District Council, he had no function in relation to

a development located outside its functional area and within the separate administrative area of Waterford County Council.

56. On this appeal, legal and procedural questions arise. There has been considerable debate internationally and in Ireland about the reverse onus of proof that arises when statutory presumptions are applied in a trial subject to being displaced by proof of the contrary. That is one of the important matters to be discussed. Procedural questions also arise. The principal ground that Mr. Forsey relies on was not raised at the trial and was not even mentioned. The defence did not make any requisition in respect of the judge's charge to the jury, nor was there any complaint about the reference by prosecuting counsel to a burden being on the accused. The issues on this appeal include the matters raised by Mr Forsey but are not confined to them.

Was the Trial Judge Correct in his Interpretation of Section 4?

57. Under s. 1 of the Prevention of Corruption Act 1906 as inserted by s. 2 of the Act of the same name of 2001, an agent or any other person who corruptly accepts any gift consideration or advantage as an inducement to doing any act in relation to his office or position shall be guilty of an offence. The inserted subsection (5)(b)(i) defines agent to include an office holder within the meaning of the Public Bodies Corrupt Practices Act 1889, as amended, which includes a member of a Council of a city or town. There can be little doubt that Mr. Forsey was an agent within the meaning of the 2001 Act because he was the holder of a public office under the Public Bodies Corrupt Practices Act 1889.

58. Section 4 of the Prevention of Corruption (Amendment) Act, 2001 provides for a presumption in the following terms:

> "4.—(1) Where in any proceedings against a person referred to in subsection (5)(b) of section 1 (inserted by section 2 of this Act) of the Act of 1906 for an offence under the Public Bodies Corrupt Practices Act, 1889, as amended, or the Act of 1906, as amended, it is proved that—
>
> (a) any gift, consideration or advantage has been given to or received by a person,
>
> (b) the person who gave the gift, consideration or advantage or on whose behalf the gift, consideration or advantage was given had an interest in the discharge by the person of any of the functions specified in this section
>
> the gift or consideration or advantage shall be deemed to have been given and received corruptly as an inducement to or reward for the person performing or omitting to perform any of the functions aforesaid unless the contrary is proved."

59. Section 4 applies generally to a variety of functions concerned with the public administration of the State under any statute and particularly to the functions of a member of a body that is part of the public administration of the State under the Planning and Development Act, 2000.

60. In directing the jury in respect of s. 4, the trial judge stated as follows:

> "The effects of this section which I've just read to you and the presumptions is that the burden of proof is lifted from the shoulders of the prosecution and descends on the shoulders of the defence. It then becomes necessary for the defence to show on a balance of probability that what was going on was not the receipt of monies corruptly, as inducement or reward. The test of whether or not an advantage has been solicited or accepted by a person in the capacity of a public representative, such as a town councillor, is whether the gift would have been given or could have been effectively solicited if the person in question were not the kind of public representative he in fact was.
>
> It is a matter for you, ladies and gentlemen, to assess if the accused as proved on the balance of probabilities if there was or was not a corrupt intention and corruption for this purposes includes is not limited to receipt of money for a past favour without there having been any agreement beforehand. The question I suggest you consider on each of the six counts, ladies and gentlemen, separately, is whether the prosecution have proven to your satisfaction beyond a reasonable doubt that the monies received by the accused were corrupt payments and if so you must convict the accused and find him guilty or whether you are satisfied on the balance of probabilities that the monies received by the accused were by way of a loan or a series of loans and if so you must acquit the accused and find him not guilty. I will explain in more detail shortly the difference between the tests of beyond a reasonable doubt and on the balance of possibility-probability."

61. In an earlier reference to the section, Counsel for the prosecution had told the jury:

> "Now, section 4, this is a very important section of the Act, section 4 of the same Act provides as follows: 'Where in any proceedings against a person referred to in sub-section 5(b), that sub-section does apply in this case, do you understand, of section 1, inserted by section 2 of this Act of the Act of 1906 of the offence on public bodies Corrupt Practices Act, 1889 (as amended) or the Act of 1906 (as amended), it is proved that (a) any gift, consideration or advantage has been given to or received by a person, the gift or consideration or amount that shall be deemed to have been given and received corruptly as an inducement to or award for the person performing or admitting to perform any of the functions aforesaid, unless the contrary is proved.' Now, that does appear -- the learned trial judge will deal with this, that appears to put -- and know this, if you come to that conclusion, if it's proved that what I've said happened, that puts an onus to some extent on the accused. Once the prosecution has established that the monies changed hands, then the onus of proof shifts to some extent to the defence to show firstly, that the money was given as a loan, that it wasn't received corruptly in other words. Now, that onus is not a heavy onus, it's only on the balance of probability, do you understand? And throughout the trial, as I've said, it's proof beyond a reasonable doubt, you must be satisfied of the guilt of the accused beyond a reasonable doubt. So, hopefully I've explained that to you properly."

62. On the simple meaning of the words of s. 4, it does appear that on proof by the prosecution of the facts stated, it is presumed that the payment was made for corrupt purposes. It is impossible to read "the gift or consideration or advantage shall be deemed to have been given and received corruptly as an inducement to or reward for the person performing or omitting to perform any of the functions aforesaid unless the contrary is proved" as meaning anything else. It is also clear that by deeming the benefit to have this character, the provision is relieving the prosecution of an obligation that it would otherwise have to discharge. The effect is clear. It imposes on the accused person the burden of discharging the presumption but it does acknowledge that he or she may be in a position to do that. If this were not the correct interpretation of the words of the section, it is clear that the instruction given by the judge to the jury and the statement by prosecuting counsel were seriously erroneous as to the law.

63. If the section is to be read as imposing not a legal burden but an evidential burden, then it follows that there was an incorrect

charge. The judge would have made a mistake in his instruction to the jury and then so did Counsel for the prosecution in saying what he did. It is no good for the prosecution to submit that there was a strong case against Mr. Forsey or that the evidence that he put forward in support of a loan transaction with Mr. Ryan was transparently unconvincing. The very weakness of the defence is a point in favour of Mr. Forsey in this respect. If his obligation was merely to demonstrate a basis for a reasonable doubt, then the weaker the case that he puts forward may mean that it is clear that he is not succeeding on the balance of probabilities, but it leaves open the possibility that a jury might – however unrealistically or improbably as the prosecution may argue – consider that there was a reasonable doubt in the case.

64. The Court is satisfied that the section is clear in its terms. The legislative history confirms the meaning and intent of the presumption. It was, as *R. v Webster* [2010] EWCA Crim 2819[2011] 1 Cr. App. R. 16, comments actually the intention of the legislature in 1916 to introduce such a provision and Webster considered that that was a reasonable thing to do at the time in the circumstances of wartime Britain and contemporary problems concerning contracts with the State. Webster makes clear that it was legitimate in its view that this presumption would have been introduced in 1916 which was effected by way of amendment to the 1906 Act, a circumstance that reinforces this interpretation of the ordinary meaning of the words.

65. R. v Webster concludes in respect of the corresponding provision for the presumption of corruption that is in the 1916 Act (s. 2 of the Prevention of Corruption Act 1916) which is in its material terms similar to s. 4(1) of the 2001 Act that:

> "In our view, there is no ambiguity here. As we have observed, s. 2 of the 1916 Act was introduced specifically to reverse the legal burden of proof of a corrupt payment or gift when received by the servant of a public body. The effect of s. 2 has been so understood and applied for many years (Braithwaite [1983] 1 WLR 385). Equally, reversal of the legal burden has the appearance of violating the terms of Article 6.2."

67. This legal burden, as identified by the English Court of Appeal, conforms with the approach adopted by the trial judge in this case in his instruction to the jury.

68. The English Law Commission in the series 'Legislating the Criminal Code' (3rd March 1998), namely, 'Part IV The Presumption of Corruption' (Law Com. No.248), described how previous examinations of the question had recommended extending the presumption with the intention of making it easier for the prosecution to secure a conviction in other instances. The report did not declare as the appellant submits that the 1916 provision was incompatible with Article 6.2 of the Convention; the Commission did not express a view.

If so, was that interpretation in conformity with the Constitution, established Irish and/or common law or the European Convention on Human Rights?

69. The problem about the above analysis is that it clearly places the burden of proof on the accused to establish facts and circumstances that will exempt him from criminal liability. It is difficult to argue that this is not a legal burden and not just an evidential consequence that follows from facts having been established. There is a limit to the capacity of the court to construe the legislative provision in a manner that negates a clear legal obligation. Courts wrestle uncomfortably with this central question that is raised on Mr. Forsey's behalf in this case. That is: can the legislature impose a legal obligation on the accused to disprove the presumption of corruption when a person who is interested in a decision by a public body pays money or confers a benefit on a person concerned with making the decision?

70. The approach of the English courts is conditioned by a view of the European Convention on Human Rights, Article 6.2. The result in R. v Webster was to "read down" the requirement of the relevant legislation in a sense different from the plain meaning as imposing not a legal burden of proof, but rather what is called an evidential burden of proof. The evidential burden is a view of the practical implications that arise in the course of a trial when the prosecution has proved its case sufficiently to go to the jury, whether that is called prima facie proof or some other description, which means that if nothing else is proven the accused person may be convicted. It is not certain that he or she is going to be convicted but the probability or the risk of such event has arisen because of and depending on the cogency of the prosecution evidence. By making the distinction between that situation, which arises in every case where the prosecution makes out a sufficient prima facie case, and the imposition of a legal obligation on the accused to establish a defence, the courts have sought to reconcile the particular legislation they are construing with the presumption of innocence. The question we have to consider in this case is whether we must or ought to employ the same mode of analysis to this particular section; whether it is necessary to do so in order to "save" the section from inconsistency/invalidity under Article 6.2 or the Constitution. This is the approach that Charleton J. adopted in delivering the judgment of the Court of Criminal Appeal in the Misuse of Drugs Act prosecution in *DPP v. Smyth*. The appellant's case is that s. 4(1)(b) of the 2001 Amendment Act cannot and does not impose on the accused person the obligation of proving positively that he did not receive the money corruptly. Notwithstanding the words used, Mr. Forsey's contention is that the words of paragraph (b) mean and require only that the accused demonstrate a reasonable doubt. In other words, the section does not impose a legal burden, but something much less which is usually called an evidential burden. He cites in support of this proposition DPP v. Smyth, dealing with a provision of the Misuse of Drugs Act 1977 (as amended) and R. v Webster, a judgment of the Court of Appeal (Criminal Division) in England and Wales on the corresponding corruption provision in that jurisdiction.

71. It is a cardinal rule of criminal jurisprudence that the onus of proof rests on the prosecution. Indeed, it may be argued that this is the cardinal rule: Lord Sankey, in Woolmington, called it "the golden thread" of the criminal process. Courts have pointed out that when an obligation is placed on an accused to prove something by way of defence it must be to the civil standard of the balance of probabilities, the situation may arise where he goes some way to make that defence, but falls short in point of cogency. The court, whether judge or jury, considers that he has failed to established the ground of defence. He has adduced evidence and/or argument tending to make the proof, but the court has not accepted his case as having been established. Courts have regarded this scenario with anxiety in regard to the concept of due process, the European Convention on Human Rights and constitutional requirements. A conscientious jury may be satisfied beyond reasonable doubt of the elements of the offence specified in the legislation but may reject as insufficiently proven the statutory matter that the accused has to establish. In those circumstances, the telling point is made that the accused will have been convicted despite the existence of a reasonable doubt. It does not necessarily follow that such a doubt will arise, but it is wholly conceivable that it may be present. How can a conviction be satisfactory if it can happen in the presence of a reasonable doubt?

72. The presumption of innocence is a constitutional right under Article 38.1 of the Constitution; it is a common law right long recognised: Woolmington's case per Lord Sankey; it is expressly stated in Article 6.2 of the European Convention, also in the Universal Declaration of Human Rights of the UN. It follows that the burden of proof rests on the prosecution to prove all the elements of the offence charged. That includes, where it arises, proving beyond reasonable doubt that an inference or even a presumption challenged by the accused during the trial has not been overturned. See, for example, the burden of proof in a case of murder where the defence raises an issue of provocation, assuming there is some rational basis for doing so. The prosecution retains the burden of

proving beyond reasonable doubt that the accused was not in fact provoked. Similarly, in respect of the presumption that a person intends the natural probable consequences of his actions, which presumption may be rebutted. Another example is an alibi defence. The accused does not have to establish that the defence is probably true; in the circumstances, it is sufficient if the jury entertain a reasonable doubt as to whether the defence might be true. If it might reasonably be true, the accused must be acquitted. The prosecution is obliged to prove beyond reasonable doubt that the alibi defence or any other defence has not been made out. On general principles, if the jury are left at the end of the day with a reasonable doubt as to the whole case or any specific part of it, they must give the benefit of that doubt to the accused. Those are implications of the presumption of innocence.

73. The right is not absolute, however. That qualification applies whatever the source of entitlement that is relied on. First, as to the Constitution the Irish authorities establish that the legislature may in certain circumstances interfere with the presumption of innocence by imposing an obligation on the accused. In *O'Leary v. The Attorney General* [1993] 1 I.R. 102; [1991] ILRM 454, Costello J. stated:-

> "Fourthly, the Constitution should not be construed as absolutely prohibiting the Oireachtas from restricting the exercise of the right to the presumption of innocence. The right is to be implied from Article 38, which provides that trials are to be held 'in accordance with law', and it seems to me that the Oireachtas is permitted in certain circumstances to restrict the exercise of the right because it is not to be regarded as an absolute right whose enjoyment can never be abridged. This is how the European Convention has been construed. The European Commission on Human Rights was required to consider a provision of a statute of the United Kingdom in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise (X. v United Kingdom Collection of Decisions 42, 135, referred to in Jacobs, The European Convention on Human Rights, pp. 113–114). In the course of its opinion the Commission stated that the provision:
>
> creates a rebuttable presumption of fact which the defence may, in turn, disprove. The provision in question is not, therefore, as such a presumption of guilt. The commission recognises however that this form of provision could, if widely or unreasonably worded, have the same effect as a presumption of guilt. It is not therefore sufficient to examine only the form in which the presumption is drafted. It is necessary to examine the substance and effect.
>
> Because the presumption was restrictively worded and because it was neither irrebuttable nor unreasonable the statute did not infringe Article 6 of the convention. The right to the presumption in the UN Universal Declaration is subject to article 29 which provides that in the exercise of his rights and freedoms everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law (s. 11(d)) but this right, like the other rights and freedoms which the charter guarantees is 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'(s).
>
> The Supreme Court of the United States has recognised that the presumption of innocence in a criminal trial is constitutionally protected and it has held that the due process clause of the Fifth Amendment may be breached by a statute which created a statutory presumption which failed to pass a 'rational connection test', so that 'a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the other is arbitrary because of lack of connection between the two in common experience' (Tot v United States (1969) 319 US 463 and Leary v United States (1942) 395 US 6). But if the statute does pass the 'rational connection' test then it is constitutionally valid even though it may adversely bear on an accused is right to be presumed innocent of the offence with which he is charged (County Court of Ulster County, New York v Allen (1979) 442 US 140)."

74. *Hardy v. Ireland* [1994] 2 I.R. 550 concerned s. 4(1) of the Explosives Substances Act 1883, as amended, which provided that where a person knowingly had in his possession or control any explosive substances in suspicious circumstances – giving rise to a reasonable suspicion that he did not have it in his possession or control for a lawful object – he should be guilty of a felony "unless he can show that he . . had it in his possession or under his control for a lawful object". Egan J. and Murphy J. in their separate assenting judgements referred to the reverse onus. Egan J. stated at p. 566:-

> "The onus lies fairly and squarely on the State to prove these matters and they must be proved beyond reasonable doubt. It may seem perhaps contradictory that a 'reasonable suspicion' must be proved beyond reasonable doubt but this is not so. If the court or jury is not satisfied beyond reasonable doubt that a suspicion has been raised and that it is a reasonable suspicion, an essential ingredient of the offence will be missing and the prosecution will fail.
>
> If, however, all the above ingredients are proved beyond reasonable doubt the accused must be convicted unless 'he can show that he made it or had it in his possession or under his control for a lawful object'. Prima facie these words place an onus on the accused but they are in a saving or excusatory context and this is of relevance. Insanity, for instance, is something which must be established by an accused person in a criminal prosecution if he wishes to rely on it.
>
> It is true that when the evidence in a case, whether offered by the prosecution or the defence, discloses a possible defence of self-defence, the onus remains on the prosecution to negative the possible defence of self defence. See the judgments of Walsh J. in The People v. Quinn [1965] I.R. 366 and The People v. Dwyer [1972] I.R. 416.
>
> The onus in regard to self-defence springs from the common law. In the present case, however, we are dealing with a statute and the words used are very clear. If the saving clause is to be relied upon, I am satisfied that the onus shifts to the accused. The words are 'unless he can show . . . [etc.]'. These words cannot be construed as meaning that the raising of a doubt would be a sufficient discharge. The onus, not being an onus resting on the prosecution, does not require proof beyond reasonable doubt. It is sufficient if there is proof on the balance of probabilities.
>
> The conclusion which I have reached to the effect that the onus of proof can shift does not determine the matter. There is nothing in the Constitution to prohibit absolutely the shifting of an onus in a criminal prosecution or to suggest that such would inevitably offend the requirement of due process. For these reasons I am satisfied that the subsection is not inconsistent with the Constitution and that the appeal should be dismissed."

75. In his judgment in the same case, Murphy J. stated at p.566:-

> "However, I do not see that there is any inconsistency between a trial in due course of law as provided for by Article 38, s.1 of the Constitution and a statutory provision such as is contained in s. 4 of the Explosive Substances Act, 1883, which affords to an accused a particular defence of which he can avail if, but only if, he proves the material facts on the balance of probabilities."

76. Second, the ECHR recognises that Article 6.2 is not absolute. In *Salabiaku v. France* (1991) 13 EHRR 379, the court stated that every legal system contains presumptions that in one way or another cast obligations on the accused:-

> "In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States.
>
> Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the commission would appear to consider, paragraph 2 of article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words 'according to law' were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law."

77. Third, the common law adopts a similar approach: see *Woolmington; Webster; Braithwaite*. In *R v. Braithwaite* [1983] 1 WLR 385, the Court of Appeal stated (in dealing with the equivalent provision in England and Wales):-

> "It seems to us that that is precisely the reason likewise for the existence of section 2 in the 1916 Act. It is, one scarcely needs emphasising, extremely difficult, if not impossible, for the prosecution to prove that any person did not give value for a favour which he received, and that must, in our judgment, have been the reason for the Act of 1916 which supplemented the 1906 Act. It does not need very much imagination to see that between the two Acts it must have become apparent that the difficulties of bringing home these allegations were insurmountable in the absence of such a provision as section 2."

78. The UN Convention on Corruption, 2005 contains Article 28 which recognises that inferences may be drawn from proven facts.

79. Although they are sanctioned in some circumstances, statutory inferences that operate against the presumption of innocence are, however, unusual and exceptional and they fall to be justified by special circumstances of urgency or necessity and they must be reasonable and proportionate. The issue is therefore recast as an enquiry whether the presumption in this case, whereby payments are deemed to be corrupt until the contrary is proven is necessary, is reasonable and proportionate. On this point, the fact that the accused is in a position to give evidence to overturn the presumption is a relevant factor. That is one of the things that the ECtHR looks for. It would seem that the first criterion is whether the presumption is necessary. Relevant to that question is the pernicious nature of corruption in the modern world and the difficulty of proving specific corrupt intention particularly on the part of the recipient of a benefit advantage or as in this case a large sum of money.

80. Any presumption that imposes a legal obligation on the accused to prove some fact or condition or state of affairs necessarily disturbs the Woolmington principle or the golden thread. It follows that the problematic circumstances where the accused falls short of probability identified by various courts and commentators may arise with any such presumption. As noted by the ECtHR presumptions of some kind are a feature of all criminal legal systems.

81. It follows from the various authorities in Irish, English and European jurisprudence that it is not in principle contrary to due process or the concept of a fair trial or to Article 6 of the Convention to impose an obligation on the accused to prove some defence to a criminal charge. It is, however, not something that can be widely or generally imposed; it can be justified only in circumstances of special or particular importance and need and where it is exceptionally appropriate to the crime and where it is reasonable. Permissible circumstances include some serious drug offences and firearms crimes and corruption has historically been considered to justify reversing the onus as to intention. The legislative provision must be explicit in regard to the obligation; nothing less than a clear imposition will be construed as doing so. The issues arising appear to be as follows in light of the jurisprudence. First, is the provision explicit and unambiguous as to the legal obligation imposed on the accused? Second, is the imposition of the burden in the circumstances necessary, reasonable and proportionate? This expression is taken from the English jurisprudence but it reflects the understanding of the law in other jurisdictions.

82. In Webster, the English Court of Appeal Criminal took the view that the imposition of the presumption in 1916 was reasonable and justified in the historical circumstances but it held that over time the rationale had been undermined by a series of events and the Convention was also a relevant consideration in the analysis.

> (a) The Court decided that the Government, in accepting the report of the Law Commission that recommended abolishing the presumption, had demonstrated that the provision was no longer required. This, notwithstanding that previous expert groups had recommended not just retention of the provision, but extension of it to a wider spectrum of circumstances.
>
> (b) The existence of criminal procedure legislation that encouraged, not to say compelled, revelation of material by way of defence to the police in advance of the trial was also relevant.
>
> (c) The Court of Appeal distinguished the case of X v. the United Kingdom.
>
> (d) The Court accordingly "read down" the provision in a manner that it felt would be compatible with Article 6.2.

83. In our circumstances, the Oireachtas decided in 2001 to re-enact this provision in fresh legislation. This is a significant difference between Ireland and the United Kingdom. It also means that there is no question of the Government or the legislature accepting that the presumption of corruption was no longer required. Neither is it material, as it was in the UK, that it only applied to a very limited set of circumstances, which arose because of the urgency with which the legislation was introduced initially in 1916. It does seem on this question as to necessity that it is a matter for the legislature to determine, subject to review by the courts, as to whether it is in general reasonable or not unreasonable – so unreasonable that it could not be justified, which is to invoke Keegan v. Stardust principles. On these criteria, it would appear that this legislative measure is justified in the unusual circumstances of the prevalence of

corruption worldwide and the difficulty of proving intention, even where the circumstances are strongly suggestive of criminality.

84. It is questionable whether reading the provision in a less operative manner is of any real value. It is arguable that seeking to read down the section eviscerates the provision out of existence. If the section did not exist, the prosecution would have to prove its case beyond reasonable doubt including corrupt intention on the part of the recipient of the benefit in question. How does it make any difference if one reads the deeming section as imposing an obligation on the accused "to prove a reasonable doubt"? Leaving aside the conceptual problem presented by proving a reasonable, or indeed proving a doubt of any kind, to treat the section as merely creating or imposing an evidential burden, such as arises in any prosecution when a prima facie case has been made out, renders the statutory presumptive deeming nugatory. These considerations suggest that the choice may not easily be available between different readings of the section and the real decision may be whether the provision can stand as being valid constitutionally or must be struck down for conflict with existing respected rights.

85. It does not follow that the accused must himself or herself give evidence. The inference or presumption may be displaced and corruption disproved by reference to the prosecution evidence whether that is by direct examination or by cross-examination. It may come about because of an argument put forward by or on behalf of the accused person.

Application of the Tests

86. The question is whether the presumption imposed by section 4 is necessary, reasonable and proportionate in the circumstances. The 2001 Act was enacted to give effect to a series of conventions against corruption and bribery produced by the European Union, the Organisation for Economic Cooperation and Development and the Council of Europe and to provide for related matters. In regard to the prosecution at issue in this case, the international obligations did not require this provision and the Act did not introduce material changes to the 1916 legislation.

87. There is general international recognition of the corrosive and destructive effect of corruption on societies. International treaties seek to reduce or eliminate it: see the United Nations Convention on Corruption 2005. Article 28 of this compact is worth noting because it has direct relevance to the question that is under consideration in this case. It seems to authorise something of the kind of the provision that is in dispute. Article 28 provides:

> "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances."

88. It has long been recognised that there is a problem in proving corrupt intention in the receipt of a benefit from a party interested in a particular project who gives it to a person in a position of authority or power or trust capable of influencing a relevant decision. It has to be assumed that Article 28 of the Corruption Convention is not in conflict with the Universal Declaration of Human Rights and its acknowledgement of the presumption of innocence. It might be suggested that Article 28 refers only to an evidential burden, but if that were the case, such that the accused only had to establish a reasonable doubt, it would scarcely be needed. It would go no further than the situation that obtained in every criminal trial in which intention requires to be proved. That is almost every case of any serious offence. Therefore, it has to be concluded that Article 28 is intended to have actual significance in circumstances of alleged corruption, which is generally accepted and understood to be difficult to prove in respect of intention on the part of the recipient and of the giver. In addition, the series of agreements that the 2001 Act implements is itself evidence of the seriousness of the problem of corruption as viewed internationally.

89. The decision as to whether to impose a reverse onus is made by the legislature, but the courts will exercise their own jurisdiction in deciding whether they are compliant with constitutional convention or other criteria. The essential requirement is that there be a fair trial; that is the underlying fundamental proposition. This is expressly declared in Braithwaite and Webster and implicit in the other decisions.

90. An argument that seeks to establish that it was not necessary to continue this presumption in circumstances where there has been substantial changes since it was originally enacted may well be legitimate as far as it goes when the law has not been changed. However, that cannot apply where the legislature has decided, as it did here, to re-enact this provision in 2001.

91. This country, like many others, has had its share of allegations of corruption. Lengthy and costly public inquiries investigated and made recommendations. The Oireachtas has decided on this course of action and it is the appropriate body to make the decision. The function of the courts is to decide whether such a measure is reasonably justified in the circumstances. However, it has to respect the judgment of the legislature, always providing that the essential tests for constitutional propriety – whether expressed as necessity, reasonableness and proportionality or otherwise – have been met. Is there a fair trial, notwithstanding the imposition of the presumption?

92. The Court is of the view that the terms of s. 4 of the 2001 Act are not unconstitutional and neither are they in breach of Article 6.2 and they are not outlawed at common law or by any other measure or obligation. Any extension of the presumption to other cases or circumstances would be carefully scrutinised to ensure that it was not being introduced as a more general provision in criminal law. It is an exceptional measure and must be confined to particular and well-defined circumstances where it can be demonstrated to be necessary. It seems to the Court that there is nothing in the existing jurisprudence to dictate that this provision must be considered unconstitutional insofar as it imposes a legal obligation. In so deciding the Court may be adopting a different approach to that of the Court of Criminal Appeal in Smyth. However, this Court does not have to go that far. The provisions under consideration in the two cases are quite different although similar considerations to some extent arise. All the authorities emphasise that the terms of the specific legislation in question represent the crucial determinant as to the nature of the burden of proof involved. Comparisons are therefore difficult and in this case necessary. We are satisfied that this provision is clear and explicit and that to read it otherwise than in its ordinary and plain meaning would offend the principles of interpretation and undermine the legislative intention. It would be contrary to the clear intention of the 2001 Act and its predecessor in 1916 as having the express intention of doing the thing we are now discussing. We do not have to dissent from the decision in DPP v. Smyth, but merely to consider that that decision was, as it could only be, decided on the terms of the Misuse of Drugs Act 1977 (as amended).

93. The approach adopted by the CCA and this Court in Smyth and Tuma respectively is of limited assistance in the instant case. The sections are essentially different. The Misuse of Drugs Act 1977, as amended, 2. 29(2)(a) in its material part is as follows:

> "In any such proceedings in which it is proved that the defendant had in his possession a controlled drug. . . it shall be a defence to prove that-
>
> (a) he did not know and had no reasonable grounds for suspecting –
> (i) that what he had in his possession was a controlled drug …,

or

(ii) that he was in possession of a controlled drug …."

That was interpreted by the appeal courts as requiring no more than the common law does when a prima facie case is made out by the prosecution, which is usually called the evidential burden. The prosecution has put before the court a sufficient case to support a conviction or even to warrant a conviction. This analysis of the burden of proof in a drugs case where s. 29 was operative was based on the interpretation of the words of the section.

94. There is a bias against reading a statutory provision as shifting the burden of proof to the accused in a criminal trial so a doubtful case will fall on the evidential burden side of the line rather than the legal burden side. In a case such as *Smyth* or *Tuma*, the court is conditioned to reject legal burden if the section is ambiguous or unclear or doubtful on the matter. In those cases, the courts held that the section, by its terms, did not impose a legal burden on the accused. The section we have to interpret is very different. The observations of Costello J. in *O'Leary* as to the critical issue of the precise words of the section are cited above. Here, there is no doubt about the meaning of the section.

95. The appellant relied on the *Smyth* case as confirming the approach of the Irish courts to the reverse burden, not merely in the particular instance of s. 29 of the MoDA 1977, but also more generally. There is support for this argument in the judgment of the Court of Criminal Appeal where a general principle is invoked to justify the interpretation recommended by the court to trial judges. On the other side, the observations of the CCA may be considered obiter - they were unnecessary to the instant case, which addressed a clearly erroneous and presumably inadvertent jury instruction that the accused had to prove the exculpatory issue beyond reasonable doubt. It seems to this Court that Smyth's case, on appeal, represents a strong and clear enunciation of the general principle of the golden thread in criminal law.

96. Whatever qualifications might have been applied to the status of Smyth as an authority in a drugs prosecution, they were nullified by the judgment of this Court in *DPP v. Tuma* [2015] IECA 63. The position is clear therefore in regard to s. 29 of MoDA. Costello J. in O'Leary emphasised that the words of the particular provision must be carefully analysed in order to understand the intention of the legislature. Therefore, the fact that s. 29 of the MoDA is to be construed as not shifting the burden of proof does not mean that the same conclusion follows with a quite different provision. In summary, the meaning of this Corruption Act 2001 provision is clear and has been authoritatively acknowledged down through the years. Its purpose was to place the accused in a position where he would be convicted if the necessary, specified pre-conditions were met.

97. Therefore, this section is clear; it imposes a legal burden on the accused in a case of corruption when the necessary statutory elements have been proved beyond reasonable doubt; the provision is not unconstitutional and neither is it contrary to the Convention or to common law. There is nothing in the cases to dictate a different conclusion.

98. O'Flaherty J., speaking for the Supreme Court, cautioned in the *O'Leary* case [1995] 254 at 266, that notwithstanding presumptions, whether they are evidential or legal, the process of trial is still a matter of assessment of evidence and careful judgment:

> "Courts, whether comprising a judge sitting with a jury or a judge or judges only, will not act as automatons in the assessment of evidence. With a statutory provision setting out what is to be regarded as evidence — and whether it is called a presumption or not is of no moment — the court must always approach its task in a responsible manner and have proper regard to the paramount place that the presumption of innocence occupies in any criminal trial."

> Were the activities of the accused as pleaded in the indictment and proven at trial acts done by him in relation to his office or position as a member of Dungarvan UDC?

99. Mr. Forsey was an agent within the meaning of the 2001 Act because he was the holder of a public office within the meaning of the Public Bodies Corrupt Practices Act, 1889. This ground is that Mr. Forsey did not have any function in regard the proposed development because it was in the administrative area of Waterford County Council and not that of the body of which he was an elected member, Dungarvan Urban District Council. The point only relates to three of the six counts, namely 1, 3 and 5. It is clear that his actions in relation to his own council are covered and that is not in dispute. It is submitted on Mr. Forsey's behalf, however, that his convictions on the other counts should be considered unsafe because much of the evidence related to the counts on which the conviction is impugned.

100. It is difficult to see how all the convictions are to be considered unsafe because three are subject to challenge. No authority is cited for that proposition and it would appear to be inherently illogical.

101. The appellant relies on *HM Advocate v. Dick* (1901) 5 F (Ct Sess) 59. The court held that the receipt of money by a town councillor to use his influence to secure a licence, when he had no duty or concern with granting of licences was not an indictable offence "however discreditable such conduct may be".

102. It is submitted that the prosecution confused the statutory function of a town councillor and his political role.

103. The Director argues that Mr. Forsey acted in relation to his office in promoting the planning permission of lands adjacent to the town of Dungarvan, although not within the jurisdiction of its council. The evidence revealed that he enjoyed access to the councillors and to the officials of Waterford County Council because of his status as an elected member of Dungarvan UDC. The words of this section are wide: "in relation to". The appropriate test as the prosecution submits is expressed in the case of Attorney General for *Hong Kong v. Ip Chiu* [1980] AC 663. The test is whether the benefit would have been given if the person were not the kind of official he was.

104. It seems clear that Mr. Forsey was exploiting his position as an elected member of one Council in order to secure a successful outcome to the planning application made to the neighbouring body. His access was his elected status. On the prosecution evidence, the money was paid to him for the very purpose of exploiting his access. It is not necessary for a conviction that the corrupt behaviour concerns specific statutory functions of the accused. It is sufficient if the activities can be comprised in the more general definition of being in relation to his office or position. Mr. Forsey, as the evidence established, did have status by reason of his membership of Dungarvan UDC to approach and seek to influence his Waterford County colleagues and officials.

105. There may of course be circumstances, as the appellant submits, in which the allegedly corrupt exercise of influence may be remote from the office or position that he or she holds. In those circumstances, there should not be a conviction. There must be a sufficient nexus between the allegedly corrupt behaviour and the office or position of the accused. To say that is not to introduce an

impossibly vague element into the crime definition, but merely to identify the element of judgment that the legislation requires to be exercised in relation to the facts of the case.

106. The Court accordingly rejects this ground also.

Is the appellant entitled to make these points on appeal when they were not mentioned at the trial?
107. This question can only arise if there is substance in one or other of the points now raised on appeal. The court has rejected the arguments put forward on behalf of Mr. Forsey. In regard to the second ground that concerns his function in regard to planning matters within the jurisdiction of Waterford County Council, the point is limited to only three of the six counts in the indictment, but again, the court is against the appellant. Having said that, the court, for completeness, looks briefly at the considerations that would operate to render admissible and arguable one or other of these issues if they had found favour.

108. In *DPP v. Cronin (No.2)* [2006] IESC 9 [2006] 4 I.R. 329, the applicant was convicted, inter alia, of murder following a shooting incident in a night club. At his trial, the applicant raised the defence that he did not have a gun and that he did not shoot the victim. The applicant applied for leave to appeal to the Court of Criminal Appeal. Counsel for the applicant submitted that the trial judge erred in failing to charge the jury in relation to the alternative defence of accidental or mistaken discharge of the gun. This objection was not raised at the trial. The Court of Criminal Appeal refused the applicant leave to appeal. It subsequently certified that its decision involved a point of law of exceptional public importance and that it was desirable that an appeal be taken to the Supreme Courts.

109. The Supreme Court held that when an accused was represented by an experienced legal team, a trial judge should not of his own volition raise possible lines of defence which the accused had chosen not to pursue. Accordingly, where an alternative defence that would give rise to a verdict of manslaughter was not put forward by an accused, the trial judge was correct to confine his charge to the jury to explaining the question of intention in a general way as to do otherwise would have run the risk of subverting the defence put forward by the accused. Only in circumstances where the court was of the view that, due to some error or oversight of substance, a fundamental injustice had occurred should the court allow a point not raised at trial be argued on appeal. In addition, an explanation must be furnished as to why it was not raised at trial.

110. Kearns J., giving judgment, set out the criteria for admitting on appeal points not raised at the trial:

> "It seems to me that some error or oversight of substance, sufficient to ground an apprehension that a real injustice has occurred, must be demonstrated before the court should allow a point not taken at trial to be argued on appeal. There must in addition be some sort of explanation tendered to explain why the particular point was not taken. Furthermore, as noted above, the Court of Criminal Appeal is concerned only with a review of the trial and the rulings made therein, and not with other suggested errors or oversights which may pre-date the trial or have been amenable to remedy in some other manner."

The appellant has not furnished an explanation as to why these points were not taken at the trial. The implicit suggestion is that it simply did not occur to either prosecution or defence to make these arguments.

111. The Circuit Court was obliged to take the Act as being constitutional and to apply it according to its terms. It is difficult to conceive of any basis on which the court of trial could have decided, particularly of its own motion without any suggestion by counsel, to instruct the jury as to a meaning of the section that was entirely different from what the words actually said. That would appear to be contrary to constitutional propriety. The Act is presumed to be constitutional and the court must apply the law as it understands it. It follows that the suggestion that the trial was unsatisfactory and that the conviction should be overturned on the basis proposed is an untenable proposition. It was simply not open to the trial judge to do what is now relied on by the appellant.

If the court is satisfied that the appellant is or may be correct in either of the submissions he makes, is it a proper case for the application of section 3 (1) (a) of the Criminal Procedure Act 1993 to affirm the conviction nevertheless, if it considers that no miscarriage of justice has actually occurred?

112. The question of application of the proviso is also entirely hypothetical in view of the conclusions of this Court. The Director has submitted that the case against Mr. Forsey was an extremely strong one and that the suggested defence was demonstrated to be inconsistent and unreliable. It might be that in the event that the Court were of a different view on the points argued, this issue would be a live one. That is not the situation, however. The Court considers that in the circumstances, this point is moot.

113. This discussion of the issues leads to the conclusion that the appeal must be dismissed and the Court accordingly orders.