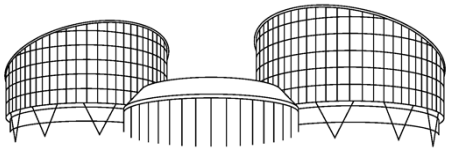

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BUSUTTIL v. MALTA

(Application no. 48431/18)

JUDGMENT

Art 6 § 2 • Presumption of innocence • Not unreasonable use of legal presumption by which company director found guilty of failing to pay tax dues • Adequate defence of impossibility, arising out of domestic jurisprudence, having regard to context of tax offences and importance of such income for the State

STRASBOURG

3 June 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Busuttil v. Malta,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Péter Paczolay,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 48431/18) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Maltese national, Mr Antonio a.k.a Anthony a.k.a Tony Busuttil ("the applicant"), on 11 October 2018;

the decision to give notice to the Maltese Government ("the Government") of the complaint concerning Article 6 § 2 of the Convention, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 20 April 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns criminal proceedings against the applicant, as a director of a company, in which he was found guilty of failing to pay tax dues, with the use of legal presumptions.

THE FACTS

2. The applicant was born in 1947 and lives in Sliema. He was represented by Dr E. Borg Costanzi and Dr P. Borg Costanzi, lawyers practising in Valletta.

3. The Government were represented by their then Agent, Dr P. Grech, then Attorney General, subsequently by their then Agent Dr V. Buttigieg, then State Advocate and later by their Agents Dr C. Soler, State Advocate and Dr J. Vella, Advocate at the Office of the State Advocate.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. Prior to his resignation, the applicant was, from 2001 to 2006, a co-director (owning 25% of the shares) of company M. following an invitation from the two other directors.

6. During the period 2003-2006 company M. failed to submit to the authorities the relevant tax forms and payments (provisional tax and national insurance contributions on behalf of their employees). After the applicant's departure (in 2006), under the management of the two other directors, the company went bankrupt.

7. In 2011 the tax authorities ordered the applicant to pay, on behalf of company M., approximately 323,500 euro (EUR) in outstanding tax.

II. CRIMINAL PROCEEDINGS

8. The applicant having failed to pay, in March 2011 criminal proceedings were instituted against him for failing to submit the relevant tax forms pursuant to Section 23 (1) and (2) of Chapter 372 of the Laws of Malta (the Income Tax Management Act) and Rules 15 and 20 of Legal Notice 88 of 1998 (see paragraph 28 below).

9. The applicant claimed that he was unaware of such a situation as he had only dealt with sales (which was his job since 1996 when he had been employed by the company). Indeed, since in practice he knew nothing about administration, he had insisted with the other directors that they should employ a financial controller as in fact they had eventually done.

10. By a judgment of 23 March 2012, the Court of Magistrates found the applicant guilty of the charges against him and fined him EUR 400. It did not impose any additional fine given that the applicant no longer represented company M. It examined his defence that he had been unaware that the offence had been committed and that he had exercised all due diligence to prevent such offence from taking place and dismissed it. In particular, it found that, from his own testimony, it was clear that he had failed to take any interest, no matter how minimal, in the fiscal obligations of the company of which he had been director, leaving the matters completely in the hands of third parties.

11. The applicant and the Attorney General appealed. The latter requested the court to apply an additional daily fine and the former claimed, *inter alia*, that he had been unaware of the situation and had always acted in good faith and with diligence (and thus could not be found guilty according to Section 13 of the Interpretation Act), and that the charge against him was time barred, since he had left the company in 2006 and could no longer act on its behalf. He claimed that during the company meetings it had never been mentioned that such payments had not been made, and the forms in respect of his own employment showed that his contributions had been paid.

Thus, he had no reason to think the same had not been done in respect of all the employees.

12. By a judgment of 6 December 2012, the Court of Appeal confirmed the first-instance judgment and fined the applicant EUR 400 plus a daily fine of EUR 4 until the sum of EUR 323,500 was paid.

13. It held that it was undisputed that the applicant had been the director of the company, and that a director had been responsible for sending in the relevant forms and payments – an obligation which had not been fulfilled. In the present case it was futile for the applicant to argue that he had been in charge of sales outside the company premises, that the running of the business had been left to someone else and that the problems at issue had never been mentioned to him. These were merely internal workings of the company and the Commissioner of Tax was entirely in his remit in turning onto the applicant, as director, for payment.

14. The Court of Appeal found that the offence at issue was a permanent one. Thus, prescription would only run in respect of the offender - irrespective of whether he remained director of the company - once the payment was made.

15. The applicant's defence of impossibility to fulfil the obligation requested of him today on the basis that he was no longer a director, was rejected by the Court of Appeal. It considered that in his case this was a self-inflicted impossibility since the applicant had chosen to leave the company of his own free will before such dues were paid. It would have been otherwise had he been dismissed or had he fallen sick. But this was not the case. Since he had voluntarily closed the door to the possibility of fulfilling the obligation, the offence could not be considered time-barred. According to the Court of Appeal, it would be for the accused to prove such impossibility and, in the absence of such proof, he or she would remain liable for an indefinite period of time given that the offence was one of a permanent nature.

16. The applicant had also argued that he had complied with Section 13 of the Interpretation Act - that he had done all that was possible to avoid the commission of the offence and that in any event he had been unaware that the offence had been committed. However, in the Court of Appeal's view, Section 13 of the Interpretation Act (see paragraph 29 below) did not apply in the applicant's case, given that the offence arose from a special law covering fiscal measures issued by the Government. Thus, it was that law which had to apply and not the Interpretation Act. It followed that a director of a company (whether working in sales or in administration) had the duty to fulfil the obligations arising from that law in favour of the Tax Commissioner, and it could not be argued that another person had been in charge of the company's administration and documentation.

17. The Court of Appeal, reiterating that his resignation from directorship had been voluntary, noted that when the company had been

having financial problems, negotiations concerning the division of the shares and the change in directorship had gone on for a long time until the applicant resigned in 2006. During such time the applicant had had both the time and the opportunity to enquire about the situation of the company *vis-à-vis* the tax authorities, but he had failed to do so. Thus, there was no reason to uphold the defence of impossibility.

III. CONSTITUTIONAL REDRESS PROCEEDINGS

18. The applicant instituted constitutional redress proceedings complaining, *inter alia*, that he had suffered a breach of a fair hearing in particular in regard to his presumption of innocence.

A. First-instance

19. By a judgment of 26 April 2017, the applicants' claims were dismissed by the Civil Court (First Hall) in its constitutional competence.

20. The court held that, according to the jurisprudence of the European Court of Human Rights', Article 6 § 2 allowed for presumptions to come to play as long as these could be rebutted in fair proceedings. However, Section 23 of Chapter 372 of the Laws of Malta (see paragraph 28 below) created no such presumption. In this case the law provided that a director would be responsible for the failings of the company and the prosecution had proved such failings. The fact that the law imposed certain legal obligations on directors of companies did not breach the right to be presumed innocent.

B. Appeal

21. The applicant appealed, in particular claiming that he had acted in good faith and had been unaware of the debts due at the time It followed that Chapter 372 of the Laws of Malta and Legal Notice 88 of 1998 in so far as they related to the responsibility of a director, once he ceased his functions, had breached his right to be presumed innocent.

22. By a judgment of 13 April 2018 his claims were dismissed.

23. The Constitutional Court found that the applicant could not claim that he had been unaware of the failings of the company. Even if that were the case, directors could not be released from their responsibility, be it for that reason, or because they were not competent, or because they relied on advisors. According to domestic case-law, a director, including a non-executive director or one with a minority shareholding, had the same responsibility as other directors and had the obligation to know and comply with the duties imposed on him or her by law. Once a person accepted a directorship he or she had to comply with its obligations and had to take an

interest in all the aspects of the company, including the financial ones for which he or she was responsible in the eyes of the law.

24. Furthermore, the Constitutional Court considered that the applicant had been aware of the documents showing the debts. Witness testimony by the bookkeeper before the first-instance constitutional jurisdiction had shown that all directors had obtained copies of the relevant documents and that the applicant had been present in the meetings where the lack of liquidity of the company and the failed payments of tax and contributions had been discussed. Thus, the applicant's claim was not acceptable both legally and factually, because he had a duty to remain informed and because he had been so informed, according to witness testimony which had not been contradicted. In the Constitutional Court's view this was in any event not a complaint of a constitutional nature and it was not the Constitutional Court's role to act as a third or fourth instance court in respect of the assessment of facts made by the ordinary courts.

25. Further, the Constitutional Court held that the principle of the presumption of innocence did not mean that no reversal of the burden of proof was permitted. Moreover, examining the relevant provisions, namely Section 23 (7) and (13) of Chapter 372 of the Laws of Malta, the Constitutional Court considered that in the present case it had been for the prosecution to prove the facts (sub-paragraph 13), namely that the accused failed to fulfil the duties imposed by Section 23, which it did. The reverse presumption (under sub-paragraph 7) applied only to the quantification of the amounts due, in the sense that they would be taken as correct unless they had been challenged and proved wrong. In the present case the applicant had not even contested the fact that the tax forms had not been sent and that the relevant tax had not been paid. The only matter he contested was his criminal responsibility. Having examined the case file of the criminal proceedings it did not appear that the prosecution had been freed from its obligation to bring forward the best proof, as well as evidence for and against the applicant and on the basis of the evidence the criminal courts were satisfied that the prosecution's case was made out.

26. That said, the Constitutional Court also considered that any other laws cited by the applicant in his application to the constitutional jurisdictions could not be considered to have breached his right to be presumed innocent.

IV. OTHER RELEVANT FACTS

27. The two other directors of the company were also prosecuted for the same offences. By final appeal judgments of 20 September 2018 and 27 February 2020, respectively, they were found guilty of the charges against them. They were each ordered to pay a fine of EUR 400 and a daily fine of EUR 7 until payment of the sums due.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

28. Section 23 sub-paragraphs (1) (2) (7) and (13) of the Income Tax Management Act, Chapter 372 of the Laws of Malta, at the relevant time read as follows:

> "(1) Where any person pays income chargeable under article 4(1)(a), (b) or (d) of the Income Tax Act, or any other income as may be prescribed, he shall, at the time of payment deduct tax therefrom at such amount and in such manner as may be prescribed under this sub-article or under any other provision of the Income Tax Acts.
>
> (2) Any tax deducted as required under sub-article (1) shall be remitted to the Commissioner in such manner and within such period as may be prescribed.
>
> ...
>
> (7) Where a person has not contested the default notice referred to in sub-article (5) hereof or where his contestation has been refused, the Commissioner may, where the payment of the amount due has not already been made, serve a demand notice on such person showing the tax which should have been deducted or remitted and any additional tax imposed upon him; and, unless the contrary is proved, the said notice shall be sufficient evidence that the amount shown therein is the amount due to be paid to the Commissioner by the said person:
>
> Provided that a person on whom a demand notice has been served in consequence of a refusal by the Commissioner in accordance with this sub-article may appeal such decision in a court of law within fifteen days from the date of service of such notice.
>
> ...
>
> (13) Any person who contravenes or fails to comply with the provisions of this article or of any rules referred to in sub-article (1) shall be liable, on conviction, to a fine (*multa*) of not less than one hundred and sixteen euro (116) and not exceeding one thousand and one hundred and sixty euro (1,060) or imprisonment for a term not exceeding six months or to both such fine and imprisonment, and to a further fine (multa) of not less than four euro (4) but not exceeding twenty-three euro (23) for every day during which the offence continues after conviction:
>
> Provided that the Commissioner may compound any offence under this sub-article and may before judgment stay or compound any proceedings thereunder:
>
> Provided further that the offence under this sub-article shall continue to subsist until the offender shall have conformed and complied with the provisions of this article or of any rules referred to therein."

29. Section 13 of the Interpretation Act (1975), Chapter 249 of the Laws of Malta, reads as follows:

> "Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence:

Provided that, except in respect of offences under or against a provision contained in an Act in which a provision similar to that of this article occurs, the provisions of this article shall apply only to offences committed after the commencement of this Act."

30. Subsidiary Legislation 372.14, the Final Settlement System (FSS) Rules, a subsidiary legislation to the Income Tax Act (Legal Notice 88 of 1998), in so far as relevant, reads as follows:

Rule 2

"In these rules, unless the context otherwise requires –

"payer" means any person by whom emoluments are paid or deemed to be paid in terms of the provisions of article 4(1)(b) of the Income Tax Act or of regulations prescribed under that paragraph, or who pays, or is liable to pay emoluments whether on his own account or on behalf of another person and includes government departments, persons in the public service of Malta, public corporations and their officials, and other bodies of persons and their officials."

Rule 15

"(1) Every payer shall, by the last working day of the month following that during which he has made payments of emoluments, remit to the Commissioner the total amount of tax deducted or which should have been deducted therefrom in accordance with these rules.

(2) The remittance due to be made to the Commissioner under sub-rule (1) shall be forwarded by the payer together with the information required to be given on the form referred to in rule 20 which shall be completed and signed by the payer:

Provided that, when so directed by the Commissioner, the payer shall make the said remittance by means of an electronic payment.

(3) If the remittance required by sub-rule (1) is not received by the Commissioner by the due date, or if the amount received is less than that which should have been remitted, the Commissioner shall determine to the best of his judgement the total amount of the deduction of tax which should have been remitted by the payer and serve a default notice upon him in accordance with rule 24 requiring him to pay, in addition to any additional tax imposed thereby, the amount or the difference, as the case may be, within the time to be limited by such notice."

Rule 20 (before amendments in 2020)

"Every payer shall prepare and forward, on a form supplied or approved by the Commissioner, a monthly payment advice (including a nil advice) for the purposes of rule 15(2) which, apart from the details relating to the payer's identity and the name and place of business, shall contain the following information:

(a) the number of payees to whom emoluments have been paid during the previous month showing separately the number of payees receiving emoluments referred to under paragraphs (b) and (c);

(b) the gross amount of emoluments paid to the payees in respect of part-time employment qualifying under article 90A of the Income Tax Act;

(c) the gross amount paid to the payees in respect of emoluments arising from any other source, distinguishing between the value of fringe benefits and other emoluments and showing sub-totals for different categories of fringe benefits;

(d) the total amount of tax, if any, deducted in respect of the emoluments referred to under paragraph (b);

(e) the total amount of tax, if any, deducted in respect of the emoluments referred to under paragraph (c); and

(f) the total amount of tax, if any, deducted in respect of the payees' outstanding tax liability as directed by the Commissioner under rule 10."

Rule 29

"Where two or more persons are concurrently to be considered to be the payer in relation to any payee for the purposes of these rules, the obligations, duties and liabilities imposed on payers by these rules shall be deemed to have been imposed on them jointly and severally."

Rule 30

"The manager, other principal officer or liquidator of anybody of persons shall be personally answerable for all matters required to be done under these rules by or on behalf of the body of persons."

II. DOMESTIC PRACTICE

31. In *the Police vs Carmela Agius*, Court of Criminal Appeal judgment of 29 January 2015, the court held:

"This court has already had the opportunity to rule that the offences contemplated in Chapter 372 of the Laws of Malta are of a permanent nature and that a director remains responsible towards the Tax Commissioner even once he/she no longer holds that position. ... However, an individual, whether director or not, may successfully plead that he or she was in the impossibility of complying with the law for some reason or other, including that it was not her or him who perpetrated the offence at the start."

...

"It is true that this court has previously argued that every director, even non-executive, has an obligation to ensure that the laws and regulations vis-à-vis the Commissioner for Revenue are observed and applied where necessary, and despite the fact that this director would not be part of the managements of the company, he would nevertheless be responsible if the company somehow failed. This case is, however, different, since the appealed was not in a position to ensure the carrying out of the obligations towards the Commissioner for Revenue."

III. COUNCIL OF EUROPE

32. The declaration made at the time of signature of the Convention, on 12 December 1966, and contained in the instrument of ratification,

deposited on 23 January 1967, by the Government of Malta reads as follows:

> "The Government of Malta declares that it interprets paragraph 2 of Article 6 of the Convention in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts."

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

33. The applicant complained that a presumption of guilt was applied against him on the basis that he was the director of company M., despite the fact that the situation had been hidden from him, which was contrary to Article 6 § 2 of the Convention. This provision reads as follows:

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

A. Admissibility

34. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

35. The applicant submitted that he had suffered a breach of his presumption of innocence. He had been found guilty without the necessity of proving the criminal intent, which was necessary at law in order to ascertain the commission of a crime by an individual. Thus, the domestic courts had operated on the basis of a presumption of guilt simply due to the fact that, purely on paper only, the applicant had been listed as a director of the company in question. This was so despite the wording of Section 13 of the Interpretation Act which the Court of Criminal Appeal considered did not apply in the present case.

36. According to the applicant, this interpretation deprived him of his defence at law. As a result, the domestic courts had completely ignored the fact that he had had no knowledge of the crime at the time it had been committed and that he could not have known about the crime because the facts had been deliberately hidden from him. The applicant noted that he had testified many times throughout the domestic constitutional proceedings

stating that papers he had been shown regarding any finances or debts had not indicated any problems. He further considered that the domestic courts had completely ignored the fact that it had not even been his task to have paid the tax. As testified throughout the domestic proceedings, the applicant had continued on with his sales position, despite having become a shareholder and despite having been listed as a director. He had also been diligent in advising the other directors to appoint a financial controller.

37. The applicant submitted that, while the Government relied on the fact that the constitutional jurisdictions had considered that his ignorance of the matter had been disproven (see paragraph 42 below), this had been based on the bookkeeper's testimony obtained in those proceedings. The applicant considered that the latter's testimony had not been uninterested given that she had to have been complicit to the dealings. Moreover, no documents showing the faulting tax payments had ever been presented by her. Thus, he could not be considered guilty beyond reasonable doubt. In this connection he relied on the European Union directives to the effect that any doubts should benefit the accused.

38. The applicant explained that the presumption of guilt lied in the fact that the Criminal Court of Appeal had not given him an effective opportunity to rebut the presumption at law (that as a director he was responsible), by declaring the Interpretation Act inapplicable to his case. Thus, the theoretically rebuttable presumption at law had been made in practice irrebuttable, as no matter how much evidence the applicant could have brought, this had been, in the Court of Appeal's view, useless (see paragraphs 13 and 16 above). He considered that by dismissing all his evidence, the domestic court had placed on him an extreme and unattainable burden of proof, so that his defence had no prospect of success.

39. In relation to the cases relied on by the Government (see paragraph 43 below) the applicant noted that the only relevant case was that of *Carmela Agius* where, however, the accused had had the possibility to rebut the presumption, unlike the applicant, and had thus been acquitted. In his case, his status as director had also been on paper alone, and he had not had access to the information or funds necessary to be able to send the tax forms in question and make the relevant payments. The problems had persistently been hidden from him, thus he could also not have been considered negligent. The applicant considered that he had simply been a scapegoat in the situation and that the domestic court's actions resulted in his being punished for a crime he had not committed. Moreover, the company being now defunct the applicant had no possibility to recover such sums from them.

(b) The Government

40. In the Government's view, the legislation challenged by the applicant allowed him to exculpate himself and in no manner created an

irrefutable presumption. They explained that upon the payment of income to one's employee the payer was required to deduct the tax therefrom and to pay it to the Commissioner every month. If a payer failed to deduct the relevant tax or failed to pay such deduction, the person became criminally liable and a director was personally answerable for all obligations in this respect on behalf of the company. In such cases the prosecution was required to prove that the individual was the director of the company at the time, that the company failed to satisfy these obligations, and that the company failed to pay a certain amount of tax.

41. The Government noted that Article 6 § 2 did not prohibit strict liability offences thus a certain act could still be an offence without their necessitating *mens rea*. They considered that in the present case the criminal courts had not undertaken proceedings with a pre-conceived idea of the applicant's guilt.

42. Both the Court of Magistrates and the Court of Appeal had found the applicant guilty, beyond any reasonable doubt, on the basis of the strength of the evidence produced by the prosecution, that had proved both that company M. had failed to adhere to its fiscal obligations and that the accused had been a director of that company. Indeed, the applicant had not questioned the evidence put forward, but based his defence on the fact that he was unaware of the situation and that he had exercised all due diligence to prevent the offence from taking place. The Court of Magistrates, having thoroughly examined the applicant's defence and all the evidence, had dismissed it (see paragraph 10 above). Further, before the domestic constitutional courts it had been disproven that the company's problems had been deliberately hidden from him, based on the witness testimony to this effect. It was therefore not for this Court to re-assess those findings.

43. The Government submitted that various other cases of the type, where the same charges had been brought against directors of companies, had resulted in acquittals. This was so despite a lack of reference to Section 13 of the Interpretation Act, which the Court of Appeal had found to be inapplicable in the present case. They referred to:

- *The Police vs Emanuel Micallef*, judgment of the Court of Magistrates as a court of criminal judicature of 10 July 2012 and *The Police vs Charlie Andrew Cordina,* judgment of the Court of Magistrates (Gozo) as a court of criminal judicature of 8 May 2012, in both cases the charges had been dismissed for lack of evidence.

- *The Police vs Carmela Agius,* Court of Criminal Appeal judgment of 29 January 2015. Confirming a first-instance judgment, the court upheld the accused's defence of impossibility (applicable under domestic law) and found that it had been amply proven that the accused's husband had listed her as a director of a company without her knowledge, and therefore that the accused, unaware that she was a director, had no management role in the company (see paragraph 31 above).

44. Thus, according to the Government, an accused had the procedural possibility of demonstrating his innocence. In the present case the applicant could have relied on the defence of impossibility allowed under domestic law (see paragraph 15 above). However, in the Government's view, the case of *The Police vs Carmela Agius* was not comparable to the applicant's position, since the applicant had freely chosen, of his own accord, to become director. He thus knew, or ought to have known, of the responsibilities attached to that role, including that of personal liability towards the Commissioner for Revenue for the unpaid tax as per Rule 30 of the FFS rules (see paragraph 30 above). However, he had abdicated this responsibility opting to focus on sales. These had been matters which the domestic criminal courts had considered.

45. Lastly, the Government submitted that the applicant could have also challenged the amount of tax by showing that the amount was incorrect and this was not contrary to the Convention, even more so in the light of the declaration of interpretation made by the Maltese State in 1966 (see paragraph 32 above).

2. The Court's assessment

(a) General principles

46. The Court reiterates that viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof and legal presumptions of fact and law (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013). The right to the presumption of innocence is not absolute, since presumptions of fact or law operate in every criminal-law system. The Court has previously found that the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (see *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 243, 28 June 2018; *Janosevic v. Sweden*, no. 34619/97, § 100, ECHR 2002-VII, and *Salabiaku v. France*, 7 October 1988, Series A no. 141-A, § 27).

47. While the Convention does not regard such presumptions with indifference, they are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence (see *G.I.E.M. S.R.L. and Others*, cited above, § 243; *Grayson and Barnham v. the United Kingdom*, nos. 19955/05 and 15085/06, § 40, 23 September 2008 and *Salabiaku*, cited above, § 28). In other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved (see *Janosevic*, cited above, § 101, and *Falk v. the Netherlands* (dec.), no. 66273/01, 19 October 2004).

48. It is not for the Court to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair (see *Grayson and Barnham*, cited above, § 42; and *Sofia v. San Marino* (dec.), no. 38977/15, § 59, 2 May 2017).

(b) Application to the present case

49. The Court notes that it is not in dispute that under Maltese law a director is responsible for any act which by law must be performed by the company and this is the presumption of law at issue in the present case. It is also not disputed that Section 13 of the Interpretation Act provides the ways in which a director can exculpate himself, namely if he or she proves that the offence was committed without his or her knowledge and that he or she exercised all due diligence to prevent the commission of the offence (see paragraph 29 above). That provision has been found to be compatible with Article 6 § 2 by this Court as the conditions, which required the applicant to prove that he had no actual knowledge of the offence and also was not negligent in his duties as an officer of a company, were not self-contradictory, nor did they impose an irrebuttable presumption (see *A.G. v. Malta*, Commission decision, no. 16641/90, 10 December 1991).

50. However, the Court notes that, according to the Court of Appeal, Section 13 of the Interpretation Act (which would have given the applicant, as a director, a possible defence) had not been applicable to the applicant's case (see paragraph 16 above). Thus, in the criminal proceedings against him, the applicant's possibility of rebutting his presumption of guilt, as director, had been limited to the defence of impossibility which the Court of Appeal found had not been proved (see paragraphs 14-15 above).

51. The Court observes that the parties have not elaborated on the extent of this defence. However, it appears evident that its scope is more limited than that under Section 13 of the Interpretation Act. Nevertheless, the Court considers that the applicant was not left without any means of defence (see, *mutatis mutandis*, *Müller v. Austria*, no. 12555/03, § 34, 5 October 2006). He had been allowed to plead his case and put forward relevant evidence before the domestic courts having full jurisdiction. The Court of Magistrates had dismissed all his defences on the basis of his own testimony and the Criminal Court of Appeal had also assessed in detail the merits of his defence of impossibility.

52. Furthermore, the Court observes that the Constitutional Court did not confirm the finding that Section 13 of the Interpretation Act was inapplicable. Instead it found that, even assuming that it was applicable, the evidence before the constitutional jurisdictions showed that the elements to uphold a defence under Section 13 of the Interpretation Act had not existed. The Court observes that, while it is true that the function of the

constitutional jurisdictions is not to determine the guilt or innocence of an accused, their findings in relation to this defence comfort the findings of the courts of criminal jurisdiction. The applicant, who before the Court contests that evidence, has not complained that he was unable to bring all the relevant evidence before the constitutional jurisdictions.

53. Moreover, the Court notes that in the criminal proceedings the prosecution had been required to prove that the applicant had been the director of the company at the time, that the company had failed to satisfy the relevant fiscal obligations, and that the company had failed to pay a specified amount of tax. Elements which had been proven by the prosecution and had not been disputed by the applicant. There is no indication that the domestic courts applied the domestic rules on the burden of proof in a manner incompatible with the presumption of innocence. In particular, the applicant has not explained in what way the burden of proof imposed on him was unattainable (see paragraph 38 above) to the extent that his defence could have no prospect of success. As noted by the domestic courts the defence of impossibility could be upheld in various circumstances (see paragraph 15 above).

54. The Court also notes that there is nothing indicating that the criminal courts in fulfilling their functions started from the assumption that the applicant was guilty (see, *mutatis mutandis*, *Hansen v. Denmark*, (dec.) no. 28971/95, 16 March 2000). Further, in reply to the applicant's argument concerning the lack of criminal intent (see paragraph 35 above) the Court reiterates that the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (see general principles at paragraph 46 above).

55. The Court has regard to the financial interests of the State in tax matters, taxes being the State's main source of income (see *Janosevic*, cited above, § 103, and *Västberga Taxi Aktiebolag and Vulic v. Sweden*, no. 36985/97, § 115, 23 July 2002). Moreover, the present case also concerns the failure to pay national insurance contributions which in turn are used to fund welfare benefits and public health care, both prominent interests in a State's set up. Given that such contributions are paid in part by employers, which are often established as, *inter alia*, companies, a director's role assumes considerable importance in such a system. In the Court's view, it is therefore judicious for the law to provide that the latter, in taking up his or her responsibilities as director, takes up the obligation to pay the relevant tax dues, in order to allow for a functional system in the interests of all those concerned, as long as some means of defence remains available to an accused.

56. Bearing in mind the above, the Court considers that the presumption under Maltese law, that a director is responsible for any act which by law

must be performed by the company, was not unreasonable in the circumstances of the present case.

57. There has accordingly been no violation of Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention;

Done in English, and notified in writing on 3 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

K.T.U.
R.D.

CONCURRING OPINION OF JUDGE WOJTYCZEK

In the instant case the Court expressed the following view in paragraph 46:

"The Court has previously found that the Contracting States may, in principle and under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (see G.I.E.M. S.R.L. and Others v. Italy [GC], nos. 1828/06 and 2 others, § 243, 28 June 2018; Janosevic v. Sweden, no. 34619/97, § 100, ECHR 2002-VII; and Salabiaku v. France, 7 October 1988, Series A no. 141-A, § 27)."

I have reservations about this approach, and I share the main concerns with regard to objective liability, expressed in paras. 61-63 of the partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque appended to the judgment in the case of *G.I.E.M. S.R.L. and Others v. Italy.*