THE ACCUSED IN MALTESE LAW

By HUGH W. HARDING, B.A., L.P.

THE spirit underlying the Maltese Criminal system is substantially contained in the rebuttable presumption that every man is presumed to be innocent until he is proved to be guilty : *semper praesumitur pro negante.* This presumption, which, in the words of Taylor, rests on "the right which every man has to his character, the value of that character to himself and to his family, and the evil consequences that would result to society if charges of guilt were lightly entertained or readily established in courts of justice" protects the accused throughout the whale course of criminal proceedings,—from the very moment of arrest up to the moment of conviction or acquittal.

In fact, although the power to arrest any person who has committed, or is suspected of having committed, any crime punishable with death, hard labour , or imprisonment is vested in the Executive Police (Sec. 359, Criminal Code, Cap. 12, Rev. Ed.), considerations touching the personal liberty of the subject have inspired the requirement that the officer of the Executive Police, charged with the execution of a warrant of arrest, must inform the person, subject to such arrest, of the officer's authority and of the reason for the arrest (Sec. 365). "The liberty of the subject"—Warburton and Grundy point out—"is so jealously guarded that all prescribed formalities must be carefully complied with before an arrest can be recognised as legal". Furthermore, Sec. 365(2) lays down that if the order is given far the person arrested to be brought before the Court of Judicial Police, such order shall be carried into effect without any undue delay and shall in no case be deferred beyond two working days. The importance of this provision is paramount, and it practically corresponds to a writ of Habeas Corpus. Indeed, the Habeas Corpus Act has undoubtedly suggested the other provisions relating to cognate matters, that is. Sec. 127, which prescribes a punishment for any turnkey who shall subject any person under his custody to any arbitrary act or restriction not allowed by the prison regulations, and Sec. 135, which makes it an offence far a Magistrate to fail or refuse to attend, in a matter within his powers, to a lawful complaint touching an unlawful detention.

Even after arrest, in case the punishment exceeds the jurisdiction of the Court of Judicial Police, as a Court of Criminal Judicature, the enquiry by that Court, as a Court of Criminal Enquiry, must be concluded within the term of ten days, and after the acts are sent to the Attorney General, the latter must file the indictment within six days. Moreover, if a longer period is necessary for the determination of the true nature of the offence, the party accused is, on the expiration of forty days, to be released on bail (Sec. 444(1)). In virtue of a very recent amendment (Ord. VI of 1947) most of the previous restrictions on the granting of bail have been removed, and it may now be given by the Court at its discretion in all cases except in the case of crimes against the safety of the Government and in the case of crimes liable to the punishment of death. Moreover, in cases where the accused is not admitted to bail, the Court may, in assessing the appropriate punishment, take account, in its discretion, of any period during which the accused was kept in custody, prior to conviction, for the offence or offences charged.

There are further guarantees for the party accused. The most important of these is the constitution of the Criminal Court itself. This is made up of a judge or judges and jury. The independence of the former is secured by their holding office "*quamdiu se bene gesserint*". The names of the latter, who represent the ordinary man in the street, are

drawn by lot when the panel of jurors for a particular trial is formed. As Blackstone observes in regard to the similar institution obtaining in England : "The liberties of England cannot but subsist so long as this palladium remains sacred and inviolate."

Moreover, if the accused appears without Counsel, the Court shall inform him that he has a right to be assisted by Counsel (Sec. 457), and if he does not bring Counsel, the Court proceeds to appoint the Advocate for the Poor, who is bound to give assistance gratuitously to the accused. (In England the matter is governed by the Poor Prisoners' Defence Act 1930—20 & 21 Geo. 5, c. 32—and by the Cr. Off. Rules, 1906, r. 257). Indeed, the law, in the interest of the accused, considers the office of Counsel so important that it provides a punishment for any Advocate or Legal Procurator who betrays the interests of his client.

In consequence of the principle that every man is presumed to be innocent until he is proved to be guilty, the benefit of the doubt goes in favour of the accused throughout the whole course of the trial and the burden of proof, as a rule, lies on the Prosecutor. Indeed, if, after the indictment is read and the preliminary pleas determined, when the accused is asked whether he is guilty or not of the charge brought against him, he states that he is guilty of the offence, the Court shall in the most solemn manner warn him of the legal consequences of such statement and shall allow him a short time to retract it before passing sentence on the accused (Sec. 465(2)); if the accused does not answer simply that he is guilty, any answer given by him shall be "considered as an answer of not guilty, notwithstanding the plea of guilty (Sec. 465(2)), for as Archbold points out: "It is important that there is no ambiguity in the plea and that where the accused makes some other answer than 'Not Guilty' or 'Guilty', as the case may be, care should be taken that he understands the charge and to ascertain what the plea amounts to."

The same rule holds good when the accused does not give any answer at all (Sec. 466 (4)). It was similarly held in the English Courts of Law in R. v. Israel, 2 Cox 263, and in R. v. Schleter, 10 Cox 409, that where the defendant stands mute, the Court cannot itself determine whether in fact he is mute of malice or by visitation of God but must direct a jury to be forthwith impanelled and sworn, to try whether the person be mute of malice or ex visitatione Dei.

Another safeguard for the accused is provided by Sec. 466(7) which lays down that it shall not be lawful for the Court, the Attorney General or the jury, during the trial, to put any other question to the accused with regard to the fact with which he is charged.

The party accused must be present throughout the whole course of the proceedings for it is a principle well established in Maltese law that the person accused cannot be sentenced in default (in contumacia). The only exception to this rule introduced by Ord. XV of 1937 is the case of repeated misbehaviour of the accused. This follows English law. Thus, in R. v. St. George, 9 C & P. 483, it was held that no trial for felony can be had except in the presence of the defendant and he must stand in the dock to be tried, and in R. v. Richardson, 29 T.L.R. 228 it was said that if he creates a disturbance, then the trial may go on without his presence. It might be of interest to add that in Maltese Law, before Ord. XV of 1937, the removal of the accused was limited to cases in which the punishment of death was demanded and a eclaration

of the jury stating that the behaviour of the accused was such as to disturb the good order of the sitting was necessary. According to the law as amended, the power of removal has been made operative in *all* cases, before all Courts of Criminal Jurisdiction and *independently* of a declaration of the jury.

To safeguard further the interest of the accused as well as of justice, the trial must be open to the general public, though the Court may, in certain cases, for reasons of public hear proceedings in camera. In England, also—Archbold observes—at common law, a trial must be held in a public Court with open doors, though the Children Act 1908 (8 Edw. 7. c. 67) admits certain exceptions to this rule similar to those obtaining in Maltese Law.

Because of the principle obtaining in the Law of Evidence that no one is bound to criminate himself *(nemo tenetur prodere se ipsum),* it was held for many years in England and Malta that the accused could not give evidence. However, now, in England, the Criminal Evidence Act 1898 and in Malta, Sec. 630, provide that the accused may give evidence, if he so wishes. Indeed, the local law further lays down that the Prosecution may not comment adversely an the failure of the accused to give evidence. In this connection, it may be of interest to note, that in Rex. vs. Constantino Magri, 5th August 1924, it was held to be lawful for *the Court* to make such comment, though this power had to be used exceptionally and sparingly . If the accused elects to give evidence, then he may be cross-examined, though not with regard to his previous conduct, unless, in giving evidence, the accused tried in any way, to establish his own previous goad conduct (Rex. vs. Zammit, 21st February, 1922).

The communications of the accused with Counsel are privileged, and for this reason Sec. 638 provides that Advocates and Legal Procurators may not be compelled to depose with regard to circumstances, the knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.

If the accused is found guilty, then the Court may grant him the benefit of the provisions relating to first offenders, that is, conditional release, if the circumstances are such as to warrant the application of Sec. 23 of the Criminal Code. Moreover, if the verdict of the jury is erroneous (Sec. 498(1)), the Court may order a new trial before another jury whose declaration shall be final. This power, however, is restricted to the case in which the jury shall have declared the accused "guilty" and does not extend to the case in which the jury declares the accused "not guilty".

With regard to punishment, prior to a recent amendment the Judge or Magistrate could not award anything less than the minimum, whenever this was expressly prescribed by law, as it was in the majority of provisions—In 1944 the law was amended (vide G.N. 324/1944 and Ord. XII of 1944) in the sense of enabling the Court to award any lesser punishment which it may deem adequate if there were special and exceptional reasons for doing so, to be stated expressly in the decision.—This innovation was indeed a salutary one, as it gives more freedom to Judges and Magistrates to weigh the particular circumstances of each case in meting out the punishment which must fit not only the crime but also the criminal. After all, as Mr. J. A. R. Cairns said in his book "The Loom of the Law" : "This, then, is the loom of the law; its threads are human souls".

THE PROSECUTION

It cannot be too often made plain that the business of Counsel for the Crown is fairly and impartially to exhibit all the facts to the Jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done" — **LORD HEWART**.