

# Evidence law – imposing legal burden of defendant

Law



Imposing a legal burden upon a defendant will negate the principle of presumption of innocence. If a defendant has to prove their innocence then it would automatically and unconsciously bring up the issue that they were never considered innocent until proven guilty. The presumption of innocence was first articulated in the case of *Woolmington v DPP* AC 462, 461 where Viscount Sankey LC stated that: 'Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained' This statement of the nature of the legal burden of proof in a criminal trial is basically a summary of the important presumption that highlights our criminal justice system, that a person is presumed innocent till proven guilty. In the case of *McIntosh v Lord Advocate* 3 WLR, Lord Bingham referred to the judgement of Sachs J in the case of *State v Coetzee*, where the importance of the principle as explained.

Lord Bingham explained that: The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted... Hence the presumption of innocence, which serves not only to protect a particular individual on trial but to maintain public confidence in the enduring integrity and security of the legal system'. The presumption of innocence is supported by the European Convention of Human Rights; Article 6(2) states that ' anyone charged with a criminal offence shall be presumed innocent until proven guilty according to law'. Furthermore, the Human Rights Act 1998 supports the presumption of

innocence as well as the European Convention of Human Rights. An issue that is faced by the court in respect of cases is whether imposing a legal burden of proof on the defendant will raise issues with article 6(2) of ECHR as well as the Human Rights Act 1998. In addition, the same can be said about legislation that imposes a statutory defence for the defendant to use, and in order for them to use that defence, they will bear the legal burden.

Even at Common law Lord Viscount Sankey himself stated that it is upon the prosecution to prove guilt, but if a defendant uses the defence of insanity then he shall bear the legal burden of proof. Despite the rule in *Woolmington v DPP*, there are circumstances where the burden of proof does pass to the accused. This is known as the 'reverse burden' or 'reverses onus'. There are many express statutory exceptions to offences which place's a legal burden upon the defendant and failure to do so could mean a potential conviction. The Homicide Act 1957, s2(2) imposes a burden of proof on the accused in relation to suffering from diminished responsibility. It states: 'On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder'. There is a similar reverse burden on the accused to prove insanity under the common law rule in *M'Naghten's Case* 10 CL & Fin 200. Furthermore, the Magistrates Courts Act 1980 s101, places a burden on the defendant but impliedly.

It states that 'where a defendant relies for his defence on any exception, exemption, proviso, excuse or qualification... the burden of proving .... shall be on him'. In the case of *R v Edwards* QB 27, the defendant was convicted of selling alcohol without a license. The defendant tried to appeal on the grounds that prosecutors had not produced any evidence in

relation to him being granted a license. The Licensing Act 1964, section 160 clearly states 'if any person sells... any intoxicating liquor without holding a justices license ... shall be guilty of an offence'. The appeal was dismissed on the grounds that under common law, where a statute forbids an act in certain situations, the court could interpret such that the burden of proving that situation, including granting of a license could lie on the defendant. In addition to this s1(1) of Prevention of Crime Act, 1953 clearly states that 'Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence'.

This is an example of implied statutory exception which imposes a burden of proof upon the defendant. Another example of a case where it was impliedly stated by the statute is the case of *Gatland v Metropolitan Police Commissioner* 2 All ER 100 QB. A lorry driver drove into a builder's skip which had been left in front of the building where builders were working. The owners of the lorry claimed against the company which supplied the skip. It was held that the burden was on the prosecution to prove that the skip had been left outside the building and that it could have caused danger to the driver, the burden was on the defendant to prove that it was there with 'lawful authority or excuse', this was due to the Magistrates Court Act 1980 section 101. However, the courts have imposed limitations on this principle and this was portrayed in the case of *R v Hunt* 1987 AC 352. This case involved the defendant being convicted of unlawful possession of Morphine in respect of section 5 of the Misuse of Drugs Act 1971.

The regulation provided that section 5 will have no effect if the morphine was less than 0.2%. The defendant tried to appeal on the grounds that prosecutors had failed to adduce enough evidence on the proportion of morphine. The trial judge at first instance upheld the conviction and stated that the legal burden fell on the defendant to prove. The defendant appealed by leave of court, and Lord Griffith gave judgement in that since *Woolmington v DPP* a rule was not established that the burden of establishing a statutory defence lay on the defendant only where the statute expressly provides it. He also referred to the case of *Nimmo v Alexander Cowan & Sons Ltd* 1968 AC 107, where it was agreed that it was not clearly stated that the burden would lie on the defendant and that the courts should take into consideration what the intention was of the Parliament. Lord Griffith went on to say that section 5 of the Act only made it an offence to carry the illegal substance in possession. So, therefore, it was up to the prosecution to prove that the substance was carried in an illegal form. The burden was on the prosecution to prove that the substance was unlawful and also that the morphine was not in a legal form and not under 0.2%. The appeal was allowed and the defendant's conviction was quashed. This case illustrates that the courts are not always willing to place the legal burden on the defendant especially when the statute is not clear as to the intention of who would bear the burden. Following the performance of the Human Rights Act 1998 section 3 the courts have been required to consider whether the imposition of the burden of proof on the defendant is incompatible with the right to a fair trial under Article 6 ECHR. It also should employ the attitude that all reverse burdens of proof should be viewed as evidential burdens rather than legal, at least for offences with an identified guilt and rigorous

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sentences. In the case of *R v Lambert* [2001] 2 Cr App R 511, HL, the defendant was convicted under section 5 of The Misuse of Drugs Act 1971 for possession of cocaine with intent to supply and was sentenced to seven years imprisonment. He relied on section 28(3)(b)(i) of the Act as a defence that he did not believe or suspect, or have reason to suspect that he was carrying the cocaine.

The judge directed the jury in agreement to the law that the prosecution only had to prove that he had and knew that he had possession of cocaine in his bag. The Act imposed a reverse burden on him in relation to this defence. On appeal against the conviction, the defendant tried to argue that the reverse burden that he carried contravened Art 6(2) even though the HRA 1998 was not yet to come into force. The court of appeal held that because the Act had not come into force he could not rely on the convention rights. The result of s28 of the Act was to impose only an evidential burden on the accused, as imposing a legal burden on the defendant would contravene Article 6 of ECHR. It was addressed that imposing a legal burden on a defendant would require a high level of explanation to be actually compatible with Article 6. Lord Steyn said that the burden is on the state to show that the legislative means adopted were not greater than necessary. He also went to explain that there must be a 'pressing necessity' for a legal burden to be placed upon the defendant.

However, in the case of *R v Johnstone* [2003] UKHL 28 HL, the defendant as charged with an offence under s92 of the Trade Marks Act 1994, in relation to production and sale of counterfeit CD's involving reproducing the trademarks of the various artists. The defence that could be relied on was

under s92(5) which claimed: ‘ It is a defence for a person charged with an offence under this section to show that he believed on a reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trademark’. It was held that the placing of a legal burden of proof on the accused was compatible with article 6 of ECHR. Lord Nicholls gave the judgment that ‘ Given the importance and difficulty of combating counterfeiting and given the comparative ease with an accused can raise an issue about his honesty, overall it is fair and reasonable to require a trader, should need to arise, to prove on the balance of probability that he honestly and reasonably believed the goods were genuine’. This clearly indicates that in certain circumstances the ECHR article 6 can be infringed upon if the crime is detrimental in society as well as raising issues of honesty.

It can be inferred that the decisions made in Lambert and Johnstone have caused friction as both offences have given way to defence through statutory exceptions. In Johnstone, it was only an evidential burden that was placed on the defendant whereas in Lambert a legal burden was placed. However, a common ground which both cases have come to is that a case would have to have great justification to go against article 6 of ECHR and the Human Rights Act 1998. An issue that arises is what would constitute as having great justification and that there is a lack of clarity in this. It can be said that judges have not interpreted properly statutes that impose a burden of proof on the defendant, and therefore cases are resulting in different outcomes. Furthermore, this can be seen again in the case of *Sheldrake v DPP; Attorney General's Reference (No 4 of 2002)* UKHL 43 HL. The hearing before the

court was raised as a result of two different cases. The first case involved the defendant being charged under s5(1) of the Road Traffic Act 1988 for being charge of a motor vehicle after having being intoxicated by so much alcohol, going over the required limit.

The defendant tried to rely on the defence provided under s5(2) of the Act ‘ that at the time he alleged to have committed the offence the circumstances.... likely to exceed the prescribed limit’. The defendant tried to claim that if an evidential burden was not placed than it would intervene with ECHR article 6. It was held that even if it did contravene Article 6, that it would be justified by the fact that it was proportionate and directed towards a legitimate objective. The second case involved the defendant being charged and convicted under the Terrorism Act 2000, and the defence was available from section 11(2) for a defendant ‘ that the organisation was not a proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and that he has not taken part in the activities of the organisation at any time while it was proscribed’. Take into consideration that the statute states that it is a defence to the offence, but does not state that the burden is upon the defendant to prove.

The court stated that once the defendant had raised the issue and satisfied the evidential burden of proof it was up to the prosecution to rebut that evidence rather than the defendant having to undergo the legal burden of proof. It was held that in relation to s11 it would be incompatible with article 6 if interpreted as imposing a legal burden and therefore should be ‘ read down’ so it only imposed an evidential burden. In conclusion to this assignment, it can be seen that judges are more conscious about placing a

legal burden upon the defendant as it does intervene with ECHR article 6. Judges have tried to justify in a situation where a legal burden is placed on a defendant, by stating where a crime is so severe with harsh imprisonment a defendant does have to prove the legal burden. In certain situations where the reverse burden is transferred the courts are willing to place an evidential burden on the defendant rather than legal however where there is a statutory defence judge may go either way by stating that the legal burden has to be proved or that an evidential burden may be placed.

Furthermore, a problem that statutory defences pose is that judges may be unclear as to the wording of the provision so, therefore, there is not much clarity and confusion may be caused. Furthermore the same can be said about implied statutory exceptions as the wording does not expressly say that the burden is on the defendant again this can cause confusion and sometimes result in the defendant having the burden. In all the courts are more willing to be flexible and only when there is a necessity in placing the burden with great justification will the courts impose a burden upon the defendant. I do agree that placing a burden on the defendant does negate the principle of presumption of innocence but I would agree with the courts that sometimes it is necessary to do so.

## Reference

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