

Burden of proof essay

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As stated by Lord Chancellor Viscount Sankey[1], it is essential that the prosecution to prove the guilt of the defendant in criminal cases. Hence, the burden of prove solely lies in the hands of the prosecution. The obvious reason to this is because everyone is entitled to a fair trial with a general presumption of innocence until proven against. The case of Woolmington v DPP clarified several uncertainties in regards to this area of the law. Here, Reginald Woolmington's wife left him to live with her mother three months after their marriage. After sometime, Woolmington sawed off the barrel of a double barrel shotgun, cycled to the house his wife was living and shot her.

She died and Woolmington claimed the incident was an accident and he only wanted to scare her by convincing her that he was going to kill himself. However, he was charged with murder. The jury was directed by the judge to acquit the defendant if there was reasonable doubt in their mind and they were directed to convict if they had no doubt if the defendant had killed intentionally. The judge directed the jury correctly but however, the jury was unable to agree on it.

However, in the trial, the jury was wrongly directed when it was told that in a case where murder has already been proven, any defenses, excuses or possible justification the defendant wishes to rely on must be proven by none other than the defendant itself, hence, placing the burden of prove on the defendant. Hence, there was a common presumption that malice was aforethought unless the defendant could place evidence to differ. Justice Swift quoted that this was the " law of this country for all time since we had law". [2] He added that a person, who had been deemed for murder, has the

burden of proof to show that what occurred was less than murder. Hence, Woolmington was found to be guilty for murder.

Even though Woolmington's attempt to appeal on the basis that the jury was misdirected by the judge failed, the Attorney General allowed the case to be heard by the HOL as it was in regards to a point of law which had exceptional public importance. Subsequently, the conviction was quashed by the HOL. The HOL decision was the prosecution had the duty to prove two things; a) the act was a voluntary act by the accused b) defendant had malice aforethought. Hence, the defendant had a duty only to explain or provide evidence in the noted incident. Ergo, if the jury are satisfied with the explanation given or are still in doubt after reviewing all the evidence whether it was unintentional or not, the defendant must be acquitted even if his explanation falls short. This was given by the case *Rex v Abramovitch*[3].

Same was said in *Rex v Davies*[4] where it said that it is not the burden of the defendant to satisfy the jury. All in all, the HOL stated that it is up to the prosecution to prove the defendant killed with malice aforethought and not the defendant to prove he had justification behind the murder. In order to clearly understand the stand of the HOL in the Woolmington case, it is necessary to view the law before it. The development of such started in 18th century, where a renown judge, Sir Michael Foster[5] of the *Foster's Crown Law*[6][7] stated in an article "Introduction to the Discourse of Homicide"[8] that; "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced

against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth.... "[9]The definition above was quoted very similarly in the judgment given by the Court of Criminal Appeal in the case of Woolmington.

The HOL were bemused that the passage was quoted in most textbooks such as Russell on Crimes[10]. Even the Halsbury's Law of England[11] quoted on the 1st May 1933 the above with much similarity when saying; " When it has been proved that one person's death has been caused by another, there is a prima facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder. " The authority for this stand was Foster, pp. 255, 290 and also the case of Rex v Greenacre. [12] Hence, in the Woolmington case, the HOL tried to justify the words used by the Appeal's Court as if they were trying to say that the defendant had to prove his innocence, there was no previous authority to this. After examining the cases cited to them, the HOL were of the opinion that these cases were more concerned with the elements of murder rather than the burden of proof. They decided that the Foster's passage and the comments made by Chief Justice Tindal in the Greenacre case made reference to parts of trials which would enforce that a defendant can only be convicted if it can be proved it was a conscious act and no other element appears in court.

Ergo, the duty to prove burden of proof still remains with the prosecution to show that the murder was committed with malice aforethought. The HOL

also added that the judge would have the power to shift the burden of proof to the defendant once the prosecution had established its case, by which, if the defendant fails to discharge that burden, he would be deemed to be guilty giving the judge the power to direct the jury to find the defendant guilty. In such cases, the standard of proof placed on the prosecution is ‘beyond reasonable doubt’.

Hence, absolute certainty is not required, but a high degree of probability needs to be shown. This was given by the case of *Miller v Minister of Pensions*. [13] To add to this, when deciding on the standard of proof, judges are not required to use particular words, as long as the jury understands the substance of the test. In contrary, Lord Scarman[14] stated that judges should use a specific formula in ensuring the jury understands the test. This was explained in the case of *R v Kritz*. [15] The rule has been widely used in criminal law, such as in rape cases where the prosecution bare the burden of proving the absence of consent, as seen in cases such *R v Horn*[16] and *R v Donovan*[17] including statutes such as the Sexual Offences Act 2003.

18] However, the *Woolmington’s* rule is subject to certain exceptions such as if a person charged with murder raises partial or general defenses such as insanity or diminished responsibility, it is up to the defendant to prove evidence to prove it. This was provided by the *M’Naghten’s* case[19]. This is due to the difficulty in proving false claims of insanity as the defendant could be uncooperative during an investigation of his mental state of mind. However, this was severely criticized by Ashworth in his article ‘Four threats to the presumption of innocence’. 20] If a defendant is charged of murder

and raised the defences such as insanity or diminished responsibility, the burden will then be shifted to the prosecution to adduce evidence for the other, as given by section 6 of the Criminal Procedure (Insanity) Act 1964. However, the standard of prove which would be expected would be beyond reasonable doubt as given by in the case of R v Grant. [21] In R v Robertson, [22] it was held that if the defendant is disable rendering him unfit to plead or stand trial, it can be raised and proven by both the prosecution or the defense.

However, the lower standard of proof will be placed on the defense. [23] This was also stated in R v Padola. [24] The second category of exceptions is expressed statutory exceptions where the statute places the burden on the defendant. Section 2(2) of the Homicide Act 1957 states when a defendant raises the partial defense of diminished responsibility, the burden of proof would be on the defendant. This is given by Chief Justice Lord Lane's obiter[25] in R v Campbell. [26] The statute does not contravene with the rights given under Article 6 of the European Convention on Human Rights as given by R v Jordan. 27] The third category of exceptions is those which are implied by the statutes.

An example is the Magistrate Court Act 1980 where it is stated under section 101 that when a defendant relies on an exception, the burden of proving it will be on him. However, it is subject to be inline with the Human Rights Act 1998. These mainly apply to legislation which contains terms such as provided that, unless and so on. This was seen in the case of Gatland v Metropolitan Police Commissioner[28]. In this case, Chief Justice Lord Parker

held that even though the prosecution should have the burden in proving that an object was deposited on a highway, the accused needed to prove that it was lawful use of the authority[29]. The statute in contention was the Highways Act 1980, section 161(1). [30] However, this rule was deemed to be non-exclusive in the case of *R v Hunt*[31]. Two cases which showed a lot of irregularities in this were *R v Hunt* and *R v Edwards*[32].

Edwards was convicted on the offence of selling intoxicating liquor without a license present. This was in contrary to section 160(1)(a) of the Licensing Act 1964. *Edwards* appealed on the grounds that the burden of proving that he did not have a license rested on prosecution and not the defense as the common law presumption given by *R v Turner*[33] stated that the burden of prove is only reversed into the hands of the defendant if the fact was so peculiar that it was not even of the knowledge of the defendant. Other common law authorities on this point are *R v Oliver*[34], *R v Ewens*[35] and *John v Humphreys*[36]. *Edwards* claimed that license were public records which could be easily obtained by the police. However, the Court of Appeal did not allow the appeal and stated the burden was on the defense.

Lord Justice Lawton quoted; "...its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. "[37] On the other hand, *R v Hunt* was about a man who was charged under section 5 of the Misuse of Drugs Act 1971 as he had in possession some unlawful substance. It is stated under the Misuse of Drugs Regulations 1973 that if one is caught with a substance that has less than 0.

% of morphine, it would not be against the section 5 regulation. At trial, the defense claimed that they did not adduce any evidence regarding the percentage as the prosecution failed to raise the matter. However, the claimed failed and Hunt changed his plea to guilty. Court of Appeal dismissed his appeal and on appeal to the HOL, two points were raised by the defendants; a) the decision in *R v Edwards* was inaccurate and shall not be followed b) and the prosecution actually had to bare the burden of proving it fell outside the exceptions given by the Misuse of Drugs Regulations 1973. The appeal was allowed by the HOL as it stated that when *Woolmington v DPP* was decided, the phrase 'any statutory exception' used by Lord Sackay was not merely for statutory exception which had placed the burden on the defendant by the Parliament expressly. Lord Griffiths and Ackner[38] were of the opinion that it could be placed by implied terms as well as in this case. Secondly, the decision in *R v Edwards* was correct but it was subject to a condition which was when the statute states it's the legal burden of the defendant even though it fell short of the formula[39] which was forwarded by Lord Justice Lawton. This case was not in the scope; hence, *R v Edwards* was not applicable here.

Lord Ackner stated it may be a 'helpful approach'[40] but it is not exclusive in certain circumstances. Thirdly, it stated that every case needed to be referred back to only its legislation. Hence, if the legislation is unclear, then it would require the court to base on practicality and on ease as to which party would be able to discharge the burden on a light and easier manner. This was given by *Nimmo v Alexander Cowan & Sons Ltd*[41]. Recent cases which followed the Hunt case and overruled the Edwards case are *R v*

Putland and Sorrell[42], R v Cousins[43] and R v Curgerwen[44]. With the introduction of HRA 1998, any of the reverse onus provisions presents are capable to be challenged if it contravenes with article 6(2) of the European Convention on Human Rights.

Article 6(2) states anyone criminally charged for any offence is to be assumed as innocent until held guilty by law. Hence, statutes contravening this article must be interpreted in a manner compatible to it and if not, could be held to be incompatible by the courts and section 3 of HRA 1998 states it would cause an evidential burden on the accused instead of a legal one. This quoted in R v Lambert[45] by Lord Hope. Innocent until proven guilty is a presumption of utmost importance, as expecting one to be dealt as a criminal until he proves his innocence would be unfair especially knowing if he fails, he would be convicted. This was stated in Attorney General's Reference (No. of 2002)[46] by Lord Bingham[47]. However, Article 6(2) isn't always applying absolutely, in situations where the provisions were made to achieve a legitimate aim and is inline with the proportionality principle, it would be deemed compatible.

Hence, as long as it's reasonable, strict liability offences are included. This was seen in Salabiaku v France[48] where it stated when a presumption of great importance exists to a defendant; opportunity might be given by the court to the accused to rebut the presumption. This caused obvious difficulties. One obvious example was R v Lambert[49], where Lambert was convicted for the possession of cocaine with the intent to supply.

Section 28(3)(b)(i) of the Misuse of Drugs Act 1971 states that one shall not be charged if the defense can provide sufficient prove that he neither believe or even suspected that the drugs in his possession was a controlled drug. Lambert relied on this defense and the jury was directed that if it's proven that the drugs were in Lambert's possession, it is then up to the defense to prove that he was unaware based on a balance of probabilities. The HOL stated that Lambert could not rely on the breach of his rights as it took place before HRA 1998. Although it was made clear that since section 28 was contravening article 6(2), the burden placed on the defendant must be evidential. When an obligation is placed on a party to forward sufficient evidence for a certain fact to be heard before the jury, it is known as an evidential burden.

The evidence provided must be enough in order to avoid the judge from eliminating the issue from the consideration of the jury. Legal burden on the other hand places a duty on a party to prove a fact. When its placed on the defense, the standard expected is on the balance of probabilities whilst when on the prosecution, would be beyond reasonable doubt. In *L v DPP*[50], a man was charged for the possession of a lock-knife in a public place.

This was in contrary to section 139(4) of the Criminal Justice Act 1988[51]. It was held this did not contravene with Article 6(2). It differed from the Lambert case as unlike section 28, the offending person was aware that he had the object in his possession. Secondly, the defendant was needed to prove something he was aware of. In *R v Johnstone*[52], Lord Nicholls stated that when the burden is reversed, the accused must be given a reason

behind and the bigger the offence, the bigger the obligation to explain. In *R v S*[53], the statute in question was section 92(5) of the Trade Marks Act 1994 where the accused was needed to provide prove that the registered trademark he used was done with the believe on reasonable grounds that it was not an infringement.

This statute placed the legal burden on the defendant and is in accordance to Article 6(2). Reason for this decision was given in *R v Johnstone*[54] where Lord Nicholls stated that when the burden is reversed, the accused must be given a reason behind and the bigger the offence, the bigger the obligation to explain. This was supported by Lord Hope and Lord Rodger. [55] Evidential burden is much easier to be discharged; submission of evidence falling short of proof would suffice. However, legal burden isn't that simple, as seen in the Trade Marks Act 1994, the accused would be required to fulfill it on the balance of probability and if he fails, he will be convicted. Hence, this would be against the whole idea of a fair hearing. The Parliament has always been against the idea of enacting a law to eliminate all reverse onus provisions as it would be impractical and cause a massive change in most of the areas in criminal law.

However, change needs to be made, directly contravening with article 6(2) proves rights are being infringed. To add to this, it causes a lot of uncertainty and increases the cost of litigation. ————— [1] *Woolmington v DPP* (1935) AC 462 (p. 481) [2] *Woolmington v DPP* (1935) AC 462 (p.

465) [3] (1914) 11 Cr. App. R. 45 [4] [1962] 1WLR 1111, C-MAC [5] judge of the King's Bench 6] influential treatise on the criminal law of England, written

by Sir Michael Foster (1689 – 1763) [7] It was first published in 1762 [8] 1762 [9] Published by Oxford at the Clarendon Press in 1762, p. 255 [10] 8th edition, 1923 [11] 1933 vol. 9 [12] (1837) , 8. C.

& P. 35 [13] [1947] 2 All ER 372 [14] Ferguson case [15] [1949] 2All ER 406 [16] (1912) 7 Cr App R 200 [17] [1934] 2 KB 498 [18] ss75 and 76 [19] (1843) 10 Cl & Fin 200, HL [20] (2006) 10 E & P 241 at 263 [21] [1960] Crim LR 424 [22] [1968] 1 WLR 1767, CA [23] Prosecution must prove its beyond reasonable doubt whilst defense has to prove it on a balance of probability. 24] [1960] 1 QB 325, CCA [25] Section 2(2) not only dictates which party shoulders the burden of proof once the issue is raised, but also leaves it to the defense to decide whether the issue should be raised at all; therefore, the defense does not raise the issue but there is evidence of diminished responsibility, the trial judge is not bound to direct the jury to consider the matter but, at most, should in the absence of the jury draw the matters to the attention of the defense so that they may decide whether they wish the issue to be considered by the jury [26] (1986) 84 Cr App R 255, CA 27] [2001] 2 WLR 211 (CA) [28] [1968] 2 QB 279 [29] or excuse pursuant to s.

81 of the Magistrates Court Act 1952 (now s. 101) [30] provides that a person depositing anything on the highway “ without lawful authority or excuse” shall be guilty of an offence [31] [1987] 1 All ER 1, HL [32] [1975] QB 27, CA [33] (1816) 5 M & S 206 at 211 [34] [1944] KB 68 (dealing in sugar without a licence) [35] [1955] 1 All ER 793 (driving without a licence) [36] [1967] 1 QB 322, CA (possessing drugs without prescription) [37] [1975] QB 27 at 32-40 38] At 6-7 and 15 [39] ‘ limited to offences arising under

enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the license or permissions of specified authorities' [40] At 19 [41] [1968] AC 107 [42] [1946] 1 All ER 85, where the charge being the acquisition of rationed goods without surrendering clothing coupons, it was held that the burden was on the prosecution to prove that the goods were bought without such surrender. 43] [1982] QB 526, CA [44] (1965) LR 1 CCR 1 [45] [2002] 2 AC 545 at [88] [46] [2005] 1 All ER 237 [47] At [9] [48] (1988) 13 EHRR 379, ECHR [49] [2002] 2 AC 545, HL [50] [2003] QB 137, DC [51] Provides that it shall be a defense for an accused to prove that he had good reason or lawful authority for having the knife with him in a public place. [52] [2003] 1 WLR 1736, HL [53] [2003] 1 Cr App R 602, CA [54] [2003] 1 WLR 1736, HL [55] [2003] 1 WLR 1736, HL at [49]-[51]