

# The term burden of proof law general essay

Law



Ian Dennis identified in his article [2] 6 factors that have emerged from cases discussing the point on presumption of innocence that would determine if a reverse burden is proportionate. According to him the factors to be considered is judicial deference, classification of offences, construction of criminal liability; element of offences and defences, significance of maximum penalties, ease of proof and peculiar knowledge, and presumption of innocence. On the part of judicial deference, it is necessary to consider the will of the courts and the will of parliament. The basic rule for presumption of innocence was first established by Viscount Sankey LC in *Woolmington v DPP* [3]. Referred by most as the Golden thread or rule in criminal law, the duty lies on the prosecution to prove a prisoner's guilt. Even before the trial, there is an evidential burden on the prosecution to establish that there is a prima facie case. There are of course two sides to every coin where the burden would be on the defendant if the defence of insanity [4] under the M'Naghten Rules were raised or if there were any statutory provisions which stated otherwise. A clear express statutory provision is section 2 Homicide Act 1957 where if diminished responsibility is raised as a defence towards a charge of murder. However with these exceptions, challenges have been made towards the justifiability of the placing the burden on defendants. One example is a theory made by Paul Roberts [5] whom was of the opinion that by having the burden on the prosecution it would 'lawfully sanction the power of the state to intervene in the lives of individuals in far-reaching and sometimes catastrophic ways'. But if placed on the defendant would entail that he must be convicted even though the jury is indecisive about facts relevant to the issue. This seemingly lopsided effects towards defendants called for an opinion made by The Criminal Law Revision Committee in their <https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

11th report that burdens placed on the defence should be evidential only[6]. Despite this clear violations of the principle have been seen in the research conducted by Ashworth and Blake that at least 40% of the offences triable in the crown court violated the presumption[7]. This stance by the courts poses two questions pointed out by Dennis which is how much weight should the courts put on the principle and how far should the courts defer from Parliament. In effect this was considered in the case of *Kebilene*[8] by Lord Hope where referring to his succinctly termed "discretionary area of judgement" he said : " ... In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention... It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection..." However the aspect between the legitimate aim and proportionality had not been explained and needs further clarification. Similar protectionist stands were taken by Lord Nicholls in *Johnstone*[9] and Lord Woolf in *AG's Reference (No. 1)*[10]. However, Lord Bingham in *Sheldrake*[11] argued that the approach taken by the courts to defer the issue would lead the courts to give too much weight to the enactment under review and too little on presumption of innocence and the obligation imposed by s. 3 of the HRA 1998. Dennis attempted to distinguish

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

between legitimate aims and proportionality whereby a legitimate aim is the task on Parliament to make clear when making an enactment. Proportionality should be looked at as a procedural rather than a substantive issue as Dennis puts forwards that courts are guardians of principles of procedural justice and upholders of the rule of law. By tweaking the perspectives of the courts Dennis suggests that the issue should not be resolved by principle of deference but by focusing on the importance of Art 6(2) of the ECHR. Following on the second point of classification of offences, where the decision to reverse the burden of proof would depend on the degree of the offences. The significance towards the presumption of innocence was explained by Sachs J in *State v Coetzee*[12] where he said: "... the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing inquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book... 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..." An example is seen as Lord Clyde distinguishes in *Lambert*[13] that reversal could happen in cases of strict responsibility where offences are concerned to regulate the conduct of a certain activity in the public interest[14]. Activities that require the possession of a license in order to operate can justify a legal burden to prove possession of the license and would come in conformance with Art 6 (2). As such cases would not be seen

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

as 'truly' criminal and may be relatively trivial and carry no real social disgrace. The approach was followed in *Davies*[15] where the court upheld s 40 of the Health and Safety at Work Act 1974. The provision imposed a legal burden on the defendant to prove that it had not been reasonably practicable to do more than he had done to ensure that employees were not exposed to risks to their health and safety. The problem with this as pointed out by Dennis is that it may not be justifiable to base the reversal on classification as it does not take into account the moral quality of the act. The significance between a regulatory and a truly criminal may intertwine that for example a regulatory offence that leads towards widespread pollution of the environment. As such according to *Davies* the perspective of the courts should change to view offences not only in terms of the seriousness of the offence but also its implications and its moral inequity to decide on a reversal. Dennis also in his third factor comments how the courts should also take into account certain features when distinguishing the elements of offences from defences when deciding on a reversal. Generally, the prosecution bears the burden to prove all elements of a crime beyond a reasonable doubt. On the other hand as illustrated by *AG of Hong Kong v Lee Kwong-Kut*[16], Lord Woolf remarked that: "... If the prosecution retains the responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable..." That being said, Lord Woolf added on that distinguishing the essential elements will be decided on the substance and reality of the language creating the offence rather than its form. An example of this is shown by *Dennis* whereby a reverse burden for an element of offence would be acceptable for an offence such that not having a license in the offence of unlicensed driving. However,

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

there lies the problem in distinguishing offence from defence and vice versa. Cases such as *Sheldrake* where Lord Rodger in that case shows that the courts can distinguish freely between the elements of offence and defence. Whereby Lord Steyn in *Lambert* professes that: " ... The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary... it is sometimes simply a matter of which drafting technique is adopted...[17]" Where the essential element can be manipulated and cast as a defensive issue, it is as Lord Steyn puts it 'necessary to concentrate on matters of substance'. Substance could be referred to as moral blameworthiness where a reversal would mean a derogation of the principle to transfer legal burden to the accused. Another important factor which was highlighted was that on penalties. As different penalties are used to serve out various punishment, they provide act as an indicator to grade the seriousness of an offence. Taking the principle above from Sachs LJ, assuming that the graver the offence the more weight is put on presumption of innocence then there should be some correlation with penalties. As grave offences carry maximum penalties, judges may assume that penalties such as life imprisonment give more weight to the presumption compared to mere simple fines. Tuckey LJ in *Davies* pointed out that absence of any risk of imprisonment posed an important factor in determining a legitimate reversal of burden[18]. However, the frequency in which cases decide to uphold a reverse onus is uncertain as cases differ in opinion. On one hand in the case of *Sheldrake*, the HOL upheld a reverse burden where the maximum penalty under s5 (2) of the Road Traffic Act 1988 for drunk driving was six months imprisonment in contrast to AG reference no4 where the courts refused to uphold a reverse burden for a

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

crime with ten years maximum imprisonment could be understood that the courts depend on substantial terms of imprisonment to justify a reverse burden. Then on the other, there is the case of Johnstone where the courts upheld a reverse burden for a crime punishable by a maximum penalty of ten years imprisonment. From this even Dennis admit that maximum penalties is an uncertain guide to determine the application of a reverse onus proportionate to the legitimate aim of the offence in question. Moving on, the ease of proof and peculiar knowledge on the accused is also an important deciding factors for the courts. In certain situations it is easier for a defendant to prove a certain piece of evidence rather than the courts. The courts will generally find a reverse onus where it is much easier or efficient to provide proof or peculiar knowledge. The difference between the two is that ease of proof is something which can be physically obtained by authorities other than the defendant himself while peculiar knowledge relates to the state of mind of the defendant. Judges have been seen to utilise this factor to independently justify a reverse onus. For example Lord Hope in Kebilene was of the opinion that to place a burden on the defendant, one must first contemplate whether the nature of the burden placed on the defendant was related to something that was within his own knowledge to which he had access to[19]. This was followed by Lord Nicholls in Johnstone where he related that the burden would fall on the accused if it was facts that were within his own knowledge to prove or to which he had ready access to prove[20]. However, this may not be in line with the case of Edwards when it comes to relying on peculiar knowledge when imposing a burden on the accused. Edwards had rejected the approach using peculiar knowledge on imposing a legal burden and only allows at most an evidential

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>

burden to be placed on the accused where his state of mind comes into question[21]. This authority while foreign was seen similarly applied in the 2007 case of Keogh[22] where the Court of Appeal 'read down' the defences of reverse onus in ss 2(3) and 3(4) of the Official Secrets Act 1989. This was because as the courts commented: "... these defences were closely linked with the state of the defendant's mind and with the moral blameworthiness of his actions, they infringed the presumption of innocence...[23]" From this, courts have to consider the implications of attempting to place legal burden on the defendant on the basis of 'easy knowledge'. For even with ease of proof, in certain circumstances where it might seem that that evidence may be easily proven by the accused, it may not be so in facts. The final aspects to be considered as identified by Dennis is the presumption of innocence itself. Aside from the principle in Woolmington by Lord Sankey, the courts in Strasbourg take the notion seriously as many would say that it is the founding right to a fair trial under Art 6. The European Courts of Human Rights stressed clearly in Salabiaku v France[24] that under art 6 was an enshrined fundamental principle of the rule of law and would with exceptions prevent the courts from depriving the presumption of innocence from a defendant. Lord Bingham advocates for this in respect to the Convention in Sheldrake in his own terms: "... The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary... The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the

<https://assignbuster.com/the-term-burden-of-proof-law-general-essay/>



particular case...[25]" This factor facilitates judges to consider the importance of upholding the presumption of innocence in light of the rule of law. The domestic courts seem to take a different approach towards upholding it by focusing more on the outcomes of cases rather than through the process of cases. Taking the example of Lambert again, the courts focused on the aspect of moral blameworthiness in ascertaining whether it would be acceptable that a reverse onus should be imposed. As mentioned above, this reason is the cause for Lord Steyn in that case to take a strong stand in rejecting clear distinctions between the elements offences and defences as some defences steer closer to the realm of mens rea and moral blameworthiness that it would not be conceivable to justify a reverse onus. The only exception as observed by Dennis is that in cases such as Johnstone or Davies where there was a circumstance of a 'voluntary acceptance of risk' that a departure should occur. The implications of the six factors therefore do play an important role in assessing the outcomes of burden of proof in cases. The various scenarios that the courts have to face each day may confuse their perceptions on where the burden of proof should lie. By considering these six factors, it may give the courts a more wholesome view towards the principle of presumption of innocence under Art 6 of the ECHR and the situations where exceptions to the principle may occur.