

15, 1969

IN THE PRIVY COUNCIL

No. 28 of 1968

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

PUBLIC PROSECUTOR

Appellant

- and -

P. YUVARAJ

Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDY
- 6 MAR 1970
25 ...
LONDON

CASE FOR THE AMICUS CURIAE

10 1. This is an appeal from the judgment of
the Federal Court of Malaysia (Syed Sheh
Barakbah, L.P., Malaysia, Azmi, C.J., Malaya
and Ong Hock Thye, F.J., Malaysia) holden at
Kuala Lumpur, dated 19th February 1968,
whereby the said Federal Court decided a
question of law referred to it pursuant to the
provisions of section 66 of the Courts of
Judicature Act 1964 as a question of law of
public interest which had arisen in the course,
and affected the determination, of an appeal
20 by the Appellant to the High Court in Malaya at
Johore Bahru, in the State of Johore, from the
judgment and order of the Sessions Court, Batu
Pahat, dated 21st November 1966, acquitting
the Respondent of a charge punishable under
section 4(a) of the Prevention of Corruption
Act 1961. The said High Court of Johore Bahru
dismissed the Appellant's appeal, and the said
Federal Court, in deciding the said question of
30 law referred to it as aforesaid, held that the
decision of the said Sessions Court was right
in law and ought to be re-affirmed by the said
High Court of Johore Bahru. Special leave to

RECORD

pp.49-58

pp.33-35

pp.3 -28

p.62
lines
32-36

appeal to His Majesty the Yang di-Pertuan Agong was granted by Order, dated 28th August 1968, on condition that the Appellant lodged an undertaking in the Privy Council Registry that whatever the result of this appeal no further proceedings would be pursued against the Respondent in respect of this charge, such leave being granted consequent upon a report of the Judicial Committee of the Privy Council (Lord Morris of Borth-y-Gest, Lord Pearce and Lord Wilberforce) dated 20th June 1968.

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2. The sole issue in this appeal is whether the presumption of a corrupt motive "unless the contrary is proved" within section 14 of the Prevention of Corruption Act 1961 is rebutted by the accused adducing evidence of an explanation of his conduct that is reasonable and probable; or whether the presumption ousts the rule in Woolmington's case that the onus of proof throughout a criminal trial is on the prosecution to establish the accused's guilt beyond reasonable doubt thereby shifting the onus of proof on to the accused who must establish the truth of his account at least on a balance of probabilities.

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3. The question of law referred to the Federal Court in pursuance of section 66 of the Courts of Judicature Act 1964 was as follows :

"Whether in a prosecution under section 4 (a) of the Prevention of Corruption Act 1961 a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable or probable; or

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Whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition it exists (section 3, Evidence Ordinance)"

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RELEVANT STATUTORY PROVISIONS

4. The following statutory provisions are relevant to the question of law referred to in paragraph 3 hereof:

Punish- ment of corrupt trans- actions with agents	<u>A. Prevention of Corruption Act 1961</u> (No.42 of 1961) Section 4: "If (a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having after the coming into operation of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour, to any person in relation to his principal's affairs or business;.... he shall be guilty of an offence..."
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Part III EVIDENCE

Presump- tion of corrup- tion in certain cases	<u>Section 14:</u> "Where in any proceedings against a person for an offence under section 3 or section 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved."
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B. Evidence Ordinance 1950

40	<u>Section 2:</u> "This Ordinance shall apply to all judicial proceedings in or before any Court other than Courts Martial or Muslim Religious Courts, but not to affidavits presented to any Court or Officer nor to proceedings before an arbitrator".
	<u>Section 3:</u> "In this Ordinance, unless there is something repugnant in the subject or context - 'fact' means and includes

(a) anything, state of things or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious.

.....

'proved'; A fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstance of the particular case, to act upon the supposition that it exists.

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'disproved'; A fact is said to be 'disproved' when after considering the matters before it, the Court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist".

'not proved'; A fact is said to be 'not proved' when it is neither proved nor disproved".

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Section 101: "(1)Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

Burden of proof

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 102: "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

On whom 30 burden of proof lies

Section 103: "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Burden of proof as to particular fact

Burden of proving that case of accused comes within exceptions

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Section 105: "When a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, as the Court shall presume the absence of such circumstances."

Illustrations

(a) A, accused of murder, alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A.

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(c) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances, bringing the case under section 335, lies on A"

30 Burden of proving fact especially within knowledge

Section 106: "When any fact is especially within the knowledge of any person the burden of proving that fact is upon him".

JUDGMENTS OF COURTS A QUO

5. The President of the Sessions Court of Johore sitting without a jury at Batu Pahat made the following findings of law relevant to the question referred to the Federal Court of Malaysia:-

p.23, lines 27-34

(a) "This is briefly the gist of the accused's defence, in rebuttal of the presumption under section 14 of the Prevention of Corruption Act 1961 - a defence that was credible and one that could be reasonably true in the circumstances of the case, not least the circumstances being the silent workings and darker elements of P.W.1's character and disposition". 10

p.26, lines 40-42

(b) "Having seen and heard the accused, the court accepted this explanation as being probable and credible, in all the circumstances of this case".

(c) "It was held in the case of Mehar Singh v. State of Persu 1956 Persu 156: 1955 Cr.L.J. 1387 that: 20

p.27, lines 8-18

"In a bribery case all that is required from the accused, and having regard to section 4, Prevention of Corruption Act (the presumption section) is to establish by evidence satisfying the judge of the probability that the amount was received or obtained by him innocently. If he establishes that probability, he has rebutted the presumption and is entitled to be acquitted". 30

p.28, lines 8-13

(d) "... the Court was of the humble view, having weighed and estimated the force of each of the several circumstances in evidence, that the circumstances enumerated by the accused are consistent and compatible with the superior probability of his innocence".

An appeal by the Appellant was dismissed by Ali J. in the High Court of Malaya, who affirmed the decision of the learned President and subsequently also dismissed an application by the Appellant for a reference to the Federal Court of Malaysia on the said question of law.

p.50, lines
20-22

p.50, lines
22-24

10 6. The Federal Court of Malaysia (Syed Sheh Barakbah, L.P., Malaysia, Azmi, C.J., Malaya and Ong Hock Thye, F.J.) in a judgment delivered on 19th February 1968 by Ong Hock Thye, F.J. upheld the legal ruling of the President that the Respondent's explanation was not merely "reasonable and probable" which would have sufficed to rebut the presumption in section 14 of the Prevention of Corruption Act 1961, but also that it was "Probable and credible" as well as "compatible with the superior probability of his innocence".

20 Accordingly, the Federal Court of Malaysia answered the question of law referred to it by finding that "in a prosecution under section 4 (a) of the Prevention of Corruption Act 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting such presumption can be said to be discharged by a defence as being reasonable and probable".

p.58, lines
30-38

p.60, lines
4-10

30 7. Ong Hock Thye, F.J., delivering the judgment of the Federal Court of Malaysia, held that:-

pp.49-58

40 (a) The decision of Hepworth J. in Public Prosecutor v. Gurubachan Singh (1964) M.L.J 141, 145, to the effect that the burden of proof under section 14 of the Prevention of Corruption Act 1961 is "no higher than that on a party to a civil action to prove his case on the balance of probabilities, was to be preferred to that of the Buhagiar J. in Saminathan v. Public Prosecutor (1955) M.L.J. 121, 124

p.50, line
40 p.51,
line 11

(b) The line of authority in Indian cases on a similar provision in section 4 (1) of the Indian Prevention of Corruption Act 1947

p.54, lines
15-21

neither followed nor even cited the English decision of R. v. Carr-Briant [1943] K.B. 607

p.55, lines
21-35

(c) The words "proof" and "proved" in the administration of criminal justice in England (which for this purpose was part of the law of Malaya) did not relate to the quantum of proof required in a criminal trial.

p.55, lines
43-p.56
line 26

(d) The phrase "unless the contrary is proved" in no way whittled down the fundamental principle in Woolmington v. Director of Public Prosecutions [1935] A.C.462, 481, and that the Indian cases had failed to draw the distinction between the persuasive burden of proof and the evidential burden as set out in the Indian Evidence Act. 10

p.58, lines
23-29

(e) "If 'proof' were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution". 20

p.58, lines
31-36

(f) An explanation which is "reasonable and probable" suffices to rebut the presumption in section 14 of the Prevention of Corruption Act 1961; an explanation which is "probable and credible" as well as being "compatible with the superior probability of his innocence" is more than an accused is required to adduce in evidence to "prove" the contrary. 30

SUBMISSIONS

A. General

8. There are three main submissions :-

(a) The phrase "burden of proof" has two quite distinct meanings in the administration of criminal justice in Malaya (which for this purpose is the same as English law).

10 (i) Persuasive burden - which is the burden imposed on the prosecution (or, exceptionally, the defence) of persuading the tribunal according to a standard of proof laid down in the formula "beyond reasonable doubt", or some phrasing to the like effect; and

20 (ii) Evidential burden - which is the duty, imposed on either prosecution or defence in relation to any issue of fact, to satisfy the judge of law that there is material adduced in evidence, sufficient to induce a reasonable doubt in the mind of the judge of fact.

(b) Section 14 of the Prevention of Corruption Act 1961 is an example of an evidential burden being imposed statutorily on the accused in order that, without the accused offering in evidence some explanation, the presumption of a corrupt motive suffices to satisfy the persuasive burden imposed throughout the trial on the prosecution.

30 (c) Section 14 of the Prevention of Corruption Act 1961 imposes on an accused the evidential duty of inducing a reasonable doubt such as would rebut the presumption of corrupt motive.

B. BURDEN OF PROOF

40 9. (a) The principle that in a criminal trial the onus of proof is throughout the trial on the prosecution to establish beyond all reasonable doubt all the facts and circumstances which are essential to the offence which the accused person is charged has always been accepted as being part of the criminal law of

Malaya: See Thomson, C.J. in Looi Wooi Saik v. Public Prosecutor (1962) 28 M.L.J. 337, 340, adopting the principle laid down by Viscount Sankey L.C. in Woolmington v. Director of Public Prosecutions [1938] A.C. 462, 481.

(b) The term "burden of proof" is used in two senses,

(i) of establishing a case; and (ii) of leading evidence: Glanville Williams, Criminal Law: The General Part, 2nd Ed.1961, para 286; Part 10 p.871. In criminal cases, even where the secondary burden of adducing evidence is cast upon the accused, the primary burden of satisfying the jury of the accused's guilt beyond a reasonable doubt is always upon the prosecution and never changes: and if on the whole of the case there is any reasonable doubt the accused is entitled to the benefit of the doubt: Bratty v. A-G for Northern Ireland [1963] A.C.386, 407

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(c) In section 105 of the Evidence Ordinance the term "burden of proving" is used in the sense of the duty on the accused of adducing evidence. The duty of the accused under section 105 is to introduce evidence as will displace the presumption of the "absence of such circumstances", thus taking the case out of the exception. The evidential burden of the issue as to the non-existence of such circumstances shifts back to the prosecution, which still has the persuasive burden to discharge of proving the accused's guilt beyond reasonable doubt.

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(d) Section 105 of the Evidence Ordinance, under the rubric of Part III "Production and effect of evidence", places only a limited burden on the accused - to establish by evidence circumstances tending to make an exception applicable. It is not possible to read into the section words which convey the sense that the onus of proving circumstances establishing an exception is on the accused.

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(e) Nowhere is there stated in section 105 of the Evidence Ordinance or in section 14 of the Prevention of Corruption Act 1961 the quantum of proof that is required of an accused upon whom the evidential burden is laid. It is necessary therefore for the court to act on the fundamental principle that in a criminal trial the guilt of the accused should be established beyond reasonable doubt. The corollary of that is that so long as the persuasive burden remains on the prosecution the accused person has only to raise a reasonable doubt about the totality of evidence. The quantum of evidence will depend on the particular kind of evidential burden laid on the accused.

(f) Section 3 of the Evidence Ordinance, in interpreting the word "proved", does not assist the argument whether and to what extent there is imposed on an accused in a criminal trial the persuasive burden of proof. Section 3 defines "proved" in relation to the establishment of the truth or falsity of "a fact" in either criminal or civil proceedings. It does not purport to define what constitutes inferential proof of a complex set of facts such as would be necessary to establish the absence of a corrupt motive under section 14 of the Prevention of Corruption Act 1961.

30 C. RULE IN WOOLMINGTON'S CASE

10. (a) The fundamental principle of law in Malaya is that laid down by Viscount Sankey, L.C. in Woolmington v. D.P.P. [1935] A.C.462, 481, 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.... the defence of insanity and subject also to any statutory exception".

40 (b) This statement has been repeated several times in English and Malayan cases: Chan Kau v. The Queen [1955] A.C.206, 211; R. v. Lobell [1957] 1 Q.B.547, 550; Lee Chun-Chuen v. The Queen [1963] A.C.220, 229:

Looi Wooi Saik v. Public Prosecutor (1962)
28 M.L.J. 337,339. The principle is not
confined to charges of homicide but "is of
general application in all charges under the
criminal law" per Viscount Simon, L.C. in
Mancini v. Director of Public Prosecutions
[1942] A.C. 1,11

(c) The defence of insanity has, for no discernible logical reason, been a common law exception to the principle. If the persuasive burden is thrown upon a party charged with a criminal offence (as it is in the case of insanity) it is sufficient for the accused to satisfy the court in the same manner and to the same extent as required in the proof of a civil issue - on the balance of probabilities: Sodeman v. R. (1936) 55 C.L.R. 192, 216 10

(d) A statute may expressly cast upon the accused the onus of proving facts, deeming or presuming him to be guilty "unless he proves" these facts. Since any reversal of the persuasive burden puts the offender in a position of having to prove his innocence the legislature is deemed only to have intended to shift the evidential burden unless the words in the legislation are absolutely clear. Section 2 of the Homicide Act 1957, which provides that on a charge of murder "it shall be for the defence to prove" that the accused is suffering from diminished responsibility so as to reduce the crime to one of manslaughter, is an example of a shifting of the persuasive burden. 20 30

(e) The approach to statutory construction on the burden of proof is laid down in R. v. Ward [1915] 3 K.B. 596 where the Court of Criminal Appeal held that, once the defendant has introduced prima facie evidence of a lawful excuse for being in possession of housebreaking implements, the onus is shifted back to the prosecution to prove beyond reasonable doubt that the defendant was not in possession of the tools for an innocent 40

purpose but for the purpose of housebreaking. This decision, which is still good law, means that there is no persuasive burden of proof on the defendant but only a duty to rebut a presumption of guilt by raising a reasonable doubt in the court's mind.

10 (f) The decision in R. v. Ward is in accordance with the policy of the legislature to retain the general principle that the burden of persuasion is throughout on the prosecution while placing the "proof" (or evidential burden) of a particular fact on the accused in those instances where it would be unreasonable to expect the prosecution to negative in advance every lawful excuse. Otherwise, by exercising his right to silence, the accused could effectively obtain an acquittal in circumstances where he alone possessed information of an ingredient in the offence charged. Once the
20 accused has particularised the issue by adducing some evidence of a particular excuse, the prosecution's difficulty of negating a possible defence is removed. This view is consistent with the observation of Devlin J. (as he then was) in Hill v. Baxter [1958] 1 Q.B. 277, 284 that "there is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the
30 prosecution from having to prove in the end all facts necessary to establish guilt".

D. PRESUMPTION OF CORRUPT MOTIVE UNDER SECTION 14 OF THE PREVENTION OF CORRUPTION ACT 1961

40 11. (a) Section 14 is substantially in the same words as section 2 of the English Prevention of Corruption Act 1961 which provides that "where in any proceedings against any person for an offence of corruption ... it is proved that any money, gift or other consideration has been paid or given to or received by a person in public office ... the money, gift or consideration shall be deemed to have been paid or given and received

corruptly as such inducement or reward... unless the contrary is proved". The English Act amended the law relating to the prevention of corruption. The Malayan Act is a comprehensive law dealing with the prevention of corruption, section 14 whereof appears under the rubric "Part III Evidence", thereby indicating that the section is dealing with evidential matters and not with matters relating to fundamental principles of criminal justice 10

(b) The word "proved" in section 14 means the same in both parts of section 14 and means no more than "some evidence... must be given sufficient to be left to the jury": per Denman J in Tatam v. Haslar 23 Q.B.D. 345, 348, "Proved" does not mean in either case "established" as was held in R.v. Jenkins (1923) 39 T.L.R. 458, 459, a case which was not approved generally in R. v. Carr-Briant/1943/ 1 K.B. 607. 20

(c) Ong Hock Tye, F.J., in the judgment of the Federal Court of Malaysia, relied strongly on the decision in R. v. Carr-Briant /1943/ 1 K.B. 607 as being a "classic judgment, so far as we have been able to advise ourselves/which/ has been accepted without any breath of criticism throughout all common law countries since its pronouncement a quarter-century ago... we would prefer the English decision...." It is submitted that the learned Federal Judge was right in thinking that section 2 of the English Prevention of Corruption Act 1916 did not cast any burden on the defence greater than that of adducing evidence of an explanation of his conduct that was reasonable and probable, but that he may not have correctly interpreted the decision in R. v. Carr-Briant. 30

p.55 lines
8-15

(d) It is necessary to state what the Court of Criminal Appeal did decide in R. v. Carr-Briant. 40

(i) The headnote states that an accused

discharges the burden of proof where the statute states that some matter is presumed against an accused "unless the contrary is proved", by evidence satisfying the jury of the probability of that which the accused is called upon to establish" (1943 1 K.B. 601, 612)

10 (ii) This ratio decidendi did not distinguish explicitly the persuasive burden and the evidential burden. Counsel for the appellant complained only of the trial judge's direction to the jury that the standard of proof on the accused was the same as that on the prosecution. No argument was advanced to the like effect as that advanced herein.

20 (iii) Humphreys J., in delivering the judgment of the Court, specifically approved of the decision in R. v. Ward 1915 3 K.B. 696, although that case was cited to support the proposition that words throwing the onus of proof of certain matters on the accused did not require the accused that he should prove his case beyond any reasonable doubt. And, indeed, the learned judge went on to conclude that the rebuttable presumption created by the section should be construed in the same manner in other statutes or
30 similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up the defence of insanity (p.610)

40 (e) It is submitted that R. v. Carr-Briant does not directly assist the argument accepted by the Court a quo in upholding the Respondent's acquittal. It is submitted that the decision in Carr-Briant was right in so far as the Court of Criminal Appeal quashed the appellant's conviction on the ground that the trial judge had been wrong to direct the jury that the accused had under section 2 of the Prevention of Corruption Act 1916 the same burden of proof as the prosecution to negative corrupt motive beyond reasonable doubt. In so far as the

decision in Carr-Briant purported to equate the accused's burden of proof under section 2 of the Prevention of Corruption Act 1916 with the accused's burden of proof in a defence of insanity or of diminished responsibility, it is submitted, for the following reasons, that the decision is wrong in law:

(i) The Court failed to direct its mind to the crucial distinction between persuasive burden of proof and evidential burden of proof. 10

(ii) The Court failed to regard the setting up of the defence of insanity both as a rule peculiar to the mental responsibility of an accused and as an illogical exception to the rule in Woolmington's case

(iii) The Court too readily assumed that words in a statute which presumed a state of affairs unless the accused proved the contrary were to be construed in the same manner as similar words in other statutes: whereas each statutory reversal of the onus of proof should be judged according to the context of the subject matter, and that only exceptionally should the courts infer that Parliament intended to shift the persuasive burden on to the accused. 20

12. The amicus curiae humbly submits that the question of law answered by the Federal Court of Malaysia, in the form that a presumption of corruption under section 14 of the Prevention of Corruption Act 1961 can be said to be rebutted "by a defence as being reasonable and probable", was right and should be affirmed for the following, among other 30

R E A S O N S

(1) Because there is a fundamental principle that the persuasive burden of proof remains on the prosecution throughout a criminal trial in Malaysia unless there is a positive statutory provision reversing 40

that rule.

- 10 (2) Because Section 14 of the Prevention of Corruption Act 1961 does not effect a statutory reversal of the fundamental principle but only shifts the evidentiary burden of proof on to the accused to adduce some evidence of an innocent explanation of his conduct.
- (3) Because the judgment of the Federal Court of Malaysia in answering the question of law referred to it under section 66 of the Courts of Judicature Act 1964 was right and ought to be affirmed

L.J. BLOM-COOPER

No. 28 of 1968

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N

PUBLIC PROSECUTOR Appellant

- and -

P. YUVARAJ Respondent

CASE FOR THE AMICUS CURIAE

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