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Shifting Trends in Burden Of Proof on Accused: A Legal Analysis

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INTRODUCTION:

Delphidius (Prosecutor): O, illustrious Caesar! If it is enough to deny, what hereafter will become of the guilty? Julian: If it is sufficient to accuse, what will become of the innocent?[1]

The above discussion brings out very clearly the two extreme opportunities in the process of bringing an accused to justice. The interest of the prosecutor lies in getting the accused convicted. The accused views himself as the victim of the procedure and tries to take advantage of the protections that are integral in any trial procedure. Both sides put forth a specific point of view, which rendering to each is the only way of looking at things. Both sides depend significantly on one benchmark - adducing evidence with respect to either exculpation or inculpation. The question that we are concerned with is who has the burden of proof? i.e. who ought merely to allege and who ought to deny or affirm by addcing evidence?

Everyone would like to see the guilty brought to book. But to arrive at a conclusion of guilt is a long drawn out process and requires demanding adherence to rules. It would be easy for the state to give rules a go-by and declare that from now, any person charged with an offence would have to come to Court and prove his innocence failing which he would be convicted. The attraction for the short cut is often felt by the state, which sees a gradually low conviction rate as a threat to law and order and thereby its legitimacy and seeks to correct this by various means, all of which may not be required.[2]

The present paper focuses on the said issue of Burden of proof *vis a vis* the accused person.

In the matter of providing evidence, there are certain facts in cases that need not be proved. All other relevant facts, however, must be proved by evidence i.e. by the statement of witnesses, confessions of parties and the production of documents and the burden of proving such relevant facts is cast upon either of the parties by the Courts or the statutes. The expression "burden of

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[1] As cited in *Coffin v. United States*. 156 US 432, at 454 (1895).
[2] Rahul Singh, "Reverse Onus Clauses: A Comparative Law Perspective', available at Westlaw India. Last accessed on Apr. 2019.

proof", therefore simply means the rules regulating the questions upon which of the parties to the cause rests the commitment of adducing the evidence.

The phrase 'burden of proof', is used by the Courts in India in two different contexts and this has created a great amount of confusion. The root cause of the ambiguity lies in the indiscriminate use of the phrase 'burden of proof', as meaning either the necessity of establishing the existence of a certain facts or the necessity which lies on a party at any particular time during a trial to create a *prima facie* case in his own favour or to overthrow that one which is created against him.

Basically, the burden of proof lies on the party who substantially proclaims the affirmative of the issue as it is considered reasonable and just that the person who relies upon the existence of a fact, should be called upon to prove his own case. Further, in the application of this rule, regard must be given to the substance and effect of the issue as in many cases the party may give the issue a negative or affirmative form for his own convenience by making a slight change in the drawing of the pleadings.[3]

In order to succeed, the party on whom the burden of proof lies must establish a *prima facie* case and he must succeed by the strength of his own right and the lucidity of his own proof. On his failure to do so, he cannot simply take benefit of the weakness of his rival's case nor can he contend that it was too difficult or virtually impossible to prove the matter in question.[4]

The said general rule is mentioned under Section 101-105, Indian Evidence Act, 1872, these general rules are subject to exceptions as given under:

a) He will not be required to prove such facts as are especially within the knowledge of the other party (Section 106); and
b) He will not be required to prove so much of his allegations in respect of which there is any presumption.

[3] *Taylor on Evidence,* Sweet and Maxwell Ltd., 12th Edition. 1931, s. 364, p. 252.
[4] *Shiv Charan Singh v Chandra Bhan,* AIR 1985 SC 637.

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DEFINING THE TERM "BURDEN OF PROOF"

As per the Indian Evidence Act, 1872 the definition of the concept of burden of proof has been laid down under Section 101 covered under the Act.[5] The Act defines it as follows

"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."

Now the prime issue of concern is to prove the concept of Burden of proof in context of the accused person.

ACCUSED IN THE EYES OF LAW: LEGISLATIVE PARADIGM

Procedural law, though merely the hand-maiden of justice, undoubtedly regulates the substantive law and thereby the administration of justice. The burden of proof is one of the important principles of procedural law, especially in criminal law. It essentially designates who should "prove" the existence or non-existence of a "fact"[6] which is alleged by either party, during the trial of a case.

When one considers the first meaning of burden of proof as explained above, it is easy to reach the conclusion that the burden of proof of satisfying the jury of the guilt of the accused beyond reasonable doubt is always upon the prosecution and it can never change. If a doubt exists, then the accused should be innocent.[7] The presumption of innocence implies that the prosecution is required to prove each and every ingredient of the offence, even though there may be negative averments[8] made by the prosecution.[9] The burden of proof is never on the accused to prove his

[5] Part III (Production and Effect of Evidence), Chapter VII of the Indian Evidence Act, 1872.
[6] See section 3, The Evidence Act, 1872.
[7] As cited in *Mancini v. DPP*, [1941] 3 All E.R. 272, 279-280, *Woolmington v. DPP*, [1935] A.C. 462, 482
[8] For instances, in cases of murder, the burden of proving death, as a result of a voluntary actus reus of the accused and requisite mens rea on the part of the accused is on the prosecution. Likewise, on charges of rape the burden of proving non-consent by the prosecutrix is on the prosecution. See *Vijayee Singh v. State of U.P.*, A.I.R. 1990 S.C. 1459, 1474.
[9] As cited in See *R. v. Errington Edwards*, [1974] 59 Cr. App. R. 213, 217.

case or disprove the prosecution's case. The legal burden remains on the prosecution to prove every essential ingredient of the offence.[10]

The burden of proof lies on the prosecution to adduce evidence before the Court and if it fails to introduce any or sufficient evidence, it is an established principle that acquittal will follow.[11] However, if one considers the evidential burden, it constantly shifts during the trial; the evidential burden may "shift" once the prosecution has made out a prima facie case against the accused and he may be convicted if he does not adduce evidence to create a reasonable doubt.[12] The accused bears the burden of adducing evidence if he wishes to prevent adverse inferences being drawn from other evidence, where that other evidence is relevant to an issue on which the prosecution already bears the legal and evidential burdens. As has been discussed already, the legal burden of proof always remains on the prosecution but under section 105 of IEA,[13] the burden may shift upon the accused to prove special circumstances when he takes the support of an exception or a proviso. The most common illustration since the time of Woolmington is that of insanity.[14] The prosecution has to prove all the elements of the crime including the required *mens rea*. However, the accused may rebut this by pleading insanity but the burden of proof in this case is only one of balance of probabilities. Even if the accused is unable to establish his insanity, the evidence led by him may raise a reasonable doubt as to the *mens rea* of the accused at the time of the committing the offence.[15]

It is clear from the definition of a presumption that it liberates the person in whose favour it acts, from the evidential burden of adducing evidence in the first instance. Sections 105 to 114A of Indian Evidence Act,1872 deal with presumptions where the evidential burden is there on

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[10] S.L. Phipson & D.W. Elliot, "*Manual of The Law of Evidence*" 70 (11th ed. 2001) [hereinafter PHIPSON] at Pg. 371
[11] The fact that evidence may be difficult to obtain or any other excuse including a hostile witness do not and cannot relieve the prosecution from the burden of proof. Id as above on Pg. 97
[12] *I.d.*
[13] Indian Evidence Act, 1872, Section 101: "*Burden of proving that case of accused comes within exceptions - When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions... is upon him, and the Court shall presume the absence of such circumstances.*"
[14] M. Monir, "Principles and Digest of The Law of Evidence" 1002 (1999) (hereinafter MONIR), Pg. 1049
[15] *Dahyabhai v. State*, A.I.R. 1964 S.C. 1563

the accused. It may also be argued that in the absence of any evidence presented by either side, the presumption prevails in order to establish the truth of the issue under consideration.[16]

VERDICTS IN ACCORDANCE WITH BURDEN OF PROOF

The judiciary, however, has not strictly glued to the provisions of the Evidence Act, 1872. Right from the age-old decision of the Allahabad High Court in *Parbhoo v. State* [17] to the Supreme Court's decision in *Vijayaee Singh v. State of U.P*.[18] the judiciary has in numerous cases followed a consistent exposition vis-a-vis burden of proof in cases of general exceptions. The following principles may be derived from the said decisions.

a) The prosecution must prove beyond reasonable doubt that the accused has committed the offence.

b) There is a rebuttable presumption that the circumstances which bring the case under general exceptions do not exist.

c) The accused may, after making his plea, prove his case beyond reasonable doubt or may lift presumption by a pre-ponderance of probabilities.

d) The accused is entitled to a benefit, if he manages to create a reasonable doubt as to the ingredients of the offense, even if he fails to prove his case under general exceptions.

Practically, therefore, the burden of proof on the accused in cases of general exceptions is lighter than that prescribed by the Act. While the Act requires the accused to prove his plea on a pre-ponderance of probabilities, the judiciary has diluted it and allows the accused to benefit from

[16] However, the point to be remembered here is that the legal burden on the prosecution to prove the guilt of the accused beyond all reasonable doubt remains. The prosecution cannot be freed from this burden by a mere presumption. See generally *R. v. Lambert*, [2002] 2 AC 545.
[17] AIR 1941 All 402
[18] AIR 1990 SC 1459

the general exceptions if he merely creates a rational doubt as to ingredients of the offence itself.

The judicial stand reflects the all-pervasive common law hangover in Indian law. This is evident from the importance attached to some of the fundamental principles of English criminal jurisprudence. A blind following of the principles of common law, namely, "the accused is presumed to be innocent until proved guilty", the prosecution has to prove the guilt of the accused beyond reasonable doubt", "the accused is entitled to benefit even if there is a doubt as to the ingredients of the offence" inter alia, has led to the dilution of the principles treasured in the Act. The principles laid down by the judiciary in relation to general exceptions can be traced back to English cases, especially *Woolmington v. D.P.P.*[19] In that case, the Court of Appeal laid down that the ' burden of proof is on the prosecution to prove beyond reasonable doubt that the offence was committed and the accused need not prove his innocence.

The Indian judiciary, it is opined, has committed a blunder resulting in catastrophic consequences for the prosecution. A perusal of the Woolmington ratio and S. 105 of the Act show that they operate at two different levels. S. 105 deals with "burden of proof" on the accused to prove that his action of committing the offence falls within general exceptions, while the Woolmington ratio deals with the benefit that an accused can avail when the prosecution has failed to prove the case against the accused. Combining the two has led to various gratuitous consequences. The prosecution now has to not only prove the offence beyond reasonable doubt, but also the act resulting in the offence does not fall within the general exceptions. The latter, also, has to be proved to such an extent, so as to dismiss any 'reasonable doubts' as to the commission of the offence. On the other hand, the accused merely has to raise the plea of general exceptions and, if necessary, he has to highlight the drawbacks in the prosecution's case to show that there is a "reasonable doubt" as to the offence itself.

All these consequences were envisioned by the Saurashtra High Court in *J.D. Vanubhai v. State* as early as in 1952. In that case, the Court instructed about following the Woolmington ratio to interpret sec. 105 of the Act. This approach was followed by a few High Courts initially and

[19] (1935) All. E.R. Rep. 1

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indirectly by the Supreme Court in *State of M.P. v. Ahmadulla*[20]. But they have not been enough to stop the total sell-out to the Woolmington ratio.

However, the Privy Council in *Jayasena v. Reginam*[21] opined that the Woolmington ratio is not applicable to the burden of proof on the accused vis-a-vis general exceptions. Dealing with Sec. 105 of the Sri. Lankan Evidence Ordinance which is in pari materia with Sec. 105 of the Act, the Privy Council refused to follow the logic in Woolmington. It felt that Sec. 105 places an evidentiary burden on the accused. The extent of this burden is based on realistic situations but is generally based on a "preponderance of probabilities". In fact the Council relied on two decisions by the Indian Supreme Court, namely, *Dayabhai v. State of Gujarat* [22] and *Bikhari v. State of U.P*[23], where the Supreme Court had made a similar distinction but, unfortunately, failed to carry the distinction to its logical conclusion

CONCLUSION

It is clear that the burden on the prosecution has amplified beyond the standards anticipated by the legislature, perhaps unwantedly and unintentionally, as the result of the judiciary's anxiety to ensure that the accused should have all possible benefits during a criminal trial. Reasonably, criminal law imposes the gravest possible punishment to the man. But the prosecution is the sufferer here. Its already onerous job has increased and assumes disproportionate volumes considering the efficiency of the investigating agencies and the various rights guaranteed to the individuals by the Constitution.

[20] AIR 1961 SC 998
[21] (1970) 1 All. E.R. 219
[22] (1964) 1 SCR 361.
[23] (1965) 3 SCR 194.