BURDEN OF PROOF IN CRIMINAL CASES

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Inception with comparing inquisitorial system

In studying the numerous legal systems utilized by different localities all over the world, basically two trial systems can be identified. They have popularly gained recognition as the adversarial system and the inquisitorial system of trials. As in most common law countries Sri Lanka has opted for the adversarial system of trials.

The adversarial system which is also often referred to as the accusatory system, as the name suggests, is accusatory in nature, whereby two or more opposing parties gather and present evidence to an impartial judge or jury who is not conscious of the case till it is presented before them. In such criminal trials the defendant is not required to testify.

On the contrary, the inquisitorial system involves a primary judge who actively steers the search for evidence and questions the witnesses, including the respondent or defendant and is responsible for supervising the gathering of evidence necessary for each case on a *pro rata* basis. Here the attorneys play a more passive role unlike in an accusatorial system.

In both trial systems the emphasis is on finding the truth but the two approaches used for such are distinct. While the adversarial system pits the parties against one another with the hope that competition will reveal the truth, the inquisitorial system questions those familiar to the case. According to Dr. K. N. Chandrasekharan Pillai "The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth. The adversarial system places a premium on the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth"[1]. Under both systems, the trial judge is vested with the power to conduct the trials accordingly. The presumption of innocence and where the burden of proof lies is generally of the same context in both systems. The standard of proof in a civil litigation in both the systems is on a balance of probabilities whereas in criminal litigation the standard required is beyond reasonable doubt. Thus, both the systems have common features and rules of procedure.

The weight put upon the concept of 'presumption of innocence' is higher in the

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[1] Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme Court - New Trends, 2003) 8 SCC (Jour) 49, available at http://www.supremecourtcases.com

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practice followed by the functionaries in the adversarial system which seems to give an undue advantage to the defence. This is not a prominent feature in the inquisitorial system.

Even though *prima facie* there doesn't seem to be much of a difference between the two systems of trial it is generally asserted that a major portion of the convictions that are registered arise under the inquisitorial system rather than the through the adversarial system of trials. The reason for this appears to be the approach that practitioners adopt towards the principles[2].

Prosecution should prove its case beyond reasonable doubt

In a criminal trial, English law treated the burden to prove the case of the prosecution beyond reasonable doubt as sacrosanct and the trial generally begins with the presumption of innocence on the part of the accused. In other words, the prosecution should prove its case beyond reasonable doubt in order to negate the 'presumption of innocence'.

As held in ***Woolmington vs. DPP***[3]"Throughout the web of the 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. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…" However in ***Padmathilake vs. Bribery Commissioner***[4] the court emphasized that 'Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt to which the accused is entitled, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind.'

As per ***Karunadasa vs. OIC, Nittambuwa*** cited in ***Mudiyanse Appuhamy vs. State***[5] the court further said that "The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence. When the guilt of the accused is not established beyond reasonable doubt he is liable to be acquitted as a matter of right. What the (trial) court has done in this case perhaps unwittingly, is to bolster up a weak case for the prosecution by referring to the weaknesses in the defence case. This is not permissible". And also in ***Kamal Addaraarachchi vs. State***[6] "The case of the prosecution is not considered to be proven until the 'presumption of innocence' is disproved regarding the defendant. Statements made by the defendant or the stance taken by him being rejected does not prove the prosecution case".

This position was approved in the case of ***Mahinda Herath vs. AG***[7], where it was held that, "The trial judge must always bear in mind that the accused is presumed to be

[2] Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme Court - New Trends, 2003) 8 SCC (Jour) 49, available at http://www.supremecourtcases.com

[3] 1935 AC 462

[4] SC 99/07 dated 30.07.2009

[5] CA 61/98 dated 11.01.2001

[6] 2008 3 SLR 393

[7] CA 21/2001 dated 13.09.2005

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innocent until the charge against him is proven beyond reasonable doubt. What happens when a plea of alibi or complete denial is taken up by an accused person is rejected? The trial judge should not forget the above legal principles regarding the burden of proof and the presumption of innocence".

Defendant's case

The defendant is not obligated to prove his case unless the prosecution proves the case beyond reasonable doubt. In the ***Nan vs. Dewage Wilmon*** case[8] referring to the **James Chandrasekara** case the court held that "According to Section 105 of the Evidence Ordinance, the court must presume the absence of such defence [any general exceptions in the penal code, or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence] unless it is proven to the satisfaction of court on a balance of probability that such circumstances did exist". Further in ***King vs. James Chandrasekara***[9] it was held that "Creating a doubt with regard to a general exception is not sufficient and further that it must be proved on a balance of evidence that such circumstances, indicative of the existence of such exceptions have to be proved on a balance of probability". Balance of probability does not in itself mean only the defendant calling for evidence and proving but if the relevant exception is unfolded from within the Plaintiff's case itself, then the defendant need not call for extra evidence. In ***S. L. Farook vs. AG*** case[10] **Shirani Thilakawardena J** was of opinion that **"**The defence that a sudden fight occurred has been proved on additional evidence by cross examining the Prosecution's evidence and dock statements made by the defendant".

The dossier prepared by the investigating judicial officer under the inquisitional system of trial weakens the presumption of innocence. However, as the organized power of the State has been at the command of the prosecution, it was generally the impression that if there is any doubts on the accuracy of the prosecution case, the benefit of doubt should go to the defendant who is the weaker between the two.

In the plea of an *alibi* no burden of proof exists on the defence to prove such *alibi* since it is neither a special nor a general exception. But such *alibi* should be submitted without undue delay. (Section 126 of the Code of Criminal Procedure as amended by No 14 of 2005 Act). An *alibi* proceeds to create substantial doubt and the case is not proved beyond reasonable doubt if the defence of *alibi* is not struck out *ab initio*. It was held in ***Punchi Banda vs. The State***[11]**, G. P. A. de Silva J**. "When an alibi is pleaded in defence, the burden of proof on the accused is not similar to that in a case where the accused raises a mitigatory or exculpatory plea. Where the defence is that of an *alibi*, the accused has no burden as such of establishing any fact to any degree of probability". Further, in ***King vs. James Chandrasekara***[12], **Soertz J** held that "In a

[8] CA 122/2008 dated 12.11.2007

[9] 44 NLR 97

[10] SC dated 27.06.2008

[11] 76 NLR 293

[12] 44 NLR 97 (at page 126)

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case where the accused's plea is simply that he is not guilty, or in a case where he pleads an alibi, if he creates a sufficient doubt in the minds of the jury as to whether he was present or not, or as to whether he had the necessary *mens rea* or not, the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case".

System responses to low conviction rate

The above principles had been insistently upheld by the courts in common law countries which had created the impression that many offenders escape the clutches of law making the system to respond to it in a different manner. While some jurisdictions excluded the *mens rea* component of crimes others shifted the burden from the prosecution to the defendant[13].

1. Strict liability offences

Here the defendant is held liable for the criminal offence committed even in the absence of *mens rea*. In spite of the defendant's ignorance that he is committing a crime the doctrine of strict liability holds him liable for the criminal offences committed.

All offences under the penal code require the mental element, but some offences created by the legislature towards the latter part which do not contain the mental element to it are called strict liability offences. In the case of ***Casie Chetty vs. Ahamudu***[14] and ***Perumal vs. Arumugam***[15] it was held that '*mens rea* was not an essential element of the offence'. Therefore in the two cases above the offences were regarded as strict liability offences.

However, **Prof. G. L. Peiris** has pointed out in *Principles of Criminal Liability In Ceylon, A comparative Analysis* that; "In Sri Lanka there is no such (as Common Law Crimes and Statutory Crimes) classification and all the offences are statutory provided. Mainly the Penal Code gives room for the offences by interpreting and denoting the sentences. Rest is included in other legislative enactments. Most of the offences include the mental element in to their definitions while some of them do not. Anyhow the basic rule is regardless of including or not in the Penal Code is subject to the operation of the general exception which is defined in the Penal Code [according to Sec 38(2)]. If the defendant can prove the general exceptions stated in chapter IV of the Penal Code on a balance of probability, we will be able to exonerate from the criminal liability. Hence mistake of fact which embodied in Sec. 69 and Sec. 72 is applicable to the entire body of criminal law in Sri Lanka."

2. Ellen borough Dictum

It is considered that a duty arises in the defendant to provide for an explanation of his innocence even though such

[13] Chandrasekharan Pillai K.N., (2003), Burden of Proof in Criminal Cases and the Supreme Court - New Trends, 2003) 8 SCC (Jour) 49, available at http://www.supremecourtcases.com

[14] 1915 18 NLR 84

[15] 1939 40 NLR 532

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explanation is not necessary, in the contrary it has been held in ***Rex vs. Cockraine***[16] that the does not provide an explanation because of his guilty conscience. This is famously known as the Ellen borough Principle. Accordingly, "no person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which is attached to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out where it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so, only from the conviction that the evidence so suppressed or not adduced, would operate adversely to his interests".[17] Also it was held ***in M. A. Samy & four others vs. AG***[18] that "If the prosecution had failed to establish a strong prima facie case against the 3rd accused-appellant, prosecution does not warrant the application of the dictum of Lord Ellen borough".

Adherence to principles; analysis through Indian cases

Adherence to fundamental principles is a very good practice but, undue adherence to such is not always adviced upon. In ***Shivaji Sahabrao Bobade* vs. *State of Maharashtra***[19] Justice K. Iyer in India warned about undue adherence to the fundamental principles.

> "The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breaks down and lose credibility with the community."

Justice Krishna Iyer further stated that:

> "We must observe that even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused."

In pursuance of this view in ***Kali Ram* vs. *State of H.P.***[20] the observations of Justice Iyer misinterpreted and Khanna J clarified

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[16] 1814 Gurney's Report 479

[17] Ref. **W. M. Sirisena vs. AG** dated 22.03.1999

[18] ***See*** 2005 BASL Law journal

[19] 1973 SCC (Cri) 1033

[20] 1973 SCC (Cri) 1048

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thus "observations in a recent decision of this Court, ***Shivaji Sahabrao Bobade* vs. *State of* Maharashtra** to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles, which has always to be kept in view in our system of administration of justice for criminal cases, is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused."

Khanna, J. emphasised on the importance of the fundamental principles thus:

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt."

The abovementioned principle was rationalized by the learned Judge as thus:

> "It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse; however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable."

Furthermore it was observed by Dr. K.N. Chandrasekharan Pillai that "It is apparent that strict adherence to the basic principles of presumption of innocence and burden of proof require delicate balancing of the trial procedures by the impartial and independent Judge. Our system reposes much faith in the impartiality of the Judge in a smuch as it confers on him many powers with potential for abuse".

As per Dr. K.N. Chandrasekharan Pillai, a fitting example for the above can be observed in ***Ram Chander* vs. *State of***

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Haryana[21] where a trial judge in accordance with this provision, firmly rebuked and virtually threatened the witnesses with prosecution for perjury in order to make them speak what he thought must be the truth. The Supreme Court found it impossible to justify this attitude and refused to accept any portion of the evidence of the two eyewitnesses recorded by the Sessions Judge. This position was explained by the Court as:

> "We may go further than Lord Denning and say that it is the duty of a Judge to discover the truth and for that purpose he may 'ask any question, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant' (Section 165 of the Evidence Act- India). But this he must do, without unduly trespassing upon the functions of the Public Prosecutor and the defence counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. He must take the prosecution and the defence with him."

The approach taken by Justice Thomas in such a situation in ***State of W.B.* vs. *Mohd. Omar***[22] is of particular interest where the Public Prosecutor did not inquire regarding the nature of the injury and the court did not have the doctor's opinion to decide the gravity of the offence. Justice Thomas answered to this situation thus, "no doubt it would have been of advantage to the court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach a wrong conclusion. Though not an expert as PW 30, the Sessions Judge himself would have been an experienced judicial officer. Looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death."

Justice Thomas declared his view regarding the change of outlook on presumption of innocence as thus: "the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty. In this case when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this."

Further Justice Thomas also dwelt on the role of the trial court in the reasoning process. Accordingly he said "when it is proved to the satisfaction of the Court that Mahesh (deceased) was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction, the permitted reasoning process would enable the Court to draw the presumption that the accused have

[21] 1981 SCC (Cri) 683

[22] SCC (Cri) 1516

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murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody."

Conclusion

Inspite of all the new developments in the legal arena our criminal justice system has not been successful in ensuring conviction in all cases. The critics were of the opinion that this shortcoming was due to the sacred adherence of judges to the presumption of innocence and the requirement of proving *mens rea*. Although there is no harm in reversing the trend of frequent acquittals on technicalities, this reversal should not be at the cost of losing the credibility and reputation of the Judges as impartial functionaries. Even though judges may be impartial and independent their credibility depends upon how they function.

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