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THE INCOMPREHENSIBLE BURDEN OF PROOF

I. INTRODUCTION

UNDERSTANDING the burden of proof provisions (especially the sextet from section 103 to section 108) in the Singapore Evidence Act[1] has never been an easy matter. 'Engaging but incomprehensible' might be an appropriate description of them. As an intellectual exercise, there is much that is challenging. As a matter of practicality, there is no question that burden of proof considerations are important in criminal cases. What has been said of burden of proof in civil cases, that it seldom matters,[2] can scarce be transposed to criminal cases. In a civil case, wherever may be the onus, a party would be foolish not to press his case to its utmost but in a criminal case, the protestation of innocence may be all that an accused lacking the resources to investigate can proffer. For him the burden of proof will be crucial.

Can we say that the recent decisions on burden of proof have helped to relieve the burden of explanation? *Syed Abdul Aziz's case*[3] involved section 105; but the pity is that it did not deal with what it should have dealt with. *Suradet's case*[4] depended on section 107 and that provision has a depth which needs to be brought out. *Kum Chee Cheong's case*[5] started out as a section 108 case. It transformed to a section 107 case. The fourth case to be discussed, *Lee Ngin Kiat's case*[6] will certainly not be the last word. The first three cases are similar in that the provisions which might have been invoked were not the provisions reckoned material. The result in two of them is not questioned. The quarrel is with the reasoning. The third case should have gone the other way; not on account of any inherent virtue in the accused's case but for the sake of posterity, the result and the reasoning wants re-examination. The last case is a bright light on the escutcheon.

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1 Cap 97, 1990 Ed.
2 See Lord Reid in *McWilliams* v *Sir William Arrol & Co Ltd* [1962] WLR 259 at 307.
3 [1993] 3 SLR 534.
4 [1993] 3 SLR 265.
5 [1994] 1 SLR 231.
6 [1993] 2 SLR 511.

II. Prefatory Propositions

Two propositions may be taken as established, although the second to be discussed is still misconceivedly oppugned. They are the derivatives of section 3. If the term "prove" as defined in section 3(3) of the Evidence Act means persuade or satisfy – because the trier of fact must believe,[7] then the term "burden of proof" wherever it occurs in the Act must refer to the legal burden of proof. Only the legal burden of proof posits persuading the trier of fact. Only that burden looks for satisfaction of the trier of fact. The first proposition then is that persuasion or satisfaction must be adjudged according to the standard of a prudent man. The provision asks the court to be satisfied or convinced if a prudent man would be convinced. If further and in the alternative, supposing non-synonymity of the first limb and second limb in the provision, a prudent man would act on the supposition of the existence of a fact, then the court may be persuaded as to its existence. This alternative, whether synonymous with the first limb or not, sets up the same standard.[8] What is that standard? There are really only two. It is either proof beyond reasonable doubt or on a balance of probabilities.[9] Into either harbour the ship of proof may safely put in. More than two no court could handle. It would be an invitation to inordinate appeals.[10] Hence also, the steadfast refusal to accept that there are intermediate standards.[11]

The second proposition, in the present view an incontestable one, follows on the heels of the first. The first is the feet but the second which is the head must lead. If the burden of proof invariably means the legal burden,

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7 And it does. S 3(3) says this: 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 circumstances of the particular case, to act upon the supposition that it exists.

8 See also *Loo Hwee Hong* v *PP* [1978] 2 MLJ 164 at 165; *Saminathan* v *PP* [1955] MLJ 121.

9 The former is the standard prescribed for the prosecution in criminal cases: *McGreevy* v *DPP* [1973] 1 WLR 276; *Miller* v *Minister of Pensions* [1947] 2 All ER 372. The latter is prescribed in civil cases and in criminal cases where the legal onus is on the accused: *Yuvaraj* v *PP* [1969] 2 MLJ 89. The reason the accused discharges his legal burden according to this standard is that a prudent man would not require of him the same exacting proof required of the prosecution.

10 As it is, with only two standards, the incidence of appeals is not altogether insignificant. There is a temptation to tinker around with the formulas. Whenever this leads to a suggestion of an intermediate standard the appellate court is quick to intervene: see *R* v *Gray* (1973) 58 Cr App R 177; *cf Walters* v *R* [1969] 2 AC 26.

11 In civil cases in which serious allegations (say) of fraud are made, the degree of proof is greater but the standard is still the balance of probabilities: see *Bater* v *Bater*; *Nederlandsche Handel-Maatschappij NV* v *Koh Kim Guan* [1959] MLJ 173; Dixon J in *Briginshaw* v *Briginshaw* (1938) 60 CLR 336 at 362; Lord Tucker in *Dingwall* v *Wharton (Shipping) Ltd* [1961] 2 Lloyd's Rep 213 at 216.

there can be no room for the *Woolmington*[12] principle that an accused person seeking to rely on an exception merely needs to introduce some evidence of the exception fit to go to the jury. The argument that Lord Devlin in *Jayasena's case*[13] was misconceived in rejecting the catachrestic concept of an evidential burden of proof misses the point.[14] Where proof is undefined, as it is at common law, the evidential burden of proof can be taken to mean the burden to introduce evidence for consideration. To prove something can be taken to mean to produce some evidence of it. But even at common law to prove something should not be taken to mean to show a likelihood of it. The evidential burden means less than show a likelihood of it.[15] It means more than show evidence of a trifling and inadequate nature. For the evidence which is inherently incredible falls in limine.[16] It is unfit even for consideration, let alone fit for a likelihood. On the other hand, evidence fit for consideration may be inadequate by reason of the inherent strength of the prosecution's case to amount to a likelihood. Or, it may be rebutted and if rebutted will be no likelihood. To say that the evidential burden is to prove a likelihood implies that there is a burden on the accused to ensure that the evidence fit for consideration somehow survives the force of the prosecution evidence; or that he must reply to the rebuttal. This is not so. If the evidence fit for consideration amounts to a likelihood, from the accused's eyes, and therefore involves the prosecution's case in reasonable doubt,[17] from their eyes, the accused is entitled to be acquitted. His acquittal is not because he has proved anything but because the prosecution has failed to prove the offence and offender.

Lord Devlin's powerful and unanswerable holding is that proof in the Evidence Act, whatever it may be at common law, is defined to mean satisfaction. How does one prove, in this sense, the existence of a fact merely by proposing a likelihood of its existence? There are only two standards, beyond reasonable doubt or balance of probabilities. There is no third standard based on proving by a likelihood. Likelihood creates a suspicion, not satisfaction. To rest in a condition of mere likelihood, it is a matter of conjecture, not of proof.

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12 [1935] AC 462; it applies whatever the nature of the defence: see *Mancini* v *DPP*; *Bratty* v *A-G of Northern Ireland* [1963] AC 386; *R* v *Dunbar* [1958] 1 QB 1; *R* v *Gill* [1963] 2 All ER 688. But not in case of insanity: *Sodeman* v *R* [1936] 2 All ER 1138 or in case of statutory exceptions: *R* v *Carr-Briant* [1943] KB 607.

13 [1970] AC 618.

14 Hor, "The Burden of Proof in Criminal Justice" [1992] 4 S AcLJ 267.

15 See Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), at 355.

16 See the salutary reminder in *The Popi M* [1985] 2 Lloyd's Rep 1.

17 Since the trier of fact cannot say he believes and that he does not believe, he must say that the accused's story might possibly be true: see *R* v *Bone* [1968] 2 All ER 644 at 646.

This is why the otherwise extremely attractive solution broached in *Looi Wooi Saik*[18] fails. Thomson CJ in that case gave two reasons why on burden of proof grounds the accused was entitled to be acquitted. First, the presumption of non-provocation was to be pitted against the presumption of innocence. A prudent man would attach less significance to the first presumption. The second would weigh more with him. Therefore the accused who must persuade the prudent man needed only to raise a reasonable doubt as to provocation. In the alternative, "Where there is any reasonable doubt as to whether the accused has brought himself within the exception of provocation that must in turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him."[19] Both reasons assume to their destruction that proof can consist of something less than tilting the balance. The same confusion occurred in *PP* v *Alang Mat Nasir*.[20] Having reasoned that the burden was on the accused to prove insanity on a balance of probabilities, the Federated Malay States Court of Criminal Appeal leaped to the impossible and equiparated reasonable doubt to that balance of probabilities required of the accused. Until we recognize that the accused succeeds, not because he has proved but because the prosecution has failed to prove, we cannot be faithful to section 3(3).

III. The Alibi

The alibi, as the illustration to section 105 indicates,[21] is a particular fact.[22] So as section 105 directs, the burden of proof of the particular fact of alibi must be the legal burden. The accused bears the onus to satisfy the trier of fact that his alibi is more likely than not true.

So clear a demonstration is not without qualification.[23] The defence of alibi, not being an exception within the Penal Code, has nothing to do with section 107.[24] The use of section 108 should also be resisted.

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18 [1962] MLJ 337. See also *Wong Chooi* v *PP* [1967] 2 MLJ 180 at 181.

19 At 340.

20 See especially Cussen J in *PP* v *Alang Mat Nasir* [1938] MLJ 153 at 160-161.

21 S 105 states that: 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. The illustration (b) states that: B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

22 It is not an essential part of the prosecution's case. Or else the prosecution would have to disprove the existence of an alibi which would be unduly burdensome; for if the prosecution disproved the accused's presence at A, he would not have disproved his presence at B and so on.

23 *Cf* Chin, "The Burden of an Alibi" [1986] 2 MLJ lxvii; Salim, "Alibi – To Prove or Not to Prove" [1988] 2 MLJ xvii.

24 See *infra*.

More importantly, the alibi very often involves the prosecution's case.[25] Where it involves it in some doubt, the accused is entitled to be acquitted not because he has proved his alibi but because the prosecution has failed to prove the identification beyond reasonable doubt.

The alibi very often engages, as it were, the prosecution's case.[26] Not that it is a necessary negation of or is invariably a dent in the prosecution's case. For the alibi may be false, being a concoction, and the identification evidence may be false, being another concoction. For the possibility thus exists that the prosecution witness may falsely identify the wrong offender and either the accused person was really where he says he was, at some other place, or he was not really where he says he was but was still not at the place of the offence. The trier of fact may in these circumstances conclude, without self-contradiction, against both the identification evidence and the alibi. Or, the identification evidence alone may be fabricated. Even then, the alibi will not necessarily reveal the fabrication without more. The finding that one exists will not entail the non-existence of the other. So, it makes sense to render the alibi a particular fact when it does not invariably coincide with the fact of identity or identification which is part of the prosecution's case.[27]

But where the alibi engages the prosecution's case, it may in appropriate circumstances constitute reasonable doubt in that case; and from that perspective. Unless then the prosecution rebuts it, it will fail to discharge its burden under section 103. In circumstances where the prosecution's identification evidence is inherently strong, whether as a result of the nature of the case[28] or the credibility of the identifying witness, the accused's alibi evidence may fail to make an impression. The accused may have to go on to prove his alibi on a balance of probabilities in order to secure an acquittal.

This analysis explains the result in *Illian's case*.[29] It provides a good fit. The accused was identified to be the man who escaped arrest on the day the police saw two men handling controlled drugs. The officers who had successfully arrested one of the men and had unsuccessfully sought the accused's arrest, identified him again at a police station where he had appeared in connection with a traffic offence. The accused's defence was

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25 Provided that the requirements of notice in the Code are complied with: *Chee Chi Tiam v PP* [1982] 1 MLJ 88.

26 What is meant is a matter of sufficiency of evidence. The evidence of alibi may engage the identification evidence.

27 Apart from the reason that it would not be fair to require the prosecution to prove a negative, namely, non-presence other than at the scene of the offence.

28 As where the case is of day light robbery by an unmasked robber, purportedly identified by an acquaintance.

29 [1988] 1 MLJ 421.

an alibi. He produced a border pass to show that he was in Thailand at the material time. The co-accused's testimony supported his innocence. It was to the effect that the second man was a stranger but the accused was a friend. In those circumstances, and particularly since the prosecution was unable to dispute the authenticity of the border pass, one would have thought that the alibi had been proved beyond a balance of probabilities. Alternatively, even supposing proof failed, the nature of the alibi was a very denial of the identification evidence since there was no suggestion of fabrication and concoction. Therefore, if the alibi involved the prosecution's case in reasonable doubt, the accused was entitled to be acquitted. The trial judge evidently thought otherwise and convicted the accused. Hence the appeal against the conviction; and rightly was the conviction quashed.

But the actual reasoning of the Supreme Court, with respect, fails to be faithful to the provision in section 105. There seems to be more than a suggestion that the accused merely bears an evidential burden to show some evidence of alibi. This follows from the citation and approval of the English cases.[30] The legal burden of course invariably includes the evidential burden to start. If the accused bears the legal burden to prove alibi, he also has the evidential burden to begin with some evidence of alibi. If this is what the court intended, there can be no quarrel with its decision. But if, as seems more the case, the court meant that the accused who wishes to rely on an alibi need not prove its existence, that is a hard holding. The truth is the accused was entitled to an acquittal in that case not because he did not have to prove the existence of the alibi, but because the prosecution failed to prove the identity of the offender.

Regrettably, the Court of Appeal of Singapore has chosen to endorse this reasoning in *Syed Abdul Aziz's case*.[31]

IV. Proof of an Exception

An exception or proviso to an offence which is relied upon by an accused must be shown by him to exist. That is what section 107 says.[32] Not any defence is an exception. The defence of alibi, for instance, is not. Moreover, some defences so-called, such as innocent association or a complete denial or fabrication are matters which deny the prosecution's case and which involve an essential part of the prosecution's case. It would be a mistake

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30 Especially *Johnson* (1961) 46 Cr App R 55.

31 [1993] 3 SLR 534.

32 The provision is this: 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 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, and the court shall presume the absence of such circumstances.

to *oblige* an accused person to introduce some evidence of innocent association or of complete denial or of fabrication. There are some instructive cases. In *Nagappan's case*[33] the accused was charged with cheating in that he had dishonestly induced the complainant to part with moneys representing the deposit in a sale of land transaction. The accused's story as he told on the stand was a complete denial of cheating. The moneys, he said, were not for the purchase of land but counterfeit moneys. There is no question of demanding from the accused some evidence of this let alone requiring the accused to prove on a balance of probabilities. The accused's story was a very negation of the prosecution's case. If he had not produced some evidence of the true nature of the transaction, and if that had been suspected from the prosecution's evidence alone, he would still have been entitled to an acquittal. He could legitimately have found his evidence in the prosecution's evidence, in whole or in part. So suppose a case in which the accused is charged with extortion. On the prosecution evidence alone (even in the absence of cross-examination) suppose that the accused was acting under orders in carrying out the extortion. The accused is entitled to be acquitted of extortion because he is guilty of abetment of extortion.[34] No one can deny him the acquittal merely because *he* has not produced some evidence. No one can say that the evidential burden is cast to introduce some evidence of the defence; although in not a few cases the accused will in fact produce some evidence of the negation.

So we must be clear that the accused is relying on an exception or proviso. This exception or proviso may exist in the Penal Code (the first limb) or specific legislation (the second limb); and there is nothing corresponding to the English distinction between common law offences and statutory offences.

As stated in the prefatory remarks, the legal burden of proof is cast on the accused to prove the existence of an exception or proviso, whether under the first or second limb. But as Soertsz J said in *Chandrasekera's case*:

> The position is, however, different in cases in which, by involving the fact in issue in sufficient doubt the accused ipso facto involves in such doubt an element of the offence that the prosecution has to prove.... In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case.[35]

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[33] [1988] 2 MLJ 53.

[34] See *VKS Samy* v *R* [1937] MLJ 172.

[35] (1942) 44 NLR 97 at 125.

This admirable proposition was endorsed by Lord Devlin in observation in *Jayasena's case*.[36] That case was not of course the forum for demonstrating the efficacy of the proposition, here referred to as the *Chandrasekera* qualification. In a charge of murder, the defence was an exception, namely, self-defence. It was relied on not to reduce the charge of murder to culpable homicide (it could not have been) but to avoid the murder altogether. The defence was nothing short of confession and avoidance. The prosecution's case was virtually conceded. The question raised was to avoid the murder charge altogether. Therefore there had to be proof on a balance of probabilities of the existence of self-defence. The conviction was affirmed, as no such proof was found.

But the case should be altered where the defence involves the prosecution's case. *Jayasena's case*[37] is law in Singapore. That much is clear from *Govindasamy's case*[38] which held that the accused must prove provocation on a balance of probabilities. But that case may be criticized for ignoring the *Chandrasekera* qualification. A special exception, namely, provocation was relied on by the accused. Upon proof of the existence of provocation, the accused would be guilty of culpable homicide instead of murder. Provocation, whatever its nature elsewhere, is a special exception which reduces the gravity of the offence. The rationale is that the provoked *mens rea* counts as a less serious, though still serious, offence of culpable homicide. If that is so, the raising of the exception may in an appropriate case involve the prosecution's case in reasonable doubt as to murder. The accused has not proved provocation. But the prosecution would fail to prove murder but succeed in only proving culpable homicide. *Jayasena's case*[39] is different. As has been shown, the exception there invoked was a confession and avoidance in the true sense.

The result in the Singapore case is clearly right. There was not even the slightest evidence capable of establishing provocation in law. On the accused's own uncontradicted account, the deceased who was courting his once severely estranged daughter had charged him with being a bad father. That had provoked him, he said, to 'chop up' the accused. Where was provocation in law when so heavy a retaliation is returned to such conduct, though adjudged immoderate and disrespectful?

There is some doubt whether the *Chandrasekera* qualification will be relevant where the exception relied on is insanity. Here the qualification may be inoperative if it is transcended by a presumption of sanity in section

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[36] [1970] AC 618.
[37] *Ibid.*
[38] [1976] 2 MLJ 49.
[39] [1970] AC 618.

84 of the Penal Code.[40] Apart from the presumption of sanity, a defence of insanity must involve the prosecution's case and might involve it in doubt leading to failure of the prosecution's proof. But the presumption of sanity can remove any such effect if it calls for disproof on the part of the accused.[41] Pre-*Jayasena* decisions are equivocal. Some referred to that presumption of sanity but treated it as merely a confirmation that the defence of insanity is as much within section 107 as the exceptions of accident, provocation and so on.[42] The logic, at any rate, is clear, if that is the total effect of the presumption of sanity, namely, as a confirmation that insanity is an exception. There surely may be cases in which the accused's defence of insanity which cannot be believed but cannot be disbelieved may nevertheless involve the prosecution's case in reasonable doubt as to the *mens rea*. Why should the accused not be entitled to an acquittal?

It follows that a defence may fall short of reliance on an exception; and as an associated reminder, since there is no such thing as a criminal pleading, care must be exercised in ascertaining the true nature of the defence. If the accused is not seeking to rely on an exception, but means merely to blunt the prosecution's case, should the court seek to place a legal burden on him? This is to court danger where the prosecution is unable even to rebut the possibility of a missing ingredient in its case introduced by the defence evidence. Should the court simply pass over the dent in the prosecution's case by waving the wand of the legal burden?

With respect, the latest Court of Appeal decision in *Suradet's case*[43] overlooks this useful distinction. The accused was part of a merry-making group. There was drinking and singing. This drove a fellow-worker on the construction site to administer a reprimand to the group. The accused not too long afterwards left the group and was seen talking to some other accused persons. The fellow-worker was found dead, killed by lethiferal blows administered with several pieces of planks found on the construction site, stained with blood. Even on the prosecution's evidence alone, there was evidence of drinking. Counsel argued that the accused could not on account of his drinking form the intention to kill. The Court of Appeal rejected the argument in these terms: "Under section 86(2), the burden lay on the first appellant to show on a balance of probabilities that he had not formed any intention for the offence due to his state of intoxication."[44]

The dismissal of counsel's argument seems too hasty. The result is better explained in terms of the failure of the evidence of drinking even to amount

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[40] Cap 224, 1985 Rev Ed.

[41] The simple answer may be that the presumption has since been repealed.

[42] See, *eg*, *PP* v *Alang Mat Nasir* [1938] MLJ 153; *cf Chia Chan Bah* v *R* [1938] MLJ 147.

[43] [1993] 3 SLR 265.

[44] At 270. For a fuller exposition, see *Juma'at bin Samad* v *PP* [1993] 3 SLR 338 at 345.

to some evidence of intoxication. After all, the accused had left the group purposefully and purposefully conferred with two others. If the drinking itself might suggest a likelihood of intoxication, that evidence would dispel it, leaving the defence with nothing.

So the result in *Suradet's case*[45] was right but the reasoning leaves one unconfident that the *Chandrasekera* qualification will be followed. The proposition of Soertsz J has a depth beyond what superficially appears. It is not giving short shrift to the words of presumption in section 107. Section 107 not only refers to the burden of proof of the accused but adds that the court shall presume the non-existence of any exception or proviso. That presumption confirms that the accused must prove the existence of any exception on which he seeks to rely. But the qualification exists in spite of that; for it relates to the prosecution's burden of proof. Nor should it bother us that the effect of the qualification seems to render section 107 a piece of paper except in so-called confession and avoidance defences. Not so, but the accused does not, where his defence involves the prosecution's case, succeed by reason only that his defence involves the prosecution's case. Although in another case the evidence of the exception might involve the prosecution's case in doubt, it may make no impression where the nature of the prosecution's case makes it impregnable. In such circumstances, only proof of the exception will avoid the plain conclusion in the prosecution's case.

V. Facts within Especial Knowledge

Quite the most polemical provision in this notable sextet is section 108.[46] Unskilfully handled, it will be a dragon to swallow up all the rest. Widely construed and lifted out of its context, it will reverse the burden of proof of the essential ingredients of the prosecution's case which by section 103 is cast on the prosecution.

The Privy Council cases are a powerful warning against indiscriminate application of the provision. In one of them,[47] the provision was used to require the proof of the *actus reus* by the accused; since he was the doctor performing the operation whilst the patient was unconscious under anaesthesia, the argument was that he had to prove what happened during the operation. In another,[48] the trial judge's summing up directed the jury to attach significance to the failure of the accused to explain the death of the deceased

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45 [1993] 3 SLR 265.

46 S 108 says that: When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

47 *Attygalle* v *R* [1936] AC 338.

48 *Seviratne* v *R* [1936] 3 All ER 36.

"in a very difficult and quite exceptionally mysterious case" with a large area of the unexplicable. In the third,[49] the trial judge required the accused to prove deceit which was what the prosecution had to prove. In all three cases, approbation of such employment of section 108 would have meant the demise of section 103. Hence the disapprobation of the Privy Council.

The proper employment of section 108 is quite circumscribed for another reason. Relative practicalities of proof explain when some fact is especially within the knowledge of an accused so that he has to prove its existence, whether he seeks to rely on it or not.[50] These can change with time. During the early stages of the Malaysian emergency, the register of persons legitimately residing within a security area could readily be produced by the prosecution. As the emergency prolonged and protracted, leading to the proclamation of more security areas, and mobility increased, leading to cross-residence, it became no longer as easy for the prosecution to produce the appropriate register.[51] So at a later stage, though not at the earlier, the courts began rightly to demand proof of registration from the accused, as being proof of a fact especially within his knowledge.[52]

Cumulative application of the burden of proof provisions cannot be ruled out; but should not be raised to a dogma. Suppose an exception to a statutory offence of poaching on state land such as lawful excuse. Lawful excuse is an exception within the meaning of the second limb of section 107. A particular fact such as the possession of a fishing licence or a contract to recover some fishes for observations or a scientific exercise may be the lawful excuse.[53] So section 105 which deals with proof of particular facts will be relevant. So also section 108 which deals with facts within the special knowledge of the accused will be relevant. There may therefore be several reasons why the accused must prove that he was carrying out a scientific study and they are cumulative.

But again, that the fact which is within the especial knowledge may in some cases engage the prosecution's case must not be overlooked. In the poaching hypothetical, a lawful excuse which consists of a scientific undertaking will involve the prosecution's case in doubt. Even if the accused fails to prove the existence of a scientific undertaking, he may succeed in involving the essential ingredients, especially the *mens rea*, in reasonable doubt. Take another hypothetical. Suppose that drug trafficking is defined

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49 *Mary Ng* v *R* [1958] AC 173.

50 *Lim Kwai Thean's case* [1959] MLJ 179.

51 See *Abdul Manap* v *PP* [1952] MLJ 47.

52 *Busu bin Haji Teh* v *PP* [1948-1949] MLJ Supp 140. See also *New Tuck Shen* v *PP* [1982] 1 MLJ 27 at 30.

53 Or, as in *Yusoff* v *PP* [1964] MLJ 264 in respect of the fact that the accused was carrying his *keris* home after lending it to a friend for the purpose of a wedding ceremony.

as giving, selling or distributing or contracting to do so for gain and being an authorized person is an exception. Particular facts such as being a nurse who is transporting the drug from one hospital to another will not only bring the nurse within the exception but may also negative the prosecution's case or at least sometimes involve it in doubt.

In *Tan Ah Tee's case*[54] cumulative application is urged in a proper case. In a joint trial of two accused persons for a drug trafficking offence, the court held that the burden of proof of being an authorized person was on the accused persons. First, section 107 said so. Second, section 108 required it to be so. But interestingly, the court was reticent about cumulatively applying section 107 and section 108. The court thought it unnecessary to invoke the latter when the former was clearly relevant. This reticence is dispelled on regard to the simple fact that under section 107 we prove the exception whereas under section 108 we prove the particular fact, which may vary from case to case, which also happens to come within the exception. Under section 108 we prove the accused was (say) a nurse, and under section 107 we prove a nurse to be an authorized person.

But the recent Court of Appeal decision in *Kum Chee Cheong's case*[55] seems to run up against several of these tenets, especially the fundamental tenet that section 108 (or section 107 for that matter) should not be used to reverse the prosecution's burden of proof.

We start with the Road Traffic Act offence of driving without a valid driver's licence,[56] not because it is directly relevant but because it helps to shed light on the material offence in the case, namely, using a motor vehicle without there being in force a valid insurance policy. The absence of a driver's licence is a negative averment. On the authority of such cases as *Horn's case*[57] the negative averment is really an essential part of the prosecution's case. If the prosecution must prove absence of consent, a negative averment, in a rape case because the negative averment is really an essential part of the prosecution's case, how can it be different in this case? Or, if we suppose an offence constituted by negligent driving or driving without due care. Plainly, the prosecution must prove the negative averment that the driving was without due care. Again, if we suppose an offence of unlawful possession of rubber. Take away the negative averment, there is no offence.[58] But as the motor vehicle is potentially an instrument of

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54 [1980] 1 MLJ 49.

55 [1994] 1 SLR 231. The first instance judgment is reported in [1992] 2 SLR 126.

56 Created by s 35 of the Road Traffic Act (Cap 276, 1985 Rev Ed).

57 (1912) Cr App R 200. See also *Man bin Ismail* v *PP* [1939] MLJ 207.

58 So as Thomson J (as he then was) held in *Moh Yee Chong* v *PP* [1955] MLJ 115: "For the purposes of the Regulation, unlawful possession of rubber is an offence, and, in the absence of anything further, in any prosecution the onus would lie on the prosecution of proving it up to the hilt."

great power posing great risks for the public, there may be a policy for casting the burden of proof on the user to prove a valid licence. In other words, there may be a policy for regarding the possession of a valid licence as a pre-requisite of driving. The user must obtain it; and he should prove it in any charge of using a motor vehicle without a licence. This was the effect of the decision in *John* v *Humphreys*.[59] The result caused Ormerod J some uneasiness. It seemed extraordinary that anyone found driving could be put to proof of possession of a valid licence. The answer would be that that is a small price to pay for a huge safeguard against the risks posed by the use of a motor vehicle.

We come then to the offence of using a motor vehicle without there being in force a valid insurance policy.[60] (We are not concerned with the offence of failing to produce on proper demand.) This offence is laid down in a separate Act, not the Road Traffic Act but the Motor Vehicle (Third Party Risks and Compensation) Act.[61] As the negative averment of absence of a driver's licence makes or constitutes that offence, so the negative averment that there is no insurance in force makes or constitutes this offence. But the case should be altered with this offence. There is no similar unrelenting policy to cause a reversal of the burden of proof. No doubt the compensation of victims is aided and safeguarded by the existence of a valid insurance policy. This, however, is not on the level of safeguarding the public from inexperienced and untrained drivers. The latter is crucial enough to reverse the burden of proof of the negative averment. But the compensation of third parties though important is not. The third party who is injured by a driver when there is not in force a proper insurance policy can still look to the driver or in appropriate cases the owner of the car for compensation. These considerations suggest that the prosecution should prove the existence of a proper insurance policy according to section 103.

But section 108 then tells us that the person who has especial knowledge of the fact must prove that fact. A harmonious reading of the two relevant provisions leads to the result amply vindicated by the illustration, described as the famous ticket collection case.[62] The prosecution in order to discharge its section 103 burden need only prove a demand by the police to inspect the insurance policy which was unrequited.[63] Thereafter, section 108 requires

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[59] [1955] 1 WLR 325. But the reliance on *R* v *Oliver* [1944] 1 KB 68 is less defensible. That case dealt with a wartime situation and if that is not highlighted, it would be inconsistent with *Esa* v *PP* [1962] MLJ 341 where the court held that the prosecution must prove the terms of the licence and its conditions.

[60] The offence includes permitting the use of the motor car in these circumstances.

[61] S 3(1) of the Act (Cap 189, 1985 Rev Ed).

[62] See Peiris, "The Burden of Proof and Standards of Proof in Criminal Proceedings, *etc*", (1980) 22 Mal LR 66.

[63] This is not to constrain the prosecution to prove an unrequited demand where the police

the accused to prove he actually had a valid insurance certificate. This is disarmingly fair. This analysis is sometimes described as requiring the prosecution to prove a *prima facie* case, which is an inaccurate way of ensuring the prosecution's burden under section 103 is not reversed.[64] But even without resorting to the notion of a *prima facie* case, the relative practicalities enable a satisfactory allocation in these terms. Since the statute imposes a duty on the police to make a demand and since the statute imposes an obligation to carry a valid insurance policy, relative convenience suggests the prosecution prove the demand[65] and the accused prove the existence in fact of a policy.

The possibility of the existence of a valid policy not being especially within the knowledge of the accused must be conceded. If he is a thief who has stolen the car, that fact would not be especially within his knowledge. But the prosecution may be entitled to rely on section 116's presumption as to facts arising in the ordinary course of human conduct.[66] Unless the thief raises some evidence of a valid insurance policy, his conviction will be sealed by the presumption that he did not have one as he failed to produce one on lawful demand.

The Court of Appeal's contrary reasoning which makes proof of an unrequited demand unnecessary and shifts the burden of proof to the accused has the apparent support of English authorities. There are English cases which place the burden on the accused to show possession of an insurance policy.[67] But in all these cases there was proof of an unrequited demand and the challenge was that the prosecution had further to prove the absence of a valid insurance policy. The real point in issue in our case was whether if there was absent proof of an unrequited demand, the accused needed nevertheless to prove that he had a valid insurance policy. His case was that the prosecution's case was incomplete; that issue did not directly arise in the English cases. More importantly, all these authorities including *John* v *Humphreys*[68] must now be re-interpreted in the light of *Hunt's case*.[69]

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through an omission have failed to make the demand. In these circumstances, the prosecution might discharge their burden of proof by proving the apparent absence of a valid policy after reasonable inquiries.

64 Any insistence on a pre-conditional fact in all cases would be indefensible: see the analysis in *Abdul Manap* v *PP* [1952] MLJ 140.

65 It would be unduly burdensome to require the prosecution to prove the existence of such a policy when it is not privy to the private contract of insurance between the user and the insurers.

66 My colleague, Hock Lai, alerted me to this possibility.

67 *Williams* v *Russell* (1933) 149 LT 190; *Philcox* v *Carberry* [1960] Crim LR 563; *Leathley* v *Drummond* [1972] RTR 293.

68 [1955] 1 WLR 325.

69 [1987] 1 All ER 1.

So the Court of Appeal was right to make that the starting point. Where the statute does not clearly place the burden of proof on either party, the court must do so having regard to policy and the practicalities of proof.[70] There is no longer any rule that the prohibition of an act except with lawful authority *ipso facto* results in a shifting of the burden of proof to the accused to prove lawful authority.[71] So the court is right to regard the policy and the practicalities of proof.

But oddly enough the court did not reach the same result as in *Hunt's case*. The statute there created an exception in favour of any preparation of morphine containing not more than a prescribed quantity of morphine. Having regard to the policy and the practicalities of proof, the House of Lords held that the offence was possession of morphine in a prohibited form. The negative averment was an essential part of the prosecution's case; and was to be so regarded as a matter of policy. The prosecution therefore had the burden of proof that the exception did not exist. The statute in *Kum Chee Cheong's case* is perhaps even clearer. The negative averment clearly forms an essential part of the prosecution's case. Without it, there is no offence at all. The statute states the offence as using a motor vehicle without there being in force an insurance policy. Is not the offence therefore the using of a motor vehicle in a prohibited mode? If the driver has a proper driving licence, using the motor vehicle would not be an offence. Therefore the offence must be using the motor vehicle in a prohibited mode.

The case is not on the same plane as *Lim Kwai Thean's case*[72] and other equivalent cases such as *Nimmo's case*.[73] In the former case, there was a real offence in being found in a security area. There was an obligation to take out registration or other travel documents. The fact of registration, or possession of a travel document, would therefore be a true exception. Even so, the court apparently preferred to rely on section 108. That indicates proper reticence in casting the burden of proof of an exception on the accused. Again, as in the second case, if statute creates an offence by imposing a duty on employers "so far as is reasonably practicable" to install safety precautions, there is a true exception in effect. Apart from the exception that all reasonable practicable efforts have been undertaken, there is a real offence constituted by the absence of safety precautions. The burden of proof can fairly be cast on the accused to prove an exception where apart from the exception there is an offence. The burden of proof can still fairly be cast on the accused to prove a negative averment which

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70 The court can be understood as thinking that the prior case of *John* v *Humphreys* [1955] 1 WLR 325 is explicable in terms of *Hunt's case*.

71 *Ie*, the rule in *R* v *Turner* (1816) 5 M & S 206.

72 [1959] MLJ 179.

73 [1968] AC 107.

is otherwise really part of the prosecution's case when there is a strong policy for it. (Even then, the courts should be slow to do so.) This is probably why the accused charged with using a motor vehicle without a driving licence must prove that he had one. But what overwhelming policy demands the same result in a charge of using a motor vehicle without there being in force an insurance policy?

The court said:[74]

> Following the approach laid down in *Regina* v *Hunt* (*supra*), it seems to us that the mischief at which the Act is directed is the risks of injury or damage to third parties arising from the use of motor vehicles and the purpose of the Act is undoubtedly to make mandatory the necessary insurance to be taken out to cover such risks. Under the Act, the obligation is placed absolutely and squarely on users of motor vehicles to take out such policies of insurance. As we have said earlier, in a prosecution under section 3(1) of the Act, the fact that there was in force at the material time in relation to the use of the motor vehicle a policy of insurance as complies with the Act is one fully within the knowledge of the user of a motor vehicle, and he can with ease prove the existence of such policy simply by producing it. On the other hand, it would be impossible or disproportionately more difficult for the prosecution to prove that he did not have in force at the material time such policy of insurance. We are therefore of the opinion that the terms of section 3(1) shift the burden to the user of a motor vehicle to show that there is in force in relation to the use thereof such policy of insurance.[75]

The reasoning of the court is an example of what the critics of *Hunt's case* most feared.[76] Their apprehension that the application of such trite formulas as relative ease of proof may obscure the fundamental premise of proof beyond reasonable doubt by the prosecution has come to pass in the Singapore case. The fundamental premise in section 103 has been lost sight of.

Moreover, the force of the reasoning is not fully plain. First, the necessary cover must be taken out by the owner, who need not be the user. Second, the user need not have the fact within his knowledge when he is not the owner of the car. The owner may have failed to renew the insurance policy

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74 We are still applying the second limb of s 107 and *Hunt's case* [1987] 1 All ER 1 serves merely to discover the so-called exception or proviso to us, where the language of the statute is untypical or ambiguous.

75 [1994] 1 SLR 231 at 243.

76 See particularly Glanville Williams, "The Logic of Exceptions" [1988] CLJ 261.

and he may be ignorant of that. Or, the user may be a thief. That is not to his credit; yet he is entitled to say that he does not especially know of the fact of insurance. The court alerts us to one fact:[77] that a policy taken out by an owner with respect to his car will also invariably cover his use of another car. So the user who owns another car will have a valid insurance policy. That in agreement with the court will be easy for him to show. But the point is that the user may not have a valid insurance policy at all. In the circumstances listed above – not exhaustively – he would not appear as against the prosecution to have the fact especially within his knowledge. The prosecution may find it more difficult to prove; but that is why the police are empowered to require the production of the insurance at the police station. The alternative answer that the prosecutor must prove a demand unrequited would seem satisfactorily enough to promote the practicalities of proof. When section 108 aptly provides the solution, should we go to section 107?

VI. Handling Statutory Presumptions

A critique of the 1989 amendments[78] to the "double presumptions" in the Misuse of Drugs Act[79] will complete this discussion of the recent developments. The relevant amendments to be discussed have more recently been repealed in favour of the restoration of the pre-1989 *status quo*.[80] But a critique may still be helpful if it will illustrate the judicial attitude and response to difficult issues of the burden of proof. Down to the 1989 amendments, the double presumptions in the Misuse of Drugs Act were predominantly matters of the *mens rea*. If the basic fact of possession was established by the prosecution, the presumed fact of knowledge of the nature of the drugs in possession arose until the contrary was proved.[81] If further, the quantity so possessed exceeded certain prescribed limits, the presumed fact of guilty intent to traffic in the drugs in possession arose until the contrary was proved.[82]

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77 At 244.

78 Act 38 of 1989 s 2 which came into force on 15 February 1990.

79 Cap 185, 1985 Rev Ed.

80 Act 40 of 1993 s 4.

81 S 18(2) provides that he is until the contrary is proved presumed to have known the nature of the drug. But s 18(1) says that the accused found in possession or custody or in control of anything containing any quantity of prohibited drugs is presumed until the contrary is proved to have had that quantity in his possession. This is a matter of the *actus reus*: see *Syed Ali bin Syed Abdul Hamid* v *PP* [1982] 1 MLJ 132. This helps to relieve the prosecution of proof of one of the three elements of possession which are knowledge of the nature of the thing possessed, consciousness of his possession over the thing, and power of disposal over the thing possessed: see *Toh Ah Loh* v *R* [1949] MLJ 54.

82 Under s 17. Proof of the act of transporting plus the presumption will constitute a *prima*

Some explanatory remarks may help. There is no doubt that the words "shall presume"[83] or equivalent words "the burden of proof is on the accused"[84] shift the legal burden to the accused.[85] They are not the same as words which are directory in nature. If the court may presume, as in section 116 of the Evidence Act, the legal burden is not shifted. The accused, however, must introduce some evidence to the contrary of the presumed fact. It is still for the prosecution to rebut that evidence and establish the basic and presumed fact beyond reasonable doubt. So in a charge of handling stolen goods, proof of the goods having been recently stolen makes it incumbent on the accused to introduce some evidence of absence of knowledge of the nature of the goods as stolen property.[86] The accused might for instance suggest that he bought the goods in a proper shop and produce a semblance of a receipt. Then the prosecution must rebut by showing, for instance, the receipt to refer to different goods or else risk losing a conviction.

Again, there is no restriction of presumed facts to *mens rea*. Rather the instances of presumed facts pertaining to the *actus reus* are too many to recount. But rarely are there instances of the presumption of the entire *actus reus*, for the simple reason that this would trench on section 103 and raise the very issue which the Privy Council left open in *Mary Ng* v *R*.[87] A second powerful reason explains why a presumption of the entire *actus reus* is an unlikely experience. The *actus reus* encompasses not only the facts in issue but also the particular relevant facts. If only the facts in issue were intended, there would be some hope of clear rebuttal. When the entire relevant facts are included, that dashes the hope of a clear answer. How should an accused begin to answer a charge of murder if the entire *actus reus* is presumed? If he says that he did not administer poison, the prosecution will reply that he has not rebutted the possibilities of strangulation and so on.

The 1989 amendments to the double presumptions in the Misuse of Drugs Act created precisely this problem and invited misgivings as to whether the crucial fight against drug trafficking could still be achieved by fair means. The response of the Court of Appeal showed sensitivity to the demands of the law of proof. The response was pragmatic and in the present view admirable, though insufficient.

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facie case of trafficking which if unrebutted will warrant conviction: see *Wong Kee Chin* v *PP* [1979] 1 MLJ 157 at 161.

83 See s 4 of the Evidence Act. The words "until the contrary is proved" are words of abundant caution: see *Lee Chin Hock* v *PP* [1972] 2 MLJ 30. *Cf Ong Beng Soon* [1992] 1 SLR 731.

84 *Ng Eng Kooi* v *PP* [1970] 1 MLJ 267 at 271.

85 *PP* v *Yuvaraj* [1969] 2 MLJ 89. See also *PP* v *Saubin Beatrice* [1983] 1 MLJ 307 at 315; *PP* v *Ang Boon Foo* [1981] 1 MLJ 40; *Neo Koon Cheo* v *R* [1959] MLJ 47; *Loh Hock Seng* v *PP* [1980] 2 MLJ 13; *PP* v *Tahir bin Kassim* [1985] 1 MLJ 381.

86 See *Mah Kok Cheong* v *R* [1953] MLJ 46.

87 [1958] AC 173 at 182.

Under the law as amended in 1989, the accused *proved* to be in possession of a quantity exceeding the prescribed limit was presumed to be trafficking in it. This law extended the previous presumption of guilty intent to the *actus reus*.

The plight of the accused was exacerbated by the manifest possibilities of the *actus reus* which he had to rebut. The definition assigned to the prohibited transaction of trafficking is very revealing in its range and depth.[88] Trafficking means giving, selling, delivering, sending, administering, transporting or distributing or offering to do any of these things.[89] Few definitions are as widely framed, but then few transactions are as lucrative and damning. So the accused presumed to be trafficking would have to negative giving, selling, importing, transporting and so on. If his facts showed that he was not giving, he must not stop there. One had now seriously to ask whether the presumption should be curtailed or read down in the light of section 103. And an affirmative answer might well be right. Unless a presumed fact is capable of rebuttal once and for all by a clear category of facts, it must also be oppressive to the accused. A presumed fact of (say) importing (*ie*, one category of trafficking) would be defensible. If the quantity possessed exceeded certain prescribed limits, a presumed fact of importing might even be sensible. But when the presumed fact was not one but several and diverse, as the presumed fact of trafficking in essence was, that was peculiarly worrying.

The double presumptions of *mens rea* were not always perfect. To use the possession as a basis of presumption had an unequal capture. The little guy, the street pedlar, was caught, not the master pedlar, directing the operations, who could astutely keep himself from being in possession. No doubt the presumption was better than nothing. No doubt convicting the street pedlar was a correct objective. If the street pedlar was deterred, the master pedlar would have to take his wares elsewhere. But with the amendments came exacerbation. The street pedlar's treatment accorded him by the amendments became hard to defend in proportion to the leniency with which the master pedlar was favoured. Would this now still be equal protection of laws; notwithstanding, the provision was no longer a 'double presumptions' provision but the possession must be proved (and arguably not merely presumed)?[90]

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88 See especially the detailed analysis of Lord Diplock which emphasizes the implicit element of transfer of possession; therefore, transporting has a technical meaning reflecting the purpose of distribution: *Ong Ah Chuan* v *PP* [1981] 1 MLJ 64. The fact that the drugs do not reach their intended destination is immaterial: *PP* v *Lau Chi Sing* [1988] 1 MLJ 383. See also *PP* v *Oo Leng Swee* [1981] 1 MLJ 247.

89 S 2.

90 *Cf Ong Ah Chuan* [1981] 1 MLJ 64 which dealt with the former presumption of guilty intent to traffic and addressed a different aspect of alleged unequal protection of laws.

As the Court of Appeal in *Lee Ngin Kiat's case*[91] implicitly recognized, the infelicity in the wording of the amendment, "shall be presumed to traffic in that controlled drug", was not commendable. As the court acknowledged, infelicitous criminal provisions should be strictly construed, whether procedural or substantive in nature, but not to the extent of denuding the provision of any meaning altogether. To the court, there were three possible constructions of the statute.

The first in two variants was vented by counsel for the defence. In its first variant, the presumption of trafficking would be unavailable if at the time of possession the accused could not possibly traffic in the drug. The time of possession was sought as a constraint on the presumption. That was rightly rejected by the court. In its second variant, the time specified in the charge was sought as constraint. Since the charge must specify the time and place of trafficking, the rebuttal evidence called for must relate to that time and place. But as that time and place would in reality be the time and place of possession, the second variant was essentially no different from the first. "The provision", the court said, "would be self-defeating",[92] rejecting the second variant. The real point of the first construction related inconsequentially to time. It was to oppose possession and trafficking to gain a contrariety between possession and trafficking; *ie,* possession must necessarily negative trafficking. But that was incorrect when an offer to traffick itself was trafficking. If possession was consistent with making an offer to traffic, how could possession entail the absence of trafficking or the impossibility of it?

The second construction explored by the court supposed that the presumption of trafficking related to some point anterior to the time of proved possession. The rebuttal evidence then must disprove trafficking at any time prior to or at the time of possession. This rightly also was rejected because:

> there are a number of objections to this interpretation. The most obvious one is that the interpretation does not seem to be borne out by the literal meaning of the words in section 17. The words used are 'to traffic', in contra-distinction to the words 'to have trafficked', and they strongly suggest that the effect is that the possessor of the drugs is presumed to be trafficking at the time he was in such possession.[93]

Again, by way of comment, time was really not the significant issue.

The court settled for the third construction in which "the act of possession is presumed to be an act of possession in the course of selling, giving,

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91 [1993] 2 SLR 511.
92 At 518.
93 At 519.

transporting and so on, or offering to do so, and thus the act of possession is presumed to be the act of trafficking."[94] There was in the end really little to the time of possession. The difference between defence counsel and the court was the supposed contrariety between possession and trafficking. But that a man could possess in the course of and for the purposes of trafficking demolished the supposed contrariety.

The court thought that there was, however, one objection to the preferred construction.

> The only possible objection to such a wide reading of section 17 is that it may be potentially unfair to an accused, as an act of possession can be presumed to be any, or an offer to do any, of the seven overt acts of trafficking as defined in section 2 of the Act. It would be unduly burdensome for the accused to show that he was not in possession of the drugs in the course of performing any of these acts.[95]

Therefore, lest, as it were, the burden of proof be unfairly reversed, the prosecution must state in the charge the particular and specific manner of trafficking which was alleged to have been carried out. *Lim Hong Yap's case*[96] which held that such particulars were not necessary in a drug trafficking charge was held to be superseded by the amendments to the Act.

With respect, what the court thought was an objection to the preferred construction was an objection to all three constructions under examination. Nor would the solution be unique to the preferred construction. The solution was innovative and not uninspiring in confidence. It was typically pragmatic. Instead of the more draconian step of abridging the presumption by section 103, there was recourse to the charging process. Logically burden of proof can no more affect the framing of a charge than the framing of a charge can affect the burden of proof. So the pragmatism had this demerit. But the pragmatism had other advantages besides seemingly achieving allocatory fairness. Though the charge particularized distributing as the manner of trafficking, yet if the rebuttal evidence successfully rebutted distributing but disclosed giving, a conviction might still follow. The court has power to amend the charges and would rightly do so in these circumstances.

Pragmatism exacts its own price. Where was the guarantee against fishing expeditions? The prosecution might have no evidence whatsoever of the mode of trafficking and therefore of any trafficking. It might simply put down one, say giving. The accused as it happened was not giving anything,

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94 At 519.
95 At 520.
96 [1978] 1 MLJ 154.

let alone controlled drugs. The allegation might turn out to be wrong. Could the prosecution apply for a discharge not amounting to an acquittal? Could the accused then be charged again with selling? And so on until all fourteen possibilities be exhausted? Would this constitute an abuse of process?[97]

Again, what was meant by 'specify the particular manner of trafficking in the charge'. Would the rule against duplicity or some variant of it preclude the stating of alternative modes which were really mutually exclusive, such as giving or selling? But surely the rule of duplicity which precludes the framing of alternative offences should not preclude the stating of alternative modes? In the case itself, the court framed the charge as "offering to sell or distribute". Was that permissible because selling and distributing, the subject matter of the offer, were non-exclusive?

There was at least one other criticism that needed further examination. The presumption as thus understood left out the trafficker who was in possession but had yet to traffic and who did traffic at a later time. Under the old law, the presumption of *mens rea* was useful. It covered or extended to the alleged time of trafficking. Under the preferred construction, the presumed *mens rea* related to the time of possession since the act of possession was presumed an act of trafficking. The drug trafficker would be able to rebut the presumption of the *actus reus* by showing that at the time of possession he had not yet made an offer to traffic nor was he in the course of trafficking. He might easily rebut the presumption of *mens rea* since at the time of possession that was absent. Notwithstanding the evidence of an overt trafficking at some other time, there would be no presumption to aid in the proof of the guilty intent, as previously there was.

This decision is the brightest light of all the recent cases discussed, although it could not be the last word and could have been brighter. If a presumption violates fundamental fairness, should the court not read the presumption as directory instead of mandatory in nature, by imputing to the legislature the proper tenet of fairness? Would not a reasonable construction of the 1989 amendments be that the prosecution must prove the act of moving the drugs or offering to move them? But the accused must raise some some evidence of absence of transfer of possession for the prosecution to rebut. The accused in other words could have been compelled to decide which of several possibilities of transfer of possession to raise for consideration; with the prosecution in rebuttal being bound by this choice. The charging process and *Lim Hong Yap's case* could have been left unaffected.

Perhaps the legislature appreciated the immense difficulties created by the 1989 amendments. The repeal of the relevant part in the wake of *Lee*

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[97] See *Connelly* v *DPP* [1964] 2 All ER 401; *Lee Tin Ball* [1985] 1 MLJ 388.

Ngin Kiat's case and the restoration of the presumption of guilty intent to traffic is very welcome. It signifies the legislative commitment to fair and due process in a very reprehensible and punishable activity.

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