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THE BURDEN OF PROOF OF PROVOCATION IN MURDER

Vasquez v *R; O'Neil* v *R*[1]

Introduction

ALTHOUGH decisions of the Privy Council in London no longer carry the weight they used to,[2] its pronouncements are still highly instructive to the development of local jurisprudence, especially where it concerns the interpretation of similar provisions of law in another part of the Commonwealth.

Vasquez was such a case on appeal to the Privy Council from Belize[3] concerning provisions of the Belize Criminal Code and the Constitution of Belize. The two appellants killed their estranged mistresses in similar circumstances and were both convicted of murder. In both cases, the trial judge had directed the jury that the onus was on the accused to prove extreme provocation on a balance of probabilities. The main issue before the Privy Council was whether this direction was correct.

The Criminal Code

The first question for their Lordships was one of statutory interpretation: which party had the persuasive burden of proof of provocation in murder? So far as is relevant to our purposes, the Belize Criminal Code provided that:

1 [1994] 3 All ER 674. The judgment was delivered by Lord Jauncey. The other members of the Privy Council were Lord Templeman, Lord Lloyd, Lord Nolan and Sir Vincent Floissac.

2 Judicial Committee (Repeal) Act 1994 (No 2 of 1994); Practice Statement (Judicial Precedent) [1994] 2 SLR 689.

3 A country in the north-east of Central America, it was officially proclaimed a British Crown Colony ("British Honduras") in 1862. Internal self-government was granted in 1964 and independence in 1981. It is a member of the Commonwealth, and it practises constitutional monarchy, with the British monarch as the nominal Head of State. (The New Encyclopaedia Britannica, 15th ed, 1992).

> Section 114: Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of extreme provocation, or other matter of partial excuse...
>
> Section 116: A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if either of the following matters of extenuation be *proved on his behalf*, namely - (a) that he was deprived of the power of self-control by such extreme provocation given by the other person... (emphasis added)

Where an accused bears the burden of proof, it is of great importance to know whether the burden is a persuasive or evidential burden. Where the persuasive (or legal) burden of proof rests on the accused, the matter in question must be taken as proved against the accused unless he satisfies the tribunal of fact on a balance of probabilities to the contrary. Where only the evidential burden is cast on the accused, the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter. But if there is sufficient evidence, then the prosecution has the burden of satisfying the tribunal of fact as to the matter beyond reasonable doubt.

Adopting *Woolmington* v *DPP*,[4] the appellants advanced the argument that only an evidential burden is imposed on the accused by the above provisions of the Belize Criminal Code, which may be met by raising the issue of provocation in evidence. Thereafter, it was for the prosecution to negative provocation beyond reasonable doubt.

However, as in *Jayasena* v *The Queen*,[5] their Lordships dismissed this line of attack. It was held that when the Belize Criminal Code was first enacted 1888, it embodied the common law of England as it stood at the time which did in fact place the onus of proving provocation on the accused. Changes to the common law since *Woolmington* in 1935 could not be incorporated into the Criminal Code without doing violence to the language of its provisions.[6] Such ossifying is a drawback in having a codification

4 [1935] AC 462.

5 [1970] AC 618 (Privy Council).

6 See also s 119(1): Notwithstanding *proof on behalf of the accused person* of such matter of extreme provocation..., his crime shall not be deemed to be thereby reduced to manslaughter if it appear, either from evidence given on his behalf, or from evidence given on the part of the prosecution...[various matters], (emphasis added).
"[P]roof means what it says and not something of lesser value." *Supra*, note 1, 678f.
"The code is not malleable and subject to evolution like the common law." *Supra*, note 1, 679h.

of the law. Hence, section 116(a) of the Criminal Code was held to have firmly placed the persuasive burden of proof of provocation upon the accused.

Constitutional Supremacy

Their Lordships next turned to the Belize Constitution. By demonstrating remarkable sensitivity to the constitutional protection of fundamental rights, a way was found to override the strictures of the Criminal Code.

The Belize Constitution came into force on 21 September 1981, on obtaining independence from the British, a date long after the enactment of the Criminal Code. Being the supreme law of the land,[7] all existing laws must be construed in such a way as to conform with the Constitution.[8] Hence, the burden of proof of provocation in murder under the Criminal Code must be re-examined in the light of the Constitution.

Indeed, this line of argument had been foreshadowed locally by an academic writing on the Singapore Evidence Act:

> The Evidence Act is a statutory provision of some antiquity drafted as a comprehensive Code ... A hundred years is a long time in the context of legal development and if a Code such as the Evidence Act is to retain its relevance and not degenerate into an anachronistic obstacle to justice with nothing to commend itself but age, its provisions must be interpreted purposively and with an eye on modern conceptions of criminal justice.[9]

Returning to the instant case, section 6(3)(a) of the Belize Constitution provided that every person charged with a criminal offence shall be presumed to be innocent until he is proven or has pleaded guilty. Giving this provision the generous and purposive construction it deserves, it was held that in order to give effect to this constitutional provision, the prosecution must retain the responsibility for proving the essential ingredients of the offence.[10]

7 S 2 Belize Constitution.

8 S 134(1) Belize Constitution.

9 Michael Hor, "The Burden of Proof in Criminal Justice" (1992) 4 S Ac LJ Part II 267, 271. See also cases pre-*Jayasena*, particularly *Looi Wooi Saik* v *PP* (1962) 28 MLJ 337 and *Mohamed Salleh* v *PP* [1969] 1 MLJ 104.

10 Although s 6(10) Belize Constitution expressly protects laws imposing a burden of proof on the accused, the Privy Council held that this did not apply to the essential ingredients of the offence because "[a]ny other construction will enable the legislature to drive a coach and four through the fundamental provisions of s 6(3)(a) whenever it wished." *Supra*, note 1, 683g.

In the case of murder, absence of provocation is an essential ingredient of the offence.[11] Hence, sections of the Criminal Code must be modified such that only an evidential burden is placed on the accused to raise the issue of provocation in a charge of murder.

Application to Singapore[12]

The above analysis of the Privy Council could easily be adopted in the local context. Singapore's criminal law, like that of Belize, is codified with the persuasive burden of proof of provocation in murder[13] placed on the accused.[14] And like Belize, the law on this area may need to be re-interpreted after the coming into force of the Singapore Constitution in 1963.[15] Both the Penal Code and the Evidence Act were first enacted pre-*Woolmington* when Singapore was still part of the Straits Settlements. The former was introduced in 1871,[16] and the latter in 1893.[17]

But there are two major difficulties. Firstly, there is no express guarantee of the presumption of innocence under Part IV ("Fundamental Liberties") of the Singapore Constitution. However, the lesson gleaned from another Privy Council case, *Ong Ah Chuan* v *PP*,[18] is that there are also implied limits to legislative power imposed by the requirements of "fundamental rules of natural justice". In *Haw Tua Tau* v *PP*,[19] the presumption of innocence was stated to be an "undoubted fundamental rule of natural justice".[20]

[11] "When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked." *Woolmington*, *supra*, note 4, 482.

[12] Indeed, *Jayasena* itself may need to be re-examined in Sri Lanka. See Article 13(5) Constitution of the Democratic Socialist Republic of Sri Lanka.

[13] S 300 Exception 1 Penal Code (Cap 224, 1985 Rev Ed).

[14] Ss 3(3), 107 Evidence Act (Cap 97, 1990 Ed), illustration (b); *Govindasamy* v *PP* [1976] 2 MLJ 49, 52.

[15] Art 156, 162 Constitution of the Republic of Singapore (1992 Ed).

[16] Ordinance 4 of 1871.

[17] Ordinance 3 of 1893.

[18] [1981] 1 MLJ 64.

[19] [1981] 2 MLJ 49, 52.

[20] *Cf Ong Ah Chuan*, *supra*, note 18, 71, where the fundamental rule of presumption of innocence is re-stated as "a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it". This formulation, however, fails to answer which party should have the persuasive burden of proof of the essential ingredients of an offence.

The present Court of Appeal is of course free to determine the exact content of these fundamental rules of natural justice,[21] but it will be surprising to say the least, for it to hold that the presumption of innocence is not so fundamental in an adversarial system of justice as to be accorded constitutional status. Neither should it make a difference whether conviction follows upon a trial by jury or by a single judge (as in Singapore). The maxim warns the tribunal against acting on anything less than clear legal proof to the required standard.[22] Mere suspicion and conjecture is not enough to convict so long as there lingers a reasonable doubt in the prosecution's case.[23]

Such an interpretation will bring the Fundamental Liberties protected under our Constitution in line with various international human rights documents where this protection is clearly stated, for example Article 11(1) of the Universal Declaration of Human Rights;[24] Article 14 of the 1993 Human Rights Declaration of the ASEAN Inter-Parliamentary Organisation;[25] and Article 4 of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.[26] Reference to international practice appears not only permissible but necessary at times to decipher the cryptic phrase "fundamental rules of natural justice".[27]

The second difficulty relates to a difference in the wording of the definitions of murder under the Belize Criminal Code and the local Penal Code. However, it is submitted that this is but a distinction without a difference. Both codes seek to exclude some situations of unlawful killing

[21] As it did in *PP* v *Mazlan bin Maidun* [1993] 1 SLR 512.

[22] Black's Law Dictionary (6th ed, 1990) describes the presumption of innocence as:
A hallowed principle of criminal law to the effect that the government has the burden of proving every element of a crime beyond a reasonable doubt and that the defendant has no burden to prove his innocence.

[23] But this principle is qualified. For a discussion on why such qualifications are unjustified, see Michael Hor, *supra*, note 9.

[24] General Assembly Resolution 217 A (III), December 10, 1948: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

[25] ASEAN Inter-Parliamentary Organisation Study Committee Meeting on Human Rights, August 6 - 7, 1993: Everyone charged with a criminal offence has the right to be presumed innocent until proven otherwise according to law.

[26] General Assembly Resolution 39/118, December 14, 1984 which endorsed the Economic and Social Council Resolution 1984/50: Capital punishment may be imposed only when the guilt of the person charged is based upon *clear and convincing evidence leaving no room for an alternative explanation of the facts.* (emphasis added).

[27] *Haw Tua Tau* v *PP*, *supra*, note 19, 53.

from the ambit of murder. Killing another whilst under "extreme"[28] or "sudden and grave"[29] provocation is one of these exceptions.

Other Exceptions and Defences to Murder

Section 107 of the Evidence Act[30] imposes the burden of proving any general or special exception or proviso contained in the Penal Code or any law defining the offence on the accused. If proof is not forthcoming, the court presumes the absence of any such circumstances. Following from the above arguments, is this provision unconstitutional? One approach is for the local courts to distinguish defences which go to controvert the prosecution's case and those where the accused asserts new facts to justify or excuse his actions (confession and avoidance).[31]

Vasquez only held that it would violate the presumption of innocence by imposing the persuasive burden of proof of essential ingredients of criminal liability on the accused. It is axiomatic that the prosecution cannot look to the accused to fill any gaps in its case; and proof of an intention to kill or to cause bodily injury is doubtlessly the most important element of murder. Hence, broad statements found in local cases may need to be elaborated on later: see for example, *Kong Poh Ing* v *PP*[32] (accident); *Sinnasamy* v *PP*[33] (unsoundness of mind); *Juma'at bin Samad* v *PP*[34] (intoxication).

Where the defence is one of the confession and avoidance variety, for example, private defence or duress, it would seem that the persuasive burden of proof may still fairly be put on the accused. Killing another person whilst under extreme provocation may at first sight appear to be a defence of the confession and avoidance variety, and should thus be treated similarly. However, their Lordships added a crinkle to the logic: it was held that the lack of provocation is nevertheless an essential ingredient of murder.

Another approach is to make a fundamental overhaul of the law and recognise that it is impossible to make any meaningful and coherent distinction between essential elements of an offence and its defences.[35]

[28] Ss 116(a), 117, 119 Belize Criminal Code.

[29] S 300 Penal Code Exception 1, *supra*, note 13.

[30] *Supra*, note 14.

[31] See also *Jayasena*, *supra*, note 5, 625 - 626; Tan Yock Lin, "The Incomprehensible Burden of Proof" [1994] SJLS 29, 34-38. *Cf* Michael Hor, *supra*, note 9.

[32] [1977] 2 MLJ 199.

[33] (1956) 22 MLJ 36. *Cf R* v *Chaulk* (1990) 62 CCC (3d) 193 (Supreme Court of Canada).

[34] [1993] 3 SLR 338. *Cf R* v *Daviault* [1994] 3 SCR 63 (Supreme Court of Canada); *R* v *Canute* (1993) 80 CCC (3d) 403 (British Columbia Court of Appeal).

[35] For an evaluation of the confusing approach in Sri Lanka under s 105 Evidence Ordinance (*in pari materia* with our s 107 Evidence Act), see GL Peiris, "The Burden of Proof and Standards of Proof in Criminal Proceedings" (1980) 22 Mal LR 66.

Considerable academic opinion[36] also exists against the use of such a distinction in relation to section 101 of the English Magistrates' Courts Act (a pre-*Woolmington* provision originally found in section 39(2) Summary Jurisdiction Act 1879). In *R* v *Hunt*[37] Lord Griffiths thought that such a fundamental change would be a matter for Parliament and not the courts. *Vasquez*, however, shows us that the limits placed on the judiciary in a system of constitutional supremacy are far different.

Conclusion

This case note, as apparent from its title, only reviews the burden of proof of provocation in murder. *Vasquez,* however, may hold out implications which reach beyond to other situations which apparently cast a burden of proof on the accused, for example in use of alibi defence, where a fact is especially in the knowledge of the accused,[38] and use of presumptions of law and of fact. It may be the organising principle long awaited for to inveigle the courts to re-examine these diverse areas of the criminal law.

While *Vasquez* may be persuasive authority in Singapore at best, the presumption of innocence is an important matter for an accused – often a question of life and death. Constitutional developments from various parts of the Commonwealth are surely worth exploring by defence counsel and the highest court in Singapore. Only then can we proclaim the *Woolmington* principle within a framework of constitutionally protected rights:

> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[39]

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[36] *Eg* AAS Zukerman, "The Third Exception to the Woolmington Rule" 92 LQR 402; JC Smith, "The Presumption of Innocence" (1987) 38 NILQ 223.

[37] [1986] 3 WLR 1115, 1129.

[38] S 108 Evidence Act, *supra*, note 14.

[39] *Supra*, note 4, 481-482. See also *R* v *Oakes* (1986) 26 DLR (4th) 200, 217 where Dickson CJC of the Supreme Court of Canada said:
The *Woolmington* case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter.

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