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THE PRESUMPTION OF INNOCENCE – A CONSTITUTIONAL DISCOURSE FOR SINGAPORE

Much of the legal thinking in Singapore and Malaysia on the problems of the burden of proof in criminal cases has so far been along textual and historical lines. Little has been said about the principles and policies which ought to govern the decision to place burdens of persuasion on the accused. This article draws on developments in comparative constitutional jurisprudence, especially of the Privy Council and the Canadian Supreme Court, to explore the potential of using the presumption of innocence as a constitutional idiom for the assessment of the prevailing law on the burden of proof borne by the accused in criminal cases.

I. Innocent Until Proven Guilty

NEVER before has criminal justice in Singapore been the subject of such intense international scrutiny.[1] Hot on the heels of the caning of Michael Fay[2] came a series of similar occurrences: the hanging of the Dutchman Van Damme[3] for drug trafficking, the extradition of Rajan Pillai[4] from India and Nick Leeson[5] from Germany in the aftermath of the Barings collapse

1 While it is true that the use of detention without trial (provided for in the Internal Security Act, Cap 143 (1985 Ed)) in the 1970s and 1980s attracted some degree of international protest, this is the first time the core criminal processes have been under attack.

2 The Fay incident called attention, in particular, to two aspects of the criminal process: the propriety of confessions extracted during police investigation and the proportionality of caning as punishment for charges of vandalism. See the decision on appeal in *Fay* [1994] 2 SLR 154. So serious was the disagreement with the United States government that the President of Singapore decided to exercise his powers of clemency to reduce the mandatory penalty.

3 The unpleasantness between Singapore and Holland following the case of *Johannes van Damme* [1994] 1 SLR 246 seems to have been based on an inherent revulsion against the death penalty amongst the Dutch.

4 This gentleman was convicted and awaiting sentence in a subordinate court when he fled to India where he fought attempts to extradite him on what appears to be general grounds of unfairness of the Singapore criminal process, see *Business Times*, 15 June 1995. Unfortunately, he died whilst in detention in India before the extradition proceedings could be resolved. See the account of Pillai's counsel at the trial, Jones, "Who killed Rajan Pillai" *The Spectator* 15 July 1995.

5 Leeson, it appears, was attempting to return to the United Kingdom when he was arrested in Germany. Singapore made an extradition request based on potential charges of forgery.

and, by far the most worrying, the execution of the Filipino domestic-help Contemplacion for murder.[6] The issue which is central to the ensuing debate is, in my view, the question of whether the criminal justice system of Singapore provides sufficient protection against the conviction and punishment of an innocent accused. No doubt the severity of both the forms and quantum of criminal punishment in Singapore draw attention to the entire criminal process; but that may, perhaps, be defended on the ground of what is said to be a cultural difference between East and West, and the consequent differences in socio-political priorities. On the issue of guilt and innocence, however, one would not expect the same degree of relativity. No government would argue that it intentionally shows less of a commitment to the protection of the innocent than any other government. Indeed, for Singapore, the justification and acceptability of controversial dispositions like capital and corporal punishment and of long terms of imprisonment depend to a large extent on the success to which the criminal justice system ensures that only the guilty are punished.[7]

In this regard, the centrepiece of common law criminal jurisprudence is the presumption of innocence. Conversely, it is the principle that guilt must be proven. It finds expression in most major international and constitutional documents.[8] In the older American Bill of Rights, the principle is incorporated by implication under the concept of due process.[9] Yet when the emerging "case-law" from these jurisdictions is analysed, we do not see an unrelenting obedience to the principle. Instead the courts which have had to make the principle work in practice have countenanced the occasional exception to the presumption of innocence. A very subtle balancing exercise

Leeson is, at the time of writing, resisting the request on two grounds: first that he would get a "show trial" in Singapore and that the prison terms he is likely to get would be grossly disproportionate to the crimes he is alleged to have committed: *Reuter,* 17 July 1995.

6 It is not easy to summarise the many grievances of the Filipino Gancayco Commission (*Report and Recommendation on the Delia Maga-Flor Contemplacion Case*, 6 April 1995) set up to investigate the case. It appears that the Commission was unconvinced that Contemplacion actually killed the deceased; in particular, dissatisfaction was raised as to the conduct of her interrogation and the manner in which her confessions were taken. See the Court of Appeal decision in *Contemplacion* [1994] 3 SLR 834.

7 It is well known that the abolition of capital punishment in the United Kingdom was partly fuelled by the public horror which followed the revelation that a number of people had been wrongfully convicted and executed for crimes they did not commit.

8 Many of the cases discussed below have been decided in the context of attempts to interpret the presumption of innocence in these documents. The presumption of innocence does get politically charged. It was the focus of American criticism (and Chinese defence) of Chinese criminal procedure following the trial of the Gang of Four in the early eighties: Gelatt, "The People's Republic of China and the Presumption of Innocence" (1982) 73 J Crim Law & Criminology 259.

9 *Winship* 397 US 358 (1970) is perhaps the ancestor of this line of jurisprudence.

is seen to be at work. These courts have upheld some of these exceptions, but at the same time they have struck down others. Understandably, lines are drawn differently by different courts and even differently by the same court at different times. Considerations are most of the time legal – in the sense that the courts believe that a particular criminal legislation will indeed be unworkable without creating exceptions. Occasionally, however, one gets the impression that although the courts do not entirely buy the argument that exceptions are necessary, they are reluctant to be seen as an obstruction to the attempts of the government of the day in tackling some serious socio-criminal problems like illicit drug trafficking. All this should not, however, be novel to the constitutional lawyer. No right, no matter how fundamental, can invariably be enforced to the exclusion of all other considerations. It is always open for the Legislature to create exceptions for the sake of some other, more important, interest. Courts called upon to adjudicate between constitutional right and exception have regard not only to strict legal considerations, but are often acutely conscious of the political ramifications of whatever decision they make.

The purpose of this discussion is to draw on the experience of other jurisdictions grappling with the presumption of innocence to fashion a constitutional discourse for the evaluation of developments in the law concerning the burden of proof in criminal cases in Singapore.[10] The Supreme Courts of the United States and Canada and the European Court of Justice have, for some years, been developing rather sophisticated approaches to the presumption of innocence. The Privy Council has, in two recent decisions, begun to do the same. In Singapore, apart from the one bright flash of discussion by the Privy Council in *Ong Ah Chuan*,[11] courts have been making decisions impinging on the presumption of innocence without much analysis of constitutional principle. *Ong Ah Chuan*, it appears, has been largely disowned by the Privy Council itself. Perhaps the time is ripe for a re-consideration of the approach the courts of Singapore should take when called upon to review legislation or cases which adversely affect the presumption of innocence.

The presumption of innocence operates at many stages in the criminal process. In pre-trial process and when the defence submits that there is no case to answer, the presumption of innocence is enmeshed with the privilege against self-incrimination. It is beyond the scope of this discussion

[10] Such developments have, in the past, been analysed in the traditional common law methodology. See my earlier effort in M Hor "The Burden of Proof in Criminal Justice" (1992) 4 SAcLJ (Part II) 267 and Tan Yock Lin, "The Incomprehensible Burden of Proof" [1994] SJLS 29.

[11] [1981] 1 MLJ 64.

to analyse this and other implications of the presumption of innocence.[12] The precise point of time with which this discussion deals with is at the end of the day when all the evidence has been heard and the judge has to make a decision whether to convict or to acquit.[13]

II. Innocence and the Constitution

For Singapore a threshold question must be dealt with. Unlike most other modern Bills of Rights, the Constitution of the Republic of Singapore[14] does not contain an express protection of the presumption of innocence. If at all, is to be found in two rather more general provisions: Article 9(1) which provides that life and personal liberty can be taken away only where it is "in accordance with law", and Article 12(1) which grants to all persons "equal protection of the law". That "law" in the context of these two fundamental liberties cannot refer exclusively to just any law enacted by the Legislature was authoritatively decided by the Privy Council in an appeal from Singapore in *Ong Ah Chuan*.[15] To be constitutional, the law prescribed in the relevant statutes and cases must conform to "fundamental rules of natural justice". Otherwise they are inoperative to the extent of any inconsistency.[16] Although the content of these "fundamental rules" may differ in detail from jurisdiction to jurisdiction, this decision brought Singapore in line with the position under both the United States ("due process of law") and Indian ("procedure established by law") Constitutions.[17] It would only be fair to mention at this point that, although there has been a sprinkling of rather disturbing *dicta* from the Court of Appeal in recent cases which could be read as a reversion to the view that it is in accordance with law if it has been so enacted by Parliament,[18] *Ong Ah Chuan* has never been

[12] See M Hor, "The Privilege Against Self-Incrimination and Fairness to the Accused" [1993] SJLS 35.

[13] This means that the focus of this article is on the allocation of the legal burden of proof or the burden of persuasion. It is not primarily concerned with the evidential burden or the burden of production which has to do with the question of who is to go forward with producing evidence rather than with the question of the distribution of the risk of non-persuasion at the end of the day.

[14] Reprint (1992 Ed).

[15] *Supra*, note 11.

[16] The supremacy clauses in the Constitution are art 4 (subsequently enacted laws void to the extent of inconsistency) and art 162 (prior laws to be brought into conformity).

[17] See Tan, Yeo and Lee, *Constitutional Law in Singapore and Malaysia* (1991), chapter 12. Remarkably, this development was accurately predicted by Professor S Jayakumar, now Minister for Law and Foreign Affairs, many years before in "Constitutional Limitations on Legislative Power in Malaysia" (1967) 9 Mal LR 96.

[18] See, *eg*, *Jabar* [1995] 1 SLR 617 where the Court of Appeal, in rejecting decisions of the Indian Supreme Court that prolonged delay in executing a sentence of death might render

doubted or overruled. One hopes that it will never be as it will mean that the protection meant to be offered by Articles 9 and 12 would then be, in the words of Lord Diplock, "little better than a mockery".

Ong Ah Chuan established that it is a fundamental rule of natural justice that a criminal conviction can only be sustained where "it has been established to the satisfaction of" the court that the accused committed the crime. Although Lord Diplock preferred this expression of the principle, it appears that the term "presumption of innocence" has caught on and is today the term almost universally used. Significantly for Singapore, the ASEAN Inter-Parliamentary Organization Declaration of Human Rights contains an express provision for the protection of the "the right to be presumed innocent until proven otherwise".[19] This is additional, and cogent, evidence that the fundamental rules of natural justice in Singapore encompass the presumption of innocence. That settled, the real issues lie in the elaboration and application of the presumption of innocence in practice. What *Ong Ah Chuan* failed to do was to provide an adequate (or any) framework for this.[20] As the cases will show, this is no easy task and there is a variety of approaches to choose from.

III. Innocence and the Exceptions in the Penal Code

The anchoring authority for the law concerning the burden of proof of the Exceptions which are to be found in the Penal Code[21] is the 1970 decision

the execution unconstitutional, said, "We respectfully agree that art 9(1) is different from art 21 in India. Any law which provides for the deprivation of a person's life or liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned to see whether it is also fair, just and reasonable as well". Taken literally, this is contrary to both the letter and spirit of *Ong Ah Chuan*. The full breadth of this *dicta* is, of course, not necessary for the disposal of the case at hand. The Court could have simply held that only unjustifiable delay would have made it unconstitutional, but that the delays in this case were justified. The Court could have also held that the fundamental rules of natural justice do not cover a situation where execution is delayed.

19 Art 14, 6th-7th August 1993, Jakarta. The inclusion of the presumption in this Declaration is particularly important because, unlike other such Declarations, it is something created by the governments of ASEAN for the peoples of ASEAN. Lord Diplock in *Haw Tua Tau* [1981] 2 MLJ 49, 53 did in fact describe Art 6(2) of the European Convention on Human Rights ("Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law") as an "undoubted fundamental rule of natural justice". Such declarations and treaties are evidence of customary international law. The common law principle that municipal law should, wherever possible, be interpreted in conformity with international law is accepted in Singapore: *Seow Teck Meng* v *Tan Ah Yeo* [1991] 2 MLJ 489 (CA) and [1989] 2 MLJ 3 (HC).

20 See the discussion in "The Burden of Proof in Criminal Justice", *supra*, note 10, at 300-308.

21 (1985 Ed).

of the Privy Council in an appeal from Malaysia in *Jayasena*.[22] It was held that the accused must prove private (or self) defence on a balance of probability. The Privy Council felt that section 107 of the Evidence Act[23] which placed the "burden of proving" any exception in the Penal Code on the accused could only mean the burden of persuasion, and not the burden of production,[24] as was argued by counsel for the defence. Since then, cases in both Singapore and Malaysia have consistently applied the *Jayasena* conclusion to various other exceptions, both special and general, in the Penal Code.[25] It has been argued elsewhere that this result is undesirable and contrary to sound principle.[26] Now, about 25 years later, there is another decision from the Privy Council, *Vasquez*,[27] which found that the rule in *Jayasena* violated the presumption of innocence in the Constitution of Belize.[28] Lord Jauncey held that the absence of provocation was "an essential ingredient" of murder. The provision in the Belize Criminal Code which attempted to place the burden of persuasion on the accused was unconstitutional and invalid. It was constitutionally rewritten to provide that the accused bore only the burden of production. The tide has turned.

It is conceded that, formally, the two decisions are not inconsistent. No constitutional point was raised in *Jayasena*. Indeed, *Vasquez* accepted and even quoted *Jayasena* as far as statutory interpretation was concerned.[29] Nevertheless, the potential impact of *Vasquez* is far-reaching. This is because the jurisdictions which have accepted *Jayasena* as unquestioned authority almost invariably have either an express or an implied constitutional protection of the presumption of innocence.[30] If *Vasquez* is good law, the

22 [1970] AC 618.

23 Cap 107, 1990 Rev Ed.

24 The burden of persuasion is also described as the legal burden, and the burden of production, the evidential burden. The terminology chosen in this discussion has the merit of describing the nature of the burden actually placed on the accused (or the prosecution, as the case may be).

25 See, *eg*, *Govindasamy* [1976] 2 MLJ 49 and *Vijayan* [1975] 2 MLJ 8 (provocation), and *Soosay* [1993] 3 SLR 272 (private defence and sudden fight). Some Malaysian decisions have, however, been rather non-committal (*Ikau Anak Mail* [1973] 2 MLJ 153) and even cryptic (*Nagappan Kuppusamy* [1988] 2 MLJ 53).

26 See my discussion, *supra*, note 10, at 272-279.

27 [1994] 3 All ER 674. See Chan Wing Cheong, "The Burden of Proof of Provocation in Murder" [1995] SJLS 229.

28 Belize was formerly British Honduras and achieved independence in 1981 with a Constitution in place well before then. See Internet, http://www.belize.com/histgeo.html. See generally, Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992).

29 *Supra*, note 27, at 679.

30 *Eg*, art 11(1) of the Hong Kong Bill of Rights Ordinance 1991 contains an express presumption of innocence; and arts 5 and 8 of the Federal Constitution of Malaysia are the immediate ancestor of arts 9 and 12 in the Constitution of the Republic of Singapore.

result in *Jayasena* must be unconstitutional in both Singapore and Malaysia. The discourse in *Jayasena* was typical of common law methodology. Parliament is supreme and whatever it enacts is law. The only judicial task is to discern the intention of the Legislature. *Vasquez* demonstrates that this alone will no longer be enough. Enacted law must withstand constitutional scrutiny or be struck down. *Vasquez* is, of course, not binding on a Singapore or Malaysian court.[31] How persuasive is *Vasquez* as an authority for the elaboration of the "fundamental rules of natural justice" in Singapore and Malaysia?

The Privy Council in *Vasquez* took the following approach. The presumption of innocence demands that all facts relevant to guilt must be proven beyond reasonable doubt. Nevertheless, deviations or exceptions (where the accused is made to bear the burden of persuasion) should be allowed, where it would be "sensible and reasonable" to do so. Where the prosecution retains the responsibility to prove the "essential ingredients" of the offence, it is "less likely" that the exception would be unreasonable. In deciding what the essential ingredients of the offence are, although the language of the provision is important, the decisive factor will be the "substance and reality" of the language creating the offence and not its "form". On the particular issue at hand, the absence of provocation is an essential ingredient of murder. This makes it less likely that it will be constitutionally acceptable. No good reasons were advanced for shifting the burden to the accused. The exception is unreasonable and unconstitutional.

It is, perhaps, significant at this point to notice the alternative approaches implicitly rejected by the Privy Council. The purist position that no exceptions whatsoever are to be tolerated was not even considered. This was understandable in view of an express provision in the Belize Constitution which permitted the shifting of the "burden of proving particular facts". A similar deviation clause exists under some other constitutional instrument, notably the Canadian Charter of Rights and Freedoms, as the Privy Council itself noted. The "due process" provisions of Singapore and Malaysia do not, however, have such an express allowance for deviation. It is therefore possible that a purist position be adopted, as the United States Supreme Court once did in *Mullaney* v *Wilbur*.[32] It has been argued elsewhere that, perhaps, this is the only principled stand to take.[33] However, no court interpreting a constitution can ever be entirely free from political and tactical considerations. The criminal law can, on occasion, have as much a symbolic

[31] The Singapore Court of Appeal demonstrated its independence from the Privy Council in dramatic fashion in *Chin Seow Noi* [1994] 1 SLR 135. See the discussion in Hor, "The Confession of a Co-Accused" (1994) 6 SAcLJ 366.

[32] (1975) 421 US 684.

[33] See my discussion, *supra*, note 10.

role as it has a utilitarian function. For example, no court would wish to be labelled "soft" and obstructionist by banishing all presumptions from drugs legislation in the face of an alarming increase in the use of illicit narcotics in modern society. Whether such presumptions actually aid the "war on drugs" is questionable, but what is important is that the court is not seen to be hamstringing the legislature in its attempts to deal with the problem. Again, as the Privy Council itself recognised in the slightly earlier decision of *Lee Kwong-kut*,[34] invalidating a legislative attempt to place persuasive burdens on the accused may well be a classic instance of winning the battle but losing the war. The legislature might do away a particular defence altogether, rather than risk the possibility of imposing on the prosecution the task of disproving the defence. On a broader perspective, every judicial attempt to limit the power of the legislature is potentially fraught with controversy and the greater the limit, the higher the sensitivities. Pragmatically, compromises have to be sought by the adoption of a more flexible position. A blanket prohibition on casting burdens on the accused is just politically untenable. It is significant that the United States Constitution does not have an express deviation clause but this has not prevented the Supreme Court interpreting its provisions from evolving a concept of justifiable exceptions.

Neither did the Privy Council consider the rather peculiar stand taken by the United States Supreme Court since its decision in *Patterson* v *New York*.[35] *Patterson* quickly quashed the purist sentiments found in the earlier decision in *Mullaney*,[36] but put in its place a rather unhappy compromise. The prosecution must bear the burden of persuasion for all ingredients of the offence. No such requirement exists for the ingredients of a defence. The legislature decides whether a particular fact is part of the offence or defence. Expectedly, this has been subjected to intense adverse criticism.[37] The crux of the matter seems to be that it gives no constitutional protection at all to the presumption of innocence except, perhaps, in a case of the

[34] [1993] 3 WLR 329 (Hong Kong). See the case note, "Presumed Innocence, Proportionality and the Privy Council" (1994) 110 LQR 223, 346.

[35] (1977) 432 US 197. See the Note, "Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard" (1993) 106 Harv LR 1093, 1096.

[36] *Supra*, note 32.

[37] A particularly useful summary of the various academic responses is found in Sundby, "The Reasonable Doubt Rule and the Meaning of Innocence" (1989) 40 Hast LJ 457. American analysts have been much vexed by the contradiction between the legislature's undoubted power to do away with an element altogether and its constitutional inability to shift the burden of proof. This has led to the advancement of what Sundby calls the "substantivist" position which holds that the legislature cannot reverse the burden of proof only of elements which are substantively required by the legislature. This opens a new can of worms because it is far from clear which elements of an offence are substantively required by the constitution.

legislature inadvertently casting the burden on the accused. Whenever the legislature wishes to cast the burden on the accused, it simply labels the fact as part of the defence. This formalistic criterion does not do justice to the presumption of innocence. It can be confidently predicted that the Privy Council would not have been impressed by all this. It was earlier noted that in relation to assessing whether a particular ingredient is essential, the Privy Council emphasised that it was the "substance and reality" which was decisive and not its "form".

So the Privy Council opted for a flexible, "depends on all the circumstances" approach pioneered, in the context of the presumption of innocence, by the Supreme Court of Canada[38] and, to a lesser extent, by the European Court of Human Rights.[39] It is perhaps also the shape of things to come for Singapore and Malaysia as it gives expression to a more or less satisfactory compromise between the politically unacceptable purist approach in *Mullaney* and the constitutionally sterile "leave it to the legislature" approach in *Patterson*. Unfortunately, the flip-side of flexibility is uncertainty. *Vasquez* employed the "essential ingredient" formula. The Privy Council did not explain why the absence of provocation was "essential" to the offence of murder. What seems to be called for is a certain qualitative assessment of the relative importance of the different ingredients of the offence. It could have been that the ingredient of the absence of provocation was so well entrenched morally, that society would hold that it was essential to moral guilt for murder. More tactically, it could have been essential in the sense that even if the court required the prosecution to disprove provocation, the legislature would not dream of responding by doing away the defence of provocation altogether.[40] The precise rationale for this aspect of the decision must remain to some degree speculative and until there is further elaboration from the Privy Council itself, students of criminal justice are left to explore for themselves the exact width of the decision in *Vasquez*. In the context of Singapore and Malaysia, it has to be asked whether it applies to the other special exceptions for homicide,[41] and, more broadly, to all the general exceptions[42] in the Penal Code.

[38] The mother of Canadian constitutional jurisprudence on the presumption of innocence is *Oakes* (1986) 26 DLR (4th) 200.

[39] The most extended treatment by the European Court is to be found in *Salabiaku* v *France* (1988) 13 EHRR 379.

[40] This is not to suggest that the two possible factors are unrelated for the probability of a legislature doing way with a particular element is much less where there is a strong moral commitment in the society that the element is necessary.

[41] See the seven exceptions in s 300 of the Penal Code, Cap 224 (1985 Ed) which convert what would otherwise be murder to culpable homicide not amounting to murder.

[42] These are conveniently clustered together in chapter IV (ss 76-106) of the Penal Code which by s 40(2) extends to all offences wherever they are found.

The starting point for this enquiry should naturally be section 107 of the Evidence Act[43] which expressly attempts to place a burden on the accused for general and special exceptions. It was discussed earlier how *Jayasena*[44] held that this could only mean the burden of persuasion. This, Lord Devlin pronounced, merely reflected and codified the position at common law at the time when Sir James Stephen drafted the Evidence Act. It was therefore immune against all subsequent changes to the common law.[45] That was as far as Privy Council went (and, indeed, needed to go) for the purpose of deciding *Jayasena*. However, the constitutional dimension opened by the Privy Council in *Vasquez* demands that the analysis be continued. Is it "sensible and reasonable" that the burden of persuasion be cast on the accused? Surely the simple historical explanation in *Jayasena* will not be enough. There must be a good contemporary reason why the 19th century understanding ought to be preserved. Some attention must now be paid to Professor Fletcher's illuminating study of the reason why the 19th century common law mind saw the structure of the criminal law to be neatly divided into offence and defence (or in the language of the Penal Code, exception) ingredients for the purpose of allocating the burden of proof.[46] It appears that the dichotomy rested on two phenomena. The first is the 19th century conflation of the two distinct kinds of burdens, that of persuasion and that of production. To the modern observer, the 19th century jurists hopelessly confused the two concepts. Subsequent scholarship, led by the redoubtable Professor Thayer,[47] has established that they are indeed different – the burden of persuasion is on the party who must satisfy the court at the end of the day of the existence of a particular fact, the burden of production is on the party who must satisfy the court that a particular fact is worth considering (or in a jury trial, worth putting before the jury to decide). For any issue, one burden may rest with one party and the other burden with the other party. Lord Devlin said in *Jayasena* that the Evidence Act did not have the concept of a burden of production independent of the burden of persuasion.[48] If so, the Evidence Act itself was infected with this 19th century fallacy. The Privy Council in *Vasquez* in result held this fallacy to be unconstitutional by rewriting the Criminal Code of Belize so that the burden of persuasion (for the absence of

[43] Cap 97 (1990 Ed).

[44] *Supra*, note 22.

[45] It has become customary to quote this line from Lord Devlin: "The common law is malleable to an extent that a code is not" (*ibid*, at 625).

[46] Fletcher, *Rethinking Criminal Law* (1978), chapter 7.

[47] See *A Preliminary Treatise on Evidence at Common Law* (1969 Reprint), chapter 9.

[48] *Supra*, note 22, at 624. The Privy Council failed to take advantage of this inherent ambiguity in the use of the term "prove".

provocation) remained with the prosecution, but, at the same time, holding that the accused bore the burden of production.

The second reason for the 19th century position was the invasion of the "private law style" into criminal litigation. The assumption was that facts and issues could be neatly divided into those pertaining to the rule (or offence) and those relating to the exception(or defence). The prosecution (just like the plaintiff in a civil case) must plead all the elements of the offence. The accused must plead any defence or exception which he wants to rely on. The burden of proof follows the burden of pleading. Professor Fletcher calls this approach the "descriptive theory of guilt"[49] which was eventually undermined by a "normative theory of guilt". The focus shifted away from the nuts and bolts of litigation to a moral assessment that both the offence and the defence serve an identical moral function. An accused person is equally guiltless whether he falls outside of the definition of an offence or whether he succeeds in placing himself within an exception. The rules on the burden of persuasion cannot therefore be different. Put another way, there is an all-encompassing principle in the criminal process which is entirely absent in the civil process – this is the presumption of innocence and behind it the need to protect the innocent from judicial punishment. The descriptive theory of guilt ignores this very principle which all modern constitutions seek to enshrine and, in result, allocates the risk of non-persuasion in, what appears to be, a totally capricious fashion.[50] Surely, it cannot be allowed to survive constitutional scrutiny.

In sum, the conclusion ought be that all the special and general exceptions fall to be treated in the same way as provocation – the constitutional presumption of innocence requires that the prosecution retain the burden of persuasion and the accused bears only the burden of production. Furthermore, the fear that in placing the burden on proof on the prosecution

[49] Stein, "From Blackstone to Woolmington: On the Development of a Legal Doctrine" (1993) 14 Legal History 14, seems to challenge Fletcher's idea that the 19th century concept of guilt was purely "descriptive" and argues that it was also "normative" – except that what was normative had changed.

[50] This is because, in all probability, Macaulay did not have the burden of proof in mind when he structured the Penal Code into the offence and exception provisions. Then there is that "twilight zone" category of exceptions which, at the same time, call in question an element of the prosecution's case. *Jayasena*, *supra*, note 22, at 627, was willing to grant the accused the benefit of the doubt in these cases. Nevertheless, this dispensation was presumably never intended to apply to unsoundness of mind (insanity) (even *Woolmington* [1935] AC 462 did not recognise this exception for a plea of insanity at the common law). This has created tremendous problems of artificiality for Australia. See the High Court's attempt to juggle insanity and automatism in *Falconer* (1990) 171 CLR 30. Additionally, as was pointed out to me by my colleague Peter English, considerable doubt surrounds the question of which party is to prove a *proviso* within an exception, *eg*, *provisos* (a), (b) and (c) to the defence of provocation in the Penal Code, exception 1 to s 300.

the legislature might abolish the defence altogether is not particularly real here – it is inconceivable that private defence would be abolished in the event that the burden of persuasion is given to the prosecution. Yet the picture is in reality not quite so clear. While it does seem to follow that the special exceptions of sudden fight or consent and the general exceptions of private defence and necessity must follow the position which pertains to provocation, some other exceptions have turned out to be surprisingly controversial. For these exceptions, other considerations have been advanced (some of which have been accepted) for the preservation of the rule that the accused bears the burden of persuasion. What follows is a discussion of two particularly difficult exceptions – unsoundness of mind and intoxication.

IV. Innocence and Unsoundness of Mind

One might be forgiven for thinking that the defence of unsoundness of mind (or insanity in the common law) should be in the same boat as provocation – the accused ought to bear the burden of production, but the prosecution retains the burden of persuasion (for the absence of insanity). Unfortunately, the story is not that simple. Even that water-shed decision of the common law in *Woolmington*, which converted almost all burdens of persuasion resting on the accused to burdens of production, left the 19th century rule with respect to insanity untouched.[51] *Woolmington* is unhelpful in that no other reason was offered for the preservation of this deviation except that it was historically too well-entrenched to be overthrown. Similarly, the Privy Council in *Vasquez*, citing its own decision in *Lee Kwong-kut* declared,[52] without any explanation, that the duty of the accused to prove insanity was "an obvious example" of a "sensible and reasonable" deviation from the presumption of innocence. We turn to Canada where the issue was tackled head-on by the Supreme Court in *Chaulk*.[53]

The majority preferred orthodoxy, justifying the deviation by describing a burden on the prosecution to disprove insanity as "impossibly onerous". Chief Justice Lamer felt that it would be so as long as "our state of knowledge and technology" could not "conclusively determine whether a person was sane".[54] In other words the principled position that the prosecution is to

[51] [1935] AC 462. See the most recent explication of the difficulties of justification and application of the insanity rule in the common law in Jones, "Insanity, Automatism, and the Burden of Proof on the Accused" (1995) 111 LQR 475, where the survival of the burden of persuasion on the accused is described as an "anachronism".

[52] [1993] 3 WLR 329, 341.

[53] (1990) 62 CCC (3d) 193.

[54] The core of the reasoning of the majority is found in *ibid*, at 218-219.

disprove insanity is simply not workable because a conclusive psychiatric opinion is unobtainable. The reasoning of the learned Chief Justice is not convincing and indeed failed to persuade Madame Justice Wilson who, in a powerful dissent, took the majority to task for wrongly assessing the burden on the prosecution as being "impossibly onerous". Her Honour quite rightly pointed out that the prosecution need never prove sanity in a vacuum. Its task was "simply to address any doubt raised by specific evidence adduced by the accused to support his or her insanity plea". The crux of the matter was that "the prosecution faces this kind of challenge all the time".[55] The point of the dissent was that an exception to the presumption of innocence is not justified simply because the prosecution may not find it easy to prove (or disprove) something – it is justified only if it is so unusually difficult that it would be unworkable. This the majority failed to show. The appeal to the inconclusiveness of psychiatric opinions is puzzling. Resolving conflicting expert opinions (in psychiatry and indeed in any other area of scientific specialisation) is difficult but is in no sense unusual to a criminal judge. There is surely no suggestion that in all areas where the potential for conflicting expert opinions is high, the accused ought to bear the burden of proof. Furthermore, although the point is taken that the accused bears only a burden to prove on a balance of probabilities, it is strange that the majority is comfortable with requiring the accused to prove insanity when the task of getting a convincing psychiatric opinion is so "impossibly onerous". It is sauce only for the goose, not the gander.

Professor Fletcher's study speculates that the stubbornness with which the insanity rule is adhered to is perhaps explained by the conflation of two separate issues at stake.[56] First, there is the determination of the guilt of the accused – here principle dictates that the prosecution must disprove insanity. The second matter is that of the civil confinement of the person thought to be insane – here the principle must be that the person confined has to be proved to be insane. Professor Fletcher quite rightly concludes that the issues must be determined separately and in a criminal trial, for the first issue, that of criminal blameworthiness, the presumption of innocence must prevail.

Perhaps the insanity exception is countenanced in the English common law, Canada and approximately half the states in the United States of America because the difference between finding of guilt and of insanity is, in reality, not exceptionally important – the guilty are confined in a prison, the insane in a mental hospital. The same cannot be said of Singapore where the death penalty is mandatory for, *inter alia*, a conviction of murder.[57]

[55] *Ibid*, 245.
[56] *Supra*, note 46, at 539-541.
[57] S 302, Penal Code.

The difference is literally between life (albeit in confinement at the President's pleasure) and death (by hanging). The stark question is whether our society is comfortable with hanging someone where his or her sanity is in (reasonable) doubt. Similar issues surround the question of the burden of proof for diminished responsibility.[58] It could well have been that Singapore would have been spared the ugliness of the Contemplacion affair had the rule on burden of proof of diminished responsibility been different. Contemplacion, it appears, killed without any convincing motive. The psychiatrist called by the defence (who testified that she was of diminished responsibility) was completely contradicted by the psychiatrist called by the prosecution. The existing rule being that it is the defence who must prove diminished responsibility, it was not unreasonable for the trial judge to have found that it was not so proven.[59] On the other hand, had the rule been that the accused bore only the evidential burden, the judge would have been completely justified in finding that a reasonable doubt had been raised. She would have been found guilty of culpable homicide not amounting to murder and imprisoned, but she would have been alive and subsequent attempts to re-open her case would not have been an exercise in futility.

If it is accepted that the prosecution must constitutionally bear the burden of persuasion for the absence of provocation, a very strong argument exists for a similar treatment of the defences of unsoundness of mind, and of the related special exception of diminished responsibility. Indeed, the United Kingdom Criminal Law Revision Committee in its 11th Report,[60] an influential document in Singapore,[61] concluded that whatever was thought to be the difference between insanity and the other defences, it did not justify a different allocation of the burden of persuasion.

V. Innocence and Intoxication

Intoxication as a "defence to any criminal charge" is recognised under two separate provisions in the Penal Code. The first is conveniently called "insane" intoxication and this is found in section 85(2). The elements of

[58] Exception 7, s 300, Penal Code. The difference between a successful plea of insanity and of diminished responsibility is that for the latter, the accused is formally convicted of culpable homicide not amounting to murder and sentenced accordingly.

[59] See the Court of Appeal judgement, *supra*, note 6.

[60] Cmnd 4991 (1972), at 88-89.

[61] Substantial portions of the Report were made into law in Singapore, particularly the recommendations on hearsay, accomplice evidence and adverse inferences from silence. See the Criminal Procedure Code (Amendment) Act (No 10 of 1976). The members of the Committee envisaged their proposals as a "package deal" where recommendations advantageous to the prosecution were meant to be balanced by those benefiting the accused. The latter seem to have been left out, wittingly or unwittingly.

this arm of intoxication are, although not identical with, very similar to the requirements of unsoundness of mind under section 84. The essence is that the intoxication must be to such a degree as to cause the accused not to know that his actions were "wrong" or that it caused him not to know "what he was doing". Broadly, this seems to be another way of requiring that the accused was "incapable of knowing the nature of the act", or that it was "wrong or contrary to law". It must follow that in principle, and on any constitutional analysis, the same result should be obtained with respect to the burden of proof. The foregoing discussion on unsoundness of mind or insanity ought to apply equally to "insane" intoxication under section 85(2).

Section 86(2), however has turned out to be the source of conflicting judicial approaches. By that provision, intoxication is to be "taken into account" for the purpose of determining whether the accused had formed any relevant intention. Who is to bear the burden of proof of intoxication here? The Court of Appeal in *Suradet*[62] simply declared that "the burden lay on (the accused) to show on a balance of probabilities that he had not formed any intention for the offence due to his state of intoxication". It was left to the Chief Justice, this time sitting alone in the High Court in *Jumaat bin Samad*,[63] to supply the reasons. An almost entirely "descriptive" (as opposed to normative) justification was used. Section 86(2) is found in the Chapter in the Penal Code entitled "General Exceptions". By virtue of section 107 of the Evidence Act, the burden of persuasion is on the accused. The Chief Justice found support for his conclusion in that section 85(1) describes section 86(2) as affording a "defence" (presumably in contradistinction to "offence") to the accused. These decisions do not seem to have resolved the "controversy". There is some indication that some High Court judges may still be of the contrary view that the burden rests with the prosecution. In *Mohd Sulaiman bin Samsudin*,[64] Rajendran J quoted from section 86(2), reviewed the evidence of intoxication, and came to the conclusion that his Honour "had *no doubt* that the accused in stabbing the deceased as he did intended to cause these and all the other wounds on the body". The clear implication seems be that had his Honour found that there was (reasonable) doubt, the result might have been different. More telling is the approach of Rubin JC (as his Honour then was) in *Saengarun Ukhunthod*.[65] The learned judge explained that the onus was on the accused

62 [1993] 3 SLR 265, 270.

63 [1993] 3 SLR 338, 344-345. The views of the Chief Justice were affirmed yet again in the Court of Appeal: *Indra Wijaya Ibrahim* [1995] 2 SLR 442, 447-448.

64 [1994] 2 CLAS News 161, 173-174 (italics added).

65 [1994] 2 CLAS News 229, 243-244. See also the confusing pronouncements by Roberts CJ (Brunei) in *Lim Eng Kiat* [1995] 1 MLJ 625, 632-633. The High Court was "content

to prove his defence on a balance of probabilities. *Jayasena* and the first two Singapore decisions on intoxication were cited in support of this. Then followed this totally contrary paragraph:

> The question before me was whether the accused could have formed the specific intent to cause the injury inflicted on the deceased. There was some material suggesting the drunken state of the accused. I therefore took that aspect into account to determine whether it was weighty enough to leave me with *a reasonable doubt about the intent* of the accused.

The justification for the prosecution bearing the burden of persuasion was not articulated in these cases. It may, nevertheless, be cogently argued that the "defence" in section 86(2) is *sui generis* in the context of the General Exceptions in the Penal Code. Both sections 85 and 86 were amended in the early part of this century to take into account common law developments in the House of Lords decision in *Beard*.[66] Section 86(2) adopts a significantly different linguistic formula. The other (original) General Exceptions employ variants of the phrase "nothing is an offence". Section 85(2) uses the phrase "shall be a defence", but section 86(2) merely says that intoxication "shall be taken into account" for the purpose of determining any relevant intention. It could plausibly be argued that it is the duty of the prosecution (and never the accused) to prove intention and that any evidence of intoxication is to be taken into account for that purpose, *ie* to determine if any reasonable doubt as to his intention arises. Although section 86(2) may be described as a "defence", as it is, tactically, it is not an "exception" as it is technically used in the Evidence Act. It is not an "exception" but a factor to be taken into consideration in determining intention. Even if the Chief Justice is right in classifying it as an exception, there is yet another reason why the accused need not be made to bear the burden of proof. There is a subsidiary principle in *Jayasena* which seems to have been forgotten – where in an attempt to come within an exception the accused successfully raises a reasonable doubt as to an element of the

to follow" Malaysian authority that the burden of proof of provocation was on the accused to prove "on the balance of probabilities". In the very next sentence, it was held that "[i]f the court is left in any reasonable doubt as to the circumstances giving rise to the defence, the benefit must be given to the defendant".

66 [1920] AC 479. This decision was ambiguous as to whether the defence was limited to crimes of specific intent. The House of Lords in *Majewski* [1977] AC 443 decided that it was so limited. The person who drafted the amendment for the Penal Code obviously came to the opposite view.

prosecution's case, an acquittal must follow.[67] "Intention" in section 86(2) is undoubtedly an element of the prosecution's case.

The confusion stems from the inappropriate drafting of the amendment to the Penal Code which resulted in the existing section 86(2). The amendment clearly attempted to incorporate the rule in *Beard* without regard to the position as to burden of proof in the Evidence Act. The textual arguments are, as we have seen, inconclusive. In a constitutional inquiry, however, what matters is whether section 86(2) as interpreted by the Court of Appeal and the Chief Justice is a "sensible and reasonable" deviation from the presumption of innocence. In an interesting sentence in *Jumaat*, the Chief Justice expressed these sentiments:[68]

> Furthermore, the scope of section 86(2) *generously* extends to voluntary intoxication, a legal excuse which, in my view, can never put an accused in a more favourable position than another accused who pleads any of *the other defences*.

There appears to be two points here. First, there is no justification for a defence of intoxication to stand in a more favourable position than other defences. The argument is a valid one if we accept as unshakeable the proposition that the accused bears the burden of persuasion for the other defences. Why indeed should the accused bear a heavier burden for, say, the defence of private defence or necessity? We have seen, however that this very proposition lies in ruins in the face of *Vasquez*. If the Constitution requires that the prosecution bears the burden of persuasion for the other defences, this argument, which rests on the principle of equality of defences, as it were, falls.

The second point is more subtle. The implication from the use of the word "generously" might well be that the Chief Justice considered the substantive law of section 86(2) to be more solicitous towards accused persons pleading voluntary intoxication than is deserved.[69] It is therefore not unjust to impose on them the burden of persuasion. Is the law of evidence to be used in this way to level an imbalance created by the substantive criminal law? Whether section 86(2) is indeed "generous" to the accused cannot be conveniently dealt with in this discussion. Suffice it to say that

[67] [1970] AC 618, 625-626. The example the Privy Council gave was the Ceylon version of the defence of accident (s 80, Penal Code).

[68] *Supra*, note 63.

[69] This inference is not that clear as the Chief Justice also found it "somewhat disturbing" that s 86(2) applies only to crimes of "intention" and not to offences requiring other forms of *mens rea* like knowledge or recklessness. The Chief Justice was, however, unwilling to depart from this "literal interpretation".

this is a question of considerable complexity involving difficult policy choices which are, arguably, best decided by the legislature.[70] What does seem to be clear is that to use the law of evidence to shore up perceived inadequacies in the substantive law is to court confusion. If the substantive law is unsatisfactory, it ought to be for the Legislature to change it. If that is not done, it must be assumed that the Legislature, in its wisdom, chooses to abide by the existing law. The presumption of innocence, which deals primarily with due *process* of the law must require that criminal intention be established beyond reasonable doubt. For this exercise, evidence of intoxication, the section says, must be taken into account. This would also spare the court from the unsatisfactory position of asking "hypothetical and artificial questions" which stem from the need to ignore completely evidence of intoxication when it considers whether the prosecution has proven intention beyond reasonable doubt.

VI. Innocence and Implied Burdens

The Evidence Act contains two other provisions which attempt to place the burden of proof on the accused. The exceptions rule in section 107, which we have seen in the context of the Penal Code, applies equally to "any law defining the offence". Unlike the Penal Code, however, other

[70] As we have seen, *supra*, note 66, the Penal Code is indeed more generous than the common law, as it is now understood. However, the artificial dichotomy in the common law between crimes of specific and basic intent has been severely attacked. See Ashworth, *Principles of Criminal Law* (1991), pp 186-192, who concludes thus: "Whatever the merit of these criticisms, it is undeniable that the intoxication rules in English law rest on fictions and apparently illogical legal devices". The Australian High Court in *O'Connor* (1980) 4 Aust Crim Rep 348 (and before that the New Zealand Court of Appeal in *Kamipeli* [1975] 2 NZLR 610) refused to follow the position taken in *Majewski* , *supra*, note 66, and held that intoxication ought to be taken into account for crimes of basic as well as of specific intent. This brings the law of Australia (and New Zealand) in line with s 86(2) of the Penal Code. The Canadian Supreme Court has had a particularly difficult time with reconciling the rule in *Majewski* with the presumption of innocence in Charter of Rights and Freedoms. In the first round two judges felt that the rule was justified, three preferred the Australian (Penal Code) position and two others (principally, Wilson J) tried to hammer out a compromise by proposing that intoxication should be relevant to crimes of basic intent, but only where it was so extreme as to be akin to insanity or automatism: *Bernard* [1988] 45 CCC 1. The matter arose before the Supreme Court again in *Daviault* [1994] 3 SCR 63. This time six judges agreed with the compromise solution of Wilson J whilst the other three wanted to stick with *Majewski*. The majority also felt the need to cast the burden of proof on the accused if he wants to plead intoxication for a crime of basic intent, perhaps to allay fears that their decision would be interpreted as "going soft" on voluntary drunkenness. Additionally, s 86(2) applies only to crimes of "intention" and not, it appears, to offences requiring other forms of *mens rea*. The Chief Justice found the result "somewhat disturbing", but was unwilling to depart from the "literal interpretation" of the section.

statutes do not normally have the relevant facts clearly demarcated into offence and exception elements. Great difficulty arises as to the criteria which should be used to divide offence from exception. Cases interpreting this part of section 107 are rare.[71] Much more used and discussed in the cases is section 108 which places the burden of proof on the accused for any fact "especially within (his) knowledge".[72] A surprising number of different approaches have been adopted. On its face, the two provisions seem to cast a burden on the accused on different bases – one because it is an exception and the other because it is especially within the knowledge of the accused. Nevertheless, the important Court of Appeal decision in *Kum Chee Cheong* demonstrates that there is a definite move to collapse the two rules into one.[73] It also shows how this combined approach has itself been unified with the prevailing common law approach, which finds most recent expression in the House of Lords decision in *Hunt*.[74] The approach is this: where a statute does not expressly place the burden on the accused, it may nevertheless do so impliedly. Formal linguistic considerations, although a factor to be considered, is not decisive. Other considerations of policy must be taken into account, such as the "mischief at which the Act was aimed" and particularly practical matters such as "the ease or difficulty that the respective parties would encounter in discharging the burden."[75] Thus the exceptions rule in section 107 is no longer (if it ever was) a straightforward linguistic exercise – that which is called, or which appears to be, an exception qualifies to be an "exception" within the meaning of section 107 only if these requirements of policy can be met; it has acquired a technical meaning. Similarly, the especial knowledge rule in section 108 no longer requires the burden to be borne by the accused just because be is in a better position to know more about the fact in question. It is not sufficient that it is easy for the accused to prove it, it must also be that it is unreasonably difficult for the prosecution to do so.

If this is how the combined approach is understood, it is constitutionally unobjectionable. It has within it a built-in policy justification which would mirror constitutional analysis. Both exercises are the same – they start from the presumption of innocence and then ask whether they are any reasons to justify a departure. What has turned out to be particularly worrisome

71 Hor, *supra*, note 10, at 280-285.

72 *Ibid*, at 286-293.

73 [1994] 1 SLR 231. The Court of Appeal first quotes with approval from *Tan Ah Tee* [1980] 1 MLJ 49 which adopted the common law rule in *Edwards* [1975] 1 QB 27 for exceptions and *provisos* (which is practically identical with s 107 – the Court never mentions s 107). The Court of Appeal then applied s 108. Finally, the reformed common law rule in *Hunt* [1987] AC 352 was used.

74 *Ibid*.

75 *Supra*, note 73, at 242-243.

is the way it has been applied in two recent decisions.[76] In *Kum Chee Cheong* itself the accused was charged with using a motor vehicle without a valid policy of insurance. Was it for the prosecution to prove the absence of such a policy or for the accused to prove the existence of one? The Court of Appeal held that this was "fully within the knowledge of the user" and that he could easily prove it by simply producing the policy. To require the prosecution to prove the non-existence of the policy, however, would have been "impossible or disproportionately difficult". An exception to the presumption of innocence was thus upheld. It is not always true that the existence of a policy of insurance is "fully within the knowledge of the user". One thinks of a situation where a friend, family member, or indeed a thief, uses the car for a day – the user would probably not have applied his mind to the existence of a policy. It is the owner, not the user, who knows about the policy. It should be noted that although it may be said that the user ought to have found out, the criteria in section 108 is actual, not imputed, knowledge. Thus it would not always be easy for the user-accused to prove the existence of a valid policy. Similarly, it is not easy to understand why it is "impossible or disproportionately difficult" for the prosecution to bear the burden. The prosecution does not have to do this in a vacuum. There are records with the Road Traffic Department which requires the production of a valid insurance policy before a vehicle licence is issued. The Monetary Authority of Singapore keeps a register of insurers which can be inspected.[77] The prosecution (or police) have adequate powers to search the records of a particular insurance company. It is not impossible for the prosecution to prove it. Neither is it disproportionately difficult – "disproportionate" here cannot refer only to a comparison with the ease with which the accused can prove it, but also with the difficulty which the prosecution encounters when it is called upon to prove other well-recognised elements of the offence, for example, intention or some other form of *mens rea*. Just as the mental state of the accused is often proved by circumstantial evidence, so too can the absence of policy be similarly proved – what comes to mind is the failure of the accused to produce the policy on demand. The existence of a policy of insurance presents no exceptional difficulty. What, perhaps, the court had in mind was the situation where the accused keeps absolutely quiet and puts the prosecution to prove

[76] When *Hunt* was first decided, a lively academic debate ensued in the United Kingdom with some commentators roundly condemning it (preferring instead a rule that burdens of persuasion can only be reversed expressly) and others commending its counsel of restraint in impliedly reversing burdens of proof, Hor, *supra*, note 10, at 283-284. The Singapore decisions which have purported to apply *Hunt* does seem to confirm the worst fears of its critics.

[77] S 3, Insurance Act, Cap 142 (1985 Ed).

the absence of a policy from scratch. Admittedly, this would be entirely unreasonable. The proportionate solution would, however, be the placing of the burden of production on the accused. There is some indication from the language of the judgement that only the burden of production was meant. Thean JA said that the accused "can with ease prove the existence of such policy simply by producing it". The word "prove" here cannot mean the burden of persuasion – merely producing what appears to be a policy cannot by itself satisfy this burden – it could have been forged. What the accused satisfies by simply producing the document is the burden of production. On a constitutional analysis, it appears that the shifting of the burden of persuasion is unjustified and that the placing of a burden of production on the accused would have been reasonable.

The recent decision of *Tan Khee Wan Iris* can only be described, in the language of the Chief Justice, as "unfortunate".[78] It is the clearest example we have so far of the injustice in the way the exceptions rule found in section 107 has been applied. The accused was charged with assisting in providing public entertainment without a licence.[79] She had organised a public performance which ended only at 6am on 1 January 1994. She applied for a licence to provide public entertainment until 1 January 1994. The licensing officer fully intended to give her such a licence. Indeed the prosecution had earlier assumed that she had a valid licence (and had originally charged her with breaching a condition in the licence). The only problem was that a clerical mistake was made by the licensing officer – in one part of the licence, the expiry date of the licence was (correctly)

[78] [1995] 2 SLR 63 (HC).

[79] This incident, which climaxed in a performer shaving his pubic hair with his back turned to the audience, stirred up a great deal of discussion on the freedom of expression and the legitimacy of performance art designed to shock and discomfort the audience. The authorities were not amused and sought to bring the organiser, Iris Tan, to book. She was originally charged with breaching a condition of the licence issued to her. The Chief Justice upheld the learned District Judge's acquittal of the accused on the ground that there was no valid licence to breach, but directed a trial on the amended charge of providing public entertainment without a licence, [1994] 3 SLR 214. It was this decision which landed the court in a dilemma. The accused could not be guilty of the first charge because a valid licence could not be proved. She could also not be guilty of the second charge because the absence of a licence could not be proved (if the court had ruled that it was for the prosecution to disprove the licence). If indeed this famous performance was in breach of the licence (had it been issued properly), it does seem morally right that she should be found guilty of something. The court would have been spared all this agony if it had considered the use of s 72 of the Penal Code (and s 125 of the Criminal Procedure Code Cap 68 (1985 Ed))which provides for a situation where "a person is guilty of one of several offences" but "it is doubtful of which of these offences he is guilty". The court simply makes a judgement that the accused is guilty of either the first or the second charge and then subjects the accused to the lower punishment provided.

described as 1 January 1994, but in another part of it, it was mistakenly drafted as 31 December 1993. The Chief Justice had no doubt that the statute creating the offence "prohibits any person from providing public entertainment, save within a special exception or proviso, namely, with a valid licence". The accused had to bear the burden of persuasion, and this she could not do successfully as it was "impossible to say one way or the other" whether the licence was good until 31 December or 1 January.[80]

Although the Chief Justice cites *Kum Chee Cheong*, his Honour appears to have side-stepped the approach prescribed in that case. There was no weighing of the ease or difficulty of proof. It was not explained why it would have been "impossible or disproportionate" for the prosecution to prove that no licence was validly issued. It does seem to be that the learned Chief Justice may have used the very approach rejected by the House of Lords in *Hunt* (and therefore the Court of Appeal in *Kum Chee Cheong*) – linguistic considerations were decisive and no assessment of practical considerations of proof was even attempted. Is there anything about licences which justifies a shifting of the burden of persuasion? Although licences were not in issue, there is an indication by the Privy Council in *Lee Kwong-kut* that licences, like insanity, may justify a persuasive burden on the accused.[81] Lord Woolf felt that "[c]ommon sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence". The case of *Tan Khee Wan Iris* demonstrates how such generalisations can go sadly wrong. Whatever the state of public records is in England or Hong Kong, it surely cannot be said that it was impossible for the prosecution to establish that an accused person did not have a valid public entertainment licence in Singapore. It is inconceivable that the government department administering the Public Entertainment Act does not keep a register and a copy of all licences issued. It is also inconceivable that the prosecution does not check with the licensing authority before commencing prosecution. All that the prosecution need do is to show the court what it already has done. Indeed, if anything, it is more likely that the copy of the licence

[80] My colleague Ho Hock Lai has pointed out to me that the whole issue of the burden of proof should not have arisen at all – this is not a case of a factual dispute. All the facts are not in dispute and before the court – the only question is a legal one, whether the licence issued was in law valid. There is much force in this observation. The discussion, however, assumes that it is a question of fact for two reasons: first, the boundary between fact and law may not always be so clear and secondly, the same principles would apply to a case where the issue was clearly one of fact, *eg*, where the issue is whether a particular licence was indeed given by a proper official.

[81] [1993] 3 WLR 329, 341.

given to the licensee would be lost or destroyed than the copy kept by the licensing authority. Similarly, the case also demonstrates that it is not always easy for the accused to prove he had a valid licence. It may not be a simple matter of producing the licence – what if there is a mistake in it? Who is to bear the burden of the uncertainty? The situation in *Tan Khee Wan Iris* was that it was equally difficult for either party to prove a valid or, as the case may be, invalid licence.

At the end of the day, we have to ask whether the accused in *Tan Khee Wan Iris* had done the sort of thing that calls for criminal sanction. That the Chief Justice was not particularly happy with convicting the accused is clear. Twice his Honour described the situation as "unfortunate". The correct result would have been reached had a constitutional analysis of the shifting of the burden of persuasion been adopted. The formulation in *Hunt* is not inherently objectionable. The burden of persuasion may be constitutionally passed to the accused where it would be impossible or unduly difficult for the prosecution to bear it. This can only happen in a very small minority of situations. In some licence cases, the circumstance where the prosecution is required to prove the absence of a licence from scratch is something which the law must avoid. In that event, the only constitutionally permissible thing to do is to shift, not the burden of persuasion, but the burden of production. Iris Tan would then have had to bear the burden of production, which she successfully did by producing a copy of the licence and by the testimony of the licensing officer. The prosecution would have retained the burden of persuasion, a burden which could not have been discharged as reasonable doubt would have remained as to the validity of the licence. It is left only to note that the obstacle created in *Hunt* (and for that matter in *Jayasena*) to the employment of the device of the burden of production has now been swept away by the constitutionally sanctioned use of such a concept by the Privy Council in *Vasquez*.

VII. Innocence and Alibi

It may come as a surprise to the newcomer to this area of law that some degree of difficulty has been encountered in the allocation of the burden of proving (or disproving) an alibi.[82] It does seem a matter of common sense that if the burden of persuasion is on the prosecution to show that the accused was indeed at the scene of the crime, it must follow that where there is some evidence that the accused may not have been there, the

[82] See discussion in Hor, "The Burden of Proof in Criminal Justice" (1992) 4 SAcLJ (PtII) 267, 293-297.

prosecution ought to disprove that possibility beyond reasonable doubt. Even if it is considered an "exception" within the meaning of section 107, the defence of alibi must surely engage an essential element of the prosecution's case – the *actus reus* – and thus fall under the subsidiary rule in *Jayasena*.[83] The contrary argument rests on two pillars. First, it is said that illustration (b) of section 105 expressly provides that he who alleges the alibi must prove it. Secondly, this position is sought to be justified on the ground that a defence of alibi actually does not call in question an element of the prosecution's case but raises fresh issues of its own.[84] Malaysian decisions at the highest level have gone both ways in the past, but it is now well established that it is the prosecution which retains the burden of persuasion, although the burden of production is cast on the accused.[85] The Court of Appeal seems to have accepted this position for Singapore in *Syed Abdul Aziz*.[86] Illustration (b) of section 105 was, nevertheless, not even mentioned. We have to ask whether *Syed Abdul Aziz* is constitutionally mandated. Drawing again from the jurisprudence of the Privy Council in *Vasquez* and *Lee Kwong-kut*,[87] the burden of persuasion of a particular fact may be cast on the accused only where it is "impossible or disproportionate"[88] to expect the prosecution to do so. If it is accepted that the prosecution must prove that the accused was present where the crime is alleged to have been committed, it becomes exceedingly difficult to argue that the prosecution would find it unduly onerous to disprove an alibi (*ie,* that the accused was not where he said he was). Even if it is accepted that for some alibis, fresh issues are raised, it cannot be said, generally, that it would be "impossible or disproportionate" for the prosecution to bear the burden of persuasion. What, perhaps, is difficult for the prosecution to do is to anticipate in advance (and hence disprove) every possible alibi the accused may raise. That problem is adequately taken care of by the imposition of the burden of production on the accused. In other words the prosecution does not have to disprove an alibi in a vacuum – to satisfy the burden of production, the accused must first bring forward some evidence

[83] *Supra*, note 67. See Chin, "The Burden of an Alibi" [1986] 2 MLJ xvii, lxx-xi.

[84] See Tan Yock Lin, "The Incomprehensible Burden of Proof"[1994] SJLS 29, 32-34 for a sophisticated argument that some forms of alibi affect the prosecution's case, but not others. On a constitutional analysis, however, there does not appear to be any justification why the two kinds of alibi should be treated differently.

[85] *Illian* [1988] 1 MLJ 421.

[86] [1993] 3 SLR 534, 543. Nevertheless, in *Neo Kay Liang*, 28 June 1995, HC (Sinnathuray J), there appears to have been a reversion to the view that alibi must be proved on a balance of probabilities. *Syed Abdul Aziz* was not mentioned.

[87] [1993] 3 WLR 329, 341.

[88] This is the language of the Court of Appeal itself in *Kum Chee Cheong*, *supra*, note 73, at 242-243.

of his alibi. If that were not enough, section 182 of the Criminal Procedure Code[89] requires that the accused give pre-trial notice of certain particulars of the alibi he intends to raise at the trial (unless the court waives this requirement). All material particulars would be available to the prosecution well before the trial, enabling the police to investigate the alibi to their heart's content. In short there is no reason to make an exception to the presumption of innocence for the defence of alibi. Illustration (b) to section 105 is resolved thus: if it is read as imposing only a burden of production on the accused, it is constitutional and in accord with *Syed Abdul Aziz*; if, however, it must mean that the burden of persuasion is to be cast on the accused, this aspect of the section is probably unconstitutional.

VIII. Innocence and Presumptions

Perhaps the most difficult problem for any constitutional enforcement of the presumption of innocence lies in the area of statutory presumptions, where on proof by the prosecution of a certain triggering fact (or facts), the burden is cast on the accused to disprove the presumed fact. Thus far we have subjected to constitutional scrutiny only the provisions in the Evidence Act which purport to place a burden of persuasion on the accused. It is well known that the Evidence Act itself was taken from India to the Straits Settlement.[90] The Indian legislation was in turn largely the work of the eminent Victorian jurist, Sir James Fitzjames Stephen. Stephen's avowed purpose was no more or less than to codify the existing English rules of evidence for India.[91] As we have seen, the shape of these rules, as far as the burden of proof was concerned, was informed by two factors which we now believe to be fallacious – the failure to distinguish the burden of production from the burden of persuasion, and the adherence to a descriptive or formal concept of criminality wrongly derived from private law. In short, they were formulated without regard to the modern conception of the presumption of innocence. To that extent they must be modified to bring them in line with the constitutional presumption of innocence. Statutory presumptions do not suffer from the same obsolescence. Indeed they found favour with the colonial legislature and continue to do so with the parliament of independent Singapore. The increasing reliance of modern penal statutes on presumptions is stark – the Penal Code, first enacted in 1871,[92] is almost devoid of statutory presumptions, but the Misuse of Drugs Act,[93] enacted in 1973, is replete

[89] Cap 68 (1985 Ed).
[90] Ordinance 3 of 1893.
[91] See Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), at 20.
[92] Ordinance 4 of 1871.
[93] Cap 185 (1985 Ed).

with them.[94] That which is behind modern statutory presumptions is not any outdated doctrine but what seems to be a firmly held belief on the part of the legislature that they are required either to deal with serious crime or to give an impression that the legislature is doing something about it. Any move by the judiciary to limit parliamentary freedom in the creation of presumptions is likely to be politically controversial. Judges are keenly aware of this. Lord Woolf put it thus in *Lee Kwong-kut*: "rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime ... [Q]uestions of policy remain primarily the responsibility of the legislature."[95] On the other hand judges are equally cognisant that statutory presumptions have the potential to strike at the very heart of the presumption of innocence. The European Court of Human Rights in the leading decision in *Salabiaku* declared that the presumption of innocence "does not ... regard presumptions of fact or law ... with indifference", and that it required "[s]tates to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[96] The courts have to draw the line somewhere and in doing so have regard to a number of matters, many of which call for assessments of a high degree of subjectivity. In addition, they have to be acutely aware of the possible legislative response to an attempt to "confine" the legislature. Lord Woolf expressed it in this way: "[i]t would not assist the individuals who are charged with offences if, because of the approach adopted ... by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge."[97] The fear is that the legislature might simply do away with the presumption (and make the triggering fact itself sufficient to found an offence) rather than risk the possibility of the courts making the prosecution prove the presumed fact.[98] Such a consideration does not exist for, say, the defence of insanity or provocation. It would be far-fetched to suggest that the legislature might do away with these defences altogether if the courts were to require the prosecution to disprove insanity or provocation.[99] With all this subtle interplay of law, politics and value

[94] The legislative strategy in Singapore (and, perhaps, Malaysia) has been to leave the Penal Code untouched (with respect to presumptions), but to have liberal recourse to presumptions for offences found in more specialised statutes.

[95] [1993] 3 WLR 329, 346.

[96] (1988) 13 EHRR 379, 388.

[97] *Supra*, note 95.

[98] S*upra*, note 37.

[99] Similar considerations exist for the situations discussed so far where the accused is required to bear the burden of persuasion. *Eg*, even if the court required the prosecution to prove the absence of a licence for public entertainment, it is inconceivable that the legislature

judgements, not all of which will be evident in a particular judgement, it should not surprise us that seemingly contradictory decisions are made, even by the same court.[100] Nevertheless, it is useful to look at some factors which appears to have made a difference in actual litigation. No constitutional challenge has been launched against any statutory presumption in Singapore since the unsuccessful attempt in *Ong Ah Chuan*.[101] It would be instructive to look at some developments in comparative constitutional jurisprudence.

The approach of the Supreme Court of Canada is, in the words of Chief Justice Lamer, first, to determine if "the objective of the impugned legislation [is] of sufficient importance to warrant overriding a constitutionally protected right."[102] This bears a close resemblance to the doctrine of the Supreme Court of the United States which requires constitutionally acceptable deviations from fundamental rights to be justified by governmental objectives of sufficient "weight". Conceptually, the more pressing or important the need is to deal with a particular social problem, the greater is the latitude given to the legislature in deviating from the presumption of innocence. In practice, however, the Supreme Court of Canada seems to have shied away from a direct finding that the legislature's objective was of insufficient weight.[103] Although that Court goes through the motion of examining governmental objectives every time a statutory presumption is challenged, it has never held that this requirement of weight has not been fulfilled. When the Court has struck down or rewritten statutory presumptions, it was not because of the insufficiency of governmental objectives. The reasons are not hard to find. It is hardly likely that the legislature will go through the trouble of drafting and enacting statutory presumptions to deal with trivial matters. Where the legislature has done so, it would be impertinent, as it were, for the court to contradict the legislature by saying

will do away with the defence of holding a licence (and thus outlaw public entertainment altogether).

[100] As the Privy Council itself noted, the Supreme Court of Canada seems to have adopted a "stricter approach" in the cases following *Oakes* (1986) 26 DLR (4th) 200, see *supra*, note 95, at 338-339.

[101] *Supra*, note 11.

[102] *Chaulk* (1990) 62 CCC (3d) 193, 216.

[103] See, *eg*, *Downey* (1992) 90 DLR (4th) 449 where the Supreme Court held that a presumption that the accused was living off the "avails" of a prostitute (triggered by proof of "living with or being in the habitual company of prostitutes") was sufficiently supported by the objective of dealing with "the cruel and pervasive social evil associated with pimping". The court, however, seemed to stress that the presumption in this case reversed only the burden of production (*ie,* it was an evidential presumption), implying that the objective may well have not been sufficient to support a reversal of a burden of persuasion. The three dissenting judges significantly did not hold that the objective was too trivial but found fault with the presumption because it was too broadly drafted.

that the problem which it intends to deal with is unimportant. The urgency in dealing with a particular social problem is eminently a question of policy which "remain primarily the responsibility of the legislature". However, the attitude of the Privy Council in *Lee Kwong-kut* shows that the factor of "weight" of governmental objective has a role to play in constitutional analysis.[104] In the formulation of the constitutional approach towards the Hong Kong Bill of Rights, the Privy Council significantly collapsed the two-step "Canadian process of reasoning".[105] In striking down a presumption concerning the disposal of stolen property and at the same time upholding rather similar legislation dealing with the disposal of the proceeds of drug trafficking, the Privy Council appears to have taken into account the "war against drug trafficking". No doubt, the Privy Council did seize upon other differences between the two presumptions (which will be discussed below), but the clear implication seems to be that the court might be more willing to countenance deviations from the presumption of innocence in the context of illicit drugs than it would be in stolen property legislation. The court appears to have made a judgement that there was greater relative urgency in dealing with drugs than with stolen property. Perhaps the comparison for Hong Kong between drugs and stolen property was a stark one. It may not be quite so simple to assess the relative urgencies of dealing with, say, corruption[106] and living off the earnings of prostitution.[107] The decision of the Privy Council to strike down the presumption of stolen property was a bold one which may not be quite so palatable to a court more sensitive to legislative reaction. A more likely compromise is to be found in the more recent Canadian Supreme Court decisions which have sanctioned the use of evidential presumptions (or a reverse of the burden of production).[108] If that indeed is the more desirable approach, the factor of "weight" of governmental objective would not be seen as a bar on deviations from the presumption of innocence but a variable in deciding whether an evidential presumption would suffice. This technique of using evidential presumptions as a constitutional compromise will be examined below.

That leaves the other requirement in United States jurisprudence for exceptions to constitutional rights – the deviation must "fit" the governmental

[104] *Supra*, note 95, at 343-346.

[105] *Ibid*. This two-step approach first requires the court to determine if the objective of the legislation is important enough to justify any deviation, and secondly, if the means chosen is proportionate to the objective. The Privy Council did not find it "necessary" to adopt this approach and opted for a more general inquiry of whether the deviation was "reasonable".

[106] See s 8, Prevention of Corruption Act Cap 241 (1993 Ed) and *Yuvaraj* [1969] 2 MLJ 89 (PC Malaysia).

[107] *Supra*, note 103. Singapore has an almost identical presumption in s 146(3), Women's Charter Cap 353 (1985 Ed).

[108] *Supra*, note 103.

objective. This concept has within it the idea of proportionality between the social purpose and the need to deviate from constitutional norms and the requirement that the deviation be as minimally invasive as possible to achieve that purpose.[109] It is here that the courts have developed an increasingly sophisticated strategy to hold the balance between the presumption of innocence and the need to deal with serious crime by means of statutory presumptions.

It seems almost axiomatic that a statutory presumption should be rebuttable. The triggering of the presumption is not the end of the matter. The accused is to be given an opportunity to rebut the presumed fact and thus show his innocence. The importance of this factor of rebuttability comes out most clearly in the decisions of the European Court of Human Rights. Most recently, in *Pham Hoang* v *France*,[110] the European Court, in upholding the use of presumptions in a piece of customs legislation was emphatic in pointing out that "[t]he presumption of his (the accused's) responsibility was not an irrebuttable one". The clear implication seems to be that if the presumptions were indeed irrebuttable, the presumption of innocence might well have been unjustifiably breached. It is in this regard that some *dicta* found in the High Court decision of *Ong Beng Soon* is troubling.[111] The Road Traffic Act[112] made it an offence for any person to drive a motor vehicle while he is under the influence of alcohol to the extent that as to be incapable of having proper control over the vehicle. This legislation also had a presumption[113] – the accused is presumed to be incapable of handling a motor vehicle if he is found to have more than 80ml of alcohol in 100ml of blood. The presumption was uniquely worded in that it does not contain the usual companion phrase "unless the contrary is proved". The Chief Justice, astoundingly, declared that this was an "irrebuttable presumption". Once the "legal limit" was exceeded, "the court would not entertain the argument that he was not in fact incapable of having proper control of the car". It does not appear from the judgement that the point was argued. Neither was this pronouncement necessary for the disposition of the case – the accused had in fact lost control of the car he was driving. Although section 4(2) of the Evidence Act[114] formally applies only to the Evidence Act, it

[109] *Supra*, note 102, at 217.

[110] (1993) 14 Human Rights LJ 95. The similar point was made in *Salabiaku* v *France* (1988) EHRR 379 and *Lingens* v *Austria* (1981) 4 EHRR 373.

[111] [1992] 1 SLR 731. See the comments in Chan Wing Cheong, "Drunk Driving: A Wrong Turning in the Law" (1994) 6 SAcLJ 82.

[112] Cap 276 (1985 Ed).

[113] S 70, *ibid.*

[114] Cap 97 (1990 Ed). Indeed the Chief Justice himself had recourse to the definitions in the Evidence Act for the purpose of interpreting other legislation in *Ng Kum Peng*, 31 July 1995, HC (Yong Pung How CJ).

ought surely to have been of some persuasive value that "presumed" meant (in that section) that the court "shall regard such fact as proved unless and until it is disproved". Reading the presumption as the Chief Justice did places it in grave danger of being unconstitutional. As the Chief Justice himself observed in the later case of *Teo Kwee Chuan*,[115] "[t]he offence for which the driver might then be convicted is not called "exceeding the statutory blood alcohol limit" – ultimately the offence for which he might be convicted is still an offence of driving while under the influence of drink". An accused charged with the offence is deprived of the opportunity of proving his innocence, *ie,* that he did in fact have proper control of his vehicle. The legislature was free to make "exceeding the statutory blood alcohol limit" an offence, as some legislatures have done, but it did not.[116] The situation is now this: even if, for some reason, there is incontrovertible evidence that the accused had full control over his vehicle (*eg,* where a complete video recording of the incident is available), he must still be convicted. This violates the presumption of innocence without reason. The creation of new offences is for the legislature, not the court. It is unfortunate that in the recent prosecution of the prominent gynaecologist, Professor Ratnam, it appears to have been accepted by a subordinate court without argument that *Ong Beng Soon* is good law.[117]

Rebuttability is not an issue for most statutory presumptions. The more difficult questions surround the constitutionality of admittedly rebuttable

[115] [1993] 3 SLR 908, 911-912.

[116] It appears that it does matter how the Legislature creates the new offence. The manner in which the Legislature chose to amend s 5(2) of the Misuse of Drugs Act Cap 185 (1985 Ed) is problematic. Under that provision, a person who is found to be in possession of drugs for the purpose of trafficking is deemed to be trafficking in those drugs. This does look like an irrebuttable presumption because the accused is not allowed to prove his innocence in that, although he may have had the drugs for the purpose of trafficking, he did not actually traffick in those drugs. See the discussion of the effect of the amendments in *Lee Yuan Kwang* [1995] 2 SLR 349, 367-369 and the recent history of the drugs presumptions in Palakrishnan, "The Misuse of Drugs Act (Chapter 185): A Presumption Too Many?" [1994] 2 CLAS News 131. If indeed what the Legislature was trying to say was that possession for the purpose of trafficking is as good (or as bad) as trafficking itself – it could have provided for two distinct offences with the same penalty. If that is what the Legislature had done, there would not have been a problem with the presumption innocence, although a challenge could possibly be mounted on the grounds of a breach of equal protection (unlike cases treated alike), art 12, Constitution of the Republic of Singapore (1992 Ed).

[117] *Business Times,* 15 June 1995. The Attorney-General has lodged an appeal against sentence.

[118] [1993] 3 WLR 329, especially 344-346. Similar confiscation provisions in Singapore are far more stringent and would, therefore, have probably been approved by the Privy Council. It is only on conviction for drug trafficking and proof that the accused held property in excess of his known sources of income that a presumption that the property was derived from trafficking is raised: s 4, Drug Trafficking (Confiscation of Benefits) Act Cap 84A (1993 Ed). See also an almost identical presumption in s 4, Corruption (Confiscation of

presumptions. The decision of the Privy Council in *Lee Kwong-kut*[118] is especially instructive in this respect for the Court had before it two different presumptions, one of which was struck down, but the other upheld. First, the presumption which could not be justified was found in legislation dealing with possession of stolen property. The effect of the relevant provision was that the prosecution bore the burden of "proving possession by the defendants and facts from which a reasonable suspicion can be inferred that the property has been stolen or unlawfully obtained". Once that was done, the accused had the burden of proving innocent possession. In other words, guilty possession was presumed upon proof of reasonable suspicion that the property was stolen. The presumption was struck down because the burden on the prosecution (of proving reasonable suspicion) was "likely to be a formality" while the accused was made to disprove "the most significant element of the offence". In short, the prosecution was made to prove too little and the accused too much.

The other presumption, this time in the context of laundering of money made in the illicit drug trade was, however, sustained. Here the prosecution bore the burden of proving that "the defendant has been involved in a transaction involving ... proceeds of drug trafficking ... and at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts". If the prosecution succeeded in showing this, the accused then had to disprove guilty knowledge. Once reasonable grounds to believe is proved, guilty knowledge was presumed against the accused. This presumption was upheld because the prosecution still bore the burden of proving "[t]he substance of the offence" and that while it was "reasonable" that the accused be required to establish innocent involvement, it would have been "extremely difficult, if not impossible for the prosecution" to disprove it. "In the context of the war against drug trafficking", as been earlier discussed, such a presumption was justified.

This important decision is worthy of closer scrutiny on a number of points. First, and perhaps most significantly for Singapore, *Lee Kwong-kut* must mark the demise of the attitude found in the celebrated case of *Ong Ah Chuan*.[119] It will be remembered that the Privy Council was then reluctant

Benefits) Act Cap 65A (1990 Ed). Equivalent provisions under the Malaysian Dangerous Drugs (Forfeiture of Property) Act 1988 appear to be much looser. It seems that a presumption of knowing involvement is triggered by the fact of the Public Prosecutor (and not the court) having reason to believe that there was knowing involvement: *Kanagasavey* [1995] 2 MLJ 238 (HC). Much would depend on the extent to which the Public Prosecutor's satisfaction can be challenged. If it be that there is no real evaluation by the court of the evidence which satisfied the Public Prosecutor, the presumption might not have passed the constitutional test in *Lee Kwong-kut*.

[119] [1981] 1 MLJ 64. See a more detailed analysis of this case in Hor, "The Burden of Proof in Criminal Justice" (1992) 4 SAcLJ (PtII) 267, 301-307.

even to recognise the existence of the presumption of innocence. This reservation it has since shed without apology. It will also be remembered that the Privy Council then held that all that the fundamental rules of natural justice required was that what the prosecution was required to prove (the triggering fact) was "logically probative" of guilt (the presumed fact). This, it appears has gone as well. There is no doubt that what the prosecution was required to prove for the presumption struck down in *Lee Kwong-kut* was "logically probative" of guilt. Where there is reasonable suspicion that the property concerned was stolen, it is more likely (probative) that the accused knew about it (than in a situation where there is no reasonable suspicion). It has been recognised for some time that *Ong Ah Chuan* could not stand with the modern constitutional conception of the presumption of innocence.[120] What was most telling about *Lee Kwong-kut* was that *Ong Ah Chuan*, a decision also of the Privy Council, was neither mentioned in the judgement nor cited in argument. Instead the Canadian Supreme Court decision of *Oakes*,[121] which refused to follow *Ong Ah Chuan* (albeit by politely distinguishing that case), was found to contain "a number of helpful statements". Clearly the Privy Council now demands much more by way of justification than it did in *Ong Ah Chuan*.

Secondly, the Privy Council seems to be developing a concept of "essential ingredients" or "important" or "significant elements" of an offence.[122] For these elements, it appears to be difficult, if not impossible, to justify casting the burden on the accused. The court did not look at the burden cast upon the accused in isolation. If the court had done that, it would have come

[120] Hor, *ibid*.

[121] (1986) 26 DLR (4th) 200, 219. Chief Justice Dickson was able to distinguish *Ong Ah Chuan* only by holding that the Privy Council did not read the presumption of innocence into the general due process protections of the Constitution of Singapore. It appears that a decision from far-away St Lucia was of the view that *Oakes* was irreconcilable with *Ong Ah Chuan* and that *Oakes* was preferred: quoted in Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992), at 355. See, however, the valiant attempts of the Hong Kong Court of Appeal in *Sin Yau-ming* [1992] 1 HKCLJ 127, especially p 144 to salvage *Ong Ah Chuan*. Admittedly, the result in *Oakes* (possession of any amount of drug raised presumption of trafficking – unconstitutional) and *Sin Yau-ming* (possession of 0.5gm of or 5 packets of drug raised presumption of trafficking – unconstitutional) is not necessarily inconsistent with the result in *Ong Ah Chuan* (possession of 2 gm of drugs raised presumption of trafficking – constitutional). What is undeniable is that the approach was not compatible: Lord Diplock in *Ong Ah Chuan* did expressly say (albeit *obiter*) that there was nothing objectionable about the Canadian presumption struck down in *Oakes*.

[122] *Supra*, note 118, at 341-344. Perhaps an earlier example of the Privy Council using such a concept is *Jobe* [1984] 1 AC 689 (Gambia). Gambian legislation sought to deal with the problem of misappropriation of public funds by requiring any person possessing the tainted property to prove that it was acquired lawfully. Lord Diplock had no hesitation in declaring this presumption to be "a plain and flagrant infringement" of the presumption of innocence.

to the conclusion that the burden imposed on the accused in both presumptions is very similar – one to prove innocent possession and the other to prove innocent involvement.[123] The task of deciding which elements are essential involved a comparison of the relative burdens on the prosecution and the accused. It is here that the first presumption failed because the prosecution bore only the light burden of establishing (objectively) "reasonable suspicion" that the property in his possession was stolen, and the second succeeded because the prosecution had the heavier burden of proving that the accused in question had (subjectively) reasonable grounds to believe that he was dealing with drug proceeds. To generalise, where the burden on the accused is constant, it is less likely that the presumption is unconstitutional where the burden on the prosecution is (notwithstanding the presumption) still heavy.

Thirdly, although the Privy Council did try to justify the second presumption by what appears to be a relative ease or difficulty of proof analysis,[124] speculations as to ease of proof do not appear to have made a real difference. Strangely, the Privy Council did not subject the first presumption (which was struck down) to the same analysis. If it did, it would have found that if (as it did hold) it was "extremely difficult, if not virtually impossible" for the prosecution to disprove innocent involvement (for the second presumption), the same conclusion would hold for the task of disproving innocent possession in the first presumption. It was also observed that it was reasonable for the accused in the second presumption to bear the burden of proof because "he will be aware of the relevant facts", presumably, concerning the innocent way by which he came to be involved. Similarly, it ought also to have been that an accused faced with the first presumption "will be aware of the relevant facts" which would explain how he came by the tainted property. Essentially, this kind of ease of proof analysis, although appropriate in the context of burdens of production, is too speculative and unconvincing for the purpose of deciding where the (more important) burden of persuasion should lie.[125] It is more likely to be used to justify a desired conclusion rather than to decide whether a presumption is reasonable.

Fourthly, the Privy Council seems to have adopted a criterion found in United States jurisprudence that it would be "difficult to justify" a presumption unless "it can be said with substantial assurance that the presumed

[123] Indeed, an insular conception of "essential element" would result in every element being "essential" to conviction.

[124] *Supra*, note 118, at 345.

[125] It has been discussed above how, in the context of implied burdens and s 107 and s 108 of the Evidence Act, the ease of proof analysis has gone sadly wrong.

fact is more likely than not to flow from the proved fact on which it is made to depend".[126] This consideration focuses on the strength of the probative connection between the triggering (proved) fact and the presumed fact. To be acceptable, proof of the triggering fact should also prove, on a balance of probabilities, the presumed fact. It is interesting that this standard was chosen out of the entire spectrum of positions which has, at some time or other, been adopted by the United States Supreme Court.[127] First, it was thought that presumptions were all right if the triggering fact had some logical connection with the presumed fact.[128] The triggering fact has to go some way towards proving the presumed fact, but no more. This appears to have been the position also taken by Lord Diplock in *Ong Ah Chuan*.[129] Then the United States Supreme Court in *Leary* v *United States*, the decision cited by the Privy Council, tightened the screws and required not just logical connection but proof of the presumed fact on a balance of probabilities (*via* proof of the triggering fact).[130] Finally, in what is now the leading case on presumptions in the United States, *Ulster County Court* v *Allen*,[131] the Supreme Court declared that even proof on a balance of probabilities will not do. For the presumption to survive, proof of the triggering fact must now prove the presumed fact beyond reasonable doubt. This latest position in fact outlaws presumptions in the only situations where it is thought to be of some use. It is only where proof beyond reasonable doubt cannot be shown that presumptions are needed (from the point of view of the prosecution) to bridge the gap. By this, the United States Supreme Court has achieved a rough balance of sorts. It will be remembered that in *Patterson*[132] the legislature was given a great deal of latitude in classifying relevant facts into offence elements (where the prosecution must bear the burden of persuasion) and defence elements (where the accused may be made to bear the burden of persuasion). What *Allen* means is that, once this decision has been made, no further tampering with the burden of proof by means of presumptions is allowed. As we have seen, the Privy Council preferred an approach towards offence-defence classifications more stringent than that which is found in *Patterson* – the court must also inquire into the reason-

[126] *Supra*, note 118, at 341.
[127] Concise accounts are found in Harris, "Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness" (1986) 77 J Crim L & Criminology 308, and Note, "The Improper Use of Presumptions in Recent Criminal Law Adjudication" (1986) 38 Stanford LR 423.
[128] *Tot* v *United States* (1943) 319 US 463.
[129] [1981] 1 MLJ 64, 71. See discussion above.
[130] (1969) 395 US 6.
[131] (1979) 442 US 140.
[132] *Supra*, note 35.

ableness of legislative classification of elements for the purpose of imposing the burden of proof. The balance is achieved by adopting a position less stringent than *Allen* – the triggering fact need only prove the presumed fact on a balance of probability, not beyond reasonable doubt.

In principle, this consideration is proper. The weaker the probative connection between triggering and presumed facts, the greater is the deviation from the presumption of innocence, and, therefore, the more difficult it is to justify. In practice, however, it is rather artificial and speculative to examine the presumption in isolation (as this consideration would have us do). It is therefore only a little surprising that the Privy Council itself in *Lee Kwong-kut* did not actually take this factor into consideration when it examined the impugned presumptions. Taking the second (drugs) presumption (which was upheld) as an example, it would have been no easy task to decide if proof that the accused had reasonable grounds to believe that drug proceeds were involved would automatically make it more likely than not that the accused actually knew that that this was so. One would immediately ask, for example, what those reasonable grounds were, the context in which it is said that reasonable grounds exist and the sort of person the accused was. The court is, supposedly, not to look at these extraneous matters. Furthermore, and more importantly, a strict requirement of a strong probative connection would operate to strike down a great many presumptions where it is felt to be needed most. The stronger the probative connection, the less a role it plays in helping the prosecution overcome perceived difficulties of proof. A certain de-emphasis of this consideration is detectable in two jurisdictions. First, in Hong Kong, the Privy Council's lip service to it is to be contrasted with the commanding role it played in the earlier Court of Appeal decision in *Sin Yau-ming* where the probative connection factor was used to strike down a number of presumptions in

[133] *Supra*, note 121, at 146-149. The impugned legislation presumed possession for the purpose of trafficking where possession of 0.5gm of heroin was proved. Expert evidence indicated that daily consumption of the drug was anywhere between 0.7gm and 0.22gm. As the triggering amount was "in no way clearly in excess of the average consumption the average addict needs daily", the fact presumed was "neither rationally nor realistically connected" with the basic fact. It is interesting that in *Ong Ah Chuan*, *supra*, note 129, the Privy Council could say that the triggering amount in Singapore, 2gm (s 17, Misuse of Drugs Act, Cap 185 (1985 Ed)), was many times above the average daily dose of the typical heroin addict. If 0.5gm is taken as the average dose, 2gm would give only 4 doses – not an unduly large amount for an addict to possess. The Hong Kong court may well have found the Singapore presumption wanting. Indeed it emerged from expert testimony given at a recent High Court decision in Singapore that, in severe cases of addiction, the consumption could be as much as 1.2gm per day: *Dahalan bin Ladaewa*, 12 May 1995, CAESAR. The Hong Kong Court of Appeal was even stricter when it struck down one other presumption – possession of the place (or the keys thereof) where drugs are found raised a presumption of possession of the drug itself. The court seemed to be edging away from a simple rational connection

drugs legislation.[133] Likewise, in Canada, the Supreme Court in *Oakes* had even earlier employed the same tactic in striking down a similar drugs presumption. Chief Justice Dickson was of the view that "at a minimum ... there must be a rational connection between the basic fact ... and the presumed fact."[134] Recently, however, the Supreme Court, in its pronouncements in *Laba* seemed to cut back on this. Sopinka J thought that "there is no general requirement that a presumption be internally rational, in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption."[135] The Supreme Court, however, did not jettison this factor entirely – it was to be taken into account in assessing whether a particular reverse onus clause was proportionate. One may predict that the probative connection factor may no longer decisive and will probably only be supportive of a conclusion shaped mainly by other considerations.

Finally, and rather disappointingly, the Privy Council in *Lee Kwong-kut* did not seize the opportunity to consider whether, in the circumstances, the imposition of a burden of production on the accused (a opposed to a burden of persuasion) would have been sufficient to deal with the suppression of the crime in question. One would have thought that the device of imposing on the accused the burden of production would be the ideal solution to most problems concerning the burden of proof. It would give effect to the presumption of innocence in that the benefit of the doubt, at the end of the day, still accrues to the accused. It would also go a long way towards alleviating the problems which the prosecution might face in proving certain facts from scratch. In justifying the second (drugs) presumption, the Privy Council thought that it would have been "extremely difficult, if not virtually impossible" for the prosecution to disprove innocent involvement. Surely, this is so only in the context of the prosecution attempting to so prove in a vacuum. If however the Privy Council had considered the imposition of a burden of production on the accused to prove innocent association, the perceived difficulty would have disappeared because, in satisfying the burden of production, the accused would have

test to one of proof on a balance of probability or even beyond reasonable doubt. Singapore has a similar presumption – s 18 of the Misuse of Drugs Act.

134 (1986) 26 DLR 200, 229. The Canadian presumption of possession for the purpose of trafficking was triggered by possession of any amount of illicit drug. For accounts of the different drug presumptions, see Peiris, "Some Constitutional , Substantive and Evidentiary Aspects of Drug Control Legislation: A Comparative Study of the Law of Singapore, Hong Kong and Canada" (1982) 24 Mal LR 119, and Jayasuriya, "The Burden of Proof in Drug Offences in Asian Countries and the Influence of English Law" (1981) 30 ICLQ 906.

135 [1994] 3 SCR 965. The Supreme Court used the weakness of the probative connection between basic and presumed fact to hold that only an evidential (and not a persuasive) burden was justified. See the discussion below.

had to give details of his case – how he came to be involved and the circumstances of his innocence. The prosecution would then have every opportunity to follow up and rebut the claims of the accused. It would be rare indeed that shifting the burden of production would be insufficient.

It is, nevertheless, also true that, for some reason which is not entirely clear, both the Privy Council and the House of Lords have, in the context of common law and statutory interpretation, been generally hostile towards the concept of separating the burden of production from the burden of persuasion.[136] The Privy Council in *Jayasena* refused even to recognise the concept of a burden of production in the Evidence Act of Malaysia.[137] Again, in *Yuvaraj* the Privy Council flatly denied that the word "proved" in a statutory presumption could refer to the burden of production.[138] In the House of Lords' most recent extended discussion of the burden of proof in *Hunt*, the possibility that a statute could impliedly reverse the burden of production was dismissed.[139] The express reasons for this aversion did not go beyond the formal, linguistic and historical. In none of these decisions is there any discussion of why the concept is unacceptable in either principle or policy. As we have seen the device of the burden of production is perhaps the most satisfactory way of reconciling the presumption of innocence and alleviating prosecutorial problems of proof. Denying its existence forces the court to choose between two equally unpalatable extremes. Thus, on the result of *Lee Kwong-kut* is that the prosecution is left with even the burden of production after the first presumption was struck down. How is the prosecution going to disprove innocent possession in a vacuum? In the case of the second presumption (which was upheld), the accused is still to be convicted even if he has provided all the details of innocent involvement and succeeded in raising a reasonable doubt (but for some reason fails to adduce sufficient evidence to prove on a balance of prob-

[136] The burden of production normally follows the burden of persuasion. Perhaps there is a certain neatness about this general rule.

[137] [1970] AC 618. Lord Devlin simply argued that the definition of "proved" in s 2 of the Evidence Act, Cap 97 (1990 Ed) could never refer to the burden of persuasion. See Hor, "The Burden of Proof in Criminal Justice" [1992] 4 SAcLJ (Pt II) 267, 273-275. See also Tan, "The Incomprehensible Burden of Proof" [1994] SJLS 29, 30-31.

[138] [1969] 2 MLJ 89. See Hor, *ibid*, at 297-300. The Privy Council merely followed the English common law rule in *Carr-Briant* [1943] 2 All ER 156. The attitude of the English common law is inconsistent, recognising evidential burdens in *Woolmington* [1935] AC 462, but rejecting it for statutory presumptions and the doctrine of implied exceptions, see *infra*, note 139. The Canadian courts have no difficulty in construing statutory presumptions so as to reverse evidential burdens: *Downey* (1992) 90 DLR (4th) 449. The courts of New Zealand also appear to have countenanced a statute impliedly reversing the burden of production, contradicting the rule in *Hunt*, *infra*, note 139: *Rangi* [1992] 1 NZLR 385, 389.

[139] [1987] 1 All ER 1.

abilities). The Privy Council ought to have taken the opportunity, created by the constitutional dimension to the burden of proof, to dispel this prejudice of the past in the context of presumptions. Constitutional law requires that any deviation from the presumption of innocence be proportionate to the reason for the deviation. Where a less intrusive deviation is sufficient to provide for the problems of the prosecution, it must be chosen in preference to a more intrusive one. In short, where a shifting of the burden of production will do, an attempt to shift the burden of persuasion will be unconstitutional. This is exactly the path that the Supreme Court of Canada took very recently in *Laba*.[140] Canadian legislation made it an offence to buy or sell any ores of precious metals unless the accused can establish that he is the owner or agent of the owner or is acting under lawful authority. In other words proof of the fact of selling or buying ores triggered a presumption that it was done unlawfully. Sopinka J, delivering the unanimous judgement of the Court, held that although "there is good reason to believe that it would be difficult for the prosecution to prove that goods have been stolen", it was constitutionally impermissible for the legislature to impose the burden of persuasion on the accused because "Parliament's purpose will be effectively served by the imposition of and evidential burden (of production)". The Court explained that a shift of the evidential burden would force the seller to testify or produce documents tending to show that he was the owner, agent or was authorised. This, in turn, would "enable the Crown to produce testimony of documents disproving the claim". The presumption of innocence is given effect because it was "unlikely that an innocent person will be unable to point to or present some evidence which raises a reasonable doubt as to their guilt". It is hoped that this approach will change the shape of things to come. Already, as we have seen, the Privy Council has recognised that, at least for the defence of provocation, the only way to do justice to both prosecution and accused is to use the concept of the burden of production.[141] So has the Court of Appeal in Singapore in the context of the defence of alibi.[142] There is absolutely no reason why its use cannot be constitutionally considered for, and extended to, every class of exception to the presumption of innocence.

The modern approach to the justifiability of presumptions in constitutional law is, therefore, informed by a dynamic interplay of considerations such as the importance of the governmental objective, the relative burden on the prosecution and accused, the strength of the probative connection between triggering and presumed fact and the possibility that a reverse of the burden

[140] [1994] 3 SCR 965.
[141] *Vasquez* [1994] 3 All ER 674. See discussion above.
[142] *Syed Abdul Aziz* [1993] 3 SLR 534. See discussion above.

of production might be sufficient. That is, however, not all. These are only the legal considerations – those which a court has no difficulty articulating. Operating in another plane, as it were, are the political and tactical considerations of how the government of the day is likely to perceive or respond to a move by the judiciary to limit legislative discretion in combating crime by tinkering with the criminal process.[143] How these "extra-legal" matters affect consideration of the more legal (and express) factors is beyond the scope of this discussion. Nor is there sufficient litigation in Singapore to enable generalisations to be made. Suffice it to say, at this point, that the courts are likely to guard fundamental rights in the context of the criminal process more jealously than it would other liberties for the criminal process touches the very heart of the judicial function.

IX. Innocence and the Future

The basis of the existing law governing the burden of proof in Singapore and Malaysia has been a number of statutory provisions and cases which have been insufficiently sensitive to the presumption of innocence. As it stands, the law is vulnerable to the charge that there is an unacceptable degree of risk that an innocent accused will be convicted. It is true that no criminal justice system is or can be fool-proof and that the degree of risk of wrongful conviction which is socially tolerable is primarily a domestic question – one for Singaporeans or Malaysians, as the case may be, to decide. Nevertheless, recent high-profile events show that norms of due process and the presumption of innocence of other jurisdictions are to be ignored only to our detriment. We can be proud that in the provisions of our own Constitution is to be found the seeds of a new discourse on the burden of proof based on considerations of principle and policy rather than on the purely formal, linguistic and historical approaches which characterise most of the judicial decisions in the past. This article has attempted to explore and develop such a constitutional discourse for Singapore drawing on the rich experience of other jurisdictions which have taken such a path.

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[143] See the discussion above and *supra*, notes 95 and 97.

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