NOTES OF CASES

BURDEN OF PROOF ON THE ACCUSED: AN UNACCEPTABLE EXCEPTION
Tan Ah Tee & Anor. v. *P.P.*[1]

Introduction

The Court of Criminal Appeal decision in *Tan Ah Tee* vividly demonstrates the need for local lawyers to know the English law of evidence, the Evidence Act[2] notwithstanding. In this instance, the Court applied the English rule established in *R.* v, *Edwards*[3] which supposedly lays down a test for determining the incidence of the burden of proof in statutory provisions. It will be argued here that the adoption of the *Edwards* rule is unnecessary and undesirable and alternative approaches will be discussed. This is not to say that the conclusion reached by the Court — that the accused bears the burden of proof on the issue in question — is wrong. In fact, it will be argued that the conclusion is correct; the problems lie with the reasoning.

The facts relevant to this case-note are that the accused and his accomplice were charged with trafficking in a controlled drug contrary to section 3 (a) of the Misuse of Drugs Act 1973.[4] They were found guilty and sentenced to death. They appealed, *inter alia,* on the ground that the prosecution has failed to prove an essential element of the offence, namely, that they (the accused) lacked the authority to deal with the drugs in question.[5] The question before the Court, therefore, was: Who has the burden of proof to establish authorisation to deal with the drugs?

The Court answered this question by first acknowledging that "it is a fundamental rule of our criminal law that the prosecution must prove every element of the offence charged".[6] It then referred to the *Edwards* rule which provides an exception to the fundamental rule.[7] The rule is lucidly stated by Lawton L.J. in *Edwards* as follows:

[1] [1980] 1 M.L.J. 49. The Court comprised Wee Chong Jin C.J., Kulasekeram and Chua J.J. A further appeal (with Haw Tua Tau) was dismissed by the Privy Council: *Haw Tua Tau* v. *P.P.* [1981] 2 M.L.J. 49; [1981] 3 All E.R. 14. The ground of appeal discussed in this case-note was not brought up in the Privy Council. The Judicial Committee thought that "the various grounds relied on by.., the appellants in the Court of Criminal Appeal... were plainly without merit___" ([1981] 3 All E.R. 14, at page 16).

[2] Cap. 5 (Singapore Statutes, Revised Edition 1970).

[3] [1975] Q.B. 27; [1974] 2 All E.R. 1085; [1974] 3 W.L.R. 285.

[4] Cap. 5 of 1973 (Singapore Statutes, Revised Edition).

[5] The other ground of appeal raised by Tan Ah Tee was that the trial judges did not give adequate consideration to his defence. This was rejected: [1980] 1 M.L.J. 49 at p. 51E.

[6] *Ibid.*, at p. 51B.

[7] *Ibid.*, at p. 51C.

> "This exception... is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception."[8]

The Court held that this rule correctly states the local law.[9] It then applied the rule to section 3 and concluded thus:

> "What then is the true construction of section 3 of the Act? In our opinion the section prohibits trafficking in a controlled drug save in the circumstances specified therein i.e. save as authorised by the Act itself or the regulations made thereunder. Consequently, the prosecution was under no necessity to prove a *prima facie* case of lack of authorisation and it was for each appellant to prove that he or she was authorised to do the prohibited act."[10]

The Court, however, did not state how it construed the section. Perhaps it regarded the reasoning to be so obvious as to need no mention. This, it is submitted, is unfortunate and reduces the value of the decision as a guide. It must be remembered here that the *Edwards* rule must now be borne in mind whenever statutory offences are considered and in Singapore, that means virtually every offence.[11] When one realises that the rule has to do with the incidence of the burden of proof on the accused, the magnitude and importance of the decision can be appreciated.

The question which has to be considered is: How does one apply the *Edwards* rule? Is the exercise of construction a purely syntactical one, *i.e.*, dependent solely on the way the section is phrased? Or does one have to take into account the object of the section to be construed? Or to find out whether there is an accepted code of practice by Parliamentary draftsmen that the use of certain formulae (such as "except" or "provided always") is always intended to place the burden of proof on the person relying on the exception or proviso?

Difficulties in Applying the *Edwards* Rule[12]

The application of the *Edwards* rule depends, first of all, on the distinction between the defining part of an offence and its exception(s). If a fact is contained in the defining part (so the theory goes), the burden of proof of that fact lies on the prosecution. If a fact is found

[8] [1974] 3 W.L.R. 285 at pp. 295E-F.

[9] [1980] 1 M.L.J. 49 at p. 51I. The judgment states: "…the law here is the same as the law in England…." This is ambiguous: it could mean that the rule is consistent with local law (in which case, why not apply the latter?) or that it *is* the law in Singapore (which is probably wrong as there are statutory rules covering the issue).

[10] *Ibid*., at p. 51I.

[11] See esp. Professor Koh Kheng Lian, *Criminal Law* (Singapore Law Series, No. 3) at p. 3. ("… there is no more room left for the reception of English criminal law (both common-law and statute law) … in view of the comprehensive penal legislation passed by the Singapore legislature.").

[12] The most sustained attack on *Edwards* is by A.A.S. Zuckerman in his article "The Third Exception to the Woolmington Rule" (1976) 92 L.Q.R. 402. The rule was criticised on the basis that it is historically inaccurate and conceptually unsound.

in the exception part, then the burden of proof lies on the accused to prove that fact; The distinction is time-honoured and widespread in use.[13] However, it is reasonably clear that there is no hard and fast rule which can determine generally what facts belong inherently to a defining part and what facts belong to the exception. Professor Julius Stone argues forcefully in the following way:

> "What is the difference in logic between a quality of a class as contained in the definition of the class, and a quality of a class as contained in an exception to the class? The answer appears to be — none at all. Every qualification of a class can equally be stated without any change of meaning as an exception to a class not so qualified. Thus the proposition 'All animals have four legs except gorillas', and the proposition 'All animals which are not gorillas have four legs', are, so far as their meanings are concerned, identical."[14]

To illustrate this point in the context of section 3 of the Misuse of Drugs Act 1973, the fact of lack of authorisation can be regarded either as part of the defining part of the offence of trafficking or as part of an exception to it. Thus, the formula as used in the Act "Except as authorised by this Act or the regulations made thereunder, it shall be an offence for a person... to traffic in a controlled drug" can be reformulated to "It shall be an offence for a person unauthorised by this Act or the regulations made thereunder to traffic in a controlled drug". The meanings of both these sentences are the same. Yet, in the first case, applying *Edwards* would place the burden on the defendant, as the Court decided. If the section had been worded in the way as reformulated above, applying *Edwards* would have placed the burden on the prosecution. This way of allocating the burden can hardly be satisfactory. It can be justified, perhaps, only by showing that Parliament actually intended the result, that is to say, Parliament knew the effect the difference in formulation would have on the allocation of the burden.

If there is no code of practice either in Parliament or used by Parliamentary draftsmen with regard to this problem, then, as Julius Stone points out, the result will depend on the "accidents of draftsmanship"— hardly a reason at all, let alone a reason to *justify* placing the burden of proof on the defendant. What is clear about the *Edwards* rule is this: if mechanically applied (in the sense of identifying facts within an exception or a defining part of an offence), it avoids the fundamental question relating to the allocation of the burden of proof, *viz.,* are there good reasons which can justify departure from the fundamental rule placing the burden of proof on the prosecution?

[13] See, for instance, Ch. IV of the Penal Code (Cap. 103, Singapore Statutes, Revised Edition 1970).

[14] "Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd.* v. *Imperial Smelting Corporation, Ltd."* (1944) 60 L.Q.R. 262, at p. 280.

[15] It is unlikely that there is a uniform drafting practice to the effect that where it is intended to place the burden on the defendant, a certain formula such as "except" or "provided always" is used. Presumptions are frequently resorted to to impose the burden of proof on those against whom the presumptions operate. See for instance, section 30(2) Bills of Exchange Act (Cap. 28), sections 15 to 19 of the Misuse of Drugs Act (No. 5 of 1973).

Alternative Approaches

(a) *Section 106 of the Evidence Act*[16]

In *Tan Ah Tee,* the Court noted that the appellants had contended that section 106 would not assist the prosecution.[17] Since their Lordships applied *Edwards* they held that "it is unnecessary for the prosecution in proceedings under the Act [Misuse of Drugs Act] to rely on section 106".[18] Thus, they did not really examine whether this section has any use at all in allocating the burden of proof in statutes generally. There is no doubt that the rule in section 106 has been expressly disapproved by the Privy Council on at least four occasions.[19] The principle that he who has special knowledge of a relevant fact has the burden to prove that fact has also been denied validity in England.[20] Indeed, Lawton L.J. in *Edwards,* after examining the origins of the principle, confidently declared that "There is not, and never has been, a general rule of law that the mere fact that a matter lies peculiarly within the knowledge of the defendant is sufficient to cast the onus on him."[21] Against such a preponderance of authority deprecating this principle, it comes as no surprise that the Court in *Tan Ah Tee* exercised extreme caution in refraining from pronouncing on its applicability to the case. This is a missed opportunity which the Court could have used to establish proper limits to section 106. For one thing, the authorities which disapproved of the principle did so on the basis that it is a principle of general application. The principle may be more acceptable if confined to, say, trivial statutory offences in which there is a plurality of excuses or qualifications. Professor Cross thought that the rule is a rule of statutory interpretation "confined to cases in which the affirmative of negative averments is peculiarly within the knowledge of the accused".[22] The simplest illustration of this limited rule is to be found in section 106 itself. Illustration (b) states "A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him". If the burden of proof were put on the prosecution, it would have to prove a negative fact, namely, that the accused did not have a ticket. The accused on the other hand would undoubtedly know whether he has a ticket or not — he only has to produce it to prove his innocence.

Apart from the limitation that the rule is only applicable in situations where the prosecution has to prove a negative fact and where the positive fact is peculiarly within the knowledge of the accused, two other limiting factors have been suggested. These are that the offence be a trivial one and that there is a plurality of ex-

16 S. 106 provides "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him," (Illustrations omitted)

17 [1980] 1 M.L.J. 49 at p. 51D.

18 *Ibid.*

19 *Attygalle* v. *R.* [1936] 2 All E.R. 116; *Seneviratne* v. *R.* [1936] 3 All E.R. 36; *Mary Ng* v. *R.* [1958] A.C. 173 (on appeal from Singapore); *Jayasena* v. *R.* [1970] A.C. 618.

20 *R.* v. *Spurge* [1961] 2 Q.B. 205; *R.* v. *Edwards (supra.).*

21 [1974] 3 W.L.R. 285 at p. 291C. This does not, however, mean that it is not a relevant factor in deciding together with other factors how the burden on an issue should be allocated: see generally, J.D. Heydon, *Evidence Cases and Materials,* Butterworths 1975, at pp. 14-17, and *post,* fn. 37.

22 *Cross on Evidence* (5th ed. 1979, Butterworths), p. 102.

culpatory conditions upon which an accused person can rely.[23] The case of *Turner*[24] (from which the rule emerged) illustrates these two limitations clearly. The accused was convicted of possession of game without authority and fined. He had to fall under any of ten qualifications listed in the statute to escape liability. The Court of King's Bench held that the burden of proof rested on the accused to prove that he did fall under any one of the qualifications. To place the burden on the prosecution would give rise to a "moral impossibility of ever convicting upon such an information". Lord Ellenborough's judgment establishes the *rationale* of the rule:

> "If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet,* but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended?"[25]

It is pertinent at this point to discuss how section 106 might be prayed in aid in *Tan Ah Tee's* case. The primary condition appears to be reasonably satisfied: the prosecution has to prove a negative fact, namely, the lack of authorisation whereas the accused, in order to exculpate himself, need only prove he is an authorised person, a fact which is likely to be within his knowledge. Insofar as the factor that there must be a plurality of excusing conditions is concerned, that too appears to be satisfied. According to the regulations made under the Act, a large number of people are authorised to "traffic" in controlled drugs.[26] These include persons authorised by a licence issued by the Minister,[27] practitioners,[28] pharmacists,[29] persons lawfully conducting a retail pharmacy business,[30] laboratory staff,[31] analysts[32] and certain nurses.[33] To require the prosecution to prove that the accused does not fall within any of these categories is quite unreasonable. An accused person, however, could easily show that he was employed in any one of those occupations and thus prove that he had the necessary authority. The other factor — that the offence be a trivial one — is unlikely to be satisfied. No one can seriously argue that a charge attracting the death penalty is a trivial offence. It may be argued, however, that this last factor is outweighed by the other considerations which conduce towards placing the burden on the defendant. Thus, it is submitted that the Court in *Tan Ah Tee* could have relied on section 106 to place the burden on the defendant to prove authorisation.

23 Heydon, *op.cit*., p. 16.
24 (1816) 5 M. & S. 206.
25 *Ibid.*
26 Misuse of Drugs Regulations 1973 (S. 234, Singapore Subsidiary Legislation Supplement, July 1973), Part II.
27 *Ibid*., regulation 4.
28 *Ibid*., regulations 7(2) (a), 8(2) (a). "Practitioner" under the regulations means "a medical practitioner, dentist or veterinary surgeon" (Regulation 2).
29 *Ibid*., regulations 7(2) (b), 8(2) (b).
30 *Ibid*., regulations 7(2) (c), 8(2) (c).
31 *Ibid*., regulations 7(2) (e), 8(2) (e).
32 *Ibid*., regulations 7(2) (f), 8(2) (f).
33 *Ibid*., regulations 7(2)(d), 8(2)(d).

(b) *Section 105 of the Evidence Act*[34]

The Court in *Tan Ah Tee* did not refer to this section at all. Yet, this section, on the face of it, appears to be of direct relevance. It is the general provision placing the legal burden[35] on the accused to prove excusing conditions. The relevant part applicable to *Tan Ah Tee's* case is as follows: "Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case... within any special exception ... contained in any law defining the offence, is upon him".

Read literally, this section appears to place the burden on the defendant to prove authorisation if one regards the phrase "Except as authorized..." in section 3 of the Misuse of Drugs Act 1973 as a special exception contained in the section defining the offence of trafficking. It is submitted here that from the viewpoint of strict law, this is the correct section to apply with the result, of course, that the accused has the legal burden to prove authorisation. The appeal could have been dismissed on this ground alone.

The application of this section is not without its problems. It has to be acknowledged that the test is, as in the *Edwards* case, premised on the court being able to distinguish between an exception and the defining part of an offence. This distinction, as has been discussed above,[35a] is a purely formalistic one. If it can be shown however that the draftsman (effectuating the intent of Parliament) adopted a certain mode of expressing an exception with the intention of placing the burden of proof on the accused, then, the test is more defensible. In this case, it is noteworthy that sections 3 to 7 of the Act contain the formula "Except as authorized..." and that these sections are differently drafted from the remaining five sections defining other offences under the Act. Is this fact enough to indicate the intention of Parliament? The use of words such as "except" and "provided always" has been judicially recognised as giving rise to exceptions and provisos.[36] Bearing in mind that what is being applied is a purely

[34] Section 105 provides "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances." (Illustrations omitted)

[35] The Privy Council decision in *Jayasena (supra.)* held that the burden mentioned in section 105 is the legal burden as distinct from the evidential burden. As to the two burdens, see, *e.g., Cross on Evidence (supra.),* Ch. IV, Heydon, *op. cit*., Ch. 2. The effects of the distinction are discussed by Professor G.L. Peiris, "The Burden of Proof and Standards of Proof in Criminal Proceedings: A Comparative Study of English Law and A Codified Asian System" (1980) 22 Mal. L.R. 66.

[35a] See pp. 268-269, *supra.*

[36] See especially *Nimmo* v. *Alexander Cowan & Sons Ltd.* [1968] A.C. 107. Cf. *Gatland* v. *Metro. Police Comm.* [1968] 2 Q.B. 279; *Leathly* v. *Drummond* [1972] R.T.R. 293; *Robertson v. Bannister* [1973] R.T.R. 109. And see discussion by Zuckerman, *supra*., at p. 416 *et. seq.* The learned writer's explanation that there appears to be standard rules on interpreting words like "except" and "provided always" is that there are "standard considerations usually present" in a class of cases, *e.g.,* licences and thus "have naturally produced similar results in a considerable number of cases" (p. 420). This does not detract from the proposition that the allocation of the burden is still a matter of policy and practical considerations. See also, Stone, *supra.*

formalistic test, it is submitted that section 3, properly construed, does place the burden on the accused to prove authorisation. This is because authorization is intended by Parliament to be an exception to the general prohibition against trafficking.

(c) *Policy Analysis*[37]

So far, it has been argued that the adoption by the Court in *Tan Ah Tee* of the *Edwards* rule was undesirable (because it relied on a formal test) and unnecessary (because local law, in the circumstances, does provide equally good, if not better, alternatives). The submission is that the Court is under a duty to apply local law when that is available. If the Court regarded the matter as *res integra,* it is further submitted that *Edwards* is a poor choice as it does not provide an independent set of principles which can justify imposing a burden on the defendant, relying as it does on the formalistic distinction between the defining part of an offence and its exceptions.

Is there a principle or set of principles which could justify every departure from the general rule that the prosecution must prove every element of the offence? The answer seems to be: No. Professor Wigmore considered the matter of allocating the burden of proof to be "a question of policy and fairness based on experience in different situations".[38] It follows from this that in any case in which the prosecution alleges that the burden is on the accused, convincing reasons must be given as to why that should be so. In *Tan Ah Tee,* the justification for placing the burden on the defendant could be based on the difficulty of proving a plurality of negative facts (that neither the defendant nor his accomplice were doctors, nurses or, for that matter, anyone licensed by the Act to traffic in drugs) and on the relative ease on the part of the defendants to show that they were authorised. It must be noted, however, that the offence carries the death penalty. This factor — the severity of the offence — should be carefully considered. The solution may be to hold that the defendants shoulder only an evidential burden and not the burden of proof on the issue of authorisation.[39] This means that the defendants would have the duty of providing evidence to show that they were authorised. For example, they might provide evidence to show that they were laboratory staff[40] authorised to traffic in the drugs. There would then be a duty on the prosecution to prove to the judge that the defendants were not so authorised.

The prosecution might do this, for instance, by proving that the defendants were not employed as laboratory workers. This is different from the situation where the prosecution has the legal and evidential burdens of proving that the defendants do not fall at all into any of

[37] See, *e.g.,* Wigmore, *A Treatise on the Anglo-American System of Evidence* (3 ed., 1940, Little, Brown & Co.), Vol. IX, S. 2483 *et. seq.;* Zuckerman, *supra.*, Stone, *supra.* Professor Heydon *(op. cit.*, at pp. 14-17) discusses some of the factors taken into account by courts in allocating the burden. These include: the difficulty of proving a negative, a fact peculiarly within one's party knowledge, express statutory provisions, provisos in statutes, whether a fact is common or uncommon.

[38] Wigmore, *op. cit.*, at p. 275.

[39] See fn. 35 above.

[40] See fn. 31 above.

the classes of authorised persons. If the burden were placed on the defendants to adduce some evidence that they were authorised, the prosecution would no longer be "shooting in the dark", as it were: the prosecution's burden would simply be to rebut the evidence set up by the defendants. In this way, the time-honoured principle that the prosecution must prove every element of the offence is respected. As a matter of law, the prosecution would still have the burden of proving that the accused persons were unauthorised to traffic in drugs. But the initial burden of providing some evidence to suggest that they were authorised persons would rest with the defendants. To put it another way, the prosecution would still have the burden of "disproof" on the issue of authorisation.[41]

Conclusion

It is unfortunate that the Court in *Tan Ah Tee* adopted the *Edwards* rule. This is neither warranted in law nor in policy. The Court should not have given the go-by to local statutory provisions in preference for an English common-law rule of dubious origin and questionable utility. The duty to provide reasons of substance for departing from the "golden rule" that the prosecution must prove every element of the offence should not be allowed to be discharged by resort to a formalistic distinction. Although it appears inevitable now that *Edwards* is part of the law in Singapore, it may still be possible to hold that in arguing that the burden on an issue rests with the defendant, the prosecution must show that Parliament intended that to be the case or that good reasons of substance exist to justify departure from the general rule. The preferable solution is to hold that the burden on the defendant in such a case is an evidential and not a legal burden.[42]

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[41] As to the meaning of "disprove", see s. 3(4) Evidence Act (*supra*.).

[42] If s. 105 or 106 were applied, then this course may not be proper as the Privy Council in *Jayasena (supra.)* has already held that the burden mentioned is the legal burden and not the evidential burden. See fn. 35 above.