THE BURDEN OF PROOF IN CRIMINAL JUSTICE

1 The Sense of Proof Beyond Reasonable Doubt

Whatever is thought to be the purposes of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his guilt must be proved beyond reasonable doubt. Perhaps the most eloquent statement of reason for this is to be found in the opinion of Brennan J in the United States Supreme Court decision in Re Winship: 2

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction . . . Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

The first reason is drawn from the perspective of the accused person and is a moral one. Before the community may visit the severe consequences of a conviction on an accused person, its courts must be morally certain of his guilt. Absolute certainty is almost always impossible in the judicial fact-finding process. The standard which the common law tradition has developed is, however, one which requires the court to consider and reject all reasonable doubt or explanation before it convicts. 3

It should, in Singapore, be added that the accused person stands to lose more than his liberty: he may be subjected to corporal punishment and, in a significant number of prosecutions, he may lose his life. 4 In the language of rights, it

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1 This discussion is concerned primarily with the burden of proof in criminal proceedings at the end of the day when all the evidence is heard. It does not deal with the vexed question of the burden of proof at the end of the prosecution’s case, a matter which implicates the privilege against self-incrimination and is perhaps more appropriately discussed in the context of the privilege as a whole. It also does not deal with the burden of proof in civil proceedings where the presumption of innocence has no application.


4 A cursory reading of the Penal Code Cap. 224, 1985 Rev. Ed. will reveal, for example, that the mandatory punishment for murder is death under s. 302 and that the offence of voluntarily causing grievous hurt by dangerous weapons or means is punishable with caning under s. 326. These punishments are by no means historical relics. A mandatory death penalty is provided for trafficking over certain quantities under the Misuse of Drugs Act Cap. 185, 1985 Rev. Ed., first enacted in 1973 and mandatory caning is prescribed for illegal immigrants under the Immigration Act Cap. 133, 1985 Rev. Ed., first introduced in 1980.
may be said that the accused person has the right not to be convicted unless his guilt has been demonstrated beyond reasonable doubt.

The second reason emphasises the interest of the community in maintaining the reasonable doubt standard. The criminal law exists to protect the members of the community from activity which injures them without justifiable cause in some way or other. If conviction and punishment follow from evidence which leaves a reasonable doubt as to guilt, there is a reasonable possibility that an innocent man is being punished. If this possibility turns out to be true, as it will in a significant number of cases if conviction is possible notwithstanding reasonable doubt, the criminal law is self-defeating. The courts, police force and prison officials will be no different from any other criminal who injure the members of the community, except that these institutions are far more powerful than the average criminal. The criminal law will do the very thing it sets out to prevent. Right thinking members of this community would then, justifiably, withdraw their trust and confidence in the criminal law. Their peace of mind in the assurance that only the guilty will be punished, and not the innocent, will be destroyed. The moral force of the criminal law will be undermined.

It is for these two compelling reasons that the law of criminal evidence has placed particular importance in the need to protect the innocent from conviction.5 We see it operating prominently at the stage of admissibility of evidence: elaborate rules are designed to exclude potentially unreliable evidence and evidence which might give rise to a high level of prejudice. We see it finally at the stage of evaluation of evidence where all reasonable doubt and explanation must be rejected before a finding of guilt.6

The existence of the principle of proof beyond reasonable doubt is unchallenged in the common law world. In the English common law, it was elegantly affirmed by the House of Lords in the celebrated judgement of Viscount Sankey in *DPP v. Woolmington*.7 The United States Supreme

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6 For example, the hearsay rule aims to filter unreliable evidence and the rules concerning similar facts and cross-examination of the accused on his character attempt to minimise prejudicial evidence. The corroboration rules also seek to deal with unreliable evidence, but at the stage of evaluation of evidence. See generally, Chin, *Evidence* (1988), Caps. 2, 5 and 10.

7 [1935] A.C. 462. It has since been almost compulsory for academic works to quote or refer to this passage at p. 481:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt subject to . . . the defence of insanity and subject also to any statutory exception.

Court in *Re Winship*\(^8\) has held that the reasonable doubt rule has constitutional force under the Due Process provisions of the United States Constitution. The Supreme Court of Canada in *R v. Oakes*\(^9\) has decided that it is embodied in the protection of the presumption of innocence under the Charter of Rights and Freedoms. The Court of Appeal of Hong Kong came to a similar decision under their recently enacted Bill of Rights in *The Queen v. Sin Yau-Ming*.\(^10\) Provisions protecting the presumption of innocence is found, outside the common law world, in Article 6(2) of the European Convention on Human Rights and Article 11(1) of the Universal Declaration of Human Rights.

Although, in Singapore and Malaysia, the law of evidence is governed principally by the Evidence Act,\(^11\) the principle of proof beyond reasonable doubt seems to apply with equal force. S. 103 illustration (a) makes it clear that the prosecution must prove that the accused committed the crime for which he is charged. In an appeal from the Federal Court of Malaysia in *PP v. Yuvaraj*,\(^12\) Lord Diplock ruled that “prove” in this provision of the evidence Act must mean proof beyond all reasonable doubt. This was felt to be “historic” and “fundamental to the administration of the justice under the common law” and was not altered by the Evidence Act. Lord Diplock went further in *Ong Ah Chuan v. PP*,\(^13\) an appeal from the Court of Criminal Appeal of Singapore, to hold that the principle is a fundamental rule of natural justice constitutionally protected in Singapore by Article 9 and Article 12:\(^14\)

One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has

\(^{8}\) Above, note 1.
\(^{10}\) A copy of the judgement is not yet available. It is commented on in Litton, “Courting Chaos With the Bill of Rights”, *South China Morning Post*, 24 Oct 1991, p. 17. This judgement has since been reported in [1992] 1 H.K.C.L.R 127.
\(^{13}\) [1981] 1 M.L.J. 64, at p. 71. See the detailed treatment below.
been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal’s being satisfied that all the physical and mental elements of the offence with which he is charged. . .were present on the part of the accused.

2 Examining the Exceptions: a Constitutional Dimension and an Exercise in Statutory Interpretation

One may be tempted to conclude that, with its impressive legal pedigree and supported by such rhetoric, the principle of proof beyond reasonable doubt is alive and well and little more need be said of it. Unfortunately, this is not so and the principle has been severely eroded and is in danger of being crippled beyond recognition by what may sometimes appear to be a concerted action of both the Legislature and the Judiciary. The makers and interpreters of our law seem bent on the creation of exceptions to the principle of proof beyond reasonable doubt for a host of insubstantial and unsubstantiated reasons. Exceptions, we are led to believe, are to be found in no less than five situations: when the accused wishes to rely on a proviso or exception in the Penal Code, when he relies on a proviso or exception in any law defining an offence, when a fact is especially within the knowledge of the accused, when the accused wishes to raise an alibi and when there is a statutory presumption. This is not to say that all our judges have been insensitive to this unsavoury trend. Indeed pockets of judicial rebellion are the only silver lining to this very dark cloud.

2.1 A Constitutional Dimension

The rationale for each of these exceptions will, in the course of this discussion, be scrutinised in some detail. It is nevertheless useful to make a prognosis, as it were, of any attempt to justify a compromise to the principle of proof beyond reasonable doubt. If any justification is to be convincing in the least, it must be clearly demonstrated that such a compromise is necessitated by a public interest which is sufficient to override the very strong and historic public interest in the protection of the innocent from conviction. This kind of analysis holds not merely a jurisprudential interest. We have seen that the cumulative effect of Ong Ah Chuan and Yuvaraj is that the principle of proof beyond reasonable doubt, or its proxy, the presumption of innocence, is constitutionally protected in Singapore and Malaysia. However, as with most fundamental liberties, it may theoretically be overtaken if a clearly demonstrated public interest of surpassing importance is at stake. Thus the jurisprudential enquiry dovetails with constitutional scrutiny. The constitutional dimension to the principle of proof beyond reasonable doubt is no stranger to courts within and without the common law world. Judicial review of exceptions to the principle of proof beyond reasonable doubt occurred in
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Ong Ah Chuan, and is most clearly seen in pronouncements of the Canadian Supreme Court interpreting their Charter of Rights and Freedoms, and more recently of The European Court of Human Rights under the European Convention on Human Rights.¹⁵

2.2 An Exercise in Statutory Interpretation

This discussion has another level which is logically prior to the constitutional question. This is the stage of statutory interpretation. Ought a particular statutory provision be interpreted so as to create an exception to the principle of proof beyond reasonable doubt? First, there are those provisions which are comparatively more recent. These normally expressly place the burden of proof of particular facts on the accused person upon proof of other facts. Here it is crucial to bear in mind the principle of strict construction against derogation from an important constitutional right or value.¹⁶ Although it is perhaps of more significance in England where there is no enforceable Bill of Rights, it does have the purpose in Singapore of allowing the judiciary to prevent the violation of fundamental liberties without having to expressly strike a statute down. This has obvious political advantages. There is, secondly, the provisions of the Evidence Act. The same principle of strict construction applies with full force. But there is one other consideration. The Evidence Act is a statutory provision of some antiquity¹⁷ drafted as a comprehensive Code, or nearly so.¹⁸ This means that it has to be treated with some degree of sensitivity. The literalist view of statutory interpretation is now clearly out of fashion and it is even more foolish to adopt it in the context of the Evidence Act.¹⁹ A hundred years is a long time in the context of legal development and if a Code such as the Evidence Act is to retain its relevance and not degenerate into an anachronistic obstacle to justice with nothing to commend itself but age, its provisions must be interpreted purposively and with an eye on modern conceptions of criminal justice. This is not as startling as it sounds. Indeed our courts have been, albeit inconsistently, doing just this in these and other provisions of the Evidence Act.²⁰

¹⁵ See below for further discussion in the context of statutory presumptions.
¹⁶ Cross, Statutory Interpretation (1976), Cap. 7.
¹⁷ It first came into operation in Singapore in 1893.
¹⁸ That Stephen intended his work to be exhaustive is clear from the introduction in Stephen, Digest of the Law of Evidence (5th Ed., 1886). It appears however that somewhere in the legislative process there was a loss of faith in that ambition. S. 2(2), which appears to continue in operation common law rules consistent with the Act, is inconsistent with Stephen’s underlying philosophy and has never been locally used or interpreted.
²⁰ This will be obvious from the discussion which follows. Apart from the burden of proof, our courts have been particularly flexible with the Evidence Act in the context of, for example, similar fact evidence and corroboration: see Chin, Evidence, Caps. 5 and 10.
We turn now to consider each of these exceptions.

3 Exceptions and Provisos in the Penal Code: a Historical Hiccup

In 1969 the Privy Council in Jayasena v. The Queen\(^2\) dealt a severe blow to the principle of proof beyond reasonable doubt. The Ceylon equivalent of s.107 of the Evidence Act\(^2\) was interpreted so as to cast the burden of proof on the accused to show on a balance of probability that he falls within the general or special exceptions or provisos in the Penal Code. Take the case of an accused person who contends that he acted in the exercise of the right of private defence. The enormity of this interpretation is this: the accused stands to be convicted even if there is reasonable doubt that he so acted and although he has provided a reasonable explanation of his actions. The reason is that the accused may well be able to do just only that and not go further to prove his contention on a balance of probability. Our courts are bound to convict under these circumstances notwithstanding the existence of significant doubt that the accused is guilty.

3.1 On principle

It must first be asked whether there is any justification in principle or in policy for this serious derogation from the principle of proof beyond reasonable doubt. Few have attempted to argue that Jayasena is so justified. This is not surprising for it would require the advocate of such a view to demonstrate that there should be a distinction of substance between proof of the elements of the offence, which the prosecutor must show beyond reasonable doubt and proof of the ingredients of the defence or exception, which the accused must show on a balance of probability. There is clearly no such distinction.\(^2\) The absurdity of Jayasena is easily illustrated. The prosecution alleges that an accused person has caused death with the intention of causing death. The accused produces enough evidence to raise a reasonable doubt as to the existence of the requisite intention but he cannot prove it on a balance of probability. He is acquitted. Another accused person facing the same allegation succeeds in raising a reasonable doubt that he acted in exercise of the right of private defence, but cannot prove it on a balance of probability. He hangs. On this matter of, literally, life and death, the law according to Jayasena is capricious and arbitrary.

\(^2\) S. 107 reads, where relevant, 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 . . . is upon him, and the court shall presume the absence of such circumstances.
\(^2\) See the discussion below in the context of exceptions and provisos in other statutes.
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True enough, in the Penal Code, the sections prescribing the elements of the offence are spatially distinct from the sections or provisos providing for defences and excuses. That is not a distinction in substance but is probably reflective of drafting style. The danger is that one may be mislead into thinking that it is something more. What must be realised is that the provisions concerning both offence and defence serve the same function: they define the parameters of criminal liability and therefore guilt. If the court, as a matter of public interest must, be sure of the existence of the elements of the offence to convict, so too must public interest demand that it be sure of the non-existence of the defence. It is telling that Lord Devlin, that great criminal judge, in *Jayasena* offered not a shred of argument that his interpretation of the Evidence Act is either desirable or justifiable on principle or policy. It is necessary to move on to consider the validity of the reasons which Lord Devlin did give for this startling interpretation of the Evidence Act.

3.2 Semantics

The advice of the Privy Council rests on two pillars which have nothing whatever to do with principle or policy. The first is the simple argument that the words of the Evidence Act can bear no other interpretation. The accused bears the “burden of proving”. At the very least, this means that the accused must prove on a balance of probability. Anyone mindful of the strong public interest in proof beyond reasonable doubt would immediately ask if the words of the Evidence Act were capable of bearing a meaning which is not in derogation of the principle. Indeed there was such an alternative interpretation presented to the Privy Council. It is that the “burden of proving” may also bear the meaning of an evidential burden and in the context of exceptions and provisos in the Penal Code, it should and must. But Lord Devlin rejected this suggestion, the only one which would keep the principle intact. Why? The evidential burden is the burden to raise sufficient evidence for the trier of fact to consider the existence of the exception or proviso. It cannot, it is said, be described as a burden of “proof”, which must mean demonstrating positively to the court that the exception or proviso exists. Lord Devlin declared, “Their Lordships do not understand what is meant by the phrase ‘evidential burden of proof’.”

This is stunning. It would appear that it is only their Lordships who do not so understand. As long ago as in 1898, the great evidence scholar, James Bradley Thayer, had identified the two principal meanings of the phrase “burden of proof” in Anglo-American common law. In modern terminology, the first is the persuasive burden to establish the proposition at the

24 Cap. 224, 1985 Rev. Ed.
end of the case, and the second is the evidential burden to produce enough evidence to raise the issue. Thayer remarked on the “indiscriminate use of the phrase...in which it may mean either or both of the others”. Whatever linguistic elegance may dictate, the fact is that the phrase “burden of proof” had become a term of art capable of bearing either meaning, depending on the context in which it is used. Notwithstanding the semantic pedantry of the Privy Council in Jayasena, the practice of using the phrase to bear either of the two meanings has persisted to this day in the common law world. Of the two meanings, it is clear that the “evidential burden” meaning must prevail. This preserves the principle of proof beyond reasonable doubt because, at the end of the day, it is the prosecution who must still satisfy the trier of fact that the exception or proviso does not apply. Placing the evidential burden on the accused is easily justified in that it would be too unreasonable and onerous on the prosecution to anticipate and produce evidence, in the first instance, to disprove every conceivable exception or proviso. It makes absolute sense to require the accused to come up with at least a reasonable possibility that the alleged exception is founded before the court may consider it.

Their Lordships felt vindicated in their interpretation by the definition of “proving” found in s. 3 of the Evidence Act. A fact is proved, wrote Stephen, the author of the Evidence Act, if “a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists”. The Privy Council thought it quite clear that a “prudent man” will not act on anything under any circumstances unless he has proof on a balance of probability that it exists. This is, of course, quite unfounded. Stephen had the foresight to leave the degree of probability unspecified but

26 That the term has two possible meanings is clear from the judgement of the Federal Court of Malaysia in International Times v. Leong Ho Yuan [1980] 2 M.L.J. 86 and the earlier decision of Lee Hon Hoe J. in Wong Siew Ping v. PP [1967] 1 M.L.J. 56. Lord Denning in his influential piece “Presumptions and Burdens” 61 L.Q.R. 379 (1945) lamented that “the confusion has persisted” notwithstanding the work of Thayer.

27 Although placing the evidential burden on the accused is strictly in violation of the principle of proof beyond reasonable doubt, see R v. Nagy 45 C.C.C. (3d) 350 (Ont. C.A.), (as a conviction may well follow if the accused is either unable or unwilling to lead evidence and there is no evidence at all on the issue), the right which is more directly implicated is the privilege against self-incrimination which is in decline in many jurisdictions: see my brief discussion in “The Confessions Regime in Singapore” [1991] 3 M.L.J. lvii, at pp. lviii and lviv. The justification for exceptions to the privilege ought, more appropriately, to be considered in an examination of the privilege as a whole in Singapore.

28 [1969] 2 M.L.J. 89, at p. 91. Associate Professor Chin has pointed out to me that, when the Evidence Acts of what is now the Commonwealth were enacted in the last century, it was far from clear that the “historic distinction” prevailed. What is unquestionable is that when Lord Diplock wrote the advice of the Privy Council, the distinction between proof in criminal and civil cases had been indisputably established in at least the common law world.
tacked on to the standard of the prudent man, thus effectively building into the definition the community’s assessment of how important the protection of the innocent accused against conviction is. The “prudent man” is likely to require less than proof on a balance of probability, if the risk of error is so intolerable, as the conviction of an innocent man is. Placing the evidential burden on the accused would mean that the accused has to come up with evidence sufficient to raise a reasonable doubt or to provide a reasonable explanation. Surely it would involve no verbal gymnastics to say that a “prudent man” ought under the circumstances of a criminal prosecution act on the supposition that an exception applies if the accused is able to provide an explanation which leaves him in reasonable doubt that it does. The Privy Council itself in Yuvaraj 28 drew on the flexibility of the definition in s. 3 to affirm the “historic distinction” between proof beyond reasonable doubt in criminal prosecutions and proof on a balance of probability in civil cases. There is no reason not to do so to place an evidential burden on the accused in the context of exceptions and provisos in the Penal Code.

3.3 History

Perhaps it was the argument from history that weighed most heavily on Their Lordships’ minds. The House of Lords decision in 1935 in Woolmington v. DPP 29 which finally settled the common law of England in favour of placing an evidential burden on the accused had changed the law. The Evidence Act, drafted as it was long before 1935, embodied the old position of placing the persuasive burden on the accused. The common law could be changed by the courts but the Act had to be obeyed until amended by Parliament.

Fortunately history itself is susceptible to various interpretations. Francis Adams has advanced the plausible alternative view that it is more correct to say that Woolmington settled rather than changed the law. 30 The law before that House of Lords decision was confused. The Evidence Act crystallised, not the clear position that the accused bore the persuasive burden, but the confusion as to whether he bore the persuasive or the evidential burden. This historical view is supported by Thayer’s masterly analysis which concluded that there was “undiscriminated use of the phrase”, sometimes meaning evidential burden and sometimes persuasive. That Stephen himself was infected with this “undiscriminated use” is evident from a perusal of his Digest of the Law of Evidence which he wrote after the Indian Evidence Act. The phrase is used clearly to mean

persuasive burden at some points and to mean evidential or even other kinds of burdens at other points.\textsuperscript{31}

What this amounts to is that when the phrase “burden of proof” or its derivation are used in the Evidence Act, they may either be persuasive or evidential depending on its context. In the context of the prosecution’s burden to prove the crime in s. 103, it means persuasive burden. In the context of s. 107 the Act places an evidential burden on the accused to prove the exceptions and provisos. Indeed reading both burdens as persuasive will mean that one section contradicts the other. S. 103 requires proof beyond reasonable doubt of guilt but s. 107 requires only a balanced probability of the absence of an exception, a crucial element of guilt.

3.4 Local Initiatives

It is sad that although \textit{Jayasena}, an appeal from Ceylon, was not strictly binding on Singapore, it now holds complete sway. The Court of Criminal Appeal accepted without question the authority of the Privy Council in \textit{N. Govindasamy v. P.P.}\textsuperscript{32} in the context of the mitigatory defence of grave and sudden provocation. More recently the High Court has on two occasions applied the interpretation of the Privy Council: for the defence of mistake of fact in \textit{P.P. v. Teo Eng Chan},\textsuperscript{33} and for the defences of sudden fight, grave and sudden provocation, exceeding private defence and private defence in \textit{P.P. v. Chan Kim Choi.}\textsuperscript{34}

The tragedy is that before \textit{Jayasena}, although there was an initial period of uncertainty, the courts of Singapore and Malaysia had clearly settled the law in favour of the more enlightened interpretation of placing only the evidential burden on the accused. These authorities are not even mentioned in the post-Jayasena decisions and seemed to have been buried, as it were, without a decent funeral. It is time they were resurrected to remind us of what our law was and to show us what it now should be. The first

\textsuperscript{31} For example, Article 94 reads, “... The burden of proving that any person has been guilty of a crime ... is on the person who asserts it ...”. This burden clearly means the persuasive burden or both the persuasive and the evidential burden. Article 96 however says, “The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence ... but the burden may in the course of a case be shifted from one side to the other ...”. This burden cannot, of course, be the persuasive burden as that never shifts. It probably refers to the tactical or provisional burden which does.

\textsuperscript{32} [1976] 2 M.L.J. 49, at p. 52. Although there is authority that Privy Council decisions from a foreign jurisdiction are binding (\textit{Khalid Panjang v. P.P.} [1964] M.L.J. 108), they must be based on the new erroneous assumption that the Privy Council is the highest court of the land and should no longer be followed. See the comprehensive argument in Phang, Rajah and Tan, "The Case for a Re-appraisal and Restatement of the Doctrine of Stare Decisis in Singapore" [1990] 2 M.L.J. xcii.


\textsuperscript{34} [1989] 1 M.L.J. 404, at p. 470.
appellate decision to take a clear position was Soh Cheow Hor v. PP. Rose CJ in the Court of Criminal Appeal said:\(^{35}\)

Whatever the position may have been in the past, it appears now to be the accepted rule that when an accused person endeavours to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist.

Eight years later, in the year before Jayasena was decided, the Federal Court on an appeal from Singapore in Mohamed Salleh v. PP\(^{36}\) affirmed this interpretation in the context of grave and sudden provocation. It can be seen that for a good number of years before Jayasena this was the established interpretation in Singapore.

Across the Causeway, the Court of Appeal of the Federation of Malaya in Looi Wooi Saik v. PP had authoritatively held that:\(^{37}\)

\[\ldots\text{if the defence of provocation is to succeed there must be something to support it}\ldots\text{But if there is anything to support it then the burden, which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation.}\]

The judgement of Thomson CJ is in stark contrast to the blinkered advice of the Privy Council. It displayed a keen appreciation of the values at stake in the question of the nature of the burden on the accused. It was clear to the court that any attempt to interpret the Evidence Act so as to cast the persuasive burden on the accused would come into direct collision with the presumption of innocence found in the Malaysian equivalent of s. 103 illustration a). It was equally clear to the court that the presumption of innocence must prevail. The prosecution bears the persuasive burden to show that the accused “has committed the crime”. It must demonstrate “the guilt” of the accused person, not simply that the elements within the definition section of the offence are satisfied. Both the definitions of offence and defence perform essentially the same function: together they define the meaning of guilt. It is difficult to improve on the language of Thomson CJ, who well deserved the distinction of subsequently becoming the first Lord President of the Federation of Malaysia:

Where there is any reasonable doubt as to whether as to whether the accused person has brought himself within the exception of provocation

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that must in turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him.38

3.5 Living with Jayasena

It remains to discuss two other ways in which Jayasena has had a deleterious effect on the coherence and rationality of the law of evidence in Singapore. The first concerns the position of exceptions and provisos which “ipso facto involves ... an element of the offence” that the prosecution must prove. The classic example is the defence of accident. The Privy Council felt that it was sufficient for the accused person to raise a reasonable doubt of accident. Chin rightly observes that this reduces the rigours of the principal ruling.39 Be that as it may, this concession makes the decision internally inconsistent and quite incoherent. According to s. 107 all the exceptions and provisos clearly stand on the same footing. If the “burden of proving” is a persuasive one, then the accused must bear the persuasive burden for all of them. There is nothing to justify different treatment of different exceptions. Pinsler follows Jayasena to its logical and frightening conclusion and declares this aspect of the judgement to be “not wholly satisfactory because section 107 imposes the burden of proof on the accused in respect of all defences under the Penal Code, including accident”.40

The Privy Council obviously could not live with the full effect of its own literalist philosophy. But this twinge of conscience adds another layer of senseless refinement. Not only is a distinction to be drawn between offence

38 A word must be said of perhaps the only flaw in that decision. This concerns the defence of “insanity”, or more accurately, unsoundness of mind. The Court felt that the pronouncements had no necessary application to this particular defence and that it was “in a class of its own”. The Court was no doubt swayed by a corresponding lapse in Woolmington where the House of Lords created an exception for insanity in the English common law. The insanity rule is now well recognised to be a concession to a quirk of English legal history. It is sometimes argued that the rule can be justified because of the undue burden that would otherwise fall on the prosecution. As we shall see this kind of justification is not unique to the insanity rule and the plight of the prosecution can be adequately met by the imposition of an evidential burden on the accused. Indeed the existence of this anomaly in England is tolerable only because of the rarity of the plea since the abolition of the death penalty. The same cannot be said of Singapore where the death penalty is a living reality and pleas of unsoundness of mind far from extinct. Fortunately, in the Evidence Act, as far as the burden of proof is concerned, unsoundness of mind is placed on the same footing as all other defences. The same rule must apply. It was so held in a decision of the Federal Court in Goh Yoke v. W[1970] 1 M.L.J. 63, at p.66, which was decided shortly before Jayasena. Ong Hock Thye CJ (Malaya) said: . . . the evidence as a whole must be sufficient to exclude any reasonable doubt regarding the sanity of an accused person pleading unsoundness of mind as a defence.

39 Evidence, at pp. 156–57.

40 Evidence Advocacy and the Litigation Process, at p. 165.
and defence, it is also necessary to pick out the defences which affect the prosecution’s case and those which do not. It does not take much discussion to show the absurdity of it all in its full glory. An accused person charged with murder pleads that he killed by accident. He succeeds if he raises a reasonable doubt of accident. Another accused pleads private defence. He fails and hangs unless he can do more than raise a reasonable doubt that he acted in private defence.

And what is one to do with defences which may or may not affect the prosecution’s case, depending on the particular circumstances of the defence? Take unsoundness of mind, for example. A person accused of murder pleads unsoundness of mind on the ground that his mental illness led him to believe that the victim was an animal. This affects the prosecution’s case as raising a reasonable doubt as to this defence would \textit{ipso facto} put in doubt the essential element of an intention to kill a human being. He succeeds if he raises a reasonable doubt. Another accused faced with a similar charge admits that he intended to kill the victim but argues that because of mental illness he was under the deluded belief that the victim had the power to resurrect himself. This does not affect the prosecution’s case and he fails if he can do no more than raise a reasonable doubt. These mindless distinctions do not speak well for our law of criminal evidence.

The second, and more disastrous, effect of \textit{Jayasena} is of wider import. If “the burden of proving” exceptions and provisos in the Penal Code is to be inflexibly interpreted as imposing a persuasive burden on the accused, all similar phrases must be similarly construed. The Evidence Act places the burden of proof on the accused for exceptions and provisos in any other law (than the Penal Code) under s. 107, for the defence of alibi under s. 105 illustration b) and for any fact especially within the knowledge of the accused under s. 108. There is finally a host of more specific statutory presumptions which require the accused to “prove” certain facts. If the \textit{Jayasena} philosophy is to be pursued, all of these would become exceptions to the principle of proof beyond reasonable doubt and there would be more than a reasonable doubt that the presumption of innocence is dead in Singapore. We turn now to consider each of these potential exceptions.

\textbf{4 Exceptions and Provisos in Any Other Law: an Incipient Evil}

The Evidence Act places on the accused “the burden of proving the existence of circumstances bringing the case within . . . any special exception or proviso contained in. . . any law defining the offence”. Although this limb of s. 107 has been expressly applied in the Federal Court decision
in *Lee Chin Hock v. PP*\(^{41}\) and impliedly employed by the Court of Criminal Appeal in *Tan Ah Tee v. PP*.\(^{42}\) It has never been clearly interpreted in Singapore or Malaysia. Following *Jayasena* however, this must mean that the accused bears the persuasive burden of proving the existence of special exceptions and provisos in each and every statutory offence outside the Penal Code. This is a crushing blow indeed to the principle of proof beyond reasonable doubt because, as we shall see, the crucial exercise of defining “exception or proviso” is intractably arbitrary and uncertain, and even if it could be satisfactorily defined, no known rationale exists for differentiating offence from exception for the purposes of allocating the persuasive burden. It is fortunate that this provision has not been extensively used, at least in the reported decisions, but as long as it is in existence and the law is as it stands, the possibility of it breaking out like a dormant AIDS virus looms large.

Although *Woolmington* preserved the principle of proof beyond reasonable doubt for the English common law exceptions (which broadly correspond with those in the Penal Code), it now seems that for statutory exceptions, this kind of heresy has crept in and would now appear to be quite established. This is because of the decisions of the Court of Appeal in *R v. Edwards*,\(^{43}\) and of the House of Lords in *R v. Hunt*.\(^{44}\) This portion of s. 107 is thus exactly mirrored by a corresponding common law rule. This has raised a storm of academic protest there and we would do well to be informed by the English critique.

### 4.1 Definition and Exception: a Quagmire of Confusion

If the difference between offence and exception is, as we have seen, spurious in the context of the Penal Code, it is difficult to see how it can be anything else just because the offence is found in a different statute. Evidence scholars have over the decades pointed out that there is no distinction in substance between the definition of an offence and an exception to it. It represents nothing more than drafting style and economy. Nearly 50 years ago Professor Julius Stone gave this lesson in logic, which has become a classic in this field:\(^{45}\)

> What is the difference in logic between quality of a class as contained in

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\(^{41}\) [1972] 2 M.L.J. 30, at p. 3.  
\(^{42}\) [1980] 1 M.L.J. 49, at p. 51. The Court never mentions s. 107. Instead it appears to use the common law. Whatever the source, the formulation of the exception is, as we shall see, the same. One can surmise that had the provision been brought to the attention of the Court it would have justifiably thought that it was the same as the common law. It is in this sense that s. 107 was impliedly used.  
\(^{44}\) [1987] 1 All E.R. 1.  
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.

The reason is simply that both the definition and the exception are functionally identical: together they mark out the boundaries of the class, or back to the terminology of the criminal law, the offence. Chin applies this lesson to the facts of Tan Ah Tee in a very convincing fashion. S.5 of the Misuse of Drugs Act reads, “Except as authorised by this Act . . . it shall be an offence for a person . . . to traffic in a controlled drug . . . “. His argument deserves to be quoted in full:46

. . . the fact 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 formulation used in the Act . . . can be reformulated to “It shall be an offence for a person unauthorised by this Act . . . 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 . . .

The English Court of Appeal in Edwards thought itself justified by “experience” and “the need to ensure that justice is done to both the community and defendants’. It should now be obvious that far from serving the ends of justice, this deviation has the potential to be a source of great injustice. As far as the experience of the common law goes, Adrian Zuckerman has quite effectively demolished the argument that this rule was “hammered out on the anvil of pleading”. This is simply because there was no necessary connection between the requirements of the rules of pleading and the incidence of the burden of proof: they were both conceptually and functionally distinct and quite occasionally did not coincide.47

It is thus more than a little surprising that the Court of Criminal Appeal in

Tan Ah Tee chose to rely on Edwards to pronounce a similar rule for Singapore, instead of setting about the task of interpreting s. 107 of the Evidence Act. But the sad truth is that s. 107 can fare no better than Edwards. Whether one adopts Edwards or s. 107, potentially any element of an offence could, by a semantic sleight of hand, be transformed into an exception which must be proved by the accused. It really is anybody’s guess whether a fact in issue is part of the definition or of the exception. Professor Peiris chronicles the “welter of confusion” over the Edwards-like provision in the Evidence Act of Sri Lanka which has “defied judicial ingenuity for almost a century”. He reviews the decisions which have applied the provision and those which have refused to do so and concludes that they are “arbitrary and unpredictable” and they “rest on no firm basis of principle discoverable in criteria relevant to the construction of statutes”. We are fortunate here to have seen only the seeds of such confusion, but seeds grow. We have seen the arbitrary nature of Tan Ah Tee. The only reported Malaysian decision is no different. In Lee Chin Hock the Federal Court held that in an offence which read, “any person who without lawful excuse has in his possession any document or publication the possession of which is prohibited . . . shall be guilty of an offence”, it was the accused who must prove that he had lawful excuse. How the Court arrived at the conclusion that “lawful excuse” was an exception rather than the definition is unknown.

4.2 Policy to the rescue?

It was obvious that Edwards could not be the last word on the matter in England. When the issue came before the House of Lords in Hunt hopes were high that the rule would be done away with. But that was not to be. Instead, the two leading speeches of Lord Griffiths and Lord Ackner sought to shift the basis and criteria of the rule away from “linguistic construction” of definition and exception to a consideration of “matters of policy”. What are these matters of policy? Lord Griffiths said:...

. . . the court should look to other considerations . . . such as the mischief which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance . . .

52 Ibid., at p. 11.
Lord Ackner was similarly persuaded in his speech: 53

If the result of holding that the burden of proof rested on the prosecution. . .would be to make the prosecution of offences under the relevant sections particularly difficult or burdensome then this would be a relevant consideration to weigh against the grammatical form of the legislation.

It appears that the new kid on the block is the comparative ease of proof analysis. This has sparked off an academic debate as to where the Hunt ruling will lead. At the heart of the contention is the fluidity of this kind of policy analysis. Linguistics and form are only a guide. The determinative factor is the dictates of policy. Thus facts in issue which do not even have the appearance of an exception may well be construed as such on a policy calculus. Conversely, elements which clearly bear the form of an exception may turn out to be otherwise. Two prominent critics of Hunt, Professor Glanville Williams and Peter Mirfield, 54 have adequately demonstrated the enormous practical difficulties of the ease of proof analysis. The judge or magistrate called to decide whether the rule applies or not is cast upon a sea of uncertainty. Ease and difficulty of proof are matters of degree. When does a difficulty become “particularly difficult or burdensome”? That this is not splitting hairs is shown by the passage of Hunt itself through the appellate process. Both the Court of Appeal and the House of Lords were agreed on the need for this sort of policy analysis. The lower court was unanimously convinced that it would be burdensome but the House of Lords was equally and unanimously convinced that it would not. Then again, ease and difficulty of proof is dependent on circumstances which may vary from case to case for the same offence. Is the burden of proof to be assessed afresh on a case to case basis? The fundamental importance of proof beyond reasonable doubt is too crucial to be made dependant on such uncertainty. Even those who view Hunt optimistically seem to do so on a heavy reliance on the goodwill, as it were, of the courts towards the principle of proof beyond reasonable doubt. Zuckerman thinks that the decision “may yet prove to have a salutary effect if it induces the courts to practice restraint in reaching the conclusion that a statute can be inferred to impose the burden on the accused”. 55 But that is a very big and uncertain “if”. True enough, their Lordships did indulge in some rhetoric counselling restraint, but surely the principle of proof beyond reasonable

53 Ibid., at p. 17.
55 “No Third Exception to the Woolmington Rule” 103 L.Q.R. 170, at p. 174. See also Birch, “Hunting the Snark: the Elusive Statutory Exception” [1988] Crim.L.R. 221, who is more optimistic but is forced to concede that “it makes the best of a bad job”.
doubt deserves to be protected by much more than that. The House of Lords may have practised what it preached but there is precious little to prevent other courts and even the same court, differently constituted, from changing course.

What of s. 107? Jeffrey Pinsler argues that the policy approach of Hunt should be adopted because by it “the court is . . . forced to ensure that a fair result is achieved . . . by taking into account certain practical and policy considerations so that neither party is impossibly burdened”. We have seen how this is an invitation to plunge headlong into that which could well be a quagmire of confusion. There is however an even more fundamental question: Can these practical and policy considerations ever justify a departure from the principle of proof beyond reasonable doubt? It is not denied that there is some degree of injustice if the prosecution were to bear the entire burden of proof in these exception-type cases. Zuckerman paints the typical scenario:

They are all concerned with relatively minor offences involving the doing of an act without having a licence or without similar qualifications. At the trial the prosecution proves the doing of the act but not, at least specifically, the lack of licence or qualification. The defendant either does not give evidence at all, or else, he does not make any attempt to show that he has the necessary license or qualification. Instead he tries to take advantage of the prosecution’s failure to prove want of licence. He pursues the same argument on appeal, still not having produced his licence or qualification. It is hardly surprising that the courts have been unsympathetic towards the defendant, for the conclusion that the defendant must have lacked a licence seems almost self-evident.

This picture, except for the reference to minor offences, aptly describes the situation in both Tan Ah Tee and Lee Chin Hock. The justifiable lack of sympathy for the accused is compounded with the prosecution’s understandable complaint, so well described by Ong FJ in Lee Chin Hock:

To say that the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused is to place upon it an impossible burden . . . “Lawful excuse” is not defined. . .and it is well nigh impossible for the prosecution to anticipate-and rebut in advance-any explanation the accused may offer in exculpation . . . (I)t is open to the accused to tender any sort of excuse, however fanciful or flimsy, the legality or sufficiency of which is to be determined by the court . . .

57 see above note 43, at p. 423.
58 see above, note 46, at p. 32.
But these are the classic reasons for imposing, not the persuasive but, the evidential burden on the accused. The difficulties of proof experienced by the prosecution have never been thought to be sufficient to cast the persuasive burden on the accused. What would be more difficult for the prosecution to prove and more easy for the accused to show than the mental element in any crime? It has never been suggested that the persuasive burden should fall on the accused. There is no, and has never been any, independent principle or common law rule or statutory provision that proof, or rather disproof, of the mental element should fall generally on the accused. Indeed the fundamental principle, or as Viscount Sankey LC will have it, the golden thread, is that it is the prosecution who must demonstrate, not just some aspects of an offence, but the guilt of the accused.

The alleviation of the problems of the prosecution lie in the imposition of the evidential burden on the accused to raise an issue that he is licensed or authorised. The prosecution needs to rebut nothing before the accused shows, at least, a reasonable doubt that he is within the exception. The court need consider nothing before this hurdle is crossed. The defendant in Zuckerman’s scenario will still be convicted. All this is achieved without compromising the principle of proof beyond reasonable doubt. Why, it may then be asked, did the House of Lords not adopt this solution? Lord Griffiths was well aware of “the body of distinguished academic opinion” standing for use of the concept of the evidential burden. His Lordship then curiously washed his hands, declaring that “such a fundamental change is . . . a matter for Parliament”.59 It is difficult indeed to fathom how a rule created or declared by the judiciary itself in Edwards could suddenly disqualify itself from judicial reform. Lord Ackner reasoned that Parliament has the power to impliedly cast the burden of proof on the accused. This must mean persuasive proof as “the discharge of the evidential burden proves nothing”.60 This merely repeats Lord Devlin’s error in Jayasena and nothing more need be said.

It remains clear however that if Jayasena stands, little can be done with the Edwards-type provision in the Evidence Act. The two rules occur not only in the same section but the same sentence within the section. “The burden of proving” cannot have one meaning for one of the limbs but not the other. But if the way is cleared by a reconsideration of Jayasena, the door is open to the only satisfactory solution—the introduction of the concept of the evidential burden in s. 107 and hence the Evidence Act.

59 see above, note 47, at pp. 11–12.
60 see above, note 47, at p. 19.
5 Especial Knowledge-Rumblings of Rebellion

Nowhere is judicial unease of casting persuasive burdens on the accused more evident than in the extraordinary jurisprudence that surrounds s. 108 of the Evidence Act. It simply says, “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him”.

5.1 On Principle

If “the burden of proving” refers to the persuasive burden (as it must after Jayasena), then what the section appears to be declaring what is fundamentally unsound in principle. This heresy was decisively disowned for the common law by Lawton LJ in Edwards in the following terms:

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. If there was any such rule, anyone charged with doing an unlawful act with a specified intent would find himself having to prove his innocence because if there ever was a matter which could be said to be peculiarly within a person’s knowledge it is the state of his own mind.

This is incontestable. Giving full effect to such a rule would spell the end of the principle of proof beyond reasonable doubt, and with it the presumption of innocence. Not only is the mental element usually especially within the knowledge of the accused, in most cases the existence of the criminal act itself may be similarly described. Hardly anything is left for the presumption of innocence to bite on. This intolerable spectre has spurred the judges to draw upon their creative reserves to put a leash on the provision. While this is commendable and shows that our courts are sensitive to the requirements of the principle of proof beyond reasonable doubt, this flurry of purposive interpretation has left the law in considerable uncertainty.

5.2 Bald Rejection and Blind Faith

The Privy Council has on no less than three occasions baldly declared that the provision does not affect the allocation of the persuasive burden in a criminal trial. An appeal from Ceylon started the ball rolling. Viscount Hailsham LC in Attygalle v. The King, in the course of interpreting the Ceylon equivalent of s. 108 declared, “It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed”. This was

affirmed in *Seneviratne v. R.*,63 another appeal from Ceylon requiring the Privy Council to interpret the same section. Some years later, closer home, the Court of Appeal of the Federation of Malaya applied the two Ceylon decisions in *Goh Ah Yew v. PP.*64 The provision came before the Privy Council yet again in *Mary Ng v. The Queen.* This time it was an appeal from Singapore. The Rt. Hon. L. M. D. De Silva understandably re-affirmed *Attygalle*, a case in which he had participated as junior counsel for the petitioner, without further ado:65

It is clear, therefore, that by reason of the section no burden was placed on the appellant in the present case to prove that there had been no deceit. The burden was upon the prosecution to prove affirmatively that there had been.

The commitment to the presumption of innocence shown by these decisions is commendable. The judges realised either instinctively or implicitly that the especial knowledge rule was fundamentally incompatible with the principle of proof beyond reasonable doubt. One could not co-exist with the other. What is unsatisfactory about this line of authority is the failure to explain exactly what s. 108 does mean. They establish in no uncertain terms what it does not mean but left absolutely no guidance as to when and to what effect it should apply. It is perhaps this lapse that resulted in subsequent courts ignoring this line of authority.

At the other end of the spectrum are a set of Malaysian cases which seemed to have applied the Malaysian equivalent of s. 108 rather literally and without any reservation. They concern offences of possession of some article without lawful authority or excuse. Ong FJ in *Lee Chin Hock* employs the literal approach to this effect.66

Here the appellant was accused of an offence of having in his possession prohibited documents without lawful excuse. If he had lawful excuse, that fact would be especially within his knowledge. Section 106 (the Malaysian s. 107) in the clearest language provides that the burden of proving that fact is upon the appellant. It follows that it is not for the prosecution to prove the absence of lawful excuse. (parenthesis mine)

If these cases try to establish that the persuasive burden is cast on the accused where the fact is literally within his especial knowledge, then they are wrong in principle and contrary to the *Mary Ng* line of authority. There

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is however a possibility that they can be salvaged. It would appear that the reason why the courts were quite happy with placing the burden on the accused was that it would have been unfair to require the prosecution to provide *prima facie* evidence of those facts. We have seen how Ong FJ in *Lee Chin Hock* was moved by the “impossible burden” of the prosecution if it had to “lead evidence to meet any defence that may be open to the accused”. In *Busu v. PP* the Court of Appeal of the Federation of Malaya had to consider the allocation of the burden of proof in the context of the offence of possession of fire-arms without lawful authority. Under the legislation, lawful authority existed where (a) the accused had a licence, (b) where he has been authorised without a licence and (c) where he was exempted from having a licence. Willan CJ said:67

If, therefore, it is necessary for the prosecution to call *prima facie* evidence that an accused had no licence, equally it must be necessary for them to call *prima facie* evidence regarding (b) and (c) above.

The implication is clearly that this is something unreasonable to expect of the prosecution. In *Abdul Manap v. PP* the same court, differently constituted, had to consider a very similar piece of emergency legislation. The earlier decision of *Lim Ah Tong v. PP* had decided that the prosecution was obliged to provide *prima facie* evidence of the lack of a licence. Spenser Wilkinson J said:68

At the time when *Lim Ah Tong*’s case was tried the emergency was only a few month old and some evidence of the absence of a licence for a fire-arm could be given by producing the register of licences in respect of the State or Settlement in which the offence took place . . . In view of the continuance of the emergency and the movements of terrorists it later became useless to prove that a fire-arm was unlicensed in one particular State and it would clearly be impracticable to produce all the registers in every case.

It is obvious that these judges thought that casting the burden on accused is justified because it would be unduly burdensome and wasteful to require the prosecution to lead *prima facie* evidence of the non-existence of those facts. The equally obvious solution would be to cast only the evidential burden on the accused to raise the issue of licence or excuse. This answers the complaint of the prosecution but preserves the principle of proof beyond reasonable doubt. It so happens that in none of these cases do the judges say specifically that it is the persuasive burden which is cast on the accused by virtue of s. 108. It is thus possible to reconcile this set of cases.

68 (1952) 18 M.L.J. 140.
with the *Mary Ng* line of authority which merely established that the section does not cast the persuasive burden on the accused. It said nothing of the evidential burden.

The only sensible interpretation of s. 108 is that it operates to cast the evidential burden on the accused where it would be unduly onerous to require the prosecution to lead evidence on it and because of his especial knowledge of the fact it would not be unreasonable to expect him to do so. Again *Jayasena* will be the stumbling block. Apart from what has already been said of the error of *Jayasena* in banishing the concept of the evidential burden from the Evidence Act there is evidence from the work of Sir James Stephen that he considered especial knowledge to be relevant only to the question of the allocation of the evidential burden or some other kind of provisional burden. He said in Article 96 of *A Digest of the Law of Evidence*:

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence . . . but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Persuasive burdens do not shift. Lord Denning, commenting on *Attygalle* in his seminal article, “Presumptions and Burdens”, in the *Law Quarterly Review* said:

> Another striking example occurred when the Ceylon Legislature enacted that ‘when any fact is especially within the knowledge of any person, the burden of proving that fact is on him’. A judge trying a criminal case interpreted that as meaning that the legal burden was on the accused to prove that he had not committed the offence. The Privy Council pointed out that is not the law. The burden referred to in the enactment is provisional only. It cannot supply the want of necessary evidence.

*Jayasena* must be reconsidered so that s. 108 can be given this eminently coherent meaning.

### 5.3 Making Sense of Nonsense

If however s. 108 can only refer to the persuasive burden, the judges are faced with a cruel dilemma. They can either apply it with full force and kill

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69 pp. 282–283.
the presumption of innocence or read restrictions into the section to prevent it from doing too much damage. Except for the Lee Chin Hock set of cases (which, it has been argued are explicable by the concept of the evidential burden) the courts have chosen a second option; that of restrictive interpretation. This even has the blessing of the Privy Council in Jayasena: 70

The principle involved in this section derives from the English law of evidence, where it has, however, been sparingly used. The prosecution is usually able to establish that an accused person has special knowledge of the circumstances of the crime with which he is charged. Under some systems of law this is considered to be sufficient for the accused to be called upon at the outset of a trial to say what he knows. Such a procedure would be quite inconsistent with the accused’s right to silence which prevails in the English system as adopted in Ceylon . . . It may well be that the general principle that the burden of proof is on the prosecution justifies confining to a limited category facts “especially within the knowledge of an accused . . .

The principle has, as we have seen, been disowned by English law and there is a more important constitutional value at stake apart from the right to silence: it is the presumption of innocence. Lord Devlin did not indicate how this confinement can be satisfactorily achieved but this strategy had been anticipated by our judges. We now examine these attempts.

There is first a line of cases which has tried to restrict the operation of s. 108 by requiring the prosecution to show a prima facie case of the fact in question before the persuasive burden is cast on the accused. In Lim Ah Tong, the now familiar issue of licence to possess a fire-arm arose. Spenser Wilkinson J said: 71

The prosecution should give prima facie evidence that a firearm in the possession of the accused is unlicensed; but if the accused in fact had a licence . . . it is . . . for the accused to show, if this be the fact, that he is licensed.

The same device was employed in the context of proof of vehicle insurance. In the Malaysian High Court decision of Re Tan Kheng Cheng, Adams J elaborates: 72

Although the fact that the vehicle is insured is in the knowledge of the defendant or his employer and therefore section 106 . . . applies and,

once a *prima facie* case has been made out, it is for the defence to show that he was properly insured, the prosecution must make out a case which, if unrebutted would entitle the court to convict before it can call on the defence. The police must adduce evidence to say that they asked the defendant for his certificate of insurance and that he was unable to produce it or that having asked him for it and inspected it, they found that it did not cover the use for which the vehicle was being put at the time that it was stopped.

This case was quoted with complete approval in the very recent decision of *PP v. Kum Chee Cheong*. K. S. Rajah JC held:73

The prosecution had not made out a *prima facie* case because the prosecution did not require the Respondent to produce his certificate which he thereafter failed to do. Mere proof of driving is not enough to shift the burden of proof.

What is immediately obvious is that this restriction is completely unwarranted by the words of the provision. It is not express, and it must be by a very far stretch of imagination that it may be implied. The reason for such a requirement to be met before the provision may operate is not explained in the judgements. A fact either is or is not “especially within the knowledge” of the accused and it is difficult to see how the making out of a *prima facie* case by the prosecution can affect such a determination. What these cases have done is very awkward: the prosecution retains the evidential burden to raise the issue but the persuasive burden is cast on the accused. There is first a logical difficulty. Evidential burdens are always pegged on to persuasive burdens. It appears that the evidential burden here cannot be tied to the prosecution’s general burden to prove beyond a reasonable doubt because it is the accused who bears the persuasive burden with respect to this particular fact. It must then relate to the persuasive burden on the accused. This means that the prosecution’s *prima facie* case is made out if it raises sufficient evidence to prove or disprove the fact in question on a balance of probability. This is entirely anomalous and does not occur in any other situation. More compellingly, the practical considerations of proof, as we have seen, dictate that it is the accused who ought to bear the evidential burden of raising the issue. Casting an evidential on the prosecution does not meet the prosecution’s legitimate complaint that it is impractical for it to lead evidence in advance to meet each and every possible excuse. It is for this reason that the *Lee Chin Hock* line of cases and *Lim Kwai Thean v. PP*74 have justifiably rejected this sort of restriction. We would do well to do the same.

73 [1992] 2 S.L.R. 126, at p. 135. It has been brought to my attention that leave has been given to reserve this point of law for the decision of the Court of Criminal Appeal in Criminal Motion 54 of 1991.
The second kind of restriction was attempted in *R v. Khoo Guan Teik* and affirmed in *Tan Koh Keng v. PP*. Both are Malayan High Court decisions. These cases seem to say that the provision operates to cast the burden on the accused only if the fact is as a negative averment. Rigby J in the first case said:

... where an offence consists in doing an act without lawful authority, it is not necessary for the prosecution to prove the negative averment of absence of authority; the onus is on the defence to prove that such authority existed. This is recognised by section 106 (the Malaysian counterpart of s. 108) of the Evidence Ordinance. (parenthesis mine)

Thus, as “the gravamen” of the offence in question was that the accused “being a duly licensed rubber purchaser, failed to comply with the statutory requirements imposed upon the holder of any such license”, the section did not apply as there was no question of the prosecution being required to prove a negative averment that he did not possess a licence but a positive one that he did.

Again this restriction is not warranted by the words of the section. Neither can it be convincingly implied. The basis for such an implication has to be that a fact “especially within the knowledge” of the accused must necessarily be a negative averment for the prosecution. This cannot be valid as the fact that the accused is not in possession of a licence must surely be “especially within the knowledge” of accused. It cannot be that the fact that the accused had a licence is “especially within the knowledge” of the accused, but the fact that he did not have such a licence is not. Even if we put aside this logical difficulty, this interpretation still runs into problems of justification. The consequence that the prosecution has to prove a negative averment has never been thought to be sufficient to cast the persuasive burden on the accused. The stock example is that the fact of consent in the offence of rape. It is clear that the prosecution still bears the burden of proving the absence of consent. Lawton LJ in *Edwards* confirms that the negative avermen t rule has no general validity in these terms: “Such rule as there is relating to negative averments . . . developed from the rules for pleading provisos and exceptions in statutes and is limited in its application”.

What is rather more convincing is a justification which was not expressed in these cases. This is that it is generally easier for one party to prove that something such as a licence exists rather than for the other party to prove that it does not. This raises the familiar argument centering on ease and

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difficulty of proof and brings us to the final attempt to make some sense out of s. 108. In *PP v. Lim Kwai Thean* we at last get to the bottom of the matter. Good J reinterpreted especial knowledge in terms of the comparative ease and difficulty of proof and thereby expressed the real concern in the mind of the judges in these words:77

... the effect of the word “especially” is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution . . .

This sounds surprisingly like *Hunt*, which it amazingly pre-dates by almost three decades. There is no need to rehearse the comments already made on the *Hunt* rule. Suffice it to say that while the “balance of convenience” can never justify placing the persuasive burden on the accused, it makes absolute sense in the allocation of the evidential burden. On the facts of *Lim Kwai Thean*, the concern of the court that the prosecution would otherwise be unreasonably burdened by having to lead evidence to rebut a number of exceptions to the Emergency registration provisions is adequately met by the imposition of an evidential burden on the accused. As it turns out, the court in the last three cases, *Lim Kwai Thean*, *Khoo Guan Teik* and *Tan Koh Keng* did not specify whether it was referring to the persuasive or the evidential burden. If they are to be consistent with the *Mary Ng* line of cases, they must refer to the evidential burden.

6 Agonising Alibis

Nowhere is the battle between literalism in the interpretation of the Evidence and the desire to preserve the principle of proof beyond reasonable doubt more grimly fought out than in the defence of alibi. The Malaysian Supreme Court has produced starkly contradictory decisions. The matter has attracted no less than four academic commentaries, a rare phenomenon indeed. But even the scholars are evenly divided. It seems clear that the early decisions did not think that the question of allocation of proof was particularly problematic. In Malaysia, Ong CJ in the Federal Court decision in *Gui Hoi Cham v. PP* felt that the trier of fact “must be satisfied that this defence was unsound” before the accused may be convicted.78 This places the persuasive burden squarely with the prosecution. In Singapore, Murray-Aynsley CJ in *Liew Chin Seong v. R* thought that the defence could succeed on a defence of alibi if the accused raised a reasonable doubt.79 This must mean that the persuasive burden rested on

79 (1952) 18 M.L.J. 236.
the prosecution. It also seems implicit from these cases that the evidential burden was borne by the accused. He had to “produce” a reasonable doubt of alibi. This position made complete sense on principle. When the accused raises an alibi, he is saying both that he was not at the scene of the crime and that he was somewhere else. If he produces sufficient evidence to create a reasonable doubt in the mind of the trier of fact, he immediately raises a corresponding doubt that he could not have committed the acts which constituted the crime. His responsibility for the crime has not been shown beyond reasonable doubt and he must be acquitted. This appears to have been so self-evident that this position was not explained or justified in these decisions.

Then Dato Mokhtar Hashim v. PP\textsuperscript{80} crashed into this peaceful situation. Abdoolcader FJ, speaking for the Federal Court, expressed the view that certain amendments to the Criminal Procedure Code (which were also made for the Code in Singapore\textsuperscript{81}) to provide for a notice requirement for the defence of alibi had changed the law. It was held that:

The position here, however, would appear to be different in view of the provisions of section 402A(2) of the Criminal Procedure Code with regard to notice to be given of a defence of alibi which was added by way of amendment to the Code . . . The concluding words of section 402A(2) ‘for the purpose of establishing his alibi’ are significant and would seemingly put a probative burden on the accused.

It is now clear that at least the expressed justification for placing the persuasive burden on the accused cannot be sustained. H. M. Zafrullah, in what appears to be the first commentary on the issue, pointed out that the amendment to the Code dealt specifically with the procedural requirement of notice and had nothing to do with the allocation of the burden of proof.\textsuperscript{82} Even Valentine Winslow, who supports the result in Dato Mokhtar, was unpersuaded by this piece of reason. He observes that a similar amendment was made in England but the burden of proof was unaffected.\textsuperscript{83} The Federal Court itself, now renamed the Supreme Court, overruled this holding in Yau Heng Fang v. PP. Mohamed Azmi SCJ said:\textsuperscript{84}

The object of section 402A(1) is to make provision for a written notice to be given by the Defence . . . Nothing more should be read in the section.

\textsuperscript{80} [1983] 2 M.L.J. 232, at p. 280.
\textsuperscript{81} S. 182 Criminal Procedure Code Cap. 68, 1985 Rev. Ed.
\textsuperscript{82} “Admissibility of Relevant Evidence and Other Related Issues. . .” [1984] 2 M.L.J. xv, at p. xxiii.
\textsuperscript{83} “Of Political Intrigue, Questionable Interrogations and Incredible Alibis” 26 Mal.L.R. 343 (1984), at pp. 351–52.
\textsuperscript{84} [1985] 2 M.L.J. 335, at p. 340.
and we do not think that it is the intention of the legislature . . . to introduce a new legal burden on the accused to establish his defence. It is of course for the defence to adduce evidence to establish the defence of alibi, but there is nothing in the section to justify the interpretation that the ‘reasonable doubt’ test has been replaced . . . In our judgement the test has not changed.

This was affirmed by the same court in the subsequent decision of Illian v. PP85 and it is likely that no more will be heard of this argument. It only remains to say that, even if the phrase “establishing his alibi” referred to the burden of proof, it could still be construed as describing the evidential burden on the accused to raise the issue of his alibi.

However, two academic commentators, Winslow in Singapore86 and Rafiah Salim in Malaysia87 have seized upon illustration (b) to s. 105 to argue that it is the persuasive burden which rests on the defence. It reads:

B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

It is unfortunate that the Supreme Court in Illian refused to deal with this illustration although it was expressly raised by the Deputy Public Prosecutor. Salim, predictably, uses Jayasena to argue that “prove” must mean persuasive proof and nothing else. Notwithstanding the efforts of T. Y. Chin to dispel the idea that the illustration does not cast the persuasive burden on the accused,88 it seems clear that, if the Jayasena is right, Salim’s point is unanswerable. Chin complains that using an illustration to allocate the burden of proof is “obscure” but Salim would, as it were, reply on high authority, that illustrations may be ignored only if they are repugnant to the sections.89 Here it is clearly not. Chin suggests that the illustration may not apply to criminal proceedings as it does not refer specifically to them. There is nothing to support this view. One would have thought that as the Evidence Act was meant to apply generally to both criminal and civil proceedings, failure to mention the particular proceeding would mean that the provision applies to both.90 Chin says that it is of “some relevance” that “at the time the Evidence Act came into existence, the distinction between the two burdens was not well maintained”. He does not mention how this

86 See above, note 78, at p. 352.
89 See above, note 82, at p. xix.
90 Take, for example, s. 24 which embodies the voluntariness principle for the admissibility of confessions. It is clear that it applies only to criminal prosecutions, but the Act bothers to make it explicit that the section pertains only to “criminal proceedings”.

is relevant but, if Jayasena stands, the Evidence Act can only contain the concept of the legal, and not the evidential, burden.

Perhaps his most cogent argument is that which flows from the dicta in Jayasena that defences which affect the prosecution’s case need only be shown on a reasonable doubt. Chin convincingly demonstrates that “every alibi involves a direct negation of what the prosecution has to prove: the presence of the accused at the scene of the alleged offence”. 91 It is in this regard difficult to understand the distinction which Winslow attempts to draw between “a denial of presence at the scene of the crime” and “the pleading of a new fact that one was somewhere else”. 92 These are two sides of the same coin: raising a reasonable doubt that the accused was elsewhere ipso facto creates the corresponding doubt that he was not there at the scene of the crime. There is no need to repeat the unsatisfactory nature of this concession, which is the product of flawed internal logic. Assuming that the illustration applies to criminal cases, whatever could it mean in the context of a criminal trial? It can have no meaning at all as the only sensible meaning of “prove” as evidential proof is precluded by Jayasena. That it should bear such a meaning cannot be in doubt. It would be absurd to require the prosecution to anticipate and rebut in advance the numerous possible variations to the defence of alibi. Although this possibility has been minimised by the procedural device of notice, it must be remembered the Evidence Act was in existence long before the advent of the notice requirement. Placing no more than an evidential burden on the accused is also consistent, according to Yau Heng Fang, with the settled practice in the courts of Singapore and Malaysia. 93

That being the position, it must now be clear that the only satisfactory solution is to pluck the Jayasena weed from our evidential garden. The Malaysian Supreme Court has begun this task in the context of the alibi defence. The ground has been cut from Jayasena. If the burden of proving means an evidential burden for the defence of alibi, it can also bear that meaning in other provisions of the Evidence Act and of other statutes. It only remains to observe that Pinsler’s suggested reconciliation that “the accused’s obligation to prove alibi does not come into effect unless and until the prosecution has discharged its own burden of sufficiently proving that the accused committed the offence” 94 is reminiscent of the device used

91 See above, note, at pp. Ixx–xi.
92 See above, note, at pp. 352–53.
93 see above, note, at p. 340, where Mohamed Azmi SCJ declared, “In this country we have been applying the ‘reasonable doubt’ test in alibi cases as laid down by Sir Charles Murray-Aynsley C.J. in Liew Chin Seong v. Rex”.
in *Kum Chee Cheong* in the context of especial knowledge and therefore suffers from the same incurable illness.\(^95\)

### 7 Pervasive Presumptions

Nearly 20 years ago Professor Tommy Koh wrote:\(^96\)

Under our criminal justice system, the traditional position is that the accused is presumed to be innocent and the prosecution has to establish his guilt beyond reasonable doubt. In recent years, this traditional position has been departed from, by the creation in many of our criminal laws, of statutory presumptions which shift the burden of proof to the accused. Whether this is desirable or not is, in the first place a question of value, the answer to which depends upon the particular community’s or legislature’s sense of what is fair and just.

Perhaps the most serious threat to the principle of proof beyond reasonable doubt is posed by the proliferation of specific statutory presumptions. Unlike the categories we have discussed thus far, these derogations from the presumption of innocence are directed at particular crimes, not by the Evidence Act, but by the statutes creating the offence. Lord Diplock has described them as “a common feature of modern legislation concerning the possession of use of things that present a danger to society like addictive drugs, explosives, arms and ammunition”.\(^97\) Its use is, in fact, more pervasive. Over the years our courts have had to face presumptions in the context of corruption and customs offences as well. How our courts construe the meaning and constitutionality of these provisions will have a crucial bearing on the vitality of the principle of proof beyond reasonable doubt. The significance of the allocation of proof is especially significant in the context of statutory presumptions as many of these offences carry very severe punishments, including the ultimate sanction of death.

### 7.1 The Meaning

The classic statutory presumption provides that on proof by the prosecution of one or more triggering facts, the burden is placed on the accused to disprove a presumed fact. The presumption which came before the Privy Council in *PP v. Yuvara*\(^98\) was found in the Malaysian Prevention of

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\(^95\) See the discussion above.


\(^97\) *Ong Ah Chuan v. PP* [1981] 1 M.L.J. 64, at p. 71.

\(^98\) [1969] 2 M.L.J. 89.
Corruption Act 1961. This piece of legislation provided that on proof that gratification was received by the accused and that the accused was at that time a public servant, it was to be presumed “unless the contrary is proved” that it was received corruptly. Lord Diplock followed the English rule, expressed in *R v. Carr-Briant*,99 that such a provision made it incumbent on the accused to disprove the presumed fact “on a balance of probability”. The word “proved” has thus been categorically interpreted as persuasive proof. It is understandable that, with the kind of respect accorded to Privy Council decisions in Singapore and Malaysia, this interpretation would be accepted without question. The Supreme Court of Malaysia has recently affirmed *Yuvaraj* as the “locus classicus of cases on the shift of proof where a presumption comes into effect” in the context of drug offences in *Akin Khan v. PP*.100 Wee CJ had earlier cited it with implicit approval in *Chew Chee Sun v. PP*.101

It is unfortunate that in none of these cases was the possibility of the word “proved” bearing the meaning of the evidential burden of proof even considered. We have seen how the usage of the word had long before Thayer’s classic work at the turn of the century embodied both concepts of proof and how this practice has persisted till this day.102 It is thus, to say the least, conceivable that the intention of the Legislature is to place the evidential burden of the presumed fact on the accused once the triggering facts are established by the prosecution. It is this ambiguity in the meaning of the word “proved” that Lord Diplock stubbornly refused to recognise, just as Lord Devlin was to do shortly thereafter in the context of the Evidence Act in *Jayasena*. The Privy Council should have acknowledged reality. The word is and has been for a long time ambiguous. In the face of two equally plausible interpretations, the court should have leant heavily on the side of evidential proof, unless there was some compelling reason why the Legislature must be taken to have meant persuasive proof. In the process of statutory interpretation, the court, when it has the choice, ought to choose the meaning which does not derogate from basic constitutional values. Lord Diplock himself described the principle of proof beyond reasonable doubt in the following terms in *Kwan Ping Bong v. PP*, a Privy Council decision from Hong Kong:103

There is no principle in the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged—and the proof must be “beyond all reasonable doubt” . . .

99 [1943] 2 All E.R. 156.
102 See the discussion above.
The principle is no less fundamental in Singapore and Malaysia but this is useless verbiage unless the court is willing to adopt the principle of strict interpretation against derogation from such principles. It is neither unreasonable nor unduly onerous to expect the Legislature to state specifically that it refers to the persuasive burden if that is the intended meaning. The tragedy is that there was a growing line of local authority that such presumptions could and did bear the meaning of shifting only the evidential burden. The Court of Appeal of the Federation of Malaya in Looi Teik Lan v. PP,\(^{104}\) affirming two earlier High Court decisions,\(^ {105}\) had taken the progressive step of construing a presumption concerning customs offences as an evidential rather than a persuasive one. The statute in question had declared that, in a prosecution for non-payment of duties on intoxicating liquor, the burden of proof of the fact of payment of such duties is on the accused. Thomson CJ, characteristically displaying commendable sensitivity to the presumption of innocence, said that it was for the accused “to show positively that duty had been paid on all this samsu or at the very lowest to raise a reasonable doubt on the point in the mind of the Court”. Shortly before Yuvaraj, Azmi CJ in Wong Chooi v. PP was similarly persuaded to place only an evidential burden on the accused who, under the statute concerned, had the burden to prove that he possessed a weapon for a lawful purpose. It was held that:\(^ {106}\)

Where a burden is placed on the accused person to prove anything by statute or common law, that burden is only a slight one . . . The appellant’s explanation as to how he came into possession of the parang . . . should . . . be accepted as reasonably true and would . . . be sufficient to discharge the burden placed on him . . . or would be sufficient to raise a reasonable doubt . . . as to whether the appellant possessed the weapon for an unlawful purpose . . . she (the trial judge) should have given the appellant the benefit of the doubt and should have acquitted him. (parenthesis mine)

This pronouncement, though brief, is indeed visionary. It was some years later that the 11th report of the formidable Criminal Law Revision Committee in England made a remarkably similar recommendation that the only burden which an accused person can be made to bear is an evidential one.\(^ {107}\) All this was, of course, destroyed by Yuvaraj.

Lord Diplock was not unaware of these decisions which held that statutory

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107 Eleventh Report Evidence (General) (1972), clause 8.
presumptions called “for an explanation by the defendant of no greater degree of plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove”. This position was rejected because this was the test “in the absence of any statutory provision reversing the burden of proof” and therefore gave “no sufficient effect to the reversal of the ordinary onus of proof”. That the placing of an evidential burden on the accused has some effect cannot be in doubt. The trier of fact will not consider the excusing fact unless the accused raises a reasonable doubt of the existence of that fact. This is quite different from the situation in the absence of such a presumption where the prosecution must in every case, regardless of what the defence can or cannot prove, demonstrate the absence of that fact beyond reasonable doubt. It is a mystery why Lord Diplock thought that this significant distinction was not enough to give “sufficient effect” to the presumption. The only indication seems to be that Lord Diplock thought that the shift of the evidential burden alone will not sufficiently serve the social policy of the statute. This brings us to the issue of whether derogations from the principle of proof beyond reasonable doubt can ever be justified by a legitimate social policy. It will be argued that it cannot.

7.2 Constitutionality and Justification

It has been explained that in answering the question of whether and under what circumstances derogations to the principle of proof beyond reasonable doubt can be justified, the prescriptive jurisprudential inquiry substantially coincides with the descriptive constitutional inquiry. The existence of an enforceable Bill of Rights in Singapore thrusts on to the shoulders of our judiciary the responsibility of scrutinising the constitutionality and therefore the justifiability of every such departure. This becomes necessary if the Legislature expressly places the persuasive burden on the accused. This the Legislature of Singapore has not done but it is a theoretical possibility. It is also necessary where the Legislature fails to be explicit in the nature of the burden that it wishes to place on the accused. This has been the pattern of the statutory presumptions coming before the court. The court has then to choose between the evidential and persuasive meaning of proof. It must ask whether there are compelling reasons to take the persuasive meaning and thereby permit an exception to the presumption of innocence.

It is important to rephrase the issue to emphasise what is at stake: when is it a legitimate social policy to increase the probability of convicting the innocent in order to achieve a corresponding decrease in the probability of acquitting the guilty? Placing persuasive burdens on the accused will mean that he is to be convicted and punished, occasionally with the ultimate
penalty of death, notwithstanding that he is able to provide a reasonable explanation and notwithstanding that his defence is as likely to be true as the prosecution’s case; situations which would have exonerated him in all other criminal proceedings unaffected by presumptions. Professor Tommy Koh puts it far more elegantly in the context of a presumption in the Misuse of Drugs Act:108

Herein lies the danger of the presumption: it could ensnare not only the guilty but also the innocent.

It is again in the context of the Misuse of Drugs Act that the first, and till today the only, constitutional challenge was mounted against a statutory presumption. It is unfortunate that the Privy Council took the opportunity to display its almost total insensitivity to the presumption of innocence and complete disregard for the fundamental values which are the foundation of this principle. In Ong Ah Chua v. PP109 the Privy Council encountered a provision which, on proof of the triggering fact of possession of 2 grammes of heroine, presumed the fact of possession for the purpose of trafficking, “until the contrary is proved” by the accused. It held that there was no violation of any fundamental rule of natural justice. The reasoning of the court ought now to be examined in some detail.

Lord Diplock starts off the constitutional discussion commendably, interpreting Articles 9 and 12 to incorporate the fundamental rules of natural justice. A particular rule is then identified, that “a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it”. The tribunal, the court said, must be “satisfied that all the physical and mental elements of the offence, . . . conduct and state of mind as well where that is relevant, were present on the part of the accused”. All is well and Lord Diplock seems to have stated the content of the presumption of innocence with characteristic clarity. What then follows is astounding. The constitutional prescription which Lord Diplock extracted from this is as follows:110

What the fundamental rules of natural justice do require is that there should be material before the court that is logically probative of the facts sufficient to constitute the offence with which the accused is charged.

One would have thought it clear beyond doubt that it is implicit in the initial statement of the fundamental rule of natural justice (commonly called the presumption of innocence) that, first, it is the prosecution who

108 See above, note 91, at p. li.
110 Ibid., at p. 71.
must bear the responsibility of establishing and satisfying the court that the accused is guilty of the offence charged and that the prosecution must do so beyond reasonable doubt. Lord Diplock could not have forgotten what he himself had said in Kwan Ping Bong that:

There is no principle in the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence . . . -and the proof must be “beyond all reasonable doubt” . . .

It does not need much argument to show that a requirement that guilt must be established beyond all reasonable doubt is entirely different from a requirement that there must be material which is logically probative of guilt. The second prescribes no more than a test of simple relevance. So long as there is evidence which increases the probability that the accused is guilty, the test is satisfied. It has nothing to say about the necessary probative weight of such evidence. The prosecution may have succeeded in adducing “logically probative” material which manages only to raise a reasonable doubt that he is guilty. His conviction is constitutionally justifiable, as the Privy Council will have it. This is complete and utter destruction of the presumption of innocence. One searches in vain for anything resembling a reason for this mutilation of the principle of proof beyond reasonable doubt. By no stretch of imagination can the principle be described as “the perpetuation in Singapore of the technical rules of evidence and permitted modes of proof” or “a legacy of the role played by juries . . . inappropriate to the conduct of criminal trials in Singapore”, phrases which Lord Diplock uses. There is nothing technical about the principle—it reflects the community’s assessment of the value of protecting the innocent from conviction. It is equally inconceivable that the principle is inappropriate to Singapore. Whether it is the jury or the judge who has to assess the evidence at the end of the day, the principle, which requires the trier of fact to consider and eliminate all reasonable innocent explanations, apply with full force.

The judgement then shifts gear. Although Lord Diplock had said that the presumption of innocence had little or nothing to do with the allocation of the burden of proof, he seems to change tack and tries to justify casting the burden on the accused to disprove the presumed fact. Lord Diplock is not entirely clear at this point but he appears to have placed some emphasis on the observation that the triggering fact of possession was itself unlawful in these words:

In the case of the Drugs Act any act done by the accused, which raises

111 See above, note 98.
112 See above, note 105.
the presumption that it was done for the purpose of trafficking is *per se* unlawful, for it involves unauthorised possession of a controlled drug, which is an offence under section 6. No wholly innocent explanation of the purpose for which the drug was being transported is possible.

It is difficult to see what the characterisation of the triggering fact as unlawful has to do with the justifiability or reasonableness of the presumption. If one uses the “logically probative” test of Lord Diplock himself, the unlawful nature of the triggering fact is irrelevant. If proof is required beyond reasonable doubt, then proof of possession, though unlawful, can never justify the leap to proof of the intention to traffic. It seems clear that if an exception is justifiable at all, it cannot be on this factor. There is, for example, no difference in principle between the allocation of the burden in the mitigatory defence of provocation and the full defence of private defence, although, by analogy, the triggering fact in provocation is unlawful.113

Then it is said that:

> The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose.

There is little need to repeat the cogent arguments which show that such touching faith in the peculiar knowledge rule is misguided. It may only justify the allocation of the evidential burden, never the persuasive burden. Similarly, if the “logically probative” test is used, the question to ask is whether the triggering fact is logically probative of the triggering fact. It cannot matter if the presumed fact is or is not peculiarly within the knowledge of the accused.

Consistent with their “logically probative” test, their Lordships could “see no constitutional objection to a statutory presumption . . ., that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them”. Thus the Canadian Narcotic Control Act, 1960–61, which so provided, passed the test of constitutionality. Surely the possession of a drug *per se* is logically probative of an intention to traffic. It is now obvious that a test of such a low threshold is of little use. The only guarantee is that the triggering fact cannot be completely irrelevant to the presumed fact. This would be rare indeed. It is perhaps this that subsequent courts in the Commonwealth...

113 Woolmington places only the evidential burden on the accused for both defences and Jayasena casts the persuasive burden equally for both. See the discussion above.
could not stomach. A later version of the Canadian legislation (similar in all relevant respects to the one approved by the Privy Council) was considered by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms which constitutionally guaranteed the presumption of innocence. In a landmark decision in *R v. Oakes*, the Court struck down that very presumption because it violated the presumption of innocence. Diekson CJC said:114

In general one must, I think, conclude that a provision which requires an accused person to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence . . . If an accused bears the burden of disproving on a balance of probabilities . . ., it would be possible for a conviction to occur despite the existence of a reasonable doubt.

This is, as we have seen, entirely correct on the principle of proof beyond reasonable doubt and completely at odds with *Ong Ah Chuan*, which was cited to the Supreme Court of Canada. Diekson CJC was quick to “reject the applicability” of that decision. It was purportedly distinguished as follows:115

That case concerned constitutional provisions of Singapore which are significantly different from those of the Charter; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

In truth, however, this was but a polite way of rejecting, not the applicability, but the validity of *Ong Ah Chuan*. It matters not whether the presumption of innocence is explicit or implicit in the due process provisions. In either case it would have the same effect. The Privy Council did read this principle into them, as we have seen. The fact is that their Lordships were completely mistaken as to what it meant and Diekson CJC was eager to disown it for Canada.116

The requirements of the presumption of innocence as found in *Ong Ah Chuan* seems to have been rejected once again, this time by the Court of Appeal of Hong Kong interpreting its newly enacted Bill of Rights. In *The

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115 Ibid., at p. 219.
116 Perhaps it was done in this fashion because it was not within the province of the Canadian court to over-rule *Ong Ah Chuan*. 
Queen v. Sin Yau-Ming.\textsuperscript{117} the Court considered a number of presumptions of intent to traffic inconsistent with the Bill of Rights. One was triggered by possession of not less than half a gramme of heroine and the other by possession of more than five packets of heroine. We have seen how Lord Diplock would have approved of at least the first of these presumption.

Lord Diplock’s view of the content of the presumption of innocence is unsupportable and clearly out of favour. The presumption of innocence is a guarantee concerning, not only the relevance, but the weight of evidence which must be adduced to ground a conviction. The definition in \textit{Oakes} is correct in principle and would operate to prohibit any attempt to place the persuasive burden on the accused person. Unfortunately the analysis did not stop there. The Canadian Charter contained a derogation clause which permitted reasonable limitations “demonstrably justified in a free and democratic society”.\textsuperscript{118} This made it possible to justify exceptions, at least theoretically. It introduces an element of uncertainty which does not bode well for Canadian jurisprudence on the presumption of innocence. The reason is that there appears to be no “demonstrable” reason why exceptions to the presumption of innocence by way of shifting the persuasive burden should be justified in principle or practice.\textsuperscript{119}

The position in principle has been explored in some detail by Adrian Zuckerman in the context of the justifiability of employing a standard of proof lower than that of reasonable doubt. His conclusion is that there is “no justification from principle for accepting a standard lower than the highest attainable standard for the proof of guilt”.\textsuperscript{120} Placing persuasive burdens on the accused will mean that for some facts crucial to a conviction, there need not be proof beyond reasonable doubt. This means that there will be occasions in which convictions occur when the court is not morally certain of the guilt of the accused. The probability of the conviction of the innocent will increase and those who would argue that

\textsuperscript{117} unreported, decision of the Court of Appeal on 30 Sept 1991. This case is commented on in Litton, “Courting Chaos with the Bill of Rights” 24 Oct 1991 \textit{South China Morning Post} p. 17. Constitutional scrutiny of statutory presumptions was predicted by Bruce and McCoy, \textit{Criminal Evidence in Hong Kong} (2nd Ed., 1991) pp. 444–447. This decision has now been reported in [1992] 1 H.K.C.L.R. 127. The Hong Kong Court of Appeal declared inconsistent with The Bill of Rights a number of presumptions closely resembling those found in the Singapore Legislation.

\textsuperscript{118} See above, note 109, at pp. 224–30.

\textsuperscript{119} United States constitutional jurisprudence is in a state of confusion because the courts have been unwilling to prohibit entirely the placing of persuasive burdens on the accused. For an excellent summary of the present debate and a plea for a constitutional ban on persuasive burdens on the accused, see Sundby, “The Reasonable Doubt Rule and the Meaning of Innocence” 40 Hast.L.J. 457 (1989).

\textsuperscript{120} \textit{The Principles of Criminal Evidence}, pp. 125–34.
persuasive presumptions are justifiable must point to some legitimate and acceptable criminal justice policy which will justify the conviction of the innocent. Zuckerman performs the exercise of going through the classic aims of the criminal justice system to show that there is no such justification. It fails on the retributive aims of criminal justice as it cannot be said that the innocent morally deserves punishment for a crime he did not commit. The argument from deterrence is tenuous. The mechanics of deterrence are such that the certainty of detection and apprehension are far more significant in contributing to deterrence than tampering with the burden of proof. It would be difficult to argue that persuasive presumptions are necessary to increase the deterrent effect of the law to an acceptable level. There is much else that can be done. Punishments may be enhanced and this has been done for some of the offences which seem to attract presumptions. Detection and apprehension may be improved. The argument from incapacitation also fails as there is the double uncertainty of whether the accused did commit the crime in the first place and of whether he will do it again.

Zuckerman was concerned that the commitment to the principle of proof beyond reasonable doubt “could degenerate as an instrument for the protection of the innocent and give way to ad hoc considerations of social advantage”. The truth is that it is difficult to say with any certainty what such an advantage could be. Persuasive presumptions interfere with the normal process of inference of the trier of fact and there with common sense itself. These presumptions force the court to rush in where logic, common sense and experience fear to tread. It is perhaps in response to this that Lord Diplock in *Ong Ah Chuan* felt moved to say:

> It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroine addicts in Singapore; so, as a matter of common sense, the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking.

In a recent High Court decision, Kan Ting Chiu JC put it more starkly in this paraphrase of Lord Diplock:

> When a person is caught conveying drugs in a quantity much larger than is likely to be needed for his own consumption, the inference that he was transporting them for the purpose of trafficking in them, in the absence of any plausible explanation from him, is irresistible. The effect of s 17 is to transform the inference into a presumption.

Simply, if the presumption is so much in line with common sense, why is it

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121 See above, note 105.
necessary at all? Of course there are fact situations in which both common sense and presumption reach the same result, but surely the point is that the presumption forces the trier of fact in other situations to draw the inference even when it is contrary to common sense to do so. Otherwise it would serve no purpose at all. The enormity of the presumption is such that even with “plausible explanation” the learned Judicial Commissioner must still draw the inference. One is must ask if all these logical contortions are necessary. We have encountered similar situations where the prosecution might legitimately experience some difficulty in leading evidence. We have seen that the answer is to place the evidential burden on the accused. How can it be said that persuasive presumptions are necessary when there exists the device of the evidential burden? Indeed, as we have seen, some of the earlier presumptions were so construed without any evidence that the enforcement of the statute was impaired and without apparent outcry on the part of the community or the government.

There is, in short, no evidence that persuasive presumptions are either a justifiable or a necessary response to even serious crimes. Refusal of a court interpreting a constitutional provision to recognise this will spell trouble. The tempting compromise that some presumptions are justifiable and some are not will land the court with an impossible task of drawing the line. Lord Diplock in *Ong Ah Chuan* seemed to have said that the double presumptions in the Drugs legislation may stand on a different footing. But how could it? If the test is the “logically probative” one, then surely the double presumptions must stand as well. For example possession of keys to a container filled with drugs is logically probative of possession of the drugs and this in turn is logically probative of possession for the purpose of trafficking. The Canadian courts have encountered this problem of coherence. Not long after the Supreme Court decided *Oakes*, it upheld a persuasive presumption in *R v. Whyte* in which, on proof that the accused occupied the seat ordinarily occupied by the driver, the burden fell on him to prove that he did not enter the vehicle for the purpose of setting it in motion. It is difficult to distinguish the presumptions. The *Oakes* presumption failed because addicts might be caught together with traffickers. Similarly too the *Whyte* presumption will catch people who are sitting at the driver’s seat, but who did not intend to drive. The Supreme Court in *Whyte* gave a number of other reasons for the justifiability of the presumption in that case which cannot be discussed at length here. Suffice it to say that they could well have been fashioned in favour of the presumption in *Oakes*. A similar fate awaits the European Court of

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123 This difficulty was foreseen by Sheldrick, “Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses” Vol. 44, No. 2 Toronto Faculty of Law Review 179.
Human Rights in its efforts to interpret the protection of the presumption of innocence. In *Salabiaku v. France* the Court ruled:\(^{125}\)

Article 6(2) does not regard presumption of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

While the observation that the presumption of innocence does bear on the validity of presumptions is heartening, the doctrine of “reasonable limits” is bound to lead to confusion. All that the Court seemed to have required in that decision was that the prosecution had to prove the triggering fact and that the defence could rebut the presumption. This is scant protection indeed and one is left to wonder what an unreasonable presumption is. Needless to say even the *Oakes* presumption may have survived this half-hearted scrutiny.

8 Some Themes in Conclusion

The law concerning the burden of proof in criminal justice has been plagued with a number of timid decisions at the highest level, displaying the greatest insensitivity to the principle of proof beyond reasonable doubt. At the level of statutory interpretation, the Privy Council has twice, in the context of the Evidence Act in *Jayasena* and in the context of statutory presumptions in *Yuvaraj*, and the House of Lords once, in *Hunt*, chosen to construe references to the burden of proof as the persuasive burden, rejecting the far more sensible meaning of an evidential burden. At the constitutional level, it was once again the Privy Council which, in *Ong Ah Chuan*, with one hand gave constitutional significance to the principle and with the other robbed it of any meaningful content. There is, however, a silver lining and it is a strand of local authority which has struggled hard to keep the principle afloat; by confining the peculiar knowledge rule, by refashioning the rule on alibis and by offering an alternative to *Jayasena*. It is to these decisions, made by our own judges, that we must now look. We gain inspiration from what appears to be a global awakening to the realisation that the presumption of innocence does prescribe constitutional requirements on the rules governing the burden of proof. But the concept of the reasonable or justifiable persuasive presumption is bound to lead to inconsistency and should not be accepted. At the end of the day, however, our courts must begin to be aware of the

sound constitutional value in the protection of the innocent from conviction and that it cannot be compromised for what is perceived to be short-term convenience for the prosecution. Lest this may seem a rather radical position to take, this is precisely the recommendation made in the 11th Report of the Criminal Law Revision Committee,\textsuperscript{126} a document which has found considerable favour in Singapore.\textsuperscript{127}

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\textsuperscript{126} Parliament has adopted a number proposals of the 11th Report. They include, the curtailment of the privilege against self-incrimination and the rules concerning cross-examination of the accused on his character.

\textsuperscript{127} I am grateful to my colleagues who have helped to sharpen my thoughts in our discussions and to my students at National University of Singapore in the 1991–92 academic year who had to endure my unrefined ideas in lectures and tutorials on the burden of proof in the Evidence course.

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