

REVISITING S.105 OF THE INDIAN EVIDENCE ACT, 1872

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Any student of the Indian Evidence Act¹ would require to start with one essential presumption - that the legislation be treated as *sui generis*. This is because, much discussed common law phenomena like legal burden, evidentiary burden, primary burden and secondary burden do not find mention in the IEA.² In fact, the principles of Standard of Proof, which form the fulcrum of any criminal statute, are undefined in the Indian scenario.³ It is perhaps in this background that one needs to approach S.105 of the IEA.⁴

In legal discussions the term 'Burden of proof' or 'Onus Probandi' is used in two ways: a) To indicate the duty of bringing forward arguments or evidence in support of a proposition; b) To mark that of establishing a proposition as against all counter arguments of evidence.⁵ This definition perhaps best defines the middle path taken in the definition of Burden of Proof in the context of general exceptions.

What is the rationale of placing the burden on the defence? George Fletcher⁶ has identified two fundamental notions as to why the defence bears the burden: a) The burden of persuasion in private legal disputes had a great impact on criminal cases in the 19th century and the rules of criminal law are functional

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1 Hereinafter the IEA.

2 Though the Supreme Court in *State of Maharashtra v. Wasudev Ramchandra*, AIR 1981 SC 1186, discussed the issue, the Courts have stopped short of defining these terms in the context of the IEA. See also, *Jayasena v. Reginam*, [1970] 1 All ER 219.

3 See, the indirect reference of Macklin J. in *Government of Bombay v. Sukur*, AIR 1947 Bom. 38 wherein his lordships has commented on the same.

4 S.105 reads : 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 Indian Penal Code, (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. Reference here should be drawn to S. 4 for the definition of *shall presume*, S. 3 defines *Proved, Disproved and Not proved*. These definitions are useful in not just defining the burden of proof requirement in S. 105 but also to present the amplitude and the standard of proof required.

5 James B. Thayer, *The Burden of Proof*, 4 Harv L Rev 45 (1890).

6 George P. Fletcher, *Two kinds of legal rules: A Comparative Study of Burden of Persuasion practises in Criminal cases*, 77 Yale LJ 880 (1986).

analogies of the rules of settling private disputes b) The concept of presumption of innocence has reduced the above mentioned burden on the defence only to that what is available in the civil cases.

A. S.105 AND THE COURTS

A judicial analysis of S.105 begins with the watershed decision of *Parbhoo v. Emperor*⁷ and ends with the landmark three-judge bench decision in *Vijayee Singh v. State of U.P.*⁸ Though the Supreme Court on a number of occasions⁹ and the Privy Council in *Jayasena v. Reginam*¹⁰ have thrown light on the debate, the single most important influence has been Viscount Sankey's dictum in *Woolmington v. D.P.P.*¹¹ Some of the propositions which have emerged out of the judicial opinions on S.105 are as follows:

1. The burden on the accused under S.105 is not so onerous as the burden on the prosecution, and can be discharged by a balance of probabilities.¹²
2. The burden on the accused in S.105 can be discharged by creating a reasonable doubt as to whether he can avail himself of the exception of S.105.¹³
3. The burden on the accused in S.105 cannot be discharged by merely creating a *reasonable doubt* as to whether he can avail himself of the benefits of the exception but in some cases an indirect acquittal can be secured if the evidence on record creates a reasonable doubt as to the essential ingredients of the offence.¹⁴

7 AIR 1941 All 402, hereinafter referred to as *Parbhoo's case*.

8 AIR 1990 SC 1459, (per S. Ratnavel Pandian, Fatima Beevi and J. Reddy JJ.), hereinafter referred to as *Vijayee Singh's case*.

9 Important being, *Dayabhai v. State*, AIR 1964 SC 1563 : (1964) Cri L J 472; *Nanavati v. State*, AIR 1962 SC 605: 1962 Cri L J 521; *Mohan Singh v. State*, AIR 1975 SC 2161: 1975 Cri L J 1865; *Pratap v. State of U.P.*, AIR 1976 SC 966 : 1976 Cri L J 697 and *Mohd. Ramzan v. State of Delhi*, AIR 1980 SC 1341: 1980 Cri L J 1459.

10 [1970] 1 All ER 219. (per Lord Hudson, Lord Devlin, Lord Donovan, Lord Pearson and Lord Dilhorne).

11 (1935) A.C. 462. Hereinafter referred to as *Woolmington's case*. The Court held that throughout the web of 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 statutory exceptions. If at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

12 *K.M. Nanavati v. State of Maharashtra*, AIR 1962 SC 605.

13 *Parbhoo's case* (as per majority, Iqbal Ahmed C.J., Allsop, Bajpai, Ismail, Braund and Mullah JJ.)

14 *Rishikesh Singh v. State*, AIR 1970 All 51 per Oak, C.J.; see also *D.C. Thakkar v. State of Gujarat*, AIR 1964 SC 1563 (Per Subba Rao J.)

4. S.105 does not envisage the English situation wherein the Jury is left in reasonable doubt upon a review of all the evidence even after the explanation of the accused as regards. More so, the whole concept of reasonable doubt after the explanation by the accused, is wrong because the prosecution, in any event has to prove its case beyond reasonable doubt at the very first instance.¹⁵

In the light of the Supreme Court decisions which are law by virtue of Article 141 of the Constitution, approaches 1 and 3 have been disapproved. In *Parbhoo's case*, the Full Bench of the Allahabad High Court brought out two important propositions. 1) In the case of self defence, where the accused has failed to satisfy the court beyond a reasonable doubt, it still remains open to the accused to use the evidence for showing a reasonable doubt as to the existence of the exception itself and if a reasonable doubt is created as to the existence of exception, then it is sufficient to secure an acquittal. 2) Reading Ss.4 and 105 it is clear that the court shall presume the absence of such circumstances as 'proved' unless and until they are 'disproved'. Where the accused is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to discharge the burden of proving absence of such circumstances, the case would fall in the category of 'not proved'. The court while presuming the absence of such circumstances, will bear in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond reasonable doubt and the benefit of every reasonable doubt should go to the accused.¹⁶ The first point in *Parbhoo's case* came up for review in a nine judge bench of the Allahabad High Court in *Rishikesh Singh v. State*¹⁷ which partly disagreed with the logic of *Parbhoo* as follows: "The majority in *Parbhoo's case* was not right in assuming that the accused can secure an acquittal if he creates a reasonable doubt as to the existence of exception. However in some cases the accused can secure an indirect acquittal... because there may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is the ingredient of the offence. So the court said that an acquittal can be secured by firstly, the creation of a reasonable doubt as to the ingredient of the offence, and secondly, complete proof of the exception on a preponderance of probabilities.

In the same year, the Privy Council decided the Sri Lankan case of *Jayasena v. Reginam*¹⁸ wherein their lordships quoted with approval the dictum of

15 *Government of Bombay v. Sukur*, AIR 1947 Bom 38, followed in *Hariprasad Ghasiram v. State*, AIR 1952 Bom 184.

16 *Vijayee Singh v. State*, AIR 1990 SC 1472.

17 AIR 1970 All 51 (per Oak C.J., Broome, Mathur, B.D. Gupta, Gyaneshwar Kumar, Beg, Yashoda Nandan, Mukerji and Parekh JJ with a majority of seven judges agreeing upon the same point).

18 [1970] 1 All ER 219.

Mudholkar J., in *Bhikari v. State*¹⁹ and *Dayabhai's case*²⁰ and commented that the *Woolmington* logic may not be applicable in codified systems of evidence law. The court was of the view that the very conceptual understanding of burden of proof varies between England and the Indian subcontinent, (the latter being based more on Stephan's digest), and that therefore, the propriety of importing common law doctrines and definitions into the Indian context was questionable. Finally, the dissenting note of Macklin J. in the *government of Bombay v. Sukur*²¹ needs to be considered "Though the absence of reasonable doubt is often the convenient way of expressing what is meant by 'proof' it is not the real test. Once the prosecution has convinced the jury, the effect of S. 105 is that the accused must prove to the jury that he has a right of private defence; if he does not prove that, then the act established by the prosecution stands as a criminal act and must be dealt with accordingly.

B. S.105 AND WOOLMINGTON'S CASE

The effect of *Woolmington's case* in the realm of general exceptions has been mainly to reaffirm the presumption of innocence, indirectly placing greater onus on the prosecution. This can be explained as follows:

Since the interpretation is that a reasonable doubt which goes to strike a necessary ingredient of the offence is enough to acquit the accused, the accused is not under an obligation to prove on a balance of probabilities. Following the above, the prosecution will now have to disprove the exception failing which the defence can use S.105 to cast a reasonable doubt so as to secure an acquittal.

However, the opponents of this case make out the following points of criticism to the application in India. Firstly that English law has no application to a codified Indian statute.²² Secondly, that the IEA is in any event based on Stephen's digest which preceded *Woolmington*, and thirdly that the dictum of Viscount Sankey has exceptions to statutes and the IEA being a statute cannot fit into the *Woolmington* framework.²³

C. CONSTITUTIONALISATION OF THE PRESUMPTION OF INNOCENCE AND ITS IMPACT ON S.105

In many jurisdictions all over the world the phenomenon of constitutionalisation of the general principles of criminal law, and especially the

19 AIR 1966 SC 1 : (1966) Cri L J 63.

20 (1965) 2 S.C.J. 531 : AIR 1964 SC 1563. On this point reference may also be drawn to the *Vijayee Singh's case*, AIR 1990 SC 1472.

21 AIR 1947 Bom 38.

22 See, Lord Hudson in *Jayasena v. Reginam*, [1970] 1 All ER 219.

23 See, Paul Roberts, *Taking the Burden of Proof Seriously*, Crim LR 783 (1995). See also, Francis Benson, *Statutory Exceptions : A third knot in the Golden Thread*, Crim L R 31 (1988).

constitutionalisation of the presumption of innocence is underway.²⁴ Perhaps the forerunner in this regard is *The Canadian Charter of Rights and Freedoms* which provides for a constitutional guarantee of the presumption of innocence. As laid down by Justice Dickson in *R v. Oaks*²⁵ "the presumption of innocence protects the fundamental liberty and human dignity of any and every person and if an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible to convict him despite the existence of a reasonable doubt. Similar utterances can be found in the South African case of *S v. Bhulwana*²⁶ However, in the United States, though there is no specific guarantee of the presumption of innocence, the courts in *In re Winship*²⁷ and *Mullany v. Wilbur*²⁸ expanded the due process clause in the 5th and 14th amendments to constitutionalise the presumption of innocence. However, the U.S. approach demands that there be an offence-defence difference, and the protection only applies to the true elements of the offence.²⁹ However, it would be sufficient to state that the American experience of the presumption of innocence, though not so pronounced as in South Africa or Canada, needs to be noticed as it is one stage in the gradual evolution of constitutionalisation and if the Indian experience is to graduate from the present static stage, it is immediate perhaps the U.S. examples which require attention.³⁰

CONCLUSION

It should be remembered that as regards the Indian position on the constitutionalisation of the presumption of innocence in *P.N. Kishanlal and others v. Government of Kerala and others*³¹ it was explicitly laid down that the presumption of innocence is not a constitutional guarantee and reverse onus

24 Bruce P. Archbold, *The Constitutionalisation of the General Part of Criminal Law*, 67 Can Bar Rev 403 (1988). See also, Richard Mahoney, *The Presumption of Innocence: A new Era*, 67 Can Bar Rev 1 (1988).

25 26 DLR 200 (1986) c.f. Dr. S.V. Joga Rao, *Presumptive evidence and presumption of innocence - A South African Perspective*, reproduced in the *Max Planck Institute Lectures*. S. 11(d) of the charter provides that an accused person has the right to be presumed innocent until proven guilty according to law in fair and public hearing by an independent and impartial tribunal.

26 4 BCLR 401 (1995) c.f. Dr. S.V. Joga Rao, *S v. Bhulwana - some reflections after reading the interpretation of the Constitutional Court of the Republic of South Africa*, 4 SBRRM Law Journal (Mimeo). Here the courts interpreted Ss. 25(2), (3)(c), (3)(d) and 33(1) of the Constitution to pronounce on the unconstitutionality of reverse onus clauses.

27 25 L Ed (2d) 368 (1970).

28 95 S Ct 1881 (1975).

29 *Tot v. The United States*, 319 US 463 (1943); The essential element is found out by applying the rational connection test.

30 A case is not being made for the importation of American precedents. In fact, one should also remember the opinions of Kania J. in *A.K. Gopalan v. State of Kerala*, AIR 1950 SC 27, Viswanath Shastri J. in *Champakam Dorairajan v. State of Madras*, AIR 1951 Mad 120 (129) and P.B. Mukherjee J. in *Mahadeb Jain v. B.B. Sen* AIR 1951 Cal 563 (569) wherein the "Craze for American Precedent" have been warned against.

31 1995 SCC (Cri) 466.

clauses cannot be declared as *ultra vires*. However, adverting to the questions which were raised earlier with respect to the *Woolmington* formulation, there is a need to answer an oft quoted criticism... that the formulation vastly increases the burden on the prosecution. In answer to this, Paul Roberts retorts "What is wrong if the prosecution's onus is made weightier? It is repugnant to public policy to allow conviction even when doubt exists."³² Whilst a normative suggestion is not sought to be made, given the present circumstances, wherein an abysmally low conviction rate stares us in the face, a comprehensive burden (as Fletcher puts it) on the prosecution may not be advisable. The existing formulation in *Woolmington's case*, as reflected in the decisions of the Indian courts is a correct and thoughtful exposition of law.

32 Paul Roberts, *Taking the Burden of Proof Seriously*, Crim LR 783 (1995).