

REVERSE BURDEN OF PROOF IN TERRORIST RELATED ACTIVITIES

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INTRODUCTION

Terrorism

Terrorism is, in its broadest sense, the use of intentionally indiscriminate violence (terror) in order to achieve a political, religious, or ideological aim. It is classified as fourth-generation warfare and as a violent crime. In modern times, terrorism is considered a major threat to society and therefore illegal under anti-terrorism laws in most jurisdictions. It is also considered a war crime under the laws of war when used to target non-combatants, such as civilians, neutral military personnel, or enemy prisoners of war.

Reverse burden of proof

The golden rule that runs through the web of civilized criminal jurisprudence is that an accused is presumed to be innocent unless he is found guilty of the charged offence. Presumption of innocence is a human right as envisaged under Art.14 (2) of the International Covenant on Civil and Political Rights 1966. Art.11(1) of the Universal Declaration of Human Rights 1948 also provides that any charged with penal offences has a right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Even before, it was part of English Common Law as observed by Viscount Sankey in **Woolmington v. Director of Public Prosecutions**¹, [Golden Thread Judgment] that “no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained”. This principle is also became a fundamental part of Criminal Law of India in **V.**

¹ (1935 AC 462), House Of Lords Case

D. Jhingan Vs. State of Uttar Pradesh², it was held by the court that It is also the cardinal rule of our criminal jurisprudence that the burden in the web of proof of an offence would always lie upon the prosecution to prove all the facts constituting the ingredients beyond reasonable doubt. If there is any reasonable doubt, the accused is entitled to the benefit of the reasonable doubt. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. But in **Veeraswamy Case**³ the Constitution Bench held that “..... a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Art.21 of the Constitution as contended for the appellant. It may be noted that the principle reaffirmed in Woolmington case (Supra), is not a universal rule to be followed in every case. The principle is applied only in the absence of statutory provision to the contrary”. As observed by Justice K.T.Thomas in **State of West Bengal v. Mir Mohammad Omar and Others**⁴, that “the pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty”. The Concept of “**reverse burden**” has been adopted in many statutes like Negotiable Instruments Act, Prevention of Corruption Act, Narcotic Drugs and Psychotropic Substances Act etc. In Indian Evidence Act, Section 113A (for S.306 IPC) and Section 113B (for 304B IPC) places a reverse burden on the accused and also in terrorist related activities reverse burden lies on the defence to prove its innocence.

Reverse burden of proof in terrorist related activities

Indisputably, everyone has the right to be presumed and be treated as innocent, until they are convicted according to law in the course of proceedings which meet the minimum prescribed requirements of fairness. Presumption of innocence is fundamental to the protection of human

² AIR 1966 SC 1762

³ (1991) 3 SCC 655

⁴ 2000 (8) SCC 382

rights, and the fairness of a trial depends on observation of this guarantee. Its purpose is to minimise the risk that innocent persons may be convicted and imprisoned. If accused persons are not given this benefit of doubt, any person can be charged with any crime by the state. Given the fact that the state has the resources behind it and an individual is powerless in comparison with the state, this principle is sacrosanct. Presumption of innocence casts the burden of proof on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. The presumption of innocence contains three fundamental components: the onus of proof lies with the prosecution; the standard of proof is beyond reasonable doubt; and the method of proof must accord with fairness.

Rules of evidence and conduct of a trial ensure that the prosecution bears the burden of proof throughout a trial. However, the onus of proof shifts such that the accused must prove elements of certain defences. For example, the accused may be required to explain their possession of certain things (stolen goods or contraband or show the possession of a licence in the case of an offence involving the performance of an act without a licence). The prosecution is not required to shoulder the virtually impossible task of establishing that a defendant does not have a licence when it is a matter of comparative simplicity for the defendant to establish that s/he has it. Such explanations or requirements are known as statutory presumptions of law or fact. It is commonly accepted that statutory presumptions do not violate presumption of innocence per se if they are defined by law and reasonably limited. They must also preserve the right of the accused to a defence so that they must be capable of rebuttal by the accused.

Whether a statutory presumption, or a reverse burden as it is sometimes called, amounts to a reasonable incursion on the presumption of innocence will depend upon:

- a. What does the prosecution have to prove in order to transfer the onus to the defence?
- b. What is the burden on the accused and does it relate to something which is likely to be difficult for him/her to prove or does it relate to something which is likely to be within his/her knowledge?
- c. What is the nature of threat faced by the society which the provisions is designed to combat?

The real concern is not whether the accused must disprove an element or prove an excuse, but whether an accused may be convicted while a reasonable doubt exists. When that possibility

exists, the presumption of innocence is lost. If the accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction despite a reasonable doubt about the guilt of the accused. No common formula determines whether a statutory presumption of law or fact conflicts with presumption of innocence. Whether an exception is justifiable will in the end depend upon whether it remains the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed. The less significant the departure from the normal principles, the simpler it will be to justify the exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, it is less likely that an exception will be regarded as unacceptable. This is the basic premise on which the incursions into the presumption of innocence are tested in various countries, although there do exist minor difference from jurisdiction to jurisdiction.

English case law

In R v DPP ex parte Kebilene⁵ court asserts the incompatibility with the presumption of innocence and Article 6(2) of the provisions of s16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. This makes it an offence to possess an article in circumstances giving rise to a reasonable suspicion that it is for acts of terrorism, the burden being on the defence to prove that that was not the purpose and a burden being placed on the defendant in relation to proof of possession. This judgment was reversed in the House of Lords. At 378 to 379 in the House of Lords, Lord Hope of Craighead observed that, in deciding whether a statutory provision is vulnerable to challenge on the ground of incompatibility with Article 6(2), it is first necessary to distinguish between the shifting evidential burden and the ultimate persuasive burden on the balance of probabilities on a defendant. Statutory presumptions placing an evidential burden on the accused do not breach the presumption of innocence. As to persuasive burdens, a mandatory presumption of guilt as to an essential element of the offence is inconsistent with the presumption of innocence. A discretionary presumption of guilt may not be inconsistent, depending on the tribunal of facts' view as to the cogency of the evidence. Provisions in relation to an exemption or proviso which the accused must establish to avoid conviction, but which are not an essential element of the offence, may

⁵ [2000] 2 AC 326

or may not violate the presumption of innocence depending on the circumstances. At 386c Lord Hope adopted three questions, suggested by counsel, for considering where the balance lies:

- (1) what does the prosecution have to prove in order to transfer the onus to the defence?
- 2) what is the burden on the accused - does it relate to something which is likely to be difficult for him to prove, or does it relate to something likely to be within his knowledge or (I would add) to which he readily has access?
- (3) what is the nature of the threat faced by society which the provision is designed to combat?⁴

National Legislations

In 1985, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was introduced, and used to suppress anyone who raised a voice against the Indian State's actions, specifically in Punjab. The Act gave wide powers to law enforcement agencies for dealing with so called terrorists, and socially disruptive activities in the following ways:

- An accused person could be detained up to 1 year.
- Confessions made to police officers were admissible as evidence in the court of law, with the burden of proof being on the accused to prove his, or her, innocence.
- Secret courts were set up exclusively to hear the cases, and deliver judgments, pertaining to the persons accused under this Act.
- A person could be detained under this act, with no evidence required, on the mere suspicion that an individual may have performed an act not in the national interest.

TADA effectively gave Police the power to accuse anyone of being an enemy of the state, without need of any evidence. A government who puts its citizens first would not grant such powers, even to a police force with an exemplary human rights record. In India, where the police are known for their corruption, the outcome of TADA was predictable and brutal, yet politicians enthusiastically endorsed it. In the decade that TADA was in force, the Punjab Police imprisoned, tortured, and used blackmail to illicit money from, victims, and their families. The fact that their Police actions could not be questioned under TADA, further emboldened them to rape, torture, murder, and commit other atrocities against, large numbers

of Sikhs in the Punjab. The Act was scrapped in 1995, but many Sikhs charged under the TADA still remain in prison today.

Section 21 TADA, talks about reverse burden of proof in terrorist related matters, according to the section:

21. Presumption as to offences under Section 3 – (1) In a prosecution for an offence under sub-section (1) of Section 3, if it is proved –

- a. that the arms or explosives or any other substances specified in Section 3 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of similar nature, were used in the commission of such offence; or
- b. that by the evidence of an expert the fingerprints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence.

(2) In a prosecution for an offence under sub-section 3 of Section 3, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that sub-section.

This section of TADA talks about reverse burden on accused, according to it accused is not presumed as innocent and burden is on him only to prove his innocence beyond reasonable doubt.

In 2002, Terrorist and Disruptive Activities (Prevention) Act (TADA) gets repealed and parliament of India introduced **the Prevention of Terrorism Act (POTA)**, The same provisions as TADA applied, except for the fact a person could not be convicted of activities not in the national interest, on mere suspicion, without evidence.

Prevention of Terrorist Act has almost same provisional as related to Terrorist and Disruptive Activities Act, it also has same provision related to reverse burden of proof on accused to prove its innocence and not on prosecution to prove his guilt beyond reasonable doubt.

Section 53 of this Act, are as follows:

53. Presumption as to offences under section 3.

(1) In a prosecution for an offence under sub-section (1) of section 3, if it is proved—

(a) that the arms or explosives or any other substances specified in section 4 were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature, were used in the commission of such offence; or

(b) that the finger-prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence, the Special Court shall draw adverse inference against the accused.

(2) In a prosecution for an offence under sub-section (3) of section 3, if it is proved that the accused rendered any financial assistance to a person, having knowledge that such person is accused of, or reasonably suspected of, an offence under that section, the Special Court shall draw adverse inference against the accused.

This section 53 of POTA is very much similar than section 21 TADA both these sections make provisions for reverse burden of proof on accused to prove its innocence,

POTA included as crimes activities performed with an ‘intent to threaten’ national integrity, and allowed for admissibility of confessions extracted in police custody. The Appendix demonstrates that the definition of actions included in the scope of these laws has grown broader, and that the burden of proof has shifted from the prosecution to the accused, thus impacting negatively on civil liberties of all citizens

These type of provisions is necessary in terrorist type of cases because if there is a reasonable doubt and prosecution is not abling to prove his guilt, he gets benefit of doubt and gets acquitted which is not good in nations interest.

State legislations

On March 31,2015 the Gujarat Assembly passed the *Gujarat Control of Terror and Organised Crime Bill, 2015* (“the Bill”), It is modelled on the *Maharashtra Control of Organised Crime*

Act, 1999 (“MCOCA”), both these Acts are major state legislations related to prevention of terrorism and both of them has provisions related to reverse burden of proof on accused

a law that was criticised for being draconian, in excessive violation of civil liberties, and with several documented instances of misuse. This bill had previously been passed on two occasions, in 2003 and in 2009. Each time, it was unsuccessfully referred for the President’s assent.

Section 21 of the Bill, which is identical to Section 22 of MCOCA, is a reverse-onus clause, which shifts the burden of proof from the prosecution to the accused in certain circumstances. In doing so, it dispenses with the presumption of innocence of the accused and breaks the “golden thread” of criminal jurisprudence, requiring the prosecution to prove the guilt of the accused beyond reasonable doubt, which originated in common law but has become a settled proposition in Indian criminal jurisprudence as well.⁷

This is the initiatives of the states to make more efficient laws related to terrorist actiities

Malimath committee report

V.s malimath, retired judge of karnataka was appointed as chairman of a committee known as malimath committee in 2003. This committee was a committee on reform of criminal justice system. In its report it suggest some reforms and it includes burden of proof in terrorist matters also.

The Committee has recommended placing an increased burden on the defendant to defend him or herself early in the trial, with consequences if the defence is weak. For example, the Committee recommends the preparation of a statement of prosecution and a statement of defence. However it notes that where the reply of the defence is general, vague or devoid of material particulars, the Court shall deem that the allegation is not denied. Prior to this it may give the accused an opportunity to rectify the statement.

Once again the right of the accused to remain silent with regard to certain facts that may incriminate him/her self is in danger of being violated. The Committee also suggests, on considering the prosecution and defence statements, the Court shall formulate the points of determination that arise for consideration (para 10 i, Recommendations), and these points for

determination shall indicate on whom the burden of proof lies (para 10 ii, Recommendations). This is an attempt to reverse the burden of proof and may require the accused to prove his innocence, violating a basic tenet of criminal law that a person is innocent until proven guilty.

The ICCPR points out that in accordance with the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial. Article 67 (1)(i) of the ICC Statute also lays down minimum guarantees to the accused including no imposition of any reversal of the burden of proof or any onus of rebuttal.⁸

The Supreme court's view in **PUCL v. Union of India**, the petitioners, who were civil rights activists, challenged the constitutional validity of POTA. Pointing out that the fight against terrorism was not a regular criminal justice endeavour, but rather a defence of the nation and citizens, the court said that terrorism was a new challenge for law enforcement. It said, "To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws (such as POTA)."

Findings of the study

Findings of the study is that in India there is a reverse burden of proof on the accused to prove its innocence, unlike other criminal cases where accused is presumed to be innocent and it is the duty of the prosecution to prove his guilt beyond reasonable doubt and if there is a doubt than benefit of doubt goes to accused.

But in terrorists related matters it is the matter of national security and if prosecution fails to prove its case beyond reasonable doubt than there is always a risk in giving benefit of doubt to the accused terrorist, that is why burden of proof is on accused to prove his innocence and no benefit of doubt is given to him.