

BURDEN OF PROOF IN CRIMINAL PROCEEDINGS
IN MALAYSIA : A REVIEW

BY

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Preface:

The problems arising from the interpretation of the court in reference to the question of burden of proof in criminal proceeding has led many judges and writers to interpret the subject differently. Thus the aim of this project paper is to review the decisions of the various jurisdictions in England and Malaysia especially and to discuss the various judgements and commentaries that were put forward for the purpose of showing the problem.

Although the topic directly concerns the burden of proof in criminal proceeding, the writer felt that it is important to review first the basic and broad principle regarding the burden of proof under the law of Evidence and only in the later chapters, the writer discusses the position in England and (in detail) in Malaysia.

It is not the intention of the writer to limit the scope on the subject to Malaysian Jurisdiction only since the decision in other common law countries like Ceylon and India have in fact upon appeal to the Privy Council had its effect in the Malaysian cases. Thus the cases and material here does not only concern the Malaysian authority but also involve cases from England, India, Ceylon and Singapore.

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ABBREVIATIONS

M.L.J	Malayan Law Journal
M.L.J Supp.....	Malayan Law Journal Supplement
All.E.R.....	All England Law Report
C.L.R	Criminal Law Review
A.I.R	All India Report
A.C	Appeal Cases
Q.B	Queens Bench
A.L.J	Australian Law Journal
HL	House of Lords
C.L.J	Current Law Journal
Bom. L.R	Bombay Law Report
J.M.C.L	Journal of Malaysian Comparative Law (Jernal Undang-Undang)
W.L.R	Weekly Law Report
M.L.R	Modern Law Review
Mal.L.R.....	Malayan Law Review
Ch.	Chancery

TABLE OF CASES CITED

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Sow Cheow Hor v Reg (1960) MLJ 254
Tikan v R (1953) MLJ. 131
Woolmington v PP, (1935) A.C 462, (1935) All.E.R 1 HL

an inference from such evidence.⁴ On such a question, Sarkar has pointed out that:

"When the issue raised in substance is whether the plaintiff's or defendant's story is true, it is possible that neither of them may be true. The question then arises which of the two alternatives of the issue is the really material one is the first of the issue - Is the plaintiff's case true? If the defendant's defence is a plea in confession and avoidance, viz a plea which admits that the plaintiff story is true but avoids it, then if the defendant fails to prove his case, the plaintiff may recover. But if the defence is substantially an argumentative travesty of the truth of the plaintiff story, not admitting that one word of it is true and setting up certain things perfectly inconsistent with its the second alternative of the issues ought to be rejected and the truth of the plaintiff story becomes the real question. If the plaintiff then does not prove the affirmative of his issue, the consequence is that he must fail...."

The cases decided in Malaysia and abroad⁵ in connection to the question of burden of Proof particularly in criminal proceeding had given the picture to the history of law of evidence the difficulties faced by the courts. It is realised that learned judges and reknown writers have held mistaken notion on the subjects.⁶ The writer on the subject of 'Burden and Onus of Proof',⁷ had pointed out that several problems of burden of proof such as what is meant by the phrase, the problem of determining the incident of the burden and the onus is of important matters to be brought forward.

The phrase 'burden of Proof' is in itself is not defined in the Evidence Act.⁸ It has two distinct and frequently confused meanings. Firstly the burden of proof as a matter of law and pleadings. This burden rest upon the party, whether plaintiff or defendant who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings or their equivalent, and it is settled as a question of law, remains unchanged under any circumstances