

The Burden of Proof

Overview of Topic

1. The importance of the burden and standard of proof in any criminal case is impossible to understate. They are the core principles that govern all criminal trials and establish who bears the burden of proving a defendant's guilt and how this is done.
2. In 1935, in the case of *Woolmington v DPP (1936) 25 Cr App R 72*, the House of Lords described the burden and standard of proof in criminal cases in the following terms:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ... 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 [defendant had committed the offence with which he was charged], the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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." (per Viscount Sankey L.C. p.481)

3. References to "golden threads" are now rarely heard, however, the fundamental principles set out in *Woolmington* have been reaffirmed by the courts ever since.

Key Cases

- *Woolmington v DPP (1936) 25 Cr App R 72*
- *R v Appleby (William) (1943) 28 Cr.App.R. 1*
- *Kritz (1949) 33 Cr.App.R. 169*
- *R v Summers (1952) 36 Cr.App.R 14*
- *Hepworth & Fearnley (1955) 39 Cr.App.R 152 at 154*
- *R v Bentley (Deceased) [2001] 1 Cr.App.R. 21, CA*
- *R v Gray 58 Cr.App.R 177 at 183*
- *Walters v. R. [1969] 2 A.C. 26*
- *R v Yap Chuan Ching (1976) 63 Cr.App.R 7*
- *R v Penny (1991) 94 Cr.App.R*
- *R v Alan Edward Stephens [2002] EWCA Crim 1529*
- *R v Abdul Majid [2009] EWCA Crim 2563*

Discussion of Detail

Burden of Proof

4. In all criminal cases the prosecution bears the burden of proving the defendant's guilt. A defendant does not have to prove his innocence. In all criminal trials the trial judge must direct the jury that the burden of proving the defendant's guilt is on the prosecution and remains on the prosecution throughout the case. It follows that it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged. Although an extremely important direction it is one that in practice can be simply expressed and easily understood.

Standard of Proof

5. The question of how the prosecution succeed in proving their case is one that has over time proved a little more difficult to express in such simple terms.
6. In *Woolmington v DPP* [1935] A.C. 462 Viscount Sankey, L.C. said: "juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt" (at p.481). In a number of other cases tried at about the same time juries were directed that they had to be satisfied of the defendant's guilt beyond reasonable doubt, or that they should be "sure" of guilt (see, for example *R v Appleby* (William) (1943) 28 Cr.App.R. 1).
7. In the case of *Kritz* (1949) 33 Cr.App.R. 169 at 177 Lord Goddard sought to provide some guidance on the point (in a case where the trial judge had directed the jury only that they must be "reasonably satisfied" of guilt rather than satisfied beyond a reasonable doubt) in the following terms:

"It would be a great misfortune, in criminal cases especially, if the accuracy or inaccuracy of a summing-up were to depend upon whether or not the Judge or the Chairman had used a particular formula of words. It is not the particular formula of words that matters; it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the learned Judge uses one form of language or whether he uses another is neither here nor there."

... [juries know] that it is the duty of the prosecution to prove the case and that they have to be fully and thoroughly satisfied, and they very seldom want guidance on that point. It is right that they should have it. It is right that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded in a criminal case that they must be fully satisfied of the guilt of the accused person and should not find a verdict against him unless they feel sure ... When once a Judge begins to use the words "reasonable doubt" and tries to explain what is a reasonable doubt and what is not, he is much more likely to confuse them than if he tells them in plain language: "It is the duty of the prosecution to satisfy you of the man's guilt". I am not saying that the learned Common Serjeant used that formula of words, nor am I saying that it is to be preferred before all others, but what I do say is, and I am sure I can say it with the full assent of my brethren, that it is not the actual formula used that matters, but the effect of the summing-up, and if the effect of the summing-up is to convey to the jury what is their duty, that is enough."

8. Lord Goddard returned to the same point some years later in the case of *Hepworth & Fearnley* (1955) 39 Cr.App.R 152 at 154:

*"... one would be on safe ground if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt" and one could also say: "You must be completely satisfied" or better still: "You must feel sure of the prisoner's guilt." But I desire to repeat what I said in the case of *Kritz* (33 Cr.App.R. 169, at p. 177; [1950] 1 K.B. 82, at p. 89): "It is not the particular formula of words that matters; it is the effect of the summing-up. If the jury are charged whether in one set of words or in another and are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence," that is enough. I should be very sorry if it were thought that cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the prisoner's guilt. If that is done, that is enough."*

9. Since Lord Goddard's comments in 1955 the Court of Appeal has repeatedly insisted on the need for a clear direction to the jury on the standard of proof and have consistently held that a mere reference to being "satisfied" without any further reference to the need to be "sure", or alternatively to being satisfied beyond reasonable doubt, is inadequate (see *R v Bentley (Deceased)* [2001] 1 Cr.App.R. 21, CA).

10. The most recent editions of the Judicial Studies Board Crown Court Bench Book and the Bench Book Companion (publications which are intended to guide the judiciary in how best to direct the jury) suggest a simple form of words when it comes to the standard of proof: the prosecution proves its case if the jury, having considered all the evidence relevant to the charge they are considering, are sure that the defendant is guilty.
11. However, the difficulty arises when (as sometimes happens) a jury asks for clarification on precisely what it means to be sure. In answering this question judges have occasionally fallen into error.
12. In the case of *R v Gray* 58 Cr.App.R 177 at 183 the Court of Appeal considered a judge's direction to a jury that the standard of proof could be equated to "...the sort of doubt which might affect you in the conduct of your everyday affairs." In quashing the conviction Megaw L.J. stated:

"If the learned judge had referred, for example, to the sort of doubt which may affect the mind of a person in the conduct of important affairs (emphasis added), there could be, in the view of this Court, no proper criticism. Indeed that was the very sort of direction which was approved by the Judicial Committee of the Privy Council in Walters v. R. [1969] 2 A.C. 26. But in this case the direction is open to legitimate criticism. The reference to "the conduct of your everyday affairs" might in this context suggest to a jury too low a standard of proof; because a doubt which would influence a decision on an important matter might sensibly be disregarded in a decision on some "everyday affair.""

13. Notwithstanding the comments of Megaw L.J. as to what might constitute an acceptable explanation of the standard of proof, the Court of Appeal, in a number of cases that followed, suggested that it is better to avoid any sort of explanation altogether. In *R v Yap Chuan Ching* (1976) 63 Cr.App.R 7 Lawton L.J. stated:

"[I]n most cases ... judges would be well advised not to attempt any gloss upon what is meant by "sure" or what is meant by "reasonable doubt." In the last two decades there have been numerous cases before this Court, some of which have been successful, some of which have not, which have come here because judges have thought it helpful to a jury to comment of what the standard of proof is. Experience in this Court has shown that such comments usually create difficulties. They are more likely to confuse than help"

14. In the case of *R v Penny* (1991) 94 Cr.App.R. 345 Stuart-Smith L.J. said "it is usually best to keep the direction on this important matter short and clear". In *R v Alan Edward Stephens* [2002] EWCA Crim 1529 Keane L.J. went further and stated that:

"[I]t does not seem to this court to be helpful to a jury to seek to draw distinctions between being certain of guilt and being sure of guilt and in our view judges should avoid doing so. Most people would find it difficult to discern any real difference between the two. A trial judge faced with [a request from the jury for clarification] would be better advised simply to remind the jury that they had to be sure of guilt before they could convict, indicating, if he felt it necessary, that that was the limit of the help which he could give them." (see also R v Abdul Majid [2009] EWCA Crim 2563)

15. It therefore seems clear that if a judge directs the jury in clear and simple terms along the lines recommended by the Judicial Studies Board and resists any temptation to explain the standard of proof further no criticism can be properly made.

Analysis

- **Keys Areas of Complexity**
- **Latest Developments**
- **Possible Future Developments**
- **Human Rights**
- **European Union Aspects**
- **Further Reading**

Presumption of Innocence

Reverse burden

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