THE PRESUMPTION OF INNOCENCE

EVIDENTIAL AND HUMAN RIGHTS PERSPECTIVES

Andrew Stumer

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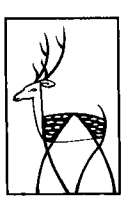

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FOREWORD

It is a particular pleasure to have been invited to contribute a foreword to this book, since its subject-matter was touched upon in Dr Stumer's very first BCL tutorial, on the burden and standard of proof, with me in Oxford. Since then I have enjoyed seeing its evolution and expansion through an MPhil dissertation, and a DPhil thesis into this full monograph.

Its subject matter lies at the intersection of legal theory and practice, public and private law, and substance and procedure. It is at the very heart of the discipline of law. Partly for this reason, it is no surprise that it should be under constant scrutiny and subject to innumerable suggestions for change in a myriad different ways. It is crucial for the whole topic of human rights, and helps to provide one of the essential components in the spine that provides both structure and control to the enterprise of law. As such it deserves serious analysis, rather than the sometimes glib justifications, and no less glib criticisms, of its elements, customarily provided elsewhere, especially in political circles, but regrettably sometimes in judicial pronouncements.

The hallmark and success of Dr Stumer's work is the careful and conscientious dissection and discussion of the sometimes high-flown rhetoric in which not only the fundamental provisions, but even their judicial applications, are so often cast. Everyone can pay lip-service to some conception of the presumption of innocence, perhaps expressed in numerical calculation of the number of guilty persons acquitted rather than that of innocent convicted. But what are the implications of the nature of the relevant crimes of the guilty or of the severity of the sentences passed upon the innocent?

This book examines from a strict legal perspective the way in which the relevant provisions of the European Convention, especially article 6(2), have been construed both by the European Court of Human Rights, and in the national courts of the member states, especially those of the United Kingdom. The aim of the analysis is to guide both the direction of further development within Europe, but every bit as importantly to examine and promote the use of that analysis in the interpretation and construction of similar provisions elsewhere, especially in other common law jurisdictions.

The main theme that emerges is strong affirmation of the use of the presumption so as to prevent the conviction of the innocent, and strict interpretation of any derogation on the basis of vague community values. The merit of this work is that it shows in clear detail just how this line can be held against inroads inspired by blurred and imprecise conventional slogans and sound-bites.

It is only by work of this character and quality that the institutions of human rights can be made to operate as effective and acceptable tools to direct legal decisions, rather than as affirmations of loose aspirations. This book sets the tone, and opens the door, for a fresh approach to this whole area.

Professor Colin Tapper
Magdalen College, Oxford
September 2009

LIST OF ABBREVIATIONS

Abbreviation	Full Title
CLJ	*Cambridge Law Journal*
Crim LR	*Criminal Law Review*
Cross & Tapper	Colin Tapper *Cross and Tapper on Evidence* 11th edn (OUP, Oxford 2007)
Dennis	IH Dennis *The Law of Evidence* 3rd edn (Sweet & Maxwell, London 2007)
E & P	*International Journal of Evidence and Proof*
LQR	*Law Quarterly Review*
MLR	*Modern Law Review*
Munday	Roderick Munday *Evidence* 4th edn (OUP, Oxford 2007)
OJLS	*Oxford Journal of Legal Studies*
PL	*Public Law*
Roberts & Zuckerman	Paul Roberts & Adrian Zuckerman *Criminal Evidence* (OUP, Oxford 2004)

INTRODUCTION

The presumption of innocence is universally recognised as a core principle in the administration of criminal justice.[1] Any system that regarded a person as guilty merely by virtue of accusation would fall short of commonly accepted standards of fairness. The presumption of innocence tilts the scales of justice in favour of a defendant by requiring the prosecution to establish guilt to a high standard of certainty. As a result, convictions are made more difficult and there is an increased likelihood that the guilty will escape punishment. Every system of criminal law therefore faces a constant tension between protecting the rights of defendants and the community interest in convicting the guilty. On many occasions, this tension is resolved by measures that undermine the presumption of innocence. In all parts of the world, those who define the rules of criminal justice must have some means of deciding whether, and if so when, limitations on the presumption of innocence may be justified.

In the past decade, English lawyers have confronted these issues in a direct fashion, due to the introduction of the Human Rights Act 1998 (HRA). The HRA gives quasi-constitutional status to the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR). Article 6(2) of the ECHR states: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.' While Article 6(2) is expressed in unqualified terms, the Strasbourg Court has declared that the right protected therein is subject to 'reasonable limits'.[2] On six occasions since 1999, the House of Lords has endorsed the notion that the presumption of innocence is subject to 'reasonable limits' and has applied a proportionality test to determine the scope of those limits.[3] This book considers

[1] See Universal Declaration on Human Rights (adopted 10 December 1948) Article 11(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) Article 14(2); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) Article 6(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) Article 8(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986); Declaration of the Rights of Man and of the Citizen (France, August 1789) Article 9; Canadian Charter of Rights and Freedoms 1982, s 11(d); Constitution of the Republic of South Africa 1996, s 35(3)(h); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 25(1); New Zealand Bill of Rights Act 1990, s 25(c). In the United States, the presumption of innocence has been held to be implicit in the "due process" guarantee of the Fifth and Fourteenth Amendments: see *Coffin v US*, 156 US 432, 453–461 (1895) (White J); *Estelle v Williams*, 425 US 501, 503 (1976) (Burger CJ, for the Court); *Taylor v Kentucky*, 436 US 478, 484 (1978) (Powell J, for the majority).

[2] *Salabiaku v France* (App No 10589/83) (1991) 13 EHRR 379 [28].

[3] *R v DPP; ex p Kebilene* [2000] 2 AC 326 (HL) 384 (Lord Hope); *R v Lambert* [2002] 2 AC 545 (HL) [34] (Lord Steyn), [87] (Lord Hope), [150] (Lord Clyde); *R v Benjafield* [2003] 1 AC 1099 (HL) 1153 [15] (Lord Steyn); *R v Johnstone* [2003] 1 WLR 1736 (HL) [48] (Lord Nicholls); *Sheldrake v DPP;*

whether, and if so to what extent, the presumption of innocence ought to be subject to restriction. It will be argued that limits on the right to be presumed innocent cannot ordinarily be justified. They should be permitted only in a narrow set of circumstances when the values underpinning the presumption of innocence are not truly threatened.

Academics have identified two facets to the presumption of innocence.[4] The first is a rule applicable at trial that the burden of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt. This facet was described in *Woolmington v DPP* as the 'golden thread' of English criminal law.[5] It is the more familiar aspect of the presumption of innocence, at least to common law lawyers, and it is sometimes treated as exhaustive of its content.[6] The second facet is a more general principle that the treatment of the defendant throughout the criminal process should be consistent, as far as possible, with his or her innocence. Used in this broader sense, the presumption of innocence underpins the whole range of rules intended to ensure fairness to defendants.[7] Specifically, the Strasbourg Court has stated that it would be a breach of the presumption of innocence for a decision concerning the defendant to reflect his or her guilt prior to conviction.[8] Hence, the refusal of bail pending trial,[9] an order for confiscation of property without proof of an illegal source,[10] and even the publication of the name of the defendant prior to conviction[11] could be said to breach the presumption of innocence. In the same vein, the Strasbourg Court has stated that the right to

AG's Reference (No 4 of 2002) [2005] 1 AC 264 (HL) [12] (Lord Bingham); *R v Chargot Limited* [2009] 1 WLR 1 (HL) [27] (Lord Hope). See also *McIntosh v Lord Advocate* [2003] 1 AC 1078 (PC) [30] (Lord Bingham); *AG of Hong Kong v Lee Kwong-kut* [1993] AC 951 (PC) 969 (Lord Woolf).

[4] P Healy 'Proof and Policy: No Golden Threads' [1987] Crim LR 355, 364; PJ Schwikkard 'The Presumption of Innocence: What is it?' (1998) 11 *South African Journal of Criminal Justice* 396, 403; S Summers 'Presumption of Innocence' (2001) 1 *The Juridical Review* 37, 57; L Laudan 'The Presumption of Innocence: Material or Probatory' (2005) 11 *Legal Theory* 333, 333–334; A Ashworth 'Four Threats to the Presumption of Innocence' (2006) 10 E & P 241, 243; M Redmayne 'Rethinking the Privilege Against Self-Incrimination' (2007) 27 *Oxford Journal of Legal Studies* 209, 218–219.

[5] *Woolmington v DPP* [1935] AC 462 (HL) 481–482 (Viscount Sankey LC).

[6] See N Bridge 'Presumptions and Burdens' (1949) 12 MLR 273, 282; G Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3rd edn (Stevens, London 1963) 184; Cross & Tapper 144.

[7] See WS Laufer 'The Rhetoric of Innocence' (1995) 70 *Washinton Law Review* 329, 333–334.

[8] *Minelli v Switzerland* (App No 8660/79) (1983) 5 EHRR 554 [37].

[9] *Caballero v UK* (App No 32819/96) (2000) 30 EHRR 643 [43]. *Cf Bell v Wolfish*, 441 US 520, 533 (1979) (Rehnquist J, for the majority): 'Without question, the presumption of innocence plays an important role in our criminal justice system . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.'

[10] Such orders have been held to fall outside the scope of Art 6(2) since they do not involve the determination of a 'criminal charge': *McIntosh v Lord Advocate* [2003] 1 AC 1078 (PC) [25] (Lord Bingham), [43] (Lord Hope); *R v Benjafield* [2003] 1 AC 1099 (HL) 1152 (Lord Steyn); *R v Briggs-Price* [2009] UKHL 19 [40] (Lord Phillips), [64] (Lord Rodger), [13] (Lord Mance), *cf* [94] (Lord Brown); *Phillips v UK* (App No 41087/98) ECHR 5 July 2001; *Van Offeren v The Netherlands* (App No 19581/04) ECHR 5 July 2005. However, the House of Lords has held that the presumption of innocence is implicit in Art 6(1), which applies to the sentencing stage of a criminal proceeding: *R v Briggs-Price* [2009] UKHL 19 [41] (Lord Phillips), [65] (Lord Rodger).

[11] R Munday 'Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence' [1991] *Criminal Law Review* 680 and 753.

silence and privilege against self-incrimination are closely associated with the presumption of innocence.[12]

This book is concerned exclusively with the burden and standard of proof and does not directly address the second, broader facet of the presumption of innocence. One reason for this is that the first facet of the presumption has a more clearly definable legal content: the burden of proof must be on the prosecution, and guilt must be proved beyond reasonable doubt. It has been suggested that the presumption of innocence should be understood exclusively in this more restricted sense, since otherwise it would become a 'vaporous euphemism for fairness'.[13] A second reason for focusing on the burden and standard of proof is that English cases so far decided under Article 6(2) have been primarily concerned with this aspect. In the English cases, Article 6(2) has been used to challenge the practice of imposing burdens of proof on defendants. A burden of proof on the defendant is referred to as a 'reverse burden' since it is a departure from the ordinary rule requiring the prosecution to prove guilt.

In understanding the conflict between reverse burdens and the presumption of innocence, there is much to be learned from other jurisdictions that have addressed the problem. Useful comparative material is found in the United States, Canada, South Africa and, to a lesser extent, New Zealand. The courts in these jurisdictions have grappled with questions very similar to those faced under Article 6(2). Both Strasbourg[14] and the House of Lords[15] have warned against the use of comparative law in interpreting and applying Article 6(2). This is because differences in the language and structure of national constitutions may affect the interpretation of the presumption of innocence in other jurisdictions. Nevertheless, the comparative law is useful in shedding light on concepts and problem that are faced by the English courts. Accordingly, the comparative law on the presumption of innocence is worked throughout each of the chapters in this book, wherever it assists in illuminating the discussion of a key concept.

Chapter one is foundational and introduces key concepts such as the burden and standard of proof. The central theme of this book is outlined in Chapter two. Chapter two argues that there is a dual rationale for the presumption of innocence: protecting the innocent from wrongful conviction and promoting the rule of law. The first of these rationales is of such importance that it cannot, in general, be subjugated to other interests. Only when this rationale is not called into play or is called into play in an attenuated sense should the courts consider approving limits on the presumption of innocence through the use of reverse burdens. The rationale of protecting the innocent may be attenuated either because there is a

[12] *Saunders v UK* (App No 19187/91) (1997) 23 EHRR 313 [68]; *Heaney and McGuinness v Ireland* (App No 34720/97) (2001) 33 EHRR 12 [40], [59]; *Weh v Austria* (App No 38544/97) (2005) 40 EHRR 37 [39]. The connection has also been noted in Canada and South Africa: *R v Noble* [1997] 1 SCR 874, 921 (Sopinka J); *Dubois v The Queen* [1985] 2 SCR 350, 357 (Lamer J); *S v Zuma* 1995 (2) SA 642 (CC) [27] (Kentridge AJ).

[13] Healy (see n 4 above) 365. See also Schwikkard (see n 4 above) 404; Summers (see n 4 above) 56.

[14] *Bates v UK* (App No 26280/95) EComHR 16 January 1996.

[15] *Sheldrake v DPP; AG's Reference (No 4 of 2002)* [2005] 1 AC 264 (HL) [33] (Lord Bingham).

low risk of wrongful conviction, or because the consequences of conviction are minimal. In cases where the rationale of protecting the innocent is attenuated, the courts can take account of the community interest in obtaining convictions by applying a proportionality analysis. In this analysis, the courts must give weight to the continually applicable rationale of promoting the rule of law.

The remaining chapters work through the consequences of this understanding of the presumption. Chapter three argues that the presumption of innocence is an entirely procedural protection and therefore does not have consequences for the substance of the criminal law. It also argues that the presumption of innocence requires, as a *prima facie* matter, that the prosecution bear the burden of proof with respect to every matter necessary for conviction. Chapter four analyses the decisions of the Strasbourg Court concerning Article 6(2). It will be shown that the Strasbourg Court has routinely permitted reversal of the burden of proof. Since this practice is inconsistent with the best understanding of the presumption of innocence, the English courts ought to depart from it. Chapter five discusses the proper approach to the proportionality inquiry when it is relevant to the presumption of innocence. It will be argued that the proportionality inquiry should focus upon the 'necessity' of a reverse burden, and not upon its 'reasonableness' or 'balance'. Chapter six ties together each of the points made in the earlier chapters by considering the relative weight to be given to each of the factors relevant to the allocation of the burden of proof.

The presumption of innocence is one of the most fundamental human rights. Underlying it is the principle that the state must not take coercive action against any individual unless it has been proved that the person is guilty of a criminal offence and is properly subject to punishment. The guarantee that the state will not interfere with its citizens except when it has demonstrated the justification for the interference is essential for any state with aspirations of conforming to the liberal ideal. This ideal requires that each individual be treated as an end, not as a means, and that the pursuit of life's goals be left to the best endeavours of the individual, without unnecessary intervention. The coercive powers of the state in the field of criminal law, in particular the power of imprisonment, have the potential to deprive individuals of the right pursue their own objectives and to fashion the path of their own lives.

The liberal ideal frequently comes up against the harsh realities of criminal justice, in which perfect procedures which result in no wrongful convictions are impossible. The pressure to ensure public safety leads governments into curtailing the rights of criminal defendants who, as a class, are viewed unsympathetically by many in the community. Yet, if the liberal ideal is to be put into practice, criminal procedure must continue to protect the rights of defendants and limit the abuse of the coercive powers of the state. In forging a way through the conflict between the aspiration to fulfill the liberal ideal and the needs of criminal justice, a proper understanding of the role of the presumption of innocence is essential. This book seeks to provide that understanding, in a manner that will guide both the legislature, in the passage of criminal legislation, and the courts, who are charged with protecting the presumption of innocence in the context of the Human Rights Act.

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