Table of Contents

Chapter 1: Burden & Standard of Proof ...........................................................7
  S 107: Burden on the accused to prove facts within the exception pleaded.7
  Defence of Alibi and S 105:.................................................................................10
  Burden of Proof: Who bears the burden?...................................................11
  S 108 and Special Knowledge: ..................................................................14
  Standard of Proof: What is the level of proof required?.........................15
    (i) Criminal cases- beyond a reasonable doubt:......................................15
    (ii) Balance of probabilities:.....................................................................17
  Effect of a codified EA................................................................................18

Chapter 2 Evidence—Statements made by Accused + Confessions +Entrapment ..................................................................................................20
  A. Introduction to admissibility provisions...................................................20
  B. Admissibility of accused’s statement......................................................22
  C. Recording a statement pursuant to S 22 ...............................................23
  D. Recording a statement pursuant to S 23 ...............................................23
  E. Non-compliance with procedural requirements of S 22/ S23 .................23
  F. Admissibility Provision and Voluntariness test .......................................24
  G. Voir Dire (Ancillary proceedings to determine voluntariness of statements).................................................................................................28
  H. Confirmation by subsequent facts..........................................................29
  I. Confessions of a co-accused ..................................................................29
  Notes on Court’s residual discretion & Phyllis Tan like cases ...................43
  Order 92 R 4:..............................................................................................44

Chapter 3: Hearsay & its Exceptions .............................................................45
  A. Definition of Hearsay .............................................................................45
  B. Hearsay vs Real Evidence .....................................................................45
  C. Modes of Assertion ..............................................................................50
    Documentary records .............................................................................50
    Conduct ..................................................................................................51
    Implied Assertions ..................................................................................51
  Positive / Negative hearsay ......................................................................53
  D. Hearsay Rule under the Evidence Act ..................................................54
  EA exceptions ............................................................................................56
    Res gestae................................................................................................56
    Broad application of S 6:........................................................................58
Dying Declarations.................................................................58
Business Records........................................................................59
Computer records .........................................................................59
Chapter 4 – Similar Fact Evidence..................................................60
  Introduction: Admissibility of similar fact evidence at common law......60
  Similar fact evidence under the Evidence Act ..................................64
  Similar fact evidence to prove background .....................................66
  Similar fact evidence in civil cases ...............................................67
  Rules of corroboration in relation to specific categories of witnesses ....68
    Accomplice witnesses ................................................................68
    Victims of sexual offences ..........................................................68
  Types of corroborative evidence ....................................................71
    Previous consistent statements of a witness ..................................71
    Similar fact evidence as corroboration? ........................................72
    Mutual Corroboration ................................................................72
Chapter 5: Competence & Compellability ...........................................72
  Accused persons .........................................................................72
Chapter 6: Legal Privilege ...............................................................73
  Introduction ................................................................................73
  Legal professional privilege ........................................................73
  Legal Advice Privilege ..................................................................74
  Litigation Privilege .......................................................................74
  Waiver of Privilege ......................................................................75
Chapter 7: Without prejudice communications ....................................75
Chapter 8: Character Evidence ........................................................82
  A. Good Character of Accused ......................................................82
  B. Evidence of Bad Character .......................................................84
    The ss 122(4) Protective Shield ..................................................84
    Where the accused puts his character in issue – s 56 EA ...............85
    Attacking credibility of prosecution/co-accused’s witness ...............86
    Attacking a co-accused: 122(8) EA ..............................................88
Chapter 9: Opinion Evidence ...........................................................88
  General Rule on Opinion Evidence .................................................88
  B. Admissibility of expert opinion ..................................................91
  C. Expert Evidence on Foreign Law ...............................................92
  D. Expert Evidence on “Science or Art” .........................................93
  E. Need for Expert Evidence? .......................................................94
F. Qualification of an expert ............................................................... 95
G. Evidence that experts may refer to as basis of their opinion ....... 96
H. Assessing expert evidence .............................................................. 100

Cases

*XP v PP [2008] 4 SLR(R) 686 .......................................................... 72
Skandinaviska Enskilda Banken v Asia Pacific Breweries (Singapore) [2007] 2
SLR® 367 .................................................................................. 77
Abdul Rashid v PP (1994) 1 SLR 119 .................................................. 32
AD v AE [2005] 2 SLR(R) 180 .......................................................... 101
Anandagoda v R [1962] MLJ 289 ...................................................... 32
Balabel v Air India [1988] 2 All ER 246 ............................................. 81
Boardman v DPP ........................................................................ 61
Brinks Inc v Singapore Airlines [1998] 2 SLR® 372 ................................ 81
Chai Chen Wei Kelvin v PP ......................................................... 25
Chai Chen Wei Kelvin v PP [1999] 1 SLR 25 ................................. 34
Chandrasekaran v PP [1971] 1 MLJ 153 ........................................... 94
Chandrasekera v The King [1937] AC 220 ...................................... 52
Cheng Heng Lee v PP ................................................................ 32
Chin Seow Noi v PP ................................................................ 101
Chin Seow Noi v PP [1993] SGCA 87 .............................................. 38
Chou Kooi Pang & Anor v PP ...................................................... 101
Chou Kooi Pang & Anor v PP [1998] 3 SLR 593 ................................ 95
Chua Hwa Soon Jimmy [1998] 2 SLR 22 ...................................... 102
Chua Kwee Chen v Koh Choon Chin ............................................ 18
Clarke Beryl Claire v Silk Air ....................................................... 17, 18
Dato Mokhtar Hashim v PP .......................................................... 28
Daubert v Merrell Dow Pharmaceuticals ...................................... 94
Deokinan v R ............................................................................ 27
Don Promphinit v PP ................................................................ 59
DPP v P [1991] 2 AC 447 .............................................................. 61
Easter Enterprises v Ong Choo Kim .............................................. 18
Fung Yuk Shing v PP ................................................................. 28
Garmaz s/o Pakhar & Anor v PP [1995] 3 SLR 701 ....................... 88
Garnam Singh v PP [1994] 2 SLR 243 .......................................... 35
Gema Metal Ceilings v Iwatani Techno Construction .................. 98
George Abraham Vadakathu v Jacob George [2009] SGHC 79 .... 104
Ghous b Haji Kader Mustan [1946] MLJ 36 .................................. 73
Goh Joon ong v PP [1995] 3 SLR 305 ............................................ 36
Govindasamy v PP [1976] 2 MLJ 49 (CA) .................................... 9
Greenline-Onyx Envirotech v Otto Systems Singapore [2007] 3 SLR® 40 .... 83
Hanafi bin Abu Bakar & Anor v PP (CCA 23/1998) (see PL at 95) .... 106
Hin Hup Bus Service (a firm) v Tay Chwee Hiang and Another [2006] 4 SLR
723 .......................................................................................... 68
Jagatheesan v PP ..................................................................... 17
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jayasena v R (1970) AC 618</td>
<td>9</td>
</tr>
<tr>
<td>Jayasena v R [1970] AC 618</td>
<td>21</td>
</tr>
<tr>
<td>Jumaat bin Samad v PP</td>
<td>8</td>
</tr>
<tr>
<td>Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 SLR 239</td>
<td>19, 41</td>
</tr>
<tr>
<td>Lee Chez Kee v PP</td>
<td>31</td>
</tr>
<tr>
<td>Lee Chez Kee v PP [2008] SGCA 20</td>
<td>40</td>
</tr>
<tr>
<td>Lee Chez Kee v Public Prosecutor [2008] 3 SLR 447</td>
<td>55</td>
</tr>
<tr>
<td>Lee Kwang Peng v PP</td>
<td>70</td>
</tr>
<tr>
<td>Lee Kwang Peng v PP [1997] 3 SLR 278</td>
<td>62</td>
</tr>
<tr>
<td>Lee Yuan Kwang v PP</td>
<td>31</td>
</tr>
<tr>
<td>Leong Wing Kong v PP [1994] 2 SLR 54</td>
<td>96</td>
</tr>
<tr>
<td>Lim Chuan Huat v PP (CCA 57/1995)</td>
<td>97</td>
</tr>
<tr>
<td>Lim Chee Soon v PP [1997] 2 SLR 60</td>
<td>107</td>
</tr>
<tr>
<td>Lim Guan Cheng v JSD Construction Pte Ltd [2004] 1 SLR(R) 318</td>
<td>100</td>
</tr>
<tr>
<td>Lim Kim Tjok v PP [1978] SLR 306</td>
<td>26</td>
</tr>
<tr>
<td>Lim Mong Hong v PP [2003] 3 SLR 88</td>
<td>60</td>
</tr>
<tr>
<td>Lim Seng Chuan v PP</td>
<td>29</td>
</tr>
<tr>
<td>Lim Thian Lai v PP</td>
<td>26</td>
</tr>
<tr>
<td>Lim Thian Lai v PP [2006] 1 SLR(R) 319</td>
<td>34</td>
</tr>
<tr>
<td>Lim Young Sien v PP [1994] 2 SLR 257</td>
<td>24</td>
</tr>
<tr>
<td>Lu Lai Heng v PP</td>
<td>35</td>
</tr>
<tr>
<td>Mariwu Industrial v Dextra Asia [2006] 4 SLR 807</td>
<td>82</td>
</tr>
<tr>
<td>Mary Ng v R [1958] AC 173</td>
<td>15</td>
</tr>
<tr>
<td>Miller v Minister of Pensions</td>
<td>16, 17</td>
</tr>
<tr>
<td>Mohamed Bachu Miah v PP [1993] 1 SLR 24</td>
<td>22</td>
</tr>
<tr>
<td>Mohamed Bachu Miah v PP [1993] 1 SLR 249</td>
<td>23</td>
</tr>
<tr>
<td>Mohamed Bin Allapitchay &amp; Ors v R [1958] 1 MLJ 197</td>
<td>59</td>
</tr>
<tr>
<td>Muhammad Jeffry v PP [1997] 1 SLR 197</td>
<td>106</td>
</tr>
<tr>
<td>Ng Beng Siang v PP [2003] SGCA 17 (¶38-41)</td>
<td>66</td>
</tr>
<tr>
<td>Ng So Kuen Connie v PP [2003] 3 SLR 178</td>
<td>102</td>
</tr>
<tr>
<td>Ong Chan Tow v R [1963] MLJ 160</td>
<td>95</td>
</tr>
<tr>
<td>Ong Seng Hwee v PP [1999] 4 SLR 181</td>
<td>35</td>
</tr>
<tr>
<td>Ong Sock Hung v PP [2005] SGHC 95</td>
<td>68</td>
</tr>
<tr>
<td>Pacific Recreation Pte Ltd v SY Technology Inc [2008] 2 SLR(R) 491</td>
<td>93</td>
</tr>
<tr>
<td>Panya Martmontree &amp; Ors v PP</td>
<td>29</td>
</tr>
<tr>
<td>Panya Martmontree v PP [1995] 2 SLR(R) 806</td>
<td>25</td>
</tr>
<tr>
<td>Panya Martmontree v PP [1995] 3 SLR 341</td>
<td>35, 37</td>
</tr>
<tr>
<td>Poh Kay Keong v PP</td>
<td>27</td>
</tr>
<tr>
<td>PP Koh Aik Siew v PP [1993] 2 SLR 599</td>
<td>35</td>
</tr>
<tr>
<td>PP v Andul Naser bin Hamsah [1997] 1 SLR 73</td>
<td>15</td>
</tr>
<tr>
<td>PP v Chin Moi Moi [1994] SGHC 279</td>
<td>37</td>
</tr>
<tr>
<td>PP v Dahalan bin Ladaewa</td>
<td>27</td>
</tr>
<tr>
<td>PP v Don Promphinit &amp; Ors (CC 89/1993)</td>
<td>68</td>
</tr>
<tr>
<td>PP v Haji Kassim [1971] 2 MLJ 115</td>
<td>75</td>
</tr>
<tr>
<td>PP v Kum Chee Cheong</td>
<td>13</td>
</tr>
<tr>
<td>PP v Kum Chee Cheong [1994] 1 SLR 231</td>
<td>14</td>
</tr>
<tr>
<td>PP v Lee Kwai Thean</td>
<td>15</td>
</tr>
<tr>
<td>PP v Lim Kian Tat</td>
<td>28</td>
</tr>
</tbody>
</table>
EVIDENCE LAW SUMMARY

PP v Mohammed Liton Mohammed Syeed Mallik [2008] 1 SLR(R) 601 ............. 69
PP v Ng Pen Thine [2009] SGHC 230 ................................................................. 34
PP v Tan Boon Tat ............................................................................................. 28
PP v Yuvraj [1969] 2 MLJ 89 .......................................................................... 21
PP v Yuvraj [1969] 2 MLJ 89 .......................................................................... 10
Pulukuri Kottaya v Emperor ............................................................................ 38
R v Abadom [1983] 1 All ER ........................................................................... 99
R v Andrews [1987] AC 281 .......................................................................... 58
R v Blastland [1986] AC 41 ........................................................................... 49
R v Blastland: .................................................................................................... 53
R v Chanderasekera ......................................................................................... 8
R v Cleary .......................................................................................................... 27
R v Edwards ...................................................................................................... 12
R v Fulling [1987] 2 All ER 65 ........................................................................ 28
R v H [1995] 2 AC 596 ................................................................................... 64
R v Hunt ............................................................................................................. 12
R v Hunt [1987] 1 AC 352 ............................................................................... 13
R v Kearley [1992] 2 AC 228 (HL) .................................................................. 53
R v M [2000] 1 All ER 148 .............................................................................. 67
R v Patel [1981] 3 All ER 94 .......................................................................... 54
R v Ratten [1972] AC 378 ............................................................................... 50
R v Sang: ........................................................................................................... 44
R v Shone (1983) 76 Cr App Rep 72 ................................................................. 55
Ramakrishna v PP [1998] 3 SLR 645 .............................................................. 11
Ratten v The Queen ......................................................................................... 58
Rush & Tompkins Ltd v Greater London Council [1989] AC 1280 ............... 77
Saeng-Un Udom v PP [2001] 3 SLR 1 .............................................................. 103
Sakthivel Punithavathi v PP [2007] 2 SLR 983 ............................................... 105
Seow Choon Meng v PP .................................................................................. 28
Sim & Associates v Tan Alfred ....................................................................... 100
Sim Ah Ngoh v PP [1989] 2 MLJ 340 .............................................................. 69
Sim Cheng Soon v BT Engineering Pte Ltd and Anor [2007] 1 SLR 148 ....... 89
Sim Tiew Bee v PP [1973] 2 MLJ 200 .............................................................. 60
Soon Peck Wah v Woon Che Chye ................................................................. 55
Soon Peck Wah v Woon Che Chye [1997] 3 SLR(R) 430 ............................ 46
Sparks v R [1964] 1 AC 964 ........................................................................... 25
Subramaniam v PP .......................................................................................... 46
Subramaniam v PP [1956] 1 MLJ 220 ............................................................. 46
Subramaniam v Public Prosecutor .................................................................. 55
Syed Abdul Aziz v PP: .................................................................................... 11
Tan Meng Jee v PP [1996] 2 SLR 422 ............................................................. 66
Tan Nguan Siah v PP [1993] 3 SLR 895 ........................................................... 87
Tang Kin Seng v PP [1997] 3 SLR 46 ............................................................... 69
Tang Yoke Kheng v Benedict: ........................................................................... 18
Teh Thiam Huat v PP [1996] 3 SLR 631 ......................................................... 107
Tentat Singapore v Multiple Granite [2009] 1 SLR® 42 .................................. 81
Teo Ai Nee v PP [1995] 1 SLR(R) 450 ............................................................. 62
Teo Keng Pong v PP [1996] 2 SLR(R) 890 ..................................................... 17
Teow Chuan & Anor v Dato’ Anthony See Teow Guan [1999] 4 MLJ 42 ....... 76
Took Leng How v PP [2005] 3 SLR 263 .......................................................... 17

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Chapter 1: Burden & Standard of Proof

S 107: Burden on the accused to prove facts within the exception pleaded

- S 107 imposes the legal burden on the accused to prove the elements of the defence according to the requisite standards set out in s 3 (EA). What has been contentious is whether s 107 places an evidential burden or legal burden on the accused?

*The scheme of the EA contemplates a single burden of proof which can only be discharged according to the appropriate standard of proof (Jayasena v R: Lord Diplock said that the code embodied the old criminal law and cannot be construed in light of the decision in Woolmington (which has changed the common law position to the point that the common law only imposes a duty on the accused to raise a reasonable doubt as to whether he acted in self defence)

(1) Defences: Accident (conflicting requirement)

*Problematic defence of Accident: By virtue of S 103, the burden is on the prosecution to prove the facts that the accused had the intention, while yet S 107 requires him to prove accidence because it is a general exception in the Penal Code (s 80).

Suggestion: R v Chanderasekera- Defences ought to be differentiated according to whether they raise separate issues or merely challenge the prosecution’s case.

Example: Defence of accident merely rebuts the prosecution’s case of intention being present while the defence of insanity and diminished responsibility raises separate issues as to the accused’s state of mind.

Jumaat bin Samad v PP: Since intoxication is a defence, the accused is required to prove it on a balance of probabilities. The prosecution is entitled to treat the accused sober and establish their case to the standard of beyond reasonable doubt (legal burden?). Since, the case was dealing with voluntary intoxication, to favor the latter view (which was that the burden was on the prosecution that the accused had formed the intention, in spite of the intoxication). It can be concluded that the prosecution only has to show
apparent intention of the accused from the *actus reus* of the crime and leave it to the accused to prove that it was accidental.

| Jayasena v R (1970) AC 618 | Appellant had admitted to the deceased dying of wounds inflicted upon him which he claimed were made when he acted in self-defence or private defence. Issue: Was the jury right directed on the burden of proof on the issue of self-defence of private defence to the charge of murder? Was the defence a legal burden or an evidential burden? Argument was made on the construction of s 105 (our s 107) and the meaning of burden of proving. Appellant contended that that S 105 (our s 107) only imposed an evidential burden on the accused and there was no burden on the accused to show that he was acting in self-defence. Holding: (1) Since self-defence or private defence was a general exception (and a special exception), it's use was dictated by s 105 (of the Evidence Ordinance). S 105 (our s 107) clearly stated that the burden of proving that the facts fall under the special exception was on the accused. (2) S 3 of the Ordinance Act defined what proof meant and thus when read with s 105 (our s 107), it is clear that the burden is on the accused to prove the existent of the facts within the exceptions that he is claiming. ‘…it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by s105 (our s 107) can be anything less than proof in accordance to S 3’ (3) The case of Woolmington (where the HOL held that there was no burden on the accused to prove his innocence, unless he was raising a statutory defence or pleading insanity) ought not to be applied as the Council was purely interpreting the code, which only embodied the old criminal law and not the common law (which was in fact, malleable). (4) Re-iterated that burden of establishing intention was the job of the prosecution. Since the common law as of then was codified with the principle that the burden on the accused was a legal burden and not evidential. And that’s what has been codified. So, thus s 105 (our 107) adds a legal burden on the accused. |
| Govindasamy v PP [1976] 2 MLJ 49 (CA) | (1) Re-iterated the position in Jayasena and PP v Yuvraj. |
| PP v Yuvraj | Respondent was charged with corruptly receiving gratification and was |
subsequently acquitted by the Sessions court and the High Court. Point of law was brought up to the Privy Council.

Whether burden of rebutting the presumption under s4(a) of Prevention of Corruption Act 1964 was that of being

(i) Reasonable and probable or
(ii) by proof that the defence is on such fact the existence of which is so probable that a prudent man would act on the supposition that it exists?

Holding: Both descriptions were essentially the same and meant that the burden is discharged if the court considers on a balance of probabilities that the gratification was not paid or given and received corruptly as an inducement or reward (as per s3/4 of the PCA).

Analysis of PCA: When the first 2 elements of the section is proven, the 3rd element is assumed to exist unless the contrary is proven.

(1) gratification was paid or given or received by the defendant
(2) the defendant was in the employment of a public body at the time of payment
(3) gratification or payment was for the purpose of inducement or reward for doing or forebearing to do an act in relation to the affair of the public body (this element will be considered to exist unless the contrary is proven).

’Contrary is proven’

Meaning of proved: …’or considers its existence so probable that a prudent man ought to act upon the supposition that it exist’

Degree of probability required: Depends on the nature of the action contemplated and the consequence if those proceedings of a finding of a fact is proved or disproved. If that consequence is that a civil suit is in favour of one party, then all that is required is a balance of probabilities. However, due to reason of public interest, if the finding of fact leads to a conviction, the degree of probability is much higher to exclude any reasonable doubt.

In this case, since if the facts (contrary facts) are disproved, there will be an acquittal and if the facts are proved, there will be an conviction. Where disproving the facts leads to acquittal, there is no reason (in public policy) to require a high degree of certainty to remove all reasonable doubt.

‘Thus all that I required is that its more likely than not that the fact does not exist’.
Defence of Alibi and S 105:

**Burden of proof as to particular fact**

### 105. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

**Illustrations**

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

**Definition of proved when read with s 105:**

“Proved”

(3) A fact is said to be “proved” when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

*Note that the comments in Jayasena regarding the meaning of proved when s3 was read with s 107 equally applies to prove in s 105.

**Syed Abdul Aziz v PP:** It was for the prosecution to prove that the accused could not rely on alibi and for the accused to prevent such proof by raising a reasonable doubt as to his presence at the scene of the crime.

In other words, the accused bore the evidential burden (this case was endorsed in Ramakrishna and Chong Siew Chin). Thus, confusingly, this meant that the accused had the evidential burden (this contradicts the position in Jayasena that the EA only imposes a single burden of proof. Pinsler opines that the word burden does not necessarily mean proof. As such, all the accused has is an evidential burden to adduce evidence and not to proof anything (as proving requires the adduction of facts to establish the legal elements of a case)

**Ramakrishna v PP [1998] 3 SLR 645**

Since the defence of alibi was invoked, S 105 would mean that the appellant had the evidential burden of proving it (not legal burden).

Evidential burden (merely adduce evidence to ensure that the prosecution’s case remains below the standard of proof required- no reasonable doubt)

**Pinsler’s opinion on alibi defence and s 105,107 and 108:**

Roles of parties ought to be considered in stages:

(1) Prosecution adduces sufficient evidence to prove his claim and thus established that the accused had committed the offence. Accused can be acquitted if he is able to raise a reasonable doubt as to whether he was at the
scene of the crime (e.g. Through cross-examination of the prosecution witnesses)

(2) If the accused is unable to do that, the Accused has a case to answer and thus he has to prove his alibi on a balance of probabilities pursuant to s 105. Accused can be acquitted if he is able to prove his defence after he opens a case.

**Burden of Proof: Who bears the burden?**

Allocation of the legal burden of proof depends on proper interpretation of a statutory provision in accordance with the principles espoused in *Hunt* (or *Edwards*)

- S 107 places the burden on the accused to prove a defence or exception if the relevant fact (i) falls within the general exceptions contemplated under the Penal Code (ii) constitutes ‘any special exception or proviso contained …in any written law’ defining the offence.

Tests used to determine if the fact in question constitutes an exception or provision thus triggering the application of S 107.

(1) In *R v Edwards*: It was stated that statutes can be construed as prohibiting acts ‘save in specified circumstances’, then the burden of proof will be on the accused to prove that he falls within one of those situations. Thus, the test is that whether the statute contains an exception or proviso which provides an exception, and the burden is on the accused to prove that he falls within that exception or proviso.

(2) *R v Hunt*: Acknowledged the test used in Edwards and said that the case was an excellent guide for construction rather than a strict rule. Thus, it can be understood that by using the test as a construction guide, there might be situation where there might be qualification in the statute but they may be construed as not imposing the burden of proof on the accused. Even if a statutory provision does not contain words of exception or qualification, the court might still hold that the section does impose the burden of proof on the accused.

*Note the lack of consistency between the construction approach advocated in *Hunt* and S 107 (which imposes the burden on accused to prove that he comes within any special exception or proviso). Does s 107 require the special exception or proviso to be that of substance or form? If it’s substance, then the burden is on the accused but if it’s form, then the burden is on the prosecution. Or, courts might rule that s107 does not make any such distinction and that the burden will be on the accused no matter if the ‘proviso or exception’ is of form or substance.*
(3) PP v Kum Chee Cheong: Case involving Motor vehicles (3rd Party Risks and Compensation) Act – s 3(1): Who had the burden of proving that there was a policy of insurance in place?

- Courts referred to s108 that the part with the special knowledge of certain facts has to prove them
- Construction of the statutory provision must involve an assessment of the difficulty that either party would have in proving that particular fact. Accused in this case would have little difficulty in producing the insurance policy and while it would impossibly difficult for the prosecution to prove that the accused did not have such a policy in force at the material time.

<table>
<thead>
<tr>
<th>R v Hunt [1987] 1 AC 352</th>
<th>(1) Rule in Edwards was merely a guide to construing the statute and not an exception to a rule. Each case must turn upon the construction of the particular legislation to determine whether the defence is an exception.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(2) Issue of construction: Since, it is an offence to have morphine in one form but not an offence to have it in some other form, it is for the prosecution to prove that the substance was morphine and it was in the prohibited form.</td>
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<td>(3) Regulation 4 (as compared to other regulations) dealt with the elements of an offence and not with exceptions to what would be unlawful.</td>
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<td>(4) No undue burden was placed on the prosecution, in fact, the prosecution could easily prove such as the compound was confiscated by the police for analysis. Often than not, very little evidence (or substance) is available and they are usually destroyed after analysis.</td>
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<td>Practical considerations were referred to and that the relative ease the prosecution would have access to those details as the drugs has been analyzed for prosecution. Accused would not have had opportunity to analyze the drug if the police had seized it from him. This would have imposed an onerous burden on the accused.</td>
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<td><em>HOL mentioned that in doubt as to who has the onerous burden, it should be resolved in favor of the accused</em>.</td>
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<td>- Mischief</td>
</tr>
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<td></td>
<td>- Ease of burden</td>
</tr>
</tbody>
</table>
|                           | - Onerous burden (must be slow to presume that parliament would
| **impose an onerous burden on the accused)** |
| PP v Kum Chee Cheong [1994] 1 SLR 231 |
| Respondent was charged under s 3(1) of the Motor Vehicles (Third Party Risks and Compensation) Act. |
| Question of law: Who has the burden of proving that the accused had used the vehicle without there being an insurance policy in force? |
| (1) Mischief of act was directed to 3rd parties who got injured from the use of motor vehicles. Obligation is placed on the owners to take out such policies and sensibly it ought to be the accused who produces such evidence as it was within the knowledge of the vehicle owner. |
| The burden would be disproportionately high on the prosecution if they had to prove that the accused did not have a policy of insurance at that point of time. |
| (2) The burden on the vehicle owner is a legal burden and not evidential burden and there is no need for the prosecution to submit any prima facie case or evidence of the lack of such a policy. |

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