

## CHAPTER 2: Presumptions and the burden of proof

1. *What do you understand by the terms ‘legal burden of proof’, ‘evidential burden’, ‘tactical burden’ and ‘invisible burden’?*

You will find all these terms explained in the chapter at paras. 2.3-2.5 and 2.9-2.11, 2.28-2.34, 2.6-2.8, and 2.35-2.40 respectively.

2. *Blaster is appealing a conviction for supplying adult fireworks to Simplex, a person under the age of 18, contrary to the Fireworks Act 2003 and the Fireworks Regulations 2004 (SI 2004/1836). Section 11(8) of the 2003 Act provides:*

*“In proceedings against any person for an offence of contravening a prohibition imposed by fireworks regulations made by virtue of s 3(1) it is a defence for that person to show that he had no reason to suspect that the person to whom he supplied . . . the fireworks was below the age specified in the regulations.”*

*At trial, Blaster’s defence was that he had no reason to suspect that Simplex was only 17 years old. The judge directed the jury that Blaster had to prove his lack of belief on a balance of probabilities. On appeal, Blaster contends that this was a misdirection because s 11(8) imposes only an evidential burden on a defendant.*

*Discuss.*

The question requires you to consider the incidence of the burden of proof given that s. 11(8) specifies that “it is for the [defendant] to show . . .” The first step is to construe the true meaning of s. 11(8). Is this one of those cases where, by employing the term “show”, the legislature has explicitly cast the burden on Blaster to prove (on a balance of probabilities) that he did not have any reason to suspect—a category of provision referred to in Viscount Sankey, L.C.’s speech in *Woolmington v. DPP*.

If that is the true meaning of the provision, the next question is whether this requirement is compliant with human rights law. Alternatively, does it compromise Blaster’s presumption of innocence? (All this is discussed in some detail in paras. 2.42-2.71.) Reference should be made to Article 6(2) of the ECHR and to *Saliabaku v. France* (1988) 13 EHRR 379, and there should of course be discussion of the four cases in which the House of Lords has either explained or applied human rights law in relation to reversal of the burden of proof: see *ex parte Kebilene* [1999] 3 W.L.R. 972 (*obiter*), *R v. Lambert, Ali and Jordan* [2001] 2 WLR 211, *R v. Johnstone* [2003] 1 WLR 545, and *R v. Sheldrake* [2005] 1 AC 264. These cases hardly speak with one voice, although it would seem that Lord Bingham’s speech in *Sheldrake* has quelled much of the disagreement.

The question is then whether this particular derogation from the presumption of innocence can be justified, bearing in mind that each statutory provision has to be considered as an individual instance. The question is whether there is objective justification for the reversal,

weighing “the importance of what is at stake” against maintenance of the rights of the defence (*pace Saliabaku*, [28]). If, at the end of the day, the conclusion is that the provision constitutes an infringement of the presumption of innocence that cannot be objectively justified, then the question becomes whether the provision can be read down, employing s. 3 of the Human Rights Act 1998, and to hold that it imposes only an evidential burden on Blaster requiring him to adduce sufficient evidence to raise an issue as to whether he had reason to suspect, at which point it will be for the prosecution to prove beyond reasonable doubt that he did have reason to suspect that Simplex was under age.

3. *Section 4 of the Psychoactive Substances Act 2016 provides:*

“(1) A person commits an offence if—

- (a) the person intentionally produces a psychoactive substance,
- (b) the person knows or suspects that the substance is a psychoactive substance, and
- (c) the person—
  - (i) intends to consume the psychoactive substance for its psychoactive effects,

...

(2) *This section is subject to section 11 (exceptions to offences).*”

*Section 11(1) states:*

“It is not an offence under this Act for a person to [produce a psychoactive substance] if, in the circumstances in which it is carried on by that person, the activity is an exempted activity.”

*Exempted activities, listed in Schedule 2 of the Act, include in para 1:*

“Any activity carried on by a person who is a health care professional and is acting in the course of his or her profession.”

*Advise Dr Tripping, who wishes to appeal against his conviction of an offence under section 4 on the grounds that the trial judge had told the jury in the summing-up:*

“As a matter of law, it is for the prisoner to persuade you on a preponderance of probabilities that when he was manufacturing this substance in his laboratory, he was acting in his capacity of Manager of Controlled Substances at Trumpton NHS Trust and that he had been instructed by the board of the Trust to manufacture this pernicious drug in order to cut the cost to the hospital when treating its mentally disturbed patients.”

Like the previous problem, this question is concerned with reversal of the burden of proof. Much of the commentary to question 2 will therefore apply also to question 3. However, there are points of difference. Notably, in construing the legislation, you are presented with a statute which resembles the provisions of the Misuse of Drugs Act 1971 which fell to be considered by the House of Lords in *R v. Hunt* [1987] A.C. 352. In determining the true meaning of the Psychoactive Substances Act 2016, you will need to consider the factors mentioned in *Hunt* and applied by the Court of Appeal in *R v. Clarke (Roy)* [2008] EWCA Crim 893.

Additionally, there are various points that might be criticised in the extract from the trial judge's summing-up. Reference to "the prisoner" has now fallen out of favour; although technically correct, "preponderance of probability" is not easily intelligible to jurors and the preferred expression is "more likely than not"; the reference to a "pernicious" drug is not exactly measured.