

THE SHIFTING OF THE EVIDENTIAL BURDEN IN CRIMINAL TRIALS: A CLARIFICATION BY THE COURT OF APPEAL

[2022] SAL Prac 18

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I. Introduction

1 In a criminal trial, the Prosecution bears the burden of proving its case beyond a reasonable doubt, “no more and no less”.² Or, put another way, the Defence must point to evidence capable of creating a reasonable doubt.³ The latter is sometimes referred to as the Defence’s “tactical” or “evidential” burden – though, in reality, it is not a legal burden. An accused person merely needs to challenge the Prosecution’s evidence, or to adduce evidence of his own, to create a reasonable doubt. If he is able to do so, then the focus switches back to the Prosecution, which has to either call further evidence to rebut the accused’s allegations or run the risk that the court may find in his favour. In this way, the evidential burden may shift throughout the trial.

2 The above principles are well established. However, they were somewhat misunderstood following the Court of Appeal’s judgment in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*⁴ (“*Nabill*”), as the case was misconstrued by some as lowering the threshold for the evidential burden to shift to the Prosecution.

1 While the authors are with the Ministry of Law and the Attorney-General’s Chambers respectively, the views expressed in this article are their own.

2 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [1].

3 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [145].

4 [2020] 1 SLR 984.

This article explores how this misconception arose and outlines the recent, and welcome, clarification by the Court of Appeal in *Roshdi bin Abdullah Altway v Public Prosecutor*⁵ (“*Roshdi*”) on the applicable legal principles. In short, *Nabill* did not result in any change in the law on evidential burdens. The emphasis remains on the cardinal standard of whether the Prosecution has proved its case beyond a reasonable doubt.

II. Legal and evidential burdens

3 To lend context to the discussion, the article begins with a brief overview of the distinction between legal and evidential burdens.

4 The *legal* burden of proof is the obligation to prove (or disprove) a fact to the requisite standard. It is a matter of substantive law. In a criminal trial, the Prosecution *always* bears the legal burden of proving the charge against the accused beyond a reasonable doubt. On the other hand, the accused may bear the legal burden of rebutting a statutory presumption or of proving a statutory defence or exception to liability. For example, for the offence of drug trafficking, the Prosecution may rely on the presumptions under the Misuse of Drugs Act 1973 which place the legal burden on the accused to disprove, on a balance of probabilities, certain elements such as his knowledge of the nature of the drugs.⁶ Similarly, an accused person facing a charge of murder bears the legal burden of proving, on a balance of probabilities, any partial defence (such as grave and sudden provocation) on which he relies.⁷ Whether borne by the Prosecution or the accused, the legal burden of proof is permanent and enduring.⁸ It does not shift between the parties.

5 In contrast, the *evidential* (or tactical) burden is not a true legal obligation or burden. It is best understood as “the tactical

5 [2022] 1 SLR 535.

6 Misuse of Drugs Act 1973 (2020 Rev Ed) s 18(2).

7 Penal Code 1871 (2020 Rev Ed) s 300, Exception 1.

8 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [130], citing *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 at [60].

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desirability of adducing evidence in order to avoid an adverse decision of the issue by the trier of fact”.⁹ Take the example of an ordinary criminal trial. At the start of the trial, the Prosecution must adduce sufficient evidence to support its case. It therefore bears the evidential burden. If the Prosecution puts forth sufficient evidence of the accused’s guilt, then the evidential burden shifts to the Defence – this reflects the reality that although the accused does not bear any legal burden of proof, it is obviously desirable that the Defence adduces further evidence to cast a reasonable doubt on the Prosecution’s case. But there is no *obligation* on the Defence to adduce further evidence. It may instead make the tactical decision to undermine the Prosecution’s case in other ways, such as by cross-examining and discrediting the Prosecution’s witnesses. Ultimately, the Defence’s aim is to create a reasonable doubt. And if the Defence can point to sufficient evidence to do so, then the evidential burden shifts back to the Prosecution. In such a case, the Prosecution must make a tactical decision whether to adduce further evidence to rebut the Defence’s case or to take the consequences, which “may or may not be adverse”¹⁰ depending on the overall evidential picture. In this manner, the evidential burden may conceivably shift throughout the trial.

6 The dynamism of the trial process, however, makes it difficult for the parties to assess whether the evidential burden has shifted. A trial invariably involves multiple issues and pieces of evidence, which may tug and pull at one another. Where there are many moving parts, it is often difficult for a party in the thick of the proceedings to assess on whom the evidential burden lies at a particular juncture. Furthermore, at the close of a trial, the court’s focus is on whether the relevant party has discharged its *legal* burden based on the *totality* of the evidence before the court. By then, any analysis of evidential burdens is of limited use and is only liable to confuse. For these reasons, many commentators have noted that the concept of evidential burdens,

9 Roderick Munday, *Cross and Tapper on Evidence* (Oxford University Press, 13th Ed, 2018) at p 129.

10 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [132], citing *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 at [37].

which originated from jury trials,¹¹ is of questionable utility and is perhaps best discarded.¹² As famously noted by Sir Nicholas Brown-Wilkinson VC, “every time the phrase ‘evidential burden’ is used it leads to error”.¹³ An example of such an error is the misconception in some quarters that the Court of Appeal in *Nabill* had introduced a lower threshold for the shifting of the evidential burden to the Prosecution.

III. The “inherently incredible” myth

7 *Nabill* was an appeal by the appellant against his conviction for having capital amounts of diamorphine and cannabis in his possession for the purpose of trafficking. The appellant’s defence was that the drugs had been brought to his flat by his friend, Faizal, without his knowledge while he was asleep. The appellant’s wife, domestic helper and cousin also stayed in the same flat. The Court of Appeal noted that the Prosecution had not disclosed to the Defence the statements of the appellant’s wife, his cousin, his domestic helper and Faizal,¹⁴ all of whom could be expected to confirm or contradict the appellant’s account.¹⁵ Nor were these material witnesses called to rebut the appellant’s defence. The Court of Appeal concluded that, by not calling the material witnesses, the Prosecution had failed to discharge its

11 In jury trials, the evidential burden governs the judge’s power to withdraw certain issues from the jury’s deliberation on the basis that there is insufficient evidence to raise the issue: see Roderick Munday, *Cross and Tapper on Evidence* (Oxford University Press, 13th Ed, 2018) at pp 128–129.

12 See Roderick Munday, *Cross and Tapper on Evidence* (Oxford University Press, 13th Ed, 2018) at p 128; Benny Tan, “The Role of Prosecutors as Ministers of Justice: Disclosure of Unused Material, and Calling of Witnesses at Trial (Part II)” *Singapore Law Gazette* (March 2021); Peter Gabriel, “Burden of Proof and Standard of Proof in Civil Litigation (2013) 25 SAcLJ 130.

13 *Brady v Group Lotus Car Companies plc* [1987] 2 All ER 674 at 687.

14 This observation led to the Court of Appeal’s landmark pronouncements on the Prosecution’s additional disclosure obligations in respect of statements recorded from material witnesses. Those pronouncements are beyond the scope of this article.

15 Before the Court of Appeal held in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 that the Prosecution was subject to additional disclosure obligations, the Prosecution was obliged to disclose to the Defence only unused material that tended to undermine the Prosecution’s case or strengthen the Defence’s case: see *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

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evidential burden of rebutting the appellant's defence.¹⁶ The Court of Appeal hence allowed the appeal and acquitted the appellant of drug trafficking.

8 The Court of Appeal's ruling was based on the proposition that, in certain circumstances, the Prosecution's failure to call a material witness to rebut an accused person's defence may leave a fatal gap in its case. The following passages of the judgment on *when* the evidential burden would shift to the Prosecution, however, occasioned some misunderstanding:¹⁷

70 ... In our judgment, ... the present case squarely engages the Prosecution's evidential burden to adduce sufficient evidence to rebut a defence raised by the accused person that has properly come into issue. We are concerned here with the narrow situation where an accused person has advanced a *specific* defence which identifies *specific* material witnesses and the Prosecution, despite having had access to these witnesses, has chosen not to call them.

71 In this specific situation, it seems obvious to us that the Prosecution ought to call the material witnesses in question if it is necessary to do so in order to discharge its evidential burden. To be clear, the Prosecution would not need to call these witnesses if it is satisfied that it can rely on other evidence to discharge its evidential burden, such as, for example, close-circuit television ("CCTV") records which directly contradict the accused person's defence. Neither would there be any question of the Prosecution having to discharge its evidential burden by calling these witnesses if the accused person's defence is patently and inherently incredible to begin with. Subject to these obvious limitations, ***the Prosecution runs a real risk that it will be found to have failed to discharge its evidential burden on material facts in issue if the Defence has adduced evidence that is not inherently incredible and the Prosecution fails to call the relevant material witnesses to rebut that evidence.***

[emphasis in original in italics; emphasis added in bold italics]

16 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [107], [120], [136] and [146].

17 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [70]–[71]; see also *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 at [66] and [80].

9 The above passages were misconstrued by some as standing for the *general* principle that, as long as an accused person raises a defence that is “not inherently incredible”, the evidential burden shifts to the Prosecution to rebut that defence; and if the Prosecution fails to discharge that burden, such as by not calling further witnesses, then the court should accept that defence without more. One commentator, for instance, read *Nabill* as standing for the proposition that “the evidential burden on the accused is discharged as long as his case is not inherently incredible”.¹⁸ It was also noted that “the threshold of inherent incredibility” was probably drawn from the test which applies at the close of the Prosecution’s case.¹⁹

10 The District Court’s judgment in *Public Prosecutor v Kong Swee Eng*²⁰ also seems to have been influenced, at least in part, by a similar misinterpretation of *Nabill*. The accused was a director of a company that was in the business of ship repairs (“Rainbow”). At the material time, Rainbow’s sole customer (“JSPL”) was a wholly owned subsidiary of Sembcorp Marine Ltd (“Sembcorp”). The accused faced ten charges of corruptly giving gratification to various JSPL employees to advance the business interests of Rainbow and another company (of which she was an indirect shareholder) with JSPL.

11 A key part of the accused’s defence was the alleged existence of a special business relationship between JSPL and Rainbow (“the Special Relationship Defence”). The accused claimed that she and Sembcorp’s chief executive officer (“Wong”), among others, had agreed that Wong would award certain jobs to Rainbow without Rainbow having to compete for those jobs. She thus argued that she simply did not need to bribe JSPL employees as she would secure jobs with JSPL through Wong.²¹ The Prosecution did not call Wong as a witness even though it was “undisputed” that he

18 Benny Tan, “The Role of Prosecutors as Ministers of Justice: Disclosure of Unused Material, and Calling of Witnesses at Trial (Part II)” *Singapore Law Gazette* (March 2021).

19 Benny Tan, “The Role of Prosecutors as Ministers of Justice: Disclosure of Unused Material, and Calling of Witnesses at Trial (Part II)” *Singapore Law Gazette* (March 2021).

20 [2020] SGDC 140.

21 *Public Prosecutor v Kong Swee Eng* [2020] SGDC 140 at [16].

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was a material witness whose evidence could have confirmed or contradicted the Special Relationship Defence.²²

12 The District Court acquitted the accused of all ten charges. It found that the Special Relationship Defence “was not patently and inherently incredible” and that “the Prosecution was unable to rely on other evidence to discharge its evidential burden”.²³ The District Court thus concluded that the Prosecution had failed “to discharge its evidential burden to rebut the Special Relationship Defence” by not calling Wong as a witness.²⁴ Certain portions of the District Court’s judgment appeared to suggest that the evidential burden shifts to the Prosecution as long as: (a) the accused’s defence is not inherently incredible; and (b) the Prosecution cannot rely on other evidence to discharge that burden.

13 The High Court allowed the Prosecution’s appeal in part and convicted the accused on eight of the ten charges.²⁵ The appeal was decided mainly on factual grounds. The High Court held that the Special Relationship Defence was, in fact, inherently incredible²⁶ and that the accused had failed to adduce sufficient evidence of that defence.²⁷ The evidential burden thus remained squarely on the accused, and the Prosecution did not err by not calling Wong as a witness.²⁸

IV. The myth dispelled – the Court of Appeal’s clarification in *Roshdi*

14 The misconception that *Nabill* had lowered the threshold for the evidential burden to shift to the Prosecution lingered until it was dispelled by the Court of Appeal’s decision in *Roshdi*. *Roshdi* was an appeal by the appellant against his conviction on a capital charge of having in his possession diamorphine for the purpose

22 *Public Prosecutor v Kong Swee Eng* [2020] SGDC 140 at [19].

23 *Public Prosecutor v Kong Swee Eng* [2020] SGDC 140 at [57].

24 *Public Prosecutor v Kong Swee Eng* [2020] SGDC 140 at [57], [58] and [63].

25 *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6.

26 *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6 at [56], [62] and [78].

27 *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6 at [56] and [63].

28 *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6 at [56], [63] and [78].

of trafficking. The Court of Appeal took the opportunity to clarify that *Nabill* did *not* stand for the principle that, where there was a material fact in issue, the evidential burden would shift from the Defence to the Prosecution simply because the accused had raised a defence that was not inherently incredible (which the Court of Appeal described as “the Purported Interpretation” of *Nabill*).²⁹

15 In rejecting the Purported Interpretation unequivocally, the Court of Appeal made two key points. First, it emphasised that the evidential burden had shifted to the Prosecution in *Nabill* because the appellant had discharged his evidential burden of raising *sufficient* evidence, such that his defence had properly come into issue.³⁰ The evidential burden did not shift to the Prosecution merely because the appellant’s defence in *Nabill* was not inherently incredible.

16 Second, the Court of Appeal reiterated that where the overall legal burden rests on the Prosecution, the accused’s evidential burden is to raise evidence capable of creating a *reasonable doubt*.³¹ Where the legal burden rests on the accused to prove a statutory defence or exception to liability, he bears the evidential burden of adducing evidence capable of proving the relevant facts on a *balance of probabilities*.³² In other words, the parties’ legal and evidential burdens are wholly congruent. It follows that where an accused person raises an inherently incredible defence, he will have failed to create a reasonable doubt or prove the relevant facts on a balance of probabilities, and he will hence continue to bear the evidential burden.³³

17 *Roshdi* makes it clear that the evidential burden shifts from the Defence to the Prosecution only when an accused person has discharged his evidential burden to the requisite standard of proof. Although an accused person will have failed to discharge

29 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [32] and [76].

30 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [78] and [86].

31 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [79].

32 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [80].

33 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [78] and [81]; see also *Public Prosecutor v Kong Swee Eng* [2022] SGHC 6 at [54].

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his evidential burden if he raises an inherently incredible defence, *the converse is not true* – he will not necessarily have discharged his evidential burden simply by raising a defence that is not inherently incredible.

18 The Court of Appeal’s clarification in *Roshdi* is a welcome development for three reasons. First, there is now no doubt that the legal and evidential burdens in criminal proceedings are aligned. If the Purported Interpretation were true, an accused person may be acquitted merely because he raises an assertion that is not inherently incredible, *even if* that assertion does not create a reasonable doubt. This would completely undermine the “one true evidentiary standard in criminal law” – that of proof beyond a reasonable doubt.³⁴

19 Second, it would be unprincipled to apply the standard of inherent incredibility to evidential burdens. As earlier noted in this article, that standard finds its roots in the threshold that applies at the close of the Prosecution’s case for the accused to be called on to give his defence.³⁵ At that stage in the proceedings, the Prosecution must show that there is some evidence which is “not inherently incredible” and which satisfies each and every element of the charge against the accused.³⁶ It is entirely logical that the “not inherently incredible” threshold applies in that context, when the court does not have the benefit of reviewing the evidence in totality. However, that threshold has no logical application to evidential burdens, which, as outlined above, are not true legal burdens but relate to the tactical desirability of a party adducing evidence to avoid an adverse decision by the court.

20 Third, *Roshdi* makes it clear that the remarks in *Nabill* that gave rise to the Purported Interpretation must be read in their proper context. Those remarks were made on the unique facts of *Nabill*. They should not be construed as setting out a new

34 *Public Prosecutor v GCK* [2020] 1 SLR 486 at [1].

35 Benny Tan, “The Role of Prosecutors as Ministers of Justice: Disclosure of Unused Material, and Calling of Witnesses at Trial (Part II)” *Singapore Law Gazette* (March 2021).

36 Criminal Procedure Code 2010 (2020 Rev Ed) s 230(1)(j).

(and lower) threshold of inherent incredibility that governs the shifting of the evidential burden in *all* cases.

V. Implications for practitioners

21 It follows from *Roshdi* that practitioners need not be overly concerned with the vexing distinction between legal and evidential burdens. The position is clear: *Nabill* did not change the law on the adequacy of the evidence that must be adduced by each party.³⁷ The bedrock remains that the Prosecution must prove its case beyond a reasonable doubt. As for the accused, his evidential burden is to adduce evidence that is capable of: (a) generating a reasonable doubt; or (b) proving the relevant facts on a balance of probabilities, where he bears the legal burden in relation to a statutory presumption or a defence. In other words, *Nabill* is best understood as a case in which the accused had discharged his *legal* burden of proving the relevant facts on a balance of probabilities, thereby rebutting the presumptions under the Misuse of Drugs Act.³⁸

22 In the light of *Roshdi*, it would typically not be necessary or useful for practitioners to make submissions specifically on the shifting of the evidential burden. Instead, the court is likely to focus on the totality of the evidence – including the implications of the Prosecution’s or the Defence’s failure to call any material witnesses – to assess whether the parties have discharged their legal burdens to the requisite standard of proof.

VI. Conclusion

23 *Roshdi* may have finally put to rest the thorny, and perhaps unhelpful, distinction between legal and evidential burdens in criminal proceedings. Instead of attempting to discern whether the evidential burden has shifted, parties should adopt a commonsensical approach to evaluating the totality of

37 See, in this regard, *Moad Fadzir bin Mustaffa v Public Prosecutor* [2020] 2 SLR 1364 at [16].

38 Cap 185, 2008 Rev Ed.

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the evidence. Above all, they should never lose sight of their *legal* burden – the one true burden of proof.