

1964

## Burden of Proof in Insanity Defense

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### Recommended Citation

John J. McKay, Burden of Proof in Insanity Defense, 16 S. C. L. Rev. 566 (1964).

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## CRIMINAL LAW—BURDEN OF PROOF IN INSANITY DEFENSE

*Bradford v. State*, 234 Md. 505, 200 A.2d 150 (1964)

The defendant was tried, without a jury, on several charges involving statutory rape and assaults of female children. His sole defense was that he was insane at the time the offenses were committed. After introduction of sharply conflicting medical testimony, the trial judge ruled that the defendant was sane at the time of the offenses and on the date of the trial, but in his review of the evidence, he did not indicate whether his decision was based on the defendant's failure to prove his insanity by a preponderance of the evidence or on the prosecution's proof of his sanity beyond a reasonable doubt. HELD: Remanded. Since it was the first time the question was squarely presented in Maryland, the Court of Appeals of Maryland elected to remand the case for further proceedings as necessary to indicate which theory had been applied by the trial judge. The majority held that the presumption of sanity, as a legal presumption, prevailed only until overcome by a sufficient proof of insanity at the trial. At that time, since insanity involves intent which is an essential element of the offense, the burden of proof shifted to the State to prove the defendant's sanity beyond a reasonable doubt. Two justices dissented primarily in the belief that the defendant should bear the risk of persuasion, and that to acquit simply because doubt is raised to his sanity is to relax the fundamental concept of criminal justice, wherein the matter of the accused's sanity never attaches to the prosecution. *Bradford v. State*, 234 Md. 505, 200 A.2d 150 (1964).

The prevailing rule in all jurisdictions is that the accused is presumed sane until contrary evidence is introduced.<sup>1</sup> This presumption is sufficient to constitute a *prima facie* case in favor of the State, and until such contrary evidence is entered the State is not required to introduce evidence in chief to prove the sanity of the accused.<sup>2</sup> The initial burden of producing evidence to the judge thus falls on the defendant.<sup>3</sup> It is important to distinguish this element of the burden of proof from that of the risk

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1. For a list of cases in all jurisdictions see WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 214 (1954).

2. *United States v. Currens*, 290 F.2d 751 (3rd cir. 1961); *Walters v. State*, 183 Ind. 178, 108 N.E. 583 (1915); 2 WHARTON, *CRIMINAL EVIDENCE* § 898 (11th ed. 1955).

3. 9 WIGMORE, *EVIDENCE* § 2487 (3rd ed. 1940).

of non-persuasion of the jury.<sup>4</sup> The former is discharged when either side introduces sufficient evidence of irresponsibility to create a jury question.<sup>5</sup>

It is either held that the presumption of sanity remains an issue and should be considered by the jury along with other evidence on the question,<sup>6</sup> or that it is not evidence and cannot be treated as such, in other words, that the presumption has fully served its purpose once evidence has been introduced, and disappears.<sup>7</sup>

The courts are almost evenly divided as to the latter burden, that of the burden of persuasion. The federal government and approximately half the states place this burden *on the prosecution* and require it to prove the sanity of the defendant beyond a reasonable doubt. The remainder of the states require the *defendant to prove his insanity* by a preponderance of the evidence or some greater measure.<sup>8</sup> The authorities are in rather hopeless conflict in which no trend is readily apparent.<sup>9</sup>

Those courts placing the burden of proof on the defendant argue that sanity is not one of the elements of the crime, but rather is an essential attribute of humanity. Sanity is a condition precedent to all intelligent actions. It is a pre-existing fact which may be taken for granted as implied by law and general experience. It is further argued that sanity is a quality of the actor, not an element of the act. Criminal intent, malice, and premeditation are facts of mental condition and they can only be proved by inference from material facts and circumstances as would compel the inference of guilt in a sane person, and this is the limit of his burden. In other words, the State must prove all that is set out in the indictment beyond a reasonable doubt. The burden of proving the sanity of the accused, however, never attaches to the State. Here the presumption of sanity, which is treated as a fact, neutralizes the presumption of innocence. The defense is treated, in essence, as confession and avoidance,

4. *Id.* § 2485.

5. *Id.* § 2487, 2489.

6. UNIFORM RULES OF EVIDENCE 14; 2 UNDERHILL, CRIMINAL EVIDENCE § 453 (5th ed. 1940).

7. MODEL CODE OF EVIDENCE rule 704 (1942); 2 UNDERHILL, *op. cit. supra*, note 6; See discussion of presumptions in 15 Md. L. Rev. 157, 158 (1955).

8. WEIHOFEN, *op. cit. supra*, note 1, at 241-272; Koller, *The Insanity Defense*, 112 U. Pa. L. Rev. 733, 741 (1964).

9. For the view that placing the burden of persuasion on the defendant is the modern trend see 2 UNDERHILL, *op. cit. supra*, note 6, § 452; 9 WIGMORE, *op. cit. supra*, note 3, § 2501; *Contra*, McCORMICK, EVIDENCE § 321 (1954); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 238 (1954).

and since the accused must raise the issue of his lack of capacity or responsibility by taking the affirmative, it is felt that he should accordingly bear the burden of proving it.<sup>10</sup>

These courts seem to rely, to a greater or lesser extent on underlying policy considerations; the chief being a fear that a reasonable doubt can be too easily created.<sup>11</sup> This, it is felt, is especially true in the light of the imprecise, often conflicting psychiatric testimony.<sup>12</sup> Perhaps the most frank argument for this position was that of Attorney General Heiskell to the Tennessee Supreme Court in *Dove v. State*:

[T]hat doubt of insanity and doubt of guilt do not stand on the same footing. Rules of law are not simple matter of logical consistency. Policy influences them. Every man is presumed to know the law; to contemplate the consequences of his acts; malice is presumed from the use of a deadly weapon, or from the fact of killing; not because courts suppose there [sic] though are universally true in fact, but that policy demands their adoption. Policy, not logic, is the foundation of the rule as to drunkenness, that it shall not excuse crime. The legal reason for it is logically nonsense; practically wise. The same policy demands that we adhere to the English rule as to proof of insanity, not make a new one as other states have done.<sup>13</sup>

The federal government and those states placing the burden of proof on the State contend that the fundamental proposition of the criminal law calling upon the State to prove the defendant's guilt beyond a reasonable doubt extends logically to the area of criminal responsibility. They argue that the basic elements of the crime are, first, the act and second, the intent or *mens rea*. In order to prove the crime it is essential to show that the defendant was capable of entertaining the requisite *mens rea*. Intention is proved by the circumstances connected with the perpetration of the offense, and the sound mind and descretion of the accused. The act alone, even under the most aggravating circumstances, will not suffice, absent sanity.

10. *Bradford v. State*, 234 Md. 505, 200 A.2d 150 (1964) (dissenting opinion); *State v. Lawrence*, 57 Me. 574 (1870); *State v. Quigley*, 26 R.I. 263, 58 Atl. 905 (1904); LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 351 (1961); 9 WIGMORE, *EVIDENCE* § 2487 (3d ed. 1940).

11. *State v. Barton*, 361 Mo. 780, 236 S.W.2d 596 (1951); *Holober v. Commonwealth*, 191 Va. 826, 62 S.E.2d 816 (1951).

12. *Ortwein v. Commonwealth*, 76 Pa. 414 (1874).

13. 3 Heisk. 348, 353 (Tenn. 1874).

Sanity then, is an ingredient in crime, as much as the overt act.<sup>14</sup> The presumption of sanity considered here is but a bare legal presumption and when a doubt is raised on the question of sanity that presumption disappears.<sup>15</sup> It is further argued; that to allow the presumption of sanity to bind the jury until the defendant proves that he is not guilty by reason of insanity is, in effect, to force him to establish his innocence by proving that he was not guilty of the crime charged.<sup>16</sup>

One of the strongest arguments rejecting policy considerations is that of the Tennessee court in the *Dove* case:

The force of this argument is much strengthened by the facts proven as to the violent character of this defendant. To turn him loose might be to subject some other innocent victim to the same fate with [the deceased]. But this is not the tribunal to which the consideration of public policy can be appropriately addressed. Our business is to administer the law and not to make the law. We find the law well settled that where the State charges a citizen with crime, his guilt must be established beyond a reasonable doubt. We apply this rule to the worst men about whose sanity no doubt is raised, then turn them loose to repeat their crimes, because they are entitled to the humane doctrine of doubts. With what show of reason or humanity could we reverse the rule as to that unfortunate class of citizens whose memory and discretion is found to be of doubtful soundness and subject them to imprisonment . . . .<sup>17</sup>

South Carolina seems to be in the camp of those states requiring the defendant to establish his sanity by a preponderance of the evidence.<sup>18</sup> This rule is, however, coupled with the caveat that if the jury entertain a reasonable doubt of his legal guilt, they must acquit.<sup>19</sup> Thus it would seem that the court has adopted a double standard.

14. *United States v. Davis*, 160 U.S. 469 (1895); *Hobbs v. People*, 31 Ill. 385 (1863); *GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW* 41 (1925); *LINDMAN & MCINTYRE, op. cit. supra*, note 10.

15. *Hobbs v. People, supra*, note 14.

16. *Leland v. Oregon*, 343 U.S. 792 (1952) (dissenting opinion); *United States v. Davis, supra*, note 14.

17. *Dove v. State, supra*, note 13.

18. *State v. Bundy*, 24 S.C. 439 (1885); *State v. Young*, 238 S.C. 115, 119 S.E.2d 504 (1961), *cert. den.* 368 U.S. 868 (1961); *State v. Hann*, 196 S.C. 211, 12 S.E.2d 720 (1940); *State v. Hyde*, 90 S.C. 296, 73 S.E. 180 (1911); *State v. Paulk*, 18 S.C. 514 (1883); *State v. Stark*, 1 Strob. 479 (S.C. 1847).

19. *State v. Deschamps*, 134 S.C. 179, 131 S.E. 420 (1925) (concurring opinion); See *State v. McIntosh*, 39 S.C. 97, 17 S.E. 446 (1892) where it was considered fatal error for the judge to refuse to instruct the jury:

Prior to 1926 the defense of *alibi* was considered to be an affirmative defense that must be established by the greater weight of the evidence, but the jury was required to acquit the defendant if it entertained a reasonable doubt as to whether he had proved the defense.<sup>20</sup> This view was overruled in *State v. McGee* where the court reasoned that the above two tests were inconsistent and calculated to confuse the jury; that the one true test should be to require the State to prove the defendant's presence beyond a reasonable doubt.<sup>21</sup> These decisions could perhaps be made the basis for a future argument to the court as to the insanity defense:<sup>22</sup> first; in that there is an inconsistency in the one rule for the defense of insanity and the other for that of *alibi*, since it would seem that insanity bears a similar relationship to the *mens rea* as *alibi* to the crime itself; second, in that the two tests in the defense of insanity are inherently inconsistent and thus calculated to confuse the jury.

The better logic is clearly *opposed* to making the accused prove his insanity. It would appear extremely difficult to uphold the premise, requiring the State in criminal cases to prove only such facts and circumstances as would infer guilt beyond a reasonable doubt in a "sane" man, without regard to the particular accused then on trial. In addition, the policy argument has lost much of its effect in recent years, as insanity has come to be recognized as a disease that can be treated as such. Modern statutes provide for the incarceration, in many cases, of those acquitted because of doubtful sanity. But, in any event it seems contrary to our conception of criminal justice to convict a defendant if there is any reasonable doubt as to his guilt of the crime alleged.

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While it is true that the defendant is required to prove that he was of unsound mind at the time of the homicide, by the preponderance of the evidence, it is also true that upon the consideration of the whole case, the State's as well as the defendant's, if any reasonable doubt remains in the mind of the jury, the defendant is entitled to a verdict of not guilty.

20. *State v. West*, 138 S.C. 421, 136 S.E. 736 (1927).

21. 137 S.C. 256, 135 S.E. 59 (1926).

22. *But cf.* *State v. Deschamps*, *supra*, note 19.