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WOOLMINGTON[1] V LORD COCHRANE[2]: A MISDIRECTION OF LAW AND FACT.

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ABSTRACT

The Article deals with an issue of Burden of Proof in the Law of Sri Lanka. In 1938, the Supreme Court of Ceylon in Inspector Arendstz v Wilfred Pieris[3] *laid down that once the Prosecution has made out:*

> *"a strong prima facie case, — and when it is within his own power to offer evidence, if such exist, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.*[4]*"*

The thrust of this passage is that the burden of proof upon the prosecution is merely to establish a "Strong Prima Facie case", and at which point in the proceedings the burden would shift to the defence requiring him to answer that prima facie case established against him. Failure to do so would provide the court with proof of his guilt for the offence charged.

This passage is quoted with the authority of a secondary source, namely Wills on Circumstantial Evidence (7th Edition at page 314). Wills claimed that, that passage which the author quotes from Lord Ellenborough's judgment in Rex v Lord Cohrane and Others, could be found at page 479 of Gurney's Reports. Gurney was a scribe who was engaged by the court to report on the proceedings. The complete text of the Report expands into just over 600 pages in print and could be found at the Inner Temple Library, in London. Abridged versions of the Report may be found in the English Reports.

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[1] *Woolmington v director of Public Prosecution*, [1935]A.C.256(H.L.)
[2] Unreported (1814) – see *The Queen v Charles Random de Berenger, Sir Thomas Cochrane (Lord Cochrane), Andrew Cochrane, Richard Gathorn Butt, Ralph Sandom, Alexander M'Rae, John Peter Holloway and Henry Lyle*, taken in Short Hand by William Brodie Gurney, Short hand writer to both houses of Parliament published by Butterworth & Sons, fleet Street London in 1814.
[3] (1938) 10 Ceylon Law Weekly 121
[4] Ibid., at page, 122-123.

Neither, at page 479 of Gurney's Report, nor in any one of the pages of the 600 plus pages of his Report could the quoted passage be found. Additionally, there is not a single decision in the Common Law lexicon which had referred or followed the Lord Cochrane decision in order to support any particular proposition of law, least of all what Wills had quoted in his tome on Circumstantial Evidence. Notwithstanding this lacuna, the Supreme Court of Ceylon and later of Sri Lanka, with unfailing consistency had quoted that passage and had relied on it to affirm convictions obtained even for Capital Offences[5].

The last decision before Inspector Arendtz, to follow Woolmington was The King v Eliyatamby[6]*. With no reference to the Ellenborough dictum Abrahams C.J. applied the Woolmington rule and allowed the Appeal. It is shown in this Article that none of the subsequent decisions had made reference to The King v Elliyatamby*[7] *including Inspector Arendszt*[8]*, which was decided only an year later.*

The authority of the Ellenborough dictum continued until today although the Supreme Court was faced with a frontal attack upon the dictum in the Mohamed Niyaz Naufar Appeal, in 2006. The Supreme Court was unable in 2006 to precisely locate the dictum in Ellenborough's direction to the Jury in the Cochrane Case. The Learned judges merely presumed that, that dictum must be somewhere in that Direction.

This steady stream of authority had but a single ripple. That was in two cases in which Basanayke C.J. presided in the Court of Criminal Appeal. That was in The Queen v Santin Singho (1962) 65 N.L.R. 445 and The Queen v Sumanasena (1963) 66 N.L.R. 350. There the Learned Chief Justice pointed out that the so called dictum of Ellenborough could not have been uttered by such an experienced judge, for he would then have been laughed out of court. For in 1814 when it is alleged that he had uttered those words an accused was an incompetent witness to give evidence on his behalf. To require him to give evidence so as to explain matters which were entirely within his knowledge, under pain of being convicted would have been manifestly unjust and some what absurd. For not until 1898, when the Criminal Evidence Act was enacted in England was an accused person become a competent witness on his own behalf. Therefore the Learned Chief Justice pointed out that the so called dictum could not have existed. Therefore its use would be manifestly unjust.

In conclusion it may be pointed out that the dictum which runs contrary to the established rule regarding the burden of proof in Woolmington is firstly untenable as a Rule of Law and secondly is perhaps a product of a misdirection of both law and fact by a colonial judge presiding in an Indian court. Wills' book on Circumstantial Evidence was an Indian Text.

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[5] *The King v Seeder de Silva* (1940) 41 N.L.R. 337; *The King v Wickremasinghe* (1941) 42 N.L.R. 313; *The king v Peiris Appuhamy* (1942) 43 N.L.R. 412; *Prematilleke v The republic of Sri Lanka* (1972) 75 N.L.R. 506; *Illangatilleke v The Republic* (1984) 2 Sri L.R. 38 and more recently in *Mohamed Niyas Naufar v The Attorney General* TAB-01/2006, at pages 52 per Tilakawardene J.

[6] (1937) 39 N.L.R. 53.

[7] Ibid. at pages 56 and 58.

[8] (1938) 10 Ceylon law weekly 121