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Stephen's prudent person and the standard of proof in Indian Evidence Act Jurisdictions

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STEPHEN'S PRUDENT PERSON AND THE STANDARD OF PROOF IN INDIAN EVIDENCE ACT JURISDICTIONS

Sir James Fitzjames Stephen's Indian Evidence Act of 1872 remains on the statute books of many Commonwealth jurisdictions. The contents of the statute have also remained largely intact. Unsurprisingly, then, there has been a growing chasm between what the statute provides for and how the common law rules on evidence have developed. However, the statute's treatment of the concept of standard of proof has arguably been more sophisticated than what the courts have given credit for. In this article, it is argued that a return to the statute's original conception of standard of proof will go some way in alleviating the impact of two intractable problems that have emerged from the standard of proof jurisprudence in Indian Evidence Act jurisdictions: first, the extreme incoherence that has been introduced to the principle of presumption of innocence; and secondly, the confusion surrounding the prospect of varying standards of proof and the requirements for corroboration.

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I. Establishing the context

1 Sir James Fitzjames Stephen's Indian Evidence Act of 1872 ("**IEA**") was considered ground-breaking in his time in that the statute represented a bold endeavour at distilling, codifying, and even overhauling the common law rules of evidence of the day.[1] Although Stephen's attempt to introduce similar evidence legislation in the UK did not materialise,[2] the IEA was exported to more than a dozen British colonies, with only cosmetic changes in the local enactments.[3] Even today, many of these jurisdictions have retained much of the original design and words of the statute,[4] including the rules pertaining to burden

[*] The author would like to thank the editorial team of the Singapore Law Journal for their help with the piece.

1 Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2022) at p 2–8.

2 See generally James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1911).

3 See generally Ronald Allen *et al.*, "Reforming the Law of Evidence of Tanzania (Part One)" (2015) 31 Boston University International Law Journal 217.

4 See generally Chen Siyuan and Soh Kian Peng, "Re-Aligning Legal Professional Privilege in Indian Evidence Act Jurisdictions with Modern Practice" (2022) 41 CJQ 297.

of proof and standard of proof. For instance, the interpretation clause of Bangladesh's Evidence Act 1872 ("**BGEA**"), Brunei's Evidence Act 1951 ("**BEA**"), Kenya's Evidence Act 1963, Malaysia's Evidence Act 1950 ("**MEA**"), Sri Lanka's Evidence Ordinance of 1896, and Singapore's Evidence Act 1893 ("**SEA**") all essentially contain the original wording of the interpretation clause of the IEA. Specifically, as regards the definition of "prove", the clause states: "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 [person] ought, under the circumstances of the particular case, to act upon the supposition that it exists."

2 At first blush, a flexible range of standards of proof is provided for in this clause, since what a prudent person decides as a probable fact must surely depend on the precise circumstances of each case—arguably even the type of case or cause of action—that is before the court.[5] There are no known records as to why Stephen had phrased this aspect of the interpretation clause the way he did,[6] but the concept of a flexible standard of proof can readily be contrasted with the longstanding dichotomy drawn in the majority of common law jurisdictions[7] between a balance of probabilities (for civil cases generally) and beyond a reasonable doubt (for criminal cases generally)—a dichotomy that Stephen was quite clearly aware of when the IEA was drafted.[8] Yet in *PP v Yuvaraj* ("***Yuvaraj***"), which was an appeal to the Privy Council from Malaysia decided in 1969, it was held that:

> "[I]t cannot be supposed that the [MEA] intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction

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5 To be clear, the IEA was only designed to apply to court proceedings, and not pre-trial proceedings, which of course may engage standards of proof beyond the two main ones discussed in this paper: *Halsbury's Laws of Singapore (Evidence)*, Volume 10 (LexisNexis, 2021) at [120.005]. There also exists court proceedings that, while requiring evidence, may not engage the notion of standard of proof. One example is bail proceedings: *PP v Sollihin bin Anhar* [2015] 3 SLR 447.

6 Curiously, there is no definition of "prove" in the aforementioned *A Digest of the Law of Evidence*, but no explanation was given. However, Stephen did expressly refer to the presumption of innocence in Article 94.

7 In jurisdictions like the US, of course, there is also the substantial evidence as well as clear and convincing evidence standards (further discussed below). The standard of preponderance of evidence is understood to be the same as balance of probabilities.

8 James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1911) at p 108–110.

> fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities."[9]

In other words, notwithstanding the clear differences in expression in the MEA's interpretation clause on the definition of "prove", the Privy Council took the view that Stephen could not have contemplated more than the (two) standards of proof that already existed under the common law when drafting the IEA.[10] Notably, the position established in *Yuvaraj* remained unaltered when the Privy Council had the opportunity to revisit the issue shortly after in *Rajapakse Pathurange Don Jayasena v R* ("***Jayasena***"),[11] an appeal from the Supreme Court of Ceylon. Given that *Yuvaraj* and *Jayasena* have been consistently affirmed by the apex courts in IEA jurisdictions such as Malaysia[12] and Singapore,[13] the notion that the IEA completely follows and aligns with the common law distinction between proving facts on a balance of probabilities for civil cases and proving facts beyond a reasonable doubt for criminal cases is probably one of the most entrenched rules of evidence law in IEA jurisdictions.[14]

3 However, it is submitted that no less than two intractable problems for IEA jurisdictions have emerged as a consequence of courts in IEA jurisdictions upholding *Yuvaraj* and *Jayasena*.[15] The first (elaborated in Part II of this paper) is the introduction of incoherence to the principle of presumption of innocence within the IEA framework.

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9 *PP v Yuvaraj* [1969] 2 MLJ 89 at [15].

10 To be clear, one is not presuming that the IEA was legislated in vain just because it did not change the common law (at least in respect of standard of proof). Rather, the question is why Stephen did not specifically use anything that resembled the common law expressions if he truly intended to fossilise the twin standards.

11 *Rajapakse Pathurange Don Jayasena v R* [1970] 1 AC 618.

12 See for instance *PP v Gan Boon Aun* [2017] 3 MLJ 12.

13 See for instance *PP v Koh Peng Kiat* [2016] 1 SLR 753.

14 Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2022) at p 190–206.

15 This is not an attempt at arguing that the IEA should be followed for the sake of it—though there is merit to following laws that remain on the books—instead, the argument here is that the concept of the prudent person may well have been one of Stephen's better ideas relative to the common law developments that came after the IEA.

The presumption of innocence is widely accepted as fundamental to any given criminal justice system, and Stephen recognised this too.[16] As will be shown, however, the IEA would have self-contradictory formulations of the presumption of innocence if *Yuvaraj* and *Jayasena* are applied to the other burden of proof and standard of proof provisions in the IEA. The second problem (elaborated in Part III of this paper) pertains to the negative ramifications of maintaining that the IEA can only accommodate two standards of proof despite the broader language used in the statute's interpretation clause. One such ramification is felt in ascertaining the appropriate standard of proof in civil cases involving criminal elements, with fraud being the paradigmatic example; courts in IEA jurisdictions seem to have applied contradictory standards of proof when confronted with these cases. Another ramification is felt in the rules concerning corroboration. IEA jurisdictions generally do not mandate that corroborating evidence is required, regardless of the nature of the cause or action or nature of the evidence.[17] Nonetheless, the jurisprudence developed by courts in IEA jurisdictions have called for uncorroborated evidence to be "unusually compelling" if, for instance, an alleged victim of a sexual offence only has her own testimony to offer and there is no other direct evidence proving the crime.[18] The upshot is that there may be a de facto change, or perception of there being a change, in the standard of proof, even though there is only supposed to be a singular one (that is, beyond a reasonable doubt in all types of criminal proceedings).

4 The conclusion of this paper (Part IV) is that the aforesaid problems can be obviated if fidelity is restored to the text and purpose of the IEA's interpretation clause as regards the meaning of "prove" (and any of its grammatical variations)—Stephen's concept of a prudent person in that clause should not be construed as merely preserving the said common law binary for standard of proof, without intending for any other nuance. Rather, as can be inferred from the text of the clause itself, the prudent person whom Stephen had in mind will not only be mindful of the importance of upholding the presumption of innocence,[19] but also

[16] Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2022) at p 187–190. In Stephen's proposed bill, there are even provisions that explicitly refer to the principle.

[17] See for instance IEA, section 134; MEA, section 134; SEA, section 136.

[18] See for instance *Asep Ardiansyah v PP* [2020] SGCA 74.

[19] James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1911) at p 108–110.

be capable of appreciating that "prove" encompasses more than the two traditional common law standards of proof. Indeed, it is argued that the prudent person will not insist that all types of civil proceedings should be treated as a monolithic entity subject only to a singular standard of proof—ditto criminal proceedings. Finally, the prudent person may require corroborating evidence, depending on what is alleged and the nature and quality of the evidence available. This will work better than blanket or categorical rules that now govern corroboration, which also have the problem of being inconsistently applied and being confusing as to the precise standard of proof (or corroboration for the matter) required.

II. Presumption of innocence

A. How the principle is reflected in the Indian Evidence Act

5 The modern conception of the principle of presumption of innocence has often been traced to a passage[20] in the 1935 House of Lords decision of *Woolmington v DPP* ("***Woolmington***"):

> "[W]hile the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence … No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."[21]

6 *Woolmington*—its allusion to the presumption of innocence as a golden thread that runs throughout the criminal justice system in the common law world, in particular—has since been cited and applied in various IEA jurisdictions,[22] but it is not the case itself or the said passage that poses a conflict with the IEA. The question, instead, is how references to "prove" in the burden of proof provisions in the IEA are to

[20] Andrew Stumer, *The Presumption of Innocence* (Bloomsbury, 2010) at p xxxviii.
[21] *Woolmington v DPP* [1935] AC 462 at 481–482.
[22] See for instance *AOF v PP* [2012] 3 SLR 34; *Phrueksa Taechim (Thailand) v PP* [2013] 6 MLJ 808.

be interpreted. There are five pertinent provisions for present purposes—with their equivalents still in existence in other IEA jurisdictions:

(a) Under section 101 of the IEA, a party who "desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist."[23]

(b) Under section 102, "[t]he burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."[24]

(c) Under section 103, "[t]he burden of proof as to any particular fact lies on that person who wishes the court to believe its existence". The example given in illustration (*b*) to the provision is as follows: "B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."[25]

(d) Under section 105, when a person is accused of an offence, "the burden of proving the existence of circumstances bringing the case within [a defence in any given criminal law statute] is upon him, and the court shall presume the absence of such circumstances."[26]

(e) Under section 106, when "any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The example given in illustration (*b*) to the provision is as follows: "A is charged with travelling on a railway without a ticket. The burden of proving that A had a ticket is on him."[27]

7 As mentioned earlier, the Privy Council in *Yuvaraj* and *Jayasena* held that the IEA was not meant to abolish the common law distinction between a balance of probabilities and beyond a reasonable doubt. Because of this, the court in *Jayasena* held that section 105 of the IEA creates a burden of persuasion (or burden of proof, as referenced in

[23] See also SEA, section 103; BGEA, section 101; BEA, section 101.
[24] See also SEA, section 104; BGEA, section 102; BEA, section 102.
[25] See also SEA, section 105; BGEA, section 103; BEA, section 103.
[26] See also SEA, section 107; BGEA, section 105; BEA, section 105.
[27] See also SEA, section 108; BGEA, section 106; BEA, section 106.

sections 101, 102, 103, and 106), and not a burden of production (or what is otherwise known as the evidential burden under the common law); accordingly, for an accused to succeed in raising a defence that is provided in written law, the defence must be proved on a balance of probabilities—a more onerous task than merely raising reasonable doubt on the prosecution's case—or there will be no acquittal of the accused.[28] As for *Yuvaraj*, the court rejected the notion that obligating an accused to prove his defence on a probabilities (for there to be an acquittal) was "too high a burden"—that was simply how the IEA was conceived, and the statute had to be interpreted on its own terms and design.[29] Insofar as section 105 of the IEA (or its equivalent in other IEA jurisdictions) is concerned, courts in IEA jurisdictions have consistently followed this aspect of *Yuvaraj* and *Jayasena*, holding that all manner of statutory defences in criminal proceedings[30] must be proven on a balance of probabilities for them to succeed.[31]

B. Jurisprudential inconsistency in applying the meaning of prove/proof

8 Yet the same has not been done by courts in IEA jurisdictions when interpreting their equivalents of sections 103 and 106 of the IEA. The main text of section 103 is not the controversial aspect of the provision. It is the illustration on alibis that, when read on its face, requires the person invoking it to prove it. Read in the light of *Yuvaraj* and *Jayasena*, this means that an accused can only succeed in raising an

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[28] *Rajapakse Pathurange Don Jayasena v R* [1970] 1 AC 618 at 624. While it is theoretically possible for an accused to still be acquitted if reasonable doubt can otherwise be shown, accused persons who fail in proving their defences tend to fail in casting reasonable doubt as well: see Michael Hor, "The Presumption of Innocence" [1995] SJLS 365 at370–376.

[29] *PP v Yuvaraj* [1969] 2 MLJ 89 at [18].

[30] While arguments have been made to distinguish between defences that require an accused to show justification (for instance, private defence or necessity) and defences that directly negate *actus reus* or *mens rea* (for instance, accident or unsoundness of mind), these have not been accepted across the board in IEA jurisdictions. In any event, the text of the IEA simply does not draw such a distinction, and as will be argued, the solution that is better targeted at the root of the problem is to move away from the *Yuvaraj*/*Jayasena* definition of "prove". The same reasoning applies to distinguishing between defences that raise independent evidence and those that do not.

[31] See generally Shakil Ahmad Khan, *Ratanlal & Dhirajlal The Law of Evidence* (LexisNexis, 2018) at 212. Relatedly, statutory presumptions in criminal law statutes have been held to be rebuttable only on a balance of probabilities: see for instance *Roshdi bin Abdullah Altway v PP* [2022] 1 SLR 535. What is quite striking is that attempts to have section 105 of the IEA declared by courts in IEA jurisdictions as being incompatible with the presumption of innocence have never succeeded.

alibi if this is proven on a balance of probabilities—when arguably, if the prosecution is unable to show that the accused was even at the crime scene (assuming it is not a crime committed remotely), how can the *actus reus*, for which the prosecution is obligated to prove, be said to be satisfied? While the presumption of innocence does not prohibit reversals in the burden of proof, when this is done as a general starting point across all types of offences (since the IEA is a statute of general application), this would be fundamentally antithetical to the presumption of innocence.[32] Keeping in mind too that there is nothing to suggest that Stephen had intended to reverse the burden of proof for alibis, this is another reason to conclude that *Yuvaraj* and *Jayasena* ought to be seriously reconsidered.

9 Section 106, when read on its face in the light of *Yuvaraj* and *Jayasena*, is even more problematic. The provision itself does not place any limitations or qualifications as to when a fact "is especially within the knowledge" of a person, and neither do the preparatory works by Stephen concerning the IEA.[33] In crimes that lack independent eyewitnesses—and quite often this is the case—would an accused be presumptively considered to always have especial knowledge? Would not an accused always have especial knowledge of whether he had committed a crime or had the intention to do so? The effect of applying the *Yuvaraj*/*Jayasena* definition of "prove to section 106 would again turn the presumption of innocence on its head if the accused bears the legal burden of disproving (in the sense of balance of probabilities) the commission of the crime, regardless of whether he completely denies liability or partially admits liability (such as admitting to the *actus reus* but denying having the intention). Indeed, the assumption that an accused has especial knowledge merely by dint of being the one accused of the crime must also be considered fundamentally antithetical to the presumption of innocence.

10 It is perhaps unsurprising, then, that courts in IEA jurisdictions have not given sections 103 and 106 a literal interpretation,[34] notwithstanding the claim in *Yuvaraj* and *Jayasena* that all references to

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[32] See for instance *Chua Hock Soon James v PP* [2017] 5 SLR 997 at [69]–[77], which endorsed the approach by the House of Lords in *R v Hunt (Richard)* [1987] AC 352.

[33] *Cf.* James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1911) at p 155.

[34] See also Shakil Ahmad Khan, *Ratanlal & Dhirajlal The Law of Evidence* (LexisNexis, 2018) at p 1418–1433.

"prove" in the IEA are solely to the positive act of either proving something on a balance of probabilities or proving something beyond a reasonable doubt—the concept of an evidential burden, according to the Privy Council in those two cases, does not exist at all under the IEA.[35] In *Ramakrishnan s/o Ramayan v PP*,[36] the issue before the Singapore High Court was whether the accused, who was alleged to have exposed himself to his victims in public, had to prove his alibi on a balance of probabilities. The court held that section 105 of the SEA (the equivalent of section 103 of the IEA) "would operate such that the [accused] must bear the evidential burden of production (and not the legal burden of persuasion which is a balance of probabilities) to raise the issue of alibi."[37] This was not an anomalous decision by any means—earlier cases, such as *Syed Abdul Aziz v PP*,[38] and subsequent cases, such as *Vignes s/o Mourthi v PP*,[39] have held the same, and all the courts uniformly referred to the notion of an evidential burden when defining "prove" for the purposes of proving an alibi. Neither *Yuvaraj* nor *Jayasena* appeared to have been brought to the court's attention in any of these cases, but the rationale that the cases provided for interpreting section 103 as only imposing an evidential burden was that the prosecution is the party obligated to show that the *actus reus* even exists. When that has been done, the accused seeking to rely on an alibi is tasked with providing evidence to cast a reasonable doubt on that.

11 The jurisprudence on section 106 of the IEA have been just as consistent in not adopting *Yuvaraj* and *Jayasena* (although again it is unclear if those cases were brought to the attention of the courts, or whether the courts had adopted common law rules without regard to the IEA).[40] For instance, in *PP v Kong Hoo (Pte) Ltd*,[41] the accused were caught bringing endangered rosewood into Singapore waters. This constituted a potential violation of a statutory law. The question thus was whether they had intended to import the rosewood without a permit, or

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35 James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1911) at p 155.

36 *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR(R) 161.

37 *Ramakrishnan s/o Ramayan v PP* [1998] 3 SLR(R) 161 at [33].

38 *Syed Abdul Aziz v PP* [1993] 3 SLR(R) 1 at [35].

39 *Vignes s/o Mourthi v PP* [2003] 3 SLR(R) 105 at [62].

40 See also *Ma Wenjie v PP* [2018] 5 SLR 775 at [39]; *Jazlie bin Jaafar v PP* [2020] 1 MLJ 417 at [20]; *Ilechukwu Uchechukwu Chukwudi v PP* [2021] 1 SLR 67 at [244], which all held that this provision may indeed be referring to the legal burden of proof if Parliament has, through statutory means, placed the burden on an accused to prove a defence.

41 *PP v Kong Hoo (Pte Ltd) and another appeal* [2017] 4 SLR 421.

whether they were merely planning to use the Singapore port as a transit. The Singapore High Court held that while section 108 of the SEA (the equivalent of section 106 of the IEA) would be engaged in this case, section 108 "does not have the effect of imposing a burden on the accused to prove that no crime had been committed", and indeed, may only be invoked in exceptional situations.[42] The court then added that as "the Prosecution has made out a *prima facie* case that the rosewood had not been brought into Singapore solely for the purpose of taking it out again … [the accused] now bear the burden of raising reasonable doubt" that they had no intent to smuggle it into Singapore.[43] Although it is unclear from this passage whether the court was referring to the legal burden of proof or evidential burden, some subsequent cases have confirmed that section 108 does not reverse the legal burden of proof, but only creates an evidential burden,[44] while some—but not only civil cases thus far—have characterised the provision as reallocating the legal burden of proof.[45] If the former approach is correct, it is odd to think of an evidential burden being created only when there is especial knowledge—an evidential burden always exists, assuming the party carrying the legal burden of proof has adduced evidence to take the case forward.

12 The Malaysia courts have favoured the latter approach. In *Mohd Rizal bin Mat Yusuf v PP*,[46] the question was whether the accused had the intent to produce VCDs containing secret recordings of sexual activities for mass distribution. The High Court held that while section 106 of the MEA "applies where the prosecution has difficulties in proving a fact which would be relatively easy for the accused to do", the prosecution must first furnish *prima facie* evidence of the accused's intent before the provision can be invoked against the accused.[47]

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42 *PP v Kong Hoo (Pte Ltd) and another appeal* [2017] 4 SLR 421 at [36].

43 *PP v Kong Hoo (Pte Ltd) and another appeal* [2017] 4 SLR 421 at [37]. See also *PP v Che Cheong Hin Constance* [2006] 2 SLR(R) 24 at [95]. For civil cases, see *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [80], which confirms that section 106 (of the IEA) is meant to be read restrictively as well.

44 See for instance *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82. Perhaps another way of using the provision in a more nuanced way is to see if the accused or defendant has admitted to anything. If there has been a blanket denial—as opposed to the admission of the act (but denying of the mental element)—it should be harder to invoke the provision. However, it is unclear how the language of the provision can sustain this.

45 See for instance *Fundamental Investors Pte Ltd v Palm Tree Investment Group Pte Ltd* [2020] 4 SLR 1328.

46 *Mohd Rizal bin Mat Yusuf v PP* [2009] 8 MLJ 856.

47 *Mohd Rizal bin Mat Yusuf v PP* [2009] 8 MLJ 856 at [42].

However, it is submitted that an inescapable, fundamental problem with the latter approach is that not only was the *Yuvaraj*/*Jayasena* definition of "prove" not engaged in any of the said cases, there is absolutely nothing in the text of section 106 that gives rise to the prospect of shifting burdens based on whether *prima facie* evidence has been adduced by a party,[48] or as some cases suggest, whether there are exceptional circumstances.[49] Attempting to preserve the presumption of innocence, without confronting precedents that squarely present a complete contradiction, is simply not ideal. It also leaves open the possibility that a day could come where the courts decide to apply the *Yuvaraj*/*Jayasena* definition of "prove" to section 106 (or section 103) in the name of internal consistency.

13 At this juncture, it is also important to situate the presumption of innocence in the context in which it operates in. Apart from importing the IEA, many IEA jurisdictions received into their laws the companion legislation in the form of the Indian Penal Code of 1860 as well, and subsequently, British-influenced criminal procedure laws.[50] Collectively, these gave the criminal justice systems in IEA jurisdictions a strong pro-crime control (as opposed to due process) characterisation and emphasis—one that persists till today.[51] For instance, under the criminal procedure rules in Singapore, adverse inferences can be drawn by the court against accused persons if they do not disclose exculpatory information when they are being interrogated, if they refuse to testify after the prosecution has made out a case in court, or if they refuse to

[48] Even if one were to read the concept into the provision, this is not entirely satisfactory, for the simple reason that "prove" is referred to in many other provisions within the same statute as well—one should not lightly conclude that the same terms of art within a statute can have different meanings, regardless of whatever higher purpose is being served. If anything, the *prima facie* standard is often used in the pre-trial context, whereas the IEA was designed to be used for trial proceedings proper (relatedly, another pre-trial standard that may be applicable is the inherently incredible standard, which is used to decide if the prosecution has adduced sufficient evidence for the trial to proceed). Further, it is difficult to see how section 106 can be subject to (what is essentially) a proportionality analysis, but not section 105.

[49] See for instance *Surender Singh s/o Jagdish Singh v Li Man Kay* [2010] 1 SLR 428.

[50] See generally Chan Sek Keong, "The Criminal Process – The Singapore Model" [1996] 17 Singapore Law Review 431; Michael Hor, "The Future of Singapore's Criminal Process" (2013) 25 SAcLJ 847; Keith Thirumaran, "The Evolution of the Singapore Criminal Justice Process" (2019) 31 SAcLJ 1042.

[51] Chan Sek Keong, "The Criminal Process – The Singapore Model" [1996] 17 Singapore Law Review 431; Michael Hor, "The Future of Singapore's Criminal Process" (2013) 25 SAcLJ 847; Keith Thirumaran, "The Evolution of the Singapore Criminal Justice Process" (2019) 31 SAcLJ 1042. See also Melanie Chng, "Modernising the Criminal Justice Framework" (2011) 23 SAcLJ 23.

answer questions after having been sworn or affirmed in court.[52] Considering too that accused persons can only invoke their constitutional right to counsel after a reasonable amount of time has been given to the authorities to complete their initial investigations,[53] or that the prosecution's obligation to disclose material before the trial may depend on whether the accused has properly served a Defence,[54] the accused can easily be seen as vulnerable relative to the machinery of the state, who controls most of the evidence and has far greater financial and manpower resources at its disposal. One theory, then, is that courts in IEA jurisdictions have attempted to recalibrate their criminal justice systems by introducing greater elements of due process in their decisions to level the playing field.[55] The fact that sections 103 and 106 of the IEA have been interpreted the way they have been are therefore examples of this. Again, however, there may be a more principled and internally consistent way to uphold the presumption of innocence. The courts must squarely confront the meaning of "prove" set out in *Yuvaraj* and *Jayasena*.

III. Ramifications of strictly maintaining the two common law standards of proof

A. Whether serious civil cases require a different standard of proof

14 With what is known thus far, one might be tempted to conclude that a quick and simple solution to the conundrum described above is to simply restore—or introduce, depending on which standpoint one adopts—the concept of an evidential burden to the IEA.[56] It is not that straightforward. First, even if this is done, it is better to do so legislatively, than to go through the more protracted and unpredictable trajectory of common law development. Whether the legislatures of IEA

[52] Criminal Procedure Code 2010, sections 23, 230, 261, and 291. See also Ho Hock Lai, "The Privilege Against Self-Incrimination and Right of Access to a Lawyer" (2013) 25 SAcLJ 826.

[53] *James Raj s/o Arokiasamy v PP* [2014] 3 SLR 750 at [29]–[38].

[54] Criminal Procedure Code 2010, sections 165, 166, 217, and 218. See also Kenny Yang, "An Expansion of the Prosecution's Disclosure Obligation" (2021) 21 OUCLJ 147.

[55] See Chen Siyuan, "Disclosure in Criminal Proceedings: Developments and Issues Ahead" (2022) 34 SAcLJ 51.

[56] The Singapore courts, for instance, have in recent times largely tried to frame evidential burden as a common law rule: see *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [27]–[30].

jurisdictions feel compelled to take up this issue, of course, is a separate matter. Secondly and more importantly, the implications of *Yuvaraj* and *Jayasena* have been felt outside the sphere of the presumption of innocence too. By holding that the IEA did not abolish—and indeed completely preserved—the two longstanding common law standards of proof for civil and criminal cases, the Privy Council would effectively preclude the existence of any other standard of proof that can be accommodated by the IEA, or (if one were to stay within the confines of the two standards) have civil cases apply the criminal standard of proof and vice versa.[57] Yet in a seminal speech given by the former Chief Justice and then Attorney-General of Singapore Chan Sek Keong, he said:

> "But there are offences and there are offences and offences. Murder is a far more serious violation of the law than jaywalking or littering. Yet the burden and standard of proof applies to all equally … simpler and better laws may have to be considered … it can be argued that less serious commercial crimes and many regulatory offences could be made punishable on proof on a balance of probabilities … it may not be a heresy to suggest that the criminal law may be able to accommodate two standards of proof, the heavier one for serious offences, the lighter for minor offences. The criminal law is not static; neither is the criminal process."[58]

15 Notwithstanding this sentiment, the idea of having a spectrum—rather than a binary—set of standards of proof has never taken off in IEA jurisdictions. This was not for lack of trying, and the courts have struggled in attempting to provide an answer to this possibility. In the context of fraud (or conspiracy for the matter) being allegedly committed in a civil suit,[59] the Singapore Court of Appeal had described the dilemma in the following terms:

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57 See also *The Micro Tellers Network Ltd v Cheng Yi Han* [2021] SGHC(I) 11 at [27].

58 Chan Sek Keong, "The Criminal Process – The Singapore Model" [1996] 17 Singapore Law Review 431 at 501–502. See also Martin Smith, "Civil Liability and the 50%+ Standard of Proof" (2021) 25 IJEP 183.

59 As put by the Singapore High Court, the "[t]he offence of cheating under the Penal Code bears a significant overlap with fraudulent misrepresentation under the common law": *Leck Kim Koon v PP* [2022] 3 SLR 1050 at [20].

> "The burden of proving fraud in a civil case lies with the party alleging it, but the infusion of a shared criminal element (fraud) in civil proceedings tends to create some uncertainty as to the standard of proof required … [However], there is no known 'third standard' although such cases are usually known as "fraud in a civil case" as if alluding to a third standard of proof … [Nonetheless] because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the 'balance'. They normally require more … the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case."[60]

16 The same court was confronted with a similar question almost three decades later, but in the context of a no oral modification ("**NOM**") clause. In *Charles Lim v Hong Choon Hau*,[61] the question was about the type of proof needed before a court would find and give effect to an oral variation. The court said:

> "[One] approach requires the party alleging the oral variation to prove circumstances that justify implying an intention to vary or that there was an express agreement to do away with the NOM clause. [Another] approach requires the party alleging oral variation to rebut the presumption that there is no oral variation, and to do so, he would need to adduce more cogent evidence … this is not intended to operate as a third standard of proof, but merely serves to reflect the inherent difficulty in proving such an oral variation in the face of their express agreement to the contrary as prescribed in the NOM clause … The more inherently

[60] *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] 3 SLR(R) 263 at [10], [14]; *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [184]. *Cf. Lao Holdings NV v Government of the Lao People's Democratic Republic* [2021] SGHC(I) 10 at [361].

[61] *Charles Lim v Hong Choon Hau* [2021] 2 SLR 153.

> improbable a fact is, the more cogent the evidence that is needed to prove that fact."[62]

17 Is there a distinct, perceptible difference between imposing a higher standard of proof and requiring more cogent evidence? If the answer is no, then logically speaking the applicable standard for civil claims requiring more cogent evidence is either beyond a reasonable doubt, or somewhere in between balance of probabilities and beyond a reasonable doubt. However, under the mainstream view in the jurisprudence of common law courts, the answer is yes, and one can do no better than to borrow the words of Lord Nicholls of Birkenhead, in attempting to put to bed this vexed issue once and for all:

> "Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation … this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account … The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."[63]

A commentator has echoed this view, arguing that "[i]f a serious act or wrong is proved by a simple piece of evidence, there need not be any 'more' evidence requirement. If such a simple piece of evidence shows that a civil fraud was more probably committed than not, then on the application of the civil standard the plaintiff must win the case."[64] The Malaysian courts have likewise affirmed in a line of cases that "even if

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62 *Charles Lim v Hong Choon Hau* [2021] 2 SLR 153 at [56].

63 *In re H (Minors)* [1996] AC 563 at 586. See also *In re B (Children)* [2008] UKHL 35; *In re S-B Children* [2009] UKSC 17. In particular, Lord Hoffmann wrote in the former (at [13]) that "clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard."

64 Peter Gabriel, "Burden of Proof and Standard of Proof in Civil Litigation" (2013) 25 SAcLJ 130 at 171.

fraud is the subject in a civil claim the standard of proof is the balance of probabilities. There is no third standard."[65]

18 To be clear, although the authorities cited above all seemingly landed on the conclusion that there exist only two standards of proof in the common law world,[66] there was a tension identified over whether the notion of needing "more cogent evidence" in civil cases with criminal elements is a necessary tag-on, as it has the potential of leading courts to effectively apply a criminal standard of proof to a civil case (or at the very least a standard higher than the balance of probabilities).[67] In this regard a brief reference to the well-established tiers of standard of proof in the US is instructive. Wedged between the preponderance of evidence standard (which is no different from the balance of probabilities standard) and the beyond a reasonable doubt standard is the clear and convincing standard. This is the very standard often deployed by many states and at the federal level when it comes to claims involving fraud (and several other types of claims as well to be sure), and terms used to describe this standard include the need for "cogent" and "convincing" evidence—terms that already suggest that the court must be more than 50 percent sure.[68] In other words, when we put two and two together, when a common law jurisdiction speaks of requiring more cogent or more convincing evidence in certain types of civil proceedings, this is effectively an appeal to the intermediate standard of clear and convincing evidence—more than balance of probabilities, but below beyond a reasonable doubt. For what it is worth, international courts and tribunals—which are meant to appreciate and even apply both civil and common law rules, be it in substantive or procedural law—have also been expressly averse to merely bifurcating standards of proof into

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65 *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 at [49]; *Vehang Global Trades Sdn Bhd v Am General Insurance Bhd* [2019] 4 MLJ 581 at [10]. The Court of Appeal in these cases also expressed a preference for the English view over the Singapore position, even though like Singapore, Malaysia is an IEA jurisdiction.

66 See also *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased)* [2013] 3 SLR 801 at [30], in which the Singapore Court of Appeal wrote: "It is, in our view, of the first importance to emphasise right at the outset the *relatively high standard of proof* which must be satisfied by the representee … before a fraudulent misrepresentation can be established successfully against the representor … the allegation of fraud is a serious one, and that generally speaking, the graver the allegation, the higher the standard of proof incumbent on the claimant" (emphasis in original).

67 See also *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340 at 354; *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 at [37].

68 See for instance *Santosky v Kramer* 455 US 745 (1982); *Colorado v New Mexico* 467 US 310 (1984); *Cooper v Oklahoma* 116 US 1373 (1996).

balance of probabilities versus beyond a reasonable doubt. What is used, instead, is an even more nuanced system of tiers of standard of proof, depending on the seriousness of the allegation made.[69] What then, is so intrinsically different about the common law system of justice that cannot contemplate and accommodate more than two standards of proof?[70]

19 That, however, is perhaps the logically subsequent question—in the first place, what would Stephen's flexible prudent person say about this, since the IEA is written law for which the common law, no matter their provenance or prestige, absolutely cannot override? Unlike the English courts, courts in IEA jurisdictions are bound to apply the provisions of their evidence statutes, and the IEA jurisdictions have retained Stephen's formulation of the prudent person with respect to ascertaining standard of proof. On this, it is apposite to revisit the assumptions that gave rise to the said common law bifurcation. As mentioned earlier, historically, accused persons were considered vulnerable and requiring protection relative to the state. In most cases there would be no equality of arms in terms of legal representation, legal knowledge, access to evidence, or access to resources. Unlike civil proceedings for which the worst possible penalty suffered by the losing party was damages or an injunction, there was the prospect in criminal proceedings, upon conviction, of incarceration of the accused (and caning and the death penalty in some IEA jurisdictions). Much of this remains true today, notwithstanding the general rise in education levels, affluence, and rights of accused persons, as well as the commission of non-violent, dishonesty-based wrongs. However, this also means that maintaining a strict, immovable demarcation between civil and criminal proceedings is no longer as compelling, in that it is not so unthinkable to subject a non-serious criminal proceeding to a lower standard of proof and a serious civil proceeding to something higher than a balance of

[69] See Aniruddha Rajput, "Standard of Proof" in *Max Planck Encyclopaedias of International Law* (2021); Advaya Hari Singh, "A Clear Standard of Proof in Disputes Before the ICJ: Are We There Yet?" (2021) Cambridge International Law Journal. The International Court of Justice, for instance, hears claims ranging from breaches of commercial treaties to the gravest of crimes.

[70] See also the further sentiment expressed by Lord Nicholls in *In re H (Minors)* [1996] AC 563 at [76]: "The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject."

probabilities. Indeed, the question is not whether the IEA can accommodate tiered standards of proof—the text of its interpretation clause suggests that it is more than capable of doing so—the question is why courts in IEA jurisdictions (in this specific context at least) continue to abide by the common law position without interrogating the interpretation clause or the definition of "prove" established in *Yuvaraj* and *Jayasena*. The only time *Yuvaraj* and *Jayasena* are engaged by the courts is when they are applying section 105 of the IEA (proving defences), but no reason has ever been given as to why they do not do so when applying sections 103 (proving alibis) or 106 (especial knowledge), or when establishing the appropriate standard of proof. Stephen's prudent person may have been designed to be flexible but—one can conclude with some confidence—not in the sense of being applied as and when it is preferred.

B. Lingering confusion over corroboration

20 Closely allied to the concept of applicable standard of proof is the concept of corroboration. However, there is, in my view, incoherence in the law on corroboration in IEA jurisdictions on two levels: the first is as between the IEA provisions and the common law, and the second is as between IEA court decisions on corroboration. An appropriate starting point is the operative meaning of corroboration. The IEA neither defines nor mandates it,[71] and under the common law, there is the strict approach (that is, only independent evidence that implicates an accused in a material particular can be considered corroborative)[72] and the liberal approach (that is, the trial judge has the flexibility to treat evidence as corroborative; the focus is on the substance and relevance of the evidence, and whether it supports or confirms the weak evidence it is meant to corroborate).[73] One would have thought that since the IEA does not mandate corroboration—in fact it seems to go the other way, for instance by stating categorically that there is no bar or consequence against using the uncorroborated confessions of co-accused persons against an accused or using the evidence of accomplices against an accused[74]—courts in IEA jurisdictions would prefer the liberal approach,

[71] As mentioned above, see for instance IEA, section 134; MEA, section 134; SEA, section 136. See also *AOF v PP* [2012] 3 SLR 34 at [173].

[72] This was set out in *The King v Baskerville* [1916] 2 KB 658.

[73] *AOF v PP* [2012] 3 SLR 34 at [173].

[74] IEA, sections 30 and 133. In Singapore, the equivalent of section 30 of the IEA is found in section 258(5) of the Criminal Procedure Code 2010.

but the courts in IEA jurisdictions have not spoken in one voice: for instance, Singapore adopts the liberal approach,[75] but Malaysia has kept to the stricter common law approach.[76] Further, whereas Singapore courts have long dispensed with the rule that a judge must warn himself expressly of the danger of convicting an accused on the basis of uncorroborated evidence of a complainant,[77] the Malaysia courts have not done the same—and a failure to have such a warning in the latter could result in a conviction being overturned.[78]

21 Secondly, are there certain categories of witnesses that the courts need to be mindful of if their testimonies are uncorroborated? The traditional common law position was that while uncorroborated testimony from victims of sexual offences, children, accomplices, and eyewitnesses could be admissible, they would not be enough to convict an accused unless the court found the testimony to be so "unusually convincing as to overcome any doubts that might arise from the lack of corroboration".[79] The rationale for this requirement—for children and eyewitnesses at least—was that their testimony may suffer from a lack of reliability even if they have no intention to deceive or mislead the court, while in the case of accomplices (including co-accused persons), they may have an incentive to frame the accused and downplay their own culpability, whether in exchange for a better "deal" or otherwise.[80] As for victims of sexual offences, these would usually be witness-less crimes and maybe even injury-less crimes, resulting in a "he-says-she-says" quagmire for the court, especially since sexual offences often carry heavy penalties, not to mention the potentially acute stigmatisation of the accused if found guilty.[81]

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75 See for instance *AOF v PP* [2012] 3 SLR 34 at [173]; *Kunasekaran s/o Kalimuthu Somasundara v PP* [2018] 4 SLR 580 at [16].

76 See for instance *Puganeswaran a/l Ganesa v PP* [2020] 12 MLJ 165 at [35]; *Pendakwa Raya Iwn Kunasegaran a/l Ragavanaidu dan sat ukes lagi* [2021] 12 MLJ 367 at [129]–[130].

77 See for instance *Goh Han Heng v PP* [2003] 4 SLR(R) 374 at [25]. This was a departure from *Lee Choh Pet v PP* [1971–1973] SLR(R) 299.

78 *Puganeswaran a/l Ganesa v PP* [2020] 12 MLJ 165 at [58]–[63].

79 *Dato' Seri Anwar bin Ibrahim v PP* [2015] 2 MLJ 293 at [73]–[79].

80 *Dato' Seri Anwar bin Ibrahim v PP* [2015] 2 MLJ 293 at [73]–[79]. See also *PP v Thomas Hee Kein Vun* [2020] 8 MLJ 21. Where multiple complainants are involved, there may also be the issue of whether there has been conspiracy: see *Lee Kwang Peng v PP* [1997] 2 SLR(R) 569.

81 See for instance *PP v Wee Teong Boo* [2020] 2 SLR 533.

22 On the other hand, courts in IEA jurisdictions in more recent times have eschewed from adopting an overly categorical approach when deciding if uncorroborated testimony is unreliable. The Singapore Court of Appeal, for instance, has said that the unusually convincing standard "applies to the uncorroborated evidence of a witness in all offences (and not just sexual offences), where such evidence forms the sole basis for a conviction. In principle, the standard applies regardless of whether the witness is an eyewitness or an alleged victim."[82] However, even if the unusually convincing requirement now applies to all types of uncorroborated testimony, does this really have no bearing on the standard of proof? According to the jurisprudence of the courts in IEA jurisdictions,[83] the answer is no. The problem (as we have just seen in the requirement for more cogent evidence for civil cases involving fraud or dishonesty) is that requiring something more—and something "unusually convincing" no less—does suggest that the standard of proof is not exactly the same as when the requirement is not engaged. Yet the courts' hands are tied precisely because of the adoption of the unchangeable bifurcation between the balance of probabilities and beyond a reasonable doubt standard. At the same time, they have to navigate between applying a pro-crime control piece of legislation (insofar as the IEA does not require corroboration even in serious criminal cases and even if the uncorroborated testimony emanates from a dubious source) and rationalising how the criminal standard of proof can be met without adding ancillary requirements that may alter that standard (or be perceived as altering that standard). As aptly described by a commentator:

> "The root of the historical and contemporary agony over corroboration rules have to do with the inability of the law to decide between rules and discretion … at a more basic level, whether one settles for rules or discretion, lies the seemingly intractable problem of one person's word against another … To convict in such a case would appear to be defiance to the principle of proof beyond reasonable doubt, but to acquit in all such cases would be too much a sacrifice to the mission of the law to bring offenders to justice.

[82] *PP v GCK* [2020] 1 SLR 486 at [104].
[83] See for instance *Haliffie bin Mamat v PP* [2016] 5 SLR 636 at [29].

> It is not a wonder that our courts and judges vacillate and continue to do so."[84]

IV. Charting a way forward: restoring the prudent person standard

23 For better or worse, Stephen's antiquated IEA remains in force in most of the jurisdictions that received the statute. Much has been made of the IEA's outdated and impractical approach to critical issues like the admissibility of evidence[85] and legal professional privilege.[86] What has received considerably less attention is Stephen's conception of the burden of proof and standard of proof. In this paper I have sought to show how using the common law rules on burden of proof and standard of proof to override the IEA has resulted in incoherence across three areas that should no longer be ignored: the presumption of innocence, the appropriate standard of proof for civil cases with criminal elements, and corroboration. It is submitted that not only would Stephen's concept of the prudent person, as expressed in the IEA's interpretation clause, work very well even in today's context, it may very well be the key to overcoming the challenges in the said three areas for any given IEA jurisdiction.

24 The first step is to completely abandon the *Yuvaraj* and *Jayasena* holding of what "prove" entails under the IEA.[87] Since Stephen knew of the existence of the dual common law standards of proof when he drafted the IEA, why would he then choose to introduce the concept of the prudent person in the interpretation clause unless he did not think that the common law standards were sufficient? What is likelier is that he either thought that a civil standard of proof might sometimes apply to a criminal case—and vice versa—or that there needed to be more than just two standards of proof. The alternative to

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84 Michael Hor, "Corroboration: Rules and Discretion in the Search for Truth" [2000] SJLS 509 at 542.

85 See generally Ronald Allen *et al.*, "Reforming the Law of Evidence of Tanzania (Part One)" (2015) 31 Boston University International Law Journal 217.

86 See generally Chen Siyuan and Soh Kian Peng, "Re-Aligning Legal Professional Privilege in Indian Evidence Act Jurisdictions with Modern Practice" (2022) 41 CJQ 297.

87 Notably, IEA courts had in the past observed that the common law standards of proof might not co-exist comfortably with Stephen's prudent person: *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [17]. See also Gamini Peiris, "The Burden of Proof and Standards of Proof in Criminal Proceedings" (1980) 22 Malaya Law Review 66.

abandoning *Yuvaraj* and *Jayasena* is to apply their holding to other sections in the IEA as well—be it for proving alibis under section 103 or proving especial knowledge under section 106—but this would clearly be going too far in the direction of crime control and tear the presumption of innocence asunder. True it is that if *Yuvaraj* and *Jayasena* are abandoned, accused persons would no longer be obligated to prove any defences (whether under the Penal Code or pursuant to other statutes) raised on a balance of probabilities, but there is no compelling reason as to why they must be visited with a higher burden just because they chose to raise a defence rather than to dispute the *actus reus* or *mens rea* per se or keep silent (which comes with the penalty of adverse inferences).[88] A desire for crime control does not obviate the need to be principled and internally consistent.[89]

25 Dropping *Yuvaraj* and *Jayasena* also has the important virtue of being consistent with the text of the IEA, not to mention the overwhelming jurisprudence on sections 103 and 106 that have refused to adopt the *Yuvaraj*/*Jayasena* definition of "prove" (despite cases in the latter attempting to create their own middle ground in the form of requiring *prima facie* evidence or exceptional circumstances). Much as there is some force to the argument that "proving" something has the connotation of a positive act—thus casting reasonable doubt on an adversary's case is not quite proving something—one must not forget that the interpretation clause also contains this bit: "A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent [person] ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."[90] Regardless of whether an accused is trying to raise a defence (and under this framework it matters not whether the defence is justificatory,

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88 A parallel may be drawn with the scenario of an accused claiming that he has given a statement to the authorities involuntarily. The position on this is longstanding and consistent: it is for the prosecution to show that the statement was given voluntarily: see for instance *Ong Seng Hwee v PP* [1999] 3 SLR(R) 1 at [38].

89 The raising of a defence should not be conflated with the rebutting of a presumption. In the latter, although the courts have also concluded that presumptions placed on an accused can only be rebutted on a balance of probabilities (see n 31), this is justifiable on the basis that presumptions reverse the legal burden of proof with respect to what would otherwise be a positive ingredient of the offence the prosecution has to prove. As to the limits that may be placed on such presumptions, see *Chua Hock Soon James v PP* [2017] 5 SLR 997.

90 For completeness, it is also provided that "[a] fact is said to be "not proved" when it is neither proved nor disproved."

exculpatory, or overlapping in nature) or trying to show that the *actus reus* or *mens rea* cannot be made out, this part of the clause is broad enough to accommodate the idea that an accused can be acquitted even if he is just raising a reasonable doubt on the prosecution's case.[91] "Probable" simply means likely, and not necessarily likelier than not. Moreover, "probable" must be seen in the light of the remainder of the clause: a prudent person, when taking into account the circumstances of the case, ought to be able to factor in the presumption of innocence applicable to criminal proceedings—it is akin to giving the benefit of the doubt. The presumption is not the only thing that the prudent person can take into account. What the accused actually argues—or not—in response to the charge brought against him, as well as when that is done, may also be a relevant factor. There is no inexorable march towards greater due process at the expense of crime control just because the concept of the prudent person is applied. Rigidly enforced certainty is not superior to flexibility in this context.

26 The next step in restoring fidelity to the IEA is to recognise that Stephen's flexible prudent person can accommodate more than two standards of proof. As mentioned, in introducing the concept of the prudent person to the interpretation clause, Stephen either contemplated applying a civil standard of proof for some types of criminal cases (or a criminal standard of proof for some types of civil cases), or thought it was possible that other standards of proof could be developed over time. The latter is to be preferred. American and international jurisprudence have already shown that the intermediate standard of clear and convincing evidence is a viable one for certain types of cases. Applying this standard to civil cases with criminal elements (such as fraud) avoids the current problem found in common law decisions that oscillate between insisting that the standard remains that of balance of probabilities, without more, and insisting that there must be "more cogent evidence". Doing so is not so much a departure from precedent (as it is for, say, English courts) but a re-alignment with what the IEA actually permits, and arguably, contemplates.

[91] Of course, it is always open to the legislature to amend the law to explicitly specify when a provision imposes a legal burden of proof and when it imposes an evidential burden—and what the standard of proof is—here, we are assuming that the statute remains as is, and propose that the better solution is to remedy the lower source of law. After all, it is faster for the judiciary to course-correct than the legislature as the highest courts can always depart from its precedents.

27 Finally, although the IEA does not specifically mandate corroboration or define it, Stephen's prudent person can play an important role in clarifying existing common law rules on corroboration, justifying them, or even improving upon them. To illustrate, in a criminal proceeding involving less serious offences [92] —say shoplifting—the prudent person will be less hesitant in convicting on the basis of uncorroborated eyewitness testimony. There is no need, as the more recent cases suggest, to require unusually convincing evidence just because the evidence is uncorroborated. Of course, if there are circumstances that call into question the reliability of the eyewitness testimony, that is something the prudent person can take into account as well (which may then lead to a call for more evidence). In contrast, in more serious types of offences, the prudent person should be slow to convict solely on the basis of uncorroborated testimony. This is all the more so if that testimony is presumptively unreliable—if it emanates from an accomplice or co-accused, for instance. Calling for more evidence to confirm the testimony in such a scenario is preferable to having the additional requirement of unusually convincing evidence. This way, whether it is a serious or less serious criminal offence, it is clear that there is only one standard in operation: that of beyond a reasonable doubt.[93] In addition, it matters not so much, as a rule of universal application, whether a strict or liberal approach to the meaning of corroboration should be taken. The prudent person would consider, pursuant to his mandate under the interpretation clause, all the circumstances of the case to decide if more evidence is needed before he believes a fact to be probably true.

[92] This will be determined by factors such as the nature of the offence and the type of penalties that may follow upon conviction.

[93] As to what reasonable doubt means, see *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [53]–[61].