Vijayee Singh and Others

Vs

State of U. P.

And

Vice Versa

Criminal Appeal Nos. 375-77 with 372-74 of 1987

(S. R. Pandian, Smt. M. S. Fathima Beevi, K. Jayachandra Reddy JJ)

20.04.1990

JUDGMENT

K. JAYACHANDRA REDDY, J. -

1. On May 29, 1980 at about 8 a.m. a grave rioting took place in the village of Tirro in Varanasi District. In the course of the said rioting two persons Mahendra Singh and Virendra Singh deceased 1 and 2 were killed and Vijay Narain Singh, PW 1, Uma Shankar Singh, PW 2 and one Kailash Singh received injuries. In respect of these offences 14 accused were tried under Sections 148 and 302 read with Section 149 IPC. Chirkut Singh, accused 6 tried for offence punishable under Section 307 IPC for attempting to commit the murder of PW 1 and the remaining accused under Section 307 read with Section 149 IPC for causing injuries to Uma Shankar Singh, PW 2 and Kailash Singh. It is alleged that the material prosecution witnesses, deceased persons and the accused belong to the same village. Since 1972 there have been disputes between these two rival groups. A number of cases were also pending in the courts. On the day of occurrence at 8 a.m. PW 1 went to his pumping set. PW 2 Uma Shankar Singh and his relation Kailash Singh were also at the pumping set. Deceased 1 and 2 were proceeding along with the rasta towards the pumping set for taking bath. When they reached near the khandhar (old buildings) of Vijay Pratap Singh accused 5 Lallan Singh exhorted the other accused out of the khandhar. Out of them accused 1, 3, 4 and 6 (accused numbers are being referred to as arrayed before the trial court) were armed with guns and the rest were armed with lathis. They advanced towards deceased 1 and 2. Accused 1 fired a shot which hit deceased 1 and he was immediately also shot at by accused 3 Ranjit Singh and he fell down. In the meanwhile accused 4 Ram Briksh Singh fired at deceased 2 Virendra Singh who fell down and both deceased died on the spot. The other accused carrying lathis advanced towards PW 1 who ducked and escaped unhurt. Then the lathi-wielding accused assaulted PW 1 Vijay Narain Singh, PW 2 Uma Shankar Singh and Kailash Singh. PW 1 managed to escape and ran away.

2. The trial court relying on the evidence of PWs 1 and 2, who are the main eye-witnesses, convicted all the 14 accused of the offences for which they were charged and the substantial sentience awarded is imprisonment for life under Section 302 IPC read with Section 149 IPC. The convicted accused preferred appeals. The State also filed appeal for enhancement of the sentence. A Division Bench of the Allahabad High Court consisting of Justice Katju and Justice Agrawal heard the appeals. Justice Katju allowed the appeals filed by the accused and dismissed the appeal filed by the State but other learned Judge disagreed and dismissed all the appeals concurring with the trial

court. The matter came up before a third Judge Seth, J. He took the view that only such of those accused to whom specific overt acts were attributed could be convicted and the other should be given benefit of doubt. In that view of the matter he confirmed the conviction of accused 1, 3, 4 and 6 and acquitted the rest of the accused. Accused 1, 3, 4 and 6 applied for special leave which was granted by this Court and their appeals are numbered as Criminal Appeal Nos. 375-77 of 1987 and State has preferred appeals against the acquittal of the other remaining 10 accused which are numbered as Criminal Appeal Nos. 372-74 of 1987.

3. It is contended on behalf of the State that the occurrence has taken place in broad daylight and merely because the witnesses are interested their evidence cannot be rejected and that the view taken by Justice Seth is incorrect and the view taken by the trial court as well as by Justice Agrawal has to be accepted. On the other hand, the counsel appearing for the accused submitted that witnesses who were partisans and were highly interested have made omnibus allegations and it is highly dangerous to accept their evidence because there is every likelihood of innocent persons having been falsely implicated. It is also their further submission that the prosecution has not come forward with the whole truth; and that the origin of the occurrence has been suppressed inasmuch as injuries to some of the accused persons have not been explained and consequently it must be held the occurrence did not take place in the manner alleged by the prosecution and that under these circumstances the truth from falsehood cannot be separated and therefore, none of the accused could be convicted.

4. Before we consider these rival contentions some of the facts which are not in dispute may be noted. There was a longstanding rivalry between the two troops. The time and place of occurrence are not in controversy. That the two deceased persons died of gunshot injuries also is not in dispute. PWs 1 and 2 also received injuries during the course of this occurrence.

5. The prosecution in support of its case examined PWs 1 to 11. PW 7 the doctor examined PW 2 at about 11.40 a.m. on the same day and found 10 injuries. All of them were contusions and he opined that they might have been caused by a blunt object like lathi. On the same day, he examined PW 1 and on his person he found four contusions which could have been caused by lathis. The doctor also examined Kailash Singh, who was not examined as a witness, and found two contusions. PW 4 another doctor who conducted post-mortem on deceased 2 Virendra Singh found two gunshot wounds on the cranial cavity. Injury No. 1 is an entry wound and injury No. 2 is an exit wound. Then he conducted the autopsy on the dead body of deceased 1. He found two injuries, the first one is on the left nipple which is an entry wound and injury No. 2 is on the left palm. On internal examination he found a bullet embedded and the same was recovered. PW 5 is the Investigating Officer. After registration of the crime he undertook the investigation, went to the scene of occurrence, held the inquest of the two dead bodies and recorded the statement of the witnesses. He also found two live cartridges one of 16 bore and another of 12 bore. PW 3 is another eyewitness. He deposed that accused 1, 3, 4 and 6 were armed with guns and the other were armed with lathis. Accused 1 fired at the deceased 1 and accused 3 also fired at him as a result of which he fell down and when deceased 2 tired to move, accused 4 shot at him and deceased 2 also fell down. When PWs 1, 2 and Kailash Singh rushed towards the place, accused 6 fired at PW 1 but he escaped. Then the lathi-wielding persons beat PWs 1 and 2 and Kailash Singh. To the same effect is the evidence of PWs 1 and 2 also. Under Section 313 CrPC all the circumstances appearing against the accused were put to them. They in general denied the offence. However, among them, accused 6, 7, 8, 9, 11, 13 and 14 admitted their presence at the scene of occurrence. Accused 6 in particular stated that PW 1 and others armed with guns, spears and lathis tried to do fishing in the pond in which accused 6 had a share. Accused 6 and others went to the pond for if fishing. PW 1 and others challenged and they chased accused 6 and others and accused 13 was shot at by PW 1 and others and he and

accused 14 were beaten with lathis and in defence he fired two gunshots hitting deceased 1 and 2. He then went to the police station and lodged a report and deposited his gun and that PW 1 has falsely implicated him. As regards this report which is purported to have been given by accused 6, PW 5 the Investigating Officer was questioned. He admitted that when he returned to the police station on May 30, 1980 he came to know that accused 6 has surrendered his gun. He also admitted in the cross-examination that the crime registered on the basis of the report given by Chirkut Singh and the same was also investigated but it appears that no action was taken. Investigating Officer also admitted that when he saw accused 13 and 14 he found injuries on them. The other circumstances strongly relied upon by the defence is that there were gunshot injuries on accused 13. It may be noted that the same has not been explained by the prosecution. PW 7 the doctor admitted that he examined accused 14 and found on him a skin deep 12" x 2" lacerated wound on the left thigh and a wound certificate was issued. He also admitted that he examined accused 13 and he found five tiny abrasions in the area of 4 cm x 4 cm on outer surface of right thigh just above just above knee joint and the injured was referred to the radiologist. PW 7, however, stated that he has not seen the report of the radiologist. The defence examined Dr. S. K. Singh as DW 1. He deposed that he took the X-ray of the right thing of the accused 13 Mahendra Kahar and the report was marked as an exhibit. He further deposed that the shadows in the X-ray go to show that there were 10 radio opaque round shadows and these shadows may very well correspond to the pellets fired by some firearms and the same appear of have pierced up to muscles and bone. His examination further showed that the pellets remained embedded in the thing.

6. Before the trial court as well as before the High Court, firstly it was contended on behalf of the accused that the eye-witnesses are highly interested and therefore, their evidence cannot be accepted and even otherwise they have not come out with the whole go to show that the accused acted in right of self-defence. Relying on the presence of gunshot injuries on accused 13 it was strongly contended that the prosecution party have also used firearms and, therefore, the accused were entitled to the right of private defence. The trial court accepted the evidence of all the three witnesses holding that their evidence is consistent and does not suffer from any serious infirmity. So far as the plea of self-defence is concerned, the trial court held that the pleas taken by accused 6 was to be rejected mainly on the ground that there was no material to show that at the pond the fishing operations were going on. As regards the presence of injuries on the accused persons, learned Sessions Judge having regard to the nature and size of the injuries found on accused 13 and 14 took the view that they are simply and that it is not proved that these injuries were received during the occurrence. Regarding the presence of the alleged gunshot injuries on accused 13 he pointed out that the medical evidence is inconclusive on the point whether those injuries were caused at the time when this incident took place. In the appeal before the High Court, Justice Katju took the view that the theory that the injuries on accused 13 and 14 were self-inflicted cannot be accepted and that the plea taken by accused 6 appears to be probable in view of the fact that the bullet found in the dead body of deceased 2 was fired by a 16 bore gun and that as admitted by the Investigating Officer, PW 5, it was accused 6 only in that area who had a licence for 16 bore gun which was deposited by him in the police station after the occurrence. Coming to the injuries found on accused 13 and 14 Justice Katju took the view that they received injuries during the course of the same occurrence and that the three eyewitnesses have not furnished any explanation regarding those injuries and that these witnesses have falsely implicated some of the accused due to enmity and, therefore, their evidence cannot be relied upon and accordingly ordered total acquittal. As already mentioned Justice Agrawal, on the other hand, agreed with the trial court completely. Justice Seth, to whom the case was referred because of the difference of opinion took a third view and convicted only accused 1, 2, 4 and 6 to who specifically overt acts were attributed. Dealing with the plea of self-defence Justice

Seth held that lacerated injury on accused 14 was a simple one and he could have received that even subsequent to the occurrence. With regard to the gunshot injuries found on accused 13 Mahendra Kahar, the learned Judge himself examined accused 13 who was present in the court when the appeal was being heard and found that hard substance was palpable underneath the flesh roundabout the location of his injury. In the circumstances it does appear that firearm shots do exist underneath the location of injury found on the person of accused Mahendra Kahar. But he ultimately held that in all probability the pellets found in the leg of accused 13 Mahendra Kahar must have been there long before the incident, as in the view learned Judge it was doubtful that those pellets could have entered the body through the external injuries which are described as tiny abrasions. Seth, J. accordingly rejected the plea of self-defence.

7. Before we advert to the above contentions it becomes necessary to consider whether the accused 13 Mahendra Kahar and accused 14 Sant Singh received during the course of occurrence. PW 7 the doctor examined accused 13 Mahendra Kahar on May 30, 1980 at about 6 a.m. and he found the following injuries :

> 1. Five tiny abrasions in the area of 4 cm x 4 cm on outer surface of right thing just above knee joint.
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> 2. The injured complained of pain in the right thumb and left forearm.

8. In respect of injury No. 1 the doctor advised x-ray with a view to ascertain whether or not there were pellets, and pending the same he reserved his opinion. PW 7 also opined that injuries appeared to have been caused within 24 hours preceding the medical examination which correspond to the time of occurrence, namely, 8 a.m. on May 29, 1980. PW 7, however, stated that the x-ray report was not shown to him. The evidence of PW 7 makes it clear that accused 13 Mahendra Kahar received these injuries during the course the of the occurrence. DW 1 is the doctor who took the x-ray. He deposed that on June 5, 1980 he took the x-ray of the right thigh of the undertrial prisoner Mahendra Kahar accused 13 and the same is marked as Ex. Kha-12. On the basis of the x-ray plate he opined that he noticed 10 radio opaque round shadows in the injured and they correspond to the pellets fired by some firearm. Justice Seth considered the evidence of these two doctors. He also examined the accused in the Court and he found that hard substance were palpable underneath the flesh. As already mentioned he was of the view that these appeared to be pellets but according to him they must have been there long before the incident. The learned Judge took this view because he was doubtful that those pellets could have entered the body through the external injuries which are described as tiny abrasions. Having given our careful consideration we are unable to agree with the view taken by Seth, J. PW 7 the doctor's evidence makes it clear that the external injuries were caused during this occurrence only and underneath the same these pellets were found by the radiologist DW 1. The injuries are not self-inflicted. Therefore, there is no basis whatsoever to presume that the pellets under the flesh must have been there already even before this occurrence took place. As a matter of fact accused 13 Mahendra Kahar was referred to the doctor PW 7 since there was an injury. PW 7 having examined him found that there were 10 radio opaque round shadows underneath the injury and it was only for that reason he referred the injured to the radiologist and DW 1 the radiologist after taking the x-ray concluded that underneath the injury pellets discharged from the firearm were embedded in the flesh. Therefore, the only view that is possible is that accused 13 Mahendra Kahar received gunshot injuries during the course of this occurrence only. PW 7 also examined accused 14 Sant Singh on the same day. He found a skin-deep 12" x 2" lacerated wound vertically inflicted on the front and outer surface of left thigh from which blood was oozing and the injured complained of pain. The doctor pointed out that the injury was

simple and could have been caused by blunt weapon like a lathi. The injury was also stitched. It is suggested by the prosecution that this could have been a self-inflicted one but again there no basis for such presumption. The Investigating Officer said that on finding the injury on him he was sent for medical examination. As a matter of fact accused 6 in his statement under Section 313 stated that accused 13 and 14 received injuries and he also went to the police station and lodged a report to that effect. It, therefore, emerges that accused 13 received gunshot injuries and accused 14 received lacerated injury during the course of the same occurrence and these injuries must have been caused by some member belonging to the prosecution party.

9. Now the question is whether the prosecution has explained these injuries and if there is no such explanation what would be it effect ? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. He placed considerable reliance on some of the judgments of this Court. In Mohar Rai and Bharath Rai v. State of Bihar ((1968) 3 SCR 525 : AIR 1968 SC 1281 : 1968 Cri LJ 1479), it is observed : (SCR p. 529)

> "Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probabilised. Under these circumstances the prosecution had a duty to explain those injuries. The evidence of Dr. Bishun Prasad Sinha (PW 18) clearly shows that those injuries could not have been self-inflicted and further, according to him, it was most unlikely that they would have been accused at the instance of the appellants themselves. Under these circumstances we are unable to agree with the High Court that the prosecution had no duty to offer any explanation as regards those injuries. In our judgment the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

In another important case Lakshmi Singh v. State of Bihar ((1976) 4 SCC 394 : 1976 SCC (Cri) 671), after referring to the ratio laid down in Mohar Rai case ((1968) 3 SCR 525 : AIR 1968 SC 1281 : 1968 Cri LJ 1479), this Court observed : (SCC p. 401, para 12)

> "... Where the prosecution fails to explain the injuries on the accused, two results follow : (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants."

10. It was further observed that : (SCC p. 401, para 12)

> "... in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstances from which the court can draw the following inferences :
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
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> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Relying on these two cases the learned counsel for the defence contended that in the instant case the prosecution had failed to explain the injuries on the two accused and the genesis and the origin of the occurrence have been suppressed and a true version has not been presented before the court and consequently the truth from falsehood cannot be separated and consequently the entire prosecution case must be rejected. We are unable to agree. In Mohar Rai case ((1968) 3 SCR 525 : AIR 1968 Cri LJ 1479) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related do the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh case ((1976) 4 SCC 394 : 1976 SCC (Cri) 671) also it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. In the instant case, the trial court as well as the two learned Judges of the High Court accepted the prosecution case as put forward by PWs 1 to 3 in their evidence. The presence of these three witnesses could not be doubted at all. PWs 1 and 2 are the injured witnesses and PW 1 gave a report giving all the details. However, he attributed specific overt acts to accused 1, 3, 4 and 6 and made an omnibus allegation against the remaining accused. It is for this reason that Justice Seth found it to be safe to convict only accused 1, 3, 4 and 6 who are the appellants before us. PWs 1, 2 and 3 are the eyewitnesses. We have carefully considered their evidence and nothing material is elicited in the cross-examination which renders their evidence wholly untrustworthy. No doubt they have not explained the injuries found on accused 13 and 14. From this alone it cannot be said that the prosecution has suppressed the genesis and the origin of the occurrence and has not presented a true version. Though they are interested, we find that their evidence is clear, cogent and convincing. The only reasonable inference that can be drawn is that the two accused persons received the injuries during the course of the occurrence which were inflicted on them by some members of the prosecution party.

11. As discussed above we are satisfied in this case that non-explanation of injuries on these two accused persons does not affect the prosecution case as a whole but in a case of this nature what all that the defence can contend on the basis of non-explanation of injuries found on these two accused is that the accused could have had a right of private defence or at any rate a reasonable doubt arises in this regard.

12. The learned counsel for the defence, however, submits that if for any reason the prosecution case in its entirety is not rejected because of the non-explanation of the injuries found on these two accused, yet the right of private defence of the accused cannot be denied and that on that score also these four convicted accused are entitled to an acquittal. It is also their submission that a careful examination of the provisions of Sections 96, 99 and 102 IPC would show that on a reasonable

apprehension of grievous hurt or death the accused had a right even to the extent of causing the death of the assailants and they cannot be expected to modulate this right in such a situation and that in the instant case these four appellants were justified even to the extent of causing death of the two deceased by inflicting gunshot wounds. In this context it is also submitted that the plea taken by accused 6, Chirkut Singh that he shot at the two deceased persons in self-defence cannot be brushed aside.

13. We should at this juncture point out that the plea taken by accused 6, Chirkut Singh does not commend itself. The same appears to be an afterthought. Then conservation report and other circumstances in the case would show that there were no fishing operations in the pond. Therefore, the plea of accused 6, Chirkut Singh that fishing operations were going on in the pond and that he and some of the other accused went there and that was the genesis and the origin of the occurrence, has no basis whatsoever. On the other hand, the evidence of the eye witnesses regarding the time, place and manner of occurrence in general, as put forward by the prosecution, cannot be doubted at all.

14. We shall now consider the submission whether the accused had the right of self-defence. Learned counsel for the State contended that if the accused want to claim the benefit of the general or special exception of the right of private defence then they should plead and discharge the burden by establishing that they are entitled to the benefit of exception as provided under Section 105 of the Evidence Act. In other words, the submission is that the burden of proof of the existence of such a right is on the accused and that in the instant case the accused have not discharged the burden and that mere presence of simple injuries on the accused cannot necessarily lead to an inference that they had a right of self-defence. We have already held that having regard to the facts and circumstances of the case, mere non-explanation of these injuries by the prosecution cannot render the whole case unacceptable. We have also held that those injuries on one of the accused 13, Mahendra Kahar were inflicted by a firearm during the same occurrence. Under these circumstances, the important question that we have to consider is whether the accused should be denied the benefit of an exception on the ground that the accused have not discharged the necessary burden of establishing their right to the benefit of the exception beyond all reasonable doubt just like the prosecution is bound under Section 102 of the Evidence Act, or if upon a consideration of the evidence as a whole and the surrounding facts and circumstances of the case, a reasonable doubt is created in the mind of the court about the existence of such a right whether the accused, in such situation, is entitled to the benefit of the said exception, i.e. the right of private defence. If so, whether they have exceeded the same ?

15. The nature and extend of the burden that the accused has to discharge under Section 105 of the Evidence Act has been one of questions of great general importance and for considerable time the opinion of the courts were not uniform. As a matter of fact, in Pratap v. State of U. P. ((1976) 2 SCC 798, 804 (para 25) per Beg, J. (as he than was) : 1976 SCC (Cri) 303 : AIR 1976 SC 966), this Court noted "that the question of law arises here seems to have troubled several High Court".

16. The phrase "burden of proof" is not defined in the Act. In respect of criminal cases, it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and never shifts. This flows from the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt. Section 105 of the Evidence Act is in the following terms :

> "105. When a person is accused of any offence, the burden of proving the existence

> of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence for such circumstances."

The Section to some extent places the onus of proving any exception in a penal statute on the accused. The burden of proving the existence of circumstances bringing the case within the exceptions mentioned therein is upon him. The section further lays down that the court shall presume non-existence of circumstances bringing the case within an exception. The words "burden of proving the existence of circumstances" occurring in the section are very significant. It is well settled that "this burden" which rests on the accused does not absolve the persecution from discharging its initial burden of establishing the case beyond all reasonable doubts. It is also well settle that the accused need not set up a specific plea of his offence and adduce evidence. That being so the questions is : What is the nature of burden that lies on the accused under Section 105 if benefit of the general exception of private defence is claimed and how it can be discharged ? In Woolmington v. Director of Public Prosecutions, Viscount Sankey, L.C. Observed : (AC p. 482)

> "When evidence of death and malice has been given (this is a question for the jury) the prisoner is entitled to show, by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was whether, unintentional or provoked, the prisoner is entitled to be acquitted."

It is further observed : (AC pp. 481-82)

> "Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while 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 to bound to satisfy the jury of his innocence ...
>
> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any stationary exception. If, at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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."

In Emperor v. U. Damapala (1935 AC 462), a Full Bench of the Rangoon High Court following the Woolmington case (AIR 1937 Rang 83 : 14 Rang 666) held that the ratio therein is not in any way inconsistent with the law in British India, and that indeed the principle there laid down form valuable guide to the correct interpretation of Section 105 of the Evidence Act and the Full Bench laid down that even if the evidence adduced by the accused fails to prove the existence of

circumstances bringing the case within the exception or exceptions pleaded, the accused is entitled to be acquitted if upon a consideration of the evidence as a whole the court is left in a state of reasonable doubt as to whether the accused is or is not entitled to the benefit of the exception pleaded.

17. We have noticed that Section 105 requires that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions or special exception or proviso contained in or proviso contained in any part of the Penal Code is on him and the court shall presume the absence of such circumstances. This presumption is rebuttable. In Parbhoo v. Emperor (AIR 1941 All 402 (FB) : 1941 All LJ 619), a Full Bench of seven Judges considered the scope of Sections 102 and 105 of the Evidence Act. The majority agreed with the view taken by the Full Bench in Damapala case (AIR 1937 Rang 83 : 14 Rang 666). In Parbhoo case (AIR 1941 All 402(FB) : All LJ 619), Bajpai, J. in his concurring judgment observed that Section 105 is stated in two forms, that of a rule as to the burden of proof and that of a presumption and that burden of proving the guilt of the accused always rests on the prosecution and never shifts and the learned Judge further held that the doubt cast in connection with the right of private defence must be a reasonable doubt and if there is such a reasonable doubt, it casts a doubt on the entire case of the prosecution and that the result is that the accused gets a benefit of doubt. (AIR p. 421) "The presumption laid down in Section 105, Evidence Act, might come into play but it does not follow therefrom that the accused must be convicted even when reasonable doubt under the plea of the right of private defence or under any other plea contained in the general or special exceptions pervades the whole case." In Damapala case (AIR 1937 Rang 83 : 14 Rang 666) Dunkley, J. while concurring with the majority view after discussing the law on the subject observed : (AIR p. 88)

> "The conclusion, therefore, is that if the court either is satisfied from the examination of the accused and the evidence adduced by him, or from circumstances appearing from the prosecution evidence, that the existence of circumstances bringing the case within the exception or exceptions pleaded has been proved, or upon a review of all the evidence is left reasonable doubt whether such circumstances had existed or not, the accused in the case of a general exception, is entitled to be acquitted, or, in the case of a special exception, can be convicted only of a minor offence."

This case has been followed subsequently by number of High Courts.

18. In K. M. Nanavati v. State of Maharashtra (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521, it is observed that :

> In India, as it is England, there is a presumption of innocence in favour of the accused as general rule, and it is the duty of the prosecution to prove the guilt of the accused; to put it in other words, the accused is presumed to be innocent until his guilt is established by the prosecution. But when an accused relies upon the General Exceptions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presumption. Under that section the court shall presume the absence of circumstances bringing the case within any of the exceptions, that is, the court shall regard the non-existence of such circumstances as proved till they are disproved ... This presumption may also be rebutted by admissions made or

> circumstances elicited by the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients, of the offence with which the accused is charged; that burden never shifts. The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all."

In Dahyabhai Chhaganbhai Thakkar v. State of Gujarat (AIR 1964 SC 1563 : (1964) 2 Cri LJ 472), it is observed : [AIR Headnote (g)]

> "It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. The general burden never shifts and it always rests on the prosecution. But, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused; and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of "shall presume" in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man," the accused will have discharged his burden. The evidence so placed may be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite laid down in Section 299 of the Penal Code."

A careful reading of these two decisions would reveal that the statement of law therein neither expressly nor impliedly overrules or is in conflict with the majority view in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619). However, in Rishi Kesh Singh v. State (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657), the question that came up for consideration before a larger Bench consisting of nine Judges was whether the dictum in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) is still a good law on the ground that some of the decisions of the Supreme Court have cast a cloud of doubt. A majority of seven Judges approved the principle laid down in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619). The larger Bench also referred to various subsequent decisions of the Supreme Court including the Nanavati case (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521), Bhikari v. State of Uttar Pradesh (AIR 1966 SC 1 : (1965) 6 SCR 194 : 1966 Cri LJ 63) and Dahyabhai case (AIR 1964 SC 1563 : (1964) 2 Cri LJ 472). Beg, J., as he then was, in a separate but concurring judgment after referring to the Nanavati case (1962 Supp 1 SCR

567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521), Bhikari case (AIR 1966 SC 1 : (1965) 6 SCR 194 : 1966 Cri LJ 63), Dahyabhai case (AIR 1964 SC 1563 : (1964) 2 Cri LJ 472) and Mohar Rai and Bharath Rai case ((1968) 3 SCR 525 : AIR 1968 SC 1281 : 1968 Cri LJ 1479), held that there is no conflict between what was held by the Supreme Court and the majority view taken in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619). After analysing the view expressed by the Supreme Court in the several above mentioned decisions, Beg, J. observed : (AIR pp. 97-98, paras 160-61)

> "After a close scrutiny of every part of each of the seven opinion in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619), I have come to the conclusion that the majority of their Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court, have not been affected in the slightest degree by these decisions. These propositions are : firstly, that no evidence appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved his plea fully; secondly, that the obligatory presumption at the end of Section 105 is necessarily lifted at least when there is enough evidence on record to giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged; and, thirdly, if the doubt though raised due to evidance in support of the exception pleaded, is reasonable and affect an ingredient of the offence with which the accused is charged, the accused would be entitled to an acquittal. As I read the answer of the majority in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) I find it based on these three propositions which provide the ratio decidendi and this is all that needs to be clarified."
>
> "The practical result of the three propositions stated above is that an accused's plea of an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard of prudent man weighing or balancing probabilities carefully. These stages are : firstly, a lifting of the initial obligatory presumption given at the end of Section 105 of the Act; secondly, the creation of a reasonable doubt about the existence of an ingredient of the offence; and thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour of the accused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to an acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stages has not yet been dealt with directly or separately there in any case brought to our notice."

Mathur, J., with whom five Judges agreed, while holding that ratio laid down by the majority in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) is in conformity with law, however, observed that the reasoning in support of the conclusions is erroneous. Beg, J. was not prepared to go to that extent. The majority speaking through Shri Mathur, J. laid down that the dictum in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) which is still a good law, can, however, be modified as follows : (AIR p. 79, para 93)

> "In a case in which any General Exception in the Indian Penal Code, or any special exception or proviso contained in another part of the same Code, or in any law defining the offence, is pleaded or raised by an accused person and the evidence led in support of such plea, judged by the test of the preponderance of probability, as in a civil proceeding, fails to displace the presumption arising from Section 105 of the Evidence Act, in other words, to disprove the absence of circumstances bringing the case within the said exception; but upon a consideration of the evidence as a whole, including the evidence given in support of the plea based on the said exception or proviso, a reasonable doubt is created in the mind of the court, as regards one or more of the ingredients of the office, the accused person, shall be entitled to the benefit of the reasonable doubt as to his guilt and hence to acquittal of the said offence."

19. Learned counsel for the State, however, submitted that if the view taken by the Allahabad High Court is to be accepted then it would amount to throwing the burden on the prosecution not only to establish the guilt of the accused beyond all reasonable doubt but that the accused is not entitled to benefit of any exception and if such a principle is laid down then Section 105 of the Evidence Act would be rendered otiose and there would be inconsistency between Sections 102 and 105. This very question has been answered by the Supreme Court in Nanavati case (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521) held that the general burden of proving the ingredients of the offence is always on the prosecutions but the burden of proving the circumstances attracting the exception lies on the accused. But the failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence and the evidence relied upon by the accused in support of his claim for the benefit of the exception through insufficient to establish the exception may be sufficient to negative one or other of the ingredients of the offence and thus throw a reasonable doubt on the essential ingredients of the offence of murder. The accused for the purpose of discharging this burden under Section 105 can rely also on the probabilities. As observed in Dahyabhai case (AIR 1964 SC 1563 : (1964) 2 Cri LJ 472) "the accused will have to rebut presumption that such circumstances did not exist" by placing material before the court which satisfies the standard of a prudent man and the material may consist of oral and documentary evidence, presumptions, admissions or even the prosecution evidence and the material so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. Therefore there is no such infirmity in the view taken in these cases about and scope and effect of Sections 102 and 105 of the Evidence Act.

20. We have not come across any case of the Supreme Court where the ratio laid down in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619) and which was subsequently approved by a larger bench in Rishi Kesh Singh case (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657) has been considered comprehensively.

21. However, in Behram Khurshed Pesikaka v. State of Bombay ((1955) 1 SCR 613 : AIR 1955 SC 123 : 1955 Cri LJ 215) there is a specific reference to Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619 and Woolmington case (1935 AC 462) while considering the scope and the manner of the expression 'burden of proof', in the judgment of Hon'ble Venkatarama Ayyar, J. But the learned Judge was not prepared to go into this question in an appeal under Article 136 but only noted that the Bombay High Court in Government of Bombay v. Sakur (AIR 1947 Bom 38 : 48 Cri LJ 168 : 228 IC 251) has taken a different view.

22. In State of U. P. v. Ram Swarup ((1974) 4 SCC 764 : 1974 SCC (Cri) 674 : AIR 1974 SC 1570) a bench consisting of M. H. Beg and Y. V. Chandrachud, JJ., as they then were, and V. R. Krishna Iyer, J., while considering the right of private defence put forward by the accused to some extent went into the question of burden of proof under Section 105 and reference is made to a decision of the larger bench in Rishi Kesh Singh case (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657). Chandrachud, J., who spoke for the bench, observed thus : (SCC p. 774, para 20)

> "The judgment of one of us, Beg, J., in Rishi Kesh Singh v. State (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657) explains the true nature and effect of the different types of presumptions arising under Section 105 of the Evidence Act. As stated in that judgment, while the initial presumption regarding the absence of circumstances bringing the case within an exception may be met by showing the existence of appropriate facts, the burden to establish a plea of private defense by a balance of probabilities is a more difficult burden to discharge. The judgment points out that despite this position there may be cases where, though the plea of private defence is not established by an accused on a balance of probabilities, yet the totality of facts and circumstances may still throw a reasonable doubt on the existence may "mens rea", which normally is an essential ingredient of every offence. The present is not a case of this latter kind."

We may also refer to a judgment of bench of three Judges consisting of M. H. Beg, P. N. Bhagwati and R. S. Sarkaria, JJ. in Partap case ((1976) 2 SCC 798, 804 (para 25) per Beg, J. (as he then was) : 1976 SCC (Cri) 303 : AIR 1976 SC 966). Sarkaria, J. speaking for himself and Bhagwati, J. Observed : (SCC p. 802, para 14)

> "We have carefully scrutinised the judgments of the courts below. In our opinion, their finding in regard to the plea of self-defence is clearly erroneous. They appeal to have overlooked the distinction between the nature of burden that rests on an accused under Section 105, Evidence Act to establish a plea of self-defence and the one cast on the prosecution by Section 101 to prove its case. It is well settle that the burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a mere preponderance of probability."

Beg, J., however in a separate judgment felt a doubt the veracity of the defence case and the evidence found in support of it to be able to hold that it is proved on a balance of probabilities. But in his view what transpires from a consideration of the whole evidence is enough to entitle the accused to a benefit of doubt. Beg, J. referred to the judgments of the Full Bench in Parbhoo case (AIR 1941 All 402 (FB) : 1941 All LJ 619), Nanavati case (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521) and the larger bench decision in Rishi Kesh Singh case (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657) and applying the principles of benefit of doubt laid in the above three cases to the facts of the case before them observed : (SCC p. 807, para 35)

> "Applying the principle of benefit of doubt, as I had explained above, to the plea of private defence of person in the instant case, I think that, even if the appellant did not fully establish his plea, yet, there is sufficient evidence, both direct and circumstantial, to justify the finding the prosecution has not established its case beyond reasonable doubt against Partap on an essential ingredient of the offence of murder; the required mens rea. After examining all the facts and circumstances

> revealed by the prosecution evidence itself and the defence evidence and considering the effect of nonproduction of the better evidence available which, for some unexplained reason, was not produced, I am not satisfied that the plea of private defence of person can be reasonably ruled out here. This enough in my opinion, to entitle the appellant to get the benefit of doubt."

In Mohd. Ramzani v. State of Delhi (1980 Supp SCC 215 : 1980 SCC (Cri), 907 : AIR 1980 SC 1341) Sarkaria, J., who spoke for the such, observed that the onus which rests on the accused person under Section 105, Evidence Act, to establish his plea of private defence is not as one as the unshifting burden which lies on the prosecution to establish ingredient of the offence with which the accused is charged beyond reasonable doubt. Therefore, the contrary view taken by the Bombay High Court in Sakur case (AIR 1947 Bom 38 : 48 Cri LJ 168 : 228 IC 251) and in State v. Bhima Devraj (AIR 1956 Sau 77 : 1956 Cri LJ 1234) that the burden is entirely on the accused to establish that he is entitled to the benefit of the exception, does not lay down the correct law.

23. At this stage it becomes necessary to consider the meaning of the words "the court shall presume the absence of such circumstances" occurring in Section 105 of the Evidence Act. Section 4 of the Act explains the meaning of the term "shall presume" as to mean that the court shall regard the fact as proved unless and until it is disproved. From a combined reading of these two sections it may be inferred that where the existence of circumstances bringing the case within the exception is pleaded or is raised the court shall presume the absence of such circumstances as proved unless and until it is disproved. In Section 3 of the Act meaning of the terms "proved", "disproved" and "not proved" are given. As per this provision, 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 man ought, under the circumstances of the particular case, to act upon the supposition that to exists. 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 man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved".

24 The first part of Section 105 as noted above lays down that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the exceptions or proviso is on him and the latter part of it lays down that the court shall presume the absence of such circumstances. In a given case the accused may discharge the burden by expressly proving the existence of such circumstances, thereby he is able to disprove the absence of circumstances also. But where he is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to disprove the absence of such circumstances, then the case would fall in the category of "not proved" and the court may presume the absence of such circumstances. In this background we have to examine the meaning of the words "the court shall presume the absence of such circumstances" bearing in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond all reasonable doubt and the benefit of every reasonable doubt should go to the accused.

25. It will be useful to refer to some of the passages from the text books of outstanding authors on evidence and then proceed to consider the ratio laid down by the Supreme Court cases on this aspect. In Phipson on Evidence (13 the edn., page 44) a passage reads as follows :

> "The burden is upon the prosecution of proving a defendant's guilt beyond reasonable doubt before he is convicted. Even where the evidential burden shifts to the

> defendant the burden of establishing proof beyond reasonable doubt remains upon the prosecution and never changes. If on the whole case the jury have such a doubt the defendant is entitled to be acquitted."

Another passage at page 48 reads as follows :

> "In criminal cases the prosecution discharge their evidential burden by adducing sufficient evidence to raise a prima facie case against the accused. If no evidence is called for the defence the tribunal of fact must decide whether the prosecution has succeeded in discharging its persuasive burden by proving its case beyond a reasonable doubt. In the absence of any defence evidence, the chances that the prosecution has so succeeded are greater. Hence the accused may be said to be under an evidential burden if the prosecution has established a prima facie case. Discharge of the evidential burden by defence is not a prerequisite to an acquittal. The accused is entitled to be acquitted "if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner ... No matter what the charge ... 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 ..."
>
> "In many cases, however, the accused's defence will involve introducing new issues, for example, automatism, provocation, self-defence, duress, etc. Once there is any evidence to support such "explanations" the onus of disproving them rests upon the prosecution. The accused, either by cross-examination of the prosecution witnesses or evidence called on his behalf or by a combination of the two, must place before the court such material as makes the defence a live issue fit and proper to be left to the jury. But once he has succeeded in doing this and thereby discharged his evidential burden it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged facts constituting the defence."

Dealing the with the presumptions of law, the author has noted on page 60, thus :

> "Generally in criminal cases (unless otherwise directed by statute and subject to 4-15 ante) the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence, even though negative averments be involved therein. Thus, in cases of murder, the burden of proving death as a result of a voluntary act of the accused and malice on his part is on the prosecution. On charges of rape, etc. the burden of proving non-consent by the prosecutrix is on the prosecution and in bigamy, that of proving the defendant's knowledge that his or her spouse was alive within the seven years last past."

Wigmore on Evidence, dealing with the "Legal effect of a presumption" (3rd edn., Vol. IX, page 289) explains :

> "It must be kept in mind that the peculiar effect of presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion 'in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's

requirement of some evidence), the presumption disappears as a rule of law."

Taylor in his Treatise on the Law of Evidence (12th edn., Vol. 1, Page 259) points out :

> "On the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall in criminal proceedings on the prosecuting party, though, to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in the direct description of an offence, and not be way of proviso (a), contain negative matter, the indictment must also contain a negative allegation, which must in general be supported by prima facie evidence."

Dealing with the presumptions, the author says :

> "The proper direction as to onus of proof where prima facie evidence has been given on the part of the prosecution which, if unanswered, would raise a presumption upon which the jury might be justified in finding a verdict of guilty, and the defendant has called evidence to rebut that presumption, is that if they accepted the explanation given by and on behalf of the prisoner, or if that explanation raised in their minds a resonable doubt as to his guilt, they should acquit him, as the onus of proof that he was guilty still lay upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

It is held in Nanavati case (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521) that under Section 105 of the Act the court shall presume the absence of circumstances bringing the case within any of the exceptions, i.e. the court shall regard the non-existence of such circumstances as proved till they are disproved, but this presumption can be rebutted by the accused by introducing evidence to support his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited from the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. Dealing with the ingredients of the offence to be proved by the prosecution and the burden to be discharge under Section 105 of the Evidence Act by the accused and a reasonable doubt that may arise on the basis of such rebuttal evidence by the accused, it is observed : (SCR pp. 597-98)

> "An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased intentionally and thereby committed the offence of murder within the meaning of Section 300 of the Indian Penal Code; the prosecution has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentionally shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution; the accused against whom a presumption is drawn under Section 105 of the Evidence Act that the shooting was not by accident in the circumstances mentioned in Section 80 of the Indian Penal Code, may adduce evidence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of Section 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the

> offence, within the meaning of Section 300 Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder. In that event, though the accused failed to bring his within the terms of Section 80 of the Indian Penal Code, the court may hold that the ingredients of the offence have not been established or that the prosecution has not made out the case against the accused. In this view it might be said that the general burden to prove the ingredients of the offence unless there is a specific statute to the contrary is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused. The failure on the part of the accused to establish all the circumstances bringing his case under the exception does not absolve the prosecution to prove the ingredients of the offence; indeed, the evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

In Dahyabhai case (AIR 1964 SC 1563 : (1964) 2 Cri LJ 472), as already noted, the relevant portion reads thus : (AIR p. 1567, para 5)

> "The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code."

26. The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the courts of law in respect of assessing the evidence in criminal cases. Section 105 places 'burden of proof' on the accused in the first and in the second part we find a presumption which the court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the section as a whole the 'burden of proof' and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence, then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. The initial obligatory presumption that the court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross-examinations, probabilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a preponderance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the existence of such an exception then the rest of the enquiry does not arise in spite of a mere plea being raised. But if the accused succeeds in creating a reasonable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under Section 105 gets discharged and he would be entitled to an acquittal.

27. From what has been discussed above it emerges that the presumption regarding the absence of existence of circumstances regarding the exception can be rebutted by the accused by introducing evidence in any one of the manners mentioned above. If from such a rebuttal, a reasonable doubt arises regarding his guilt, the accused should get the benefit of the same. Such a reasonable doubt

consequently negatives one or more of the ingredients of the offence charged, for instance, from such a rebuttal evidence, a reasonable doubt arises about the right of private defence then it follows that the prosecution has not established the necessary ingredients of intention to commit the offence. In that way he benefit of a reasonable doubt which arises from the legal and factual consideration even under Section 105 of the Evidence Act should necessarily go to the accused.

28. It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under Section 105 should be somewhat specific, therefore, it is difficult to reconcile both. But the general principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reasonable doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though the may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. The Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal disputes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'.

29. There is a difference between a flimsy or fantastic plea which is to be reject altogether. But a reasonable through incompletely proved plea which casts a genuine doubt on the prosecution version indirectly succeeds. The doubt which the law contemplates is certainly not that of a weak or unduly vacillating, capricious, indolent, drowsy or confused mind. It must be the doubt of the prudent man who is assumed to possess the capacity of "separate the chaff from the grain". It is the doubt of a reasonable, astute and alert mind arrived at after due application of mind to every relevant circumstances of the case appearing from the evidence. It is not a doubt which occurs to a wavering mind.

30. Lord Denning, J. in Miller v. Minister of Pensions ((1974) 2 All ER 372, 373 H) while examining the degree of proof `required in criminal cases stated :

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so favour which can be dismissed with the sentence "of course, it is possible but not in the least probable," the case is proved beyond reasonable doubt ..."

Regarding the concept of benefit of reasonable doubt Lord Du Paraq, J. in another context observed thus :

> "All that the principle enjoins is a reasonable scepticism, not an obdurate persistence in disbelief. It does not demand from the judge a resolute and impenetrable incredulity. He is never required to close his mind to the truth."

31. Now, let us examine the types of cases to which these principles underlined under Section 105 can be applied and to what extent ? The section deals with the burden of proof in respect of the general exceptions, special exceptions and proviso contained in the Penal Code or in any part of the same Code, or in any law defining the offence. It is already noted that the doctrine of burden of proof has to be the general law and the same remains always upon the prosecution. However, in respect of the cases where the statue wholly places the burden of proof on the accused himself, then the burden is more onerous on him. As already noted in Rishi Kesh Singh case (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 657) Mathur, J. speaking for the majority, while affirming the view taken in Parbhoo case (1962 Supp 1 SCR 567 : AIR 1962 SC 605 : (1962) 1 Cri LJ 521) observed that in a case where any such exception is pleaded and the evidence led in support of such plea, judged by the test of preponderance of probability, fails to displace the presumption arising from Section 105 of the Evidence Act; yet if upon consideration of the evidence as a whole including the evidence led in created in the mind of the court, as regards one or more of the ingredients of the offence, the accused shall be entitled to the benefit of the reasonable doubt as to his guilt. In C. S. D. Swami v. State (AIR 1960 SC 7 : (1960) 1 SCR 461 : 1960 Cri LJ 131) the character of a presumption of guilt under Section 5 of the Prevention of Corruption Act from proof of certain facts "unless the contrary is proved" was considered and it was held there that the exception laid down by statute was "a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him." V. D. Jhingan v. State of U. P. (AIR 1966 SC 1762 : 1966 Cri LJ 1357 : 1966 MIJ (Cri) 827) also is case dealing with the presumption under Section 4 of the Prevention of Corruption Act under which the accused was under an obligation to disprove his guilt by adducing such evidence by which the preponderance of probabilities prove the defence case.

32. An examination of these cases would reveal that the statutory exception which modifies the operation of the general principle that the prosecution must prove all ingredients of the offence with which the accused is charged, to some extend stand on a different footing. However, Beg, J. in his separate judgment, in Rishi Kesh Singh case (AIR 1966 SC 97 : (AIR 1970 All 51 : 1970 Cri LJ 132 : 1969 All LJ 63) observed thus : (AIR pp. 89-90, para 130)

> "It covers every tilt or preponderance of the balance of probability whether slight or overwhelming. In fact, the dividing line between a case of mere "preponderance of probability" by a slight tilt only of the balance of probability and a case of reasonable doubt is very thin indeed although it is there. A case of reasonable doubt which must necessarily be one in which, on a balancing of probabilities, two views are possible. What may appear to one reasonable individual to be a case not fully proved may appear to another to be so proved on a balancing of probabilities. Such a case and only such a case would, in my opinion, be one of reasonable doubt. A mere preponderance of probability in favour of the exception pleaded by an accused would, however, constitute a "complete" proof of the exception for the accused but a state of reasonable doubt would not."

Somewhat to the same effect are the observations made by the Supreme Court in Harbhajan Singh v. State of Punjab (AIR 1966 SC 97 : (1965) 3 SCR 235 : 1966 Cri LJ 82). After citing Woolmington

case (1935 AC 462) it is therein held that : (AIR p. 102, paras 16 and 17)

> "This principle of common law is part of the criminal law of this country. That is not to say that if an Exception is pleaded by an accused person, he is not required to justify his plea; but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case ... [T] he onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court which tries an issued makes its decision by adopting the test of probabilities, so must a criminal court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him."

It can thus be seen that there is a dividing line between a case of the accused discharging the burden by preponderance of probabilities which is equated to proof of the exception and a state of reasonable doubt that arises on a consideration of the evidence and facts and circumstances as a whole, as regards one or more of the ingredients of the offence. Therefore, in a case where the prosecution has discharged its burden and where the accused pleads exception and if there is some evidence to support that plea the obligatory presumption under Section 105 is lifted and the accused may proceed further and establish his plea by a preponderance of probabilities or he may carry his plea further and succeed in creating a reasonable doubt about an ingredient of an offence. Consequently in respect of the general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the accused by one of these processes would be discharging the burden contemplated under Section 105 but in cases of the exceptions covered by special statutes and where the burden of proof is placed on the accused to establish his plea, he will be discharging the same by preponderance of probabilities and not by merely creating a doubt.

33. At this stage we have to point out that these principles cannot be made applicable to a case where the accused sets up alibi. There the burden entirely lies on him and plea of alibi does not come within the meaning of these exceptions. Circumstances leading to alibi are within his knowledge and as provided under Section 106 of the Act he has to establish the same satisfactorily. Likewise in the cases where the statute throws special burden on the accused to disprove the existence of the ingredients of the offence, he has to discharge the burden for example, in the cases arising under Prevention of Food Adulteration Act if the accused pleads a defence under Section 19, the burden is on him to establish the same since the warranty on which he relies is a circumstances within his knowledge. However, it may not be necessary to enumerate these kinds of cases as we are mainly concerned in this case only with the scope and application of Section 105 of the Evidence Act. We also make it clear that the principle laid down by us are only in respect of the said provision only. As we think that it would be appropriate and useful to set out the sum and substance of the above discussions regarding the scope of Section 105 and we accordingly state the same as follows :

> The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, as stated above, he can indirectly introduce such circumstances by way of cross-examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The

> accused can also discharge the burden under Section 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, provisos contained in the Penal Code or in any law defining the offence, the court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be entitled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accordingly.

34. In the instant case were are concerned with the exception of right of private defence. In the instant case a plea of right of private defence is raised. As noted above one of the accused received a 12" x 2" lacerated wound and other accused received gunshot injuries. The plea that the non-explanation of the prosecution case, is rejected case, is rejected as the evidence of the material witnesses even otherwise is found to be cogent, convincing and acceptable but from the circumstances these two accused particularly one of them had received gunshot injuries during the course of the same occurrence is established. The accused have also adduced defence evidence namely that of a doctor in support of their plea. This material though by itself is not sufficient to establish the General Exception under Section 96 or the special exception No. 2 to Section 300 IPC, creates a reasonable doubt about the existence of such a right. The accused have proved the infliction of injuries on them by the complainant party in the course of the occurrence. Therefore, the obligatory initial presumption against them is removed and their plea appears to be reasonably true and consequently they are entitled to the right of self-defence.

35. The next question is whether they have exceeded this right. Learned counsel submits that the accused is not expected to modulate his right of self-defence and that in the instant case it cannot with certainty be said that they have exceeded this right and therefore, they are entitled to an acquittal.

36. In Amjad Khan v. State (1952 SCR 567 : AIR 1952 SC 165 : 1952 Cri LJ 848), on the facts and circumstances of the case it was held that the accused was entitled to a right of private defence of the body even to the extent of causing death as there was no time to have recourse to the authorities and he had reasonable grounds for apprehending that either or grievous hurt would be caused either to himself or to his family. These things could not be weighed in too fine a set of scales or "in golden scales". In Puran Singh v. State of Punjab ((1975) 4 SCC 518 : 1975 SCC (Cri) 608 : AIR 1975 SC 1674) it is observed that the right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. A mere reasonable apprehension is enough to put the right of private defence into operation. It is also observed that the question whether a person having a right of private defence has used more force than is necessary would depend on the facts and circumstances of a particular case.

37. In the case before us as per the evidence of the material witnesses the two deceased were only proceeding along with the rasta towards the pump set for taking bath. Even in the plea set up by Chirkut Singh, accused 6, it is not stated specifically that deceased 1 and 2 were armed with any deadly weapons. therefore, the assailants had definitely exceeded the right of private defence when they went to the extent of intentionally shooting them to death by inflicting bullet injuries. Therefore, the offence committed by them would be one punishable under Section 304 Part I IPC.

38. We accordingly set aside the conviction of the appellants accused 1, 3, 4 and 6, Vijayee Singh,

Ranjit Singh, Ram Briksh Singh and Chirkut Singh respectively for an offence punishable under Section 302/149 IPC and the sentence of imprisonment for life awarded thereunder. Instead they are convicted under Section 304 Part I read with Section 34 IPC and sentenced each of them to undergo 10 years imprisonment. The other sentence/convictions awarded to them are confirmed. The sentences shall run concurrently. Criminal Appeal Nos. 375-77 of 1987 are allowed to this extent only and Criminal Appeal Nos. 372-74 of 1987 are dismissed.

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