ALLAHABAD HIGH COURT

Rishi Kesh Singh

Vs.

State (Allahabad)

Criminal Appeal No. 2567 of 1964

(V.G. Oak, C.J., W. Broome, Mathur, B.D. Gupta, Gyanendra Kumar, M.H. Beg, Yashoda Nandan, T.P. Mukerjee and C.D. PAREKH, JJ.)

18.10.1968

JUDGMENT

Oak, C. J.

1. The question before the Full Bench is :

> "Whether the dictum of this Court in the case of *Parbhoo v. Emperor*[1], to the effect that the accused who puts forward a plea based on a general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law".

2. I have read the judgment prepared by my learned brother Mathur, J. In my opinion, the statement of law in Parbhoo's case, 1941 All LJ 619 : (AIR 1941 Allahabad 402) (FB) is not accurate, and needs qualification.
Section 105, Indian Evidence Act, states :

> "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 of such circumstances."

Mr. P. C. Chaturvedi, appearing for the appellants conceded that when an accused pleads an exception in the Indian Penal Code, the burden of proof lies upon him. Parties are not agreed as

to the manner in which the burden may be discharged. One can conceive three different modes: (1) by proving the exception beyond all reasonable doubt; (2) by proof through preponderance of probabilities; and (3) by creating a reasonable doubt in the mind of the Court. According to the learned Advocate-General, the second mode is the correct solution. According to Mr.

[1]1941 All LJ 619 : (AIR 1941 All 402) (FB)

Chaturvedi, the third mode is the correct method. It is well settled that when burden of proof lies upon an accused person, he need not prove his case beyond all reasonable doubt. We may therefore, confine our attention to the second and the third alternatives.

3. According to Section 3 of the Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court 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 it exists. It will be seen that a fact may be said to be proved under one of the two possible situations. Either the Court believes that the fact exists, or the Court considers existence of the fact probable. There is no indication in Section 3 of the Evidence Act that a fact can be said to be proved, even when the Court entertains a reasonable doubt as to whether the fact exists or not.

4. Mr. P. C. Chaturvedi contended that unless an accused person is given the benefit of reasonable doubt on an exception, there will be miscarriage of justice in many cases. Suppose two persons, A and B quarrel at a lonely place, and cause injuries to each other. They are both prosecuted in two cross-cases. In neither case will the accused be able to produce an independent witness to prove that he was the victim of an assault by his opponent. The plea of private defense will fail in each case. The result will be that each case will end in conviction. In most of such cases the accused in one case ought to be acquitted. The same difficulty will arise, when an accused pleads the right of private defense of property, but is unable to collect reliable evidence in support of his plea.

5. I think, such cases would be rare. In most cases the accused person is in a position to substantiate the plea of private defense. If the question is whether the complainant or the accused was in possession over a field in dispute, the accused is generally in a position to establish his plea by producing local residents and village papers in his support.

6. In *Jumman v. State of Punjab* [2], it was observed on p. 474 :

> "In such a case where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, would it be correct to assume private defense for both sides? We are of the view that such a situation does not permit of the plea of private defense on either side and would be a case of sudden fight and conflict and has to be dealt with under Section 300, Indian Penal Code, Exception 4."

Chapter IV of the Indian Penal Code deals with general exceptions. The right of private defense has been mentioned in Section 96 under Chapter IV of the Indian Penal Code. Insanity has been mentioned in Section 84, Indian Penal Code. Under the
Indian Law, a plea of insanity and a plea of private defense stand on the same footing.
[2]AIR 1957 SC 469

Under the English law, a plea of insanity is treated on the same footing as a statutory

exception. It appears that under the English law, a plea of private defense is not treated on the same footing as a plea of insanity or a statutory exception. That makes the task of an accused pleading private defense comparatively easy. If it is considered that the law in India should be brought in line with the English law, Section 96 can be deleted from the Indian Penal Code.

7. In *State of Madras v. Vaidyanatha Iyer*[3], the Court was dealing with a case under the Prevention of Corruption Act. The High Court of Madras observed in its judgment thus :

> "In any case, the evidence is not enough to show that the explanation offered by the accused cannot reasonably be true, and so the benefit of doubt must go to him".

This observation of the High Court was not approved by the Supreme Court. The Supreme Court remarked that the approach of the High Court indicates a disregard of the presumption which the law requires to be raised under Section 4 of the Act.
8. *C. S. D. Swami v. The State*[4], was also a case under the Prevention of Corruption Act. It was held that after the conditions laid down in the earlier part of sub-section (3) of Section 5 of the Act have been fulfilled by evidence to the satisfaction of the Court, the Court has got to raise the presumption that the accused is guilty of criminal misconduct in the discharge of his official duties, and this presumption continues to hold the field unless the contrary is proved, that is to say, unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence.

9. In *K. M. Nanavati v. State of Maharashtra*[5] , Subba Rao J. observed on page 617 :

> "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. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused......(2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients......(3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of

the offence...... In the second case, the burden of bringing the case under the exception lies on the accused.........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

[3]AIR 1958 SC 61
[4]AIR 1960 SC 7
[5]AIR 1962 SC 605

evidence, though insufficient to establish the exception, may be sufficient to negative one or more of the ingredients of the offence."

10. In *Bhikari v. State of U. P*[6]. the Court quoted with approval the following passage from *Dahyabhai v. State of Gujarat*[7]:

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions.
(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
(2) There is a rebuttable presumption that the accused was not insane, when he committed the crime ...... the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings .... "

11. In *Harbhajan Singh v. State of Punjab*[8], it was observed on page 101 :

"Where the burden of an issue lies upon the- accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds 'in proving a preponderance of probability'."

Similarly, in *V. D. Jhingan v. State of U. P*[9]., it was observed on page 1764 :

"It is sufficient if the accused person succeeds in proving a preponderance of probability in favor of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

12. Likewise, in *Munshi Ram v. Delhi Administration*[10], it was observed on page 703:

"It is well settled that even if an accused does not plead self-defense it is open to the Court to consider such a plea if the same arises from the material on record .... The burden of establishing that plea is on the accused and that
burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

[6]AIR 1966 SC 1
[7] AIR 1964 SC 1563
[8] AIR 1966 SC 97
[9]AIR 1966 SC 1762
[10]AIR 1968 SC 702

It is to be noted that in Munish Ram's case, AIR 1968 Supreme Court 702 the accused raised the plea of private defense. So, the decision of the Supreme Court in Munshi Ram's case. AIR 1968 Supreme Court 702 is directly applicable to the present case.
13. It will be seen that it is settled law that when the burden of proof lies upon an accused person under Section 105, Indian Evidence Act, that burden can be discharged by showing preponderance of probabilities. This position is inconsistent with the stand taken by the majority of the Full Bench in Parbhoo's case, 1941 All LJ 619 : (AIR 1941 Allahabad 402) (FB) that it is sufficient for purposes of defense that the accused should create a reasonable doubt in the mind of the Court whether the accused person is entitled to the benefit of the exception or not, preponderance of probabilities implies balance of evidence. In order to succeed, the accused must make out balance of evidence in his favor. The Court may entertain a reasonable doubt even if the balance of evidence is in favour of the prosecution. So, creating reasonable doubt cannot be equated with proof by preponderance of probabilities.

14. Mr. P. C. Chaturvedi contended that under Section 105, Indian Evidence Act, the position of the accused is the same as that of an accused in a prosecution under Section 411, Indian Penal Code read with Section 114. Indian Evidence Act. Reliance was placed on *Otto George Gfeller v. The King*[11], In *Dhanvantari v. State of Maharashtra*[12], it was explained that the position of the accused under Section 105, Indian Evidence Act is not the same as that of an accused in a prosecution under Section 411, Indian Penal Code. It was explained on pages 579 and 580 :-

"That, however, was a case where the question before the jury was whether a presumption of the kind which in India may be raised under Section 114 of the Evidence Act could be raised from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under Section 114 of the Evidence Act but under Section 4 (1) of the Prevention of Corruption Act.................. the Court has no choice in the matter, once

it is established that the accused person has received a sum of money which was not due to him as a legal remuneration............ The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one."

This passage shows that for purposes of Section 105. Indian Evidence Act, it is not sufficient for the defense to make out that the explanation offered by the accused is plausible. The accused has to make out his case affirmatively.

15. Although a reasonable doubt arising under an exception may not secure an acquittal as a matter of course, in some cases the accused can secure an acquittal

[11] AIR 1943 PC 211

[12]AIR 1964 SC 575

indirectly. There may be cases where, although the exception has not been proved, the evidence on record creates a doubt as regards some element which is an ingredient of the offence. Suppose, the accused is charged with an offence involving a certain intention or a certain object as an ingredient. It may happen that, as a result of the attempt of the accused to establish a particular exception, he succeeds in shaking the prosecution case as regards the necessary intention or object which is an ingredient of the offence. In such a case the accused will have to be acquitted. The reason of acquittal will be, not proof of the exception but failure of the prosecution to prove a necessary ingredient of the offence.

16. In AIR 1964 Supreme Court 1563, it was observed on page 1567 :-

> "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 229 of the Indian Penal Code."

It was further observed on page 1568 :-

> "Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

17. In AIR 1966 Supreme Court 1 it was observed on page 3 :-

> "If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted." Mr. P. C. Chaturvedi contended that exceptions are ingredients of every offence. For this contention, he relied upon Section 6 of the Penal Code. Section 6. Indian Penal Code states :-"Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled 'General Exceptions.' though those exceptions are not repeated in such definition, penal provision or illustration."

Section 6, Indian Penal Code is merely a device to avoid quoting lengthy exceptions in description of offences. Strictly speaking, an exception cannot be treated as an ingredient of an offence. Further, Section 105 of the Evidence Act expressly lays down that the Court shall presume absence of circumstances bringing a case within any of the general exceptions in the Indian Penal Code. So, assuming that exceptions constitute ingredients of offences, the Court is bound to start with a presumption that circumstances bringing the case under any general exception do not exist. Consequently, the question whether exceptions constitute ingredients of offences or not is merely of academic interest.

18. Creating a reasonable doubt under an exception may not always enable the accused to secure an acquittal. Suppose the accused is charged under Section 325, Indian Penal Code. It is proved that the accused voluntarily caused grievous hurt to the complainant. The incident took place in a certain field. The accused pleads that he was in possession of the field, and acted in the right of private defense of property. Although the accused produces some evidence, the plea of private defense is not made out. The evidence is of such a character that the Court entertains a reasonable doubt as to whether the complainant or the accused was in possession. In such a case the position would be this. On the one hand, it is proved that the accused voluntarily caused grievous hurt to the complainant. On the other hand, the accused failed to establish his plea of private defense. In such a case the accused has to be convicted under Section 325, Indian Penal Code. Reasonable doubt on one part of the case is of no avail:

19. It will be seen that the majority in Prabhoo's case 1941 All LJ 619 : (AIR 1941 Allahabad 402) (FB) was not right in. assuming that the accused has to be acquitted whenever the Court entertains a reasonable doubt as to whether the accused is entitled to the benefit of a certain exception or not. It all depends on the circumstances of each case. If the prosecution case is damaged as regards some ingredient of the offence the accused will be acquitted. But if all the ingredients of the offence are established, the accused has to be convicted.

20. It may be that law as explained above causes miscarriage of justice in some cases. But Courts

have no power to alter statute law. The position indicated above is the combined effect of Chapter IV of the Indian Penal Code, Section 3 of the Evidence Act and Section 105 of the Evidence Act. If it is considered that the present legal position is unsatisfactory, it is open to Parliament and State Legislatures to make the necessary amendments in the Indian Penal Code and the Indian Evidence Act.

21. In my opinion, the proposition of law laid down in 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) has been too broadly stated and needs qualification. The true legal position is this. Whenever an accused person raises a plea based on some general exception, the burden of proof lies upon him under Section 105, Indian Evidence Act. That burden has to be discharged by preponderance of probabilities. So far as the accused is concerned, the standard of proof is the same as the standard of proof for a plaintiff or a defendant in civil proceedings. The accused cannot always secure an acquittal by merely creating a reasonable doubt in the mind of the Court as to whether the accused person is entitled to the benefit of the exception or not. If the nature of the case is such that a reasonable doubt arises as regards some ingredient of the offence, the accused is entitled to an acquittal. In other cases, a reasonable doubt as regards a certain exception will not entitle the accused to an acquittal.

Broome, Gupta And Parekh, JJ.

22. We are in general agreement with the conclusions arrived at by Mathur, J. in this case (except that we would prefer to say that the Full Bench pronouncement in Parbhoo's case calls for elucidation rather than amendation). He has discussed the problem at considerable length and we do not consider it necessary to repeat the reasoning followed by him or his discussion of the case law. We would like, however, to add a few words of our own so as to leave no room for doubt as to our views regarding cases where the right of private defense is pleaded under Section 96, Indian Penal Code.

23. An accused person who puts forward the plea of private defense will seek to prove it from the material on record, consisting of defense evidence, oral or documentary, and admissions elicited from the prosecution; and he can derive advantage from such material in two ways. In the first place, if this material is sufficient to show that the plea of private defense is more probable khan the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on the ground that he has discharged the onus laid on him by Section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the court regarding something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that the prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offences, mens rea is one of the essentials that the prosecution has to establish before the crime can be said to be proved; and a reasonable doubt as to whether mens rea is present or not must inevitably lead to acquittal. A person who inflicts

harm in a lawful manner in order to protect his person or property is clearly devoid of mens rea; and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defense, a doubt will simultaneously arise as to whether he had the mens rea that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential prerequisite of the prosecution case and will be entitled to acquittal.

24. Oak C. J., in his separate judgment, has considered a case in which an accused who has caused grievous hurt to the complainant in a dispute over a field pleads that he was in possession of the field and that he acted in private defense of his property; and the evidence produced, though insufficient to prove the plea, is enough to create a reasonable doubt as to which of the parties was actually in possession. In such a case, according to Oak C. J., the accused must be convicted. With this view, however, we most respectfully but emphatically disagree. If the Court were to find, in a case of that nature, that the evidence gave rise to a reasonable doubt as to whether the disputed field was in the possession of the complainant or of the accused at the time of the incident, a simultaneous doubt would arise as to whether the accused had the necessary mens rea to make him guilty of the offence of grievous hurt; and in such circumstances the accused would in our opinion have to be acquitted on the ground that the prosecution had failed to prove beyond reasonable doubt an essential part of its case.

25. This, in our opinion, is precisely what the decision in 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) was meant to convey. The judgments of all the four Judges supporting the majority view in that case lay stress on the overriding need for the prosecution to discharge the burden of proving the accused guilty of the crime. Iqbal Ahmad C. J. remarked :-

> "In cases falling within the purview of Section 105, the law placed on the accused the minor burden of bringing his case within the exception or proviso relied upon by him. There is however, nothing in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102."

And Bajpai J. observed :-

> "it is open to the Court to consider whether the entire evidence proves to the satisfaction of the Court that the accused is entitled to the benefit of the exception and the charge leveled against him has not been established or that there is a reasonable doubt as to the guilt of the accused, and in both cases the accused would be entitled to an acquittal."

And further :-

> "If there is such doubt (i.e. as to the plea of the right of private defense), has not a doubt been cast in connexion with the entire case and if that is so, is not the accused entitled to

an acquittal? I think he is, and that is so because of the constant immutable primal burden resting on the prosecution." Ismail J. also observed :-

"The decision on the question of self defense will be only a decision upon one of the issues in the case. The Court at the end of the trial has still to see whether having regard to the entire evidence and the circumstances of the case, the charge is proved beyond reasonable doubt."

And finally Mulla, J. held :-

"There is nothing in the language of Section 105 to warrant the conclusion that the law intended such a result and for that purpose enacted Section 105, Evidence Act, in order to curtail the fundamental right of the accused to claim an acquittal if there is any reasonable doubt about his guilt."

26. We are fully satisfied, therefore, that although the dictum in Parbhoo's case may be said to be somewhat unhappily worded, it is fundamentally correct and calls for no amendment. When the earned Judges who decided that case stated that "the accused person is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea of he said general exception), a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception", they had in mind the doubt that may arise, on a consideration of the entire evidence (both prosecution and defense), with regard to the discharge of the primary burden resting on the prosecution to prove the guilt of the accused. That guilt can only be established if the prosecution is able to prove beyond reasonable doubt all the essentials that go to make up the offence, including the fundamental requirement of mens rea. As already pointed out, a doubt regarding the existence of mens rea must necessarily arise whenever there is a doubt in the mind of the Court as to whether the accused is entitled to the benefit of a general exception such as the right of private defense. Viewed in this light, the dictum of the Full Bench in Parbhoo's case is perfectly sound and requires no modification.

27. Our reply to the question that has. been referred to the present Full Bench for decision, therefore, is in the affirmative.

Mathur J.

28. The question referred to this Full Bench is as below :-

"Whether the dictum of this Court in the case of 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) to the effect that the accused: who puts forward a plea based on a. general exception in the Indian Penal Code is entitled to be acquitted if upon a consideration of the evidence as a whole (including the evidence given in support of the plea based on

> such a general exception) a reasonable doubt is created in the mind of the Court whether the accused person is entitled to the benefit of the said exception is still good law."

29. The material facts of the case are that Rishi Kesh Singh and eight others were tried for offences punishable under Sections 147 or 148 and 323, 324, 325 and 307, Indian Penal Code, read with Section 149, Indian Penal Code for forming an unlawful assembly with the common object to cause injuries to Sudarshan Singh, Jai Govind Singh and: Hirdanand Singh and for causing injuries to them. Some of the accused persons took the plea that they had caused the injuries in the right of private defense of their property and person. The Sessions Judge did not accept this plea and convicted the accused persons of the various offences detailed above. They preferred an appeal which came up for hearing before Asthana, J. The appellants relied upon the Full Bench decision of this Court in the case of AIR 1941 Allahabad 402 : 1941 All LJ 619 (FB), and contended that they were entitled to the benefit of the Exception pleaded even though the Exception was not proved, and only a reasonable doubt was created in the mind of the Court. The Government Advocate, however, urged that dictum laid down in the majority judgment was, in view of the Supreme Court decisions, no longer a good law, and that the existence of a reasonable doubt could be no ground to give the accused persons the benefit of the Exception. The question being of importance, Asthana, J., after framing the question referred the matter to a larger Bench. This reference came up for hearing before Uniyal and Capoor, JJ., who were of opinion that the decisions of the Supreme Court "appear to have cast a cloud of doubt on the rule of law laid down in the majority decision" in the above case and the aforesaid decision required reconsideration. They slightly modified the question and referred it to a larger Bench for consideration. The question as modified by Uniyal and Capoor, JJ. has already been reproduced above.

30. At the very outset it may be observed that all the questions involved or which can be said to be in issue pertaining to the scope and effect of Section 105 of the Evidence Act in criminal trials are concluded by the decisions of the Supreme Court, though in different circumstances. General Exceptions pleaded in those cases were under Sections 80 and 84, Indian Penal Code, that is, accident and insanity. One case refers to the Exception to Section 499, Indian Penal Code (Defamation). The other two cases relate to the statutory presumption under the Prevention of Corruption Act, 1947. The main point for consideration is whether the rule laid down in those Supreme Court decisions applies with equal force to all the General Exceptions and the special Exception or proviso contained in the Indian Penal Code. The case of Parbhoo and others, AIR 1941 Allahabad 402 : 1941 All LJ 619 (FB) related to the right of private defense (Section 96, Indian Penal Code,) and a similar plea was raised in defense in the instant case. We shall, therefore, confine ourselves chiefly to this General Exception though reference shall be made to cither Exceptions, if necessary. An attempt shall be made to lay down the law which can be applied to all the cases in which the benefit of the General Exception or special Exception or proviso is claimed.

31. Where there exist clear decisions of the Supreme Court, it is not necessary to make comments on the English decisions, or the decisions of the High Courts in India, for the simple reason that the law laid down by the Supreme Court is binding on all within the territory of India. However, we shall make reference to the various reported cases brought to our notice making comments wherever necessary.

32. AIR 1962 Supreme Court 605 is the leading case on the scope and effect of Section 105 of the Evidence Act. It will save time by reproducing in extenso the observations made therein, which are as below:

> "The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England, there is a presumption of Innocence in favor of the accused as a 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. An illustration based on the facts of the present case may bring out the meaning of the said provision. The prosecution alleges that the accused intentionally shot the deceased; but the accused pleads that, though the shots emanated from his revolver and hit the deceased, it was by accident, that is, the shots went off the revolver in the course of a struggle in the circumstances mentioned in Section 80 of the Indian Penal Code and hit the deceased resulting in his death. The Court then shall presume the absence of circumstances bringing the case within the provisions of Section 80 of the Indian Penal Code, that is, it shall presume that the shooting was not by accident, and that the other circumstances, bringing the case within the exception did not exist; but this presumption may be rebutted by the accused by adducing evidence to support his plea of accident in the circumstances mentioned therein. 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. There may arise three different situations: (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (See Sections 4 and 5 of the Prevention of Corruption Act). (2) The special

burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients: (see Sections 77, 78, 79, 81 and 88 of the Indian Penal Code). (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence: (see Section 80 of the Indian Penal Code). In the first case the burden of (the) proving the ingredients or some of the ingredients of the offence, as the case may be, lies on the accused. In the second case, the burden of bringing the case under the ex exception lies on the accused. In the third case, though the burden lies on the accused to bring his case within the excpetion, the facts proved may not discharge the said burden, but may affect the proof of the ingredients of the offence. 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 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."

"As in England so in India, the prosecution must prove the guilt of the accused, i.e., it must establish all the ingredients of the offence with which he is charged. As in England so also in India, the general burden of proof is upon the prosecution; and if, on the basis of the evidence adduced by the prosecution or by the accused, there is a reasonable doubt whether the accused committed the offence he is entitled to the benefit of doubt. In India if an accused pleads an exception within the meaning of Section 80 of the Indian Penal Code, there is a presumption against him and the burden to rebut that presumption lies on him. In England there is no provision similar to Section 80 of the Indian Penal Code, but Viscount Sankey, L. C., makes it clear that such a burden lies upon the accused if his

> defense is one of insanity and in a case where there is a statutory exception to the general rules of burden of proof. Such an exception we find in Section 105 of the Indian Evidence Act."
>
> "Further citations are unnecessary as, in our view, the terms of Section 105 of the Evidence Act are clear and unambiguous."

33. The defense plea raised in the above case was that the deceased was killed accidentally and the death was not the result of any intentional act on the part of the accused. Benefit was thus claimed of Section 80, Indian Penal Code.

34. AIR 1964 Supreme Court 1563 and AIR 1966 Supreme Court 1 are cases where the benefit of the General Exception detailed in Section 84, Indian Penal Code was claimed: plea of insanity was invoked by the accused to show that he was incapable of understanding the nature of the act done by him and hence was entitled to acquittal. In AIR 1964 Supreme Court 1563 (supra) the law was laid down as below:

> "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 the accused caused death with the requisite intention described in Section 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But, Section 84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the Court shall presume the absence of such circumstances. Under Section 105 9f 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 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 Indian Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defense of insanity."

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea, and the burden of proving that always rests on the prosecution from the beginning to the end of the trial (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence- oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

35. At another place after summarizing the law laid down in AIR 1962 Supreme Court 605 (supra), it was observed :-

"A Division Bench of the Nagpur High Court in *Ramhitram v. State of Madhya Pradesh*[13], has struck a different note inasmuch as it held that the benefit of doubt which the law gives on the presumption of innocence is available only where the prosecution had not been able to connect the accused with the occurrence and that it had nothing to do, with the mental state of the accused. With great respect, we cannot agree with this view. If this view were correct, the Court would be helpless and would be legally bound to convict an accused even though there was genuine and reasonable doubt in its mind that the accused

[13] AIR 1956 Nag187

had not the requisite intention when he did the act for which he was charged. This view is also inconsistent with that expressed in Nanavati's case."

36. In AIR 1966 Supreme Court 1 (supra), after quoting the passage from AIR 1964 Supreme Court 1563, their Lordships of the Supreme Court observed as below :-

"This passage does not say anything different from what we have said earlier.

Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea. Once that is done a presumption that the accused was sane when he committed the offence would arise. This presumption is rebuttable and he can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to acquittal This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in Section 105 of the Evidence Act."

37. In AIR 1966 Supreme Court 97 only one point was considered in detail namely, the nature and the extent of evidence which would discharge the onus of proof placed on an accused person claiming the benefit of an Exception. Observations on the other point are in consonance with the earlier decision. The relevant observations made on the point are as below :-

> "There is consensus of judicial opinion in favor of the view that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused: but that is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where an accused person is called upon to prove that his case falls under an Exception, law treats the onus as discharged if the accused person succeeds in proving a preponderance of probability. As seen the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus, It must be remembered that basically, the original onus never shifts and the prosecution has, at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt. As Phipson has observed, when the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution which has still to discharge its original onus that never shifts, i.e., that of establishing, on the whole case, guilt beyond a reasonable doubt."
> "It will be recalled that it was with a view to emphasising the fundamental doctrine of criminal law that the onus to prove its case lies on the prosecution, that Viscount Sankey in *Woolmington v. Director of Public Prosecutions*[14], observed that "no matter which 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." This principle of common law is a part of the criminal law in 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."

38. Thereafter, after quoting with approval the observations made by Duff, J., in *R. v. Clark*[15], which had been approved by Lord Hailsham in *Sodeman v. R*[16]., and making a reference to the law laid down in *R. v. Carr-Braint*[17], it was observed as below :-

> "What the Court of Criminal Appeal held about the appellant in the said case before it, is substantially true about the appellant before us. If it can be shown that the appellant has led evidence to show that he acted in good faith, and by the test of probabilities that evidence proves his case, he will be entitled to claim the benefit of Exception Nine. In other words, the 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 trying an issue 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."

39. Similar observations, though in brief, were made in AIR 1968 Supreme Court 702, which are as below :-

> "The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favor of that plea on the basis of the material on record."

This is a case where the accused had pleaded alibi; but a suggestion of self-defense was made in the cross-examination of the prosecution witnesses. Defense evidence on this plea was also adduced. It was observed that it was open to the Court to consider such a plea if the same arose from the material on record.

40. The other two cases brought to our notice relate to the statutory presumption under the Prevention of Corruption Act. Such a presumption is also covered by Section 105 of Evidence Act. However, for purposes of this case reference need be
made to only one case, AIR 1966 Supreme Court 1762. wherein the nature of the burden of proof placed upon the accused person has been discussed. It was held :-

[14] 1935 AC 462
[15] (1921) 61 SCR 608
[16] 1936-2 All England Reporter 1138
[17] 1943-2 All England Reporter 156

> "The next question arising in this case is as to what is the burden of proof placed upon the accused person against whom the presumption is drawn under Section 4 (1) of the Prevention of Corruption Act. It is well established that where the burden of an issue lies

> upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under Section 4 (1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favor of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts, i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt."
>
> "We are accordingly of the opinion that the burden of proof lying upon the accused under Section 4 (1) of the Prevention of Corruption Act will be satisfied if the accused person establishes his case by a preponderance of probability and it is not necessary that he should establish his case by the test of proof beyond a reasonable doubt. In other words, the 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 trying an issue 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."

41. In criminal trials where the accused puts forward a plea based on a General Exception, or a special Exception or proviso in the Indian Penal Code, three questions often arise: firstly on whom the burden of proof to establish the existence of the Exception or the proviso lies; secondly, the nature of evidence that shall justify the Court to hold that the Exception or proviso has been established; and thirdly, if the accused has not succeeded to rebut the presumption, how does his inability affect the result of the case, that is how is the conflict between the general presumption and the special presumption to be resolved? The rule on the first and third points has been laid down in detail in AIR 1962 Supreme Court 605 (supra), and this rule was applied to a case of alleged insanity in AIR 1964 Supreme Court 1563 (supra). A similar rule was also laid in AIR 1966 Supreme Court 1 (supra) and AIR 1966 Supreme Court 97 (supra).

42. For purposes of this reference, we can omit at least not make comments on that category of cases where the burden of proof of all or some of the ingredients of an offence is placed on the accused. We are at present more concerned with the General Exception, or special Exception or proviso, contained in the Indian Penal Code. Consequently, there can arise two different situations (1) where the special burden of proof does not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients; and (2) it relates to an Exception, some of the many circumstances required to attract the Exception if proved, affecting the proof of all or some of the ingredients of the offence. In AIR 1962 Supreme Court

605 (supra) it was mentioned that General Exceptions under five sections of the Indian Penal Code, fall within the first category. As it was contended before us that such observations were mere obiter dicta, it shall be proper not to indicate, in this order the provisions which would fall in that category. That shall avoid unnecessary controversy in the future and it shall before the judge hearing a particular case to decide whether the case falls in the first or the second category. If this course be not adopted, it may at occasions become necessary to refer the matter to a larger Bench which would result in unnecessary waste of time of this Court.
43. Where the plea raised in defense falls in the first category, the burden of proving the case under the Exception shall lie on the accused and he shall naturally be liable to conviction forthwith in case the prosecution has succeeded to establish the charge beyond reasonable doubt, considering that the Courts of law invariably, first of all, consider the prosecution case whether the ingredients of the offence of which the accused is charged have or have not been established beyond reasonable doubt. It is when the Court is of opinion that the charge has been established beyond reasonable doubt that the defense plea is looked into. However, where the case falls in the second category, the Court can acquit the accused if on consideration of the total material on record and the defense plea, there exists a reasonable doubt in its mind as to all or any of the ingredients of the offence charged.

44. In the first two reported cases it was also observed that the difference between the general presumption and the special presumption was more imaginary than real. In view of this observation it was contended by the learned Advocate for the appellants that when the result was the same, this Court should refuse to modify the dictum as such step may lead to utter confusion. It was also contended that a case under Section 77, 78, 79, 81 and 88 of the Indian Penal Code were placed in the first category were 'obiter dicta' and not binding on this Court. Reliance was also placed upon Section 6, Indian Penal Code and Section 221 (5) Criminal Procedure Code in support of the contention that all the cases under the Indian Penal Code shall fall in one group, namely, the second group detailed above. In this connection it was mentioned that when each and every case of the General Exception or the special Exception or proviso contained in the Indian Penal Code shall fall in the same group, this Court should, in the circumstances detailed above, not disturb the law as had been in existence for more than 25 years.

45. Theoretically one can lay down how the matters in issue shall be decided: the prosecution must, first of all, establish its case beyond reasonable doubt and thereafter consider whether the accused has succeeded in discharging the burden of proof. With regard to cases falling in the second category, the Court shall have to consider again whether all or some of the ingredients of the offence charged had been established beyond reasonable doubt. Where the offence has not been established beyond reasonable doubt, the accused would be entitled to acquittal. While recording a finding on any of these points, the Courts of law have to consider the total evidence on record, oral, documentary or circumstantial, whether adduced by the prosecution or by the accused. When the total evidence has to be judged at the initial stage, it can be said what occasion there is or should be for rejudging the same evidence for recording a finding on the

other two points. It is also contended that when as a result of reasonable doubt created in the mind of the Court as to the ingredidients of the offence, the accused would be acquitted, in substance, the acquittal is based upon the doubt created in the mind of the Court as a result of the Exception pleaded by the accused; and in the circumstances, it would be better to retain the old dictum, that as consequence of reasonable doubt it be held that the accused is entitled to the benefit of the Exception.

46. In the administration of justice in India, Law prevails over equity and good conscience, and consequently the provisions of the statute must be given their full effect unless the enactment is held to be unconstitutional or invalid and it is only in the absence of an enactment that the matter can be decided on the principles of equity. In other words, it would be possible for the Courts of law to depart from the provisions contained in Section 105 of the Evidence Act only if it can be held that the Evidence Act is not a complete Code by itself. If it is a complete Code it shall not be possible to depart from its provisions on the ground of injustice or inequity. Its provisions must be given their full effect. It is now a settled law that the Evidence Act is a complete Code, not for assessment of evidence but for evidence which can be adduced in any suit or proceeding, the circumstances in which such evidence can be adduced and also on whom the burden of proof lies. This shall be evident from the preamble and also Section 5 thereof. Repeal of Section 2 of the Evidence Act shall make no difference as the repeal of a provision does not revive the provisions which had been repealed by the repealed provision. In other words, by the repeal of a provision there is no re-enactment of the provisions which had earlier stood repealed. (See *Maharaja Sris Chandra Nandy v. Rakhalananda*[18]*, Collector of Gorakhpur v. Palakdhari Singh*[19]*,* and *T. W. King v. Mrs. F. E. King*[20]*,*

47. To put it differently if the dictum under reference is contrary to the provisions of Section 105 of the Evidence Act, it must be suitably modified even though the practical effect thereof in all or most of the cases shall be the same. Further, the law laid down by High Courts must be expressed in such clear and unambiguous words that no one may feel any difficulty in enforcing it. The Courts of law do not merely read the Headnotes or the concluding or operating portion of the judgment. Consequently, if the dictum is suitably modified, the Courts shall know not only what changes have been made but why the changes were introduced. They shall thus know the correct law and how to enforce it and I see no reason why there would exist any confusion in the mind of anyone. I therefore, have no hesitation in suitably modifying the dictum even though the legality thereof has been challenged after a lapse of 25 years.

48. The prosecution is not, till the end of the trial, discharged of its burden to establish beyond doubt the guilt of the accused, and it can consequently be said that no case shall fall in the first category: they shall all be governed by the second group detailed

[18]AIR 1941 PC 16

[19](1890) ILR 12 All 1 (FB)

[20]AIR 1945 All 190

above; and further when the total evidence has to be re-assessed before considering the defense plea and also thereafter, what importance does Section 105 of the Evidence Act have which

places the burden of proof on the accused person for establishing the Exception pleaded by him.

49. Human mind does not like a machine move in only the prescribed manner. Ordinarily the judge hearing the case shall take an over-all view of the evidence irrespective of the mode that may be laid down for assessment of the evidence and independently of the question of the burden of proof, whether placed on the prosecution or on the accused; and he shall decide beforehand whether the evidence on record is sufficient for conviction or the accused is entitled to honourable acquittal or to the benefit of doubt. But to remove any misapprehension about the two categories, it would be desirable to lay down which matters must be decided before a formal opinion is expressed on the defense plea.

50. Offences defined in the Indian Penal Code or in other enactments invariably have more than one ingredient, some of which may not be connected with or co-related to the General Exceptions or special Exception or proviso pleaded by the accused. The various ingredients are established by oral, documentary or circumstantial evidence as may be adduced by the parties. Before entering into the defense plea, it shall be necessary to consider and to record a finding on the ingredients of the offence other than those connected with or co-related to the defense plea. If all such ingredients are established beyond doubt, the Court shall look into the defense plea to find out whether the presumption contemplated by Section 105 of the Evidence Act has been rebutted, that is, the absence of the circumstances benefit of which has been sought for has or has not been disproved. If the accused succeeds in rebutting the presumption, it is an end to the matter and he shall straight off be acquitted of the offence or convicted of a lesser offence on the ground that some of the ingredients of the main offence had not been established; but if the accused does not succeed in rebutting the presumption, that is, in disproving the absence of the circumstances, the Court shall consider the question from the point of view of general presumption of the innocence of the accused, whether the ingredients connected with or co-related to the defense plea have been established beyond doubt. Even though the accused may not be able to establish his plea, that is, to rebut the presumption under Section 105 of the Evidence Act, he may succeed in creating a reasonable doubt in the mind of the Court, and what the Courts of law shall say is that because there exists a reasonable doubt on some of the ingredients of the offence, the benefit thereof shall go to the accused and he shall deserve acquittal or convicted of a lesser offence.

51. In cases falling in the first category, where no ingredient of the offence is connected with or co-related to the Exception pleaded in defense, the Court shall have to consider, on the basis of the total evidence on record, whether the prosecution has or has not succeeded to establish beyond doubt the guilt of the accused and then to consider whether there has been mitigation of the offence, or the accused deserves being exonerated thereof on account of the Exception pleaded by him. If it be found that the defense plea has not been proved, that is, the presumption of the absence of circumstances under Section 105 of the Evidence Act has not been disproved, the Courts of law would straight off record a finding of conviction. There would then be no

question re-assessing the evidence as a whole to decide whether all the ingredients of the offence had been proved and the guilt established beyond doubt; but in cases falling in the second category, the Court shall have to record, in the first instance, a clear finding as to whether the ingredients other than the ingredient or ingredients covered by the defense plea have or have not been established beyond doubt. Once the finding is recorded in favor of the prosecution, the Exception pleaded by the accused shall be looked into whether the accused has succeeded in rebutting the presumption by disproving the absence of the circumstances pleaded by him. If he succeeds to disprove the absence of circumstances that is, to prove the defense plea, he shall deserve acquittal or conviction of a lesser offence as there would be absence of some of the ingredients of the main offence. In case the accused does not succeed to repel the presumption under Section 105 of the Evidence Act, but does create a reasonable doubt, the Court shall say that there exists a reasonable doubt as to the ingredients connected with the defense plea and hence the offence as defined has not been established and on this ground would acquit the accused or convict him of the lesser offence.

52. Without expressing any final opinion the above can be clarified by giving an example. I shall naturally give an example which can be said to be beyond any controversy. Section 499, Indian Penal Code defines "Defamation", while 'defamation' is punishable under Section 500, Indian Penal Code. Section 500, Indian Penal Code lays down that :-

> "Whoever defames another shall be punished.............." A person is said to defame another when "by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person." This is subject to Exceptions detailed thereafter. The First Exception is that "it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published."

53. The ingredients of Section 499, Indian Penal Code are the making or publishing of the imputation; intending to harm, or knowing or having reason to believe that such imputation shall harm, the reputation of such person. Where the accused pleads the benefit of the First Exception, what he suggests is that the allegation made is true and the imputation was made for the public good. The accused then does not challenge the two ingredients of Section 499, that is, the making and the publication of the imputation with the intention to harm the reputation of the other person. When the two facts raised in defense are in no way connected with the main ingredients of Section 499, Indian Penal Code, the Court shall, first of all, have to record a finding whether the alleged defamation has or has not been established beyond doubt and thereafter to consider the defense plea. Protection is given to the accused person by the First Exception only if the imputation is true. No protection exists where the defamatory statements are not true, but may be true. When the benefit of the First Exception can be availed of only when the imputations are true, it cannot be open to the accused to say that he should be given the benefit of this Exception

even when he is merely able to show that there is some possibility of the imputations being true; to put it differently, the imputations may be true or may not be true. When no question of reasonable doubt as to the truth of imputations arises, the charge of defamation shall be fully established where the ingredients of Section 499, Indian Penal Code are established beyond doubt and the accused fails to establish the truth of the imputations. (See *Lalmohan Singh v. The King*[21],). This case would clearly fall in the first category where none of the ingredients of the offence is connected with or co-related to the Exception pleaded by the accused.

54. The offence of murder is defined in Section 300, Indian Penal Code. This section by itself says that :-

> "Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or........."

Every homicide is not murder. It is only culpable homicide which can amount to murder. The word 'culpable' means criminal or blame-worthy. Consequently, the intention or knowledge contemplated by Section 300, Indian Penal Code must be a criminal or guilty one. Where it appears that the intention or knowledge is not criminal or illegal, the causing of death cannot be said to be culpable and it shall not be 'culpable homicide', that is, murder. In the circumstances, it must be held that the intention or knowledge contemplated by Section 300, Indian Penal Code is a criminal or guilty intention knowledge, and not mere intention or knowledge. To make this point more clear it must be mentioned that it is a well established rule that "unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind." Such observations made in *Brend v. Wood*[22], were quoted with approval by their Lordships of the Privy Council in *Srinivas Mall v. Emperor*[23], Consequently, the ingredients of the offence under Section 300, Indian Penal Code are the doing of an act by which the death is caused, and the doing of the act with the intention, that is, criminal intention to cause death. Where the accused seeks the benefit of the General Exceptions contained in Sections 80 and 84, Indian Penal Code, what he implies to mean is that he did not have the guilty intention at the time he caused the death. Consequently, at the initial stage the Court shall have to consider whether the prosecution has established beyond doubt that the death of the person was caused by or is the result of the act done by the accused. If so satisfied, the defense plea shall be looked into whether the accused has succeeded to rebut the presumption, that, is to disprove the absence of the circumstances contemplated by the above sections. Once the accused succeeds in establishing his plea, he would deserve acquittal on account of there being no guilty intention; it is a different thing that he may be liable to conviction of the lesser offence; but if the accused is not successful in disproving the absence of circumstances, the Court of law shall still have to see whether the ingredient of criminal intention, that is, mens rea has been established by the prosecution beyond reasonable doubt. It is then that a reasonable doubt created in the mind of the Court as to the defense plea shall lead to the inference that the guilty

[21]AIR 1950 Calcutta 339 *[23]49 Bom LR 68: (AIR 1947 PC 135)*
[22](1946) 110 JP 317 (318)

intention has not been established beyond reasonable doubt and on this ground the guilt of the accused as to the main offence shall be deemed not to have been established beyond doubt and he shall be acquitted. From the practical point of view the accused is being given the benefit of the Exception pleaded by him; but, in the eye of law, the benefit of reasonable doubt is of the ingredients of the offence, and not of the Exception pleaded by him. The above case admittedly falls in the second category mentioned above.

55. The contention of the learned Advocate for the appellants that in view of Section 6 of the Indian Penal Code and Section 221 (5) of the Criminal Procedure Code all the Exceptions, whether "General" or special are parts of the offence, and hence ingredients thereof and they must be established beyond doubt by the prosecution, has, in my opinion, no force. Section 6 merely lays down that every definition of an offence shall be understood subject to General Exceptions even though not repeated in such definition. The effect of Section 6 is to incorporate the General Exceptions in every definition of an offence. For example, while reading Section 300, Indian Penal Code we shall have to include therein not only the Exceptions 1 to 5 detailed therein, but also the General Exceptions contained in Sections 76 to 106, Indian Penal Code. The offence would still be as defined in the main part of Section 300, Indian Penal Code and the rest shall be Exceptions. If the burden of proving the Exception is. placed on the accused, it shall be necessary for him to discharge this burden. Section 6 cannot thus affect application of Section 105 of the Evidence Act. In other words, Section 6 can be of no help in considering the scope of Section 105 of the Evidence Act.

56. Similarly, Section 221 (5) of the Criminal Procedure Code provides that-

> "The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case." Illustration thereof is as below :-
> "(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to Section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception apply to it."

Section 221 (5), Criminal Procedure Code is a procedural clause and cannot affect the rights and liabilities of the parties, nor can it affect the burden of proof, that is, which party must establish a particular fact or matter in issue. Apparently, this provision was incorporated to make it clear that it is for the accused to plead the benefit of the Exception, and if no such plea is raised, the Court shall assume that the Exception did not exist, and on the main ingredients being established the accused can be convicted of such offence.

57. The above contention was evidently repelled in the Full Bench case of 1941 All LJ 619 : AIR 1941 Allahabad 402 (supra). Iqbal Ahmad, C. J., expressed his opinion clearly by laying down that none of the above sections had the effect of reducing the scope of Section 105 of the Evidence Act and the burden of proof did lie on the accused.

58. My attention was also drawn to the fact that the Evidence Act was passed after the Indian Penal Code and before the commencement of the Code of Criminal Procedure. Each is a distinct law: Indian Penal Code laying down the criminal offences; the Code of Criminal Procedure, the procedure to be followed in criminal trials; while the Evidence Act, the evidence which can be adduced in any suit or proceeding and on whom the burden of proof lies. When each statute covers a particular branch of the law, it cannot override the provisions of the other laws.

59. The nature and extent of the evidence necessary to establish the Exception or proviso raised in defense has been considered in AIR 1964 Supreme Court 1563 (supra), AIR 1966 Supreme Court 97 (supra) and AIR 1966 Supreme Court 1762 (supra). It is thus a settled law that the burden of proof which lies on the accused by virtue of the provisions of Section 105 of the Evidence Act is not as heavy as on the prosecution to establish the guilt of the accused. The prosecution has to prove its case beyond reasonable doubt, while the accused has simply to disprove the absence or circumstances contemplated by the Exception, that is, to prove facts which would entitle him to the benefit of the Exception. The test of probabilities is to be applied in judging the defense plea. The accused has to establish his plea in the manner a plaintiff or defendant shall prove his case in a civil proceeding. It is thus the preponderance of probabilities which shall determine whether the defense plea has been established and the case falls or does not fall within one of the Exceptions contained in the Indian Penal Code. When the three expressions mentioned above are read together, there can be no - difficulty in understanding the meaning of the term "preponderance of probability." However, in view of the fact that this question had been raised at the Bar, it is necessary to make a few observations.

60. Our attention was drawn to the definition of "preponderance of evidence" as in vogue in America. In American Jurisprudence, 2nd Edition, Volume 30 the expression has been defined in Article 1164. In America the term means "the weight, credit and value of the aggregate evidence on either side, and is usually considered to be synonymous with the term greater weight of the evidence", or "greater weight of the credible evidence". It is a phrase which, in the last analysis, means probability of the truth. To be satisfied, certain, or convinced is a much higher test than the test of "preponderance of evidence".

61. The phrase "preponderance of probability" appears to have been taken front Charles *R. Cooper v. F. W. Slade*[24], The observations made therein make it clear that what "preponderance of probability" means is "more probable and rational view of. the case", not necessarily as certain as the pleading should be.

62. On the basis of the definition of the words "proved", "disproved" and "not proved", as contained in Section 3 of the Evidence Act, a similar inference can be
drawn. The term "proved" is defined as below:-

[24](1857-59) 6 HLC 746

> "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 it exists." When the evidence is of a overwhelming nature and is conclusive, there shall exist no dispute, nor shall there be any doubt and the Court can say that the fact does exist, but in criminal trials, where the accused claims the benefit of the Exception there cannot be any evidence of such a nature. Very often there is oral evidence which may be equally balanced. In the circumstances, the case of the prosecution or of the defense has to be accepted or rejected on the basis of probabilities. Section 3 of the Evidence Act by itself lays down that a fact is said to be proved when, after considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is what is meant by the "test of probabilities" or the "preponderance of probabilities." The decision is taken as in a civil proceeding.

63. To avoid repetition it can here be mentioned that the law with regard to the discharge of burden of proof by the prosecution, or by the defense against whom a presumption can be drawn under Section 105 of the Evidence Act, is as detailed in AIR 1962 Supreme Court 605 (supra), and whether the accused has been able to discharge the burden of proof is to be judged on the basis of the "test of probabilities" or the "preponderance of probabilities" in the same manner as the Court records a finding in a civil proceeding. This rule applies to the accused. A more rigorous proof is called for from the prosecution which must establish its case beyond reasonable doubt.

64. The next point for consideration is to what extent the above rule laid down by the Supreme Court in case in which the benefit of Sections 80 and 84, Indian Penal Code is Claimed, can be applied to cases in which the accused claims the benefit of other Exceptions, all the more, where a plea of private defense has been raised. The Evidence Act is a complete Code and its purpose is to consolidate, define and amend the law of Evidence. Consequently, the provisions of this Act shall govern all the judicial proceedings in or before any Court. The Evidence Act applies equally to civil and criminal cases. It may, however, be mentioned that in the Evidence Act there are certain provisions applicable exclusively to civil proceedings and a few others to criminal trial only; but speaking broadly, it can be laid down that the Evidence Act applies equally to both the civil and criminal proceedings. Further, there shall be no justification to depart from the express provisions contained in the Evidence Act. Such provisions shall govern the recording of evidence and also the question of the burden of proof. We cannot look into the English practice or the law prevalent in our country in the past on the ground of public policy or the interest of

justice. To put it differently, the provisions of the Evidence Act must be strictly construed even though such a step may not conform with the ideas of the Court or may appear to be unjust or may cause hardship to the accused. (See Governor and Company of the *Bank of England v. Vagliano Brothers*[25], and *Norendra Nath Sircar v. Kamalbasini Dasi*[26],

[25]1891 AC 107

[26](1895) 23 Ind App 18 (PC)

65. Section 105 of the Evidence Act has been worded in clear and unambiguous terms and it shall apply to each and every case where the benefit of the General Exceptions, or the Special Exceptions or provisos contained in the Indian Penal Code, or in any other law is claimed. Section 105 reads as below:-

> "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 of such circumstances."

The term "shall presume" has been defined in Section 4 of the Evidence Act and means that the Court "shall regard the fact as proved unless and until it is disproved." Reading Section 105 of the Evidence Act with the definition of the terms "shall presume" as contained in Section 4, it must be held 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 unless and until it is disproved. "Disproved" is different to "not proved." In Section 3 the meaning of the terms "proved" and "disproved" has been given and the term "not proved" is defined "neither proved nor disproved". Consequently, if the accused is unable to disprove the absence of circumstances, that is, prove the existence of the circumstances, the case would fall in the category of "not proved" and, in the eye of law, the burden imposed by Section 105 shall not stand discharged. In other words, the accused has to prove the existence of the circumstances bringing the case within the Exception and he shall be deemed to have discharged the burden of proof only when the Court considers the existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In other words, no. question of the benefit of doubt arises while the Court is considering the question of the existence of circumstances bringing the case within the Exception. On the basis of doubt the contention can be rejected or the case of the party not accepted; but to accept a case not free from doubts, that is, to accept a doubtful case, is not warranted by the Evidence Act. In this view of the matter the accused can be deemed to have discharged the burden of proof only when he is in a position to disprove the absence of circumstances, that is, is able to discharge the onus in the manner the plaintiff or the defendant must in a civil proceeding. It would be a wrong proposition of law to say that in criminal trials where there exists a reasonable doubt in the mind of the Court, the Exception pleaded be deemed to have been proved. Section 105 of the Evidence Act makes no difference between the Exceptions or provisos contained in one enactment or the other. In the

circumstances, the rule applicable to Exceptions under Sections 80. and 84, Indian Penal Code shall apply with equal force to the other General Exceptions contained in the Indian Penal Code or the special exceptions or proviso contained in this Code or in other enactments.

66. Two other points raised on behalf of the appellants may now be considered. It was argued that the term "may presume" shall have the same meaning as "shall presume" in case the Court decides to presume the existence of a fact. The suggestion thus made is that it is discretionary with the Court to presume or not to presume and once the Court decides to presume the existence of a fact, the same rule shall apply as in a case where there is a statutory clause to presume the existence of the fact. Reliance was placed upon the case of AIR 1943 PC 211, where mere giving of a reasonable or plausible explanation was held to be sufficient to discharge the burden of proof. The definition of "may presume" and "shall presume", as contained in Section 4 of the Evidence Act, makes it clear that the discretionary presumption where the words "may presume" have been used is much weaker than in a case where the provision directs the Court to presume the existence of a fact. In case of a weaker presumption, mere explanation can be sufficient and such strong evidence is not needed as in a case where the Court must presume the existence of a fact. The above contention was raised in AIR 1964 Supreme Court 575 and AIR 1960 Supreme Court 7 but was repelled on the ground that the burden res-sting on the accused in a case under the Prevention of Corruption Act where the word "shall" had been used was not as light as it was where the presumption was raised under Section 114 of the Evidence Act, and could be held to be discharged merely by reason of the fact that the explanation offered by the accused was reasonable and probable. It was held that the presumption under the Prevention of Corruption Act must be rebutted by "proof" and not by a bare explanation which was merely plausible.

67. The second point raised is that in criminal trials more convincing evidence is expected from the prosecution before the accused can be held guilty of the charge, and this is a departure from the ordinary meaning of "proved" as contained in Section 3 of the Evidence Act. It was thus contended that in criminal trials while judging the defense plea similar leniency can be shown to the accused. The suggestion made is that where the evidence is equally balanced and the Court thinks that the defense plea may, or may not be true, a prudent person contemplated by Section 3 of the Evidence Act must act on the supposition that the fact exists. What is suggested is that the benefit of the reasonable possibility of truth of the defense plea be utilized to hold that the absence of circumstances contemplated by Section 105 of the Evidence Act has been disproved. It is true that the maxim, applicable in India as in England, that an accused shall be presumed to be innocent and the prosecution must establish its case beyond reasonable doubt is a departure from the ordinary meaning of the term "proved" as contained in Section 3 of the Evidence Act. It is, however, a rule of caution and prudence laid down by the Courts of law how a prudent man must, in a criminal case, assess the evidence adduced by the prosecution. In the words used in Section 3 of the Evidence Act, the prosecution case is not deemed to have been 'proved', that is, is deemed to be 'not proved', even though in a civil proceeding the fact could, on the basis of such evidence, be deemed to have been 'proved'; and the effect of the above maxim is to regard a

fact "not proved", though in civil proceeding it could be deemed to be "proved". The same cannot, however, be laid down for a provision where one has to consider whether the absence of circumstances had been disproved, or the existence of the circumstances had been proved. On the application of a rigorous rule, the Court can hold that the existence of circumstances had not been proved, or the absence of circumstances had not been disproved; but to say that the existence of circumstances shall be deemed to have been proved or the absence of circumstances disproved shall not be correct, for the simple reason that on the basis of doubt, the fact is to be disbelieved, and not believed. I am, therefore, not inclined to agree with the proposition that on a reasonable doubt being created, a prudent man should proceed with the assumption that the existence of circumstances had been proved.

68. Section 105 of the Evidence Act, therefore, applies to each and every Exception or proviso contained in any enactment and hence shall apply even when the accused pleads the benefit of the "General Exception" contained in Section 96, Indian Penal Code, that is pleads to have acted in the exercise of the right of private defense of his person or property. In the circumstances the rule laid down by the Supreme Court in cases where the benefit of Sections 80 and 84, Indian Penal Code had been claimed can be applied with equal force to a case where the accused pleads the benefit of Section 96, Indian Penal Code. The application of this rule to a case where the accused person has pleaded the benefit of Section 96, Indian Penal Code shall not cause any hardship to him, as in such a case the burden shall lie on the prosecution till the end of the trial to prove all the ingredients of the offence beyond any reasonable doubt. When the accused raises the plea contained in Sections 80 and 84, Indian Penal Code what he contends is that he did not have the criminal intention or knowledge contemplated by the definition of the "offence". The same can be said when the plea of private defense is raised. Section 80, Indian Penal Code provides:-

> "Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

Criminal intention or knowledge is a material ingredient of Section 80-the other ingredients being that the act should be lawful and was done in a lawful manner by lawful means and with proper care and caution.
Similarly, Section 84, Indian Penal Code provides :- "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law." A person incapable of knowing the nature of the act is a person who cannot be deemed to have guilty knowledge or intention.

69. The plea contemplated by Section 80 and Section 84, Indian Penal Code directly affects one of the ingredients of the offence, namely, the mens rea. The same can be said of the plea

contemplated by Section 96, Indian Penal Code.

70. Section 96, Indian Penal Code provides :- "Nothing is an offence which is done in the exercise of the right of private defense".
The subsequent sections detail such right. Section 97 provides that every person has a right, subject to the restrictions contained in Section 99, to defend not only his person and property but also the person or property of others.

71. When an accused person acts in the exercise of the right of private defense, what is meant is that even though armed he had no prior intention to commit an offence and whatever he did was in the exercise of the rights given to him under the law. His act would thus not be illegal and, in the eye of law, the act cannot be deemed to have been done with a criminal or guilty intention or knowledge which is invariably the most important ingredient of a criminal offence.

72. At the very start of the argument the learned Advocate for the appellants had cited three illustrations where injustice shall be done to the accused if the benefit of the Exception, as contemplated by the dictum under reference, was not given to the accused. It was said that where there was a dispute as to possession of property between A and B, and such disputes were followed by a marpit in which both the parties were injured, it shall be necessary to convict both the parties where the possession of either was doubtful, considering that none of the parties shall be able to discharge the burden of proof as contemplated by Section 105 of the Evidence Act. The suggestion thus made is that one party or the other must have been in possession and the conviction of the party in possession shall be against equity and conscience. Where the possession is in dispute there can be two kinds of cases: the property belonged to a third person and parties A and B start laying claim thereto, or that A is in possession and B raises a claim to the property at the same time asserting that he was in possession. In the first case both the parties can be deemed to have the guilty intention and they can be convicted for the acts done by them. It would be a case of free fight or in suitable circumstances a case sudden fight (See AIR 1957 Supreme Court 469). In the other case, one party alone shall be convicted and the other given the benefit of the General Exception contained in Section 96, Indian Penal Code, that is, of private defense, provided that the evidence adduced by the party in possession is acceptable; but where the evidence is sufficient to hold that the possession had been proved, the Courts of law shall hold that the burden of proof contemplated by Section 105, the Evidence Act had not been discharged by both the parties. However, while deciding whether mens rea, one of the important ingredients of the offence, has or has not been established beyond doubt the Courts of law can grant the benefit of doubt to both the parties, or convict one party and give the benefit of doubt to the other. In such a case what, according to the learned Advocate, should be done by assuming the existence of circumstances shall be by holding that all the ingredients of the offence had not been established beyond doubt.

73. The other two illustrations pertain to those cases where there is a dispute as to where the

marpit took place, or who started the marpit. The principles indicated above while making comments on the first illustration shall apply with equal force to these illustrations also. In other words, the accused person shall not be convicted simply because the dictum under reference shall not be followed and instead the law as laid down by the Supreme Court shall be made applicable.
* * *

74. Reference may now be made to the English decisions and the decisions of the High Courts in India to which our attention has been drawn. *Woolmington v. The Director of Public Prosecutions*[27], has been the foundation of decisions not only by the Courts in England but also in India. This case and also 1943-2 All England Reporter 156 were considered by the Supreme Court in some of the decisions referred to above. The rule of law laid down in 1935 AC 462 (supra) has been reproduced in Halsbury's Laws of England. In the circumstances, it is not necessary to make further comments on these three cases.

[27] *1935 AC 462*

75. The rule enunciated by Viscount Sankey L. C. in 1935 AC 462 (supra) was relied upon in *Mancini v. Director of Public Prosecutions*[28]. *The King v. Kakelo*[29], is a case where onus lay on the accused to prove that he was not an alien, and not upon the prosecution to prove that he was. This case cannot be of any help considering that therein the prosecution had itself adduced sufficient evidence to prove that the accused was an alien.

76. It was strongly argued on behalf of the State that the majority decision in 1941 All LJ 619 : AIR 1941 Allahabad 402 (supra) was contrary to the decisions of the Supreme Court and can no longer be regarded as a good law. I have carefully gone through the judgments of Iqbal Ahmad, C. J., and Collister, J., which can be regarded as the leading judgments of the majority and minority Judges and find that Iqbal Ahmad, C. J., had laid down the law correctly, though a mistake was commited while giving the answer to the question referred to the Full Bench. The answer was given in the form of a dictum which has been referred to us for consideration. If the dictum is not given unnecessary weight, it shall be found that the majority view is in consonance with the recent Supreme Court decisions. The minority view shall be contrary to the law laid down by the Supreme Court.

77. Iqbal Ahmad, C. J., has laid down not at one place but many that the reasonable doubt is as to the guilt of the accused, and not to the existence of the Exception. At page 407 he observed as below :-

> "It would thus appear that there is formidable weight of authority in sub-port of the view that in cases falling within the purview of Section 105, Evidence Act, the evidence produced by the accused person, even though falling short of proving affirmatively the existence of circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt."

Other observations made by Iqbal Ahmad, C. J., are as below :-

> "It is on the basis of these principles that it is well settled in England that the evidence against the accused must be such as to exclude, to a moral certainty, every reasonable doubt about his guilt and if there be any reasonable doubt about his guilt he is entitled to be acquitted ....

What holds good in England must hold good in India."

> "The burden of proving the existence of circumstances bringing the case within the "exception" or "proviso" is no doubt cast on the accused by Section 105, but this does not in any way absolve the prosecution of the burden laid on it by Section 102. The burden of proof, so far as the entire "proceeding" is
> concerned, remains on the prosecution, even though the burden of the "fact in

[28]1942 AC 1
[29]1923-2 KB 793

> issue" pleaded by the accused is cast upon him by Section 105... ... ...
> ... ...

There is, however, nothing in the Evidence Act to indicate that the failure of the accused to discharge the burden lightens the burden placed on the prosecution by Section 102 ... ... and "the onus never changes". It is, therefore, manifest that even in cases to which Section 105 applies the prosecution, has to prove the guilt of the accused."

> "Should it in the consideration of the question whether A is guilty of murder, put aside the evidence produced by A, so to say, in a watertight compartment and exclude that evidence entirely from consideration? or should it take that evidence, for what it is worth into consideration along with the other evidence in the case and then make up its mind as to the guilt or innocence of A? I cannot but hold that it is only the latter alternative which is open to the Court and this is what follows from the definition of "proved" in the Act. It is one thing to hold that the "exception" or "proviso" pleaded has not been proved and it is quite another thing to say that it has been disproved. If a reasonable doubt as to the existence of the exception or proviso exists the Court cannot, while considering the evidence as a whole, deny to the accused the benefit of that doubt".

78. Collister, J. personally preferred the law as enunciated by Viscount Sankey in Woolmington's

case, and saw no reason why the law in India as regards this branch of burden of proof should differ from the law in England, but he regarded it as his duty to interpret the law as it was. He summed up the legal position in the following words :-

> "Upon a careful examination of the relevant sections of the Evidence Act I find myself forced to the conclusion that at the termination of the trial the accused person will not be entitled to the benefit of Section 96, Penal Code, unless upon a review of all the evidence the Court is either satisfied as to the existence of the circumstances pleaded or considers the fact of their existence to be probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that they existed,"

Collister, jrepelled the contention that notwithstanding the specific provisions of the Evidence Act relating to exceptions, the Court must acquit an accused person if it entertained reasonable doubt as regards his guilt. At another place he expressed a similar opinion by laying down that the general onus on the prosecution was subject by statute to the special onus which Section 105 imposed on the accused person and that the Court would not be justified in falling back on the general principle that the Crown must prove the prisoners' guilt in view of the specific provisions contained in Section 105. In Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) reference to the Full Bench was made by Braund, J., and he expressed the question referred to the Full Bench in the following words:-

> "The question before this Full Bench is whether, in such a situation, the Court is bound to reject the plea of the exception, or whether it still remains open to it, on looking at the evidence as a whole (including the evidence of self-defense) to give to the accused the benefit of any reasonable doubt that remains whether the act may not have been committed in self-defense."

The judgment of Collister, J. all the more, when read with that of Braund, J., makes it clear that the minority Judges were of opinion that once the defense story of self-defense was rejected, that is, plea of the exception was not accepted, the Court cannot, looking at the evidence as a whole, including the evidence of self-defense, give to the accused the benefit of any reasonable doubt as to the guilt on the ground that the accused had acted in self-defense.

79. The Supreme Court has clearly laid down that even after the rejection of the defense plea the general onus remains on the prosecution and if there exists any reasonable doubt as to the guilt, its benefit shall go to the accused and he shall be entitled to acquittal even though he had failed to discharge the burden of proof placed upon him under Section 105. It shall thus appear that the majority judgment in Parbhoo's case expresses the law correctly, though the reply to the question referred to the Full Bench was not expressed in correct legal words.

80. To avoid unnecessary repetition later it may be added that the minority judgment in Parbhoo's

case stands overruled by the Supreme Court decision in AIR 1964 Supreme Court 1563 (supra). While discussing the case of AIR 1956 Nagpur 187 (Supra), their Lordships made it clear that they did not agree with the view expressed therein, namely, that the benefit of doubt which the law gives on the assumption of innocence is available only where the prosecution has not been able to connect the accused with the occurrence and it has nothing to do with the mental state of the accused. In other words, even if the accused is unable to substantiate the defense plea, the Court has to see whether the guilty intention or knowledge which is a material ingredient of the offence has or has not been proved beyond reasonable doubt.

81. In *J. Danubha Vanubha v. State*[30], and *State v. Bhima Devraj*[31], the view expressed in the Full Bench case of *Government of Bombay v. Sakur*[32], was adopted. Macklin, J. observed in this Bombay case that "the practical difference between English and Indian Law as to the proof of exceptions is not very great; in the result it is often no more than a matter of words". However, certain observations made suggest that in a case of murder the prosecution has merely to prove that the accused caused the death and thereafter the burden lies upon he accused to prove the existence of circumstances bringing his case within the exception relating to the right of private defense and if he fails to discharge this onus, the Court shall presume the absence of such circumstances and can convict the accused. At another place it was observed that in the eye of law, the standard of

[30]AIR 1952 Saur 3

[31]AIR 1956 Sau 77

[32] AIR 1947 Bom 38

"proof" required from both the prosecution and the accused is the same, though in practice the standard of "proof" required to bring a case within one of the exceptions is lower than the standard of proof required from the prosecution to establish its own case. It was further observed that this was because a "prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case." It was held that the jury should not be told that the accused should prove his case beyond reasonable doubt or that the burden on him is necessarily less than the burden on the prosecution. These observations are clearly against the Supreme Court decisions and I may say with respect do not lay down the law correctly. It is true that in view of the definition of "proof" as contained in Section 3 of the Evidence Act, the proof expected from both the prosecution and the accused is the same which would be, what a prudent man considers sufficient in the circumstances of the case; but in view of the presumption of the innocence of the accused, it is necessary for the prosecution to establish its case beyond reasonable doubt, while the accused has to establish his case in the manner a plaintiff or defendant has to make out his case in a civil proceeding. Further, there are not always two question involved, "the proof of the case for the prosecution and the proof of the exception put forward by the defense." They are also not "two separate questions to be decided separately", the second question arising after the first has been decided. This rule can be applied to only those cases which fall in the first category, and not those which fall in the second category detailed above. The Bombay case is more or less on the lines of the minority judgment in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402

(FB) and cannot be said to correctly express the law.

82. The above Full Bench case was followed by the same High Court in *Har Prasad Ghasi Ram Gupta v. State*[33], No further comments are therefore, necessary.

83. The observations of Mitter, J. In *Yusuf Sk. v. The State*[34], that the "question of an onus under Section 105 only arises after the prosecution has established the commission of an offence" and that the "standard of proof under Section 105, Evidence Act, is the same as the standard which is required of the prosecution in a criminal trial," are clearly against the Supreme Court decisions. The first observation may however, apply to a case falling in the first category.

84. In Re, Gampla Subbigadu, 1940-2 Mad LJ 1018 : (AIR 1941 Madras 280) it was observed that in the absence of proof of the plea of self-defense it was not possible for the Court to presume the truth of the plea of self defense. It was further observed that it was not possible to reject the prosecution evidence merely because the prosecution witnesses did not explain how the accused himself came by his injuries. The Report suggests that the accused cannot be acquitted after giving the benefit of reasonable doubt created as to his guilt on the plea of private defense raised by him not being accepted. This is clearly against the law laid down by the Supreme Court.

85. In *Baswantrao Bajirao v. Emperor*[35], it was observed that:-

[33]AIR 1952 Bom 184 *[35]AIR 1949 Nag 66*
[34]AIR 1954 Cal 258

> "The accused is not entitled to any benefit of the doubt as to his insanity because the burden is on him to prove strictly that he
> committed the act in a moment of insanity."

This can no longer be treated as a correct law, the Supreme Court having decided to the contrary, namely, that if any reasonable doubt is created as to mens rea, the benefit of doubt shall go to the accused by holding that the charge had not been established beyond doubt.

86. In the *State v. Chhotelal Gangadin Gadariaya*[36], the earlier decision of that Court in AIR 1956 Nagpur 187 (Supra) was followed; but as already mentioned above, the case of Ramhit Ram has been overruled by the Supreme Court.

87. Though not so expressed Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) appears to have been followed in *Bala Prasad Dhansukh v. State of Madhya Pradesh*[37], I am drawing this inference from the following observations made in para 21 of the Report.

> "In all such cases, as soon as such evidence is introduced, which, if believed, would

> establish the circumstances on which the defense may rely to bring his case under any of the exceptions, etc., the burden of the accused is discharged. It is equally discharged when on a consideration of the whole of the evidence the Court is left in doubt as to whether the killing may have been under the circumstances disclosed in the evidence on record."

88. Parbhoo's case was followed in *Kamla Singh v. The State*[38], and it was observed that the onus under Section 105 was discharged or could be taken as discharged once "the Court is brought to a point where it becomes doubtful of the fact or when it cannot positively hold that the prisoner was then not of unsound mind and that he was capable of knowing the nature of the act alleged against him." For reasons already indicated above, this is not a correct approach, though the accused, can be given the benefit of reasonable doubt as to his guilt. In other words, the Court can hold that the prosecution has not succeeded to establish its case beyond reasonable doubt.

89. In *Etwa Oraon v. The State*[39], the earlier case of AIR 1955 Patna 209 was not dissented from. It was observed that :-

> "The burden is discharged if the defense establishes facts and circumstances which might lead to a reasonable inference that at the time of the commission of the offence the accused was of unsound mind, the unsoundness of his mind being of the nature or extent mentioned in Section 84, Indian Penal Code."

Reasonable inference is not the same thing as reasonable doubt. It cannot also amount

[36]AIR 1959 Mad Pra 203 [38]AIR 1955 Pat 209

[37]AIR 1961 Mad Pra 241 [39]AIR 1961 Pat 355

to 'proof' as contemplated by Section 3 of the Evidence Act. The above observations are to some extent against the 'view expressed by the Supreme Court.

90. *Brindaban Prasad v. The State*[40], is based upon the Supreme Court decision in the case of *K. M. Nanawati v. State of Maharashtra (supra)* and needs no further comments.

91. Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) was not followed in *V. Ambi v. State of Kerala*[41], and it was held that the accused would be entitled to acquittal on the ground of insanity only if there was a probability of the accused being legally insane at the time of the commission of the crime. In case it was meant to lay down that the accused could not be given the benefit of reasonable doubt as to ail or some of the ingredients of the offence, it would not be a correct exposition of law.

92. To sum up, the doctrine of the burden of proof and the nature of evidence necessary to discharge this burden. in cases where the accused claims the benefit of the general Exceptions in the Indian Penal Code or of any special exception or proviso contained in any other part of the same Code, or in any other law, can be stated as below :-

1. The case shall fall in one of the three categories depending upon the wording of the enactment:-

(i) The statute places the burden of proof of all or some of the ingredients of the offence on the accused himself;
(ii) the special burden placed on the accused does not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients; and
(iii) the special burden relates to an exception, some of the many circumstances required to attract the exception, if proved, affecting the proof of all or some of the ingredients of the offence.
2. In the first two categories the onus lies upon the accused to discharge the special burden, and on failure he can be convicted of the offence provided that the prosecution has succeeded to discharge its general burden of proof, that is, to establish the case beyond any reasonable doubt.
3. In cases falling under the third category inability to discharge the burden of proof shall not, in each and every case, automatically result in the conviction of the accused. The Court shall still have to see how the facts proved affect the proof of the ingredients of the offence. In other words, if on consideration of the total evidence on record a reasonable doubt exists in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused, he shall be entitled to its benefit and hence to acquittal of the main offence even though he had not been in a position to prove the circumstances to bring his case within the exception. This shall be on the ground that the general burden of proof resting on the prosecution was not
discharged.

[40] *AIR 1964 Pat138*
[41] *1962 (2) Cri LJ 135 (Ker)*

4. The burden of proof on the prosecution to establish its case rests from the beginning to the end of the trial and it must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea.
5. The burden placed on the accused is not so onerous as on the prosecution. The prosecution has to prove its case beyond reasonable doubt, but in determining whether the accused has been successful in discharging the onus, the Court shall look into the preponderance of probabilities in the same manner as in a civil proceeding. In other words, the Court shall have to see whether a prudent man would, in the circumstances of the case, act on the supposition that the case falls within the exception or proviso as pleaded by the accused.

93. In this view of the matter the dictum laid down in 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) (Supra) is partly erroneous and requires modification, though the decision, read as a whole is in conformity with the law. The dictum can be modified as below :-

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 offence, 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.

M. H. Beg, J.

94. The question we have to answer, the facts and circumstances leading to its reference to a Full Bench of nine Judges, and the authorities cited by both sides, have been very fully set out in the judgment of my learned brother D. S. Mathur, J. I concur with the views expressed there on a number of points but respectfully differ on others indicated below. I find myself in respectful disagreement also with Oak, C. J. on the questions whether there is some conflict either between the Indian law and English law on burden of proof when the plea of private defense is set up or between the majority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) and the Supreme Court's interpretation of Section 105 of the Indian Evidence Act (hereinafter referred to as the Act also). I have endeavoured to show, in the course of this opinion, that Section 105 of the Act does not depart from the principles of English law of Evidence on the plea of private defense and that the majority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) were meant to answer questions which only arise case of reasonable doubt on the ingredients of an offence even where the exception pleaded is not established or completely proved. These questions did not arise in AIR 1968 Supreme Court 702 at p. 702 and in other cases of the Supreme Court which lay down that an exception pleaded can be completely proved only by a preponderance of probability. Application of different principles due to differing degrees of proof given by each side in different types of cases on facts does not involve a conflict of principles applied which have been taken from English law. For this reason and others, explained below in detail, I respectfully differ from the opinion expressed by my learned brethren who have referred this case to a Full Bench on the ground that decisions of the Supreme Court have "cast a cloud of doubt" on the correctness of the majority view in Parbhoo's case. I concur with the views expressed and conclusions recorded by my learned brethren Broome, Gupta, and Parekh JJ., and also with the conclusions reached by my learned brethren Gyanendra Kumar and Yashoda Nandan, JJ. My learned brother Mukherjee, J. has also dissented from the majority view here which only reaffirms and explains the majority view in Parbhoo's case. I share the majority view here expressed, also by my learned brother D. S. Mathur, J., on this point, that the plea of private defense falls in the category of cases in which proof of the

exception affects ingredients of the offence which the prosecution has to prove beyond reasonable doubt. 1 entirely agree with D. S. Mathur, J., that the majority view in Parbhoo's case correctly states the law, but I am unable to go so far as to hold that the majority actually committed an error of law in stating its conclusion in such a way that its answer does not accord with the reasoning. I prefer to use the word "answer" in place of the word "dictum" (which has a special significance attached to it), used in the question referred to us. I dp not, with great respect, find it possible to go beyond saying that, if the answer has been misunderstood, it may be restated so as to bring out its real meaning more clearly. Before I restate the answer, as I understand it, or, proceed to elaborate my reasons to support the restatement, I will summaries the main contentions of the two sides.

95. The Advocate General of Uttar Pradesh assailed the correctness as well as the validity today of the majority view in Parbhoo's case. He submitted that this view was based on a misapprehension and misapplication of what was decided in Woolmingtons case. According to learned counsel, the principle laid down in Woolmingaton's case did not apply to cases of statutory exceptions, such as those covered by Section 105 of the Act, because Lord Sankey said so clearly there. The majority view in Parbhoo's case, according to the Advocate General, substitutes the negative test of a doubtful plea for the positive statutory requirement of a proved exception laid down by Section 105. It was submitted that a negative test, requiring elimination of reasonable doubts was to be satisfied only by the prosecution, but the accused had to prove a positive case and could not succeed by merely raising doubts that his plea may be true. It was contended that the two burdens, one of the prosecution to prove its case beyond reasonable doubt, and the other of the accused, to prove his plea by a "preponderance of probabilities" had to be kept distinct and apart. It was urged that evidence tendered to discharge each burden had to be viewed separately and not confused. The majority view, in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) (supra) had, according to the Advocate General, wrongly treated the accused's burden as a "minor" one of "bringing his case within an exception" and had then held it to be capable of discharge by mere doubts instead of by credible or acceptable evidence. All proof, according to the Advocate General, has to rest on "preponderance of probabilities' so as to appeal to reason and prudence, but the test adopted by the majority, for judging the accused's plea, was imprudent and unreasonable, and, therefore, illegal. Such a test, it was submitted, was inconsistent with the test of what was "proved" propounded by the Supreme Court in several recent cases, AIR 1960 Supreme Court 7; AIR 1966 Supreme Court 1; AIR 1966 Supreme Court 97; AIR 1966 Supreme Court 1762; AIR 1968 Supreme Court 702. The Advocate General Went so far as to contend that, if the majority view in Parbhoo's case was correct, the weaker the case of an accused, and, therefore, the greater the doubt about it, the brighter would be the prospect of an acquittal before the accused. This amounted, the learned counsel urged, to a direction to acquit accused with doubtful defenses instead of acquitting them only on doubtful prosecution cases against them. It had, he informed us, actually resulted in a number of unjustified acquittals and miscarriages of justice Doubt, the Advocate General argued, could only be an obstacle or impediment in the way of the prosecution but it could not be the

foundation of or substitute for the positive proof required by law. It could not, therefore, be converted into an aid given to the accused to help them to surmount what Section 105 compels them to prove before claiming acquittal. Considerable emphasis was laid on the duty of the Court, under the last part of Section 105, read with Section 4 of the Act, to presume absence of circumstances entitling the accused to the benefit of an exception unless and until the contrary was actually proved. It was contended that, at least so far as rules relating to burden of proof were concerned, the Evidence Act, which was meant to provide a complete and comprehensive code without invoking the aid of any external rules, was exhaustive. It was, therefore, the duty of Courts to enforce the provisions of the Act, instead of making law which, should be left to the legislature.

96. Mr. P. C. Chaturvedi, appearing for the accused, contended that the accused could be presumed to discharge the positive burden of proving an exception pleaded if he succeeds in creating a reasonable doubt by evidence, from whichever side it came, that his plea may be true. According to him, the standard of proof required by a prudent man, laid down by Section 3 of the Act, would be satisfied by a hypothesis. Prudence, according to him, always bases its judgments on reasonable hypothesis and not on certainties which are seldom possible in judging human affairs. And, Section 3 of the Act, learned counsel pointed out, specifically enacts that the prudent man not only could but "ought, under the circumstances of the particular case, to act upon the supposition" that a state of facts exists. His contention was that the duty of the prudent man to act upon a supposition, based no doubt on probabilities, obliges the prudent man to equate reasonable doubt that the accused's case may be covered by an exception with "proof" of the exception in a criminal case. Such an elastic and variable concept of prudence and proof, which differs in its application from case to case, was implicit, according to learned counsel, in Section 3 of the Act itself. In criminal cases, involving deprivations of life and liberty, much depended on oral testimony which may be defective or perjured. Therefore, in order to avoid the lurking risks of grave injustice, it was necessary, according to learned counsel, not to unduly limit the scope of the principle of benefit of doubt. Learned counsel went to the extent of asking us to countenance even a fiction, if need be, so as to meet or to repeal the obligatory presumption under Section 105 and thus to remove what the learned counsel tried to depict as a possible impediment in the way of justice, equity, and prudence. The learned counsel invited us to consider the consequences in cases where evidence was so equibalanced, on a disputed question of possession of property or on the question whether one or the other party was the aggressor in a fight, that the astutest judge could not possibly determine which of two rival versions was correct Learned counsel urged that, on the State's interpretation, both sides will have to be convicted in such cases as neither side could prove its defense case positively by a "preponderance of probabilities". Lastly, the learned counsel argued that Section 6 of the Indian Penal Code, read with Section 221 (5), Criminal Procedure Code, placed the burden upon the prosecution of negativing the exceptions pleaded by the accused. This conclusion, according to learned counsel, necessarily flows from the proposition that the absence of an exception was an ingredient of each offence defined by the Indian Penal Code. The prosecution's primary and unalterable duty to

dispel all reasonable doubt in a criminal case must, it was contended, extend to removing such doubts arising from anything whatsoever in the case which Courts could properly and legally consider.

97. Much unnecessary confusion, which has gathered round the relevant provisions of the Act, will vanish if we adopt the time honored mode of construing statutes formulated in the form of rules as far back as 1584 in Heydon's case, (1584) 3 Co Rep 7a so as to remove ambiguities by examining the mischief meant to be remedied. These rules were adopted by the Supreme Court and cited with approval in *Bengal Immunity Co. Ltd. v. State of Bihar*[42], In Craies' "Statute Law" (5th Ed. p. 91), it was observed: "These rules are still in full force and effect, with the addition that regard must now be had not only to the common law, but also to prior legislation and to the judicial interpretation thereof." Fletcher Moulton, L. J. observed in *Macmillan v. Dent*[43],

> "In order properly to Interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

98. Lindley, M. R., *in Re Mayfair Property Co*[44]*.,* said :-

> "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order properly to Interpret the statute in question."

99. In *Shivanarayan Kabra v. State of Madras*[45], also the Supreme Court referred to these rules. It held that, in construing the section of an Act and determining its true scope, "it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the Statute for curing the mischief."

100. The concepts of 'proved', 'disproved', and 'not proved,' defined in alluringly

[42] AIR 1955 SC 661 at p. 674

[43] 1907-1 Ch 107 at pp. 117 at p. 120

[44] 1898-2 Ch 28 at p. 35

[45] AIR 1967 SC 986 at p. 989

simple terms in the Act, compress a great deal of judicial wisdom with history and processes of evolution and development behind them which have not yet ended. The term 'Burden of proof is not defined in the Act and cannot be fully understood without an exposition of its place and meaning in our procedural law as a whole. Nor an adequate understanding of the import of these basic concepts, even when they are Incorporated in a comprehensive code, we have to necessarily examine their sources the context in which they were given statutory form, the purposes they were designed to serve, and the functions they actually fulfil. Cut off from these

moorings they may become ugly caricatures of that justice which all law is meant to serve. It is obvious that a mechanical interpretation with the help of a dictionary and rules of grammar, found to be inadequate on several occasions by our Supreme Court (e.g. *Deputy Custodian Evacuee Property New Delhi v. Official Receiver of the Estate of Daulat Ram Surana*[46], *Kanwar Singh v. Delhi Administration*[47], *R. L. Arora v. State of U. P.*, [48]*State of U. P. v. C. Tobit.*[49]), may not suffice here also.

101. Our Evidence Act is the first of the three comprehensive codifications of our adjectival or procedural laws introduced with the object of enabling courts to correctly ascertain those facts which determine rights and liabilities defined by the substantive laws. It provides for the adduction of evidence declared relevant and in a logical order conformably with rules of natural justice and reason so that truth may be brought out so far as possible and not obscured. Its purpose was "to consolidate, define, and amend the law of Evidence" so that inadequacies and uncertainties in this branch of our law may be removed. It is no secret that this was sought to be accomplished by basing the Act on principles and rules evolved by the judge-made Anglo Saxon law of evidence with slight modifications but without departing from its basic norms. Therefore, to these principles and rules we have to turn to find out the meanings of ambiguous expressions.

102. We find that the term "Burden of Proof." as used in English law, both at the time when Sir James Fitzjames Stephen drafted the Act and also today, carries within it two meanings. I may quote from Phipson on Evidence (10th ed., at page 43) to indicate the two senses:-

> "As applied to judicial proceedings the phrase 'burden of proof has two distinct and frequently confused meanings: (1) the burden of proof as a matter of law and pleading-the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of introducing evidence." Again, we find here (p. 45):
> "It is in the second sense that the term is more generally used, and must be applied in the following pages; and while the burden of proof in the first sense is always stable, the burden of proof in the second sense may shift constantly according as one scale of evidence or the other preponderates."

103. Whenever the law places a burden of proof upon a party a presumption operates

[46]AIR 1965 SC 951 at p. 957

[47]AIR 1965 SC 871 at p. 875

[48] AIR 1964 SC 1230 at p. 1237

[49]AIR 1958 SC 414

against it. Hence, burdens of proof and presumptions have to be considered together. It has been said that a rebuttable presumption always covers a gap in evidence, but the gap, and together with it, the presumption will disappear as soon as there is credible evidence to fill the gap. The extent of the gap, in the eye of law, will vary with the nature of the presumption. The burden of establishing a plea connotes a bigger gap requiring more acceptable evidence to fill it than the burden of removing a presumption that no circumstances whatsoever exist to support the plea. As

has been often pointed out, when there is ample evidence from both sides, the fate of the case is no longer determined by presumptions or burden of proof but by a careful selection of the correct version, based no doubt on preponderance of probabilities which has to be so compulsive or overwhelming in the case of a choice in favor of a conviction as to remove all reasonable doubt. In other words, the importance of burdens of proof and presumptions vanishes in the face of evidence given by both sides.' They may, however, become decisive again in cases where evidence is equibalanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

104. In Phipson's Evidence (10th ed. p. 838), it is pointed out: "The chief function of a rebuttable presumption of law is to determine upon whom the burden of proof rests, using that term in the sense of adducing evidence." Wigmore, the celebrated American authority of the law of Evidence, dealing with the "Legal Effect of a Presumption" (See, 3rd ed., Vol. IX, p. 289) explains:-

> "...........It must be kept in mind that the peculiar effect of a 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, and the case is in the jury's hands free from any rule." Again, he observed (3rd ed., Vol. IX, p. 230): "It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary. For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of producing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances. This much is a plain consequence in our mode of jury trial; and the fallacy has arisen through attempting to follow the ancient continental phraseology, which grew up under the quantitative system of evidence, fixing artificial rules for the judge's measurement of proof."

105. It is true that the rules of evidence indicated above were evolved in the course of development of a mode of trial in which the judge gave guidance on questions of law and the jury pronounced its verdicts on questions of fact. Nevertheless, when these very guiding principles were sought to be reduced to the form of a code, the basic principles could not be deemed to be abandoned or departed from without clear words to the contrary. In fact, it is not

possible to appreciate the true meaning of a number of provisions of the Act, including Section 105, without exploring the law contained in the sources of the codification. If, however, the above mentioned expositions are kept in view, it becomes quite easy to interpret Section 105 of the Act which covers the burden of establishing as well as the duty of introducing evidence of exceptions set up by the accused. It becomes clear that the obligation of the Court to presume absence of circumstances supporting a plea is meant to operate only initially. The presumption which the Court is obliged to make vanishes when any circumstances supporting the exception are proved. On the other hand, the duty or the burden of the accused, dealt with in the first part of Section 105, to establish the exception pleaded may remain even after the initial presumption against him is removed as a result of evidence of either side. The obligation of the Court to presume initially absence of circumstances to support an exception cannot be used to eliminate or wipe out facts actually proved from either side even though they are not sufficient to establish an exception. The circumstances actually proved, even though falling short of proving the plea of the accused by a preponderance of evidence will, nevertheless, free the case from the initial presumption that no circumstances at all exist to support the exception pleaded. The case will then be decided on the whole evidence. This is all that Section 105, read with other provisions of the Act. clearly means.

106. If, for example, an accused "proves" infliction of injuries on him by the complainant in the course of the occurrence which is the subject-matter of the charge, he certainly proves some of the circumstances to support a plea of self-defense. The obligatory initial presumption against him is removed. Nevertheless, he may be convicted if the prosecution evidence proves that these injuries were indubitably caused in the exercise of a right of private defense by the complainant. But, his conviction would not be the result of any presumption under the last part of Section 105. It would follow from the superior proof given by the prosecution either direct or circumstantial or both. On the other hand, added to injuries on the person of the accused, proved to have been caused by the complainant . during the occurrence, the accused may succeed in proving, even from such circumstances as an attempt of the prosecution to conceal these injuries, that there is a doubt about the veracity of the prosecution version itself and that his plea of self-defense, although not positively established, may reasonably be true. In such a case, the prosecution could not use the presumption contained in the last part of Section 105 to secure a conviction. No doubt, the prosecution will fail, in such a case, because it has failed to prove its own case beyond reasonable doubt. But, the doubt it has failed to eliminate would have been introduced by proved facts relied upon by the accused to establish the plea of an exception. The facts relied upon for proving an exception could not be automatically equated with facts disproved or disentitle the accused from getting the benefit of an exception simply because he could not fully prove, by a "preponderance of evidence," the exception pleaded. A plea taken but left in the region of "not proved" by the evidence on record may be enough, on a criminal charge, for a bare acquittal provided the doubt introduced by some proved facts and circumstances, displacing the initial obligatory presumption, is strong enough to reasonably shake the moral conviction of guilt of the accused on the charge leveled against him. This seems to me to be the line of reasoning

underlying the majority view in Parbhoo's case. It seems to be both practical and just. It accords with very firmly established principles of proof and burden of proof applicable to criminal trials in this country as well as with the provisions of the Act read as a whole. I confess that I fail to see any flaw in it.
107. The contrary view would erect the initial presumption under Section 105 into an artificial barrier against the entry of a reasonable doubt into the prosecution case even when the accused, though failing to fully prove an exception, actually creates a reasonable doubt. Not only is it humanly impossible for a judge to keep evidence confined in two separate watertight compartments of his mind, but it would also be illegal for him to do so. Apart from being much too unrealistic a view, this would restrict the powers of the Court to judge, on all the materials placed before it, whether the prosecution has proved its case beyond reasonable doubt or not. It would equate relevant and proved facts with what is either irrelevant and inadmissible or disproved. Such a view would clearly infringe Section 3, and, indirectly, also provisions relating to relevancy by reducing even facts duly proved as relevant to the same positions as those which are irrelevant and excluded. Such a course seems warranted neither by law nor by any canon of justice or expediency.

108. In Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) Bajpai, J., held that the fixed or stable burden of proof is found in Sections 101 and 102 of the Evidence Act, whereas Sections 103 and 105 of the Act contain the unstable burden which shifts in the course of the trial "as one scale of evidence preponderates over the other." In other words, preponderance of evidence was the test to be used in criminal as well as in civil cases for judging the veracity of a case, the only distinction being that such preponderance has to be great or overwhelming enough to eliminate reasonable doubt to warrant conviction in a criminal trial. Again, Mulla, J., who expressed the opinion, in Parbhoo's case, that the principle of reasonable doubt may not be found Incorporated "in its entirety" in Sections 3 and 101 of the Act, relied on Sir John Woodroffe's work on Evidence to hold that the test which the prosecution had to satisfy to secure conviction by proving its case beyond reasonable doubt was higher than the ordinary criterion of "preponderance of probability" contained in Section 3. Even this expression of an individual opinion by Mulla, J. implied that all parties, other than prosecutors, were required to satisfy the test of "preponderance of probability" for proving their pleas or cases. To hold that the special burden of the prosecution to prove its case beyond reasonable doubt is higher than the burden which lies upon a party in a civil proceeding or upon an accused under Section 105 of the Act does not mean that the accused could establish his own plea completely by anything less than a "preponderance of probabilities." Whenever the Supreme Court had held that the burden of the accused under Section 105 was discharged on a balancing of probabilities, it had referred to a full discharge of the burden; but, that was not the type of case under consideration in Parbhoo's case.

109. Again, to hold that, even if the accused failed to prove the plea fully, it was possible that he may yet succeed in shaking the foundations of the prosecution case and obtain an acquittal on a reasonable doubt is not to lessen the burden of what may be called a "clean acquittal." There is a

difference between a complete exoneration, which is only possible when an accused turns the balance of probability in his favour, and a bare benefit of doubt, which is not entirely devoid of harmful consequences for the accused. The Supreme Court had also held that Section 105 did not prevent the Court from giving the benefit of doubt altogether to an accused pleading an exception, or in other words, Section 105 makes possible both kinds of acquittal-one by proving his plea fully and another by raising genuine doubt in the case. Ismail, J. observed in Parbhoo's case, that the difficulty to be resolved arose only in those limited number of cases where evidence in the case "falls short of proof but creates a reasonable doubt in the mind of the Court whether the accused person is or is not entitled to the benefit of the exception." He pointed out that the question before the Full Bench was whether in such a case, which was before the Court, the Court had no option except to convict. The majority of their Lordships rightly held, just as the Supreme Court later held, that the Court could not be expected to convict in such a case. It is not permissible, in my opinion, to extend the ratio decidendi of Parbhoo's case beyond what was decided there.

110. In Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) the learned Chief Justice spoke of the accused's "minor burden of bringing his case within the exception or proviso relied upon by him." Ismail, J. considered that the decision on the question of self-defense would only be a "decision upon one of the issues in the case." The Advocate General contended that this approach to the plea of the accused was itself erroneous inasmuch as it gave the impression that the accused had to prove something less than a preponderance of probabilities to establish his case. All that seems to have meant, In describing the burden of the accused as "minor" compared with that of the prosecution, was to contrast it with the heavier burden of the prosecution to eliminate reasonable doubts which may creep in about the veracity of the prosecution version. There seemed to be no intention to reduce the burden of the accused below what the law required. On the other hand, Bajpai, J. took some pains to explain that the nature of the doubt "as to the plea of the right of private defense, which was before the Court, in Parbhoo's case, was that a "doubt had been cast in connection with the entire case." He emphasized that it had to be a reasonable doubt which "reacts on the whole case." He made it clear that the doubt he had in mind was one which "pervades the whole case." In fact, the learned Judge indicated that it would be wrong to assume that the doubt before the Court did not affect "the ingredients of the offence with which the accused has been charged" (the words used by him are italicized here " "). In other words, the nature of the doubt contemplated or assumed to exist for the purposes of answering the question before their Lordships in that case was one which affected the ingredients of the offence.

111. In fact, Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) was not concerned with the quantum of credible evidence in support of the plea of the accused which could "infect", if I may use that word, the whole prosecution case and stamp it with doubt, even though it falls short of fully establishing the plea of private defense. The question framed in Prabhoo's case proceeded on the assumption that the evidence given by the accused was credible with regard to

some of the circumstances proved in support of the plea of private defense and threw a reasonable doubt on an ingredient of an offence even if it did not establish the plea of private defense by a preponderance of probabilities. The answers given in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 were based upon that assumption. It may be mentioned here that in each of the two Rangoon cases, which the majority purported "to follow in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 the plea of accused was quite substantially supported on facts. In *Emperor v. U Damapala*[50], the first question framed, which is relevant here, indicated that the exception was so well supported that the Court could be in doubt whether the exception itself was proved or not. In *Nga Thein v. The King*[51], the facts found against the victim and in favor of the accused were quite substantial. It is in cases of this sort that genuine doubts arise.

112. There is a difference between a flimsy or fantastic plea which is to be rejected altogether and a reasonable but incompletely proved plea which casts a genuine doubt on the prosecution version so that it indirectly succeeds. Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) was not meant to afford any guidance on what reasonable doubt itself means. 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 to "separate the chaff from the gram". 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.

113. I may mention here that in two reported cases I have tried to point out that Courts must reach, whenever possible, definite conclusions by a careful analysis of the evidence and not take shelter behind a supposed uncertainty created by the facts appraised from a preconceived angle. Those cases are: *Bharosa v. State*[52], which was a case resulting in two deaths, one on each side, from a fight over a disputed possession of a field, which ended in a conviction; and, *Mangat v. State*[53], where there were injuries on both sides, but the case ended in a conviction on the finding that the aggression came from the side of the accused. I doubt whether what was laid down quite correctly but in rather general terms by the majority in Parbhoo's case, 1941 All LJ 619 : AIR 1941 AU 402 (FB) has been really widely misunderstood. If any case of a real misunderstanding of the law by a trial Court occurs, it can be brought to the notice of this Court by appropriate proceedings taken by the State or by the complainant.

114. Perhaps the most Important aspect of Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) which learned counsel for both sides seem to have assumed that we will see for ourselves, was stated by Iqbal Ahmad, C. J., at the outset when it was indicated that the real question before the Court in that case was whether "the evidence produced by the accused persons, even though falling short of proving affirmatively the existence of the circumstances bringing the case within the exception pleaded by him, can be utilized as part of the entire evidence in the case for the purpose of showing that a reasonable doubt exists as to his guilt." The learned Chief Justice thus stated the prosecution's submission on this question. The argument

is that, unless the accused succeeds in proving that his case comes within the exception or proviso pleaded by him, the evidence led by him must be totally

[50]AIR 1937 Ran 83 (FB) [52]AIR 1965 All 417

[51]AIR 1941 Ran 175 [53] AIR 1967 All 204

discarded and the Court must proceed on the definite supposition that "there was an

entire absence of the 'exception' or 'proviso' relied upon by the accused." It seems to me that on this question, involving a correct interpretation of the obligatory presumption at the end of Section 105, there is no escape from the answer given by the majority in Parbhoo's case unless the accused is to be denied the benefit of doubt altogether when he pleads an exception. Any answer other than the one given by the majority in Parbhoo's case will involve a clear (Sic) with propositions enunciated by the Supreme Court in Nanavati's case, AIR 1962 Supreme Court 605 and Dahyabhai's case, AIR 1964 Supreme Court 1563 and Bhikari's case, AIR 1966 Supreme Court 1 discussed by me below, which necessarily mean that the whole evidence must determine the result.

115. Iqbal Ahmad, C. J., in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) also referred to the argument of Sir Wazir Hasan that Section 6 of the Indian Penal Code provided a part of the definition of every offence. This section reads as follows:

> "Throughout this Code every definition of an offence, every penal provision, every illustration of every such definition or penal provisions, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions; though exceptions are not repeated hi such definition, penal provision, or illustration."

The learned Chief Justice held that, although this conception was correct, yet, Section 105 of the Act would become ineffective if the further argument, built on it was accepted that Section 6, Indian Penal Code, imposed automatically a burden of disproving the existence of exceptions upon the prosecution. Thus, the prosecution was not required to lead evidence to prove that an accused person was sane. Even in the absence of any provision, such as Section 105 of the Act, this would be the position. The ordinary presumption would be that every individual concerned in a case is sane, unless and until the contrary is proved, or, at least, until the validity of the presumption is shaken. Similarly, every person inflicting an injury on another would be presumed to have done so with intent to cause it without any lawful excuse unless a justification, such as the exercise of a right of private defense, was either fully proved or its existence could be quite reasonably conceived on facts proved. Section 103 of the Evidence Act was there to place the burden of proving special facts to sustain the plea of an exception upon the accused. There seemed, therefore, no particular reason for Section 105 in the Act unless the reasoning which appealed to the learned Chief Justice, that it effectively meets an argument based on Section 6, Indian Penal Code, was present in the minds of the framers of Section 105 also.

116. Section 105 of the Act specifically refers to the provisions of the Indian Penal Code which were before the draftsman. It must be presumed that the Legislature was fully aware of Section 6, Indian Penal Code. Therefore, Section 105 of the Act seemed necessary in order to meet a possible construction which was not intended. In other words. Section 105 serves the purpose sometimes served by a proviso (See: Maxwell's "interpretation of Statutes" llth Edn. page 156). Of course, it could be looked upon as analogous to a proviso only if we view Section 6, Indian Penal Code and Section 105 of the Act together. It is certainly difficult to see the purpose of Section 105 of the Act unless it is viewed in the context of Section 6, Indian Penal Code.

117. The argument that some negative burden may rest upon the prosecution seems to have been accepted by the Advocate General by implication when he conceded that the prosecution's burden extends to eliminating doubts which may arise from the evidence on the record. Section 105 of the Act could have been enacted to repel the more ambitious contention, which was actually advanced in Parbhoo's case by Sir Wazir Hasan and before us by Mr. P. C. Chaturvedi, that the prosecution must actually disprove as a part of even its initial duty, all possible exceptions which may be set up by the accused because Section 6 of the Indian Penal Code annexes absence of exceptions to every definition of an offence. At least, its utility and effect do not seem to extend further than repelling such contentions because all else it enacts seems already covered by Section 103 of the Act. And, as we know, there is a presumption against redundancy.

118. The Advocate General repeated the argument accepted by the minority in Parbhoo's case, 1941 All LJ 619 : (AIR 1941 Allahabad 402) (FB) that English law of Evidence and English authorities could not be used for interpreting the provisions of our Evidence Act. Learned counsel tried to invoke the aid of Section 2 of the Act. He contended that its repeal in 1938 did not alter the position. Here again, I think we must apply the Mischief Rule in order to appreciate the effect of the repealed Section 2 of the Act. It appears to me that the repealed section was directed only against rules of evidence which prevailed in this country independently of statutory authority. It did not prevent an examination of the sources upon which the codification contained in the Act is based when there is a doubt about the meaning of any particular provision. It certainly did not bar the adoption of correct canons of construction in interpreting the provisions of the Act.

119. The extent to which English authorities could be used in interpreting provisions of those enactments which are largely based on English law has been indicated on a number of occasions by Courts in this country. In *State of Punjab v. S. S. Singh*[54], their Lordships of the Supreme Court who took the majority as well as the minority views did refer quite extensively to the English sources and authorities in order to determine the correct meaning and scope of some of the provisions of the Evidence Act It is true that the majority, after referring to an argument of a learned counsel, based upon the supposed intention of Sir James Fitzjames Stephen in drafting

provisions of Sections 123 and 162 of the Act, observed that the learned counsel "fairly conceded that recourse to extrinsic aid in interpreting the statutory provisions would be justified within well recognised limits; and that primarily the effect of statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself." The majority did not, however, expressly dissent from a somewhat different proposition stated by Subba Rao, J., when his Lordship said: "The

[54]AIR 1961 SC 493

dictionary meanings do not help to decide the content of the said words. The content of the said words, therefore, can be gathered only from the history of the provisions. It has been acknowledged generally, with some exceptions, that the Indian Evidence Act was intended to and did in fact consolidate the English law of Evidence. It has been often stated with justification that Sir James Stephen has attempted to crystallize the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English Common Law for ascertaining their true meaning". It is true that, where provisions of the Act are clear and unambiguous, no recourse to extrinsic matter, even if it consists of the sources of the codification, would be permissible. But, the position before us is, as already indicated, that it is not possible to fully bring out the meaning of Section 105 of the Act itself without reference to the principles found in the sources of the Act contained in English Law. At least, the aspect of Section 105 which was raised and considered in Parbhoo's case made it necessary to go to those sources.

120. The majority of the judges deciding Parbhoo's case did attach considerable importance to what was held by the House of Lords in Woolmington's case, 1935 AC 462 (Supra). But, they also examined the meanings of the words used in the relevant provisions of the Act to determine the scope of the burden of proof resting upon the accused under Section 105 of the Act. The mere fact that they sought support from the basic principles laid down in Woolmington's case, 1935 AC 462 could not make their interpretation incorrect. It only added weight to the view taken by their Lordships, perhaps, it would have been better to refer to Woolmington's case after interpreting the language used in the relevant provisions of the Act. This, however, does not affect the correctness of the view taken by the majority. Even Collister, J., expressing the minority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) turned to the statement of the law in Foster's "Crown Laws", for discovering a possible source or basis for Section 105 of our Act Allsop, J., seems to have held the view that Section 2 of the Evidence Act (no one seems to have pointed out that it was repealed then) prohibited even use of English authorities. Braund, J., took the view: "The law of England is one thing and the law of India another". If one may say so, with very great respect, the erroneous assumption which seemed to underlie the minority view in Parbhoo's case was that the law in India must be different from that in England on questions of burdens of proof of the prosecution and the accused and that the twain did not meet here. This assumption seems to have stirred the judicial instinct of that great Judge of this Court on the Criminal side, Tej Narain Mulla, J., so much that he declared it to be

"fundamentally wrong".

121. The English law on burdens of establishing cases in criminal trials is thus stated in Phipson's Evidence (10th Edn., paragraph 101. page 49): "Generally in criminal cases (unless otherwise directed by statute) the presumption of innocence casts on the prosecutor the burden of proving every ingredient of an offence, even though negative averments be involved therein. Thus, in cases of murder the burden of proving death as a result of the voluntary act of the accused and malice on his part is on the prosecution ....And the prosecution is bound to negative any exception favorable to the defendant which is engrafted in the statutory description of the offence though not one contained in a separate clause".
(Vide: *Roberts v. Humphreys*[55], *R. v. James*[56], *R. V. Audley*[57] ,
122. If this was the state of law in England, round about 1872, as it appears from (1873) 8 QB 483 (supra), decided in 1873, it will be evident why Section 105 of our Evidence Act, passed in 1872, became necessary. Although, the exceptions contained in the Indian Penal Code, to which Section 105 of the Act refers, are contained in separate sections, yet, the result of Section 6 of the Indian Penal Code could well be said to be that the exceptions were engrafted in every definition of an offence as though they formed parts of each section defining an offence. The language of Section 6, Indian Penal Code is quite explicit. Therefore, Section 105 of the Act became necessary so as to make it clear that, notwithstanding such a statutory provision, the ordinary rule of English law of Evidence, that an exception found in a separate clause or section has to be established by the party claiming its benefit, will apply in this country also. In other words, as I see it, Section 105 of the Act was introduced not in order to depart from but to make our law conform to the norms of English law of evidence on the subject.
123. The basic or primary burden of the prosecution is stated and explained again in Phipson's Evidence (10th Ed. paragraph 101, page 49) as follows:

> "The prosecution must prove the guilt of the accused and he is under no obligation to prove his innocence. It is sufficient for him to raise a reasonable doubt as to his guilt. Thus, where an act is criminal or the offence is more serious, if it is done with a particular intent, the burden of proving that intent, in the absence of statutory provision, rests throughout on the prosecution. If the evidence proves that the accused did an act the natural consequence of which is a certain result, the jury is entitled to find that the act was done with the intention of bringing about that result. If on a review of all the evidence, they are left in doubt, then the prosecution have not discharged that burden. But generally facts in confession and avoidance are upon him, e.g., insanity or diminished responsibility, and the prosecution ought not to assume that burden".

124. This statement of the law in England seems to me to be applicable with equal force in this country with this difference that instead of the jury Courts generally decide questions of fact also here, and the plea of insanity and other exceptions seem to stand on the same footing when the ingredients of an offence overlap and conflict with those of the exceptions.

125. The burdens of the prosecution and of the accused were thus contrasted in Phipson's Evidence (10th Ed., paragraph 102 at page 50):

> "When the burden of the issue is on the prosecution, the case must, as we have seen, be proved beyond a reasonable doubt; though a prima facie case made by the prosecution and not rebutted by the accused may often amount to this, and suffice for conviction. When, however, the burden of an issue is upon the accused, he is not in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a preponderance of probability, for then the burden is shifted to the prosecution* which has still to discharge its original onus that never shifts, i.e.,

[55](1873) 8 QB 483
[56]*(1902) 1 KB 540*
[57]*(1907) 1 KB 383*

> that of establishing on the whole case, guilt beyond a reasonable doubt".

The cases relied upon for this statement of English law were: (1942) AC 1; (1935) AC 462; *R. v. Stoodart*[58], *R. v. Schama*[59], *R. v. Cohen*[60], *R. v. Dunbar*[61],

126. The cases cited above in Phipson's Evidence to support the statement of the English law on the subject, include those which deal principally with the discharge of his full burden by an accused (e.g. 1943-1 KB 607 and 1958-1 QB 1) establishing a "preponderance of probability" in his favour as well as those (e.g. 1935 AC 462) which revolve round the prosecution's failure to discharge its burden of proving beyond reasonable doubt. To avoid confusion, it is necessary to bring out the difference clearly not only between the prosecution's higher onus of proving its case beyond reasonable doubt and the lower burden of the accused to prove an exception by a "preponderance of probability" only, but also between a complete proof and a reasonable doubt as different conclusions. Again, the process of balancing probabilities prudently, which is common to all cases, and the results of that process, which may differ from case to case, must also be clearly differentiated.

127. While the process of balancing probabilities is common for all cases, the burdens of the parties to establish their respective cases in a criminal trial are really only two in kind; the higher one of the prosecution to establish its case beyond reasonable doubt and the lower one of the accused to prove his plea by a mere preponderance of probability. As, however, the conclusions which can emerge from the process of assessing evidence include a state of reasonable doubt about the existence of an exception pleaded by the accused, which necessarily Involves the failure of the prosecution to discharge its burden of eliminating reasonable doubt when an ingredient of an offence involved, the result, viewed from the point of view of the practical or actual, as distinguished from the legally imposed, burden of the accused, is sometimes put as it is in Phipson's Evidence where it is stated that it is "enough" for the accused to raise a reable doubt as to his guilt. This mode describing the result of the prosecution's burden to eliminate reasonable

doubt about the guilt of the accused has Led to an attempt to reduce the legally Imposed burden of proving an exception to tile lower level of a burden of creating reasonable doubt only and to equate reasonable doubt with complete proof of an exception. On the other hand, the duty imposed by law upon the accused to prove the exception pleaded by him, by a "preponderance of probability", is sought to be used to reduce so much the prosecution's undeniable burden to eliminate reasonable doubt as to eliminate the accused's right to the benefit of doubt itself. In my opinion, neither should "preponderance of probability" be confounded with and reduced to the level of a reasonable doubt only, nor can the principle of reasonable doubt be eliminated altogether in a criminal trial. Each of the two kinds of conclusion-proof of an exception by a preponderance of probability and reasonable doubt about guilt-reflects a different situation. As soon as a Court finds one of these two types of conclusion to be the correct one to reach in a case the other is necessarily excluded.

[58](1909) 25 TLR 612
[59](1914) 84 LJKB 396; (1943) KB 607
[60](1951) 1 KB 506
[61](1958) 1 QB 1

128. The legal position of a state of reasonable doubt may be viewed and stated from two opposite angles. One may recognise, in a realistic fashion, thai although the law prescribes only the higher burden of the prosecution to prove its case beyond reasonable doubt and the accused's lower burden of proving his plea by a preponderance of probability only, yet, there is, in practice, a still lower burden of creating reasonable doubt about the accused's guilt and that an accused can obtain an acquittal by statisfying this lower burden too in practice. The objection to stating the law in this fashion is that it looks like introducing a new type of burden of proof, although, it may be said, in defense of such a statement of the law, that it only recognises what is true. Alternatively, one may say that the right of the accused to obtain the benefit of a reasonable doubt is the necessary outcome and counterpart of the prosecution's undeniable duty to establish its case beyond reasonable doubt and that this right is available to the accused even if he fails to discharge his own duty to prove fully the exception pleaded. This technically more correct way of stating the law was indicated by Woolmington's case and adopted by the majority in Parbhoo's case, and, after that, by the Supreme Court. It seems to me that so long as the accused's legal duty to prove his plea fully as well as his equally clear legal right to obtain the benefit of reasonable doubt, upon a consideration of the whole evidence, on an ingredient of an offence, are recognized, a mere difference of mode in describing the position from two different angles, is an immaterial matter of form only. Even if the latter form appears somewhat artificial, it must be preferred after its adoption by the Supreme Court.

129. The phrase "preponderance of probability" used in Phipson's Evidence to describe the lower burden of the accused for proving his plea and to contrast it with the higher onus of the prosecution to prove its case beyond reasonable doubt, has been employed for this very purpose by their Lordships of the Supreme Court, as indicated below. A passage was also cited by Mulla, J., in Parbhoo's case, from Woodroffe and Amir Ali's Law of Evidence, where the term 'proved', as used in Section 3 of the Act, was explained as implying "a mere preponderance of probability", when applied to civil cases. My learned brother Gupta has informed me that, in the

separate judgment of my learned brethren Broome, Gupta, and Parekh, JJ., the use of this expression was deliberately avoided as it is liable to be misunderstood. While I respectfully agree that such an expression can be misunderstood, I prefer to explain it, as I understand it, rather than avoid using it. I find that this expression is too well established and recognised, after the repeated use by their lordships of the Supreme Court, for Courts in this country to be able to eschew it now. As Oak, C. J., has pointed out, the expression contains, according to the Advocate General, the only test of proof when an accused pleads an exception. The use of this expression by the Supreme Court, in circumstances indicated below, could be said to be the main reason for this reference to a Full Bench. This expression has also given rise to some differences of opinion between learned judges of this Court. Therefore, it seems to me to be very necessary to explain its meaning.

130. "Preponderance", literally interpreted, means nothing more than an outweighing in the process of balancing however slight may be the tilt of the balance or the preponderance. I do not find sufficient grounds for holding that the word has been used in any other sense whenever it has been used either by our Supreme Court or by English Courts or by commentators such as Phipson or Sir John Woodroffe. 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 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. "Complete" proof for the prosecution cannot fall short of elimination of reasonable doubt about the ingredients of an offence. If one is clear about the meanings of the terms used no misapprehensions need arise.

131. It was contended by the Advocate General that the English Law had been misunderstood by the majority in Parbhoo's case inasmuch as Lord Sankey laid down in Woolmington's case (supra) that the principle of benefit of doubt was subjected to statutory exceptions. It is true that in Woolmington's case, the House of Lords was not interpreting any statutory exception to the principle, described as "a golden thread" always to be seen "throughout the web of English criminal law", that "it is the duty of the prosecution to prove the prisoner's guilt". But, their Lordships were dealing with a general statement of the law, found in Sir Michael Foster's "Crown Law", which had been repeated in different forms in Stephen's "Digest of Criminal Law", in Archbold's "Criminal Pleading, Evidence, and Practice", in Russel on "Crimes", and in Halsbury's "Laws of England". This statement of the law resembled what is to be found in Section 105 of our Evidence Act so much that Collister, J., in Parbhoo's case, almost took the view that Section 105 of the Act was meant to reproduce it. With great respect, I find some

conflict between this view expressed by Collister, J., and a passage in an earlier part of his judgment where the learned Judge said that he could find no rule of English law "which exactly corresponds with the provisions of Section 105 and certain other sections". The correspondence may not be exact, but it was close enough to make Woolmington's case, 1935 AC 462 relevant. Moreover, a glance at (1873) 8 QB 483 will indicate that, when offences were created by statute, the burden of proving exceptions was placed on the accused even in England under statutory provisions meant for clarifying the position. In Woolmington's case, however, the effect of Common Law rules of ordinary presumptions against the accused, arising from proof of commission of conscious acts, on the principle of Benefit of Doubt was explained. This was done in the context of the requirement to prove mens rea, still conventionally spoken of as "malice aforethought", as an ingredient of the offence of murder in England and of a charge to the jury which could be vitiated by a misplaced emphasis. Nevertheless, the principles stated and explained there were general and basic.

132. Section 105 of the Act is really a part of a general statement of principles derived from English Common Law rules such as those considered in Woolmington's case. It does not contain a statutory exception to any general principle. It lays down general rules for cases in which accused plead exceptions. It merely codifies, in careful and concise language, certain general rules of presumptions and burdens of proof for such cases, just as Sir Michael Foster attempted to state them in a somewhat different language. The view taken by Lord Sankey about such statements of the rules found in English law was: "Rather do I think they simply refer to stages in the trial of a case". In other words, they are more akin to rules of pleading than to rules determining quantum of proof. Lord Sankey pointed out that rules of Evidence found in earlier cases and statements of law are confused. He observed: "It was only later that Courts began to discuss such things as presumption and onus". He also said: "The word onus is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving and sometimes the conclusion." When Lord Sankey referred to a "statutory exception", he did not mean such general propositions or principles only, lying partly in the region of rules of pleading and partly of rules of evidence, which were enacted in Section 105 of the Act What was meant by Lord Sankey, when he spoke of a "statutory exception , was a real exception to the general principle of a full burden of proof upon the prosecution. Such an exception, which constitutes a departure from the general principle, was considered in (1943) 1 KB 607 where a statutory presumption of corrupt motive arose, "unless the contrary is proved", from a receipt by the accused of a gift or other consideration from a contractor. This presumption relieved the prosecution of a part of its duty. But, Section 105 of the Act has no such object or effect.

133. If there could be any doubt whether Section 105 conflicts with or subjects the general principle contained in Section 101 of the Act to an exception, so as to dimmish the prosecution's burden of proof, the very definite pronouncement of our Supreme Court in AIR 1962 Supreme Court 605 has cleared it completely. It was held there: "The alleged conflict between the general burden which lias 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." Woolmington's ease was used here to show identity of principles applied, between our law and English law, in cases in which exceptions are pleaded. Hence, the Supreme Court declared that the law in India was the same as that in England on the general principles found in Woolmington's case.

134. Cases dealing with a real statutory exception which does modify the operation of the principle that the prosecution must prove all the ingredients of the offence with which the accused is charged do not help us in interpreting Section 105 of the Act. For example, in AIR 1960 Supreme Court 7 the character of a presumption of guilt under Section 5 of the Prevention of Corruption Act (1947) from proof of certain facts, "unless the contrary is proved", was considered. 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 upon the prosecution to prove all the ingredients of the offence charged and that the burden never shifts on to the accused to disprove his guilt." AIR 1966 Supreme Court 1762 is also a Case of a presumption under Section 4 of Prevention of Corruption Act where the accused was obliged, after proof by the prosecution of facts sufficient to raise the presumption, to disprove his guilt by leading evidence which could, by a preponderance of probabilities, establish the defense case. These are cases of presumptions of guilt or of true statutory exceptions to the principle of a full burden of proof upon the prosecution.

135. In AIR 1966 Supreme Court 1 it was held that, even in a case where insanity is pleaded, the accused would be entitled to an acquittal if a doubt is created by any evidence in the case on the question whether the accused had the required mens rea when he committed the offence. Such a doubt was held to capable of shaking the prosecution case on an ingredient of the offence with which the accused is charged. It was also pointed out that "this was very different from saying that the prosecution must also establish the sanity of the accused" despite Section 105 of the Act The last mentioned observation could be reconciled with the principle stated first only by adopting the majority view in Parbhoo's case which was that the prosecution was not called upon to discharge initially any burden of eliminating the exception, although, in order to satisfy its unshifting stable burden, it had to remove doubts introduced, in the course of trial, about the ingredients of the offence. The whole evidence was examined, including the accused's previous acts and conduct, to overcome possible doubts. Therefore, this case does not conflict with the majority view in Parbhoo's case.

136. In AIR 1966 Supreme Court 97 the Supreme Court, after citing Woolmington's case held: "The principle of common law is part of the criminal law of the 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 support his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case." Here, the Supreme Court was really contrasting the lower degree of proof required from

the accused for fully establishing the exception pleaded, by a "preponderance of probabilities" just like the burden of a party in civil litigation, with the heavier special burden resting upon the prosecution in a criminal case to prove its case "beyond reasonable doubt". This was a case in which the accused, having completely justified his plea of protection, under the ninth exception contained in Section 499, in a prosecution for defamation, was acquitted. As I have already explained, the majority view in Parbhoo's case, where quite a different problem was before this Court, also was that the accused could fully establish the exception pleaded by a "preponderance of probability." The Supreme Court, in holding here that "as soon as the preponderance of probability is proved, the burden shifts to the prosecution which has still to discharge its original onus", evidently took the view, also expressed by the majority in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) that Section 105 deals with the shifting burden and Section 101 with the stable burden. This was not a case of an equipoised balance of probabilities. Nor was it a case, where the prosecution version, although not improbable, was yet faced with a genuine or serious doubt. In this case, the Supreme Court did not really have the problem before it which was before this Court in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB). I, therefore, find no conflict whatsoever between what was held here by the Supreme Court and the majority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB). On the other hand, in my estimation the views expressed by the Supreme Court in this case give considerable support, either directly or Indirectly, to the majority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB).

137. AIR 1968 Supreme Court 702 was another case in which the Supreme Court held that a party which had pleaded an exception (this was a case of private defense) must succeed due to a demonstration of "preponderance of probabilities" in favour of its version that right to possession of property was being vindicated legitimately by it. I find no statement of the law in this case also by their Lordships of the Supreme Court which either expressly or impliedly overrules or conflicts with the majority view of this Court in Parbhoo's case.

138. In AIR 1964 Supreme Court 1563 where the plea of insanity of an accused was rejected their Lordships of the Supreme Court practically held what was held by the majority in Parbhoo's case. Several of the very propositions laid down by the majority in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) were expressed here by the Supreme Court in a somewhat different language. It was very explicitly held here that even if the accused does not succeed in discharging the burden of proving the exception pleaded, he will be entitled to an acquittal if he is able, with the help of all the material on the record, from whichever side it may have come, to show that there is a prudent man's "reasonable doubt as regards one or other of the necessary ingredients of the offence itself."

139. I may, however, observe that one question, which was raised and considered both by the majority and minority of the judges of this Court, in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) has not engaged the attention of the Supreme Court so far because it does

not appear to have been raised in any case there. That question is whether the presumption under the last part of Section 105, which is obligatory upon a Court, is not removed as soon as any credible evidence in support of the plea comes on the record. This presumption imposes a duty upon the Court which differs very much from the burden of the accused, contained in the first part of Section 105, to prove his plea. Unless the hands of the Court are freed from any supposed grip or hold of this presumption, by lifting it as soon as any credible evidence comes on record in support of the exception pleaded by the accused, the Court would not be in a position to view the evidence as a whole and give the benefit of doubt to the accused. The presumption would then operate practically as a rule of exclusion of evidence. It would, in that case, act as. a genuine statutory exception snapping the golden thread of Anglo-Saxon Jurisprudence which we have adopted as our own.

140. The crux of the problem of construction of Section 105 before this Court in Parbhoo's case lay in determining the true scope of the last few words of Section 105: "The Court shall presume the absence of such circumstances". That problem is again before us. The decisions of the Supreme Court, particularly those in Nanavati's case (supra) and in Dahyabhai's case (supra), go a long way in enabling us to resolve the difficulty in the same way as the majority solved it in Parbhoo's case. I say so because the Supreme Court has held that, Section 105 does not limit or conflict with Section 101; that the accused would get the benefit of doubt even if he fails to prove his plea by a "preponderance of probability" but succeeds in casting a doubt on the prosecution version relating to an ingredient of an offence; that, the hands of the Court are not tied so that it is not legally bound to convict, even if the accused fails to discharge his burden fully but succeeds in raising a reasonable doubt (See: Dahyabhai's case, AIR 1964 Supreme Court 1563 at p. 1568) about his intent in committing the alleged offence; that, the general law on the question of the fixed or primary burden of the prosecution, which lasts till the end of the trial and is not curtailed by Section 105, is the same in India as it is in England. These propositions can only hold good if the same meaning is given to the duty imposed by the obligatory presumption upon the Court, as contrasted with the burden of the accused, which the majority of learned Judges of this Court gave to it in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB).

141. There are, however, two passages, one in Nanavati's case, (AIR 1962 Supreme Court 605 at pp. 616 to 617) and the other in Dahyabhai's case, (AIR 1964 Supreme Court 1563 at p. 1567) which have been quoted fully by my learned brother D. S. Mathur, J., and the first partly by my learned brother Mukerjee, J. also, on the strength of which it could be urged that the significance of the obligatory presumption, contained in the last part of Section 105, has also been considered and pronounced upon by their Lordships of the Supreme Court. After having examined these passages very carefully in the context in which they occur, it seems to me that the Supreme Court was not interpreting, in either of these two cases, the last part of Section 105 separately and as contrasted or compared with the first part of it. Although, the scope or the hold of the obligatory presumption on the Court under the last part of Section 105 or the situation in which it must be lifted by the Court has not been specifically or directly considered in these cases, yet, it is evident

that the Supreme Court clearly expressed views which necessarily mean that the obligatory presumption is lifted when there is sufficient material on record to justify giving the benefit of a reasonable doubt to an accused even if the accused has failed to discharge his own burden of proving an exception by a preponderance of probabilities.

142. Another difficulty in the way of accepting the correctness of the majority view in Parbhoo's case is said to arise from the three-fold division of possible situations made by the Supreme Court in Nanavati's case AIR 1962 Supreme Court 605 at p. 617. We are not concerned here at all with the first category of cases which do not really require the proof of a statutory exception by the accused but demand from him a disproof of ingredients of an offence which are deemed to be established on proof of certain facts justifying the raising of a statutory presumption (e.g. Sections 4 and 5 of the Prevention of Corruption Act). In the second and third types of cases, the accused is required to bring his case within the exception pleaded by him. The question arises whether, in these cases, the accused becomes entitled to acquittal when he proves facts or circumstances raising genuine doubts, or providing reasons to believe that the exception may exist even though not fully proved. The Supreme Court was not considering the right of private defense specifically here and did not put it in the second category of cases. But, dealing with the plea of an accident in the doing of a lawful act in a lawful manner, covered by the exception found in Section 80, Indian Penal Code, It held that the accused could, by proving only some of the facts necessary to establish the exception to the offence of culpable homicide, negative the offence or throw a reasonable doubt about the "intention or the requisite state of mind which is the essence of the offence". In other words, whenever the facts proved throw the prosecution case into a state of doubt on "intention or the requisite of state of mind" the ingredients of the offence are affected.

143. Every offence against which a plea of private defense can be taken requires a state of mind or mens rea on the part of the accused to be proved by the prosecution. This is usually gathered by circumstances raising a presumption about the intention. The defense may give some evidence pointing in another direction. This may actually negative mens rea as was the case in *Amjad Khan v. The State*[62], where the Supreme Court pointed out that a reasonable apprehension of death or grievous hurt may justify killing in exercise of a right of private defense even before an actual attack on a person had commenced. In some cases, the defense may while falling short of negativing mens rea, be only able to show that its existence has become doubtful. In such cases, according to the view of the majority in Parbhoo's case, the accused would be entitled to an acquittal because the prosecution has failed to discharge its special burden of eliminating doubts. The accused may have failed to prove his plea but he gets a benefit which, whether it is called the benefit of the exception pleaded or of doubt on the whole case, is available to him only because he has succeeded in throwing the existence of an ingredient of the offence into the region of reasonable doubt To constitute any offence under the Indian Penal Code there is a mens rea which makes the action complained of criminal or culpable. In *Shiv Ram v. State*[63]. I held, with regard to mens rea: "If the doctrine of mens rea is, as it no doubt is, elaborately and

carefully attempted to be incorporated throughout the provisions of the Indian Penal Code, I do not think that this truth is expressed felicitously at all by saying that the doctrine does not apply to offences against the Indian Penal Code". I also held there (at page 201): "In applying this fundamental doctrine of our criminal jurisprudence to an offence defined by a statute, when it is applicable, as it is to all offences under the Indian Penal Code, one has to assume that there is a mens rea for the offence, and then to proceed, by scanning the words of the statute, to discover it". To those views I still adhere.

144. The doctrine of mens rea is not abstruse. The principle is stated in the maxim: "actus non facit reum, nisi mens sit rea" or "an act does not make one guilty unless the mind is also guilty". In AIR 1947 PC 135 at p. 139, the Privy Council adopted the rule, with regard to an alleged violation of Rule 81 (2) of Defense of India Rules, that "unless the statute, either clearly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind". In other words, it is presumed to exist within or may be impliedly annexed to even a statutory definition of an offence unless the definition is in terms which necessarily exclude it.

145. A guilty mind, standing by itself, is not punishable under the law although, as Dr. Johnson's judgment on the actor Garrick, who said that he felt like a murderer when acting Richard III-that he should be hanged each time he acted Richard III-implied, it may be morally reprehensible. Mens rea as a "state of mind" becomes a part of a legally punishable offence only when it produces harmful results. It is manifested by intent, actual or presumed, gathered from acts or omissions which flow

[62]AIR 1952 SC 165
[63]AIR 1965 All 196 at p. 199

from it. It includes more than an immediate intent to injure. It partly embraces what falls under motive. As Paton points out ("Text book of Jurisprudence" 3rd Ed. p. 275),
the distinction between intention and motive is not always so precise as may annear at first sight Even if the distinction made in Salmond's jurisprudence (12th Ed. p. 372), between motive as the cause or the "ulterior object", which lies behind, and the immediate intention, which accompanies an act, is accepted, it is clear from Salmond's own explanation of mens rea as a basis of a criminal liability (See: Salmond's jurisprudence 12th Ex. p. 366), that wrong motivation overlaps mens rea. "A man is responsible", wrote Salmond, "not for his acts in themselves but for his acts coupled with the mens rea or the guilty mind with which he does them". The guilty mind is not only exhibited or proved by the immediate intent to injure but also by what may be called an "ulterior intention" actuating the action.

146. Investigation into the nature of intent, both immediate and ulterior or underlying, is carried out in cases of Insanity as well as of accident. An insane person may form the immediate intention to attack another person due to a delusion that he was about to be attacked by that other person. If he had an immediate intention to kill due to such a delusion his incapacity to see facts

as they actually are and to realise that what he was doing was wrong can only appear, if at all, from evidence other than that of his intention to injure. The pleas of accident as well as of grave and sudden provocation were repelled in Nanavati's case, AIR 1962 Supreme Court 605 (Supra) by examining facts showing an ulterior or prior intention proved by deliberate preparation. In Dahyabhai's case, AIR 1964 Supreme Court 1563 (Supra) and Bhikaris case, AIR 1966 Supreme Court 1 (Supra) the alleged incapacity of the accused for mens rea was disbelieved by investigating "all circumstances which preceded, attended, and followed the crime," including previous acts and conduct of the accused, indicating a deliberately formed legally punishable intention.

147. If the ingredients of an offence can be affected in cases of alleged insanity and accident by reasonable doubts entertained about the motivation or about the totality of facts affecting intention at the time of commission of the alleged crime, I do not see why they cannot be similarly affected by findings of reasonable doubt on the question of the real intent in causing injuries in the course of an alleged exercise of a right of private defense. The ingredients of each of these pleas will necessarily overlap and collide with the ingredients of the offence. Mens rea cannot simultaneously be present and absent. Initially, the prosecution can rely on proof of the actus coupled with the obligatory presumption at the end of Section 105. But, an incompletely established plea will remove the initial presumption and can-not must-cast a reasonable doubt on the existence of mens rea which the prosecution must dispel to succeed. In most cases of alleged exercise of a right of private defense it is not difficult to arrive at a definite finding whether the right existed or not. In a genuine case of an exercise of the right of private defense, the primary intention is to protect from injury and the intent to injure the aggressor is as much secondary and consequential as the injuries themselves. Presence or absence of mens rea will be determined in such cases by the real or ulterior or primary intent If that intent is to protect and defend, the consequential intention to injure will not make the act criminal We cannot confine our attention to the immediate or consequential intent and forget the real intent for determining mens rea.

148. There seems to me to be no need to distinguish between the wrongful-ness or guilt of the mind and of the act in a case where a right of private defense is pleaded because the two must go together in such a case. It is true that causing of injury during the lawful exercise of a right of private defense is authorized by law just as an executioner is permitted to hang a condemned man in the discharge of his duty. In Keny's "Outlines of Criminal Law" (16th ed. at p. 21) we find: "One who had duly executed a condemned criminal had effected a homicide which was justifiable; his own innocence of crime stood really on the basis that the actus was not forbidden (and therefore, not reus), but it could equally well be established by the plea that he had done nothing wicked nor immoral and therefore, had displayed no mens rea". The actus stands on a separate footing only in exceptional cases. In cases of strict statutory liability the actus is punishable without the need to prove any mens rea and the only issue to be decided is whether the actus reus is proved. In a case where a right of private defense is set up the actus cannot be wrongful or rightful independently of the existence or absence of mens rea, as explained above.

Both intention behind as well voluntariness in the commission of acts cannot, I believe, be viewed apart from the whole set of circumstances which produce them. If injuries are shown to have been caused under the compulsion of events necessitating acts of private defense, or, it is doubtful whether they were so caused, it seems to me that belief In the existence of mens rea, which is an essential ingredient of the offence, is bound to be shaken.

149. I may also observe that the Advocate General conceded that possession of property may be an essential part of a particular prosecution case which the prosecution will have to prove in establishing the ingredients of an offence. Here, the prosecution case will presumably include a charge for criminal trespass under Section 441, Indian Penal Code which requires a very clearly specified intention. And, it is likely that there will be counter-cases in which each side will claim a right to defend property and person. A definite finding on possession, which is usually not difficult, decides the fate of the case of each side in such situations. In very exceptional cases, however, it may not be possible to determine which side was in possession and which meant to disturb it. Similarly, there may be exceptional cases where, although no right to possess property may be involved, it may not be reasonably possible to decide which side had the primary aggressive intent and which side had the right and primary intent to defend. I, therefore, hold that cases in which the plea of private defense is taken would fall in the third category of cases classified by the Supreme Court in Nanavati's case (Supra) so that the plea, even if not fully proved may, when supported by sufficient evidence, make the prosecution case doubtful on an essential ingredient of the offence.

150. The views expressed by the Supreme Court and the propositions stated by the majority of judges of this Court in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) will not even appear to be inconsistent in any way if the factual context and assumptions on which each view rests are kept in mind. It has been rightly pointed out by Dr. A. L. Goodhart, in a very elaborate essay on "Determining the Ratio Decidendi of a case" (See: "Jurisprudence in Action", 1953, Essays published by the Association of the Bar of New York), that the principle of a case is determined by taking into account the facts treated by the Judge as material and his decision "as based thereon". The only criticism of this method, found in Salmond's Jurisprudence (12th ed. p. 181), is that Courts, in their quest for "the rule which the judge thought himself to be applying", tend to ignore it in practice. But, it was stated there: "any such rule must be evaluated in the light of facts considered by the Court to be material". Our Supreme Court certainly adopted the method, in *Andhra Sugars Ltd. v. State of Andh. Pra*[64], when it held that a passage in a previous decision, which appeared to lay down a rule, "must be read with the facts of the case". If this method is followed, no conflict whatsoever between anything laid down by the Supreme Court and what was held by the majority in Parbhoo's case will even seem to arise.

151. I may now refer to an argument advanced by Mr. P. C. Chaturvedi, the learned counsel for the accused, relying on AIR 1943 PC 211. It was contended that the optional presumption arising under Section 114, illustration (a), which can be rebutted by merely offering a reasonable

explanation, such as the accused may give in his statement under Section 342 of the Criminal Procedure Code, accounting for recent possession of stolen goods, results in a situation which is exactly similar to that which arises from the obligatory presumption under the last part of Section 105 of the Act after the optional presumption has been raised. The submission was that the obligatory presumption can also be similarly rebutted by a reasonable explanation. The flaw in this argument is that the particular optional presumption under Section 114 of the Act is a conditional presumption which will not arise at all if there is a reasonable explanation, whereas the rebuttable obligatory presumption under Section 105 operates always and invariably at the outset and is removed only by proof of some circumstance or circumstances, and not by a plausible explanation only. The conditional presumption under Section 114, when raised, goes the whole length of proving the guilt of the accused. The gap it will cover, when raised, is either of proof of intention in removing property or of proof of knowledge of the stolen character of goods. Where the explanation is accepted, the optional presumption is not raised at all and the prosecution will fail on the ground that an ingredient of the offence charged has not been proved. On the other hand, the accused may be convicted even if the obligatory presumption under the last part of Section 105 of the Act is removed. The learned counsel for the accused also erroneously assumed, in putting forward this argument, that the accused must be deemed to have discharged his onus of proving an exception as soon as the initial obligatory presumption at the end of Section 105 is lifted. However, the conditional, optional presumption under Section 114 can be used to illustrate how various presumptions differ in function and application.

152. The common factor which operates in using a presumption, whether optional or obligatory, is the prudence and reasonableness which the Court is expected to employ. This is not defined by any provision dealing with a burden of proof or a presumption although the illustrations given in Section 114 indicate what it requires. It is only broadly defined by Section 3 of the Act. It covers a proof by preponderance of probability, where this is enough, and, in a criminal trial, also the higher degree of proof, by eliminating reasonable doubt, which the prosecution must provide.

[64]AIR 1968 SC 599 at p. 606

153. Even a literal interpretation of the first part of Section 105 could indicate that

"the burden of proving the existence of circumstances bringing the case within" an exception is meant to cover complete proof of the exception pleaded, by a preponderance of probability, as well as proof of circumstances showing that the exception may exist which will entitle the accused to the benefit of doubt on the ingredients of an offence. If the intention was to confine the benefit of bringing a case within an exception to cases where he exception was established by a preponderance of probability, more direct and definite language would have been employed by providing that the accused must prove the existence" of the exception pleaded. But, the language used in the first part of Section 105 seems to be deliberately less precise so that the accused, even

if he fails to discharge his duty fully, by establishing the existence of an exception, may get the benefit of the exception indirectly when the prosecution fails in its duty to eliminate genuine doubt about his guilt introduced by the accused. Again, the last part of Section 105, even if strictly and literally interpreted, does not justify reading into it the meaning that the obligatory presumption must last until the accused's plea is fully established and not just till circumstances (i.e. not necessarily all) to support the plea are proved. Moreover, a restrictive interpretation of Section 105, excluding an accused from the benefit of bringing his case within an exception until he fully proves it, is ruled out by the declaration of law by the Supreme Court that there is no conflict between Section 105 and the prosecution's duty to prove its case beyond reasonable doubt. Hence, the obligatory presumption, at the end of Section 105, cannot be held to last until the accused proves his exception fully by a preponderance of probability. It is necessarily removed earlier or operates only initially as held clearly by judges taking the majority view in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB).

154. My view, therefore, is that, in cases where the accused pleads exceptions, the obligatory presumption is lifted as soon as there is some evidence to support the plea. The accused may carry his plea further and succeed In creating a reasonable doubt about an ingredient of an offence. The prosecution will have to remove this doubt, possibly in the course of argument to succeed after this. In other cases, the accused may have carried his case still further and established his plea by a preponderance of probabilities. Although, there is no provision in our Criminal Procedure Code for production of evidence in rebuttal by the prosecution, as of right, after the accused has established an exception by a preponderance of probability, yet, it is conceivable that, in exceptional cases, the prosecution may be able to demolish the defense case, even after it is fully proved, by some rebutting evidence which the Court is persuaded to admit under Section 540, Criminal Procedure Code in exercise of the Court's power to decide the case justly after finding out the whole truth. For example, the prosecution may be able to prove that a doctor, who had given evidence of the injuries on the accused, had undoubtedly fabricated evidence. Ultimately, these stages become parts of a single psychological process of appraisement of evidence as a whole which the judge goes through in his mind when considering, sifting, weighing, comparing, and testing the prosecution and defense versions and evidence, placed side by side, with a view to pronouncing his judgment. At this stage, the obligatory presumption under Section 105 cannot stand in the way of an acquittal if evidence in the case justifies giving the accused the benefit of reasonable doubt on the charge.

155. The obligatory presumption thus fits into the whole procedural machinery regulating a criminal trial in this country only as a sort of proviso, inserted almost parenthetically by way of abundant caution, so as to prevent Courts from imagining circumstances in support of exceptions pleaded when they are unsupported by any proved circumstances. Its function does not extend to obstructing Courts in performing their duties to give effect to genuine doubts which may arise from facts proved. Its purpose and meaning can only be fully understood in the context of the whole scheme for the adduction of evidence in a criminal trial. Torn from this context It can

operate only as a stumbling block and not as the aid to justice which it was, I have no doubt whatsoever, meant to be.

156. The duty and power of the Court to find out the truth in a criminal case, independently of the duties which devolve on the parties to adduce their evidence, are exemplified by Section 540, Criminal Procedure Code. This additional duty of the Court to ascertain the truth more accurately when trying a criminal case as compared with the duty in the trial of a civil case, could not be discharged satisfactorily unless it had the power to give the benefit of a reasonable doubt to the accused. Our Evidence Act has clearly provided for three kinds of conclusion a Court may arrive at. The negative conclusion, falling under "not proved" reminds one of the verdict "not proven" which a jury may return in Scotland as an alternative to either of the two other verdicts, "guilty" or "not guilty", which are the only ones open to a jury in England. In England, however, the verdict of "not guilty" covers a case in which the prosecution has failed to prove its case "beyond reasonable doubt" as well as a case where an accused pleading an exception establishes it fully so that the prosecution case is disproved.

157. The Advocate General also raised the question whether the principle of benefit of doubt accepted in England as a matter of public policy the ground upon which it was placed by Lord Hailsham in, 1936-2 All England Reporter 1138 was available to the accused on the same grounds or to the same extent in this country. The learned counsel for the accused answered this argument by pointing out that, irrespective of the ground on which this principle should be accepted, it must have the same force in India as in England after the final pronouncement of the Supreme Court on this matter. I may observe that Sodeman's case, 1936-2 All England Reporter 1138 (Supra), citing observations of Duff, J., has been mentioned with approval by their Lordships of the Supreme Court in Harbhajan Singh's case, AIR 1966 Supreme Court 97 at p. 102. Speaking for myself, I do not see why principles of public policy or consideration of consequences of taking a particular view should not affect the interpretation to be given to statutory provisions dealing with basic norms when two interpretations of a statutory provision are open. Acting in this manner would not be legislation but an operation within the "interstices of the Statute". I do not see why the principle of benefit of doubt deserves, either on grounds of public policy, or as a part of the concept of fair trial in a criminal case, to be given less recognition or force in this country. Methods of investigation of crime available to the prosecuting authorities in this country are still rudimentary and have not reached the level of scientific precision which they have attained in other countries. Powerful motives and factors come into play to conceal the actual offenders and to mislead prosecuting authorities in criminal cases every where. The adoption of short cuts by producing perjured evidence in support of hastily arrived at conclusions of prosecuting authorities are not less common in this country than elsewhere. However, I am content to base my opinion on this question on the strength of the declaration of law by the Supreme Court that the principle of benefit of doubt has the same force in this country as it has in England. Accused persons in this country are not entitled to a lesser protection than the accused in England when the Constitution itself protects life and liberty here

against deprivation except one in accordance with the procedure prescribed by law. The meaning of our procedural or adjectival laws must, therefore, be determined in conformity with firmly established notions of a fair trial unless some statutory provision clearly sanctions a departure from these.

158. As the answer given by the majority of the learned judges in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) (Supra) accords with the basic principles, embodied in Sections 3 and 101 and 103 and 105 of the Act, as explained by their Lordships of the Supreme Court, it is not necessary for me to discuss authorities of other High Courts cited before us which have been referred to fully by my learned brother D. S. Mathur, J.

159. I may also mention that although Parbhoo's case does not appear to have been specifically referred to by the Supreme Court so far-and this, according to the Advocate General, was also significant-their Lordships did cite with approval, in Dahyabhai's case, AIR 1964 Supreme Court 1563 (Supra) a decision of a Division Bench of the Patna High Court in AIR 1955 Patna 209 where reliance was placed on the majority decision in Parbhoo's case. Kamla singh's case was mentioned by the Supreme Court because, just as in Dahyabhai's case, AIR 1964 Supreme Court 1563 the plea of insanity as an exception was raised there. The precise problem considered in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) and the answer given there have not, so far as I am aware, come up for consideration before the Supreme Court in relation to the right of private defense.

160. After a close scrutiny of every part of each of the seven opinions in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) 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 justify 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 evidence in support of the exception pleaded, is reasonable and affects 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's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) I find it based on these three propositions which provide the ratio decidendi and this is all that needs to be clarified.

161. 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 a 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 favor 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 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's case which directly relates to first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice.

162. The last two preceding paragraphs, which summaries my opinion, would have been enough to answer the question before us if it had not been urged so emphatically, on behalf of the State, that the majority view in Parbhoo's case overlooks important aspects of the question, which were more fully argued before us with the help of Supreme Court decisions, and that trial Courts need detailed guidance on the application of the principle of Benefit of Doubt when exceptions are pleaded. After having anxiously examined every aspect of the question referred to us, I answer the question framed, in complete agreement with the conclusions of my learned brethren Broome, Gupta, Gyanendra Kumar, Yashoda Nandan and Parekh, JJ., as follows:-

The answer of the majority of learned Judges who decided AIR 1941 Allahabad 402 (FB) is still good law. It means that in a case in which, in answer to a prima facie prosecution case, any general exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea, he will still be entitled to an acquittal, provided that, after weighing the evidence as a whole prudently (including the evidence given in support of the plea of the said general exception), the Court reaches the conclusion that, as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of the accused beyond reasonable doubt.

Mukerjee, J.

163. I am in respectful agreement with the views expressed by my Lord the Chief Justice that the statement of law in Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) is not accurate. I would like to add a short few words

164. The answer to the question referred to this Full Bench should follow from a correct interpretation of Section 105, Section 4 and Section 3 of the Indian Evidence Act. The terms of these sections have been quoted in the judgment of my Lord the Chief Justice and I do not reproduce them here to avoid repetition.

165. The effect of Section 105, read with Sections 3 and 4 of the Indian Evidence Act, was considered by the Supreme Court in the case of AIR 1962 Supreme Court 605. At page 616 of the report Subba Rao J., (as he then was) observed as follows:

> "The legal impact of the said provisions on the question of burden of proof may be stated thus: In India, as it is in England there is a presumption of innocence in favor of the accused as a 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."

Clearly, the incidence of the burden of proving an exception under Section 105 of the Indian Evidence Act is on the accused person and this was conceded by Mr. Chaturvedi. The crucial question for determination is, as pointed out by my Lord the Chief Justice, how the burden may be rebutted by the accused. Section 105 says that the Court shall presume the non-existence of circumstances bringing the case within the exception proved until "disproved". In view of the categorical terms of the definition of the word "disproved" as given in Section 3 of the Indian Evidence Act, it is manifest that the accused person cannot succeed by merely creating a reasonable doubt in the mind of the Court as to whether he is or is not entitled to the benefit of the said exception. A presumption of law cannot be successfully rebutted by merely raising a doubt, however, reasonable. Something more than raising a reasonable doubt is required for rebutting a presumption of law and it is necessary for the accused to show that his explanation is so probable that a prudent man ought, in the circumstances, to accept it.

166. The Advocate General frankly conceded that the burden on the accused of proving an exception is lighter than the burden which lies on the prosecution of establishing the guilt of the accused. In AIR 1966 Supreme Court 97 the Supreme Court observed:

> "Where an accused person is called to prove that his case falls under an exception, law treats that onus as discharged if the accused succeeds in proving a preponderance of probability. The onus on an accused person may well be compared to the onus on a party in civil proceedings ...."

In a criminal proceeding the prosecution has to prove the guilt of an accused person beyond reasonable doubt but in a civil proceeding a party succeeds on the balance of probabilities. The distinction in the standard of proof in the two classes of cases cannot, I think, be better expressed than by quoting from the judgment of Denning, J., in *Miller v. Minister of Pensions*[65], (Not cited

at the bar). Speaking of the degree of proof required in a criminal case before an accused person is found guilty, Denning, J., stated :-

> "That degree is well settled. It need not reach certainty but it must reach 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 strong against a man as to leave only a remote possibility in his favor 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"

As regards the degree of cogency required to discharge a burden in a civil case, his Lordship stated :

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say : "We think it more probable than not", the burden is discharged 'but if the probabilities are equal, it is not'" (Emphasis (here in ' ') mine).

167. The burden on an accused person being the same as the burden on a party in a civil proceeding, it follows that if the balance or probabilities supports the plea of exception the burden on the accused person is discharged but if the Court is left in a state of reasonable doubt as to whether the accused person is or is not entitled to the benefit of the said exception it would be a case where the probabilities are equal and, having regard to what Denning, J. has laid down, the plea would fail.
168. If, however, as pointed out by my Lord the Chief Justice, the nature of the case is such that, on the totality of evidence a reasonable doubt arises as regards some ingredients of the offence, the accused person is entitled to an acquittal; in other case, a reasonable doubt as regards the exception claimed will not entitle him to an acquittal.

Gyanendra Kumar And Yashodanandan, JJ.

168. We have had the advantage of reading the judgment jointly prepared by Broome, Gupta and Parekh, JJ. as well as the separate judgments of Oak, C. J., Mathur, J. and Beg, J. Concurring with these learned Judges, we find ourselves in respectful disagreement with the view taken by Oak, C. J. that in a case where an accused pleads that he had caused grievous hurt to the complainant in the exercise of his right of private defense of property but succeeds only in creating a reasonable doubt about his claim of being in possession over the field in question he will be liable to conviction. We also respectfully concur in the view taken by Broome, Gupta, Beg and Parekh, JJ.

[65] *(1947) 2 All England Reporter 372*

that the dictum laid down by the majority of Judges in Parbhoo's case, 1941 All LJ 619 : AIR

1941 Allahabad 402 (FB) is fundamentally correct and calls for a mere elucidation. In our opinion, there is no conflict between the decisions of the Supreme Court and Parbhoo's case, 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) and we agree that the question referred to this Full Bench should be answered in the affirmative.

170. We now proceed to give our own reasons for coming to this conclusion. The question that has been engaging the attention of this Full Bench loses much of its complexity, if it be clearly borne in mind that the task before a Court administering criminal justice is to determine whether a crime has been committed and, if so, whether the responsibility for it can be fastened on the accused. Before the Court proceeds to consider the responsibility or otherwise of the accused, it has to determine as to whether a crime has been committed at all. The burden of proving beyond reasonable doubt that a crime has been committed and that the accused is responsible for it rests upon the prosecution.

171. Crime may be described as an act or omission prohibited by law and made punishable by it. In this sense not every act of killing is a crime. To cite some examples of killing which are not forbidden by law but are in fact permitted by it, we may take a case where the killing is by way of execution of a prisoner sentenced to death by a Court competent to do so by the executioner appointed by lawful authority for that purpose. In cases of such homicides, which have sometime been described as "justifiable homicide", no crime can be said to have been committed and consequently no one can be found guilty for its commission. Likewise a case in which the accused pleads having committed homicide in the exercise of right of his private defense of person or property and also successfully establishes his claim, would, in our opinion, fall in the same class. A person who kills another in order to save his own life cannot be said to have committed an act prohibited by law or a crime. If an accused claims protection of the Exception mentioned in Section 96 of the Indian Penal Code and fails to establish affirmatively by preponderance of probabilities that he had acted in exercise of the right claimed, but the evidence on record, taken as a whole, creates a doubt that the claim made by the accused might reasonably be true, then the matter becomes doubtful whether an unlawful homicide has taken place at all. In such a case a corresponding doubt is created as to whether an act prohibited by law has been committed and consequently the accused cannot be found guilty of a crime which remains in the region of doubt. He will, in spite of his having failed to discharge the burden placed on him by Section 105 of the Evidence Act, be entitled to the benefit of doubt and acquittal.

172. In a case where the accused claims to have committed homicide in the exercise of his right of private defense either of person or of property and fails to satisfy the Court affirmatively that he had such a right but only succeeds in creating a reasonable doubt regarding the correctness of his claim, it is not, in our opinion, quite accurate to say that one of the ingredients of the offence of culpable homicide, as defined in Section 299 of the Indian Penal Code, or the mens rea is wanting. The offence of culpable homicide is fully defined in Section 299 and the mens rea necessary for the offence are also expressly enumerated in the section itself. There are three

species of mens rea in Section 299 of the Indian Penal Code: (1) An intention to cause death; (2) an intention to cause bodily injury likely to cause death; (3) knowledge that death is likely to be caused. When an accused has killed another to protect his own life, he did have the intention to kill. In fact in most cases it is not denied by him that he had the requisite intention or knowledge. He merely claims that he was motivated by the desire to save his own life. To equate motive with mens rea would result in a confusion of legal concepts. "Mens rea" has been defined by Glanville Williams in his "Criminal Law, The General Part Second Edition" as follows:

> "What, then, does the legal mens rea means. It refers to the mental element necessary for particular crime and this mental element may be either intention to do the immediate act or bring about the consequence or (in some crime) recklessness as to such act or consequence".

In this sense of the expression, when a person commits homicide in exercise of the right of private defense either of property or of person, the element of mens rea contemplated by Section 299 of the Indian Penal Code is undoubtedly present. Thus where a reasonable doubt is created with regard to the claim of an accused to the protection of the Exception provided for by Section 96 of the Indian Penal Code, the accused becomes entitled, in our opinion, to the benefit of doubt and acquittal not because an ingredient of the offence under Section 299 of the Indian Penal Code or its mens rea becomes doubtful, but because a doubt is created as to whether the act attributed to him amounts to a crime at all. We find support for the view we are taking from the following passages from Russell on Crime, XI Edition:

> "The new conception that merely to bring about a prohibited harm should not involve a man in liability to punishment unless in addition he could be regarded as morally blameworthy came to be enshrined in the well known maxim actus non facit reum, nisi mens sit rea. This ancient maxim has remained unchallenged as a declaration of principle at common law throughout the centuries up to the present day. So long therefore, as it remains unchallenged no man should be convicted of crime at common law unless the two requirements which it envisages are satisfied, namely, that there must be both a physical element and a mental element in every crime... ... ...

A clear analysis of the requirements of law for the establishment of criminal liability demands a term which indicates the physical element alone, entirely distinct from that mental element which the old maxim so sharply set in opposition to it. For this purpose lawyers have for some time been in the habit of employing the expression actus reus thus using the adjective reus to qualify the noun actus in the same way as the maxim used it (in the feminine form), to qualify the noun mens in both cases then it means "legally prohibited" or "legally reprobated". Thus it is logically possible and correct to advance the legal proposition that for criminal liability at common law there must be not only an actus reus but also a mens rea, each distinct from the other.........

On this footing the word actus carries only a factual significance, i.e. that a human deed has been effected. The addition of the word reus carries the further significance that in the factual circumstances of the deed there is a situation which the law has forbidden to be brought about. To have killed a man is, without more, an actus of no precise legal kind; it is a "homicide" and we do not yet know for certain if the law has forbidden that particular killing. If however there is for example evidence that the killing was the execution of a condemned prisoner by the legally appointed executioner, then it is an actus which the law, far from forbidding has indeed commanded, and therefore, it is not an actus reus; and it is described as a "justifiable homicide", a homicide in accordance with, and not against, the law. Again if the death had been caused by a surgeon in the course of an operation which was recognised by him and by the medical profession in general to be dangerous (in the sense that it was medically advisable to risk the known chance that even when conducted with the best of skill and care it might cause the patient's death), this will be a risk which the law does not forbid to be taken but permits to be taken, and the killing will not be an actus reus.............. ... ...
... ...
However harmful or painful an event may be it is not an actus reus unless the law in the particular circumstances of the case has forbidden it to be brought about. The duly appointed executioner who has put to death a convicted criminal in accordance with his sentence has killed a man with deliberate intent so to do, but he has committed no crime because the deed was not prohibited, but was actual commanded, by the law; again, the use in certain circumstances of even deadly force by any citizen in the prevention of the commission of a crime by another person, or in the arrest of one who has committed a felony, does not give rise to criminal liability. Similarly the law does not prohibit a limited chastisement of a child by a parent or schoolmaster, nor the causing of hurt in the course of many sports and games or in the performance of a surgical operation by one duly qualified. That the deed was not prohibited by law is a complete defense for the man who had done that deed, for although the actus was his, yet in the special circumstances of his case it was not reus".

To our mind there is nothing in Section 105 of the Indian Evidence Act or Section 4 thereof which runs counter to the view expressed above.

173. The Supreme Court in AIR 1962 Supreme Court 605 while considering the question of burden of proof resting on the accused, has laid down three different categories: "(1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (2) The special burden may not touch the ingredients of the offence but only the protection given on the assumption of the proof of the said ingredients (See Sections 77, 78, 79, 81 and 88 of the Indian Penal Code): (3) It may relate to an exception, some of the many circumstances required to attract the exception if proved affecting the proof of all or some of the ingredients of the offence: (See Section 80 of the Indian Penal Code)." 173-A. We are not concerned with the first category of cases. With regard to the third category of cases, the Supreme Court has held that though the burden lies on the accused to bring his case within the Exception, the facts proved

may not discharge the said burden, but may affect the proof of the ingredients of the offence. In this category the Supreme Court has placed Sections 80 and 84 of the Indian Penal Code. Section 80 is concerned with an accident, where the consequences brought about are naturally unintentional; while Section 84 deals with the unsoundness of mind of the accused i.e. absence of capacity in the accused to form an intention.

174. In our view, the claim to an Exception under Section 96 of the Indian Penal Code does not fall in the third category of cases, because if there is a reasonable doubt regarding the correctness or otherwise of the claim of the accused, none of the ingredients of the offence defined in Section 299 of the Indian Penal Code is affected.

175. To us it appears that Section 96 is more akin to Sections 77, 78, 79, 81 and 88 of the Indian Penal Code and falls in the second category of cases contemplated by the Supreme Court. Though the Supreme Court has held that as far as the second category of cases is concerned, the burden of bringing his case under the Exception lies on the accused, it has not proceeded to consider as to what would be the result if there is a reasonable doubt regarding the claim of the accused. The observation of the Supreme Court that "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" applies, in our judgment, with equal force to the second category of cases; and if a doubt is created in the mind of the Court that the defense of the accused might reasonably be true, a resultant doubt would accrue about the commission of the crime and hence the guilt of the accused. Thus from a practical point of view there is no difference in the result whether the defense raised by the accused falls within the second or third category of "Exceptions."

176. In the result we answer the question referred to the Full Bench as under:

The dictum of the majority of learned Judges of this Court in 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) is still good law. But, it may be elucidated that in a case in which any general Exception in the Indian Penal Code is pleaded by an accused and evidence is adduced to support such a plea, but such evidence fails to satisfy the Court affirmatively that the accused has fully established his plea of the claimed Exception, he will still be entitled to an acquittal, if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general Exception), a reasonable consequential doubt is created in the mind of the Court as to whether the accused is really guilty of the offence with which he is charged.

BY THE COURT

177. In accordance with the majority opinion, our answer to the question referred to this Full Bench is as follows:-

The majority decision in 1941 All LJ 619 : AIR 1941 Allahabad 402 (FB) is still good law. The accused person is entitled to be acquitted if upon a consideration of the evidence as a whole

(including the evidence given in support of the plea of the general exception) a reasonable doubt is created in the mind of the Court about the guilt of the accused.

Reference answered accordingly.