[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Howard C.J., Soertsz, Hearne, Keuneman, de Kretser, Wijeyewardene and Jayatileke JJ.**

THE KING *v.* JAMES CHANDRASEKERA.

6—M. C. Galle, 33,768.

Self-defence—Plea of a general or special exception under the Penal Code—Accused fails to establish the plea—Reasonable doubt created on the whole case—Accused not entitled to the benefit of the doubt—Evidence Ordinance, ss. 2, 3, 4, 103, and 105.

By Howard C.J., Soertsz, Hearne, Keuneman, Wijeyewardene, Jayatileke JJ. (de Kretser J. dissenting) :—

Where, in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.

Per Howard C.J.:—

"The Jury shall regard the fact as proved that the accused did not exercise the right of private defence till it is satisfied that he did so or that it is so probable that he did so that a prudent man should act upon that supposition."

THIS was a case stated for the decision of the Court of Criminal Appeal in terms of section 355 (1) of the Criminal Procedure Code, as affected by section 21 of the Court of Criminal Appeal Ordinance.

The question stated for decision was whether, having regard to section 105 of the Evidence Ordinance and to the definition of "proved" in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied on by such accused fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.

The facts are stated in the reference by Moseley S.P.J. as follows :—

1. The prisoner, James Chandrasekera, was tried on October 5, 6, and 7, 1942, before me and an English-speaking Jury on an indictment charging him with having committed murder by causing the death of Talpe Liyanage Francis, an offence punishable under section 296 of the Penal Code.

2. By a unanimous verdict the accused was convicted of causing grievous hurt, an offence punishable under section 317 of the Penal Code, and he was sentenced to nine months' rigorous imprisonment.

3. At the trial the causing of death was common ground and the defence set up on behalf of the accused was that, in causing the death of the deceased, he was acting in the exercise of the right of private defence.

4. A statement of the facts appears to me to be unnecessary. The accused and one witness for the defence gave evidence detailing the circumstances in which they claimed that the right of private defence arose. No evidence of such circumstances emerged from the case for the prosecution.

5. If the Jury believed the evidence of the accused and his witness, the former, in my opinion, was entitled to an acquittal. The accused, however, having sought to excuse his offence under the protection of section 89 of the Penal Code, was faced with the burden of proof placed upon him by section 105 of the Evidence Ordinance. This section was quoted *in extenso* to the Jury by Counsel for the accused. Having done so he read passages from the decision of the House of Lords in the case of *Woolmington v. Director of Public Prosecutions*[1] and impliedly invited me to direct the Jury in the words of Sankey L.C., that if they "are either satisfied with his (accused's) explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted".

6. On this point my direction to the Jury was as follows :—

(The passages in the charge to the Jury are reproduced in the judgment of the Chief Justice).

Before finally asking the Jury to consider their verdict, I summed up the position in the following way :—

> "The question which it seems to me you should put yourselves is this: 'Has the accused satisfied you, in the way in which I have told you you must be satisfied, that is, by a preponderance of evidence, that he was acting in the exercise of the right of private defence. If he has satisfied you, why, then, he is not guilty of any offence. But if he has not satisfied you, by that preponderance of evidence, then he has failed in his defence and he is guilty of an offence in accordance with the intention which you are prepared to attribute to him'.".

The Jury, by their verdict, indicated that they were not satisfied and, in my view, it is impossible to say that they were wrong.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekere, L. A. Rajapakse,* and *H. W. Jayewardene*), for the accused.—The point of law stated for consideration appears in the concluding paragraph of the case stated, namely, whether, having regard to section 105 of the Evidence Ordinance and to the definition of "proved" in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.

[1] *(1935) A. C. 462.*

The branch of law involved in the case stated is concerned with the production of evidence and the effect of the evidence led. The rules of evidence are codified in Ceylon, and consequently they are often very abstract and sometimes border on the metaphysical. See, for example, the definition of "Fact" in section 3. The difficulty of interpreting the Evidence Ordinance is discussed at length by Bertram C.J. in *Eliyatamby v. Gabriel*[1], a case which was taken to the Privy Council. [*(1925) 27 N. L. R. 396.*] Even apart from the provisions of section 100 of the Evidence Ordinance, whenever a question of evidence arises not provided for by the Ordinance, reference may be made to fundamental rules of justice.

The expression "burden of proof" is used in two senses, (1) in the sense of *establishing a case,* whether by a preponderance of evidence or beyond reasonable doubt, and (2) in the sense of the duty or necessity of *introducing evidence—Woodroffe and Ameer Ali's Law of Evidence (9th ed.) p. 703.* It is in the second sense, of introducing evidence, that the expression is used in the Evidence Ordinance. Section 101 is the first of the sections dealing with burden of proof. It says no more than that if a party asserts certain facts he must prove them. Though he proves those facts to exist, it does not follow that he will necessarily get judgment in his favour. The ultimate result of, or verdict in, a case depends on principles which are quite independent of any rules of evidence found in the Evidence Ordinance. In other words, the principles deciding the actual effect of the evidence adduced are nowhere to be found in any Code and are quite distinct from the principles governing production of evidence. It is only in regard to the introduction of evidence that the sections in the Evidence Ordinance dealing with burden of proof are applicable. All rules regarding burden of proof are mainly regulative principles for getting the evidence in. Once the evidence gets in, the artificial rules disappear and natural processes of reasoning come into play. The quantum of proof necessary to establish a case is nowhere dealt with in the Evidence Ordinance, and, by virtue of section 100, English principles will apply. The question as to the burden of proof is not pertinent when the relevant facts are before the Court, and all that remains for decision is what inference should be drawn from them—*Seturatnam Aiyar et al. v. Venkatachela Goundan et al*[2].

To take an example, in an action for defamation, there may be three questions in issue, viz., (1) whether the publication is defamatory, (2) whether the defendant can prove privilege, and (3) whether the plaintiff can prove malice on the part of the defendant. In such a case, although the onus of proof in the sense of the burden of adducing evidence may change from one party to the other at different stages of the case, the final verdict to be given in respect of the case as a whole is not regulated by any provisions of the Evidence Ordinance and would depend on natural processes of the mind in dealing with the evidential facts after they are admitted in the manner provided for by law. Similarly, in the illustration (*b*) to section 106 of the Evidence Ordinance, when A is charged with travelling without a ticket, A would not necessarily be acquitted if he adduces evidence that he had a ticket on him, because, to take one instance,

[1] *(1923) 25 N. L. R. 373 at 378 et seq.*

[2] *(1920) A. I. R. P. C. 67.*

it would be open to the prosecution to lead evidence that the ticket was stolen. The stage of proceedings contemplated in the expression "burden of proof" in the sections of Chapter 9 of the Evidence Ordinance is a stage anterior to the close of the case, *i.e.*, the stage of the production of evidence. The definition of the word "proved" in section 3 gives the key to the whole question. The proof referred to in that section is the proof regarding each fact in issue. It is significant that what is defined in section 3 is the word "proved" and not the word "prove". The position, therefore, is that it is important to recognise two stages in a trial, each distinct from the other : (1) proof regarding each fact in issue and the judgment on each of these facts in issue, (2) finding whether the accused is guilty or not guilty in regard to the whole case. On given findings the verdict is a question of law depending on fundamental principles of justice which are nowhere codified. The burden of proof on each fact in issue is a matter of procedure ; the final verdict is a matter of law. The following passage occurs in the introductory chapter of *Professor Wigmore's The Science of Judicial Proof (3rd ed.)* : "The study of the principles of Evidence falls into two distinct parts. One is Proof in the general sense,—the part concerned with the ratiocinative process of contentious persuasion,—mind to mind, Counsel to Judge or Juror, each partisan seeking to move the mind of the tribunal. The other part is Admissibility,—the procedural rules devised by the law, and based on litigious experience and tradition, to guard the tribunal (particularly the Jury) against erroneous persuasion . . . . The procedural rules for Admissibility are merely a preliminary aid to the main activity, viz., the persuasion of the tribunal's mind to a correct conclusion by safe materials."

In regard to section 105, the expression "burden of proving" is used in the sense of burden of introducing evidence and not burden of establishing a case, for the latter remains throughout the trial on the prosecution. The burden of proof in section 105 is an evidentiary provision. All that the section says is that the duty of making a general or special exception a fact in issue is on the accused. I adopt the interpretation given to section 105 and to the word "proved" in section 3 by the four out of the seven Judges in *Parbhoo v. Emperor*[1], particularly the reasoning of the Chief Justice. There is nothing in section 105 or in the definition of "proved" inconsistent with the recognition and acceptance of the fundamental principle of law enunciated in *Woolmington's case*[2] In the words of Iqbal Ahmad C.J., in *Parbhoo v. Emperor* (*supra*) : "The concluding portion of section 105 means no more than this : that, in considering the evidence for the defence relating to an 'exception' or 'proviso' pleaded by the accused, the Court must start with the assumption that circumstances bringing the case within the exception or proviso do not exist. It must then decide whether the burden of proof has or has not been discharged by the accused. If it answers the question in the affirmative it must give effect to its conclusion by acquitting the accused or punishing him for the lesser offence. If, on the other hand, it holds that the burden has not been discharged, it cannot from that conclusion jump to the further conclusion that the existence of circumstances bringing the case within the exception or proviso has been disproved. All that it can

[1] *(1941) A. I. R. All. 402.*

[2] *(1935) A. C. 462.*

do in such a case is to hold that those circumstances are 'not proved'. It would be noted that section 3 draws distinction between the words 'proved', 'disproved' and 'not proved'. It enacts that 'a fact is said not to be proved when it is neither proved nor disproved'. The burden of bringing his case within an exception or proviso is put on the accused by section 105, but there is no provision in the Act to justify the conclusion that the failure to discharge that burden is tantamount to disproof of the existence of circumstances bringing the case within an exception or proviso pleaded . . . . 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." The accused is entitled to be acquitted if upon the consideration of the case as a whole (including the evidence given in support of the plea of self-defence) a reasonable doubt is created whether he is or is not entitled to the benefit of the said exception. If in his summing-up the Judge had told the Jury " If you are in a state of doubt in regard to the issue of self-defence, you will acquit him ", that would have been a correct direction.

Section 105 formulates a rebuttable presumption of law in the concluding part of the section. " 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. With regard to this class of presumptions it has been said that they are merely *prima facie precepts;* and they presuppose only certain specific and expressed facts. The addition of *other* facts, if they be such as have evidential bearing, may make the presumption inapplicable. All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate with their own natural force as part of the total mass of probative matter. Of course, the consideration which may have made these two or three facts the subject of a rule of presumption may still operate, or may not, to emphasise their quality as evidence ; but the main point to observe is that the rule of presumption has vanished "—*Phipson on Evidence (7th ed.) p. 651.* The first part of section 105 should be read in relation to the second part. The word " circumstances " must have the same meaning as it has in the first part. The presumption mentioned in the second part of the section is therefore rebutted by the presence of " circumstances " as the word is used in the first part. The burden of proof on the accused is thus limited to leading evidence of the existence of circumstances. The truth or untruth of the evidence is a matter for the Jury when they consider the case as a whole.

There is a general presumption against misconduct of all kinds, no presumption being more highly favoured in law than that of innocence. The proof of guilt must depend on positive affirmation and cannot be inferred from mere absence of explanation. See the judgment of the Privy Council in *R. v. Seneviratne*[1] and *R. v. Attygalle*[2]. See also *The Attorney-General v. Rawther*[3] ; *R. v. Chalo Singho*[4]; *Woodroffe and*

[1] *(1936) 38 N. L. R. 208 at 222.*
[2] *(1936) 37 N. L. R. 337.*
[3] *(1924) 25 N. L. R. 385 at 390.*
[4] *(1941) 42 N. L. R. 269 at 274*

***Ameer Ali on Evidence** (7th ed.) pp. 760-1.* The presumption of innocence displaces and overrides the presumption referred to in section 105 of the Evidence Ordinance. It is true that the presumption of innocence is not provided for by enactment, but all notice of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them—*Woodroffe and Ameer Ali on Evidence* (*7th ed.*) *p. 78.*

The only exceptions to the rule as explained in *Woolmington's* case arise in the defence of insanity and in offences where onus of proof is specially dealt with by statute—*Woolmington v. Director of Public Prosecutions*[1]. In regard to the plea of insanity the onus on the defence would be particularly heavy not only in English law but also in our law. In our law, regard being had to the common course of human conduct under section 114 of the Evidence Ordinance, the great majority of men would be presumed to be sane, and an accused person who raises the defence of insanity will have to prove it clearly. Besides, the "prudent man" mentioned in the definition of "proved" in section 3 of the Evidence Ordinance will have to be clearly satisfied before he will adjudge a man insane. As regards offences where onus of proof is specially dealt with by statute, an example of it can be found in section 50 of our Excise Ordinance (Cap. 42) which says : "In prosecutions under section 43 it shall be presumed, until the contrary is proved, that the accused person has committed an offence under that section". In the present case, however, we are concerned with the general rule as laid down in *Woolmington's* case (*supra*). *Woolmington's* case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that, if, on all the material before the Jury, there is a reasonable doubt in relation to the whole case, the prisoner should have the benefit of it. The rule is of general application in all charges under the criminal law—*Mancini v. Director of Public Prosecutions*[2]. It is a rule of substantive law and a fundamental principle of justice. There is nothing in the Evidence Ordinance which can prevent the application of it in Ceylon.

M. W. H. de Silva, K.C., Attorney-General (with him *J. Mervyn Fonseka, K.C., Solicitor-General, H. H. Basnayake,* C.C., and *E. W. P. S. Jayewardene,* C.C.), for the Crown.—The Evidence Ordinance admits the application in Ceylon of the English law as stated in *Woolmington v. Director of Public Prosecutions* (*supra*). The principle that in a criminal trial the onus of proof is on the prosecution to establish beyond reasonable doubt all the facts and circumstances which are essential to the offence with which the accused person is charged was accepted as far back as 1879—*Usman Sarpo v. Theodoris Fernando*[3]. See also *Regina v. John Mendis*[4] and *Kachcheri Mudaliyar v. Mohamadu*[5]. The principle of giving the benefit of a doubt to the accused is still accepted in Ceylon. The practice is justified either by section 101 or by section 100 of the Evidence Ordinance.

[1] *(1935) A. C. 462 at 481.*
[2] *(1941) A. E. R. Vol. 3, p. 272 at 279.*
[3] *(1879) 2 S. C. C. 58.*
[4] *(1883) 5 S. C. C. 186.*
[5] *(1920) 21 N. L. R. 369.*

The term "burden of proof" is used in two senses, (1) of establishing a case, and (2) of leading evidence—*Halsbury's Laws of England (2nd ed.) Vol. 13 p. 543.* In criminal cases, even where the second, or minor, burden of introducing evidence is cast upon, or shifted to, the accused, yet the major one of satisfying the Jury of his guilt beyond a reasonable doubt is always upon the prosecution and never changes; and if, on the whole case, they have such a doubt, the accused is entitled to the benefit of it and must be acquitted—*Phipson on Evidence (8th ed.), p. 27.* See also *Emperor v. Damapala*[1]; *Woodroffe and Ameer Ali on Evidence (9th ed.), p. 703; Monir on Law of Evidence (2nd ed.), p. 724.*

In section 105 of the Evidence Ordinance the term "burden of proof" is used in the sense of duty of introducing evidence. The duty of the accused under section 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving the guilt of the accused beyond reasonable doubt—*Emperor v. Damapala*[2]; *Monir on Law of Evidence (2nd ed.), pp. 747, 748.* It would be sufficient if the evidence tendered by the accused raises a reasonable doubt when the whole case is reviewed. The burden on the accused under section 105 is to show circumstances which *tend* to make an exception applicable; it is not possible to read into the section words which convey the sense that the onus of proving circumstances which shall *establish* any exception is on the accused.

The quantum of proof necessary for a case is nowhere specified. We have to fall back on section 100 of the Evidence Ordinance and say that the quantum of proof is determined by the principles of English law. Thus our Courts have always acted on the principles that in a criminal proceeding the guilt of the accused should be established beyond reasonable doubt and, in a civil proceeding, the case is decided by a balance of testimony. Further, in the definition of "proved" in section 3 of the Evidence Ordinance, 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. As to the standard of proof necessary to satisfy a prudent man guidance may be had from decisions of the English Courts. Our courts have, for example, followed English cases in regard to the evidence necessary to prove insanity (*R. v. Vidanalage Abraham Appu*[3]; *R. v. Don Nikulas Buiya*[4] and criminal negligence (*Wickremesinghe v. Obeyesekere*[5]; *Wickremesinghe v. Thomas Singho*[6]; *Lourensz v. Vyramuttu*[7]) and in respect of the burden of proof imposed upon a person found in recent

[1] *(1937) A. I. R. Rangoon 83.*
[2] *(ibid).*
[3] *(1939) 40 N. L. R. 505.*
[4] *(1942) 43 N. L. R. 385.*
[5] *(1935) 37 N. L. R. 327 at 331.*
[6] *(1937) 17 C. L. Rec. 58.*
[7] *(1941) 42 N. L. R. 472 at 473.*

possession of stolen goods (*The Attorney-General v. Rawther*[1]; *Perera v. Marthelis Appu*[2]). The effect of section 105 is also considered in *Nair v. Sudanais*[3], *Perkins v. Dewadasan*[4], *R. v. Sellammai*[5] and *Colombo Municipal Council v. J. A. Perera*[6].

Section 105 of the Indian Evidence Act is exactly similar to our section. Apart from *Parbhoo v. Emperor* (*supra*) and *Emperor v. Damapala* (*supra*), the case of *Shivdasani v. Emperor*[7] is also of assistance. The following cases from Malaya are of importance:—*R. v. Chhui Yi*[8]; *Lim Tong v. The Public Prosecutor, Johore*[9]; *Chia Chan Bah v. The King*[10]; *Mohamed Isa Bin Leman v. Public Prosecutor*[11]; *Public Prosecutor v. Chan Lip*[12].

However important the question of burden of proof may be in the early stages of the case, after all the evidence is out on both sides, it must be looked at as a whole and the truth of the charge must be inferred from it—*The East India Railway Co. v. Major Kikwood*[13]. Intention is an essential ingredient of the offence of murder, and if, upon a review of all the evidence in the case, any doubt is created regarding the exercise of the right of private defence, the issue of the presence of intention would be materially affected. The rule in *Woolmington's* case (*supra*) is discussed and followed subsequently in *R. v. Prince*[14] and *Mancini v. Director of Public Prosecutions* (*supra*).

Cur. adv. vult.

December 21, 1942. HOWARD C.J.—

This case involves a question of law reserved and referred for the decision of this Court by Moseley S.P.J., under the provisions of section 355 (1) of the Criminal Procedure Code (Cap. 16). Under section 21 of the Court of Criminal Appeal Ordinance (No. 23 of 1938) all jurisdiction and authority vested in the Supreme Court under section 355 of the Criminal Procedure Code in relation to the questions of law arising in trials before a Judge of the Supreme Court shall be transferred to and shall vest in the Court of Criminal Appeal. The accused was tried on an indictment charging him with having committed murder by causing the death of Talpe Liyanage Francis, an offence punishable under section 296 of the Penal Code. By the unanimous verdict of the Jury the accused was convicted of causing grievous hurt, an offence punishable under section 317 of the Penal Code, and he was sentenced to nine months' rigorous imprisonment. At the trial the causing of death was common ground and the defence set up on behalf of the accused was that, in causing the death of the deceased, he was acting in the exercise of the right of private defence. The accused and one witness for the defence gave evidence detailing the circumstances in which they claimed that the right of private defence arose. No evidence of such circumstances emerged from the case for the prosecution. The learned Judge took the view that if the Jury believed the evidence of the accused and his witness he was entitled to an acquittal. The accused, however, having sought

[1] (*1924*) *25 N. L. R. 385.*
[2] (*1919*) *21 N. L. R. 312.*
[3] (*1936*) *37 N. L. R. 439.*
[4] (*1939*) *39 N. L. R. 337.*
[5] (*1931*) *32 N. L. R. 351.*
[6] (*1939*) *40 N. L. R. 457.*
[7] *A. I. R.* (*1939*) *Sind 209 at 212.*
[8] *5 Malayan L. J. 177.*
[9] *7 Malayan L. J. 41.*
[10] *7 Malayan L. J. 147.*
[11] *8 Malayan L. J. 160.*
[12] *7 Malayan L. J. 153.*
[13] (*1932*) *A. I. R. P. C. 195.*
[14] (*1939*) *A. E. R. Vol. 3, p. 37*

to excuse his offence under the provisions of section 89 of the Penal Code was faced with the burden of proof placed upon him by section 105 of the Evidence Ordinance. The learned Judge was, however, invited to direct the Jury in the words of Lord Sankey L.C., as reported in the case of *Woolmington v. Director of Public Prosecutions*[1] that if they "are either satisfied with his (accused's) explanation, or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted". On this point the learned Judge directed the Jury as follows:—

"You have been told, gentlemen, what the onus is which lies upon the prosecution and that the case must be proved to you beyond all reasonable doubt. You may be confused, and I do not blame you if you are, as to the standard of proof which you are entitled to expect from an accused person. You were referred yesterday by Counsel for the defence to a case which was decided in the House of Lords, a case which has now become famous and is constantly referred to in these Courts, and the gist of the decision in that case is that if on the whole of the case the accused person raises a reasonable doubt in your minds as to his guilt he is entitled to the benefit of it. That, of course, gentlemen, is the English Law, as stated in this decision in the case of *Woolmington* (*supra*) by the House of Lords, and I say with the most profound respect that that correctly states the English Law on this point. But, gentlemen, in my view, that is not the law of Ceylon, and on a point such as this, gentlemen, you must take my direction as being correct. If it is incorrect I shall be put right by another tribunal. Just as you are the Judges of fact in a case, so am I the authority on the law, and you will accept my direction on the law as being correct, knowing that if I am wrong I shall be put right.

"Now, gentlemen, one or other, or perhaps both, Counsel referred you to section 105 of our Evidence Act. There is no provision in English Law equivalent to this. This is how the section runs: '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 of the Penal Code . . . . .'; here you have the accused putting forward circumstances which, he says, and which, if they are true, do bring his case within these general exceptions of the Penal Code which deals with the law of private defence or 'within any special exception or proviso contained in any other part of the same Code or any law defining the offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Penal Code is upon him,' that is upon the accused, and the Court shall presume the absence of such circumstances. So you see section 105 definitely places the burden of proving the existence of circumstances indicating that the accused was exercising the right of private defence upon the accused.

"Now you may ask yourselves, gentlemen, 'What does it mean to say that the burden of proof lies upon the accused person?' The same Evidence Ordinance in another section says: 'A fact is said to be

[1] *(1935) A. C. 462.*

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.' You might, perhaps, bear in mind the words: 'under the circumstances of the particular case.' That may mean that some cases require a higher degree of proof than others.

"In a criminal case you are entitled to expect the prosecution to prove its case to you beyond reasonable doubt, and that seems very reasonable, when the life or liberty of a person is at stake. On the other hand, when an accused person has to prove something which may secure him his life or liberty the burden upon him is not so heavy, and you will allow him a little latitude, and you will not ask him to prove his case beyond reasonable doubt. The Evidence Ordinance says it must be proved in this way. So you will see there is, perhaps, some elasticity in this Ordinance as regards the amount of proof expected from an accused person.

"You will remember, gentlemen—some of you sat in this Court last week, in a case in which the defence put up on behalf of the accused person was that at the time of the incident he was insane—I do not know how many of you did sit in that case but some of you must have done so—you will remember that in that case I directed you that it was for the defence to prove that at the time of the incident the accused was in that condition, and I went on to tell you that it would be sufficient according to our law if that state of mind of the accused was proved by a preponderance or balance of evidence. That, of course, does not mean by any number of witnesses, because you will remember, in that insanity case, the accused called no evidence. So, when we speak of the preponderance or balance of evidence, what we mean is, is it more probable? In that case was it more probable that he was insane than that he was sane?

"That seems to me the standard of proof which, in a case like this, where the right of private defence is set up, you should require from the accused person. That seems to me, gentlemen, to be our law on that subject."

Finally, before asking the Jury to consider their verdict, the learned Judge summed up the position in the following way:—

"The question which it seems to me you should put yourselves is this: 'Has the accused satisfied you, in the way in which I have told you you must be satisfied, that is, by a preponderance of evidence, that he was acting in the exercise of the right of private defence? If he has so satisfied you, why, then, he is not guilty of any offence. But if he has not satisfied you, by that preponderance of evidence, then he has failed in his defence and he is guilty of an offence in accordance with the intention which you are prepared to attribute to him."

The question reserved by the learned Judge for decision by this Court is "Whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy

the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded".

It has been contended by Mr. H. V. Perera, K.C., on behalf of the accused, that the passage cited from the summing-up of the learned Judge was not a correct statement of the law. The Attorney-General, who appeared for the Crown, has not submitted any contrary view. This is all the more remarkable having regard to the fact that the authors of the standard text books on the Law of Evidence do not support Mr. Perera's contention. Moreover, the opposite view was adopted by three of the Judges out of the Court of seven who heard the appeal in the case of *Parbhoo v. Emperor*[1], the main authority for the contention put forward by both Counsel. Our consideration of this case has, therefore, been more in the nature of a discussion than an argument. In contending that the law of England, as laid down by Lord Sankey L.C., in the case of *Woolmington v. Director of Public Prosecutions* (*supra*), applies to Ceylon, Mr. Perera has invited our particular attention to section 100 of the Evidence Ordinance. This provision is worded as follows :—

> "Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in this Island, such question shall be determined in accordance with the English Law of Evidence for the time being."

He maintains that the expression "burden of proof" referred to in section 105 of the Evidence Ordinance merely creates a duty on the person on whom the burden is imposed to prove all the evidence he can and that the expression "burden of proving" must be interpreted to mean merely "burden of introducing evidence". He further argues that once evidence has been introduced in support of an exception a fact in issue has been raised and the final words of the section, that is to say, the presumption, no longer applies. With regard to the definition of "proved" in section 3 of the Ordinance, Mr. Perera contends that this refers to the effect of evidence on the mind of the Jury and can have no meaning until the Jury has registered its verdict. For these reasons, Mr. Perera maintains that no provision is made by Ceylon law for the quantum of evidence that must be submitted by a person who relies on bringing his case within any of the general exceptions in the 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. Therefore, section 100 permits us to invoke in aid English law and apply the rule laid down by Lord Sankey L.C., that if the Jury "are either satisfied with the accused's explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted".

Even if the rule as laid down in section 105 of the Evidence Ordinance is clear, unambiguous and unequivocal Mr. Perera maintains that it is merely a rule of procedure and not substantive law and the presumption

[1] *(1941) A. I. R. All. 402.*

therein formulated must give way to the presumption of innocence which is never rebutted, unless the prosecution has established its case on the whole of the evidence put before the Jury.

The Attorney-General's argument was submitted on somewhat different lines. He embraced the contention of Mr. Perera that the Evidence Ordinance did not deal with quantum of evidence, that "burden of proof" in section 105 meant merely "the introduction of evidence" and that the matter was governed by English law. The principle of English law was that a Juryman, in coming to a conclusion as to whether a case against an accused person had been established, should put himself in the position of a prudent man. If there was a reasonable doubt as to whether an accused person had brought himself within an exception, a prudent man would acquit him.

In support of their contentions Mr. Perera and the Attorney-General cited the Rangoon case of *Emperor v. Damapala*[1] and the Allahabad case of *Parbhoo v. Emperor* (*supra*) and several Malayan cases. Both Ceylon and Malaya have adopted the Indian Penal Code and the Indian Evidence Act. These cases are all, therefore, directly concerned with the question reserved for our decision. They no doubt constitute a formidable weight of authority in support of the view submitted on behalf of the accused and, as such, although not binding on this Court, are entitled to our respect and careful consideration. In the Rangoon case there was as in the present case a plea of self-defence. In his judgment Robert C.J., after referring to the fact that in some quarters there had been much confusion as to the meaning of the words "burden of proof", stated as follows:—

"In many instances little or no evidence in favour of the accused will have transpired at the end of the case for the prosecution. When this is so, then in another and quite different sense the burden of proof is cast temporarily on the accused; when sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, the burden of proof in the sense of introducing evidence in rebuttal of the case for the prosecution is laid down upon him. If evidence is then adduced for the defence which leaves the Court in doubt as to whether the accused ought to be excused from criminal responsibility, or found guilty of a lesser offence than that with which he stands charged then, at the conclusion of all the evidence, it must still be remembered that it is incumbent upon the prosecution to have proved their case. Put shortly, the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal."

Further on, the learned Chief Justice states:—

"Passing on to the second question I hold that the decision in *Woolmington v. Director of Public Prosecutions* (*supra*) is in no way inconsistent with the law in British India. Indeed, the principles

[1] *(1937) A. I. R. Rangoon 83.*

there laid down form a valuable guide to the correct interpretation of section 105, Evidence Act. It is unnecessary to decide any question relating to insanity in the present reference, and the effect of our decision in no way alters the existing law on the subject."

Dunkley J., in his judgment, after referring to the fact that where the law of British India appears on examination to be the same as the law of England on any subject, a decision of the House of Lords on such a subject must be considered to be a paramount authority in India, stated the decision of the House of Lords in the *Woolmington* case was the latest and most authoritative exposition of the law of England on the subject of the duty which lies upon an accused person who, when the elements constituting a criminal offence have been proved against him by the prosecution, pleads in defence that owing to the existence of special circumstances has act or acts did not amount to an offence. The learned Judge stated as follows :—

"The judgment of Viscount Sankey L.C., in this case, ought to be accepted as a binding authority by every Criminal Court in British India in so far as the law of British India on this subject, which is comprised within the terms of section 105, Indian Evidence Act, coincides with the law of England."

Dunkley J. then stated that the true construction of section 105 depended upon the meaning to be assigned to the expression "burden of proof" and referred to the fact that the phrase is used in two distinct meanings in the Law of Evidence, namely, the burden of establishing a case, and the burden of introducing evidence. After considering the effect of section 101 and the definition of "proved" in section 3, he states as follows :—

"It is plain that in this section the term 'burden of proof' is used in the first of its meanings, namely, the burden of establishing a case. In a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to establish that each such defence could not be made out, and of this task the prosecution is relieved by the provisions of section 105 and its closely allied section, section 106. Section 105 enacts that the burden of proving the existence of circumstances bringing the case within any general or special exception in the Penal Code shall lie upon the accused, and the Court shall presume the absence of such circumstances. In this section the phrase 'burden of proof' is clearly used in its second sense, namely, the duty of introducing evidence. The major burden, that of establishing on the whole case the guilt of the accused beyond reasonable doubt, never shifts from the prosecution. The duty of the accused under section 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole

case the guilt of the accused beyond reasonable doubt. I should, perhaps, point out that the examination of the accused before the committing Court is, under section 287, Criminal P. C., evidence at the Sessions trial, and that, under section 342, the examination of the accused at any trial 'may be taken into consideration' and is to this extent evidence at the trial."

The third member of the Court, Leach J., merely stated that he was in agreement with the views expressed in the judgment of Roberts C.J. It will thus be seen that the Court based its decision on the ground that an accused person who desires to bring himself within an exception satisfies the "burden of proof" imposed by section 105 by merely introducing evidence. If this is a correct statement of the law, the law of India and *a fortiori* that of Ceylon which possesses section 100 applying the English Law of Evidence can no doubt be reconciled with the *Woolmington* case. The interpretation thus given by the Rangoon Judges to the words "burden of proving" in section 105 ignores the illustrations to this provision and the definition of "proved" in section 3. It will be noted that those illustrations place a plea by an accused person of insanity and one of deprivation of self-control by reason of grave and sudden provocation in the same category. The burden of proof according to these illustrations is on the accused. Moreover, no authority other than the passage itself from text-book writers can be discovered for the following passage from the judgment of Dunkley J.:—

"The duty of the accused under section 105 is to introduce such evidence as will displace the presumption of the absence of circumstances bringing the case within an exception, and will suffice to satisfy the Court that such circumstances may have existed. The burden of the issue as to the non-existence of such circumstances is then shifted to the prosecution, which has still to discharge the major burden of proving on the whole case the guilt of the accused beyond reasonable doubt."

In *Woodroffe and Ameer Ali's Law of Evidence* as applied to British India and in *Basu's Law of Evidence* in British India these learned authors express the opinion that section 105 is an important qualification of the general rule and it is for those who raise the plea of private defence to prove it. The burden of the general issue rests upon the prosecution and never changes until a good prima facie case is made against the accused sufficient to justify his conviction and shifts the burden upon the accused to prove any special issue raised by him. It is sufficient for an accused person in such circumstances to establish a prima facie case for then the burden of proving such issue is shifted to the prosecution. Moreover, the fact that this principle is subject to the qualification I have mentioned is in one sense not inconsistent with the decision in the *Woolmington* case. In the course of his judgment in that case Lord Sankey L.C., stated as follows:—

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception."

Lord Sankey, therefore, recognises that defence of insanity and the statutory exception as qualifications of the principle that the burden on the prosecution never shifts. The defences, however, based on the existence of circumstances bringing persons within the general exceptions in the Penal Code are not statutory exceptions in English Law and hence arises the inconsistency between Ceylon and Indian Law on the one hand and English Law on the other.

The Rangoon case was subsequently followed by the four majority Judges in the case of *Parbhoo v. Emperor* (*supra*). Generally speaking, the reasoning of the Rangoon Judges was adopted by the majority of Judges in the Allahabad case. Thus Bajpai J. held that in section 105 the expression "burden of proof" is used in the sense of burden of introducing evidence and not burden of establishing a case, for such a burden rests throughout the trial on the prosecution. The President of the Court, Iqbal Ahmed C.J. seemed to base his opinion on a belief that the framers of the Indian Law could not have intended to depart from the English Law on the subject under discussion. In this connection it is relevant to point out that at the time when the Indian Evidence Act was framed the judgment of Lord Sankey had not been delivered and different views to those expressed in that judgment were accepted. No doubt it is, as stated by the learned Chief Justice, a fundamental principle of English Law that criminality must never be presumed against an accused person but must be established by evidence such as to exclude to a moral certainty every reasonable doubt about his guilt. But even this fundamental principle of English law is qualified when pleas of insanity and statutory exceptions are raised by accused persons. One of the other majority Judges, Mohammed Ismail J., in adopting the views of the Judges in the Rangoon case, stated that the Law of Evidence regulates procedure only and has nothing to do with conviction or acquittal of an accused person. This view ignores the definition of "proved" as contained in section 3 and cannot be accepted. The remaining majority Judge in the Allahabad case, Mulla J., held that the purpose of section 105 was merely to relieve the prosecution of the burden of establishing that the act with which the accused is charged does not fall within any one of the general exceptions in the Penal Code. If this view is correct, the illustrations to this section are singularly inapt.

For the reasons I have given I find the reasoning and decisions of the majority Judges in the Allahabad case as unacceptable as those of the Court in the Rangoon case. I do not propose to make reference to the views of the three minority Judges except to say with all respect that I find their reasoning unassailable.

I will diverge at this stage to a brief consideration of the Malayan cases to which our attention was invited by the Attorney-General. In the case of *Rex v. Chhui Yi*[1] it was held that it is the duty of the Crown to give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the Jury to find the accused guilty but, once that onus is discharged, it remains for the accused to establish any facts which may show that what he did is, in his case, and as an exception

[1] *5 Malayan L. J. 177.*

to the general law, not a criminal offence. There can be no legal obligation on the Crown, as a part of its case, to rebut, in advance, all possible grounds of defence. The following passages occur in the judgment of Whitley A.C.J. :—

"The next question was that which was raised in the seventh ground of appeal, which alleged that certain parts of the summing-up of the learned trial Judge constituted a misdirection because he had failed to direct the attention of the Jury to the recent decision of the House of Lords in *Woolmington's* case which, it was alleged, had had an 'effect' on section 105 of our Evidence Ordinance. It was not very clearly explained how a decision even of the House of Lords could be said to 'effect' a statutory provision of our law but probably what this was intended to mean was that section 105 of our Evidence Ordinance should now be construed in some way different from that in which it has hitherto been construed in our Courts. We do not think the decision of *R. v. Woolmington* can have any effect on our law . . . . "

Now, not only does section 105 provide such a statutory exception but our definition of murder unlike that in England is a statutory one. It is laid down, as we all know, in sections 299 and 300 of our Penal Code and these sections make it clear that the prosecution must always prove the existence, in the mind of the accused, of one of the intentions or of the knowledge therein described. We think that, with these sections before him, no Judge of this Colony would ever have given to a Jury a direction such as that which led to the quashing of the conviction in *Woolmington's* case.

Section 105 of our Evidence Ordinance in no way lessens the onus which always remains upon the prosecution. All that that section lays down is that :—"When a person is accused of any offence, the burden of proving the existence of circumstances, bringing the case within any of the general exceptions in the 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," and illustration (*b*) to that section shows that, *inter alia*, the burden of proving sudden provocation (which would reduce the offence, in accordance with the terms of Exception 1 to section 300 of the Penal Code, to one of culpable homicide not amounting to murder) is a burden which is on the accused. This burden, however, can never arise unless the Crown has already produced evidence sufficient in law to satisfy the Jury, in the absence of evidence from the defence, that the killing amounted to culpable homicide committed with one of the intentions or with the knowledge described in section 300 of the Penal Code.

In *Lim Tong v. The Public Prosecutor, Johore*[1] a Court constituted by Terrell A.C.J. and Horne J. followed the Rangoon case of *Emperor v. Damapala* (*supra*), and held that if the accused fails to discharge fully the burden of proving provocation, but by his evidence or arguments raises a reasonable doubt as to whether the prosecution has satisfied the

[1] *7 Malayan L. J. 41.*

assessors that such criminal intention as would justify a verdict of murder has been satisfactorily established, the accused is, therefore, entitled to the benefit of such doubt, and the offence would be reduced from murder to culpable homicide not amounting to murder. This decision was shortly followed by the case of *Chia Chan Bah v. The King*[1] by a Court composed of McElwaine C.J., Terrell and Horne JJ., when it was held that "in a trial for murder it is incumbent on the Crown to prove beyond reasonable doubt that the accused killed the deceased by an act which constituted murder within the meaning of section 300 of the Penal Code. Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed upon him by section 106 of the Evidence Ordinance, but the law does not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It is sufficient if he induces in the mind of the Jury a feeling that he was probably insane though the Jury may have its doubt whether he really was insane." Soon afterwards in *Public Prosecutor v. Alang Mat Nesir Bin Anjang Talib* and *Public Prosecutor v. Chan Lip*[2] a Court constituted by Whitley A.C.J. and Gordon-Smith J. (Cussen J. *dissentiente*), held that "while it is for the prosecution to prove its case beyond reasonable doubt, the burden of proving the existence of circumstances bringing the case within one of the exceptions contained in section 84 of the Penal Code lies upon the accused. It is open to him to discharge that burden either by adducing himself or by relying upon the evidence adduced by the prosecution or by both these means. The burden of proof cast upon an accused to prove insanity is not so onerous as that upon the prosecution to prove the facts which they allege and may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. Held, further, that the trial Judge having found in each case that the evidence did raise a reasonable doubt in his mind as to whether or not the accused was insane when committing the acts complained of and such a doubt being based as it was upon a very definite and weighty expert medical opinion, and having regard to the lesser degree of proof required in such a case, the accused had discharged the burden cast upon them by section 105 of the Evidence Enactment and brought themselves within the exception provided by section 84 of the Penal Code." The last Malayan case to which I need invite attention is that of *Mohamed Isa Bin Leman v. Public Prosecutor*[3], in which it was held by Roger Hall C.J. that the onus of proving insanity is upon the accused—section 105 of the Evidence Enactment. That onus is not a heavy one. The burden is no higher than that which rests upon a party to civil proceedings. The story of the decisions of the Malayan Courts may be summarised as follows. In 1936 it was held that the decision in *Woolmington's* case (*supra*) could have no effect on the law in the Straits Settlements and that the burden of proving sudden provocation by virtue of section 105 rests on the accused. In 1937, after the decision in the Rangoon case, it was held that the law in Johore as regards the onus placed on the prosecution and the principles laid down in the

[1] *7 Malayan L. J. 147.* [2] *7 Malayan Law Journal, p. 153.*
[3] *8 Malayan Law Journal, p. 160.*

Woolmington case should be applied. In 1938 it was even held that when the accused pleaded that he was insane, he had only to raise a reasonable doubt in the mind of the Judge to discharge the burden cast upon him by section 105 and bring himself within the requisite exception provided by the Penal Code. I may remark that this finding is contrary to the decision in the English Courts in *Macnaughten's* case[1] in which it was held that, if the accused person relied on insanity, he must clearly prove it. In two other cases in Malaya in 1938 it was held, following *Sodeman v. Rex*[2], that the burden in cases in which an accused has to prove insanity may fairly be stated to be not higher than the burden which rests upon a plaintiff or defendant in civil proceedings. The Malayan cases are entertaining but not really helpful.

Having given the grounds which have led me to the conclusion that the decisions in the cases I have cited cannot be accepted, I propose to refer briefly to the various relevant sections of the Evidence Ordinance in order to see whether any gap or *hiatus* occurs with regard to the matter in dispute as would allow under section 100 recourse to English law. It is only in such circumstances that recourse can be had to such law. It will be observed that the heading of Part III of the Ordinance is not merely "Production of Evidence", but "Production and Effect of Evidence". Section 101 is worded as follows :—

> "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

I would, in particular, refer to the second paragraph.
Section 102 says—

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 103 enacts—

> "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Omitting section 104 which is not relevant and section 105 for the moment, section 106 says—

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Section 103 seems to throw on the accused the burden of proving that he had acted in exercise of the right of private defence because it is he and not the prosecution who wishes the Court to believe that he did so. The illustration to the section, which is worded as follows :—

> "A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.
> B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it."

[1] *(1843) 10 Ch. F. 200.*

[2] *(1936) 2 A. E. R. 1138.*

bears out this contention. Section 103 does not, however, stand by itself for section 105 is in the following terms:—

> "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 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."

It has been contended that "burden of proving", as used in this section has not the same meaning as "burden of proof". Any doubt as to the meaning is, as I have already observed, removed by the language of the illustrations. I need only quote the first one, which is as follows:—

> "A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.
>
> The burden of proof is on A."

Obviously the Legislature did not intend to apply different meanings to the terms "burden of proof" and "burden of proving". Moreover, no distinction is drawn either in the section or in the illustrations between the various general exceptions and the various special exceptions or between general and special exceptions. The same rule applies to them all. No distinction is made between the question of private defence and the question of unsoundness of mind. If the burden of proving unsoundness of mind is upon the accused, the burden of proving the right of private defence is upon him too. It may be conceded that one of the reasons why the final words of section 105, namely, "and the Court shall presume the absence of such circumstances", may have been inserted was so as to make it clear that the non-existence of such circumstances was not a matter to be established by the prosecution as under the old law. On the other hand, the fact that such words have been inserted seems to manifest only too clearly the burden cast on the accused. In this connection I would refer to the definition in section 3 of the term "Facts in Issue", which is as follows:—

> "'Facts in Issue' means and includes—
>
> any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any rights liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.
>
> Explanation:—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied, in the answer to such issue, is a fact in issue."

The question of an accused being faced with the burden of proving a fact in issue such as grave and sudden provocation can only arise when the prosecution has established beyond all reasonable doubt facts

which constitute an offence. Then only does the burden arise. The illustration to this definition which is as follows :—

"A is accused of the murder of B. At his trial the following facts may be in issue—

That A caused B's death ;
That A intended to cause B's death ;
That A had received grave and sudden provocation from B.
That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature ";

indicates what facts may be in issue in a case of murder. The first two issues must be established by the Crown and then by section 105, the burden of proving the existence of the third or last fact in issue is upon the accused and the Court shall presume until he has proved it that it does not exist. If, however, the provisions of section 105 of the Evidence Act mean only that the accused was bound to produce some evidence, as it has been contended, the following position would arise. After the production of that evidence, if the Jury remained in doubt as to whether the accused had established the existence of circumstances bringing him within an exception, it would still go back to the original burden upon the prosecution and hold that the prosecution had failed to prove that the accused had not acted in exercise of the right of private defence and would, therefore, give him the benefit of the doubt. If such was the position, the Jury who decided the case would have recorded in the same proceeding two contradictory findings upon a fact in issue in that proceeding. Having regard to the view I take of the section I have quoted I am of opinion that the existence of circumstances bringing an accused within an exception is a fact in issue that must be proved by him. I must now inquire as to whether the Ordinance states how that burden is discharged. In section 3 the expression 'proved' is defined as follows :—

"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."

The expression "Court" is defined earlier in the same section as follows :—

"'Court' includes all Judges and Magistrates, and all persons except arbitrators, legally authorised to take evidence."

These words would not seem to include a Jury, but in view of the words "unless a contrary intention appears from the context" that appear in the opening words of section 3, I have no hesitation in holding that the expression "Court" does include a Jury. In fact, it has been so held in India (*vide Monir, p. 10 ; Ameer Ali, p. 109 and Basu, p. 31*). It has been contended that the definition does not come into existence until a Jury has returned its verdict. I am unable to understand this argument. It seems to me that it is a direction to a Jury and a Court when functioning as a Jury as to the manner in which it should come to a decision as to whether a fact is proved. The Jury properly

directed with regard to the onus of proof has to apply the directions contained in the definition of "proved". The fact that the definition contains the words "under the circumstances of the particular case" permits a "prudent man" to require a different standard of proof in criminal and civil cases. In this connection, I cannot do better than cite the dictum of Baron Parke in *R. v. Sterne*[1] that in a criminal case owing to the serious consequences of an erroneous condemnation both to the accused and society the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt. Hence a prudent man in criminal proceedings when the burden of proof is on the prosecution requires the establishment of the case against an accused beyond all reasonable doubt. No doubt also this differentiation in the standard of proof required in criminal and civil cases is a legacy bequeathed by English law which was applied before the enactment of the Evidence Ordinance. In *Sodeman v. Rex*[2] to which reference has already been made, it was held that the standard of proof required by an accused person who pleads insanity is not higher than that required by a plaintiff or defendant in a civil suit, that is to say a mere preponderance of probability. Or, in other words, the standard required by the addition of "proved" in section 3. The authority of *Sodeman's* case is accepted by both Counsel but it has been contended that "insanity" stands in a particular class and that a prudent man would require a higher standard of proof to rebut the presumption of sanity than he would to rebut the presumption of the absence of circumstances, the existence of which would bring an accused person within an exception other than unsoundness of mind. No authority has been cited in support of the proposition. Moreover, it is contrary to the meaning of section 105 as interpreted by the illustrations which draw no distinction between insanity and other exceptions. Moreover, it is contrary to the judgment of Lord Sankey L.C., in *Woolmington's* case, in which insanity and statutory exceptions are excluded from the principle formulated therein. In considering what is the correct interpretation to be given to section 105 it appears to me that the Legislature has made the matter perfectly clear when it has said that "the Court shall presume the absence of such circumstances". The term "shall presume" is defined in section 4 of the Ordinance as follows :—

> "Whenever it is directed by this Ordinance that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

It seems to me perfectly clear that the Jury shall regard the fact as proved that the accused did not exercise the right of private defence till it is satisfied that he did so or that it is so probable that he did so that a prudent man should act on that supposition.

I may conclude by referring briefly to some further points that have been raised in the course of the argument. In order to reinforce his contention that the Court should adopt the standard of proof required by English law of an accused person who puts forward a plea of self-defence, the Attorney-General referred us to various cases in which the

[1] *Surrey Sum. Ass. 1843, MS., Best on Ev. p. 82.* [2] *(1936) 2 A. E. R. 1138.*

Courts of Ceylon had adopted the English law as to what constitutes "criminal negligence". It is true that the Courts in Ceylon have turned to English decisions for assistance as to what constitutes criminal negligence. As the Penal Code does not supply a definition as to what constitutes a negligent act, it is right and proper that the Courts in Ceylon should consult other systems of law for guidance in such a matter. The fact that they do so cannot be said to be relevant in considering whether it is proper to do so on a matter for which provision is made by Ceylon law.

Reference was also made to the case of *Attorney-General v. Rawther*[1] and *Perera v. Marthelis Appu*[2] which dealt with the burden of proof imposed upon a person found in the recent possession of stolen goods. In both these cases the Courts adopted the principle laid down by Lord Reading C.J. in *R. v. Abramovitch*[3] as follows :—

> "In a case such as the present where a charge is made against a person of receiving stolen goods well knowing the same to have been stolen, when the prosecution have proved that the person charged was in possession of the goods, and that they had been recently stolen, the Jury should then be told that they may, not that they must in the absence of any explanation which may reasonably be true, convict the prisoner. But if an explanation has been given by the accused, then it is for the Jury to say whether on the whole of the evidence they are satisfied that the prisoner is guilty. If the Jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed upon it by our law of satisfying the Jury beyond reasonable doubt of the guilt of the prisoner. The onus of proof is never changed in these cases ; it always remains on the prosecution. That is the law. In pronouncing it to be so, the Court is not giving forth any new statement of the law, but is merely re-stating it ; and it is hoped that this re-statement may be of assistance to those who have to try these cases."

The offence in both these cases and in *R. v. Abramovitch* (*supra*) was one of dishonestly retaining stolen property. The prosecution had to establish beyond all reasonable doubt all the ingredients of such an offence. One of these ingredients is guilty knowledge. If the accused gives an explanation as to his possession which may reasonably be true, it is obvious that a reasonable doubt must exist as to whether he has guilty knowledge or *mens rea*, one of the ingredients of the offence to be established by the Crown. It is, in these circumstances, difficult to understand what bearing these cases have on the matter now under consideration except once again to show that where Ceylon law is silent, assistance and guidance has been sought from English law.

We were also referred to the case of *Nair v. Saundias*[4], in which a Court constituted by three Judges held that the burden was on the prosecution to prove that the owner did consent to the commission of the offence or that the offence was due to an act or omission on his part

[1] *(1924) 25 N. L. R. 385.*
[2] *(1919) 21 N. L. R. 312.*
[3] *(1914) 84 L. J. K. B. 397.*
[4] *(1936) 37 N. L. R. 439.*

or that he did not take all reasonable precaution to prevent the offence. Section 80 (3) (b) of the Motor Car Ordinance does not cast upon the accused the burden of proving an exception within the meaning of section 105 of the Evidence Ordinance. This decision turned upon the question as to what ingredients the prosecution had to prove in order to constitute the offence. The Legislature not having indicated that it intended to effect any changes in the general law governing the burden of proof, it was held that *mens rea* had not been established.

It was suggested that the question before us was affected, in some measure, by the provisions of section 5 of the Penal Code, which are that every definition of an offence shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though these exceptions are not repeated in such definition. In my judgment, this provision does not affect the question in any way. It is sufficient for me to say that the section is not concerned with the burden of proof and cannot be held to overrule section 105 of the Evidence Ordinance. The section 6 has been inserted to facilitate brevity of expression so as to obviate the necessity of repeating in every section defining an offence that the definition is to be taken subject to the exceptions.

The point has also been taken with regard to the burden of proof and the interpretation of section 105 that presumptions disappear when an issue of fact has been raised as the result of evidence tendered on both sides. In this connection we were referred to the following passage from the judgment of Lord Sumner in *East Indian Railway Co. v. Kirkwood*[1] :—

> "However important this question may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. The judgments in question have not sufficiently observed this."

I do not think that there is anything in this paragraph to dispute the proposition that where the burden of proof of a fact in issue lies on a particular person it remains on such person until discharged. Our attention was also invited to the following passage from the judgment of Sir Lawrence Jenkins in *Aiyar v. Goundan & others*[2] —

> "This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say :—'We also hold that even if that fact could be of any use to him the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights'.
>
> "The controversy had passed the stage at which discussion as to the burden of proof was pertinent and the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

[1] *(1922) A. I. R.—Privy Council—195.*

[2] *(1920) A. I. R.—Privy Council—67.*

"In the end the learned Judges drew the inference—they speak of it as a presumption—in favour of the defendant's occupancy rights and, as finally expressed, their determination was unvitiated by any error as to the burden of proof."

I can find nothing in this passage to assist the argument of Counsel for the accused. It merely states that the question at issue in the particular case was what inference was to be drawn from the relevant facts before the Court.

It has been seriously maintained that the decision at which I have arrived will have the effect of limiting one of the fundamental principles that lies at the whole basis of British Criminal Jurisprudence, namely, the presumption of innocence. If this is so, it is not a reason for importing into Ceylon law a principle of English law contrary to the clear, definite and unequivocal language employed in a Ceylon enactment. On the other hand, in my opinion, the decision gives rise to no such limitation and, as I have already indicated, is in one sense consistent with the principle formulated in the *Woolmington* case. Moreover, I am unable to understand any logical necessity for imposing on an accused who raises a defence of insanity a greater burden than on an accused who pleads the existence of circumstances indicating that he was exercising the right of private defence or had lost the power of self-control by reason of grave and sudden provocation.

For the reasons I have given I am of opinion that the charge of the learned Judge was in accordance with our law and the appeal should be dismissed.

SOERTSZ J.—

After careful consideration of the judgments delivered in the Rangoon, Allahabad, and Malayan cases, and of the arguments submitted to us from the Bar, I am confirmed in the view which commended itself to me, and to which I ventured to give expression *obiter*, when a Divisional Bench of our Court was called upon to deal with the question of the burden of proof resting upon a prisoner who pleads insanity in answer to a criminal charge. (*The King v. Vidanelage Abraham Appu*[1].)

That view, shortly stated, is that, in virtue of sections 103 and 105 read with sections 2, 3, 4 of our Evidence Ordinance, our law differs materially, on the question before us, from the English law as stated by Lord Sankey in his speech in *Woolmington v. The Director of Public Prosecutions*[2] and as explained by Lord Simon in the speech he made in the later case of *Mancini v. The Director of Public Prosecutions.*[3] I should have been content to record, in this brief manner, my concurrence with the answer given to the question by my Lord the President but that my brother de Kretser has taken a different view, and the importance of the subject makes it desirable that I should state my reasons for agreeing with the majority.

The difficulty that attends the question before us seems to me to be due almost entirely to the fact that by the time our Evidence Ordinance came to be enacted, we had followed the English Law of Evidence, for nearly a century, and modes of thought and speech acquired during the long association have persisted in our Courts even after we had received a code with a different orientation.

[1] *40 N. L. R. 505.* [2] *(1935) A. C.462.* [3] *(1941) A. E. R. vol. 3, p. 27 at 29.*

In these circumstances, I think, as Jackson J. observed in the case of *Rex v. Asbutosh Chuckerbutty*[1] :—

> "Embarrassment and difficulty will be greatly lessened if, instead of assuming the English Law of Evidence, and then inquiring what change the Evidence Act has made in it, we regard as, I think, we are bound to do, that Act itself as containing the scheme of the law, the principles and the applications of those principles to the cases of most frequent occurrence."

But the Judges in the Rangoon case of *Rex v. Dhamapala*, the majority of the Judges in the case of *Parbhoo v. Emperor*, and the Judges in Malaya in the cases referred to and quoted from by My Lord the Chief Justice, approached the question from the opposite direction. De Kretser J. has taken the same course. By way of illustration I would quote from the judgment of Iqbal Ahamed C.J. in *Parbhoo v. Emperor* :—

> "Even though the Evidence Act does, in certain respects, differ from the English law and supplies a distinct body of law, I decline to believe that the framers of the Indian law could or did intend to depart from the English law on the subject under discussion. There are certain fundamental principles which govern the trial and decision of criminal cases in England. According to the English law the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecutor . . . . It is on the basis of these principles that it is well settled in England that the evidence against the accused must 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. The decision in (*1935*) *A.C. 469* (*i.e.*, the *Woolmington* case) does no more than push to its logical consequences the doctrines and principles just noticed. I find it impossible to hold that Sir James Fitz-James Stephen, in framing the Evidence Act, could have had the remotest intention of tampering with or modifying those fundamental principles which, I consider, are based on principles of Natural Justice. After all, there cannot be varying standards of proof about the guilt of an accused person in England and in this country. What holds good in England must hold good in India. I, therefore, regard the decision of the House of Lords as the last word on the subject and, unless I am forced by express provisions contained in the Indian Evidence Act, to ignore that decision, I should, I consider, respectfully follow it."

I have quoted at this length because this passage, if I may say so, is typical of the reasoning by which the Judges in Rangoon, Allahabad and Malaya reach their conclusions.

But I do not see what logical justification there could be for the learned Chief Justice of Allahabad declining "*to believe that the framers of the Indian law could or did intend to depart from the English law* ; or, for finding "*it impossible to hold that Sir James Fitz-James Stephen had the remotest intention of tampering with or modifying these fundamental*

[1] *I. L. R. 4 (Cal.) 484.*

doctrines" ; or for saying *"there cannot be varying standards of proof about the guilt of an accused person in England and in this country*; or, again, for saying, *"what holds goods in England must hold good in India"*.

Speaking with profound respect, this process of reasoning does not reveal an open mind in relation to the question under consideration. The learned Chief Justice appears to have addressed himself to it, fully equipped with prepossessions and assumptions and, in consequence, he adopts procrustean measures for dealing with the problem. He does not make allowance for the full dimension of our law, but he reduces it drastically to make it fit into the frame of the English law. I would respectfully associate myself with the answers given by Callister, Allsop, and Braund JJ. to the argument of the Chief Justice in the passage I have reproduced, and I would refer particularly to that part of the judgment of Braund J. where he says :—

> "As I have already said, I think it would have been an inversion of the proper order of things in India to have taken that English case of the highest authority (namely the *Woolmington* case) first, and then to have construed the Indian Statute in the light of the law . . . . that it lays down in England. What, with the greatest respect, I venture to think is overlooked is that (*Woolmington's* case) while being, unquestionably, the highest authority in England on the burden of proof in Criminal law, has no reference to India, where the law upon this matter has to be looked for in Indian Statutes and nowhere else, and, when found, applied. Indeed, I think the very form of one of the questions propounded in the Rangoon case exposes the mistake. It was 'Is the decision of the House of Lords . . . . inconsistent with the law of British India?'. It was decided that it was not. But what, may I ask, would it have mattered if it was? The law of England is one thing and the law of India is another. And, in the result, I am compelled to think that if we are to apply the principles (in the *Woolmington* case) to the one before us, the construction of an Indian Statute will have to be strained to conform to the law of England rather than that the Indian Statute will itself have been construed."

If, then, we shut our eyes to the English Law of Evidence as, I think, we must, except so far as a *casus omissus* renders recourse to it necessary, and call to mind the provisions of our Ordinance to see if there are any that deal with the question before us, sections 103 and 105 read with sections 3 and 4 (2) occur to us at once.

Section 103 says—

> "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Section 105 says—

> "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 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."

Section 3 says—

"A fact is said to be proved, when after considering all 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."

"A fact is said to be disproved when, after considering all the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist."

"A fact is said not be proved when it is neither proved nor disproved."

Section 4 (2) says—

"Whenever it is directed by this Ordinance that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

As I understand these provisions, their effect is to establish *one* measure of proof, and to make that measure applicable, due regard being had to "the circumstances of the particular case", whenever a fact has to be "proved" in all Judicial proceedings in or before any Court other than Courts-martial" . . . . (section 2 (i.)). Section 2 (2) intervenes to clinch the matter, and to prevent any doubt or ambiguity by declaring that, "all rules of evidence not contained in any written law so far as such rules are inconsistent with any of the provisions of this Ordinance are hereby repealed". This section, so to say, cuts the pointer that held us to the English Law of Evidence, except for the slender contact provided by section 100 which requires resort to the English law "whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any law in force in this Island". Both Counsel for the prisoner and the Attorney-General sought refuge in the somewhat shadowy amplitude of this section, and contended that the question now before us is such an instance. Their argument was that sections 100 to 106 of the Evidence Ordinance provide for the "burden of proof" in the sense of introducing evidence and that there are no provisions in the Ordinance dealing with the burden of proof in the sense of *establishing a case* and that resort to the English law is necessary. I am unable to entertain that argument, for it seems quite clear to me that the sections I have already referred to and quoted deal with this very question, if they are but properly interpreted. Section 100 of our Ordinance does not occur in the Indian or the Malayan Evidence Acts and yet the majority of the Indian Judges in the case of *Parbhoo v. Emperor* (*supra*) and the Judges in Malaya in the cases referred to were able to assert that, nevertheless, the English law applied, while the argument I am dealing with proceeds on the footing that the English Law applies in virtue of section 100. This is a bewildering result, for it means that for the view that the English law applies, section 100 *is* necessary and also that it is not necessary.

If section 105 is read in the light of sections 3 and 4, as it must be, it is not possible to sustain the submission made to us that sections 103 and 105 mean no more than that the accused has the burden of introducing evidence sufficient to raise, as a fact in issue, the existence of the circumstances relevant to the defence set up, and that when there is *some* evidence for that purpose, his burden is discharged, and that it is then for the Jury to say, at the end of the trial, what their finding is in regard to the existence of the relevant circumstances: that if they believe its existence or if they are left in a state of mind in which they are unable to say either that they believe or that they disbelieve its existence, they must acquit the accused because, in either of those events, the prosecution has not discharged its burden by eliminating reasonable doubt in relation to the whole case. This is a strained interpretation put upon section 105 in order to assert the English law. But, under our law, the Penal Code defines precisely the different offences penalised by it, and so do the other laws that create offences, and the *whole* burden that rests upon the prosecution, under our law, is the burden to show that the elements that constitute the offence exist, and that the definition is satisfied. Sections 101, 102, and 103 of the Evidence Ordinance make it clear that that is the extent of the burden the prosecution carries. See the case of *Seturatnam v. Venkatachile*[1]. It was in view of this difficulty that the learned Counsel who appeared for the appellant in the case of *Parbhoo v. Emperor* (*supra*), seized upon the Indian equivalent of section 3 of our Penal Code in order to contend that the prosecution does not prove its case and does not establish the offence charged unless and until it eliminates the exceptions which are contained in Chapter 4 of the Penal Code, and which state the matters that exempt a person from culpability. But all the judges in that case had no difficulty in rejecting that argument. That argument, if it were sound, can only apply, in any case, to matters dealt with by the *general* exceptions *alone* not to those dealt with by *special* exceptions and provisos. So that upon the hypothesis that that argument is sound, a distinction would have to be made between the *onus* on the prosecution in a case in which a defence to an offence is set up under a general exception, and that in a case in which a special exception is pleaded, an extremely anomalous state of things which would invest section 103 with a double meaning.

This argument of appellant's Counsel in the Allahabad case was not adopted by Counsel here, except in order to submit that that argument was based on what the law in India had been till the Legislature enacted section 105, and that they could no longer endorse that argument since by the use of the words "the Court shall presume the absence of such circumstances", a rebuttable presumption against the accused was created. That presumption was, however, displaced directly some evidence relevant to the issue raised by the particular exception was in. Thereafter—the argument proceeded—when all the evidence had been led, and the occasion arose for the Tribunal to consider its decision, section 3 merely served to caution the Tribunal that unless that evidence had persuaded it to the point of inducing belief in its mind, it should not hold that a fact has been proved unless there was such a high degree of the

[1] *A. I. R. 1920 (P. C. at p. 69)*

probability of the existence of that fact as to enable a prudent man to act upon the supposition that it exists. But section 3 does not define the *quantum* of proof necessary for the purpose. For that, a prudent man must look elsewhere. In Ceylon, he would, in view of section 100, look to the law of England. That was the argument. But the question arises, should he look to the rule of "proof beyond reasonable doubt in relation to the whole case" as enunciated in the *Woolmington* case, or to the rule as previously understood on the authority of Sir Michael Foster. That was the rule commonly in force at the time our Ordinance was passed. So far as India and other countries governed by the Indian Evidence Act are concerned, in the absence of a section similar to our section 100, it would, I suppose, be open to the prudent man to range from China to Peru in order to select his rule. It is so improbable a hypothesis that in a Code of the Law of Evidence, presumably intended to be as complete as possible, so important a matter as that of the *quantum* of proof was omitted or overlooked, that it must be rejected, particularly in view of the fact that Sir James Fitz-James Stephen, who was so largely responsible for the Code, says in his great book on the Law of Evidence:—

> "The Law of Evidence is that part of the Law of Procedure which, with a view to certain individual rights and liabilities in particular cases decides (1) what facts may and what may not be proved in such cases; (2) *what sort of evidence must be given of a fact which may be proved;* (3) by whom and, in what manner, the evidence must be produced by which any fact is to be proved."

It cannot, I think, reasonably be supposed that in the Code drafted under his supervision point (2) was omitted. The conclusion to which I find myself driven is that sections 103 and 105 read in the light of sections 3 and 4 provide not only for the "onus of proof" in the sense of the burden of introducing evidence, but also for the onus of proof in the sense of establishing the particular case.

As pointed out by my brother Hearne, it is not an adequate answer to this to say, as it was said, that if the tribunal started with a presumption against the truth of the relevant circumstances it would require "a mental revolution" to find that the circumstances are true. These "mental revolutions" are matters of daily experience in our Court although they are more simply known as changes of view.

It is often possible to test the validity of an argument by carrying it to what would be its logical conclusion. If we take that course with the main argument submitted to us, the resulting position would be that, although section 105 requires the existence of circumstances bringing the case within an exception to be *proved* by the accused, he would satisfy the requirement even though the existence of these circumstances is left in doubt by him, that is to say is *not proved* by him, for section 3 says that "a fact is not proved when it is neither proved nor disproved". Such a conclusion appears to me to refute the argument.

The position is however different in cases in which, by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law

in the *Woolmington* case, if on the charge of murder, on all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary cause of nature to cause death, existed or not. In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case.

Similarly, in a case in which the accused's plea is simply that he is not guilty, or in a case in which he pleads an alibi, if he creates a sufficient doubt in the minds of the Jury as to whether he was present or not, or as to whether he did the act or not, or as to whether he had the necessary *mens rea* or not the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case.

But in the great majority of cases in which the defence calls in aid a general or special exception or proviso "the position is different, and is on a footing similar to that under the English law in regard to pleas of confession and avoidance in which the burden of establishing the facts justifying avoidance is on the accused". (*Phipson on Evidence, 8th ed., at p. 31.*) In these cases when, at the conclusion of the trial, the occasion arises for the Jury to consider their verdict on all the matters before them they must needs consider the defence apart from the case for the prosecution, that is to say the defence arises for consideration on the assumption that on the facts established by the prosecution, "they will be warranted in convicting the accused of the offence with which he is charged" *Woolmington's* case (*supra*) or I would add, of some other offence. If, on the facts established, the Jury will not be so warranted, the case fails *in limine*. There is no occasion then to consider the defence.

Let us suppose a case of killing in which the defence set up is that of "grave and sudden provocation". That, logically, means that the act resulting in death and the intention reasonably imputable to the person doing the act are granted. The prosecution has, therefore, established the resulting offence. If the accused proves in the manner explained in section 3 of the Evidence Ordinance that at the time he did the act he had been deprived of the power of self-control by grave and sudden provocation offered to him by the victim, he is acquitted of murder, notwithstanding the fact that he did the act, and the imputable intention was murderous. But, if he does no more than create a doubt, in the minds of the Jury, he fails because, in that event, he has not proved the circumstances *bringing* the case within the exception, and the case of the Crown *remains unaffected*. His defence has not been proved nor has the case for the prosecution been disproved, or even involved in doubt.

That appears to me to be our law in virtue of the sections of the Evidence Ordinance to which I have referred and that, in that respect, it differs from the common law of England, and occupies the exceptional position of "insanity-defence" cases under that law. In those cases the law of

England, it is abundantly clear, is that the accused must "satisfy the Jury", must "clearly prove" his insanity. If he does no more than involve it in doubt, he fails.

Counsel sought to surmount this difficulty by submitting that this departure from the general rule in those cases is due to the fact that the experience of mankind is that the vast majority of men and women are sane and that, for that reason, strong proof of insanity is insisted upon.

But that is hardly convincing. The sanity of the great majority of men and women is not to the point when an unfortunate wretch is pleading his own insanity, and when in the nature of things, in order to advance such a plea with some degree of plausibility, there must be some abnormality, some mental aberration, some hereditary taint that he can point to. One would have thought that, if ever a plea amounting to confession and avoidance, deserved to be regarded with some latitude, "insanity" is that plea. But the clear law in England is that there shall be no such latitude. To use the phrase familiar to English law, the plea of insanity must be established by the "prisoner" "beyond all reasonable doubt". So it has been laid down in numerous cases during a whole century. The case of *Rex. v. Sodeman* (*supra*) does not, in my view, alter the law. But in so far as it appears to do so, it has been repeatedly commented upon. (*See Criminal Law Journal, India, Nov. 1941.*) At any rate, in regard to the measure of proof in "insanity" cases under our law, it is as stated in section 3.

Section 105 of the Evidence Ordinance, as I understand it, puts all the other general exceptions and the special exceptions or provisos in the Penal Code, and in any law defining the offence, where an offence other than under the Penal Code is charged, in one and the same category as "insanity", and provides one measure of proof for all of them, that is the measure of section 3, and for my part, I do not see any occasion for the consternation indicated in some of the judgments in the Allahabad case at this result. We are in no worse case than are "insanity-defence's" under the common law of England, and so far as the Statute law of that country is concerned, there are many instances—and they are growing apace—in which the burden is expressly put upon the person charged to prove exemption, qualification, absence of fraudulent intent and similar matters.

In short, I find it impossible to read section 105 as if it contained a proviso to the effect that the burden of proof shall be deemed to be discharged if the Court is satisfied that on all the evidence in the case there is reasonable doubt as to whether such circumstances exist or not.

That is what we are invited to do, but what, in my opinion, we have no right to do.

The conclusion to which I come, for the reasons I have given, is that the learned Judge of Assize correctly directed the Jury that the accused was not entitled to the benefit of the exceptions he invoked, if they found that the existence of the circumstances relevant to that exception was left in doubt, for my interpretation of sections 103, 106, 3 and 4 is that an accused brings himself within any of the exceptions and provisions referred to in section 105 only if, on all the matters before the Jury in

the case they are trying, they *believe* that the circumstances bringing the case within that exception exist or, at least, consider that their existence is so probable that they ought to regard them as existing.

HEARNE J.—

The question we have to decide is " whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded ".

The decision of the House of Lords in *Woolmington's* case unequivocally answers the question in the affirmative. Does an analysis of our law lead to a conclusion which is consistent with that decision or not ?

The arguments before us focussed attention on section 105 of the Evidence Ordinance. With these arguments I shall presently deal, but I would prefer, at the outset, to discuss the effect of another section of the Ordinance, namely, section 103.

This section refers to the burden of proof of a particular fact which lies on a person who wishes the Court to believe in the existence of that fact, unless it is provided by law that proof of that fact shall lie on a particular person.

Let us take the case of an accused, charged with murder, who claims to have acted in exercise of the right of private defence. He puts in issue the fact that he had acted in good faith under a reasonable apprehension of death or grievous hurt, and that he had inflicted no more harm than was necessary, having paid, as far as he was able, due care and attention to the risk to which he was exposed and to the means he adopted to avoid that risk, means which he claims were adequate but not excessive.

In putting this fact in issue, he would also put in issue the physical facts from which the Jury would be asked to infer the main fact which he asserts. I refer to such facts as that the deceased entered his house and attacked him with a lethal weapon.

It may be that prosecution witnesses are in a position to speak to the events which preceded the causing of death and that their testimony is to the effect that the events are not as the accused would have the Court believe. It may be that prosecution witnesses can only speak to facts from which the actual causing of death by the accused may be inferred and that they have no knowledge of the events which immediately preceded the causing of death. In the former case, the prosecution has no desire to prove the facts alleged by the accused which it regards as false. In the latter, the facts may possibly be within the knowledge of the accused and nobody else. But, in either event, who wishes the Court to believe in the facts asserted by the accused ? The accused alone.

A consideration of section 103 leads me without any difficulty to the conclusion that the burden of proving the facts asserted by the accused

is on the accused, and he must prove these facts at the least by showing that their existence is so probable that a prudent man, after considering all the matters which have been brought to his notice in evidence and under all the circumstances of the case, ought to act on the supposition that they existed (section 3). It is not enough if the Jury are left in a state of doubt as to whether they existed or not.

I now come to section 105. If one takes that section to mean that it casts upon an accused the burden of proving the circumstances which bring "the case within any of the exceptions" it is in complete harmony with section 103. In fact, section 105 would, on that view of it, be but an application of the general provisions of section 103 to a particular case, the case of an accused claiming the benefit of one of the exceptions on the basis of circumstances or facts in the existence of which he "wishes the Court to believe".

It was, however, argued both by Counsel for the accused and the Attorney-General that this is not the correct view of section 105. It was argued that the section means that an accused who sets up a defence based upon a general or special exception is required "to introduce into the case evidence which, if believed, would show or tend to show that he was entitled to the benefit of the exception invoked by him" and no more than that. It was even said that the section was merely a precept or caution to the accused, in his own interests, to adduce some evidence which, if accepted by the Jury, would operate in his favour.

The key to the meaning of section 105, it was argued by Counsel, is to be found in the concluding words "and the Court shall presume the absence of such circumstances". It was argued that "burden of proof" and "rebuttable presumptions" have essentially the same meaning in law : that the first and second parts of the section are, therefore, different ways of saying the same thing ; that the converse of an absence of circumstances is the existence of circumstances irrespective of their truth : that the question of the truth of the circumstances alleged is considered by the Jury at a later stage : and, finally, that the burden of proof contemplated by the section is discharged, and the presumption stated in the section is rebutted, once *some* evidence is before the Jury whether that evidence was adduced by the accused or elicited by his Counsel in cross-examination.

One answer to this argument can, I think, be stated quite simply by saying that it makes the section an unnecessary and even absurd piece of legislation. If there is a complete absence of evidence of such circumstances as are referred to in section 105, the Judge will take note of it and at the proper time will bring it to the notice of the Jury, not because of the presumption contained in the section, but for the reason that in point of fact no evidence of any such circumstances has been given. What is the object of the presumption ? Surely it is not to lay down the proposition that if there is an absence of circumstances appearing in evidence at the trial, it must be presumed that there are no such circumstances appearing in evidence at the trial ? Is there any point in enacting that there is a presumption of absence against what is absent and known by everybody to be absent—Judge, Jury, Counsel and accused alike ? Would this not reduce the section to a piece of legislative levity ?

On the contrary, is not the commonsense of the matter that the words "existence" or "absence" of circumstances, as they occur in the section, refer respectively to the existence or absence of circumstances at the time of the commission of the offence with which the accused is charged? The opening words of the section are "when a person is accused of an offence". The offence is alleged in the indictment to have been committed at some previous time. It is to the existence of circumstances at that time that the first part of the section must relate and the presumption must similarly relate to an absence of circumstances at that time. It was said that if the Jury started with a presumption against the truth of circumstances, they would only arrive at a finding that the circumstances alleged were true by a process of thought that would amount to a "mental revolution". But is this in accordance with every day experience? Cannot and do not Jurymen, to take a few of the general exceptions, start an inquiry on the assumption that the accused is sane, or that he was not intoxicated or that his act was not accidental and yet, on credible evidence being offered, adopt the reverse of these assumption as the truth?

It was remarked that the word "Court" and not Jury is used in connection with the words "shall presume". The word "Court" is used because it is not every Court that sits with a Jury, and a Court or rather Judge presiding at a Jury trial will not only take note of a presumption but communicate it to the Jury.

The meaning of section 105 is, I think, made clear by the illustration to the section. A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A—that is to say, the burden of proving that he did not know the nature of the act. The force of that illustration was appreciated by Counsel, but it was said that the defence of insanity is in a category by itself and that a different result is brought about in England when an accused proves insanity. But the law of England is beside the point. The point is that section 105 refers to general and special exceptions, that one of the general exceptions is that the accused's act is no offence if at the time of doing it he did not know the nature of the act, and the illustration makes it clear that he must prove, and not merely assert, that he did not know the nature of the act committed by him.

The third illustration, which to my mind is just as illuminating, is this. "A is charged with voluntarily causing grievous hurt under section 316. The burden of proving the circumstances bringing the case under section 326 lies on A". That does not mean the burden of merely giving evidence of circumstances. It must and can only mean what it says—the burden of proving the circumstances.

For the reasons I have given I am unable to adopt Counsel's suggested interpretation of section 105. But I would point out that that interpretation, even if it is adopted, does not, in itself, provide an answer to the question that has been referred to us. Even if section 105 considered by itself means no more than that the onus lies on an accused to "introduce" evidence, the facts he has put in issue by the evidence so introduced are facts which he "wishes the Court to believe". What, then, is the position if he fails to satisfy the Jury that the facts which he

has put in issue and which he wishes should be believed ever existed ? (section 103.) According to our law, regard being had to the definition of "proved", he has failed to prove those facts and he has also thereby failed to prove his defence which is conditioned by the supposition that those facts existed. But Counsel's argument is that, although the accused has failed to carry conviction to the minds of the Jury, the prosecution has failed to discharge its burden if he leaves the facts or circumstances which he has asserted in doubt. That, however is not a deduction from the particular view of section 105 which he advanced. It is merely a statement of the law in England. It ignores section 103 and begs the question we have to decide.

In conclusion, I would refer to the Attorney-General's argument that the Supreme Court has always directed juries that the case of the prosecution, meaning all the elements of the offence charged, had to be proved beyond reasonable doubt and that that direction was derived from the definition of proof in section 3 of the Evidence Ordinance. He argued that a prudent man would be content with proof by a balance of probability in a civil case, but would require a higher degree of proof in a criminal case. But the definition does not require him or even permit him to do so. The definition does not formulate different standards of proof which vary with the nature of the proceedings. On the contrary there is *nothing in the section to justify the view that a prudent man may or* should apply the yardstick of proof to the facts of a case with any regard to the nature of the proceedings and the consequences of his decision. He takes account of all the matters before him, all the circumstances of the case, and the probabilities—that is all.

In my opinion, section 3 lays down one measure of proof—at a minimum proof—by a preponderance of probability. It is the measure of proof required of a plaintiff in regard to his claim, of a defendant in regard to his defence, of an accused who sets up a defence based upon a special or general exception and of the prosecution in regard to its case.

It is true that Judges of the Supreme Court have in the past instructed Juries that they must be satisfied *beyond reasonable doubt* of the truth of the facts relied upon by the prosecution in order to establish the guilt of an accused, that is to say that they must be satisfied that the elements of the offence charged have been proved, apart from any defence available to and provable by the accused. This was in accordance with the pre-*Woolmington* view taken by Judges in England of the law of England. It was a principle of the common law which was stated, for instance, in *Rex v. Streme*[1]. Judges in Ceylon have imported that principle into our law and the practice of the Courts has sanctified it and in effect made it part of our law. But it is not a principle one can derive from section 3.

Proof beyond reasonable doubt of the case for the prosecution, as that expression was formerly understood in England and interpreted in Ceylon and in India, has of course been radically altered by the decision of the House of Lords in *Woolmington's* case. Even the frontiers of "the case of the prosecution" have been extended. But this alteration and extension cannot be justified by the law in Ceylon. In fact, I am satisfied that, had there been in an English Act of Parliament, sections similar to

[1] *Surrey Sum. Ass. (1843) M.S.; Best on Ev., p 82.*

sections 103 and 105 of the Evidence Ordinance, coupled with a definition of proof similar to that contained in section 3, the decision of the House of Lords in *Woolmington's* case would not have been possible without doing violence to the Statute Law.

I would answer the question referred to us in the negative.

DE KRETSER J.—

This matter comes before us on a case stated by Moseley J. Counsel for the appellant and the Attorney-General agreed that the question propounded should be answered in the affirmative. The result was that the Bench did not listen to arguments on two sides but was forced into the position of being the opposition.

I do not propose to recapitulate the arguments used by Counsel or those used in the cases cited before us. I have endeavoured to solve the question independently but I have had in mind the various views advanced and have dealt with some of them incidentally and without reference to the particular person who advanced them. I do not desire to refer to the cases cited, some of which have not been available to me owing to the large demand for the available books. In so far as they deal with the law in England it is unnecessary to refer to them for we are required to state what the law in Ceylon is and not to be shackled by our habit of reliance on what the law in England is.

Having given the matter careful consideration, my view is that we should follow the rule laid down in the *Woolmington* case, which is not only high authority embodying the English law which we have consistently followed as a model, but, if I may say so with all respect, is based on sound principles and is not in conflict with the procedure hitherto followed by the Judges in Ceylon. We should follow that rule and are not forbidden to do so by the provisions of the Evidence Ordinance.

It is not correct to say that the Codes of Civil and Criminal Procedure and not the Evidence Ordinance regulate the production of evidence, for it clearly does, and Chapter IX. is headed "Production and Effect of Evidence". It must be remembered that the Evidence Ordinance was not drafted with reference to these codes and may refer to cases outside the provisions of these codes.

In civil cases the production of evidence depends on the issues framed and the onus that arises accordingly. In criminal cases the Criminal Procedure Code directs the procedure and the order in which evidence is produced. Where there is a conflict the Code would govern. The Evidence Ordinance may be held to cover the production of evidence without there being any fallacy in reasoning.

It is equally incorrect to say that when the burden of proof is laid on a party that burden entails no more than the production of evidence. The burden extends to the effect of the evidence produced. That effect would depend on a variety of circumstances.

In my view it is a fallacy to say that a criminal case may be judged in sections, except in the cases provided in the Code itself. There is no provision of law justifying the process of saying either.—

(*a*) that the prosecution has made out a *prima facie* case, whatever that means ; or

(b) that the prosecution has proved its case, and the defence must rebut it.

There is a provision saying that if the evidence for the Crown, taken at its best, establishes no case, the defence shall not be called upon. It is fallacious to argue that before the defence is called upon the Crown *must* establish a case. All that is required is that there should be evidence which *may* establish a case, but the evidence is weighed only at the conclusion of the trial.

In a summary trial by a magistrate (Chapter XVIII.), section 189 requires the magistrate to take the evidence both for the prosecution and the defence, and section 190 expressly states that it is after taking all the evidence that the magistrate makes his finding and records his verdict.

In an inquiry into a non-summary charge, where the magistrate plays the part of a prosecutor to some extent and is only concerned to see whether there exists a case worth committing for trial, Chapter XVI. applies. The magistrate records the evidence for the prosecution and gives the accused an opportunity of calling evidence. He then hears Counsel for the accused and section 162 says that if the magistrate considers that the evidence against the accused is not sufficient to put him on trial he shall discharge him. If the magistrate considers the evidence sufficient, section 163 requires him to commit the accused for trial. Then comes section 164: where there is a conflict of evidence, disclosed presumably in the evidence called by the prosecution itself, and that evidence, if uncontradicted (presumably by the accused), is sufficient to raise, not a presumption of guilt but a probable presumption of guilt, then the magistrate must commit him for trial unless for good reasons he deviates from this rule. At no stage, therefore, is there a presumption of guilt.

In a trial before a District Judge (Chapter XIX.) the prosecution calls evidence and all statements made by the accused are read in evidence. Then section 210 provides for the case where the judge wholly discredits the evidence or thinks the evidence does not establish the commission of an offience by the accused. If, however, he considers there are grounds for proceeding (not that he makes any presumption of guilt or considers a *prima facie* case to be *established*), he calls upon the accused for his defence. It is only when the cases for the prosecution and the defence are concluded that he sums up the evidence (section 215) and then records his finding. This means he has before him all the evidence and he considers all the evidence. The evidence for the prosecution may help the defence and the evidence for the defence may help the prosecution.

In trials before the Supreme Court (Chapter XX) the prosecution calls the evidence and reads the statements made by the accused (section 232). The Jury have been told (section 231) that it is their duty to listen to the evidence and then make their finding, that is, they must listen to *all the evidence.*

Section 234 prescribes that if the Judge considers that there is *no* evidence that the accused committed an offence, then he directs the Jury to return a verdict of Not Guilty. If he considers there is some evidence he calls upon the accused. He is not the judge of facts and he cannot say what view the Jury may take of the evidence. He does not, therefore, decide that there is a *primafacie* case but there is,on one view ofthe evidence,

the possibility that the accused committed the offence. The Jury is not called on to express, and does not express, any view at that stage. Trials by jury are not held in so many stages. Section 243 enacts that when the cases for the prosecution and defence are concluded and after Counsel are heard the Judge sums up the evidence, laying down the law by which the Jury are to be guided, and it is then and then only that the Jury decide which view of the facts is true and return their verdict accordingly (section 245). They decide between the two views of the facts and not upon one set first and then the other. They have been guided as to how they should treat the evidence and then as prudent men of the world they make their decision. There is no provision requiring them to take the defence and if it fails to come up to a certain standard—though it does go rather far—then to put it away and forget it, but there is an express provision requiring them to decide which view is true. What if they cannot say either view is true ? The Crown must fail. What if they say "We cannot say which view is true and we have reasonable doubt both ways ?" Then again the Crown fails. If the accused calls no evidence, the evidence for the Crown is all that is left and the Jury must decide on it and give the accused the benefit of a reasonable doubt. If the accused calls evidence and fails the position is the same, the only difference being that the accused may have furnished evidence supporting the case for the Crown. If the accused pleads an exception why should a different rule be applied ? The presumption of innocence has been accepted by the majority in the *Allahabad* case and the dissenting minority do not reject it. It has not been questioned in the case stated nor was it questioned during the hearing. It is a natural presumption which requires no law to express it or confer it. It flows from the passion for freedom which characterises all human beings and is recognised at every turn in the British Empire. It is as natural as the air we breathe. Chapter IX. of the Evidence Ordinance is not inconsistent with it and section 101 recognises it.

Section 3 of the Evidence Ordinance does not claim that its definitions are exhaustive. It rather explains than defines the expressions "proved", "disproved" and "not proved". It contemplates an intermediate position between "proved" and "disproved". It expressly does not lay down a rigid rule as to the quantum of evidence a Court shall require. It requires all the matters before the Court to be taken into consideration and all the circumstances of the particular case. It assumes these may vary and the quantum of proof may therefore vary. It does not call for conviction alone but allows a prudent man to act on a supposition based on probability, and while a prudent man remains a prudent man and is the standard, a prudent man's judgment must vary in different matters : his approach to every matter is not the same.

Section 4 distinguishes "may presume" from "shall presume". These words have their ordinary meaning and "may presume" in the Ordinance is the same as "may presume" in ordinary life, and "shall presume" would have the same meaning if one did not import into the expression "disproved" a rule as to the quantum of evidence. The section gives directions and does not define. Does section 4 say more than that a presumption must be rebutted ? I do not think so. A

presumption is only a taking for granted, a supposition created by law, perhaps. That presumption may be rebutted by a conviction to the contrary or by a contrary supposition. The words "shall presume" do not postulate a blank but the *fictional* existence of evidence of facts. The explanation in section 3 of "proved" and "disproved" cannot be applied to this fiction. According to section 3 when a fact is proved it is proved once for all and it cannot be disproved. It seems, therefore, that the "proved" of the presumption is not the "proved" of section 3 but something less.

If then there is no conviction and a stage is reached when one cannot state whether the contrary supposition exists or not, it seems to me that one also reaches the stage when one cannot say whether the original supposition exists or not. Any argument to the contrary assumes that at that stage one's mind become a blank and therefore the original supposition exists, which is not the case. To my mind this is fallacious reasoning and is not founded on fact or common sense. Rules of evidence are not abstract propositions but must be given a practical application.

The question is what is the rule to be adopted in such a position? It seems to me to make no practical difference whether one expresses oneself in terms of the defence or of the prosecution. I prefer to do the latter. A prudent man taking all the matters before him may say—"There is some reason to believe the defence may be true; life and liberty are at stake, there is a presumption of innocence and I was warned regarding the case for the prosecution that it should be proved beyond a reasonable doubt; well, I ought to act on the supposition that the defence has been established and acquit the accused", or he may say—"I ought to say the prosecution has not proved its case beyond a reasonable doubt and therefore I acquit the accused." In the first case he takes the defence as 'proved': in the second he decides that the prosecution is "disproved". The case stated proceeded on the footing that the Crown must prove its case beyond a reasonable doubt, and my brother gave good reasons for the rule. It was not argued before us that the burden was less. Section 101 of the Evidence Ordinance leads to the same result. If the scales are evenly balanced, if the position reached is one of "not proved"—*i.e.*, neither proved nor disproved, then the party on whom the burden lay fails. The burden is not made any lighter when one remembers the strong presumption of innocence and that life and liberty are at stake. If that be the case when the scales are even, how much more favourable should be the position of an accused when the needle is quivering?

In a civil case regarding title to land, for instance, the presumption based on possession must be read with section 102, and any doubt resolved in favour of the party who had been or was in possession. Why in a criminal case should section 102 be read only with section 105 and the presumption of innocence be lost sight of, and even the provisions of section 101? It seems to me that section 102 gives the rule as to who should begin when two parties are making conflicting assertions and section 103 is applied, not to supplant section 102, but with reference to an individual fact incidentally asserted. It would apply to a plea of

private defence but sections 101 and 102 still remain effective. In my opinion section 101 begins by asserting that a person must prove an affirmative and explains that that is what is meant by saying that the burden of proof lies on him. Accordingly, the Crown must prove that the accused committed a crime and not the accused that he did not. It is noteworthy that the illustrations to section 102 refer to civil cases where conflicting assertions may be made and not to criminal cases where the prosecution asserts and the accused denies. Where the accused goes on to make in addition an assertion, then section 103 requires him to prove that assertion. Is it an accident that the illustrations to section 103 refer to criminal cases only, and not to civil cases already covered by section 102 ?

It is unfortunate, perhaps, to use the word "proved" in a colloquial sense when charging a jury but the jury ought to be charged in simple language and will have less difficulty in understanding the expression "proof beyond a reasonable doubt" than in understanding the Evidence Ordinance. If there is a reasonable doubt then there is no conviction of the mind, not even moral certainty. A prudent man can go no further than say "not proved", *i.e.*, neither proved nor disproved.

It seems to me that if the Crown must take its case beyond a reasonable doubt, it follows that the accused need only go up to the point of inducing a reasonable doubt.

The defence of insanity is peculiar in that there is a natural presumption in favour of sanity and the consequences of proving a man to be of unsound mind entail serious consequences to him and affect even those connected with him. A prudent man may well adopt a different standard in such a case from that which he would adopt in a case of self-defence. But suppose his answer was "not proved", *i.e.*, neither proved not disproved. I do not see why he should then say the accused's sanity is proved. That would be a contradiction in terms. Is fictional evidence stronger than actual evidence, and is the fiction to be applied not only at the start of deliberations but also after a conclusion has been reached?

Section 105 gives me no difficulty. Clearly, the legislator in that chapter is not acting logically throughout but is trying to lay down rules for the guidance of the Court. If he were acting logically section 105 would be unnecessary in view of the earlier section. Also, section 105 is tautological to the extent of slovenliness, for if the accused must prove an exception it can only be because the Court will not presume the existence of the circumstances constituting it : if the Court must presume the absence of such circumstances, then clearly the accused who depends on them must prove them. Why does the legislator use both expressions? To my mind the answer is given by the history of the criminal law in India, where, sometimes at least, it was assumed that section 5 of the Penal Code cast on the prosecution the burden of proving the non-existence of the circumstances. This was unreasonable and contrary to the commonsense rule that a person must prove the existence of a fact and not be called upon to prove its absence or non-existence. The legislator therefore took the opportunity of removing this misconception as to the scope of section 5 of the Penal Code. This is evident from the fact that he specially mentions

offences under the Penal Code. There are exceptions known to the Civil Law, as for example in cases of defamation, but he makes no special provision for them.

Again, he has already defined the word "*fact*". He does not use this word but the word "*circumstances*". If the absence of circumstances comes within the definition of "fact", equally so must the existence of circumstances, and yet he does not use the word "fact" in either part of section 105 though he had used it in earlier and later sections. If he had said "the court shall not presume the existence of such circumstances", I take it the explanation of "shall presume" in section 4 cannot be applied to "shall not presume". Does the phrase he uses amount to anything more than "shall not presume the existence of such circumstances"?

In the explanation of "shall presume" it is required that the fact be *disproved*. The words therefore apply to the existence of a fact which is to be taken as proved and not to its absence, if one were to apply the explanation to section 105, then one must say that the contrary must be *proved* and one is not applying "shall presume" but paraphrasing it: One is saying not merely that the circumstances are absent but that that their existence is disproved.

It seems to me that the concluding words of section 105 do not mean that the Court shall presume or take as proved anything, certainly not the guilt of the accused, but the Court must start with its mind blank and call for proof of the required circumstances. How can a Court take a fact as proved when the evidence for the prosecution itself may disprove it or raise a doubt about it? How can the Court take it as proved when the evidence leaves it in doubt as to whether the contrary has been proved or not? But if all the phrase means is that the Court starts with its mind a blank, then there is room for it to see that that blank is dispelled by the presence of a definite body of evidence, or of a considerable body of evidence lacking definiteness but nevertheless existing and dispelling the blank.

To ask a Court to say that there is a void when there is a presence of some kind is not reasonable or logical. To ask a jury in particular to say that the prosecution has made out its case and then to call upon it say whether the defence has rebutted that case is to place a very heavy burden on a jury of laymen. How can they say the prosecution has made out its case and then decide that the defence has proved the defence? Section 245 of the Criminal Procedure Code does not place such a burden on them. It only requires them to consider all the evidence and say which version of the facts is true. If the jury must decide first for the prosecution it would not only be manifestly unfair but only then comes the illogicality of their reversing their decision. But if they decide on all the evidence, then there is only one decision and there is no going back involved.

The judge should not charge them in such a way as to leave them room to decide in sections. This Court recently condemned such a process in the case of the Australian soldier, *Rex v. Buckley*[1]. The Judge should direct them as to the law and tell them to decide on all the

[1] *43 N. L. R. 474.*

evidence. If they consider the case for the prosecution not established or disproved, they should acquit. If they are left in reasonable doubt they should acquit, in whatever way that doubt arises.

Section 105 does not say that the Court shall presume the guilt of the accused or the presence of a *prima facie* case against the accused and call upon the defence. The matter of guilt it leaves to be decided by other considerations. To say the prosecution has established points A and B which constitute the crime and, unless the defence establishes C, points A and B remain, may appear to be logical but it is not logical in reality nor a practical proposition, for the prosecution *establishes* nothing before the defence is heard.

Let us take a concrete case : A kills B and says he acted in self-defence. There is no admission of the killing till A gives evidence. There may be evidence as to the killing but the jury has not yet decided on its value. Counsel may make suggestions but suggestions are not evidence. After the killing has been established will arise the question of intention. The case for the prosecution, if believed, states facts showing that there was an intention to kill. The accused says his intention was to defend himself. The Jury are left in doubt as to his intention to defend himself ; that is, they cannot say he did not intend to defend himself. How then can they say he had a murderous intent ?

But the defence may be that the accused acted in a panic, believing in good faith that he had to defend himself and not stopping to think what he was doing. The Jury is told he ought to have had a reasonable apprehension of harm. They may say that that presupposes a reasonable man and a reasonable man would not have got into a state of panic, so the case for private defence breaks down *in limine*. But the Jury say to themselves that the accused did in fact act in a panic and did in good faith believe he was called upon to defend himself. Must they say that because the right of private defence is not established a murderous intention is established ? I do not think so.

That brings me to an argument of the Attorney-General, which was not urged with sufficient emphasis or clearness perhaps. He said that the proof of self-defence eliminated the idea of a murderous intention, for the prisoner's intention was to defend himself and not to kill. To appreciate this argument one must see the reason why the killing of a person is murder, and must distinguish between a person doing a thing deliberately and a person doing it with a certain intent. To *intend* is to fix the mind upon, as the object to be effected or attained. *Deliberately* means not hastily or rashly but after consideration. The English law requires malice for the offence of murder. We call it the intention of causing death. For a person to have a murderous intent he must be shown to have had the mind fixed upon killing, that is, there is the *wish* to kill ; or, the mind fixed upon inflicting a wound the natural consequence of which must be death. Because he wished to inflict the wound he is presumed to have had the wish to kill. Where he knows a certain injury is likely to cause death and intentionally inflicts that injury, again he wishes to kill. Where he commits an act which will in all probability cause death, he either wishes to kill or does not mind killing. In all the cases there is no lawful object behind the killing.

In all there is not only a deliberate act but there is the wish to kill in order to attain some object or to satisfy some motive. The law cannot and does not punish mere killing, for the killing may be justified ; what it does punish is killing which is culpable, and the question is what was the mind fixed upon. The law speaks of a criminal intention, as in section 73, and sometimes speaks of a deliberate intention, as in section 291A of the Penal Code. But when a person is defending himself or another there is no wish to kill, real or presumed, and the mind is fixed upon defending, he is exercising a right which the law recognises. He may kill deliberately but his primary wish or intention is to defend and the killing is only the means and is involved in and incidental to the defending. The plea of self-defence, therefore, goes to the very root of the intention which the law requires the Crown to prove. It is to be noted that section 93 does not speak of *intentionally* causing death but of voluntarily causing it.

If the chapter creating the general exceptions be closely examined one will find that proof of an exception excludes a criminal intention. The hangman kills deliberately but has no wish to kill the particular person he hangs and his mind is fixed on doing his duty. A person acting under threat of instant death is excused, as for example in a case of theft, and theft needs intention ; he does not wish to steal, there is no theftuous intention, but he wishes to save his life. That plea should excuse him in cases of murder and offences against the State but for good reasons an exception is made as regards such offences. When the primary intention is thus removed by a provision in the law, what remains is the secondary intention, evidenced by his deliberate act.

In a case of self-defence, if the primary intention is disproved and so removed, then the secondary intention emerges. If the Jury consider that it emerges sufficiently enough for them to be able to recognise it, then they can have no reasonable doubt. But if there is a doubt the secondary intention has its way blocked.

Section 89 of the Penal Code creates the exception but section 90 limits it and section 92 defines the limits. The second exception to section 294 seems to proceed on these lines ; the person has exceeded the limit ; therefore the legal right does not exist and the primary intention is removed by the law ; therefore only the secondary intention exists and it should be murder, but we must make allowance for the man's good faith and since his act was culpable we shall reduce his offence. The illustration given indicates that the man did not act in a panic but deliberately killed when he might have disabled his opponent. The section does not deal with a reasonable doubt and assumes that that stage is passed.

The line of thought is original and I am afraid I was inclined to brush it aside during the argument but, on reflection, I think there is disclosed the germ of a fundamental notion. A Judge may acquire certain habits of thought. He may be able at the end of the case for the prosecution to say that there is no case or that the witnesses are unreliable, and may decide not to proceed any further. He may be influenced in his decision

by his knowledge of what the defence is going to be. It may also seem to him that at first sight the Crown has established the case and that he ought therefore to go on to hear the defence, but his impressions at first sight are not his final conclusions and these are reached only when he sums up the evidence on both sides. Habits of thought may not always be proper or justified by any provision of the law but they probably cause no serious damage in the case of a trained Judge. But it is impossible to employ the same process when one is dealing with jurymen and when one is confronted with the express provisions of the Criminal Procedure Code.

I have so far assumed that the absence of circumstances may be a *fact*, not in common parlance but as defined in section 3. In my opinion it does not come within the definition. In the first place one finds throughout the Evidence Ordinance that it is the existence of a fact which is to be proved and not its absence. The definition of "fact" relates to the existence of things which may be perceived by the senses. or any mental condition of which a person is conscious. Facts are matters regarding which a witness can speak and not conclusions which are actually or presumptively reached. The illustrations relate to such facts as, for example, that certain things are arranged in a certain order; that a man heard or saw something; that a man said certain words; (these illustrations seem to relate to clause *a*) that a man holds a certain opinion—a thing a witness may know from having heard him express it; or had a certain intention,—again gathered in the same way. So also with regard to "good faith", "fraudulently"—inferred from what the witness heard or saw; that a man has a certain reputation—gathered from what others say of him, and so on.. Illustration (*b*) relates to a person's mental condition of which the witness is conscious; and illustration (*c*) only differs in that the witness is going on repute, on report, and not on his personal knowledge. Now, how is a void capable of being perceived by the senses? The senses perceive no "thing or state of things or relation of things". A person is not conscious of a void for the mind is a blank and there is no consciousness. How is a void proved? How can a witness speak to another's mental condition as being a void? But a person who is *judging* may start with his mind a blank as to the particular facts or circumstances. If then absence of circumstances is not a "fact", still less does the direction in section 4 regarding "shall presume" apply.

No mention was made during the argument of the definition of "facts in issue" in section 3 but I see some of the judges in India were troubled by it or rather the illustrations to it. Now, the expression "facts in issue" is used only in regard to the admissibility of evidence and not as regards the burden of proof nor as regards the quantum of proof required. "Facts in issue" means nothing more than *facta probanda* and evidence is admitted only so far it bears directly on the facts to be proved or is relevant thereto. The expression does not mean that issues are impliedly framed and that the evidence on each issue is taken separately. Parties are not tied down to issues as in a civil case. The distinction between civil and criminal cases is well recognised. In a

criminal case the burden on the Crown never shifts and the final burden is on the Crown ; the broad issue in the final stage is " Has the prosecution proved its case ".

Text books on evidence are not authoritative. So far as they go they agree in saying that an accused need not prove his case—even when based on an exception—*beyond* a reasonable doubt, which carries with it the implication that it will be sufficient for him to prove his case up to a reasonable doubt. They go on to say that he need prove only a *prima facie* case but they do not explain what they mean. One gathers their meaning from what they had just said, and then *prima facie* case means a case up to and not beyond a reasonable doubt. *Prima facie* only means at first sight. The textbook writers do not speak of a " preponderance of probabilities " ; a phrase which I have some difficulty in understanding. Civil and criminal cases vary in many ways but in both classes one party has to prove his case. Civil cases depend on the issues framed and on the burden of proof and the actual evidence produced. When the evidence is such that an earlier decision cannot be reached by considering only one or more issues, then the whole case must be dealt with and one party proves his case because he has induced conviction or such a degree of probability that a prudent man will act on it. There cannot be two such degrees of probability existing on either side for both sides cannot prove their cases, but there may exist the possibility that both cases are true.

In my opinion the question propounded in the case stated should be answered in the affirmative.

Since drafting my judgment I have had the advantage of reading the draft judgment of the President. The main lines of my judgment still remain the same, and I would only add that Lord Sankey's reference to statutory exceptions refers to statutory exceptions in England. We do not know what exactly he had in mind but there are statutory offences where in certain circumstances a presumption of guilt is raised and the burden is thrown on the accused to displace the presumption. Section 105 raises no presumption of guilt.

KEUNEMAN J.—

I agree with the judgment of the Chief Justice, Soertsz and Hearne JJ.

WIJEYEWARDENE J.—

I agree that the charge of the trial Judge (Moseley J.) is in accordance with our law. I agree that the question referred to this Court be answered in the negative.

JAYETILEKE J.—

I agree with the judgments of the President and my brothers Soertsz and Hearne JJ.