Vijayee Singh And Ors vs State Of Uttar Pradesh on 20 April, 1990

Equivalent citations: 1990 AIR 1459, 1990 SCR (2) 573, AIR 1990 SUPREME COURT 1459, 1990 (3) SCC 190, 1990 ALL. L. J. 415, 1990 (2) JT 596, 1990 MADLJ(CRI) 456, 1990 (2) ALLCRILR 130, 1990 (2) ALL WC 1201, 1990 APLJ(CRI) 425, 1990 ALLCRIR 581, 1990 UP CRIR 360, 1990 SCC(CRI) 378, 1990 (2) ANDH WR 33, 1990 CRIAPPR(SC) 231, 1990 (2) CRIMES 584, 1990 (2) RECCRIR 304

Bench: S.R. Pandian, M. Fathima Beevi

PETITIONER:
VIJAYEE SINGH AND ORS.

Vs.

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT20/04/1990

BENCH:
REDDY, K. JAYACHANDRA (J)
BENCH:
REDDY, K. JAYACHANDRA (J)
PANDIAN, S.R. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1990 AIR 1459 1990 SCR (2) 573
1990 SCC (3) 190 JT 1990 (2) 596
1990 SCALE (1)163

ACT:
Indian Evidence Act: Section 105--Burden of proof--What is 'fact'--When proved--When 'disproved'--Presumption court is entitled to draw--What is.

HEADNOTE:
14 accused were tried for offences under section 148 and 302 read with Section 149 of I.P.C. for the murder of two persons named Mahendra Singh and Virendra Singh and injuries to 3 others named Vijay Narain Singh, P.W. 1, Uma Shankar Singh, P.W. 2 and Kailash Singh. Accused No. 6 Chirkut Singh

was further tried under Section 307 I.P.C. for attempting to murder P.W. 1 and all the remaining accused under section 307 read with Section 149 I.P.C. for causing injuries to Uma Shankar and Kailash Singh. The trial court relying on the evidence of P.Ws 1 and 2 who were the main eye witnesses convicted all the 14 accused under section 302 I.P.C. read with Section 149 I.P.C. and awarded them life imprisonment. The convicted accused preferred appeals to the High Court and the State filed appeals for enhancement of their sentence. A Division Bench of the Allahabad High Court consisting of Justice Katju and Aggarwal heard the appeals. While Justice Katju allowed the appeals by the accused and dismissed the State appeals, Justice Aggarwal disagreeing with him, dismissed all the appeals, both by the accused and by the State. Consequently the matter was referred to a third judge. Justice Seth who confirmed the conviction and sentence awarded to accused Nos. 1, 3, 4 and 6 only and acquitted all the rest of the accused on the view taken by him that the specific overt acts were attributable to only these four accused and the rest should be given the benefit,of doubt.

Criminal Appeals Nos. 375-377 of 1987 by special leave were preferred by the convicted accused Nos. 1, 3, 4 and 6 and Criminal Appeals Nos. 372-374 of 1987 preferred by the State against the acquittal of other accused. Accepting the plea of the accused to the right of selfdefence but holding that they had definitely exceeded this right when they went to the extent of intentionally shooting the deceased to death and therefore the offence committed was one punishable under section

574

304 Part I I.P.C. and not under Section 302 read with Section 149 I.P.C. Accordingly in partly allowing the Appeals filed by the convicted accused and dismissing the State appeals, this Court,

HELD: A fact is said to be "proved" when, after considering the matters before R, 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. [596G-H]

A fact is said to be 'disproved' when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved". [596H; 597A]

The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence in criminal cases. [601E]

Section 105 places "burden of proof' on the accused in the first part and in the second part there is a presumption

which the Court can draw regarding the absence of the circumstances, which presumption is always rebuttable. Taking the section as a whole the "burden of proof" and the presumption have to be considered together. It is exiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to displace the presumption which may affect the prosecution,case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. [601F-G]

The initial obligatory presumption regarding circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record, gathered from the prosecution evidence, chief and cross examinations, probabilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. [601H; 602A]

The presumption regarding the absence of existence of circumstances regarding the exception can be rebutted by the accused by intro-

575

ducing evidence. If from such a rebuttal, a reasonable doubt arises regarding his guilt, the accused should get the benefit of the same. Such a reasonable doubt consequently negatives one or more of the ingredients of the offence charged, for instance, from such a rebuttal evidence, a reasonable doubt arises about the right of private defence then it follows that the prosecution has not established the necessary ingredients of intention to commit the offence. In that way the benefit of a reasonable doubt which arises from the legal and factual considerations even under Section 105 of the Evidence Act should necessarily go to the accused. [602C-E]

Section 3 is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of fact, in other words, "believes it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assumption of its existence. [602G-H; 603A]

The Evidence Act while adopting the requirement of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of certainty to be arrived where the circumstances before a fact can be said to be proved. [603D]

The general burden of establishing the guilt of accused

is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. [606F-G]

In the instant case, as per the evidence of the material witnesses, the two deceased were only proceeding alongwith the rasta towards the pump set for taking bath. Even in the plea set up by accused No. 6 it is not stated specifically that deceased Nos. 1 and 2 were armed with any deadly weapons. Therefore, the assailants had definitely exceeded the right of private defence when they went to the extent of intentionally shooting them to death by inflicting bullet injuries. Therefore, the offence committed by them would be one punishable under Section 304 Part I I.P.C. The conviction of accused No. 1, 3, 4 and 6 under Section 302 read with Section 149 I.P.C. and the sentence of rigorous imprisonment for life awarded thereunder is set aside and instead they are

576

convicted under Section 304 Part I read with Section 34 I.P.C. and each of them sentenced to undergo rigorous imprisonment for 10 years. Their other convictions/sentences are confirmed the sentences to run concurrently. [608C-E]

Mohar Rai & Bharath Rai v. The State of Bihar, [1968] 3 S.C.R. 525; Lakshmi Singh & Ors. v. State of Bihar, [1976] 4 SCC 394; Pratap v. State of Uttar Pradesh, AIR 1976 S.C. 966; Woolmington v. The Director of Public Prosecutions, [1935] Appeal Cases 462; Emperor v. U. Damapala, AIR 1937 Rangcon 83; Parbhoo & Ors. v. Emperor, AIR 1941 Allahabad 402; K.M. Nanavati v. State of Maharashtra, [1962] Suppl. 1 SCR 567; Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 S.C. 1563; Rishi Kesh Singh & Ors. v. The State, AIR 1970 Allahabad 51; Bhikari v. State of Uttar Pradesh, AIR 1966 S.C. 1; Behram Khurshed Pesikaka v. The State of Bombay, [1955] 1 SCR 613; Government of Bombay v. Sakur, AIR 1947 Bombay 38; State of Uttar Pradesh v. Ram Swarup, AIR 1974 S.C. 1570; Mohd. Ramzani v. State of Delhi, AIR 1980 S.C. 1341; State v. Bhima Devraj, AIR 1956 Sau. 77; Miller v. Minister of Pensions, [1947] 2 All ER 373; C.S.D. Swami v. The State, AIR 1960 S.C. 7; V.D. Jhingan v. State of Uttar Pradesh, AIR 1966 S.C. 1762; Harbhaian Singh v. State of Punjab, AIR 1966 S.C. 97; Amjad Khan v. The State, [1952] S.C.R. 567 and Puran Singh & Ors. v. State of Punjab, AIR 1975 S.C. 1674, referred to

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 375-77 of 1987.

From the Judgment and Order dated 22.10.1984 in the Allahabad High Court in Crl. A. Nos. 1925, 1808 of 1981 and Government Appeal No. 2599 of 1981.

R.K. Garg, Prith Raj, U.R. Lalit, R.L. Kohli, Shivpujan Singh, Manoj Prashad, Dalveer Bhandari, T. Sridharan (N.P.) and B.S. Chauhan for the appearing parties.

The Judgment of the Court was delivered by K. JAYACHANDRA REDDY, J. On 29.5. 1981 at about 8 A.M. a grave rioting took place in the village of Tirro in Varanasi District. 1n the course of the said rioting two persons Mahendra Singh and Virendra Singh deceased Nos. 1 and 2 were killed and Vijay Narain Singh, P.W. 1, Uma Shankar Singh, P.W. 2 and one Kailash Singh received injuries. In respect of these offences 14 accused were tried under Sections 148 and 302 read with Sec. 149 I.P.C. Chirkut Singh, Accused No. 6 was tried for offence punishable under Section 307 I.P.C. for attempting to commit the murder of P.W. 1 and the remaining accused under Section 307 read with Sec. 149 I.P.C. for causing injuries to Uma Shankar Singh, P.W. 2 and Kailash Singh. It is alleged that the material prosecution witnesses, deceased persons and the accused belong to the same village. Since 1972 there have been disputes between these two rival groups. A number of cases were also pending in the courts. On the day of occur- rence at 8 A.M.P.W. 1 went to his pumping set. P.W. 2 Uma Shankar Singh and his relation Kailash Singh were also at the pumping set. Deceased Nos. 1 and 2 were proceeding alongwith the rasta towards the pumping set for taking bath. When they reached near the Khandhar (old building) of Vijay Pratap Singh Accused No. 5 Lallan Singh exhorted the other accused who were all lying in wait to kill them. All the 14 accused emerged out of the Khandar. Out of them Accused Nos. 1, 3, 4 and 6 (accused Nos. are being referred to as arrayed before the trial court) were armed with guns and the rest were armed with lathis. They advanced towards deceased Nos. 1 and 2. Accused No. 1 fired a shot which hit deceased No. 1 and he was immediately also shot at by accused No. 3 Ranjit Singh and he fell down. In the meanwhile Accused No. 4 Ram Briksh Singh fired at Deceased No. 2 Virendra Singh who fell down and both deceased died on the spot. The other accused carrying lathis advanced towards P.W. 1 who ducked and escaped unhurt. Then the lathis-wielding accused assaulted P.W. 1 Vijay Narain Singh, P.W. 2 Uma Shankar Singh and Kailash Singh. P.W. 1 managed to escape and ran away. The trial court relying on the evidence of P.Ws. 1 and 2, who are the main eye witnesses, convicted all the 14 accused of the offences for which they were charged and the substantial sentence awarded is imprisonment for life under Section 302 I.P.C. read with Section 149 I.P.C. The convict- ed accused preferred appeals. The State also filed appeal for enhancement of the sentence. A Division Bench of the Allahabad High Court consisting of Justice Katju and Justice Agrawal heard the appeals. Justice' Katju allowed the ap- peals filed by the accused and dismissed the appeal filed by the State but the other learned Judge disagreed and dis- missed all the appeals concurring with the trial court. The matter came up before a third Judge Seth, J. He took the view that only such of those accused to whom specific overt acts were attributed could be convicted and the other should be given benefit of doubt. In that view of the matter he confirmed the convic-

tion of Accused Nos. 1, 3, 4 and 6 and acquitted the rest of the accused. Accused Nos. 1, 3, 4 and 6 applied for special leave which was granted by this Court and theft appeals are numbered as Criminal Appeal Nos. 375-77/87 and the State has preferred appeals against the acquittal of the other remaining 10 accused which are numbered as Criminal Appeal Nos. 372-74/87.

It is contended on behalf of the State that the occur- rence has taken place in broad-day light and merely because the witnesses are interested their evidence cannot be re- jected and that the view taken by Justice Seth is incorrect and the view taken by the trial court as well as by Justice Agrawal has to be accepted. On the other hand, the counsel appearing for the accused submitted that witnesses who were partisans and were highly interested have made omnibus allegations and it is highly dangerous to accept their evidence because there is every likelihood of innocent persons having been falsely implicated. It is also their further submission that the prosecution has not come forward with the whole truth; and that the origin of the occurrence has been suppressed in as much as injuries to some of the accused persons have not been explained and consequently it must be held that occurrence did not take place in the manner alleged by the prosecution and that under these circumstances the truth from falsehood cannot be separated and therefore, none of the accused could be convicted. Before we consider these rival contentions some of the facts which are not indispute may be noted. There was a longstanding rivalry between the two groups. The time and place of occurrence are not in controversy. That the two deceased persons died of gun-shots injuries also is not in dispute. P.Ws. 1 and 2 also received injuries during the course of this occurrence.

The prosecution in support of its case examined P.Ws 1 to 11. P.W. 7 the Doctor examined P.W. 2 at about 11.40 A.M. on the same day and found 10 injuries. All of them were contusions and he opined that they might have been caused by a blunt object like lathi. On the same day, he examined P.W. 1 and on his person he found four contusions which could have been caused by Lathis. The Doctor also examined Kailash Singh, who was not examined as a witness. and found two contusions. P.W. 4 another Doctor who conducted postmortem on deceased No. 2 Virendra Singh found two gun-shots wounds on the cranial cavity. Injury No. 1 is an entry wound and injury No. 2 is an exist wound. Then he conducted the autop- sy on the dead body of deceased No. 1. He found two in- juries, the first one is on the left nipple which is an entry wound and injury No. 2 is on the left palm. On internal examination he found a bullet embedded and the same was recovered. P.W. 5 is the Investi- gating Officer. After registration of the crime he undertook the investigation, went to the scene of occurrence, held the inquest of the two dead-bodies and recorded the statement of the witnesses. He also found two live cartridges one of 16 bore and another of 12 bore. P.W. 3 is another eye-witness. He deposed that Accused Nos. 1, 3, 4 and 6 were armed with- guns and the other were armed with lathis. Accused No. 1 fired at the deceased No. 1 and Accused No. 3 also fired at him as a result of which he fell down and when deceased No. 2 tried to move, Accused No. 4 shot at him and deceased No. 2 also fell down. When P.Ws 1, 2 and Kailash Singh rushed towards the place, accused No. 6 fired at P.W. 1 but he escaped. Then the lathi-wielding persons beat P.Ws 1 and 2 and Kailash Singh. To the same effect is the evidence of P .Ws 1 and 2 also. Under Section 3 13 Cr.P.C. all the circumstances appearing against the accused were put to them. They in general denied the offence. However, among them, accused Nos. 6, 7, 8, 9, 11, 13 and 14 admitted their presence at the scene of occurrence. Accused No. 6 in par- ticular stated that P.W. 1 and others armed with guns, spears and lathis tried to do fishing in the pond in which accused No. 6 had a share. Accused No. 6 and others went to the pond for fishing. P.W. 1 and other challenged and they chased accused No. 6 and others and accused No. 13 was shot at by P.W. 1 and others and he and accused No. 14 were beaten with lathis and in defence he fired two gun shots hitting deceased Nos. 1 and 2. He then went to the police station and lodged a report and deposited his gun and that P.W. 1 has falsely implicated him. As regards this report which is purported to have been given by accused No. 6, P.W. 5 the Investigating

Officer was questioned. He admitted that when he returned to the Police Station on 30th May, 1980 he came to know that, accused No. 6 has surrendered his gun. He also admitted in the cross examination that the crime was registered on the basis of the report given by Chirkut Singh and the same was also investigating but it appears that no action was taken. Investigating Officer also admitted that when he saw accused Nos. 13 and 14 he found injuries on them. The other circumstance strongly relied upon by the defence is that there were gun shots injuries on accused No.

13. It may be noted that the same has not been explained by the prosecution. P.W. 7 the Doctor admitted that he examined Accused No. 14 and found on him a skindeep 12" x 2" lacerat- ed wound on the left thigh and a wound certificate was issued. He also admitted that he examined accused No. 13 and he found five tiny abrasions in the area of 4cm x 4cm on outer surface of right thigh just above knee joint and the injured was refer-

red to the radiologist. P.W. 7, however, stated that he has not seen the report of the radiologist. The defence examined Dr. S.K. Singh as D.W. 1. He deposed that he took the X-ray of the right thigh of the accused No. 13 Mahendra Kahar and the report was marked as an exhibit. He further deposed that the shadows in the X-ray go to show that there were 10 radio opaque round shadows and these shadows may very well corre- spond to the pallets fired by some fire arms and the same appear to have pierced upto muscles and bone. His examina- tion further showed that the pallets remained embedded in the thigh.

Before the trial court as well as before the High Court, firstly it was contended on behalf of the accused that the eye witnesses are highly interested and therefore, their evidence cannot be accepted and even otherwise they have not come out with the whole truth and the injuries found on two of the accused would go to show that the accused. acted in fight of self-defence. Relying on the presence of gun-shots injuries on accused No. 13 it was strongly contended that the prosecution party have also used fire-arms and, there- fore, the accused were entitled to the fight of private defence. The trial court accepted the evidence of all the three witnesses holding that their evidence is consistent and does not suffer from any serious infirmity. So far as the plea of self-defence is concerned, the trial court held that the plea taken by accused No. 6 was to be rejected mainly on the ground that there was no material to show that at the pond the fishing operations were going on. As regards the presence of injuries on the accused persons, learned Sessions Judge having regard to the nature and size of the injuries found on accused Nos. 13 and 14 took the view that they are simple and that it is not proved that these in- juries were received during the occurrence. Regarding the presence of the alleged gun-shots injuries on accused No. 13 he pointed out that the medical evidence is inconclusive on the point whether those injuries were caused at the time when this incident took place. In the appeal before the High Court, Justice Katju took the view that the theory that the injuries on accused Nos. 13 and 14 were self inflicted cannot be accepted and that the plea taken by accused No. 6 appears to be probable in view of the fact that the bullet found in the dead body of deceased No. 2 was fired by a 16- Bore gun and that as admitted by the Investigating Officer, P.W. 5, it was accused No. 6 only in that area who had a licence for 16-Bore gun which was deposited by him in the police station after the occurrence. Coming to the injuries found on accused Nos. 13 and 14 Justice Katju took the view that they received injuries during the course of the same occurrence and

that the three eye-witnesses have not fur- nished any explanation regarding those injuries and that these witnesses have falsely implicated some of the accused due to enmity and, therefore, their evidence cannot be relied upon and accordingly ordered total acquittal. As already men- tioned Justice Agrawal, on the other hand, agreed with the trial court completely. Justice Seth, to whom the case was referred because of the difference of opinion took a third view and convicted only accused Nos. 1, 3, 4 and 6 to whom specifically overt acts were attributed. Dealing with the plea of self defence Justice Seth held that lacerated injury on accused No. 14 was a simple one and he could have re- ceived that even subsequent to the occurrence. With regard to the gun-shots injuries found on accused No. 13 Mahendra Kahar, the learned Judge himself examined accused No. 13 who was present in the Court when the appeal was being heard and found that hard substance were palpable underneath the flesh round about the location of his injury. In the circumstances it does appear that fire-arm shots to exist underneath the location of injury found on the person of accused Mahendra Kahar. But he ultimately held that in all probability the pallets found in the leg of accused No. 13 Mahendra Kahar must have been there long before the incident, as in the view of the learned Judge it was doubtful that those pallets could have entered the body through the external injuries which are described as tiny abrasions. Seth, J. accordingly rejected the plea of self defence.

Before we advert to the above contentions it becomes necessary to consider whether the accused No. 13 Mahendra Kahar and accused No. 14 Sant Singh received the injuries during the course of occurrence. P.W. 7 the Doctor examined accused No. 13 Mahendra Kahar on 30.5. 1980 at about 6 A.M. and he found the following injuries.

1. Five tiny abrasions in the area of 4cm x 4cm on outer surface of fight thigh just above knee joint.

2. The injured complained of pain in the right thumb and left forearm.

In respect of injury No. 1 the Doctor advised X-ray with a view to ascertain whether or not there were pallets, and pending the same he reserved his opinion. P.W. 7 also opined that injuries appeared to have been caused within 24 hours preceding the medical examination which correspond to the time of occurrence, namely, 8 A.M. on 29.5. 1980. P.W. 7, however, stated that the X-ray report was not shown to him. The evidence of P.W. 7 makes it clear that accused No. 13 Mahendra Kahar received these injuries during the course of the occurrence. D.W. 1 is the Doctor who took the X-ray. He deposed that on 5.6.80 he took the X-ray of the fight thigh of the undertrial prisoner Mahendra Kahar accused No. 13 and the same is marked as Ex-Kha- 12. On the basis of the X-ray plate he opined that he noticed 10 radio opaque round shad- ows in the injured and they correspond to the pallets fired by some fire-arm. Justice Seth considered the evidence of these two Doctors. He also examined the accused in the Court and he found that hard substance were palpable underneath the flesh. As already mentioned he was of the view that these appeared to be pallets but according to him they must have been there long before the incident. The learned Judge took this view because he was doubtful that those pallets could have entered the body through the external injuries which are described as tiny abrasions. Having given our careful consideration we are unable to agree with the view taken by Seth, J.P.W. 7 the Doctor's evidence makes it clear that the external injuries were caused during this occur- rence only and underneath the same these pallets were found by the radiologist D.W. 1. The injuries are not self-in- flicted. Therefore, there is no basis whatsoever to

presume that the pallets under the flesh must have been there al- ready even before this occurrence took place. As a matter of fact accused No. 13 Mahendra Kahar was referred to the Doctor P.W. 7 since there was an injury. P.W. 7 having examined him found that there were 10 ' radio opaque round shadows underneath the injury and it was only for that reason he referred the injured to the radiologist and D.W. 1 the radiologist after taking the X-ray concluded that under- neath the injury pallets discharged from a fire-arm were embedded in the flesh. Therefore, the only view that is possible is that accused No. 13 Mahendra Kahar received gun-shot injuries during the course of this occurrence only. P.W. 7 also examined accused No. 14 Sant Singh on the same day. He found a skin-deep 12' x2' lacerated wound vertically inflicted on the front and outer surface of left thigh from which blood was oozing and the injured complained of pain. The Doctor pointed out that the injury was simple and could have been caused by blunt weapon like a lathi. The injury was also stitched. It is suggested by the prosecution that this could have been a self-inflicted one but again there is no basis for such presumption. The Investigating Officer said that on finding the injury on him he was sent for medical examination. As a matter of fact accused No. 6 in his statement under Section 313 stated that accused Nos. 13 and 14 received injuries and he also went to the police station and lodged a report to that effect. It, therefore, emerges that accused No. 13 received gun-shot injuries and accused No. 14 received lacerated injury during the course of the same occurrence and these injuries must have been caused by some member belonging to the prosecution party.

Now the question is whether the prosecution has ex- plained these injuries and if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automat- ically be rejected, without any further probe. He placed considerable reliance on some of the judgments of this Court. In Mohar Rai & Bharath' Rai v. The State of Bihar, [1968] 3 SCR 525, it is observed:

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

In another important case Lakshmi Singh and Ors. v. State of Bihar, [1976] 4 SCC 394, after referring to the ratio laid down in Mohar Rai's case, this Court observed:

> "Where the prosecution fails to explain the injuries on the accused, two results follow:

(1) that the evidence of the prosecution witnesses is un-

true; and that the injuries probabilise the plea taken by the appellants.

It was further observed that:

> "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occur-
>
> rence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable. (3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Relying on these two cases the learned counsel for the defence contended that in the instant case the prosecution has failed to explain the injuries on the two accused and the genesis and the origin of the occurrence have been suppressed and a true version has not been presented before the Court and consequently the truth from falsehood cannot be separated and consequently the entire prosecution case must be rejected. We are unable to agree. In Mohar Rai's case it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true. Likewise in Lakshmi Singh's case also it is observed that any non-expla- nation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. In the instant case, the trial court as well as the two learned Judges of the High Court accepted the prosecu- tion case as put forward by P.Ws 1 to 3 in their evidence. The presence of these three witnesses could not be doubted at all. P.Ws 1 and 2 are the injured witnesses and P.W. 1 gave a report giving all the details. However, he attributed specific overt acts to accused Nos. 1, 3, 4 and 6 and made an omnibus allegation against the remaining accused. It is for this reason that Justice Seth found it to be safe to convict only accused Nos. 1, 3, 4 and 6 who are the appellants before us. P.Ws 1, 2 and 3 are the eye witnesses. We have carefully considered their evidence and nothing material is elicited in the cross examination which renders their evidence

wholly untrustwor- thy. No doubt they have not explained the injuries found on accused Nos. 13 and 14. From this alone it cannot be said that the prosecution has suppressed the genesis and the origin of the occurrence and has not presented a true ver- sion. Though they are interested, we find that their evi- dence is clear, cogent and convincing. The only reasonable inference that can be drawn is that the two accused persons received the injuries during the course of the occurrence which were inflicted on them by some members of the prosecu- tion party.

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

The learned counsel for the defence, however, submits that if for any reason the prosecution case in its entirety is not rejected because of the non-explanation of the in- juries found on these two accused, yet the right of private defence of the accused cannot be denied and that on that score also these four convicted accused are entitled to an acquittal. It is also their submission that a careful exami- nation of the provisions of Sections 96, 99 and 102 I.P.C. would show that on a reasonable apprehension of grievous hurt or death the accused had a right even to the extent of causing the death of the assailants and they cannot be expected to modulate this right in such a situation and that in the instant case these four appellants were justified even to the extent of causing death of the two deceased by inflicting gun-shot wounds. In this' context it is also submitted that the plea taken by accused No. 6, Chirkut Singh that he shot at the two deceased persons in self- defence cannot be brushed aside.

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

We shall now consider the submission whether the accused had the right of self-defence. Learned counsel for the State contended that if the accused want to claim the benefit of the general or special exception of the right of private defence then they should plead and discharge the burden by establishing that they are entitled to the benefit of excep- tion as provided under Section 105 of the Evidence Act. In other words, the submission is that the burden of proof of the existence of such a right is on the accused and that in the instant case the accused have not discharged the burden and that mere presence of simple injuries on the accused cannot necessarily lead to an inference that they had a right of self-defence. We have already held that having regard to the facts and circumstances of the case, mere non-explanation of these injuries by the prosecution cannot render the whole case unacceptable. We have also held that those injuries on one of the accused No. 13,

Mahendra Kahar were inflicted by a fire-arm during the same occurrence. Under these circumstances, the important question that we have to consider is whether the accused should be denied the benefit of an exception on the ground that the accused have not discharged the necessary burden of establishing their right to the benefit of the exception beyond all reasonable doubt just like the prosecution is bound under Section 102 of the Evidence Act, or if upon a consideration of the evidence as a whole and the surrounding facts and circum- stances of the case, a reasonable doubt is created in the mind of the court about the existence of such a right wheth- er the accused, in such a situation, is entitled to the benefit of the said exception, i.e. the right of private defence. If so, whether they have exceeded the same? The nature and extent of the burden that the accused has to discharge under Section 105 of the Evidence Act has been one of questions of great general importance and for consid- erable time the opinions of the Courts were not uniform. As a matter of fact, in Partap v. State of U.P., AIR 1976 SC 966, this Court noted "that the question of law that arises here seems to have troubled several High Courts."

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

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The Section to some extent places the onus of proving any exception in a penal statute on the accused. The burden of proving the existence of circumstances bringing the case within the exceptions mentioned therein is upon him. The Section further lays down that the Court shall presume non- existence of circumstances bringing the case within an exception." The words "the burden of proving the existence of circumstances" occuring in the Section are very signifi- cant. It is wellsettled that "this burden" which rests on the accused does not absolve the prosecution from discharg- ing its initial burden of establishing the case beyond all reasonable doubts. It is also well-settled that the accused need not set up a specific plea of his offence and adduce evidence. That being so the question is: what is the nature of burden that lies on the accused under Section 105 if benefit of the general exception of private defence is claimed and how it can be discharged? In Woolmington v. The Director of Public Prosecutions, [1935] Appeal Cases 462, Viscount Sankey, L.C. observed:

> "When evidence of death and malice has been given (this is a question for the jury), the prisoner is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all, the evidence are left in reasonable doubt whether, even if his

> explanation be not accepted,' the act was unintentional or provoked, the prisoner is entitled to be acquitted."

It is further observed:

> "Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is enti- tled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence ... Through- out the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any stationary exception. If, at the end of and on the whole of the case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner as to wheth- er the prisoner killed the deceased with a malicious inten- tion, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecu- tion must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Emperor v.U. Dampala, AIR 1937 Rangoon 83 a full Bench of the Rangoon High Court following the Woolmington's case held that the ratio therein is not in any way inconsistent with the law in British India, and that indeed the princi- ples there laid down from valuable guide to the correct interpretation of Section 105 of the Evidence Act and the full Bench laid down that even if the evidence adduced by the accused fails to prove the existence of circumstances bringing the case within the exception or exceptions plead- ed, the accused is entitled to be acquitted if upon a con- sideration of the evidence as a whole the court is left in a state of reasonable doubt as to whether the accused is or is not entitled to the benefit of the exception pleaded. We have noticed that Section 105 requires that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions or special exception or proviso contained in any pan of the Penal Code is on him and the Court shall presume the absence of such circumstances. This presumption is rebuttable. In Parbhoo and Ors. v. Emperor, AIR 1941 Allahabad 402, a Full Bench of seven Judges considered the scope of Sections 102 and 105 of the Evidence Act. The majority agreed with the view taken by the Full Bench in Dampala's case. In Parbhoo's case Bajpai, J. in his concurring judgment observed that Section 105 is stated in two forms, that of a rule as to the burden of proof and that of a presumption and that the burden of proving the guilt of the accused always rests on the prose- cution and never: shifts and the learned Judge further held that the doubt cast in connection with the right of private defence must be a reasonable doubt and if there is such a reasonable doubt, it casts a doubt on the entire case of the prosecution and that the result is that the accused gets a benefit of doubt. "The presumption laid down in Section 105 of the Evidence Act might come into play but it does not follow therefrom that the accused must be convicted even when the reasonable doubt under the plea of the right of private defence or under any other plea contained in the general or special exceptions pervades the whole

case." In Dampala's case Dunkley, J. while concurring with the majori- ty view after discussing the law on the subject observed:

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

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

In K.M. Nanavati v. State of Maharashtra, [1962] Suppl. 1 SCR 567 it is observed that:

> "In India, as it is in England, there is a presumption of innocence in favour of the accused as a general rule, and it is the duty of the prosecution' to prove 'the guilt of the accused. But when an accused relies upon the General Excep- tions in the Indian Penal Code or on any special exception or proviso contained in any other part of the Penal Code, or in any law defining an offence, Section 105 of the Evidence Act raises a presumption against the accused and also throws a burden on him to rebut the said presump- tion. Under that Section the Courts shall presume the ab- sence of circumstances bringing the case within any of the exceptions, that is, the Court shall regard the nonexistence of such circumstances as proved till they are disproved. This presumption may also be rebutted by admissions made or circumstances elicited by the evidence led by the prosecu- tion or by the combined effect of such circumstances and the evidence adduced by the accused. But the section does not in any way affect the burden that lies on the prosecution to prove all the ingredients, of the offence with which the accused is charged; that burden never shifts. The alleged conflict between the general burden which lies on the prose- cution and the special burden imposed on the accused under Section 105 of the Evidence Act is more imaginary then real. Indeed, there is no conflict at all."

In Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563 it is observed:

> "It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. The general burden never shifts and it always rests on the prosecution. But, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused; and the Court shah presume the absence of such

> circumstances. Under Section 105 of the Evidence Act, read with the definition of "shall presume" in Section 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed Or their existence was so probable that a prudent man ought, under the circum- stances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court suffi- cient to make it consider the existence of the said Circum- stances so-probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man".

If the material placed before the Court such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfied the test of "prudent man", the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasona- ble doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code."

A careful reading of these two decisions would reveal that the statement of law therein neither expressly or impliedly overrules or is in conflict with the majority view in Parb- hoo's case. However, in Rishi Kesh Singh & Ors. v. The State, AIR 1970 Allahabad 51, the question that came up for consideration before a Larger Bench consisting of nine Judges was whether the dictum in Parbhoo's case is still a good law on the ground that some of the decisions of the Supreme Court have cast a cloud of doubt. A majority of seven Judges approved the principle laid down in Parbhoo's case. The Larger Bench also referred to various subsequent decisions of the Supreme Court also including the Nanavati's case; Bhikari v. State of Uttar Pradesh, AIR 1966 SC 1 and Dahyabhai's case, Beg, J., as he then was, in a separate but concurring judgment after referring to the Nanavati's case; Bhikari's ease; Dahyabhai's case and Mohar Rai & Bharath Rai's case, held that there is no conflict between what was held by the Supreme Court and the majority view taken in Parbhoo's case. After analysing the view expressed by the Surpeme Court in the several above mentioned decisions, Beg, J. observed:

> "After a close scrutiny of every part of each of the seven opinions in Parbhoo's case [1941] All LJ 619=AIR 1941 All 402 (FB). I have come to the conclusion that the majority of their Lordships did not lay down anything beyond three important propositions which, if not either directly or indirectly supported by decisions of their Lordships of the Supreme Court have not been affected in the slightest degree by these decisions. These propositions are; firstly, that no evidence appearing in the case to support the exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused has not proved. his plea fully; secondly, that the obligatory .presumption at.the end of Sec. 105 is necessarily lifted at least when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged;

and, thirdly, if the doubt, though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of the offence with which the accused is charged, the accused would be entitled to an acquittal. As I read the answer of the majority in Parbhoo's case [1941] All LJ 619=AIR 1941 All 402 (FB). I find it based on these three propositions which provide the ratio decidendi and this is all that needs t6 be clarified."

"The practical result of the three propositions stated above is that an accused's plea or an exception may reach one of three not sharply demarcated stages, one succeeding the other, depending upon the effect of the whole evidence in the case judged by the standard Of a prudent man weighing or balancing probabilities carefully. These stages are; first- ly, a lifting of the initial obligatory presumption given at the end of Sec. 105 of the Act; secondly the creation of a reasonable doubt about the existence of an ingredient of the offence; and thirdly, a complete proof of the exception by "a preponderance of probability", which covers even a slight tilt of the balance of probability in favour .of the ac- cused's plea. The accused is not entitled to an acquittal if his plea does not get beyond the first stage. At the second stage, he becomes entitled to acquittal by obtaining a bare benefit of doubt. At the third stage, he is undoubtedly entitled to an acquittal. This, in my opinion, is the effect of the majority view in Parbhoo's case which directly re- lates tO first two stages only. The Supreme Court decisions have considered the last two stages so far, but the first stage has not yet been dealt with directly or separately there in any case brought to our notice."

Mathur, J., with whom five Judges agreed, while holding that ratio laid down by the majority in Parbhoo's case is in conformity with law, however, observed that the reasoning in support of the conclusions is erroneous. Beg, J. was not prepared to go to that extent. The majority speaking through Shri Mathut, J. laid' down that the dictum in Parbhoo's case which is still a good law, can, however, be modified as follows:

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

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

We have not come across any case of the Supreme Court where the ratio laid down in Parbhoo's case and which was subsequently approved by a larger Bench in Rishi Kesh Singh's case has been considered comprehensively. However, in Behram Khurshed Pesikaka v. The State of Bombay, [1955] 1 SCR 6 13 there is a specific reference to Parbhoo's case and Woolmington's case while considering the scope and the manner of the expression 'burden of proof', in the judgment of Hon' Venkatarama Ayyar, J. But the learned Judge was not prepared to go into this question in an appeal under Article 136 but only noted that the Bombay High Court in Government of Bombay v. Sakur, AIR 1947 Bombay 38 has taken a different view.

In State of U.P.v. Ram Swarup, AIR 1974 SC 1570 a Bench consisting of M.H. Beg, J., as he then was, Y.V. Chandrachud and V.R. Krishna lyer, JJ., while considering the right of private defence put forward by the accused to some extent went into the question of burden of proof under Section 105 and a reference is made to a decision of the larger Bench in Rishi Kesh Singh's case. Chandrachud, J. who spoke for the Bench, observed thus:

> "The judgment in Rishikesh Singh v. State, AIR 1970 All 51 explains the true nature and effect of the different types of presumptions arising under Section 105 of the Evidence Act. As stated is that judgment, while the initial presump- tion regarding the absence of circumstances bringing the case within an exception may be met by showing the existence of appropriate facts, the burden to establish a plea of private defence by a balance of probabilities is a more difficult burden to discharge. The

> judgment points out that despite this position there may be cases where, though the plea of private defence is not established by an accused on a balance of probabilities, yet the totality of facts and circumstances may still throw a reasonable doubt on the existence of "mensrea" which normally is an essential ingre- dient of an offence. The present is not a case of this latter kind."

We may also refer to a judgment of a Bench of three Judges consisting of M.H. Beg, P.N. Bhagwati and R.S. Sarkaria, JJ. in Partap's case. Sarkaria, J. speaking for himself and Bhagwati, J. observed:

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

Beg, J., however in a separate judgment felt a doubt about the veracity of the defence case and the evidence found in support of it to be able to hold that it is proved on a balance of probabilities. But in his view what transpires from a consideration of the whole evidence is enough to entitle the accused to a benefit of doubt. Beg, J. referred to the judgments of the Full Bench in Parbhoo's case; Nana- vati's case and the larger Bench decision in Rishi Kesh Singh's case and applying the principles of benefit of doubt laid in the above three cases to the facts of the case before them observed:

> "Applying the principle of benefit of doubt as I had exp-
>
> lained above, to the plea of private defence of person in the instant case. I think that, even if the appellant did not fully establish his plea, yet, there is sufficient evidence, both direct and circumstantial, to justify the finding that the prosecution has not established its case beyond reasonable doubt against Partap on an essential ingredient of the offence of murder; the required mensrea. After examining all the facts and circumstances revealed by the prosecution evidence itself and the defence evidence and considering the effect of non-production of the better evidence available which, for some unexplained reason, was not produced. I am not satisfied that the plea of private defence of person can be reasonably ruled out here. This is enough, in my opinion, to entitle the appellant to get the benefit of doubt. ' ' In Mohd. Ramzani v. State of Delhi, AIR 1980 SC 134 1 Sar- karia, J., who spoke for the Bench, observed that the onus which rests on the accused person under Section 105, Evi- dence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prose- cution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. There- fore, the contrary view taken by the Bombay High Court in Sakur's case and in State v. Bhima Devraj, AIR 1956 Sau.

> 77 that the burden is entirely on the accused to establish that he is entitled to the benefit of the exception, does not lay down the correct law.
>
> At this stage it becomes necessary to consider the meaning of the words "the Court shall presume the absence of such circumstances" occurring in Section 105 of the Evidence Act. Section 4 of the Act explains the meaning of the term "shall presume" as to mean that the Court shall regard the fact as proved unless and until it is disproved. 'From a combined reading of these two Sections it may be inferred that where the existence of circumstances bringing the case within the exception is pleaded or is raised the Court shall presume the absence of such circumstances as proved unless and until it is disproved. In Section 3 of the Act meaning of the terms "proved", "disproved" and "not proved" are given. As per this provision, a fact is said to be "proved"

when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be "disproved" when, after consid- ering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved."

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

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

> "The burden is upon the prosecution of proving a defendant's guilt beyond reasonable doubt before he is convicted. Even where the evidential burden shifts to the defendant the burden of establishing proof beyond reasonable doubt remains upon the prosecution and never changes. If on the whole case the jury have such a doubt the defendant is entitled to be acquitted."

Another passage at page 48 reads as follows:' "In criminal cases the prosecution discharge their eviden- tial burden by adducing sufficient evidence to raise a prima facie case against the accused. If no evidence is called for the defence the tribunal of fact must decide whether the prosecution has succeeded in discharging its persuasive burden by proving its case beyond a reasonable doubt. In the absence of any defence evidence, the chances that the prose- cution has so succeeded fare greater. Hence the accused may be said to be under an evidential burden if the prosecution has established a prima facie case. Discharge of the eviden- tial burden by defence is not a pre-requisite to an acquit- tal. The accused is entitled to be acquitted if at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner .....No matter what the charge ..... the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be enter- tained.

XX XX XX
XX XX XX

In many cases, however, the accused's defence will involve introducing new issues, for example, automatism, provoca- tion, self-defence, duress, etc. Once there is any evidence to support such "explanations" the onus of disproving them rests upon the prosecution. The accused, either by cross-examination of the prosecution witnesses or by evidence called on his behalf or by a combination of the two, must place before the court such material as makes the defence a live issue fit and proper to be left to the jury. But once he has succeeded in doing this and thereby discharged his evidential burden it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged facts constituting the defence." Dealing with the presumptions of law, the author has noted on page 60, thus:

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

Wigmore on evidence, dealing with the "Legal Effect of a presumption" (3rd ed., Vol. IX p. 289) explains:

> "It must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion 'in the absence of evidence to the contrary' from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the Judge's requirement of some evidence), the presumption disappears as a rule of Taylor in his 'Treatise on the Law of Evidence' (12th Edn. Vol. 1 page 259) points out:

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

Dealing with the presumptions, the author says:

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

It is held in Nanavati's case that under Section 105 of the act the Court shall presume the absence of circumstances bringing the case within any of the exceptions, i.e. the Court shall regard the non-existence of such circumstances as proved till they are disproved, but this presumption can be rebutted by the accused by introducing evidence to sup- port his plea of accident in the circumstances mentioned therein. This presumption may also be rebutted by admissions made or circumstances elicited from the evidence led by the prosecution or by the combined effect of such circumstances and the evidence adduced by the accused. Dealing with the ingredients of the offence to be proved by the prosecution and the burden to be discharged under Section 105 of the Evidence Act by the accused and a reasonable doubt that may arise on the basis of such rebuttal evidence by the accused, it is observed:

> "An illustration may bring out the meaning. The prosecution has to prove that the accused shot dead the deceased inten- tionally and thereby committed the offence of murder within the meaning of s. 300 of the Indian Penal Code; the prosecu- tion has to prove the ingredients of murder, and one of the ingredients of that offence is that the accused intentional- ly shot the deceased; the accused pleads that he shot at the deceased by accident without any intention or knowledge in the doing of a lawful act in a lawful manner by lawful means with proper care and caution, the accused against whom a presumption is drawn under s. 105 of the Evidence Act that the shooting was not by accident in the circumstances men- tioned in s. 80 of the Indian Penal Code, may adduce evi- dence to rebut that presumption. That evidence may not be sufficient to prove all the ingredients of s. 80 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertance, i.e. it was done without any

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

In Dahyabhai's case as already noted, the relevant portion reads thus:

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

The maxim that the prosecution must prove its case beyond reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence.in criminal cases. Section 105 places 'burden of proof' on the accused in the first part and in the second part we find a presumption which the Court can draw regarding the absence of the circumstances which presumption is always rebuttable. Therefore, taking the Section as a whole the 'burden of proof' and the presumption have to be considered together. It is axiomatic when the evidence is sufficient as to prove the existence of a fact conclusively then no difficulty arises. But where the accused introduces material to dis- place the presumption which may affect the prosecution case or create a reasonable doubt about the existence of one or other ingredients of the offence and then it would amount to a case where prosecution failed to prove its own case beyond reasonable doubt. The initial obligatory presumption that the Court shall presume the absence of such circumstances gets lifted when a plea of exception is raised. More so when there are circumstances on the record (gathered from the prosecution evidence, chief and cross examinations, pro-

babilities and circumstances, if any, introduced by the accused, either by adducing evidence or otherwise) creating a reasonable doubt about the existence of the ingredients of the offence. In case of such a reasonable doubt, the Court has to give the benefit of the same to the accused. The accused may also show on the basis of the material a prepon- derance of probability in favour of his plea. If there are absolutely no circumstances at all in favour of the exist- ence of such an exception then the rest of the enquiry does not arise inspite of a mere plea being raised. But if the accused succeeds in creating a reasonable doubt or shows preponderance of probability in favour of his plea, the obligation on his part under Section 105 gets discharged and he would be entitled to an acquittal.

From what has been discussed above it emerges that the presumption regarding the absence of existence of circum- stances regarding the exception can be rebutted by the accused by introducing evidence in any one of the manners mentioned above. If from such a rebuttal, a reasonable doubt arises regarding his guilt, the accused should get the benefit of the same. Such a reasonable doubt consequently negatives one or more of the ingredients of the offence charged, for instance, from such a rebuttal evidence, a reasonable doubt arises about the right of private defence then it follows that the prosecution has not established the necessary ingredients of intention to commit the offence. In that way the benefit of a reasonable doubt which arises from the legal and factual considerations even under Section 105 of the Evidence Act should necessarily go to the accused. It can be argued that the concept of 'reasonable doubt' is vague in nature and the standard of 'burden of proof' contemplated under Section/05 should be somewhat specific, therefore, it is difficult to reconcile both. But the gener- al principles of criminal jurisprudence, namely, that the prosecution has to prove its case beyond reasonable doubt and that the accused is entitled to the benefit of a reason- able doubt, are to be borne in mind. The 'reasonable doubt' is one which occurs to a prudent and reasonable man. Section 3 while explaining the meaning of the words "proved", "disproved" and "not proved" lays down the standard of proof, namely, about the existence or nonexistence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would under the circumstances act on the assump-

tion of its existence. The Act while adopting the require- ment of the prudent man as an appropriate concrete standard by which to measure proof at the same time contemplates of giving full effect to be given to circumstances or condition of probability or improbability. It is this degree of cer- tainty to be arrived where the circumstances before a fact can be said to be proved. A fact is said to be disproved when the Court believes that it does not exist or considers its non-existence so probable in the view of a prudent man and now we come to the third stage where in the view of a prudent man the fact is not proved i.e. neither proved nor disproved. It is this doubt which occurs to a reasonable man, has legal recognition in the field of criminal dis- putes. It is something different from moral conviction and it is also different from a suspicion. It is the result of a process of keen examination of the entire material on record by 'a prudent man'.

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

Lord Denning, J. in Miller v. Minister of Pensions, [1947] 2 All ER 373 while examining the degree of proof required in criminal cases stated:

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

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

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

Now, let us examine the types of cases to which these principles underlined under Section 105 can be applied and to what extent? The Section deals with the burden of proof in respect of the general exceptions, special exceptions and proviso contained in the Penal Code or in any part of the same code, or in any law defining the offence. It is already noted that the doctrine of burden of proof has to be the general law and the same remains always upon the prosecu- tion. However, in respect of the cases where the statute wholly places the burden of proof on the accused himself, then the burden is more onerous on him. As already noted in Rishi Kesh Singh's case Mathur, J. speaking for the majori- ty, while affirming the view taken in Parbhoo's case ob- served that in a case where any such exception is pleaded and the evidence led in support of such plea, judged by the test of preponderance of probability, fails to displace the presumption arising from Section 105 of the Evidence Act; yet if upon a consideration of the evidence as a whole including the evidence led in support of plea of exception or proviso, a reasonable doubt is created in the mind of the Court, as regards one or more of the ingredients of the offence, the accused shall be entitled to the benefit of the reasonable doubt as to his guilt. In C.S.D. Swami v. The State, AIR 1960 SC 7 the character of a presumption of guilt under Section 5 of the Prevention of Corruption Act from proof.of certain facts "unless the contrary is proved" was considered and it was held there that the exception laid down by statute was "a complete departure from the estab- lished principle of the criminal jurisprudence that the burden always lies upon the prosecution to prove all the ingredients of the offence charged and that the burden never shifts on to the accused to disprove his guilt." V.D. Jhin- gan v. State of U.P., AIR 1966 SC 1762 also is a case deal- ing with the presumption under Section 4 of the Prevention of Corruption Act under which the accused was under an obligation to disprove his guilt by adducing such evidence by which the preponderance of probabilities prove the de- fence case.

An examination of these cases would reveal that the statutory exception which modifies the operation of the general principle that the prosecution must prove all ingre- dients of the offence with which the accused is charged, to some extent stands on a different However, Beg, J. in his separate judgment, in Rishi Kesh Singh's case observed thus:

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

Somewhat to the same effect are the observations made by the Supreme Court in Harbhajan Singh v. State of Punjab, AIR 1966 SC 97. After citing Woolmington's case it is therein held that "The principle of common law is part of the crimi- nal law of the country. That is not to say that if an excep- tion is pleaded by an accused person he is not required to. justify his plea; but the degree and character of proof which the accused is expected to support his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case. The onus on the accused may well be compared to the onus on a party in civil proceedings; just as in civil proceedings the' Court which tries an issue makes its decision by adopt- ing the test of probabilities, So must a criminal court hold the' plea made by the accused proved, if a preponderance of probability is established by the evidence led by him." It can thus be seen that there is a dividing line between a case of the accused discharging the burden by preponderance of probabilities which is equated to proof of the exception and a state of reasonable doubt that arises on a considera- tion of the evidence and facts and circumstances as a whole, as regards one or more of the ingredients of the offence. Therefore, in a case where the prosecution has discharged. its burden and where the accused pleads exception and if there is some evidence to support that plea the obligatory presumption under Section 105 is lifted and the accused may proceed further and establish his plea by a preponderance of probabilities or he may carry his plea further and suc- ceed in creating a reasonable doubt about an ingredient of an offence. Consequently in respect of the general excep- tions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the accused by one of these processes would be discharging the burden contem- plated under Section 105 but in cases of the exceptions covered by special statutes and where the burden of proof is placed on the accused to establish his plea, he will be discharging the same by preponderance of probabilities and not by merely creating a doubt.

At this stage we have to point out that these principles cannot be made applicable to a case where the accused sets up alibi. There the burden entirely lies on him and plea of alibi does not come within the meaning of these exceptions. Circumstances leading to alibi are within his knowledge and as provided under Section 106 of the Act he has to establish the same satisfactorily. Likewise in the case where the statute throws special burden on the accused to disprove the existence of the ingredients of the offence, he has to discharge the burden, for example, in the cases arising under Prevention of Food Adulteration Act if the accused pleads a defence under Section 19, the burden is on him to establish the same since the warranty on which he relies is a circumstance within his

knowledge. However, it may not be necessary to enumerate these kinds of cases as we are mainly concerned in this case only with the scope and application of Section 105 of the Evidence Act. We also make it clear that the principles laid down by us are only in respect of the said provision only. As we think that it would be appro- priate and useful to set out the sum and substance of the above discussions regarding the scope of Section 105 and we accordingly state the same as follows:

> The general burden of establishing the guilt of accused is always on the prosecution and it never shifts. Even in respect of the cases covered by Section 105 the prosecution is not absolved of its duty of discharging the burden. The accused may raise a plea of exception either by pleading the same specifically or by relying on the probabilities and circumstances obtaining in the case. He may adduce the evidence in support of his plea directly or rely on the prosecution case itself or, as stated above, he can indi- rectly introduce such circumstances by way of cross-examina- tion and also rely on the probabilities and the other cir- cumstances. Then the initial presumption against the accused regarding the non-existence of the circumstances in favour of his plea gets displaced and on an examination of the material if a reasonable doubt arises the benefit of it should go to the accused. The accused can also discharge the burden under Sec. 105 by preponderance of probabilities in favour of his plea. In case of general exceptions, special exceptions, provisos contained in the Penal Code or in any law defining the offence, the Court, after due consideration of the evidence in the light of the above principles, if satisfied, would state, in the first instance, as to which exception the accused is entitled to, then see whether he would be enti- tled for a complete acquittal of the offence charged or would be liable for a lesser offence and convict him accord- ingly.
>
> In the instant case we are concerned with the exception of right of private defence. In the instant case a plea of right of private defence is raised. As noted above one of the accused received a 12'x2' lacerated wound and other accused received gun-shot injuries. The plea that the non- explanation of these injuries by the prosecution warrants rejection of the prosecution case, is rejected as the evi- dence of the material witnesses even otherwise found to be cogent, convincing and acceptable but from the circumstances these two accused particularly one of them had received gun-shot injuries during the course of the same occurrence is established. The accused have also adduced defence evi- dence namely that of a Doctor in support of their plea. This material though by itself is not sufficient to establish the General Exception under Section 96 or the special exception No. 2 to Section 300 IPC but creates a reasonable doubt about the existence of such a right. The accused have proved the infliction of injuries on them by the complainant party in the course of the occurrence. Therefore, the obligatory initial presumption against them is removed and their plea appears to be reasonably true and consequently they are entitled to the right of self-defence.
>
> The next question is whether they have exceeded this right. Learned counsel submits that the accused is not expected to modulate his right of self-defence and that in the instant case it cannot with certainty be said that they have exceeded this right and

therefore, they are entitled to an acquittal.

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

In the case before us as per the evidence of the materi- al witnesses the two deceased were only proceeding alongwith the rasta towards the pump set for taking bath. Even in the plea set up by Chirkut Singh, accused No. 6, it is not stated specifically that deceased Nos. 1 and 2 were armed with any deadly weapons. Therefore, the assailants had definitely exceeded the right of private defence when they went to the extent of intentionally shooting them to death by inflicting bullet injuries. Therefore, the offence com- mitted by them would be one punishable under Section 304 Part 1 I.P.C.

We accordingly set aside the conviction of the. appel- lantsaccused Nos. 1, 3, 4 and 6, Vijayee Singh, Ranjit Singh, Ram Briksh Singh and Chirkut Singh respectively for an offence punishable under Section 302/149 I.P.C. and the sentence of imprisonment for life awarded thereunder. In- stead they are convicted under Section 304 Part I read with Section 34 I.P.C. and sentenced each of them to undergo 10 years imprisonment. The other sentences/convictions awarded to them are confirmed. The sentences shall run concurrently. Criminal Appeal Nos. 375-77 of 1987 are allowed to this extent only and Criminal Appeal Nos. 372-74/87 are dis- missed.

R.N.J. Crl. A. Nos. 375-77/87 are allowed and Crl. A. Nos. 372-74/87 are dismissed.

?609