# BURDEN OF PROOF ON AN ACCUSED PERSON IN MALAYSIA

The Privy Council cases of *Public Prosecutor* v. *Yuvaraj*[1] and *Jayasena* v. *The Queen*[2] appear to have settled the question of the burden of proof on an accused person under the Evidence Act but as the earlier cases still seem to cast their shadows so as to obscure the subject, it seems opportune to review the earlier cases in the light of the recent Privy Council decisions.

The earliest reported case in Malaya on the subject appears to be the Singapore case of *Rex* v. *Chhui Yi*.[3] In that case the accused was charged with murder and the defences relied on were alibi and provocation. The accused was convicted and one of the grounds of appeal was 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 (then) recent decision of the House of Lords in *Woolmington's case*, which it was alleged had had an "effect" on section 105 of the Evidence Ordinance. Whitley Ag. C.J. giving the judgement of the Court of Criminal Appeal (Whitley Ag. C.J., Mills and Adrian Clark JJ.) said:—[4]

> "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*, (1935) App. Case. 462 can have any effect on our law. The decision dealt with the Common Law of England and destroyed the theory, which had found place in certain textbooks that, at Common Law, "killing is murder," or, in other words, that, on a charge of murder, it is sufficient for the Crown to establish merely that the deceased died at the prisoner's hands and that thereupon the onus shifts on to the prisoner and he must show circum-

[1] [1969] 2 M.L.J. 89

[2] [1970] 1 All. E.R. 219.

[3] [1936] M.L.J. 177.

[4] *Ibid* at p. 179.

stances reducing the offence to one of manslaughter or showing the homicide to have been lawful or excusable. The Crown, it has now been laid down, must prove not only the killing but that the killing was intentional and "malicious"; the onus of proving this always remained on the Crown, whether the accused gives evidence or not; and, at the end of the case, the jury must not convict of murder unless those elements of the offence of murder have in their opinion been proved without reasonable doubt. "It is the duty of the prosecution," said the Lord Chancellor, "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."

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.

The general exceptions referred to in section 105 of the Evidence Ordinance are those contained in Chapter IV (sections 76–106) of the Penal Code, and *Woolmington's* case can be no authority for

saying that the onus is always on the Crown of negativing *ab initio* every one of those possible exceptions together with any contained in any other relevant Ordinance; of proving affirmatively in every case, for example, that the accused was acting under no mistake of fact, was over 7 years of age, was not so drunk as to come within sections 85 and 86, was not acting in self-defence, had suffered no provocation, was sane and so forth. It is true that it is the duty of the Crown to put before the Court all relevant evidence which can be given by witnesses whose honesty there is no reason to doubt, and that the evidence thus fully given may, in most cases, in fact tend to disprove many or all of the statutory exceptions. We think it is clear, however, that there can be no legal obligation on the Crown, as part of its case, to rebut, in advance, all possible grounds of defence. The Crown must give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the jury to find the accused guilty but, that onus 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 to the general law, not a criminal offence.

The direction which, in the present case, the learned trial Judge gave to the jury was the following:–

> "It is correct, as the learned Deputy Public Prosecutor has told you, that the proof of such a statutory defence is on the person who sets the defence up, and it is, of course, difficult for a man who set up an *alibi* to try and prove such a set of circumstances when presumably, he was not there. He is, of course, at liberty to try and prove his case from the evidence which is called for the prosecution."

This direction was in accordance with the law of this Colony and is not open to objection."

This case therefore decided that section 105 of the Evidence Ordinance (section 106 of the Evidence Act) in no way lessens the onus which always remains upon the prosecution; where however the accused relies on a statutory defence or exception he must prove such defence or exception. Nothing was said as to the weight of the burden.

In *Lim Tong* v. *Public Prosecutor, Johore*,[5] the accused was charged with murder and he pleaded provocation. The learned Judge in his summing up in dealing with the question of onus of proof had said, "If he alleges this exception, the burden lies on him to prove every requisite fact beyond reasonable doubt according to the same standard." The Court of

[5] [1938] M.L.J. 41.

Appeal (Terrell Ag. C.J. and Horne J.) stated that it could not accept that direction as a complete statement of the law on the subject. In its judgment the Court said that the law in Johore as regards the onus placed on the prosecution in cases of murder is the same as in England and they adopted the summary of the law by Lord Sankey in *Woolmington's case*. After referring to section 106 of the Evidence Ordinance, the Court said:—[6]

> "Clearly it would be placing an impossible burden on the prosecution to prove a negative, i.e. that none of the statutory defences applied.
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> On the other hand, although the burden of proof is by the section quoted, put upon the accused, he may very well by his defence raise a doubt as to whether the burden lying upon the prosecution has been completely discharged. The onus of proving the criminal intention lies on the prosecution and never shifts. Even, therefore, if the accused fails to discharge fully, the burden of proving provocation, he may yet by his evidence or arguments raise a doubt as to whether the prosecution have satisfied the assessors that such criminal intention as would justify a verdict of murder, has been satisfactorily established. If there is a reasonable doubt, the accused should have the benefit of it.
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> The matter is put very clearly by Lord Sankey in *Woolmington's* case at page 482 in the following words:—
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> > "When evidence of death and malice has been given (this is a question for the jury) the accused 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."
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> It must be remembered that in the *Woolmington* case the defence was accident. When the defence is provocation, then, under similar circumstances, the offence would be reduced from murder to culpable homicide.
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> Putting this interpretation on section 106 of the Evidence Ordinance the Court feels no difficulty in applying the principles of *Woolmington's* case to trials for murder under the Penal Code. These principles have in fact been followed by Assize Judges both in the

[6] *Ibid* at p. 42.

Colony and the F.M.S. The court would refer to the decision of the Court of Criminal Appeal in Singapore in the case of *Rex* v. *Chhui Yi*, 5 M.L.J. p. 177, where however the possible effect of evidence falling short of a full and complete discharge of the onus put on the accused by section 106 of the Evidence Ordinance was not considered in relation to the onus which always lies on the prosecution to prove their case.

The interpretation of section 106 of the Evidence Ordinance indicated above has the authority of a recent decision of the Full Bench in Rangoon (*Emperor* v. *U. Damapala* (1937) A.I.R. Rangoon, p. 83). The Court held that the decision in *Woolmington's case* was in no way inconsistent with the law in British India, and indeed, that the principles there laid down formed a valuable guide to the correct interpretation of section 105 (our section 106) of the Evidence Act.

The following passage may be quoted from the judgment of Roberts C.J. at p. 85:—

> "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 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."

In the present case the assessors were directed as regards the alleged provocation as follows:

> "The accused alleges:
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> (1) When the deceased admitted swindling him, he was provoked but retained his self-control.
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> (2) When the deceased abused him in a vilely offensive manner he was much provoked but retained his self-control.

(3) When the deceased abused him a second time in a vilely offensive manner he was gravely and suddenly provoked and was deprived of the power of self-control."

In the opinion of this Court, this accurately summarises the appellant's evidence on the subject. The assessors must have found that the appellant was not deprived of the power of self-control, and that the offensive expression did not cause grave and sudden provocation, and in his report the learned trial Judge expresses his concurrence with such findings. Clearly, therefore, the appellant did not discharge the onus placed upon him by section 106 of the Evidence Ordinance. The Court is also of opinion that notwithstanding the learned Judge's failure to direct the assessors upon the point, the evidence adduced by the appellant could not have raised a reasonable doubt as to whether the prosecution had discharged the onus of proving criminal intention, and that accordingly there has been no failure of justice".

It might be noted that the Court decided on the facts that the appellant had not discharged the onus placed upon him by section 106 of Evidence Ordinance. But it also expressed the opinion that all the accused need do to discharge the onus on him is to raise a reasonable doubt in the case for the prosecution and it approved and applied the decisions in *Woolmington* and *Emperor* v. *Damapala.*

The next case in chronological order is the Federated Malay States case of *Public Prosecutor* v. *Alang Mat Nasir,* which was heard together with the case of *Public Prosecutor* v. *Chen Lip.*[7] These two cases had been tried before the same judge. In the first case the accused was charged with causing mischief by fire and with causing hurt. Medical evidence was given to show the mental condition of the accused and this showed that he had been a temporary inmate of the mental hospital and that he was suffering from mental disease. The learned Judge pronounced a verdict of guilty, because he thought that the accused "probably did know the nature of the acts he was doing and that he was doing wrong" on the date when he committed the acts charged against him. The question which he reserved for the Court of Appeal was "Whether he was right in law in convicting, in view of the reasonable doubt which existed in his mind as to whether the accused was or was not insane at the date when he committed the offence."

In the second case the accused was charged with voluntarily causing grievous hurt. The medical evidence showed that the accused was suffering from confusional and delusional insanity. The learned Judge was satisfied

[7] [1938] M.L.J. 153.

that the accused knew "full well the nature of the acts he was doing" and thought it far more likely than not that he knew that those acts were contrary to law at the time he did them; but on the other hand the medical evidence had raised a reasonable doubt in his mind as to whether the accused did know that what he was doing was contrary to law. He convicted the accused but referred to the Court of Appeal the question whether he was right in doing so.

The question raised by both references was thus summarised: "If upon the whole of the evidence the Court is of the opinion that there is a reasonable doubt as to whether the accused was insane at the time that he committed the act alleged against him, ought the Court to convict or ought the Court to find that he committed the act but is not guilty because he was of unsound mind at the time?"

Whitley Ag. C.J. began by saying—[8]

> "In considering what our answer to this question should be it is important that we should bear in mind that in the Federated Malay States we are governed by our Codes and Enactments and that, whilst the main principles which we have to apply in administering our Criminal Law are substantially the same as those which are applied by the Courts in England, it is unsafe to follow the English cases without considering whether and to what extent expressions used in those cases may have to be varied, modified or adapted to comply with the provisions of these Codes and Enactments. For example the expression "reasonable doubt" which occurs in this reference, and indeed in practically every criminal trial, is not used in any of the relevant sections of the Evidence Enactment to which I shall shortly refer; but upon a careful consideration of those sections it will, I think, be found that the framers of our Enactment had in mind the idea conveyed by the expression and merely sought to codify it by using more precise words. In order to avoid any possible confusion it will I think be safe to adhere as closely as possible to the wording of our sections.
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> Before, however, proceeding to consider those sections, it may be useful, by way of introduction, to state shortly the well known broad principles which are of universal application in all criminal trials in England and the Dominions and countries such as this, where the administration of justice is founded upon the English system. It is for the prosecution to prove its case beyond reasonable doubt. If it fails to do that the accused is entitled to be acquitted. The accused starts off with the presumption of innocence in his

[8] *Ibid* at p. 154.

favour, but when once the prosecution has proved beyond reasonable doubt facts which, if unanswered, would establish the charge against the accused, it is for the accused, if he wishes either to excuse himself altogether or to reduce his offence to one of lesser gravity, to adduce evidence directed to one or other of those objects. Upon the evidence as a whole the Court decides the case."

The learned Chief Justice then referred to sections 101, 105 and 3 of the Evidence Enactment and then continued—[9]

"The answer which we give on this reference must I think depend upon the construction which we put upon the provisions of section 3 and section 105; but it is to be noted that the definitions in section 3 are so worded as to render possible a degree of elasticity in applying them, and when considering how we should apply them in any particular case it is proper that we should invoke the assistance of authoritative decisions in England.

In the two cases which we have under consideration the accused sought to avoid responsibility on the ground of what is loosely but conveniently described as insanity, by bringing themselves within the exception contained in section 84 of the Penal Code which provides that nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The burden of proving the existence of circumstances bringing the case within that exception was upon the accused in each case. It was open to them to discharge that burden either by adducing themselves or by relying upon evidence adduced by the prosecution or by both these means. Whether or not they have discharged that burden must depend upon the view which the learned trial Judge took upon considering the evidence as a whole. Section 3 indicates the way in which consideration of that question should be approached. He should put himself in the position of the prudent man, and ask himself whether under the circumstances of each case he ought to act upon the supposition that the accused was insane within the meaning of section 84 of the Penal Code. One of the circumstnaces which he ought to take into account is the fact that it is the defence and not the prosecution which is seeking to prove the fact of insanity. It is well established, as the result of the accumulated wisdom of many great English Judges, that the burden of proof resting upon an accused to prove insanity, or indeed any circumstance which may excuse him or reduce the gravity of his

[9] *Ibid* at p. 155.

offence, is not so onerous as the burden of proof resting upon the prosecution to prove the facts which they have to establish. As Viscount Hailsham L.C. observed in delivering the judgment of the Privy Council in the case of *R.* v. *Sodeman*, [1936] 2 All E.R. 1138, the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings.

In a civil action the merest tipping down of the scales in one direction or the other may be sufficient to decide the issue. A prudent man, called upon to decide upon a matter in which so much is at stake, would act wisely and properly in allowing himself to be guided by an authoritative opinion such as that; and a Judge sitting without assessors ought to direct himself to that effect just as a Judge sitting with assessors or a jury would direct them that that is the standard which they should apply. When framing the question which he referred for our determination in the two cases which we are considering the learned Judge apparently had not in mind the definition of "proved" in section 3, but he 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 act complained of; and it seems to me that a prudent man, feeling such a doubt as that based as it is upon such a very definite and weighty expert medical opinion, and bearing in mind the lesser degree of proof required in such a case and the consequences which depended upon his decision, would consider the existence of insanity so probable – and I think the word "so" here must be read in the sense of "sufficiently" – that he ought under the circumstances to act upon the supposition that insanity existed. That being so the "fact" of insanity has in my opinion been "proved" within the definition in section 3, and the accused has discharged the burden cast upon him by section 105. He has accordingly brought himself within the exception provided by section 84 of the Penal Code, and is entitled to be acquitted on the ground of insanity and dealt with in accordance with the provisions of section 348 of the Criminal Procedure Code.

In coming to this conclusion I have not lost sight of the fact that the learned Judge, whilst feeling a reasonable doubt in both cases, expressed opinions which showed that he regarded the scales as being weighed down more on the side of sanity than of insanity. In the one case he thought that the accused probably did know the nature of the acts and that he was doing wrong; and in the other he thought that it was far more likely than not that the accused knew he was doing wrong. It was urged by the learned Deputy Legal Adviser, and with much force, that a prudent man who had arrived

at such conclusions as to the preponderance in favour of sanity would assume that insanity did not exist. It may well be that some prudent men would take that view and some the other view; but regard must be had to the "circumstances of the case," and my strong personal view is that in the particular circumstances of these two cases, there are to be found in the medical evidence such substantial grounds for the reasonable doubt as to sanity, that the average prudent man would feel it his duty to act upon the supposition that insanity did exist. I feel no doubt in mind that if I were a member of a Jury called upon to decide these cases on the evidence contained in the two records that is the view which I should take.

The learned Judge apparently felt that in view of the fact that he thought sanity more probable than insanity he ought to convict. As I have indicated I do not think that is necessarily so. The answer depends entirely upon the result of the application of the test laid down in section 3 to the circumstances of the particular case."

Having thus dealt with the question referred to the Court the learned Chief Justice then dealt with two other matters which arose out of arguments addressed to the Court. He said —[10]

"It was suggested that in England, by reason of the rules in *McNaghten's case* (1843) 10 Cl. & Fin. 100, the defence of insanity stands on an entirely different footing from other defences, such as provocation and sudden quarrel, which are available to an accused person, and demands from him a higher degree of proof than is required in the case of such other defences. Whether or not, in view of recent decisions such as that in *Sodeman's case (supra)*, that can still be taken to be the state of the law in England does not concern us here, but it seems to me clear that in these States there is no distinction whatsoever between the various exceptions provided by our laws in so far as the questions of burden of proof and degree of proof required are concerned. Section 105 is comprehensive in its wording. It refers to the burden of proving 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." That puts the defence of insanity under section 84 on precisely the same footing as the defence of grave and sudden provocation under Exception 1 to Section 300. Accordingly, where the defence of provocation is set up in a murder case, the direction to the assessors should be on the same lines as that which I have already suggested would be proper in the case of a defence of

[10] *Ibid* at *pp.* 156–158.

insanity. The burden of establishing grave and sudden provocation within the wording of the exception is upon the accused. In seeking to prove it he may extract much that will assist him out of the evidence of prosecution witnesses who may, for example, depose to blows aimed at him. He may himself give evidence as to such provocation. If on the evidence as a whole the assessors feel that the probability of there having been grave and sudden provocation is such that under the circumstances a prudent man ought to act upon the supposition that there was such provocation, then the accused will have discharged the burden of proving and brought himself within the exception. In such a case it seems to me that a prudent man who felt a reasonable doubt as to whether or not there had been grave and sudden provocation would give the accused the benefit of such doubt, and find that there had been provocation.

We were referred to the well known case of *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462. In that case the charge was one of murder, and the defence set up was accident. There was no question of insanity. The facts were accordingly in no way comparable to those of the two cases which are the subject matter of these references, but the development and present state of the law as to burden of proof in criminal trials was so exhaustively dealt with by the House of Lords in the judgments in that case and these judgments are so frequently referred to in the Courts of these States, that it is important to consider to what extent, if any, the decision and expressions of opinion of the noble Lords in that case are inconsistent with the law as administered out here. I would say at once that as I read these judgments they contain nothing in any way inconsistent with the law as laid down in our Codes and Enactments, and it seems to me that the principles laid down by Viscount Sankey L.C. afford a valuable guide to the correct interpretation of section 105 of our Evidence Enactment. Certain doubts which had previously existed as to the law in England and which were resolved and settled, probably once and for all, by that case had in fact been already met and dealt with by the framers of our Penal Code and Evidence Enactment, with the result that it would be impossible for a Judge here, properly directing assessors as to the law as laid down in our relevant sections, to express himself in the words with which fault was found in the summing up in that case. The passage in question reads as follows:

> "The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstance are

to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him: for the law will presume the act to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something else, something which might be alleviated, something which might be reduced to a charge of manslaughter or was something which was accidental, or was something which could be justified."

There was, as pointed out by Lord Sankey, apparent authority for the law as thus laid down. The phrase "presumption of malice" occurs in Foster's *Crown Law* written in 1762, and is repeated in *Archbold* and *Russell* on Crimes, and finally appears in *Halsbury's* Laws of England which purports to state the law as on May 1st, 1933 in the following form:—

"When it has been proved that one person's death has been caused by another, there is a *prima facie* presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."

I extract passages from Lord Sankey's judgment which state most clearly what their Lordships held to be the true state of the law:—

"At the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

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

prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove death as the result of a voluntary act of the accused and malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked.

"When evidence of death and malice has been given (this is a question for the jury) the accused 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 not the law of England to say, as was said in the summing-up in the present case: "If the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident.". If the proposition laid down by Sir Michael Foster or in the summing-up in *Rex* v. *Greenacre* (1837) 8 C. & P. 35 means this, those authorities are wrong."

I have already pointed out a summing-up as this would amount to a misdirection under our Laws. Section 101 of the Evidence Enactment throws the burden on the prosecution to prove the guilt of the accused. Nowhere in the Enactment is there any suggestion that *that* burden ever shifts. Section 105 merely says that if the accused seeks to establish certain circumstances the burden of proving *those* circumstances is upon him. In order to discharge the burden of proof which the prosecution has undertaken, it has to prove every ingredient which goes to make up the offence charged. Those ingredients are set out with the utmost clarity and particularity in the Penal Code, and the ingredient of what in England is called "malice" is

dealt with comprehensively and in great detail in sections 299 and 300. The Code and the Enactment read together leave no shadow of doubt that the burden is on the prosecution throughout to prove malice just as much as any other ingredient of the offence.

So much for the burden of proof which is upon the prosecution. In my opinion it is on a proper reading of our laws the same here as is now laid down in England by the *Woolmington* decision. As regards the burden which is under certain circumstances cast upon the accused, and the nature of that burden, it follows from what I have already said, when analysing section 3 and 105 of the Evidence Enactment, that in my opinion there is nothing in our law on this point which is inconsistent with the principles laid down in the *Woolmington* judgment.

The judgment of the Court on the references (by a majority) will be that in each case the finding should be that the accused committed the act or acts charged against him but that at the time at which he is alleged to have committed the offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law; and that an order to keep in safe custody should be made in accordance with the provisions of section 348(i) of the Criminal Procedure Code."

Gordon-Smith J. the other Judge in the Court of Appeal stated that the question was as to the proper construction to be placed upon the expression "burden of proving" as used in section 105 of the Evidence Enactment and whether such means no more than that an accused is under the burden of adducing evidence to raise a reasonable doubt as to his sanity at the time of the commission by him of an offence alleged against him under the Penal Code. In both cases he stated the medical evidence was such as to raise a reasonable doubt in the mind of the learned Judge as to the sanity of each accused and it mattered not whether such medical evidence was produced by the prosecution or the accused. He then said:—[11]

"It is upon the evidence as a whole, whether produced by the Prosecution or the Defence that a decision rests and if upon the evidence produced by the prosecution alone a reasonable doubt exists, then the prosecution has not discharged the onus of proving the charge against an accused and an acquittal must follow.

[11] *Ibid* at p. 158.

It is not however for the Prosecution, once having established beyond reasonable doubt a *prima facie* case against an accused, to produce evidence which will bring an accused within any of the general exceptions (specifically stated in the Penal Code) and similarly in a homicide case, it is for the accused to prove facts which will either excuse altogether the act of the accused or will at least lessen his culpability. For example, in cases where accident, self-defence, grave and sudden provocation are alleged, the burden of proving such, is on the accused once the prosecution has established a *prima facie* case. Similarly in regard to insanity, the law (Penal Code s.84) presumes an accused person to be sane until the contrary is proved, and the burden of proving insanity is as in the case of accident, self-defence, grave and sudden provocation on the accused."

The question of proof, he said, is another matter. He referred to the definitions in section 3 of the Evidence Enactment and said,[12]

"In my opinion in considering the effect of sections 101 to 106 inclusive and the words 'burden of proof' regard must be had to these definitions. The words 'under the circumstances of the particular case' are wide and mean what they say and therefore in considering whether an accused has or has not proved a particular fact, the burden of proof of which may be upon him, regard is not limited solely to the evidence adduced by him in reference to this particular fact and the whole circumstances of the particular case as evidenced by both the prosecution and the defence come under consideration.

In the cases under review the learned Judge expressly finds that he has a reasonable doubt as to the sanity of both accused at the time they committed the acts. If on considering the evidence against the accused there is a reasonable doubt about his guilt, in consequence, the case against him is considered not to be proved and the accused is entitled to be acquitted; on the other hand, if by evidence for the defence, or in fact on evidence either for the prosecution or defence, a reasonable doubt arises as to whether a fact, the burden of proving which is on the accused, has been proved, this does not mean that such fact has not been proved and that therefore the accused has not discharged that obligation. It, therefore, follows that it is sufficient to ensure his acquittal for an accused to establish a reasonable doubt as to the existence of a fact, of which the burden of proof is upon him. Such applies not only to insanity but to all other general exceptions, special exceptions and provisoes of the Penal Code."

[12] *Ibid* at p. 159.

He held that as the learned Judge had found in the two cases that there was a reasonable doubt in his mind as to the sanity of both accused at the time they committed the acts in question, it followed that both accused must be acquitted of the charges brought against them.

In regard to the cases of *Director of Public Prosecutions* v. *Woolmington, Rex* v. *Sodeman* and *Emperor* v. *Damapala* which were cited in argument the learned Judge said :[13]

"It does not necessarily follow that English criminal cases, even of the highest authority, are binding authorities on the Courts of this Territory, where the Criminal Law and Law of Evidence has been codified. It may be that in such codifications, distinctions and differences, however slight, may have, intentionally or unintentionally, crept in, which make it imperative for our Courts to follow the written as opposed to the unwritten law. Where, however, no such distinctions or differences can be found or in the absence of definite provisions in the written code then as, in the main, the principles on which both laws are founded are the same, decisions of the higher English Courts can safely and should be followed. Distinctions in some important details, can be found in the written law of murder and of evidence of this Territory and that of English Law. It is impossible therefore to apply isolated expressions to be found in the considered judgment of the Lord Chancellor in *Woolmington's* case to the law of murder as defined by the written code of this Territory. In effect, the main principles laid down in *Woolmington's* case have already been given effect to in the written code of this Territory by its definition of what constitutes murder and other provisions in regard thereto and it is for the prosecution to establish a *prima facie* case of murder as so defined.

In *Rex* v *Sodeman* the question of the quantum of proof arose and it was definitely laid down that the burden of proof resting upon the accused to prove insanity was not as heavy as the burden of proof resting upon the prosecution to prove the facts which were alleged and that it might fairly be said that such burden was not higher than the burden resting on a plaintiff or defendant in civil proceedings.

The Rangoon case of *Emperor* v. *Damapala* was also examined and considered but I am unable to accept that case as an authority binding on this Court for the propositions therein contained relating to the meaning of "burden of proving" contained in Section 105 of the Evidence Enactment".

[13] *Ibid* at p. 159.

Cussen J. dissented from the majority of the court. He stated that section 105 placed a burden upon an accused to prove the existence of the particular facts required by the exception in question, and that "proved" by virtue of section 3 meant that the effect of the matters before the court must be to establish some degree of probability that the fact alleged exists. As to the degree of probability required he said:—[14]

"The first general rule which may be stated is that, when the burden of proving a fact in issue or relevant fact is upon the prosecution the evidence must create such a high degree of probability as to exclude any reasonable doubt as to the existence of the fact alleged.

But when the burden of proving a fact is upon the accused it suffices if the effect of the evidence relied upon is to make it probable, even in the very slightest degree that the fact alleged exists.

The question the prudent man must ask himself is – is it in any degree probable, is there any probability however slight, that the fact exists? If the answer is "yes" then the fact is proved.

Such a low degree of probability does not of course exclude a reasonable doubt of the existence of the fact. In all cases, therefore, to which section 105 applies, where the burden is placed upon the accused of proving the facts necessary to establish a defence of a general exception, a special exception or a proviso, the proper question for the court, at the close of the case, after hearing all the evidence, is whether there is any probability, however slight it may be that the facts alleged did exist.

If the answer is "yes" then the fact is proved and the fact presumed under section 105 i.e. the absence of the circumstances alleged in defence, is disproved; if the answer is "no" it is irrelevant to add "but I have a reasonable doubt as to whether or not the fact existed."

If the court finds itself in such an inconclusive state of mind that it is unable to answer the question whether affirmatively or negatively, then the case comes within the meaning of "not proved". But this position should not arise in a criminal trial on an issue of fact where the burden of proving such is placed upon the accused. It is not the act of a prudent man to hold the scales so delicately and exactly as against an accused person.

[14] *Ibid* at p. 160–161.

For a defence to succeed what is required by section 105 is that the necessary facts be proved and the definition of "proved" requires a positive, affirmative conclusion, in the sense which I have explained".

Cussen J. found support for his views in the judgment of the Privy Council in *Sodeman* v. *R.*[15] He stated that it was not necessary to examine the judgment in *Woolmington* v. *Director of Public Prosecutions*[16] for that judgment expressly excepted from its purview not only the defence of insanity but all statutory exceptions and section 105 of the Evidence Enactment deals with statutory exceptions. Finally he disagreed with the decision in *Emperor* v. *Damapala.*[17] In the result he held that the accused in both cases were rightly convicted.

It is clear from the decision of Gordon Smith J. in *P.P.* v. *Alang Mat Nasir* that he regarded the burden on the accused as no more than an evidential burden. Whitley Ag. C.J. appears to accept the rule that the burden is on the accused to prove the exception on a balance of probabilities, but seemed to take the view that in the circumstances of the case there were such substantial grounds for the reasonable doubt as to sanity that "the average prudent man would feel it is his duty to act upon the supposition that insanity did exist". The dissenting Judge clearly held that there was a persuasive burden of proof on the accused.

In *Chia Chan Bah* v. *R.*[18] a Penang case, the accused was charged with murder and his defence was insanity. The Straits Settlements Court of Criminal Appeal (McElwaine C.J., Terrell and Horne JJ.) held that section 106 of the Evidence Ordinance did not require an accused person setting up an exception such as insanity as a defence to prove that exception beyond reasonable doubt. It was sufficient if he tipped the scale of probability in his favour – if he induced in the mind of the jury a feeling that he probably was insane though the jury may have its doubt whether he really was insane. The Court approved the case of *Rex* v. *Sodeman*[19] where it was held that the onus of proof on an accused in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a civil suit. *Lim Tong* v. *Public Prosecutor*[20] was also referred to on the point. It may be noted that the Court in fact found nothing in the evidence to suggest that the accused was probably of unsound mind on the relevant date or to discharge the mild burden of proof prescribed in

[15] [1936] 2 All. E.R. 1138.
[16] [1935] A.C. 462.
[17] A.I.R. 1937 Rang. 83.
[18] [1938] M.L.J. 147.
[19] *Op. Cit.* n. 15.
[20] *Op. cit.* n. 5.

*Sodeman's* case, much less that on that date the accused was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The appeal of the accused against his conviction was dismissed.

In *Mohamed Isa* v *Public Prosecutor*[21] which was a case where the accused was charged with murder and the defence set up was that the accused had run amok and was insane, the Court of Appeal (Roger Hall C.J., McElwaine C.J. (S.S.) and Murray Aynsley J.) applied the test in *Sodeman* v. *R.*[22] and held that the onus of proof on the accused is not a heavy one – no higher than that which rests upon a party in civil proceedings. The trial judge had told the assessors,

> "the balance of probabilities in a civil case is quite sufficient to entitle you to decide a case in a certain direction, and you have to bear this in mind in making up your decision as to whether or not the accused has proved that he comes within the exception. You have got to bear in mind that the accused has not got to prove his case so thoroughly as you would expect the prosecution to prove theirs."

The Court of Appeal held that the case was fully and properly put to the assessors and dismissed an appeal against the conviction of the accused for murder.

In *Ng Lam* v. *Public Prosecutor*[23] the evidence established that the accused had committed culpable homicide but it was argued that had there been a proper direction to the assessors they might have found that the accused, when he killed the deceased, only exceeded the right of defence of property or of his person or acted under grave and sudden provocation. It was argued that the Judge was wrong in telling the assessors that the burden is on the accused to prove the existence of circumstances bringing the case within any exception, although he also told them that

> "the Prosecution must prove by positive evidence beyond any reasonable doubt the guilt of the accused. The burden on the accused is very much less. He is entitled to protection from any evidence whatsoever either from evidence led by the prosecution or that led by himself and the burden on him may fairly be stated to be equivalent to the burden on a plaintiff in a civil suit, and the rule in a civil suit is that a plaintiff or a defendant has discharged the onus of proof which lies upon him if he established a balance of probability in his favour."

[21] [1939] M.L.J. 161.

[22] *Op Cit.* n. 15.

[23] [1940] M.L.J. 74.

This summing up, it was pointed out, indicated that the learned Judge had in mind *Sodeman* v. *Rex*[24] and *Chia Chan Bah* v. *The King*.[25] Counsel for the accused however argued that *Chia Chan Bah* v. *The King* puts the onus on the accused too high and that *Public Prosecutor* v. *Alang Mat Nasir*[26] was the more correct decision. It was enough, it was argued, for the accused to raise a doubt as to whether he came within an exception to section 300 of the Penal Code and it was unnecessary for him to prove even in the *Sodeman* sense that he did come within it. The Court of Appeal (Poyser C.J., McElwaine C.J. (S.S.) and Terrell J.A.) unfortunately did not give a clear ruling on the matter. The Court said, "Of course, if the evidence raises any doubt as to the Crown case the accused must have the benefit of the doubt."

After referring to secton 105 of the Evidence Enactment, the Court said:—[27]

> "The argument for the appellant was in short that an accused person proves that he comes within an exception if he raises a doubt whether he does or not and that it is not necessary for him to prove that he even probably comes within an exception and that the statement in *Chia Chan Bah's* case, "It is sufficient if he tips the scale of probability in his favour — if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he really was insane," puts too heavy an onus on an accused."

The Court was referred to *Woolmington's* case[28] but the Court warned against pushing the decision much further than the decision goes. It did not mean that there is no onus on an accused to prove a statutory exception when an intentional killing has been proved. The Court approved that part of the judgment of the Straits Settlements Court of Criminal Appeal in *Rex* v. *Chbui Yi*[29] which stated that *Woolmington's* case can be no authority for saying that the onus is always on the Crown of negativing *ab initio* every possible exception. The Court concluded:—[30]

> "Taking the summing up as a whole, the Judge repeatedly told the assessors that the burden of proving the offence of murder was on the prosecution, and that they had to review the whole of the

[24] *Op. Cit.* n. 15.
[25] *Op. Cit.* n. 18.
[26] *Op. Cit.* n. 7.
[27] *Op. Cit.* n. 23. at page 15.
[28] *Op. Cit.* n. 16.
[29] *Op. Cit.* n. 3.
[30] *Op. Cit.* n. 23. at page 75.

evidence to see whether there were any mitigating circumstances which would reduce the offence from murder to a lesser offence. He also told them the benefit of any reasonable doubt must be given to the accused."

Presumably this summing up was approved, as the appeal against conviction was dismissed.

In *Raman* v. *Public Prosecutor*[31] the appellant had been convicted on a charge of defamation. Spenser-Wilkinson J. set aside the conviction on the ground that the learned President of the Sessions Court had failed to consider at the close of the prosecution case whether or not the evidence before him was sufficient to bring the case within the eighth exception to section 499 – that is that it was a complaint in good faith to a person in lawful authority. He said:–[32]

"In criminal matters while it is true that section 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled if he can to bring himself within the exceptions by reference to facts proved by the prosecution."

In *Mohamed Yatim* v. *Public Prosecutor*[33] Spenser-Wilkinson J. pointed out that it is not correct to approach a decision in a criminal trial on the basis of deciding which of two stories is to be believed. The exception, perhaps, he says, is where the law casts a burden of proof upon the accused. In such cases the accused discharges the burden upon him if he establishes a burden of probability in his favour and he quotes (though with respect not very aptly) *Ng Lam* v. *Public Prosecutor*,[34] The particular case he was dealing with – a case of attempted cheating – was however a case where there was no burden of proof on the accused and the judge said :–

"In an ordinary case where no special burden of proof or explanation is by law cast upon the accused, his position is more favour-

[31] [1948–49] M.L.J. Supp. 146. See *Harbans Singh Sidhu* v. *Public Prosecutor* [1973] 1 M.L.J. 41 where in a case of defamation under section 500 of the Penal Code, Wee Chong Jin, C.J. said, "Under section 105 of the Evidence Act, if an accused person claims the benefit of exceptions the burden of proving his plea that his case falls under any of the exceptions is on the accused. That burden is discharged if the accused person succeeds in proving a preponderance of probability."

[32] *Ibid.*

[33] [1950] M.L.J. 57.

[34] *Op. Cit.* n. 23.

able than in those cases where the law presumes something against him. The principle laid down in the recent English cases, particularly *Mancini* v. *Director of Public Prosecutions*[35] appears to me to be that, where no special onus is cast by law upon the accused, then if his story has the effect of raising a reasonable doubt as to the truth of the prosecution case, he is entitled to an acquittal."

In *Mah Kok Cheong* v. *R.*[36] Spenser-Wilkinson J. referred to his judgment in the case of *Mohamed Yatim* v. *Public Prosecutor*,[37] a passage in which he said had caused some difficulty. He distinguished three classes of criminal cases:—

(a) The ordinary case where direct or circumstantial evidence is given to prove that the accused committed the offence charged. In such cases if the defence raises a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt there will be an acquittal, and if no such doubt is raised, a conviction.

(b) Where the law casts the burden of proof upon the accused, so that the accused has to establish a probability in his favour – for example in those cases where an accused person relies upon an exception in the Penal Code, and in the kind of cases represented by the case of *Rex* v. *Carr-Briant* [1943] 2 All. E.R. 156 where the court will presume something against the accused unless the contrary be proved.

(c) Cases of theft or receiving where the *only* evidence against the accused is the possession of property recently stolen. The law in these cases is that such possession is in itself evidence of theft or receiving unless explained; and cases like *R.* v. *Abramovitch*[39] are concerned with the degree of explanation which will entitle the accused to an acquittal.

The learned judge emphasised that arguments based on *R.* v. *Abramovitch* should not be used in cases which have nothing to do with the possession of stolen goods. In the case before him the accused had been convicted of cheating and the learned Judge said that as the accused's defence had not raised any doubt in the mind of the learned President of the Sessions Court who tried the case, he was rightly convicted of the charge.

The case of *Tikan* v. *Reg.*[40] is remarkable because in that case the Court of Criminal Appeal of Singapore (Murray-Aynsley C.J., Matthew

[35] [1942] A.C. 1.
[36] [1953] M.L.J. 46.
[37] *Op. Cit.* n. 33.
[38] [1943] 2 All. E.R. 156.
[39] 24 Cox C.C. 591.
[40] [1953] M.L.J. 131.

C.J. F.M. and Brown J.) held that the Evidence Ordinance only lays down one standard of proof whether the burden is on the prosecution or the defence. In a typically cryptic judgment Murray-Aynsley C.J. said:—[41]

"The defence contended that the appellant acted in self-defence and was entitled to an acquittal or to a verdict of culpable homicide not amounting to murder under exception 2 of section 300. As has been explained, the jury by their verdict must have found an intention to cause death. In view of the fact that the deceased was unarmed it does not seem possible to bring the matter within the ambit of the exception, much less to justify a verdict of not guilty. Exception was taken to the direction in law on the question of self-defence. In view of what has been said above this appears to be immaterial.

The defence further argued that it was a case of grave and sudden provocation.

As regards exception 1, this by the Penal Code is a question of fact, and, therefore, not subject to the limitations found in English Law. The effect of exception 2 was, in our opinion, put to the jury with sufficient clearness.

It was, however, contended that there was insufficient direction on the question of burden of proof. The learned Judge in the plainest terms told the jury that the prosecution had to prove its case beyond reasonable doubt. As regards the question of grave and sudden provocation, the question of proof is clearly set out in section 106 of the Evidence Ordinance. Section 3 gives a definition of "proved", viz: "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 learned Judge said to the jury, "If you think that the accused was gravely and suddenly provoked, that he was deprived of his powers of self-control, it will be proper for you to convict of culpable homicide not amounting to murder. If, on the other hand, having weighed all the evidence together you are convinced that he is not covered by this exception, that is to say, you do not believe him, then that is, of course murder"

[41] *Ibid* at p. 132.

That appears to us to be more favourable to the appellant than a strict application of the provisions of Evidence Ordinance. The facts on the issue of grave and sudden provocation were put to the jury in a way that was, if anything, favourable to the appellant.

On the state of the evidence the jury were amply justified in negativing the contention of the defence and the verdict is not open to attack.

As it appears to us that there is some uncertainty as to the application of certain English cases in this Colony, we think it proper to add some remarks on the subject. Since *Mancini's* case it is clear that *Woolmington's* case only applies to the question of intention. By the Penal Code the burden of proving intention in these cases has always been placed on the prosecution. Therefore *Woolmington*'s case has no effect here . . . . . .

We think that the practice of directing the jury that the Crown must prove its case beyond reasonable doubt, in so far as it imposes on the Crown a burden higher than that imposed by the Evidence Ordinance, is only a matter of practice, like the direction given concerning the evidence of accomplices. It is right, as a matter of prudence, that such a direction should be given; but, as in the case of accomplices, if the jury disregard the warning their verdict is not vitiated."

*Tikan's case* was followed in *Saminathan* v. *Public Prosecutor*[42] where Buhagiar J. said:—[43]

"Submissions are frequently made in criminal trials to the effect that there is a fundamental difference in the law of evidence in criminal and in civil cases and that in criminal cases the burden on the prosecution is different from that on the defence. In civil cases it is said, a preponderance of probabilities is sufficient but in criminal cases the prisoner's guilt must be proved beyond reasonable doubt; with regard to the defence in criminal cases it is said that the burden of proof is not as high as that of the prosecution and that if the defence raises a reasonable doubt or if there is a preponderance of probabilities in favour of the accused, the accused is entitled to an acquittal.

Some confusion arises by the use of unreflective cliches and by recourse to English decisions and to statements therein without consideration to the relevant rules of evidence incorporated in the Evidence Ordinance, 1950.

[42] [1955] M.L.J. 121.

[43] *Ibid* at p. 123.

There is no question that in English Law and in this country there are important differences in the kind of evidence which is admissible in civil and in criminal cases because it is felt that some kinds of evidence which are admitted in civil cases would unfairly prejudice the accused in criminal cases (see *per.* Lush J. in *Hurst v Evans* [1917] 1 K.B. 352); but apart from such exceptions there is no difference in the application of the rules of evidence to civil and criminal cases, to the prosecution and the defence, and on the evidence admitted, the methods of demonstration and inference do not differ in civil and criminal cases."

That was a case where the accused had been convicted for offences under the Customs Ordinance. The learned President of the Sessions Court had adopted the principle of the balance of probabilities as a test for deciding the onus on the appellants to displace the presumptions of law under the provisions of the Customs Ordinance. Buhagiar J. held that if the learned President erred at all he erred in favour of the appellants. In the course of his judgment he stated that it is a rule of prudence rather than law that requires more stringent proof in criminal than in civil cases. After quoting from C.K. Allen in the article on *"The Presumption of Innocence"* in *"Legal Duties"*, he continued:—[44]

> "The doctrine of reasonable doubt has been so constantly impressed upon juries that it has come to possess some of the characteristics of superstition. No satisfactory definition has been given of this phrase and any explanation that has been given is very confusing when considered in relation to the definition of "proved" in section 3 of the Evidence Ordinance, 1950. This Ordinance is in the main in accordance with English law though it does in several respects materially diverge from that law. English decisions serve as valuable guides and indeed are binding authorities where the English law has been followed in the Evidence Ordinance, but such decisions upon the meaning of particular words are of little or no assistance when those words have been specially defined in the Ordinance.
>
> Section 3 of the Evidence Ordinance, 1950, defines "proved" as follows:—
>
> > "A fact is said to "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."

[44] *Ibid* at p. 124.

This applies to civil and to criminal cases and to prosecution and defence; the mental process of induction and deduction is the same in all cases. In view of this definition, the word "reasonable" in the phrase "reasonable doubt" would seem to denote a fluctuating and uncertain quantity of probability, and the question "what sort of doubt is 'reasonable'?" in criminal matters is a question of prudence. In view of this definition the best explanation of "reasonable doubt" is perhaps that given by Denning L.J. in *Miller* v. *Minister of Pensions* [1947] 2 All. E.R. 372 where he said:—

> "The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so 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 reasonable doubt, but nothing short of that will suffice."

The fundamental principle in criminal cases is that there is a burden on the prosecution, which never shifts, to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if he raises a doubt in the prosecution case and this he may do by "disproving" a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however be "proved" and they are proved not by showing merely a possibility that such facts exists but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstnaces of the case.

I may finally add that the definition of "proved" in section 3 of the Evidence Ordinance, 1950 (which is identical to the Indian Evidence Act) reflects the trend of judicial opinion in England at the time when the rules of evidence were first codified in India, that is in 1855. In the case of *R.* v. *Burdett* [4 B. & Ald. 95] decided in 1820: in that case Best J. made the following observation—

> "It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the

presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enought, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord Mansfield, in the *Douglas case,* gives the reason for this: "As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other." In the highest crime known to the law, treason, you act upon presumption . . . . . Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the *corpus delicti* that it ought to be strong and cogent; but in part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption, as would satisfy me in the most trifling cause that can be tried in Westminster Hall."

And Abbot C.J. said:—

"No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends to be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"

A final word about statutory presumptions. By various statutes some matter is presumed "unless the contrary is proved" and the onus of proving this matter is cast on the accused. Common examples of such presumptions are to be found in section 105 of the Evidence Ordinance, 1950, section 11 of the Common Gaming Houses Ordinance, 1953, section 5 of the Prevention of Corruption Ordinance, 1950, sections 115 and 131(2) of the Customs Ordinance, 1952. Objection has been expressed to this type of legislation because, it is stated, it reverses the traditional principle and deems the party to be guilty until he proves his innocence.

It seems to me, however, that these statutory presumptions are really nothing more than an extension of the provisions of section 106 of the Evidence Ordinance, 1950, which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

These statutory presumptions shift the burden of proving a particular fact on the accused. Burden of proof may mean the burden of introducing some evidence (evidential burden of proof) as for example in section 3(2) of the Bills of Exchange Ordinance, 1949, or it may mean the burden of satisfying the jury (persuasive burden of proof). *Prima facie,* it might be thought that the word "prove" used in criminal matters should be so construed as to uphold, rather than reverse, the principle of presumption of innocence and the common law rule affirmed so emphatically by the House of Lords in *Woolmington's* and that it becomes possible to read such statutes as referring to the evidential burden rather than the persuasive burden. This argument was adopted by the Court of Criminal Appeal in the case of *Ward*. In the more recent case of *Jenkins* the Court of Criminal Appeal held that "proved" in section 2 of the Prevention of Corruption Act, 1916, meant "established" and that if the jury had any doubt they ought to find the accused guilty. It was considered that this went too far and in the later case of *Carr-Briant* the Court of Appeal said:—

> "In our judgment, in any case where, either by statute or at common law, some matter is presumed 'unless the contrary is proved,' the jury should be directed that it is for them to decide whether the contrary is proved that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

In this case, the burden of proof on the accused was held to be the persuasive burden and that such burden was discharged by evidence to satisfy the jury of the probability of the existence of the fact which the statute requires him to prove.

In view of the Evidence Ordinance, 1950, I do not see how "proved" in any statutory presumption can mean anything but "proved" as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning and that is hardly done if "proved" is given a different interpretation from that in the Evidence Ordinance, 1950. For reasons which I have set out earlier the expression "beyond reasonable doubt" and "probability" in the *Carr-Briant case* are liable to create confusion in view of the special provisions of the Evidence Ordinance, 1950."

In *Saminathan's* case, the accused had been charged with offences contrary to section 113(1)(e) and (g) of the Customs Ordinance. At his first trial he had been acquitted at the close of the prosecution case, but on appeal, the High Court had decided that the learned President had misdirected himself on the question of when the presumptions under the Customs Ordinance arose and ordered that the case be sent back to the learned President for him to call upon the appellants for their defence. After the appellants had given their defence, the learned President found them guilty of the charge, convicted and sentenced them. The appellants appealed and the grounds relied on were (1) there was no or not sufficient evidence against any of the appellants which would if unrebutted have warranted a conviction; (2) if the presumption under Sections 115 and 131(2) applied to the facts proved by the prosecution the evidence of the articles produced by the prosecution and the conduct of the appellants were sufficient to rebut the said presumptions; (3) the learned President erred as to the quantum of the evidence necessary to displace the presumption of law under the provisions of the Customs Ordinance; (4) the learned President did not give sufficient consideration to the evidence adduced by the appellants. Bahagiar J. in dealing with the grounds of appeal said —[45]

"I shall deal first with the third ground, that is that the learned President erred as to the quantum of the evidence necessary to displace the presumption of law under the provisions of the Customs Ordinance. It seems clear from the grounds of judgment that the learned President adopted the principle of the balance of probabilities as a test for deciding the onus on the appellants. It is also clear from the grounds of judgment that the learned President con-

[45] *Ibid* at p. 125–126.

sidered this principle to be a lower standard of proof than that which rests on the prosecution in establishing a fact. For reasons which I have set out earlier in this judgment, if the learned President erred at all he erred in favour of the appellants.

The learned Counsel for the appellants referred to the case of *Rex* v. *Cohen* [1951] 1 All E.R. 203. He submitted that this case sets out clearly the quantum of evidence necessary to enable the defendant to discharge the onus placed on him by section 131(2) of the Customs Ordinance, 1952, and that, notwithstanding that there is no provision in the Customs (Consolidation) Act similar to section 131(2) the principles laid down in this case should be followed and have been followed in dealing with the presumption under the said section 131(2); I was referred to the case of *Lee Guek Hon* v. *Public Prosecutor* (1953) M.L.J. 17. I agree with this; but in view of what I have said earlier I do not consider that *Rex* v. *Cohen* lays down different standards of proof from those laid down in the Evidence Ordinance, 1950. In *Lee Guek Hon's case* the appellant was charged with knowingly being in possession of uncustomed goods. The burden of proving that the goods were customed and that he did not know that they were uncustomed was on the appellant. The appellant did not prove that the goods were customed but he gave an explanation which amounted to this: "I am not the importer and therefore I cannot produce a receipt for the payment of duties. I bought this watch from a trader in the ordinary way." In that case I held that this explanation should have satisfied the Magistrate, because, adopting the principles in the definition of "proved", I considered that the explanation given, even when considered in connection with other evidence in the case, made the existence of the fact that the appellant had no knowledge that the goods were uncustomed so probable that a prudent man ought to act upon the supposition that that fact existed. Taking the whole evidence in this case I do not consider it is possible to say that there was evidence from which it could be inferred either that the duty on the goods in question had been paid or that the appellants did not know that the goods were uncustomed. I therefore agree with the conclusion arrived at by the learned President.

The second ground of appeal is that the evidence produced by the prosecution and the conduct of the appellants were sufficient to rebut the presumptions under section 115 and 131(2). The learned Counsel for the appellants submitted that the labels on some of the articles the subject of the charge raise a presumption that the articles did not come from outside the Federation. In ordinary circumstances this is so but the circumstances under which these articles were found strongly suggest that customs duties had not

been paid thereon. With regard to the conduct of the appellants I do not see how in the circumstances of this case it can be said that the presumptions could have been rebutted.

With regard to the fourth ground of appeal, that is that the learned President did not give sufficient consideration to the evidence adduced by the appellants, the learned Counsel for the the appellants referred me to the cases of *Lok Chak Wan* v. *Public Prosecutor* (1939) M.L.J. 84, *Rex* v. *Aves* (1950) 2 All E.R. 230 and others to the effect that where the duty of giving an explanation is cast upon a defendant, and an explanation is given which is consistent with innocence, the Court must consider whether it might reasonably be true although not convinced of its truth. Counsel argued that the burden of proof on the defence as laid down in these cases is even lower than the test of the balance of probabilities.

With regard to the explanation given by the accused Goddard L. C.J. in *Rex* v. *Garth* [1949] 1 All E.R. 733 stated the law as follows:—

> "I have more than once endeavoured to say what *Abramovitch's* Case does lay down, and it is this. Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to be stolen. It must be borne in mind that the onus is always on the prosecution; but if the prisoner has given an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possibly be true, as I have said, because any account may possibly be true. A much more accurate direction to the jury is: "If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction."

It is clear from this statement that, as in every case, the explanation of the accused has to be considered together with the rest of the evidence in the case and that the accused will be entitled to an acquittal if, as a result of such explanation the existence of a material fact on which the prosecution relied is no longer so probable as to make a prudent man act upon the supposition that that fact exists.

In the present appeal, the learned President gave full consideration to the explanation given by the appellants and it is clear that he was not satisfied that it was true and it raised no doubt in his mind. The explanation could naturally if taken by itself, be true in the sense that everything is possible but when considered together with all other proved facts in the case that explanation could not raise a doubt in the mind of a prudent man that it might be true.

No attempt was really made to show that duties on the goods in question had been paid, and it should not have been at all difficult to do so considering that the third appellant is the manager of the firm to which the goods belonged; in the circumstances it seems to me that apart from the presumption under section 115 of the Customs Ordinance, 1952, the burden of proving this fact would be upon the appellants by virtue of section 106 of the Evidence Ordinance, 1950.

In the case of *R. v. Ley & Smith* (Notable British Trials, p. 286) the Lord Chief Justice in his summing up to the jury said:—

> "The evidence that is called for the defence may have one of three different effects; it may convince you of the prisoner's innocence; it may throw some doubt on the evidence that has been given for the Crown that you may no longer feel satisfied that the prisoners are guilty; thirdly, it may and sometimes does strengthen the evidence which was given for the Crown."

In the present case the evidence adduced by the appellants has, to my mind, had the third effect."

In *Public Prosecutor v. Abdul Manap*[46] the accused had been charged with voluntarily causing grievous hurt by stabbing the complainant. The defences raised were private defence and provocation. The learned Deputy Public Prosecutor had contended that the defence should be called, because on the issue of private defence the onus is on the accused. Briggs J. however said —[47]

> "It is true that in the case of private defence as in every other case of a general exception to the Penal Code, the burden of establishing the defence lies on the defendant, but it does not follow that he need do so out of his own mouth. It is clearly expressed in Ratanlal on the Law of Crime 17th Edition at p. 206, that although it is for the defence to show the existence of the right of private defence and its proper exercise, this may well be shown by pointing to facts established by the prosecution evidence, and that it need not

[46] [1956] M.L.J. 214.

[47] *Ibid* at p. 216.

at all be necessary to call on the accused for the evidence of himself or his witnesses. Although part of the defence depends on the mental attitude, about which the accused could perhaps give more accurate evidence than anyone else, the Court is not only entitled but is under a duty to draw inferences as to the accused's mental attitude from the prosecution's case; and if on consideration of the whole of the prosecution evidence it appears more probable than not that the accused acted properly in the exercise of his right of private defence, the Court has no alternative but to acquit him without calling on him for his defence."

In *Babarom* v. *Public Prosecutor*[48], the accused was charged with murder and the defence mainly relied upon insanity. The learned trial Judge directed the jury thus:—

"[B]efore you can bring in a verdict of not guilty because the accused is insane, you must be satisfied on the probabilities that the accused at the time he committed the offence by reason of unsoundness of mind was incapable of knowing the nature of his act or if he did not know the nature of his act that he did not know that what he was doing was wrong or contrary to law."

At a later stage he repeated what he said in slightly different words:—

"I would remind you that it is the duty of the defence to satisfy you, before you can bring in a verdict of not guilty on this ground, that on the probabilities the accused at the time he killed this boy was suffering from a disease of the mind and by reason of unsoundness of mind he was incapable of knowing the nature of the act or what he was doing was wrong or contrary to law."

The Court of Appeal (Thomson C.J., Hill and Good JJ.A.) stated that these passages said just what was said in *Sodeman's* case[49] and later in *Carr Briant's* case[50] and they dismissed the appeal against the conviction of the accused for murder.

About two months after *Babarom* v. *Public Prosecutor* was decided in Johore Bahru, the case of *Sow Cheow Hor* v. *Reg.* came before the Singapore Court of Criminal Appeal.[51] In that case the accused was charged

[48] [1960] M.L.J. 249.

[49] *Op. Cit.* n. 15.

[50] *Op. Cit.* n. 38.

[51] [1960] M.L.J. 254. Followed by the Federal Court in Singapore (Wee Chong Jin C.J., Tan Ah Tah F.J. and Choor Singh J.) in *Mohamad Salleh* v. *Public Prosecutor* [1969] 1 M.L.J. 104. Compare *Harbans Singh Sidhu* v. *Public Prosecutor* [1973] 1 M.L.J. 41, see note (31) above.

with murder and the defences were sudden fight, provocation and self-defence. Rose C.J. giving the judgment of the Court (consisting of himself, Wee Chong Jin and Ambrose JJ.) said—[52]

> "Whatever may have been the position in the past, it appears now to be the accepted rule that when an accused person endeavours to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together, the jury find themselves in genuine doubt as to whether or not the case falls within one of the exceptions, then their verdict must be in favour of the accused."

The Court held that as nowhere in the summing-up was this made clear to the jury in regard to any of the three exceptions relied on, the verdict of guilty of murder must be set aside and a verdict of culpable homicide, substituted for it. Unfortunately no authorities were cited for the "accepted rule", which would appear to be based on the English law, with reference particularly to the change effected by *Woolmington* [53] rather than on the cases in Singapore and Malaysia.

In *Azro* v *Public Prosecutor*[54] the accused was charged with murder and the only defence put forward at the trial was that of insanity. The learned Judge (who was the same as the trial Judge in *Babarom*'s case) had directed the jury —

> "If the accused satisfies you on the preponderance of probabilities that at the time he committed the offence by reason of unsoundness of mind he was incapable of knowing the nature of his act, that he did not know what he was doing wrong or contrary to law, then of course you must bring in a verdict of not guilty by reason of insanity."

Thomson C.J. giving the judgment of the Court of Appeal (consisting of himself, Hill and Good JJ.A.) held the direction was in line with what was said by McElwaine C.J. in the Straits Settlements case of *Chia Chan Bah* v. *King*[55] and with the direction in *Babarom* v. *Public Prosecutor*,[56] which the Court of Appeal had said in that case amounted to just what was said in *Sodeman*'s case[57] and later in *Carr-Briant*'s case.[58] Earlier he had stated

[52] *Ibid.*

[53] *Op. Cit.* n. 16.

[54] [1962] M.L.J. 321.

[55] *Op. Cit.* n. 18.

[56] *Op. Cit.* n. 48.

[57] *Op. Cit.* n. 15.

[58] *Op. Cit.* n. 15.

that the authorities seem to be unanimous in that it is for the accused to bring his case within the terms of the defence (of insanity) and that subject to a proper direction by the Judge, it is for the jury to say whether he has done so.

A month after the decision in *Azro* v. *Public Prosecutor* the Court of Appeal (again consisting of Thomson C.J., Hill and Good JJ.A.) gave its judgment in *Looi Wooi Saik* v. *Public Prosecutor.*[59] In that case the accused was charged with murder and the defence was provocation. The trial Judge, Azmi J. (as he then was) in dealing with the defence of provocation said –

> "Now the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. Now, if the accused has succeeded in satisfying you on the balance of probabilities that there was provocation then, gentlemen, the offence he committed would not have been murder but culpable homicide, or manslaughter as they call it in England. Now, the defence must satisfy you that the provocation was both grave and sudden and its gravity and suddenness not only deprived the accused of his power of self-control but would also deprive a reasonable man of his power of self-control."

The Court of Appeal held that the direction was not correct. Thomson C.J. giving the judgment of the Court said:–[60]

> "Our law of murder, except as regards so-called constructive murder, is not materially different from the law of England, at any rate as it stood prior to 1957. The definition of the offence in the Penal Code is, however, much more detailed and analytical than any statement of the English law. Section 299 says that in certain circumstances killing is culpable homicide. Section 300 goes on to say that if certain additional circumstances are present the killing amounts to murder. That section, however, states 5 exceptions one of which is provocation. If the case comes within any of these then what would otherwise have been murder is culpable homicide not amounting to murder. These are generally called "special excep-

[59] [1962] M.L.J. 337.

[60] *Ibid* at p. 339.

tions" because they are special to the offence of murder. In addition sections 76 to 106 contain certain so-called general exceptions, such things as insanity, self-defence and duress which are available as defences to any criminal charge including murder.

What is involved in a charge of murder is set out as follows in Illustration (a) to section 152 of the Criminal Procedure Code:—

> "A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Penal Code; that it did not fall within any of the general exceptions of the same Code and that it did not fall within any of the five exceptions to section 300 or that if it did fall within exception 1, one or other of the three provisos to that exception applied to it."

The question in the present appeal is the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. And here let me say that nothing that is said here is to be taken as having any necessary application to the question of insanity as a defence. That is a defence which has been generally regarded as standing in a class of its own, and in the present case we have excluded it from our consideration.

Since the case of *Woolmington* the English law has been abundantly clear. The onus of proving the guilt of the accused person lies all along on the prosecution and as was said by Lord Tucker in the case of *Chan Kau* v. *R.* [1955] 1 All E.R. 266:—

> ".... in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never on the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords in *Woolmington* v. *Public Prosecutions Director* (1935) A.C. 462 and *Mancini* v. *Public Prosecutions Director* [1942] A.C. 1, it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions, save only in the case of insanity."

In the case of *R.* v. *Lobell* [1957] 1 All E.R. 266, Lord Goddard referred to *Chan Kau*'s case and said this:—

> "A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in

which case the defendant is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution. It is, perhaps, a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but, none the less, the onus remains on the prosecution. What it really amounts to is that if, in the result, the jury are left in doubt where the truth lies the verdict should not be guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence."

In this country the question is governed by the terms of the Evidence Ordinance which is the same as the Indian Evidence Act and the present question is whether on the point with which we are concerned here the law as contained in that Ordinance is any different from the law of England.

It is generally accepted that the Indian Act was drafted by Sir James Stephen in 1872 with the intention of stating in a codified form the English law relating to evidence as it stood at that date. It is clear, however, from the historical portion of Lord Sankey's speech in *Woolmington*'s case, which was decided in 1935, that prior to the decision of that case the English law had been thought to be somewhat different from the law as there stated and it is thus possible that the law as understood by Sir James Stephen and embodied by him in the Evidence Act in 1872 differs from the law of England as it has been accepted since 1935. It is, therefore, necessary to consider the provisions of the Act and of our own Ordinance in some small detail.

The general exceptions and special exceptions contained in the Penal Code are specifically dealt with in section 105 which reads as follows:—

"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 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."

Illustration (b) refers in terms to the defence of provocation in relation to murder and reads as follows:—

"A, accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on A."

Section 105, however, is not to be read in isolation but in relation to the Ordinance as a whole. In particular sections 101 and 102

provide in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. In the words of illustration (a) to section 101:

> "A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime."

Again, section 3 differentiates between the cases where a fact is "proved" or "disproved" or "not proved". As to whether it is proved or disproved the criterion is whether or not under the circumstances of the particular case a prudent man would act upon the supposition that it exists or upon the supposition that it does not exist. Where by that criterion the fact is neither proved nor disproved it is said to be not proved.

In the case of murder where a defence such as provocation is set up there would seem to be a conflict of presumptions. On the one hand there is the presumption of innocence of the offence of murder which arises from secton 101; on the other hand there is the presumption of the non-existence of provocation which arises from secton 105. That conflict, however, in our view is more apparent than real, for clearly the hypothetically prudent man envisaged by section 3 would demand different standards of proof in the two cases and in so far as there was any conflict would have no doubt as to which presumption should prevail. In any event the only logical result is that the presumption of innocence must be the stronger. Where there is any reasonable doubt as to whether the accused person has brought himself within the exception of provocation that must in its turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him.

In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation.

This, of course, is the same as the position which has been accepted to be in England since *Woolmington*'s case (at p. 481):—

> "If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence of either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused 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."

That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of the gold.

It should be added that the course of reasoning which has been followed here is similar to that which led the Rangoon Court to the same conclusion in the case of *Emperor* v. *U. Damapala* A.I.R. 1937 Rang. 82 which was the first case where the question was considered in India after the decision in *Woolmington*. In that case Roberts C.J. (at p. 86) held that the decision in *Woolmington*'s case:—

> ". . . . . is in no way inconsistent with the law in British India. Indeed the principles there laid down form a valuable guide to the correct interpretation of section 105, Evidence Act."

Dunkley J. with reference to the same case said (at p. 87):—

> "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 the subject, which is comprised within the terms of section 105, Indian Evidence act, coincides with the law of England."

That case was followed by the Allahabad Court in the case of *Emperor* v. *Parbhoo* (1941) I.L.R. All. 843 and indeed has been generally followed in India except in Bombay where a different view was taken in the case of *Government of Bombay* v. *Sakur* A.I.R. 1947 Bom. 38.

In Singapore the attitude of the Court has to some extent varied in the past. In the latest reported case, however, that of *Soh Cheow*

*Hor* v. *Regina* (1960) M.L.J. 254 which was a murder case where the defence was that the case came within one of the special exceptions set out in section 300, the Singapore Court of Criminal Appeal said (per Rose C.J. at p. 254):–

> "Whatever the position may have been in the past, it appears now to be the accepted rule that when the accused person endeavours to bring himself within one of the exceptions, it is sufficient for this purpose if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. If as a result of the evidence of the whole case, taken and considered together, the jury find themselves in genuine doubt as to whether or not the case falls within one of the exceptions, then their verdict on the point must be in favour of the accused."

As regards provocation the present case was very much a borderline one. We found it quite impossible to say what view the jury would have taken had they been directed in what we consider the proper terms and it was for that reason that we set aside the conviction for murder and substituted for it the conviction for culpable homicide not amount to murder."

Neither *Babarom* v. *Public Prosecutor* [61] nor *Azro* v. *Public Prosecutor*[62] was cited in the case, although this can be explained by the fact that Thomson C.J. stated that "the defence of insanity has been generally regarded as a class of its own and therefore in the present case the Court had excluded it from their consideration."

In *Jusoh* v. *Public Prosecutor*[63] Thomson C.J. in giving the judgment of the Court of Appeal (consisting of himself, Hill and Barakbah JJ.A.) said [64]

> "The Court has always taken the view that insanity is to be treated on a somewhat different footing from the other "General Exceptions" contained in Chapter IV of the Penal Code (see *Azro* v. *Public Prosecutor*, *Looi Wooi Saik* v. *Public Prosecutor*) and the onus of proof is correctly set out in the following passage of the judgment of Sir Percy McElwaine in the case of *Chia Chan Bah* v. *The King*:–
>
> Where the defence is insanity the onus is on the accused to prove that he was probably insane. This onus is placed on him by section 106 of the Evidence Ordinance, but the law does

[61] *Op. Cit.* n. 48.

[62] *Op. cit.* n. 54.

[63] [1963] M.L.J. 84.

[64] *Ibid* at p. 86.

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 tips the balance of probability in his favour – if he induces in the mind of the jury a feeling that he probably was insane though the jury may have its doubts whether he was really insane. As it is put in *Rex* v. *Sodeman*, the onus on an accused person in setting up such an exception as insanity is no higher than the onus on a plaintiff or defendant in a civil suit."

The Court said that they are not called on to reconsider the view in the case before them and on that it could not be said that the trial judge's direction to the jury on the point was wrong. However, they allowed the appeal on the ground that the judge's direction to the jury on the law relating to the defence of insanity was not as clear and explicit as it might have been, so that the defence of the appellant was not adequately put to the jury.

In *Lee Ah Chye* v. *Public Prosecutor*[65] Thomson C.J. giving the judgment of the Court of Appeal (consisting of himself, Barakbah J.A. and Gill J.) again accepted as binding on the court what was said by Sir Percy McElwaine in *Chia Chan Bah* v. *King*[66] and added – "the direction as to burden of proof in this case is substantially the same as that and we do not think it open to us after 25 years to say that it is wrong."

Although the defence in *Chia Chan Bah* v. *The King* was insanity, the remarks of Sir Percy McElwaine in that case appear to cover all the General Exceptions and he was only referring to insanity as one of these General Exceptions. In any event no explanation was given as to why insanity should be treated under the law in Malaysia differently from the other exceptions.

In *Wong Chooi* v. *Public Prosecutor*[67] the appellant had been charged with possession of an offensive weapon to wit a parang. As part of the prosecution case, a cautioned statement of the appellant was put in, in which he explained how the weapon came to be in his possession. The appellant chose to remain silent after he was called to make his defence and the learned President of the Sessions Court thereupon convicted him of the offence. On appeal Azmi C.J. held that the learned President was wrong. He said,[68]

"It is true that under section 6(1) of the (Corrosive and Explosive Substances and Offensive Weapons) Ordinance the burden is on the

[65] [1963] M.L.J. 347.

[66] *Op. Cit.* n. 18.

[67] [1967] 2 M.L.J. 180.

[68] *Ibid* at p. 181.

accused to prove that he possessed a weapon for a lawful purpose at a time when he was found to be in possession. In my view the law is quite clear, that where a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence.".

Unfortunately the learned Chief Justice threw doubts on this statement of the law when he applied the law to the facts for he went on to say –

"In this case the prosecution itself put in the cautioned statement as part of its case against the appellant. The appellant's explanation as to how he came into possession of the parang in the absence of any other evidence contradicting or varying it, should in my view be accepted as reasonably true and would in the circumstances be sufficient to discharge the burden placed on him under section 6(1) or would be sufficient to raise a reasonable doubt in the mind of the learned trial President as to whether the appellant possessed the weapon for an unlawful purpose. For these reasons I would therefore say that she should have given the appellant the benefit of that doubt and should have acquitted him."

In *P.P.* v. *Yuvaraj*[69] the accused was charged with an offence under the Prevention of Corruption Act. Under that Act it is provided that once it has been proved that a public officer prosecuted under section 4(a) of the Act has received any non-legal gratification, a presumption of corruption arose against him and the question that was raised in that case was as to the degree of proof necessary to rebut the presumption. The learned Judge in that case, who had dismissed an appeal against the acquittal of the accused by the President of the Sessions Court, referred to the Federal Court the following question of law:–

"Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961 a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting the presumption can be said to be discharged by a defence as being reasonable or probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the suggestion that it exists (section 3, Evidence Ordinance)."

The Federal Court (Barakbah L.P., Azmi C.J. Malaya and Ong Hock Thye F.J.) held that the burden may be rebutted by a defence which is

[69] [1968] 1 M.L.J. 238.

reasonable and probable and they held further that in this case the decisions of the President of the Sessions Court and the Judge of the High Court were correct.

Ong Hock Thye F.J. who gave the judgment of the Court of Appeal referred to the judgment of Buhagiar J. in *Saminathan* v. *Public Prosecutor*[70] (*supra*) where he had said that in effect that there is no difference in the burden of proof between the prosecution and the accused and pointed out that a different view was taken in *Public Prosecutor* v. *Gurubachan Singh*[71] where Hepworth J. said –

> "In my opinion the burden of proof under section 14 of the Prevention of Corruption Act, 1961 is the *Carr-Briant* burden of proof and not the *Saminathan* burden of proof. That is to say, the burden on an accused person under section 14 of the Prevention of Corruption Act, 1961 is no higher than that on a party to a civil action to prove his case on the balance of probabilities."

Ong Hock Thye F.J. then referred to what he called the classic judgment in *R.* v. *Carr-Briant*[72] and stated that that case should be followed. He then dealt with the burden that rests on the prosecution to prove its case beyond reasonable doubt and in this connection he referred to *Woolmington*'s case[73] and pointed out that there are two shades of meaning which may be given to the word "onus" –

> "It may mean the burden of proof in the sense that it is used for instance in section 101(2) of the Evidence Act, 'when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person'. Then there is section 103 which contains a proviso referring to the removal of the burden. On the other hand onus may mean the quantum of proof as that which is invariably required of the prosecution: see the passage in *Woolmington*."

Ong Hock Thye F.J. seems here to attempt to distinguish between the evidential burden and the persuasive burden but later in his judgment he said that in the case of any of the five special exceptions raised to the offence of murder (see section 300 of the Penal Code) the burden on the defence is discharged by evidence sufficient to the degree of only showing that the explanation may be reasonably and probably true. However, he disagreed with the judgment of Mudholkar J. in the Indian case of *Dhanvantrai* v. *State of Muharastra*[74] where he said that "the burden resting on the accused person ..... cannot be held to be discharged

[70] *Op. Cit.* n. 42.

[71] [1964] M.L.J. 141.

[72] *Op. Cit.* n. 38.

[73] *Op. Cit.* n. 16.

[74] A.I.R. 1964 S.C. 575.

merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one." He said:—[75]

"Is the effect of section 3 of the Evidence Ordinance as to proof such as to require that, beyond an explanation which is both reasonable and probable, the defence would have to go further and, in the words of Mudholkar J., "show that the explanation is a true one?" The courts in Malaysia have consistently followed the principle enunciated in *Carr-Briant* since long before that case; see *Chia Chan Bah* v. *The King* (1938) M.L.J. 147 and *Azro* v. *Public Prosecutor* (1962) M.L.J. 321. These cases and others, such as *Liew Kaling* v. *Public Prosecutor* (1960) M.L.J. 306, *Looi Wooi Siak* v. *Public Prosecutor* (1962) M.L.J. 237 have already anticipated our answer to this reference. In the last-mentioned case, Thomson C.J. after quoting from Lord Sankey's judgment in *Woolmington*, said —

> "That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of that gold."

The most recent pronouncement on this very point is that of Azmi C.J. in *Wong Chooi* v. *Public Prosecutor* (1967) 2 M.L.J. 180:—

> "In my view the law is quite clear, that where a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence."

After all, as Buhagiar J. himself said in *Saminathan*, the facts on which the defence rely are "proved, not by showing a mere possibility that such facts exist, but by showing the probability of their existence, the degree of probability being a matter of prudence in the circumstnaces of the case." This standard is clearly different from and appreciably lower than that required of the prosecution. The presumption under section 14, be it emphasised, is a rebuttable one and if the explanation offered is one which may very well be true, how can it be said that the case for the prosecution, at the close of the trial, has been proved beyond reasonable doubt? A proper evaluation of the evidence relied on by the defence is vastly different from the imposition of a distinctly heavier onus. If "proof" were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the

[75] *Op. Cit.* n. 69 at p. 241.

quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law."

On appeal to the Privy Council, it was held that upon the true construction of the Evidence Ordinance, 1950, and the Prevention of Corruption Act, 1961, there was no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question if "the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable" is understood as meaning "the burden of rebutting such presumption is discharged if the court considers on the balance of probabilities the gratification was not paid or or given and received corruptly as an inducement or reward". Lord Diplock giving the judgment of the Privy Council said:—[76]

> "In Malaysia, as in India, the law of evidence has been embodied in a statutory code: the Evidence Ordinance. In so far as any part of the law relating to evidence is expressly dealt with by that Ordinance the courts in Malaysia must give effect to the relevant provisions of the Ordinance whether or not they differ from the common law rules of evidence as applied by the English courts. But no enactment can be fully comprehensive. It takes its place as part of the general corpus of the law. It is intended to be construed by lawyers, and upon matters about which it is silent or fails to be explicit it is to be presumed that it was not the intention of the legislature to depart from well established principles of law.
>
> Although in the judgment of the Federal Court and in the cases cited in the course of that judgment there are references to *Woolmington* v. *Director of Public Prosecutions* that authority is not in their Lordships' view germane to the present appeal. It was concerned with an offence at common law, not with an offence as to which there is an express statutory provision altering the ordinary onus of proof which in a criminal case lies upon the prosecution and imposing upon the defendant the burden of proving the existence or non-existence of a particular fact by way of defence. Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act, 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of

[76] [1969] 2 M.L.J. 89 at p. 90.

the third ingredient, viz. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed "unless the contrary is proved".

This appeal turns solely upon the construction of these words "unless the contrary is proved."

The third ingredient which is to be presumed to exist unless the contrary is proved is a "fact" within the definition of that word in the Evidence Ordinance. That Ordinance provides in section 2 that it "shall apply to all judicial proceedings in or before any court" with certain exceptions which are not material to the present case. Accordingly wherever a Malaysian enactment contains provisions relating to judicial proceedings for a criminal offence any reference in those provisions to the proof of facts must, in their Lordships' view, be construed in the light of any relevant definitions of the Evidence Ordinance.

The relevant definitions are:—

"proved"; 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.

"disproved"; 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,

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

In view of these definitions it does not matter whether the expression "unless the contrary is proved" in section 14 of the Prevention of Corruption Act 1961 is treated as a requirement that the non-existence of the facts constituting the third ingredient of the offence which are otherwise to be deemed to exist should be "proved" or that the existence of such facts should be "disproved". The requirement of the section is satisfied if, and only if, after considering the matters before it the court "either believes that it (i.e. the corrupt motive) 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."

The definitions in the Evidence Ordinance do not attempt to spell out explicitly the degree of probability for which a prudent man

ought to look before he acts on the supposition that a fact does not exist. As a matter of commonsense this must depend upon the nature of the action contemplated. A degree of probability sufficient to induce a prudent man to spend a dollar on the supposition that a fact did not exist might be insufficient to induce him to risk a million dollars. The definitions, however, contain no express identification of the action which the prudent man is to be assumed to have in contemplation.

In their Lordships' view the relevant action to be taken by the prudent man upon the supposition that a particular fact does or does not exist to which the definitions refer is the determination of the judicial proceedings which will follow from a finding that the fact is proved or disproved as the case may be. The Evidence Ordinance applies to civil and to criminal proceedings alike and the definitions of "proved" and "disproved" draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction fundamental to the administration of justice under the common law, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities.

The degree of probability of the existence or non-existence of a fact which is required in order for it to be "proved" or "disproved" within the meaning ascribed to those words in the Evidence Ordinance, in their Lordships' view, depends upon the nature of the proceedings and what will be the consequence in those proceedings of a finding that a fact is "proved" or "disproved". If that consequence will be the determination of a civil suit in favour of one party a balance of probabilities is all that is necessary. It is sufficient that upon the evidence the court considers that it is more likely than not that the fact exists or does not exist. This has been the rule at common law since at least the sixteenth century. See *Newis* v. *Lark* (1571) Plow. 412 cited by Willes J. in *Cooper* v. *Slade* (1858) 10 E.R. 1488. In criminal proceedings on the other hand, by an exception to the general rule founded upon considerations of public policy, if the consequence of a finding that a particular fact is proved will be the conviction of the defendant the degree of probability must be so high as to exclude any reasonable doubt that that fact exists.

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities. This was the test which was approved by the Court of Criminal Appeal in *R.* v. *Carr-Briant*, a case upon a provision in an English statute in similar terms to that contained in section 14 of the Malaysian Prevention of Corruption Act 1961. For the reasons already indicated their Lordships do not think that, at any rate where such provision is contained in an enactment, the definitions of "proved" and "disproved" contained in the Evidence Ordinance make any difference between Malaysian law and English law in this respect.

It has been suggested that to satisfy the court that upon the balance of probabilities a fact does not exist puts too high a burden upon a defendant in criminal proceedings where the consequences of a failure to disprove that fact would be his conviction; and in some of the cases cited by the Federal Court without explicit disapproval expressions are used which might be understood as calling for an explanation by the defendant of no greater degree of plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove. But this is the test by which in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been "proved" or "not proved" by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the existence of the first two factual ingredients of the offence, viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of payment, gift, or receipt he was in the

employment of a public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies upon the prosecution. In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist "unless the contrary is proved".

The policy which underlies section 14 of the Prevention of Corruption Act 1961 is, in their Lordships' view, clear. The section is limited to persons "in the employment of any public body". No similar presumption applies to agents of private principals. Corruption in the public service is a grave social evil which is difficult to detect, for those who take part in it will be at pains to cover their tracks. The section is designed to compel every public servant so to order his affairs that he does not accept a gift in cash or in kind from a member of the public except in circumstances in which he will be able to show clearly that he had legitimate reasons for doing so.

In the result upon the true construction of the Evidence Ordinance and the Prevention of Corruption Act 1961, there is, in their Lordships' view, no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question reserved for the consideration of the Federal Court, if the expression in the first part of the question: "the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable" is understood as meaning "the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961."

In their Lordships' understanding it is in this sense that the Federal Court intended to answer the question for they purported to follow the decision in the English case of *Carr-Briant*."

The case of *Public Prosecutor* v. *Yuvaraj* appears to have settled the law,[77] at least where there is an onus on the accused to rebut a presumption. It might be argued however that the case did not deal with the

[77] See the Singapore case of *Chew Chee Sun* v. *Public Prosecutor*, Singapore Magistrate's Appeal No. 108 of 1974. Surprisingly enough in *Mabadi* v. *Public Prosecutor* [1970]

position of the accused where the burden is placed on him under section 105 of the Evidence Act of proving that he comes within the exceptions laid down in the Penal Code. The Privy Council however did refer to the cases cited in the Federal Court (including *Looi Wooi Siak*[78]) in which expressions were used which might be understood as calling for an explanation by the accused of no greater degree of plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove and may be said to have impliedly overruled them. Moreover, section 105 itself raises a presumption of the absence of the circumstances and therefore the burden on the accused may be said to be one of rebutting this presumption.

In *Goh Yoke* v. *Public Prosecutor*[79] a case decided in 1969, the Federal Court (consisting of Ong Hock Thye C.J., Gill and Ali F.JJ.) referred to the decision in *Public Prosecutor* v. *Yuvaraj* and stated that it is binding on the courts. But the court surprisingly went on to say —[80]

> "Accordingly, for the normal presumption of sanity to prevail over evidence of insanity adduced by the defence, this court holds the view that the evidence as a whole must be sufficient to exclude any reasonable doubt regarding the sanity of an accused person pleading unsoundness of mind as a defence."

Yet Lord Diplock in *Public Prosecutor* v. *Yuvaraj* had stated —[81]

> "But this is the test by which the absence of any statutory provision reversing the burden of proof the Court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been "proved" or "not proved" by the prosecution upon whom the onus lies to prove it . . . . . .
>
> In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist, "unless the contrary is proved".

It is however not very clear what the Federal Court meant for it later went on to say —[82]

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1 M.L.J. 16 it appeared that in the Sessions Court "Counsel for the accused drew the Court's attention to the decision in *Yuvaraj*'s case in which it was held that where the statutory presumption cast the burden of proof on the accused the accused must be held to have discharged his burden, if he merely raised a reasonable doubt." Chang Min Tat J. referred to the learned President having the benefit of this advice from the Bar.

[78] *Op. Cit.* n. 59.

[79] [1970] 1 M.L.J. 63.

[80] *Ibid* at p. 66.

[81] [1969] 2 M.L.J. 89 at p. 92.

[82] Op. Cit. n. 79 at p. 66.

"As regards the degree of proof the law has been quite clear since the Privy Council laid down in *Sodeman* v. *R*, that "the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or a defendant in civil proceedings."

As was stated by the Singapore (sic) Court of Criminal Appeal in *Chia Chan Bah* v. *The King*, "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 probably was insane though the jury may have its doubts whether he really was insane". We feel that in all cases where the defence of insanity is set up a direction to the jury on these lines is much to be preferred".

In *Goh Yoke* v. *Public Prosecutor*, Ong Hock Thye C.J. in referring to the summing up of the learned trial Judge said – [83]

"Speaking of the onus of proof, the judge said as follows:–

"I told you earlier that the onus of establishing the guilt of the accused is on the prosecution. But if the defence raises the plea of insanity the onus is on him. He has to prove to you that at the time he is said to have committed the act he was of unsound mind as understood by law. But I must tell you that the onus on the accused is not as heavy as on the prosecution. It is a much lighter onus on the defence . . . . . To establish a defence on the grounds of insanity it must be *clearly proved* that at the time of committing the act that accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know, that what he was doing was wrong . . . . . You must also bear in mind that a person is *presumed* to be responsible for his action and the natural consequence thereof, unless he *affirmatively proves* that he is entitled to exemption from criminal liability."

It will be observed that the "lighter onus" – whatever meaning that term might have conveyed to the jury – was given an interpretation having reference to the presumption. They were told that the accused had, clearly and affirmatively, to prove his insanity in order to rebut this presumption. Next, after quoting from the judgment in *Geron* v. *The Emperor* A.I.R. 1914 Cal. 120 and warning the jury that "it would be utterly unsafe to admit a defence

[83] *Ibid* at p. 65.

of insanity upon arguments merely derived from the character of the crime", the judge (at p. 106) went on thus:—

"But what the law requires is that confusion (of the mind) must reach a certain degree so as to impair the cognitive faculties completely."

This, he explained, meant that they had to be "satisfied" of or "find" the mental condition laid down in section 84. The rest of the directions on insanity were, again and again, liberally strewn with references, not only to the presumption that every man is sane, but also the presumption that he is responsible for his act, "unless", the jury were again reminded, "he affirmatively proves that he is entitled to exemption from criminal responsibility".

About half-way in the summing-up (at p. 109) the Judge said:—

> "A man must be presumed to be sane until he proves to the contrary. The question, therefore, is not whether the accused was of sound mind but whether he had made out that he was not of sound mind. It is not for the prosecution to prove that the accused was of sound mind. That the law presumes. As far as the burden of proof on the accused is concerned, I might tell you that it is sufficient for the accused to raise a doubt as to *his guilt*. If on the material before you there is a reasonable doubt, and you mark the words 'reasonable doubt', the accused should have the benefit of that doubt. If you are satisfied with the defence or upon consideration of all the evidence are left in a reasonable doubt, then the accused is entitled to an acquittal and in that case you should return a verdict of not guilty."

Finally (at page 126) the Judge reminded the jury of his earlier directions on onus in these terms:—

> "But *always*, please, *apply the standards of a reasonable man* and when you decide whether the prosecution has proved its case beyond reasonable doubt always bear in mind that it is only a reasonable doubt. Always bear in mind the question of burden of proof. The burden lies on the prosecution which has got to establish it. The burden on the defence is comparatively light."

All these directions, it will be observed, were closely tied up with the standard of the reasonable man and the legal presumption of his intending the natural consequences of his acts. Of the onus on the prosecution it is true that the directions are impeccable. As regards the "lighter onus" on the defence, however, we regret to say that "comparatively light" was hardly an adequate explanation for the jury, even had they been able to recollect what they were told, about an hour earlier, as set out in the second excerpt from the

summing-up above quoted. The emphasis had been on affirmative proof by the defence. How far is "affirmative proof" of insanity consistent with "reasonable doubt" of his sanity? Assuming that the jury were able to appreciate the distinction, it would still appear that the emphasis on affirmative proof could not have been lost on them. Nor was the nature of the doubt sufficient for the defence to succeed explained as it was explained regarding the onus to be discharged by the prosecution. Doubt about his *guilt* and doubt regarding his *sanity* appeared to mean the same thing. If the plea of insanity might reasonably and probably be true, would it not have been sufficient to earn the appellant a verdict of acquittal? This would be in accordance with principle. As Viscount Kilmuir L.C. said in *Bratty* v. *Attorney-General for Northern Ireland* [1963] A.C. 386:—

> "Nevertheless, one must not lose sight of the overriding principle, laid down by this House in *Woolmington*'s case, [1935] A.C. 462, that it is for the prosecution to prove every element of the offence charged. One of these elements is the accused's state of mind; normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily, and the prosecution need go no further. But if, after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism, it seems to me that on principle they should acquit because the necessary *mens rea* — if indeed the *actus reus* — has not been proved beyond reasonable doubt."

Even where express statutory enactment reverses the ordinary onus of proof — as by section 14 of the Prevention of Corruption Act 1961 — the onus so placed on the defence is no heavier than that required for a party to succeed in a civil suit, that is to say, on balance of probabilities: see *Public Prosecutor* v. *Yuvaraj*. This recent decision of the Privy Council is merely another aspect of the principle stated in *Bratty*'s case. As Lord Diplock said:—

> "In criminal proceedings ..... by an exception to the general rule founded on considerations of public policy, if the consequence of a finding that a particular fact is proved will be the conviction of the defendant, the degree of probability must be so high as to exclude any reasonable doubt that it exists".

In this case the jury had found the appellant guilty of murder and would therefore appear to have rejected the defence plea of insanity. The Federal Court held that as the summing-up of the trial Judge was not

satisfactory, the conviction of the appellant should be set aside and an order made for him to be confined to safe custody pending the order of the Governor.

In *Ng Eng Kooi and another* v. *Public Prosecutor*[84] the accused had been charged with being knowingly concerned in conveying prohibited goods, to wit rice, an offence under the Customs Ordinance, 1952. The learned President of the Sessions Court found that the accused had not discharged the burden of proof under section 115 of the Customs Ordinance (that the rice had not been brought from outside Malaysia or that its import was under licence) nor had they rebutted the presumption under section 131(2) (that the accused knew that the rice was prohibited goods). He found the accused guilty and convicted them. On appeal, the High Court dismissed the appeal, but reserved the following question for the decision of the Federal Court –

> "Whether the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance, 1952 should be –
>
> (a) to the satisfaction of the Court; or
>
> (b) on the balance of probabilities; or
>
> (c) to raise a reasonable doubt."

The Federal Court adjourned the hearing of the reference as the case of *P.P.* v. *Yuvaraj* was then pending before the Privy Council. After the advice of the Privy Council in that case was delivered and reported, the Federal Court (Azmi L.P., Suffian and Gill F.JJ.) held that the answer to the question posed should be that the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance must be proof on a balance of probabilities. After referring to the decision in *Yuvaraj*'s case, Azmi L.P. said –[85]

> "As far as question (a) in this reference is concerned, it is to be pointed out that the words, "satisfaction of the court" can mean one of two things. First, they can mean, "satisfaction on a balance of probabilities" and secondly, "satisfaction beyond reasonable doubt" (see *R.* v. *Gaunt* (1964) Cr. Law Review 781). However, the distinction between "satisfaction on a balance of probabilities" and "satisfaction beyond reasonable doubt" is well established in the law, since the courts always stress, when the onus of proof is on the accused (for example, where he raises the defence of insanity, or where some statute puts the onus on him) that he need satisfy the jury only on the balance of probabilities, which is lesser than the onus on the prosecution, namely satisfaction beyond reasonable

[84] [1970] 1 M.L.J. 267.

[85] Ibid at p. 271.

doubt. Taking the words, "satisfaction of the court" to mean "satisfaction on the balance of probabilities" it would seem clear that question (a) in this reference can be equated with question (b).

It is clear that the expression "to the satisfaction of the Court" was taken by the learned President from the judgment in *Fatimah*'s case (1960) M.L.J. 109. We have looked at that judgment where Hepworth J. said simply that in the circumstances of that case the accused (who was charged with being knowingly in possession of uncustomed goods) had "to prove to the satisfaction of the court" that the duty had not been paid. He did not say whether the accused had to satisfy the court beyond reasonable doubt, or on a balance of probabilities or by raising a reasonable doubt in the case for the prosecution. It is therefore plain that the use of the mere expression "to the satisfaction of the court" is unsatisfactory when referring to the degree of proof required of a defendant in prosecution under the Customs Ordinance.

It was submitted by Dato' Marshall on behalf of the appellants that the *ratio decidendi* of *Yuvaraj* (1962) 2 M.L.J. 89 is not applicable to customs cases because they are not analogous to corruption cases and that in customs cases, on the authority of *R.* v. *Coben* [1951] 1 All. E.R. 203, which has been followed by the courts in this country in *Kee Kim Chooi and Others* v. *Public Prosecutor* [1952] M.L.J. 17; *Lee Guek Hon* v. *Public Prosecutor* [1953] M.L.J. 17 and *Looi Teik Lan* v. *Public Prosecutor* [1961] M.L.J. 12; it is enough for an acquittal if the accused raises a doubt. In that case Goddard L.C.J. said at page 206:

> ". . . . counsel for the Crown was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be *prima facie* evidence of guilty knowledge, or, in other words, to raise a presumption of guilt, so that if no explanation is given by the receiver the jury are entitled though not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to the guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So, in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be

told that if it either satisfies them that he did not know the goods were uncustomed or leaves them in doubt whether he knew, he should be acquitted."

The short answer to this submission is that *R.* v. *Cohen* is not binding on us, but *Public Prosecutor* v. *Yuvaraj* is. We do not think there can be any basis for an argument that the presumption under section 131(2) of the Customs Ordinance 1952 is not identical with the presumption under section 14 of the Prevention of Corruption Act 1961, the emphasis in both sections being on the words "unless the contrary is proved." As to the quantum of proof, the question has now been answered by their Lordships of the Privy Council in *Public Prosecutor* v. *Yuvaraj*. Applying with respect the opinion in that case, we can say at once that in order to rebut the presumption under section 131(2) of the Customs Ordinance the two accused in the present case had to prove on the balance of probabilities that the 50 bags of rice did not come within the category of "dutiable" or "uncustomed" or "prohibited" goods.

As regards section 115 of the Customs Ordinance, Dato' Marshall's argument is that in the context of *Yuvaraj's* case the quantum of proof under that section is radically distinct from the quantum of proof required to rebut the presumption under section 131(2) of the Customs Ordinance. We can find no substance in that argument, because in our judgment the words "unless the contrary be proved by such defendant" in section 131(2) and the words, "the burden of proof required thereof shall lie on the defendant" in section 115 mean one and the same thing. To elaborate, under section 14 of the Prevention of Corruption Act, which is in *pari materia* with section 131(2) of the Customs Ordinance, a corrupt motive is presumed unless the contrary is proved. Similarly, under section 115 of the Customs Ordinance the fact that the rice in question had not been lawfully imported is presumed unless the contrary is proved, although the section does not say so in so many words. But for that section the prosecution would have to prove that the rice had been unlawfully imported. Because of the section it is for the accused to prove that it had not been unlawfully imported. This is only another way of saying that it shall be presumed that the rice had been unlawfully imported unless the contrary is proved.

The basis of this argument by Dato' Marshall is that the phrase "the burden of proof thereof shall lie on the defendant" in section 115 means no more than "burden of introducing evidence" or "evidential burden" as Professor Glanville Williams calls it in his book on Criminal Law, The General Part, 2nd edition, paragraph 287, page 876. The short answer to that is that "burden of proof" not only means the duty of introducing evidence but also proving by

the evidence whatever the defendant is required to prove. In our judgment, it is clear from the authorities that the quantum of proof required of a defendant is the same whether it is a question of introducing evidence to rebut a presumption or introducing evidence to prove that which is required to be proved. The quantum of proof in either case is proof on the balance of probabilities as in civil proceedings.

It was next submitted by Dato' Marshall that the quantum of proof indicated by their Lordships of the Privy Council is incongruous in that it gives a higher status to a presumption of law than to actual facts. By way of example, he said that if the police search a person and find him with a tobacco pouch with tobacco in it, they can charge him for being in possession of uncustomed goods and the onus is on him under section 131(2) of the Ordinance to prove on a balance of probabilities that duty has been paid on the tobacco or that he does not know that duty has not been paid, whereas if a person is charged with far graver crimes such as treason, murder or fraud, all that he has to do is to raise a reasonable doubt in the prosecution case. He further said that the said quantum of proof has now introduced in this country two different measures of quantum of proof on an accused person at the close of the prosecution case, which if unrebutted, must result in a conviction, namely,

(a) to raise a reasonable doubt where the prosecution case is made out on facts and legitimate inferences therefrom, and

(b) to prove on a balance of probabilities where a statutory presumption is raised against him "unless the contrary is proved."

This distinction in the quantum of proof, he submitted, seems to be contrary to elementary commonsense and unnecessary.

With great respect to Dato' Marshall, that distinction in the quantum of proof has always been there, and law is not always or solely a matter of elementary commonsense. As for his suggestion that to follow the test laid down by *Yuvaraj* would cast on the defence a heavier burden than having merely to raise a reasonable doubt in the prosecution case, this very suggestion was put before the Privy Council in *Yuvaraj* and it was rejected by Lord Diplock at page 92 as follows:—

"It has been suggested that to satisfy the court that upon the balance of probabilities a fact does not exist puts too high a burden upon a defendant in criminal proceedings where the consequence of a failure to disprove that fact would be his conviction; and in some of the cases cited by the Federal Court without explicit disapproval expressions are used which might be understood as calling for an

explanation by the defendant of no greater degree of plausibility than is sufficient to raise a reasonable doubt in the existence of the fact which he must disprove. But this is the test by which in the absence of any statutory provision reversing the burden of proof the court determines whether a fact the existence of which is a necessary ingredient of a criminal offence has been 'proved' or 'not proved' by the prosecution upon whom the onus lies to prove it. It is merely another way of saying that the prosecution must not only prove the existence of the first two factual ingredients of the offence, viz. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body, but must also satisfy the court that the circumstances in which the gratification was paid, given or received give rise beyond reasonable doubt to an inference of fact that it was paid, given or received with a corrupt motive. This is the ordinary way in which the prosecution satisfies the burden of proving the motive with which an act was done by the defendant where the onus of doing so lies upon the prosecution. In their Lordships' view it gives no sufficient effect to the reversal of the ordinary onus of proof by an express statutory provision that a fact which constitutes an ingredient of a criminal offence shall be deemed to exist 'unless the contrary is proved'.".

Thus it is clear that to allow the accused in this case to discharge the burden placed on them by section 115 of proving that the rice had not come from outside Malaysia without a licence and by section 131(2) that he did not know it was prohibited goods, by merely raising a reasonable doubt in the prosecution case, would not be giving sufficient effect to the reversal of the ordinary onus of proof by the two sections.

To sum up, the answer to the question posed is that the quantum of proof on an accused person to discharge the onus placed on him by section 115 and/or section 131(2) of the Customs Ordinance, 1952 should be proof on a balance of probabilities."

It may be said with respect, that the Federal Court in that case appears to have dealt correctly with the burden and quantum of proof on an accused person and to have correctly appreciated and applied the opinion of the Privy Council in *Public Prosecutor* v. *Yuvaraj*. Unfortunately the Court obscured the issue towards the end of their judgment by referring without dissent to the views of Thomson C.J. in *Looi Wooi Saik* v. *Public Prosecutor*.[86] After dealing with the decision of Briggs J. in *Public*

[86] *Op. Cit.* n. 59.

*Prosecutor* v. *Abdul Manap* where he said in effect that in considering the right of private defence the court may do so wholly on the evidence produced by the prosecution, Azmi L.P. said:—[87]

"Thomson C.J. (as he then was) in *Looi Wooi Saik* v. *Public Prosecutor* said something to the same effect when he was dealing with the defence of provocation. This is what he said:—

> "In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation."

It is interesting to note that in the same judgment, Thomson C.J. made it very clear that what he was saying in that case has no application to the question of insanity as a defence. We think that we should cite the whole passage:—

> "The question in the present appeal is the way in which a jury should be directed in a case of murder where one of the special exceptions or one of the general exceptions has been put forward as a defence. And here let me say that nothing that is said here is to be taken as having any necessary application to the question of insanity as a defence. That is a defence which has been generally regarded as standing in a class of its own, and in the present case we have excluded it from our consideration."

It will be noticed from the above two passages that Thomson C.J. intended to say, first, that the principle laid down in that judgment would equally apply to any of the general exceptions put forward as a defence, and that therefore that principle applies to a case of self-defence. Secondly, he also stressed that what he was saying in that judgment was not intended to apply to a defence of insanity."

It is submitted that whatever doubts on the subject still exist would appear to have been removed by the decision of the Privy Council in *Jayasena* v. *The Queen*,[88] which though an appeal from Ceylon, is on a statute in *pari materia* with the Evidence Act of Malaysia and therefore binding in Malaysia.

[87] *Ibid* at p. 272.

[88] *Op. Cit.* n. 2.

In *Jayasena* v. *The Queen* the accused had been charged with murder and the sole question that arose on the appeal to the Privy Council was whether at the trial the jury had been rightly directed on the burden of proof on the issue of private defence. Lord Devlin in giving the opinion of the Privy Council said:–[89]

"The burden of proof is settled by the Ceylon Evidence Ordinance, section 105 which provides:–

"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."

The argument turns on the construction of section 105 and the meaning to be given to 'burden of proving'.

Counsel for the appellant submits that there are two kinds of burden. One, which he calls the legal burden, is the burden of establishing the case; the other, called the evidential burden, is the burden of adducing some evidence in support of the case. Counsel for the appellant submits that the burden imposed by section 105 is in the second category. If it were in the first category, the direction given to the jury by the trial Judge in his summing-up cannot be criticised by the appellant, to whom it might be said to be unduly favourable. If it is in the second category, it is at least doubtful whether the direction would be adequate. Rather than scrutinise the summing-up to see whether the direction will pass muster in either category, their Lordships will determine whether the appellant's argument on section 105 is correct.

To understand the argument it is necessary first to understand the position in English law. Before 1935 it was widely believed that in English law killing was presumed to be murder unless the contrary appeared from circumstances of alleviation, excuse or justification; and accordingly that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof on any of these issues rested on him. There was, as Lord Sankey L.C. said in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 473 'apparent authority' for this view, the foundation for it being the statement of the law in Foster's Crown Law written in 1762. In

[89] *Ibid*

*Woolmington* v. *Director of Public Prosecutions* where the accused was charged with murder and gave evidence that the killing was accidental, the trial Judge directed the jury in accordance with this view of the law. The House of Lords declared this view to be erroneous. The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt. To prove murder the prosecution must prove that the killing was intentional and unprovoked. This does not mean, as the House made clear in subsequent cases, that the jury must always be told that before it can convict, it must consider and reject provocation and self-defence and all other matters that might be raised as an answer to a charge of murder. Some evidence in support of such an answer must be adduced before the jury is directed to consider it; but the only burden laid on the accused in this respect is to collect from the evidence enough material to make it possible for a reasonable jury to acquit.

Against this background the appellant's argument can be appreciated and in particular the distinction drawn between what are said to be the two categories of proof — the establishing of a case, and the adducing of evidence. The argument is not of course that *Woolmington* v. *Director of Public Prosecutions* is directly applicable; it is a decision on the common law and the Board is required to interpret and apply the code. The argument is that the code should be interpreted in the light of *Woolmington* v. *Director of Public Prosecutions*. In his speech Lord Sankey L.C. dealt in two ways with Sir Michael Foster's statement of the law. While he made it quite clear that he was prepared, if necessary, to reject it, he had earlier indicated that it could be reconciled with the principle which the House was lying down. If the statement in Foster can be reconciled with the doctrine, then, as counsel for the appellant argues, so can section 105. The way of reconciliation is by construing "burden of proving" as referring to the burden of adducing evidence, the so-called evidential burden of proof. In this way the "golden thread", as Lord Sankey L.C. described it in a famous passage, can be preserved for the law of Ceylon.

This is an argument which has prevailed in several jurisdictions where there is an Evidence Ordinance containing a provision in the same terms as section 105. It was adopted in the High Court in Rangoon in the *Emperor* v. *Dampala* (1973) I.L.R. 14 Ran. 666, by a majority in the High Court of Allahabad in *Emperor* v. *Parhboo* (1941) I.L.R. All. 843 and in Malaysia in *Looi Woo Saik* v. *Public Prosecutor* (1962) M.L.J. 337. It has however been decisively

rejected by the Supreme Court of Ceylon sitting as a court of seven with one dissentient, in *R.* v. *Chandrasekera* (1942) 44 N.L.R. 97. In the present case the Supreme Court dismissed the appeal without giving reasons, doubtless following the previous decision. This appeal is therefore in effect an appeal against *R.* v. *Chandrasekera* which counsel for the appellant invites the Board to disapprove.

Their Lordships do not understand what is meant by the phrase 'evidential burden of proof'. They understand of course that in a trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends on the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is misnomer to call whatever it is that he has to provide a burden of proof — a misnomer which serves to give plausibility but nothing more to counsel for the appellant's construction of section 105.

Section 3 of the Ceylon Evidence Ordinance deals with proof in the following terms:—

> '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.'

Their Lordships do not think that proof means anything different in English law. But at any rate in the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by section 105 can be anything less than proof in accordance with section 3. Their Lordships will not elaborate further since the incongruities of any such supposition are fully exposed in the judgments of the majority in *R.* v. *Chandrasekera* particularly the judgment of Soertsz J.

Even if there were any ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, their Lordships would not be aided in resolving it by the decision in *Woolmington* v. *Director of Public Prosecutions*. In saying this their Lordships are not questioning the place which this authority now holds in the law of England. But it is not necessary to read more than the speech of Lord Sankey L.C. himself to see that by far the greater strength of previous authority supported the view which the House rejected. Nevertheless, for some considerable time before 1935 many English judges had in practice been applying the law with less strictness towards the defence than its terms warranted. This is illustrated by the judgment of the Court of Criminal Appeal in the very case as it appears from the speech of Lord Sankey L.C. The court said that while there was ample authority for the trial Judge's statement of the law, 'it may be that it might have been better' if he had told the jury that if they entertained any reasonable doubt about the accused's explanation they should acquit; and in fact they dismissed the appeal, not as being unfounded in law, but by resorting to the proviso to section 4(1) of the Criminal Appeal Act 1907. Thus the decision of the House of Lords is an example of a change in the content of the law resulting from a change in the manner of applying it. The common law is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a code is not. Foster's statement of the law is not in their Lordships' opinion reconcilable with the law as laid down by the House of Lords. But there can be no doubt that it was adopted in the codification of the law introduced into Ceylon. It was at that time set out in all the English textbooks (from which it has now been dropped), including Stephen's Digest of the Criminal Law and Sir James Stephen, as is well known, was the begetter of the Evidence Ordinance. The code embodied the old criminal law and cannot be construed in the light of a decision that has changed the law.

In support of his argument counsel for the appellant pointed to section 73 of the Penal Code which includes accident among the general exceptions. He submitted that the effect on this of section 105 would be, unless it is given the modified reading for which he contends, to put the burden on the defence of negativing intention. Their Lordships consider that the language of sections 3 and 105 in combination is so compelling that they would not be deterred from interpreting it in the way in which they have even if in its application to section 73 it had the consequences which counsel for the appellant foresees. Having said this and since no case under section 73 is before them, they do not propose to decide where the burden of proof lies when accidental killing is in question. Such a

question would raise different considerations from those material in the present case. Proof of intentional killing does not negative the answer of private defence; on the contrary, it is only after intentional killing is proved that private defence need be put forward. But proof of intentional killing does negative accident. In *R. v. Chandrasekera,* Soertsz J. dealt with the point as follows:—

> "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 (sic) 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."

As at present advised their Lordships agree with this dictum.

The attention of the Board has been drawn to cases in which the direction to the jury has been that, while the burden of proof of a particular defence is on the accused the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution. Such a direction might appear at first sight to lend support to counsel for the appellant's contention that some lighter burden than the ordinary burden of proof is in these cases placed on the accused. If that is the effect of it, it would in their Lordships' opinion be wrong. But it must be remembered that the evidence on which the accused relies, when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own. The present case, as counsel for the Crown has said, is a clear case of confession and avoidance, the defence admitted the intention to kill and relied entirely on private defence. It is however much more frequent for an accused to deny the intention. He will say that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. Likewise provocation and accident often feature together in an accused's story. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing

intention beyond a reasonable doubt rests always on the the prosecution. The point has recently been before the Supreme Court of India in relation to the defence of insanity in *Dahyabhai* v. *State of Gujarat* (1964) 7 S.C.R. 361. Subba Rao J. pointed out that evidence that fell short of proof of insanity might yet raise a reasonable doubt about the existence of the requisite intention. In *Bhikari* v. *State of Uttar Pradesh* (1965) 3 S.C.R. 194 Mudholkar J. said:—

> "If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in section 105 of the Evidence Act."

Their Lordships respectfully agree with this observation.

Finally, counsel for the appellant points to section 106 of the Evidence Ordinance which provides: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." He relies on two decisions of the Board *Attygalle* v. *Regem* [1936] 2 All E.R. 116 and *Seneviratne* v. *Regem* [1936] 3 All E.R. 36 in which this section was considered and was not applied so as to shift the burden from the prosecution.

The principle involved in this section derives from the English law of evidence, where it has however been sparingly used. The prosecution is usually able to establish that an person has special knowledge of the circumstances of the crime with which he is charged. Under some systems of law this is considered to be sufficient for the accused to be called on at the outset of a trial to say what he knows. Such a procedure would be quite inconsistent with the accused's right to silence which prevails in the English system as adopted in Ceylon.

Their Lordships are concerned with section 106 only to see whether it gives any support to counsel for the appellant's argument on section 105. He submits that the right solution lies in treating section 106 as imposing only an evidential burden of proof; and that if section 106 has to be treated in that way, why not also section 105? This submission gets no help from the two authorities cited. In these cases the Board said simply and without elaboration that the section does not cast on an accused the burden of proving that no crime has been committed. Their Lordships in no way dissent from this conclusion. It may well be that the general principle that the burden of proof is on the prosecution justifies confining to a limited

> category facts "especially within the knowledge" of an accused; but their Lordships do not consider that it can alter the burden of proof either in section 106 or section 105.
>
> For these reasons, and generally for the reasons given in the majority judgments in *R. v. Chandrasekera*, their Lordships have humbly advised Her Majesty to dismiss this appeal."

It is quite clear therefore that the Privy Council has rejected the view that section 105 of the Evidence Ordinance only refers to the burden of adducing evidence, the so-called evidential burden and therefore does not place a heavier burden on the accused than that of adducing evidence to cast a reasonable doubt on the issue. In *Jayasena v. The Queen* the Privy Council emphasised that while the burden of proof of a particular defence is on the accused, the burden of proving the prosecution case beyond reasonable doubt still remains with the prosecution. It is however not necessary for the prosecution to disprove any exception and the burden of proving such exception is on the accused. One lingering doubt remains as to the defence of "accident". In *Ng Lam v. Public Prosecutor*[90] the Court of Appeal said,

> "The defence in the *Woolmington* case was "accident". If the killing was accidental, it certainly was not murder but the jury was in effect told that a mere killing was murder "for the law presumeth the fact to have been founded on malice, unless the contrary appeareth".
>
> That was the defect in the *Woolmington* case which led to the quashing of the conviction. "When intent is an ingredient of a crime, there is no onus on the defendant to prove that the act alleged was accidental". That we believe is the law of the Federated Malay States."

In *Jayasena v. The Queen* it was argued that the effect of requiring the accused to prove "accident" would be to put the burden on the defence of negativing intention. The Privy Council said that they would not be deterred from interpreting sections 3 and 105 in the way they had even if in its application to section 73 it had the consequences which counsel suggested. But they went to say that since no case under section 73 was before them, they did not propose to decide where the burden of proof lies when accidental killing is in question. Such a question they said would raise different considerations from those material in the case before them.[91]

[90] *Op. Cit.* n. 23.

[91] The Privy Council however said that they agreed with the dictum of Soertz J. in *R. v. Chandrasekera* (1942) 44 N.L.R. 97.

Although the law seems to have been clarified by the Privy Council in *Public Prosecutor* v. *Yuvaraj* and *Jayasena* v. *The Queen*, we still have no case in Malaysia which clearly sets out the position in accordance with decisions of the Privy Council. In *Ikau Anak Mail* v. *P.P.*[92] the accused was charged with murder and the defence was provocation. In his summing-up to the assessors the learned Judge at one stage pointed out that there was a burden on the accused to prove on a balance of probability that he was deprived of the power of self-control by reason of provocation but at another stage he said that if the court was left with a reasonable doubt as to whether there was provocation or not then they had to accept that the defence had succeeded in bringing his case within Exception 1 of section 300 of the Penal Code. Azmi L.P. in giving the judgment of the Federal Court (consisting of himself, Gill and Ali F.JJ.) missed the opportunity of pointing out that he was correct in his summing-up as the trial Judge in *Looi Wooi Saik* v. *Public Prosecutor*[93] and that the Court of Appeal was wrong in saying that his direction was not correct. He did refer to *Jayasena* v. *The Queen*[94] and did say that *Looi Wooi Saik* v. *Public Prosecutor* appears to have been overruled but he said that the matter was not fully argued before the Federal Court. As the appeal was by the accused, the Court held that there was no ground for complaint against the summing-up. It is hoped that the Federal Court will soon have an opportunity to hear a full argument and reach a clear and definitive decision in the matter.

The Criminal Law Revision Committee has indicated in their[95] eleventh report on Evidence (General) that they "are strongly of opinion that, both on principle and for the sake of clarity, burdens on the defence should be evidential only." They said that the suggestion would be in accordance with what Viscount Sankey L.C. in *Woolmington* called the golden thread of the criminal law that "it is the duty of the prosecution to prove the prisoner's guilt." Among the reasons given by them are –

> (a) In the typical case where the essence of the offence is that the offender has acted with blameworthy intent, and the defence which the accused has the burden of proving implies that he had no such intent but acted wholly innocently, it seems repugnant to principle that the jury or the magistrate's court should be under a legal duty, if they are left in doubt whether or not the accused had the guilty intent, to convict him.

[92] [1973] 2 M.L.J. 153.

[93] *Op. Cit.* n. 59.

[94] *Op. Cit.* n. 2.

[95] Criminal Law Revision Committee, Eleventh Report, (Cmmd. 4991) at pp. 87–91.

(b) In fact that kind of situation does not at all occur commonly and in practice the prosecution assume the burden of proving the whole case "for the experience as regards existing offences suggests that in practice provisions creating a persuasive burden are less efficacious than may have been hoped when they were enacted, because juries are sometimes unwilling to convict unless the prosecution leads evidence sufficient to rule out the defence. If provisions of this kind have indeed little or no effect the case for altering them seems stronger.

(c) The change would be in general accordance with the common law, which with the sole exception of insanity has not found it necessary to impose any persuasive burden on the defence.

(d) The real purpose of casting burdens on the defence in criminal cases is to prevent the accused in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation. This applies especially to cases where the defence relates to a matter peculiarly within the knowledge of the accused. While it is entirely justifiable to impose a burden on the defence for this purpose, that purpose is sufficiently served by making the burden an evidential one.

(e) The change would get rid of the present need for the judge to give to the jury the complicated direction on the difference between the burden on the prosecution of proving a matter beyond reasonable doubt and that on the defence of proving a matter on the balance of probabilities. Many judges have said that they find it difficult or impossible to direct juries on this in a way which the jury are likely to find satisfactory or even intelligible.

Whatever the merits of the proposal of the Criminal Law Revision Committee, it is quite clear that in Malaysia the burden on the accused under section 106 of the Evidence Act is a persuasive burden and unless the Act is amended the principles laid down in *P.P.* v. *Yuvaraj* and in *Jayasena* v. *Reg.* must be followed and applied.

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