BURDEN OF PROOF ON AN ACCUSED IN MALAYSIA*

In 1960, the Singapore Court of Criminal Appeal held in *Soh Cheow Hor* v. *R.*[1] that an accused person succeeds in bringing himself within the exceptions (to criminal liability) under the Penal Code if there is a reasonable doubt as to whether or not the circumstances bringing the case within the exceptions exist. Similarly in 1962, the Court of Appeal of the former Federation of Malaya in *Looi Wooi Saik* v. *Public Prosecutor*[2] held that an accused need only raise a reasonable doubt as to the existence of any defence (except insanity) to have the benefit of that defence.

While these holdings may sound unexceptional to most modern common lawyers, they involve a severely strained interpretation of the applicable provisions of the respective Evidence Ordinances[3] and they constitute a departure from earlier decisions within the two jurisdictions. The purpose of this article is to indicate the legislative and case-law background to these two decisions, to examine them against this background, and to consider, generally, ways of determining the nature and extent of the burden of proof as to matter of defence on an accused in Malaysia.[4]

THE LEGISLATION:

Part III of the Malaysian Evidence Ordinances is entitled "Production and Effect of Evidence". Chapter 7, the first chapter in Part III is entitled "Of the Burden of Proof". This chapter contains 14 sections, the first six (ss. 101-106)[5] dealing with the burden of proof in general and the last eight (ss. 107-114) with the burden of proof on specific issues and presumptions. Section 101 provides:— "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist", and places

* This article is based on a public lecture delivered at the University of Singapore on 10th December, 1963.

1. (1960) 26 M.L.J. 254.
2. (1962) 28 M.L.J. 337.
3. Laws of Singapore, 1955, cap. 4; Federation of Malaya Ordinance No. 11 of 1950.
4. Although the article will be confined to a consideration of the legislation and cases in Singapore and the former Federation of Malaya, the argument could be applied to include the Borneo Territories (Sabah and Sarawak) whose Evidence Ordinances are *in pari materia* with those in Singapore and Malaya. I am not aware of any Borneo cases dealing specifically with the issues canvassed in this article.
5. Section numbers, unless otherwise indicated, will be as in the Malayan Ordinance where the sections here under consideration are numbered one lower than in the Singapore Ordinance.

the "burden of proof" on the person obliged to prove those facts. Illustration (a) has the person alleging a crime and desiring Court-ordered punishment for the offender having to prove the commission of the crime by the offender. Section 102 provides that "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side". The effect of these two sections in relation to criminal cases is to place the primary or general burden of proof on the prosecution. Section 102 was doubtless intended as a test for determining the incidence of the burden specified in section 101.[6]

The basic provision dealing with the burden of proof on an accused is section 105. This 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.

Illustrations (a) and (b) to section 105 have the burden of proof as to insanity and provocation, respectively, on accused who allege them in trials for murder.

As much of the subsequent discussion will be in relation to general and special exceptions under the Penal Codes[7] it might be as well to indicate here what they are. The General Exceptions are set out in sections 76-106 of the Penal Code. Compendiously they comprise, so far as is relevant for our purpose, acts the accused is bound or justified by law in doing (ss. 76, 9), judicial acts (s. 77), mistake of fact, (ss. 76, 79), accident (s. 80), necessity (ss. 81, 92), infancy (ss. 82-3), insanity (s. 84), intoxication (ss. 85-6), consent (ss. 87-91), compulsion (s. 94) and private defence (ss. 96-106). These exceptions apply to offences under the Penal Code and, unless specifically excluded, to offences outside the Code.[8] The Special Exceptions are related specifically to particular offences under the Code. The most important for our purpose relate to the offence of murder,[9] and include provocation (Ex. 1), excessive private defence (Ex. 2), sudden fight (Ex. 4) and, in Singapore only, diminished responsibility (Ex. 7). These special exceptions are partial defences only, reducing what would otherwise be murder to culpable homicide not amounting to murder.

Two of the three remaining sections dealing generally with the burden of proof are relevant for our purpose. Section 103 deals with the burden

6. See Taylor, *A Treatise on the Law of Evidence,* (10th ed., 1906), para. 365, referred to on this point, *infra* at p. 253. But see Cross, *Evidence,* (London, 1958), at p. 74, for an argument that this test, such as it is, is only applicable to the evidential burden (as to which see *infra* at pp. 255 - 7).

7. Laws of the Federated Malay States, 1935, cap. 45, as extended throughout the former Federation of Malaya by the Penal Code (Amendment and Extended Application) Ordinance, 1948; Laws of Singapore, 1955, cap. 119. The section numbers of the two Codes correspond.

8. Penal Code, s. 40.

9. Defined in ss. 299 and 300 of the Penal Code.

of proof as to any particular fact and places it on the person wishing the Court to believe the existence of that fact, unless the law provides otherwise. Illustration (b) to this section requires a person who wishes a Court to believe that at the time in question he was elsewhere to prove it. *Prima facie,* this would require an accused to prove any alibi raised by him. Finally, section 106 provides that "[w]hen any fact is especially within the knowledge of any person the burden of proving that fact is upon him". Illustration (a) to this section has the burden of proving an intention other than that which the character and circumstances of an act suggest on the person doing the act. This illustration, it may be noted, presupposes the prosecutor being allowed to prove intent by reliance on the so-called presumption that a person intends the natural and probable consequences of his acts. Illustration (b) has a person charged with travelling on a railway without a ticket being required to prove that he had a ticket.

As will be apparent the word "prove" and its cognates are of central significance in these provisions on the burden of proof. "Proved" is defined in section 3 of the Evidence Ordinances as follows:—

> A fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The above provisions would seem to indicate that the *nature* of proof is the same for an accused as it is for the prosecution — both are obliged to persuade the court either to believe in the existence of facts or to accept that their existence is at least probable. The way is left open for variation in the *extent* of proof which may be required by allowing the degree of probability of the existence of facts to be a function of what a prudent man ought, under the circumstances of the particular case, to act upon. This allows for the requirement that the prosecution prove its case beyond reasonable doubt, because presumably a prudent man would sooner see a number of guilty men go free than one innocent man punished, while permitting an accused to discharge his burden by proof of his defence to the degree of a bare probability. The provisions also indicate that both the prosecution and an accused may carry a burden of proof at a trial. Neither of these burdens will shift during a trial because the question whether they have been discharged will not be determined until the final decision on the facts of the case has been made. The burden on an accused will, of course, only fall to be discharged if and when the prosecution has made out a *prima facie* case against the accused.[10]

One particular matter arising under these burden of proof provisions may be mentioned here to foreshadow its later discussion. Illustration (a) to section 102 has the prosecutor having to prove a crime he alleges an accused has committed. It is an important question whether an allegation of crime against a person involves no more than an allegation that the person has done the thing specifically forbidden and with any necessary *mens rea* or whether it involves a denial of all matter of defence.

10. As to the degree of persuasiveness necessary for a *prima facie* case, see *infra* at p. 256.

even matter of justification or excuse that does not necessarily go to negative the criminal act or any necessary *mens rea.* Criminal defences, it is suggested, have the effect either of denying the specific allegations of the prosecution or of setting up matter in confession and avoidance, matter of justification or excuse. Section 105 makes no distinction of this kind and includes defences in denial of the ingredients of the prosecution's case *(e.g.* mistake, accident) and defences in confession and avoidance *(e.g.* private defence). This distinction, it will be argued later, has to be made if section 105 is to be properly applied, and the dilemma for the burden of proof arising from allegations of crime on the one hand and defence allegations on the other is to be resolved.

The Malayan Evidence Ordinances are close copies of the Indian Evidence Act, 1872, which was drafted by Sir James Fitzjames Stephen in the years 1870-1.[11] The Ordinances, so far as is relevant to the present inquiry, are still in the same form in which their original was drafted. The original Act was, according to Stephen, "little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order . . ." [12] The English Law of Evidence was, for Stephen, as contained in "that great repository of Evidentiary Law" [13] Taylor's *Treatise*.[14] For Taylor the burden of proof lay, basically, on the party asserting the affirmative of an issue — the affirmative in substance that was not in form.[15] The tests for ascertaining on whom this burden lay were, according to Taylor, to consider (i) which party would succeed if no evidence were given on either side, and (ii) what would be the effect of striking out of the record the allegation to be proved.[16] Taylor gives two exceptions to the basic rule as to burden of proof. The first is that the basic rule does not apply where there is a rebuttable presumption of law in favour of he who asserts the affirmative, for then he who asserts the negative must rebut that presumption.[17] The second is that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.[18]

11. See Stephen, *A Digest of the Law of Evidence,* (12th ed., 1936), Introduction, vii.

12. *An Introduction to the Indian Evidence Act,* (London, 1872), as reproduced in Woodroffe and Ameer Ali's *Law of Evidence in India,* (10th ed., Allahabad, 1957), Vol. I, pp. 10-80, at p. 10.

13. *Per* S. L. Phipson in the preface to the first edition of his *The Law of Evidence,* (London, 1892), as reproduced in subsequent editions.

14. *Op. cit.* In support of this proposition see Woodroffe and Ameer Ali, *op. cit.,* at p. 7; Sir Henry Maine, "The Theory of Evidence", in *Village-Communities in the East and West,* (3rd ed., 1876), 295 at p. 305. The earliest edition of Taylor available to the writer is the 10th, of 1906. It will have to be assumed that that edition was not materially different from that or those used by Stephen.

15. Taylor, *op. cit.,* para. 364.

16. *Ibid.,* para. 365.

17. *Ibid.,* para. 367.

18. *Ibid.,* para. 376A.

Taylor gives no rule equivalent to section 105 of the Indian Evidence Act.[19] Three points of comparison between Taylor's and Stephen's treatments of burden of proof require comment for our purpose. The first is that Stephen's section 101 is broader than Taylor's basic rule and could, on its face, require a prosecutor to prove negative allegations.[20] The second is that although Taylor has no rule equivalent to section 105,[21] it would seem that that section represented the then English law, at least as to defences to murder, and did so until *Woolmington* v. *D.P.P.*[22] in 1935. This case and the state of the law immediately before it was decided will be discussed in the following section. The third point of comparison is as to the treatment of presumptions. Stephen was skeptical about what Taylor called rebuttable presumptions of law.[23] He admitted just five as determinants of the burden of proof on particular (generally non-criminal) issues[24] and then provided that a court "may presume[25] the existence of any fact which it thinks likely to have happened . . ."[26] Presumptions thus play a negligible part in the law as to burden of proof in criminal cases in Malaysia.

TWO DEVELOPMENTS SINCE 1871

Since 1871, when the original of the Evidence Ordinance was drafted, there have been two developments in the Anglo-American law relating to the burden of proof that should be noted for the bearing they have had on

19. The section numeration in the Indian Act is the same as in the Malayan Ordinance. See *supra* n. 5.

20. S. 101 is, however, presumably subject to the other burden of proof provisions particularly, in this context, s. 106. On the other hand, Taylor, on the basis of the presumption of innocence, has the burden of proof in criminal cases always on the prosecutor, even though recourse to negative evidence is necessary. See para. 371.

21. See, however Taylor, *op.cit*., para. 118: "the law presumes that every act, which in itself is unlawful has been wrongfully intended, till the contrary appears", with the examples of and authorities for this proposition there given. Taylor had no Penal Code to prompt such an express rule.

22. [1935] A.C. 462.

23. See *Introduction* in Woodroffe and Ameer Ali, *op. cit*., at pp. 79-80; Rankin, "Presumptions and Burdens", (1946) 62 L.Q.R. 135, at pp. 135-6. Taylor devotes 91 pages to these presumptions, at pp. 112-204.

24. Burden of proof is on he who affirms that a man alive within thirty years is dead (s. 107), that a man not heard of for seven years is alive (s. 108), that persons who have been acting as partners, landlord and tenant, or principal and agent do not stand in those relationships (s. 109), that the possessor is not the owner of a thing (s. 110), and that he acted in good faith where he is in a position of active confidence (s. 111).

25. The expression "may presume" is defined in s. 4. It means a court "may either regard such fact as proved unless and until it is disproved, or may call for proof of it". The expression "shall presume", as in s. 105, is defined in s. 4 to mean that a court "shall regard such fact as proved unless and until it is disproved". "Disproved" is defined in s. 3 in terms that are the negative of the definition of "proved".

26. S. 114. One of the nine illustrations is as to the presumption that may be drawn from the possession of recently stolen goods.

the interpretation of the provisions of the Evidence Ordinance now under consideration. The first lay in recognising that the expression "burden of proof" had two different meanings. These two different meanings are accepted as having been first clearly separated by the American James Bradley Thayer at the end of the last century. These two meanings were stated to be:—

> (i) The peculiar duty of him who has the risk of any given proposition on which parties are at issue, — who will lose the case if he does not make this proposition out, when all has been said and done;
>
> (ii) ... the duty of going forward in argument or in producing evidence, whether at the beginning of a case, or any later moment throughout the trial or discussion.[27]

This distinction within the expression "burden of proof" was further elaborated by Wigmore[28] with particular reference to the distinction between the trier of fact at a trial (generally the jury) and the administrator of the law (the judge), who is obliged to keep the jury within the bounds of reasonable action. The distinction, as stated by Wigmore, was between the risk of non-persuasion of the jury and the duty of producing sufficient evidence to get past the judge to the jury. The practical distinction between these two senses of "burden of proof" according to Wigmore was that:—

> The risk of non-persuasion operates when the case has come to the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issue without leaving the question open to the jury's deliberations.[29]

That the expression "burden of proof" has these two senses has been generally accepted by writers and, less readily perhaps, by the courts.[30] The terminology used for the two concepts has varied considerably.[31] Following Dr. Glanville Williams it is proposed here to adopt the expressions "persuasive burden" and "evidential burden".[32]

A few words about the operation of the two burdens in a criminal trial. The prosecution will have a persuasive burden, at least as to the elements of the crime charged. The degree of that burden is settled as

27. *A Preliminary Treatise on Evidence at the Common Law,* (Boston, 1898), at p. 355.

28. See *A. Treatise on the Anglo-American System of Evidence,* (3rd ed., Boston, 1940), Vol. IX, paras. 2485-9.

29. *Ibid.*, at p. 284.

30. See Cross, *op. cit.*, at pp. 62-73, and particularly literature cited in n. 3, p. 62; Glanville Williams, *Criminal Law. The General Part,* (2nd ed., 1961), paras. 286-7. Contrast, however, Nokes, *An Introduction to Evidence,* (3rd ed., 1962), at pp. 457-461, and the same writer's "Codification of the Law of Evidence in Common Law Jurisdictions", (1956) 5 I.C.L.Q. 347 at pp. 358-61.

31. For the terms used and by whom see Nokes, *op. cit.* (1962), at pp. 459-61; Cross, *op. cit.*, at pp. 63-64, 72-3.

32. *Op. cit.,* esp. at pp. 876, 882-3.

persuasion beyond reasonable doubt. The prosecution will also invariably have an evidential burden because it has to produce evidence in order to persuade. Logically it would seem to follow that to discharge its evidential burden (or to make out a *prima facie* case) the prosecution should have produced evidence capable of persuading a reasonable jury beyond reasonable doubt.[33] An accused may likewise have a persuasive burden, and a corresponding evidential burden, as to matter of defence raised by him. The degree of persuasion required of an accused can, it appears, be of 2 kinds — (i) persuasion to a probability, the equivalent of the civil standard of proof, and (ii) persuasion that there is a doubt, or that there is a reasonable possibility that the defence allegations may be true. Each of these persuasive burdens will have their corresponding evidential burdens — the first will require evidence from which it could reasonably be inferred that a defence is at least probably established, the second will require evidence sufficient to allow a reasonable doubt as to the non-existence of a defence.[34] It is suggested that the second kind of burden which may be on an accused should be confined to matter of defence which does not go to negative any of the elements of the prosecution's case but which is, as it were, by way of confession and avoidance. Matter going to negative the prosecution's case is not in discharge of any of the burdens indicated above but should be treated as going potentially to prevent the prosecution discharging its persuasive burden. On the above analysis it will be apparent that the evidential burden is a function of the persuasive burden both in incidence and degree of proof required.[35] Neither burden on this analysis will ever shift. We may note however (i) that after an evidential burden has been discharged a provisional burden may be said to rest on the other party in the sense that that party is then exposed to a finding by the trier of fact against him and it would be advisable for him to try and avoid this,[36] and (ii) that an evidential burden could be said to shift if it were possible for a judge to rule, which it is generally not in a criminal trial, that the evidence produced by a party was so clear and convincing that the issue on which it was tendered

33. See J. C. Wood, "The Submission of No Case to Answer in Criminal Trials — The Quantum of Proof", (1961) 77 L.Q.R. 491, and John T. McNaughton, "Burden of Production of Evidence: A Function of a Burden of Persuasion", (1955) 68 Harv. L.R. 1382. McNaughton's analysis attempts to take account of a "credibility factor".

34. A variety of attempts has been made to describe the *quantum* of evidence sufficient to discharge the evidential burden associated with persuasion that there is a doubt. These range from *prima facie* case *(e.g. R. v. Ward* [1915] 3 K.B. 696), through evidence which might raise a reasonable doubt as to whether or not there was a defence *(Mantini* v. *D.P.P.* [1942] A.C. 1), explanation which may reasonably be true *(R.* v. *Schama; R.* v. *Abramovitch* (1914) 84 L.J.K.B. 396), to "some evidence" *(Hill v. Baxter* [1958] 1 Q.B. 277, *per* Devlin J. (as he then was) at p. 284). The difficulty seems to arise from treating the evidential burden as somehow independent and failing to recognise that it is a function of the persuasive burden of raising a doubt.

35. McNaughton, *op.cit.*

36. The term "provisional burden", with this meaning, is from A. T. Denning, "Presumptions and Burdens", (1945) 61 L.Q.R. 61. It would seem to correspond to Julius Stone's "tactical burden" in "Burden of Proof and the Judicial Process", (1944) 60 L.Q.R. 262.

should be taken from the jury and resolved in favour of the party producing the evidence unless the other party can produce sufficient countervailing evidence to get the issue back before the jury.

The second development was the decision of the House of Lords in 1935 in *Woolmington v. D.P.P.*[37] Woolmington was convicted of the murder of his wife by shooting. He alleged that the discharge of the gun was accidental. The jury was directed that once the Crown established death at the accused's hands, he was then obliged to show any circumstances of alleviation or excuse. This was held by the House of Lords not to be a correct statement of the law of England. Dealing generally with onus of proof at a criminal trial, Viscount Sankey L.C., speaking for a unanimous House, said —

> . . . 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 ... 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.[38]

It would seem that before this decision the law was generally accepted to be as stated by the trial judge in *Woolmington.* This primarily on the authority of Sir Michael Foster who had written in 1762 —

> In every Charge of Murder, *The Fact of Killing being first proved,* all the circumstances of Accident, Necessity or Infirmity are to be satisfactorily proved by the Prisoner, unless they arise out of the Evidence produced against Him: for the Law presumeth the Fact to have been founded in Malice, until the Contrary appeareth.[39]

This statement was adopted by Tindal C.J., in his direction to the jury in *R.* v. *Greenacre*.[40] It was also given as the law in Stephen's Digest of the Criminal Law, and by Russell on Crimes, Archhold, and Halsbury's Laws.[41] It is not surprising therefore that section 105 of the Evidence Ordinance deals with the question of the burden of proof on an accused as Foster did for this to Stephen in 1871 would have been the law. One of the main difficulties in the present inquiry lies in reconciling the apparent meaning of section 105 with the decision in *Woolmington* and the more favourable judicial attitude to the accused that it represents.

Finally on *Woolmington's* case it may be noted that the issue there

37. [1935] A.C. 462.

38. *Ibid*., at p. 481. The last words should be "the benefit of the doubt", not "an acquittal". See *Mancini* v. *D.P.P.* [1942] A.C. 1 at p. 13.

39. *Crown Law,* (London, 1762), at p. 255.

40. (1837) 8 C. & P. 35.

41. See references in [1935] A.C. 462 at p. 474.

was the proof of malice in murder. The effect of the decision is that malice will not be presumed against an accused unless and until he show the contrary, but that the Crown must prove malice and prove it beyond reasonable doubt. It may, though need not, be implied "where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked",[42] and if this is the evidence, if the accused shows, "by evidence or examination of the circumstances adduced by the Crown",[42] that there is a reasonable doubt as to whether the act was unintentional or provoked, the accused is entitled to the benefit of that doubt. The accused, then, cannot be said to have an evidential burden to negative malice, though he could be said to have a provisional or tactical burden.[43] An aspect of one of the problems in this inquiry is suggested here and that is what is involved in the concept of malice. In the statement of Foster's given above, malice would be negatived by proof of accident, necessity or infirmity. According to the House of Lords in *Woolmington,* malice is negatived by provocation. Now if malice is to be presumed until the contrary is shown by the accused, then all matter of defence would have to be proved, evidentially and persuasively, by the accused. But if malice is to be proved by the prosecution and the accused is to succeed if there be a reasonable doubt as to its existence, then an accused would be entitled to all defences that have the effect of denying malice if there were a doubt as to their existence (or non-existence). He would have no evidential burden as to these defences, though he might have a compelling provisional burden.

In *Mancini* v. *D.P.P.*[44] the House of Lords dealt with the defence of provocation as *Woolmington* had dealt with the defence of accident, and the defence of self-defence, it might be suggested, as *Woolmington* had dealt with provocation. *Mancini* also explained that these defences should only be left to a jury if there was evidence which might raise a reasonable doubt as to whether or not they existed. These two cases made it quite clear, however, that a doubt as to any defence other than insanity or one whose burden of proof was dealt with by statute is to go to the benefit of an accused. The problem remaining is as to the extent of the evidential burden for these defences.[45] Again, as the issue of malice must be left to the jury in any event, any suggested defence going to negative malice will seemingly be open to consideration by the jury even where there is no or insufficient evidence of the defence to discharge any evidential burden.[46]

THE MALAYSIAN CASES

It is proposed now, first, to note the Straits Settlements and, latterly,

42. *Ibid*., at p. 482.

43. See *supra* n. 36 and related text.

44. [1942] A.C. 1.

45. See *supra* n. 34.

46. See Williams, *op. cit*., at pp. 893-4.

Singapore[47] cases dealing with the burden on an accused of proving the exceptions under the Penal Code that preceded *Soh Cheow Hor*[48] and then to consider that case in the light of its precedents. Second, to note the Malayan[49] cases on the same subject that preceded *Looi Wooi Saik*[50] and then to consider that case similarly. There are four cases that preceded *Soh Cheow Hor* and nine that preceded *Looi Wooi Saik.* All 13 cases are *post-Woolmington,* the writer's researches not having revealed any pertinent cases of an earlier date. Thirdly, the cases dealing with the burden of proving facts especially within knowledge under section 106 will be noted.

(a) *Straits Settlements, Singapore Cases on Burden of Proving Exceptions.*

R. v. *Chhui Yi*[51] — Straits Settlements Court of Criminal Appeal,[52] 1936. This was a murder case in which the defences of alibi, provocation and private defence were raised by the accused. One of the grounds of appeal was as to the direction to the jury on the last two defences. *Woolmington* was urged as requiring no more of the accused than that he raise a doubt. It was held that *Woolmington* was incapable of having any effect on the interpretation of section 105 of the Evidence Ordinance as (i) it was not the law in Singapore, as it may have been in England *pre-Woolmington*, that there was an onus on an accused to prove a killing by him was non-malicious, and (ii) the onus on the prosecution to prove the prisoner's guilt was stated in *Woolmington* to be subject to any statutory exception, which was what section 105 was implied to be. Probing deeper, the Court went on to state that *Woolmington* could be no authority for saying that the onus is always on the Crown of negativing *ab initio* every one of the General Exceptions, for there can be no legal obligation on the Crown as part of its case to rebut in advance all possible grounds of defence. The Court continued:—

> 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.[53]

47. The Straits Settlements comprised, for our purpose, the Colonies of Singapore, Penang and Malacca. In 1946 the Straits Settlements were disbanded, Penang and Malacca becoming part of the Malayan Union, and from 1948 of the Federation of Malaya, while Singapore continued as a separate Colony, becoming a State in 1959.

48. (1960) 26 M.L.J. 254.

49. Malayan is used here to cover the Federated Malay States (1895-1942), the Malayan Union (1946-1948) and the Federation of Malaya (1948-1963).

50. (1962) 28 M.L.J. 337.

51. (1936) 5 M.L.J. 177.

52. Comprising Whitley Ag.C.J., Mills and Adrian Clark JJ.

53. (1936) 5 M.L.J. 177 at p. 179.

Lim Tang v. P.P.[54] — Straits Settlements Court of Criminal Appeal,[55] 1938. This was an appeal from Johore against a conviction for murder, provocation having been raised as a defence. It was held:

(i) that the law as regards the onus placed on the prosecution in cases of murder in Johore was the same as in England,

(ii) that section 106 places the onus of proving the statutory exceptions on the accused as it would be placing an impossible burden on the prosecution to prove a negative,

(iii) that it would not be incorrect to say that the degree of proof of an exception required of an accused is proof beyond reasonable doubt,

(iv) but that the accused may by his defence raise a doubt as to whether the burden lying on the prosecution has been completely discharged, for although an accused may fail to establish provocation he may in his attempt to establish it raise a doubt as to the existence of criminal intention, the onus of proving which is on the prosecution,

(v) that if such a doubt were raised the offence would be reduced from murder to culpable homicide not amounting to murder under the provocation exception to section 300 of the Penal Code (this holding would seem, to the writer, to be a strange compromise[56]),

(vi) that *Chhui Yi*[57] was distinguishable because the possible effect of evidence falling short of a full and complete discharge of the onus put on an accused was not there considered in relation to the onus which always lies on the prosecution to prove its case,

(vii) that this interpretation of section 106 had the authority of the then recent decision of the Full Bench of the Rangoon High Court in *Emperor* v. *U Damapala*,[58] a decision which found no inconsistency between section 105 of the Indian Evidence Act[59] and the decision in *Woolmington.*

54. (1938) 7 M.L.J. 41.

55. Comprising Terrell Ag.CJ. (S.S.) and Home J.

56. If there is a doubt as to the requisite criminal intention the prosecution has failed to prove its case. The result then should be either an acquittal or a conviction, where procedurally permissible, for any offence established by any lesser form of *mens rea* the prosecution has proved. A defence is not proved by raising a doubt as to the prosecution case, for then the prosecution fails to prove its case.

57. *Supra,* n. 51.

58. A.I.R. 1937 Rang. 83; 1936 I.L.R. 14 Rang. 666. This case is discussed *infra* at pp. 270 - 1.

59. Burma was at this time still part of British India.

Chia Chan Bah v. *R.*[60] — Straits Settlements Court of Criminal Appeal,[61] 1938. This was a case of murder, the accused pleading insanity. The accused was held obliged to prove that he was probably insane. This was by virtue of section 106 although the law did not require an exception such as insanity to be proved beyond a reasonable doubt, it being sufficient to tip the scale of probability in the accused's favour or to induce in the mind of the jury a feeling that he probably was insane though the jury may have doubts about it. There was a reference to *Sodeman* v. *R.*,[62] a Privy Council decision on appeal from Australia, in which it was stated that the burden on an accused setting up insanity was no higher than the burden on a plaintiff or defendant in civil proceedings. *Lim Tong* [63] was also cited.

R. v. *Tikan bin Sulaiman*[64] — Singapore Court of Criminal Appeal,[65] 1952. This was an appeal against a conviction for murder, misdirection being alleged as to the burden of proof. Private-defence, excess of private-defence and provocation had been raised in defence. *Woolmington*, which was relied on by the accused, was held not to affect the law as to burden of proof here as the case applies only to proof of intent in murder, as to which the Penal Code is quite clear. Further, under section 105 of the Evidence Ordinance, an accused is to establish any exceptions to his liability. The court also notes that there is only one standard of proof under the Evidence Ordinance — that defined in section 3 — irrespective of whether the burden is on the prosecution or the accused. The consequence of this, according to the Court, is that proof beyond reasonable doubt usually required of the Crown is in excess of the legal requirement and that, although the practice of so directing juries is to be approved as a matter of prudence, a verdict given in disregard of such a direction would not be vitiated.

It could not be said that these four cases make clear the standard of proof required of an accused relying on an exception under the Penal Code. It could perhaps he said however, that they would appear to require an accused to prove an exception at least to a probability. *Lim Tong* recognises that an accused may fail to establish an exception but that in the attempt may raise a doubt as to whether the prosecution has proved its case. The logical result of this, it is submitted, must be that the prosecution fails to prove its case, not that the accused establishes his exception. *Chia Chan Bah,* being an insanity case, might be said to add little to any general rule as to the standard of proof on an accused as insanity is notorious in being treated differently in this regard from other defences. Finally it may be noted that *Woolmington's* influence is expressly and effectively excluded in *Chhui Yi* and *Tikan* but that it is perceptible in *Lim Tong*.

60. (1938) 7 M.L.J. 147.

61. Comprising McElwaine C.J., Terrell and Home JJ.

62. [1936] 2 All E.R. 1138.

63. *Supra*, n. 54.

64. (1953) 19 M.L.J. 131.

65. Comprising Murray-Aynsley C.J., Mathew C.J. (F.M.) and Brown J.

Against this background we may consider *Soh Cheow Hor*,[66] a Singapore Court of Criminal Appeal[67] decision in 1960. This was an appeal against a conviction for murder on the grounds that the defences of sudden fight, provocation and excessive private defence had not been properly put to the jury. On the question of burden of proof, the Court, per Rose C.J., stated:—

> Whatever the position may have been 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 on the point must be in favour of the accused.[68]

No authority was cited for these propositions which would seem to be derived rather from the law in England, with reference particularly to the change affected by *Woolmington*, than from the earlier Straits Settlements and Singapore cases. In purporting to reduce the standard of proof on an accused in establishing an exception from proof to a probability to raising a doubt as to the exception, it is submitted that the Court is departing from tolerably clear authority and is doing violence to the terms of section 106 of the Singapore Evidence Ordinance.

(b) *Malayan Cases on Burden of Proving Exceptions.*

P.P v. *Alang Mat Nasir*;[69] *P.P.* v. *Chen Lip*[69] — Federated Malay States Court of Appeal,[70] 1938. These were two cases tried before the same judge in which the same question concerning the standard of proof of insanity arose. The question, which was referred for the opinion of the Court of Appeal, was whether, if the trial judge thought the accused were probably legally insane but nevertheless had a reasonable doubt as to whether they were, he should find insanity. The answer by a 2-1 majority was 'yes'. The three judgments given each consider the law on the question fully. Whitley A.C.J., starts by stating that here, as in England and the Dominions, it is for the prosecution to prove its case beyond reasonable doubt, but that if it does this, it is for the accused, if he wishes to excuse himself altogether or to reduce his offence to one of lesser gravity, to adduce evidence to this end. His Lordship then sets out sections 101 and 105 and concludes (rather surprisingly as to section 105) that these two sections effect a codification of the English law as to burden of proof in criminal trials. His Lordship then turns to the definition of "proved" in section 3 and notes that it allows a reasonable degree of elasticity. This his Lordship promptly illustrates by saying that, in the cases under reference, a prudent man, having a doubt as to

66. (I960) 26 M.L.J. 254.

67. Comprising Rose C.J., Wee Chong Jin and Ambrose JJ. (as the former then was).

68. *Ibid.,* at pp.. 254-5.

69. (1938) 7 M.L.J. 153.

70. Comprising Whitley Ag.C.J., Gordon-Smith and Cussen JJ.

whether the accused were insane, but thinking they probably were not, ought to act on the supposition that insanity existed and hence find insanity "proved" within sections 3 and 105. *Sodeman*[71] (which puts a civil onus on an accused alleging insanity) is cited in support of the proposition that the onus on an accused is not as heavy as that on the prosecution. His Lordship concludes by stating (i) that no distinction is to be drawn between the various exceptions in so far as questions of burden and degree of proof are concerned, and (ii) that *Woolmington* was consistent with the position here as to the prosecution's and accused's burdens of proof and affords a guide to the interpretation of section 105. The reasoning of Gordon-Smith J., the other majority judge, was similar to that of the Acting Chief Justice. He stated that it is sufficient for an accused to establish a reasonable doubt as to the existence of a fact of which the burden of proof is upon him. His Lordship also said, however, that it would be highly undesirable to try to lay down degrees of proof which should establish a reasonable doubt for, as stated in the definition of "proved", it depends on the circumstances of the particular case. *Woolmington* and *Sodeman* were cited again as consistent with this interpretation of the criminal burden of proof provisions, though, strangely, *Damapala*, the Rangoon case, was rejected as an authority on the interpretation of section 105.

As to these two judgments we may (i) note again the violence to language that is done by saying that a fact is proved to exist if it is believed probably not to exist but there is a doubt as to that non-existence, and (ii) question the use of both *Woolmington* and *Sodeman* as support for the answer that is being given to the question under reference, as the former expressly excludes insanity from its doctrine while the latter requires proof of insanity to at least a probability.

Cussen J. would have given a different answer to the question referred. His Lordship argued that under section 105 the accused was obliged to prove the existence of certain facts, that "proved", by virtue of section 3, meant, at least, a likelihood of a fact's existence or that the balance of probability is in favour of its existence, because that is what "probable" means to a prudent man. (The word "so" preceding probable is stated to mean "to such a degree" and to have no intensive effect). As to the actual degree of proof required of both sides in a criminal case, the prosecution, according to his Lordship, must create such a high degree of probability as to exclude any reasonable doubt as to the existence of the fact alleged, while the accused is only required to establish the probability, even the barest probability, that the alleged fact exists. Such a degree of probability, it is added, does not exclude a doubt as to the existence of the fact. The reason for the difference between the two degrees of proof, his Lordship continued, is because of the principle of prudence or wisdom contained in the familiar saying that it is better that many guilty men should go unpunished than that one innocent person should be wrongly convicted. His Lordship, along with the majority, would treat all exceptions under section 105 on the same footing, though, of course, requiring a higher standard than the majority. Finally, his

71. *Supra,* n. 62.

Lordship referred to *Sodeman,* in which he finds support; to *Woolmington* noting, as did the Court in *Chhui Yi,* that section 105 creates statutory exceptions such as, along with insanity, were excluded from the law expounded in that case; and to *Damapala*, from which he dissents. The references to *Sodeman* and *Woolmington* are more apt, it is submitted, here than in the majority judgments.

Mohamed Isa v. P.P.[72] — Federated Malay States Court of Appeal,[73] 1939. In the year following *Alang Mat Nasir*, the same Court, though completely differently constituted, held in this case that an accused was obliged to establish insanity on the balance of probabilities. *Sodeman* was cited in support and *Alang Mat Nasir* not mentioned.

Ng Lam v. P.P.[74] — F.M.S. Court of Appeal,[75] 1940. This was a murder case in which excessive private defence and provocation were raised in defence. A direction equating the burden on the accused to prove the existence of circumstances bringing the case within any exception with the burden on a plaintiff in a civil suit, that is, to a balance of probability, was upheld. The Court warned that *Woolmington* must not be pushed too far, that it did not mean there was no onus on an accused to prove a statutory exception once an intentional killing had been proved. That part of the judgment of the Straits Settlements Court of Criminal Appeal in *Chhui Yi* that 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, was cited with approval.

Raman v. P.P. (1949);[76] *Mohamed Yatim* v. P.P. (1950) ;[77] *Mah Kok Cheong* v. *R.* (1953).[78] These three cases may be taken together. They are decisions by Spenser Wilkinson J. sitting alone in the exercise of the High Court's appellate criminal jurisdiction. *Raman* was an appeal against a conviction for defamation, an offence defined in section 499 of the Penal Code. It was held that it was for the accused to prove the existence of circumstances bringing his case within an exception to that section, but that the burden was not a heavy one and that the accused was entitled to bring himself within the exceptions by reference to facts proved by the prosecution. *Mohamed Yatim* was a case of attempted cheating in which it was stated on appeal that an explanation by an accused raising a doubt as to the truth of the prosecution's case was sufficient to entitle him to an acquittal, unless the law cast a burden of proof on the accused in which case he would be obliged to establish a balance of probability in his favour. For the latter part of this proposition *Ng Lam*[79]

72. (1939) 8 M.L.J. 160.

73. Comprising Roger Hall C.J., McElwaine C.J. (S.S.) and Murray-Aynsley J.

74. (1940) 9 M.L.J. 74.

75. Comprising Poyser C.J., McElwaine C.J. (S.S.) and Terrell J.

76. [1948-9] M.L.J. Supp. 146.

77. (1950) 16 M.L.J. 57.

78. (1953) 19 M.L.J. 47.

79. *Supra*, n. 74.

was cited as support. Finally, in *Mah Kok Cheong*, a forgery case, Spenser Wilkinson J. distinguished three classes of criminal cases from the point of view of the burden of proof on the accused. The first was the ordinary case where if the defence raised a reasonable doubt as to the truth of the prosecution's case or as to the accused's guilt there should be an acquittal, and if no such doubt was raised, a conviction; the second was where the law cast a burden of proof on the accused so that the accused had to establish a probability in his favour, *e.g.,* exceptions under the Penal Code and cases like *R.* v. *Carr-Briant*[79a] where the court will presume something against the accused unless the contrary be proved; and a special third class — cases of theft or receiving where the only evidence against the accused was the possession of property recently stolen. These cases are stated to be in a class apart because special significance is given to the evidence of possession of recently stolen goods. His Lordship states that these cases do not fall into either of the first two classes. It is submitted that, from the point of view of the *persuasive* burden, these cases may be placed in the first class and that their specialness is in relation to the *evidential* burden, to discharge which a presumption is made available to the prosecution.

Saminathan & Ors. v. *P.P.*[80] — 1955. These were appeals heard by Buhagiar J. against convictions under the Customs Ordinance, 1952. In dealing with the appeals his Lordship found it necessary to make some general observations on the law as to burden of proof in criminal cases. These observations may be summarised as follows:—

1. The rule requiring more stringent proof in criminal than in civil cases is a rule of prudence rather than of law. The background to this stringency is the presumption of innocence. Given the definition of 'proved' in the Evidence Ordinance, 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.

2. To entitle the accused to an acquittal in the ordinary criminal case "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 exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case."[81] Interpolating for a moment, it does not seem that the expression "facts on which the defence rely" is meant to refer to facts in justification or excuse, but rather to facts inconsistent with the prosecution's case. There does then appear to be an inconsistency between requiring only the raising of a doubt as to the prosecution's case and yet also requiring proof to a probability by the defence to achieve this.

79a. [1943] K.B. 607; [1943] 2 All E.R. 15G.
80. (1955) 21 M.L.J. 121.
81. *Ibid.*, at p. 124.

3. Statutory presumptions, *i.e.,* a provision as in section 105 that some matter will be presumed "unless the contrary is proved", shift the persuasive and not the evidential burden to the accused. This has been settled by the more recent cases in England and has always been so here by virtue of the definition of "proved". Whatever one's view is as to the policy of such provisions (and his Lordship suggests that they are really nothing more than extensions of the provisions of section 106 whereby the burden of proving a fact especially within the knowledge of any person is placed upon that person), there is also some policy in giving words a consistent meaning.

P.P. v. *Abdul Manap*[82] — 1956. This was a charge of voluntarily causing grievous hurt to which private defence was pleaded. Briggs J. at the trial ruled 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 lay on the accused, but that he could discharge this burden by relying on evidence given by the prosecution witnesses, and that the burden would be discharged if from that evidence it appeared more probable than not that the accused was acting in the exercise of his right of private defence.

Baharom v. *P.P.*[83] — Federation of Malaya Court of Appeal,[84] 1960. This case affirmed that an accused was obliged to establish insanity on the balance of probabilities. *Sodeman* and *Carr-Briant* were cited in support.

In eight of the nine Malayan cases noted above, accused were held obliged to prove exceptions under the Penal Code to the degree of probability. Only the majority in *Alang Mat Nasir* took a different view, and they would accept insanity as proved if there is some reasonable doubt about the matter, that is it would be proved even if an accused were found to be probably sane so long as there was a doubt about that finding. The view of the majority in *Alang Mat Nasir* is also remarkable in that it is the only case in the jurisdictions under consideration that has allowed proof to less than a probability of insanity. On this point *Alang Mat Nasir* must be taken to have been overruled by *Mohamed Isa* and *Baharom.* It may be noted also that, as with the Straits Settlements and Singapore cases, *Woolmington* is given a mixed reception in the Malayan cases so far considered. Cussen J. in *Alang Mat Nasir* and the Court in *Ng Lam* would not allow it to affect the interpretation of section 105, while the majority in *Alang Mat Nasir* are happy to report consistency of the law here with its principles.

Against this background, *Looi Wooi Saik*[85] was decided by the Federation of Malaya Court of Appeal[86] in 1962. This was a murder case in which the defence was provocation. The trial judge directed the jury

82. (1956) 22 M.L.J. 214.

83. (1960) 26 M.L.J. 249.

84. Comprising Thomson C.J. (as he then was), Hill and Good JJ.

85. (1962) 28 M.L.J. 337.

86. Comprising Thomson C.J., Hill and Good JJ.

that, to succeed with his defence, the accused was obliged to satisfy them on the balance of probabilities that there was provocation. The Court of Appeal, *per* Thomson C.J. (as he then was), held this to be a misdirection. The Court indicates that it takes a denial of all possible matter of defence to be involved in a charge of murder by reference to Illustration (a) to section 152 of the Criminal Procedure Code.[87] After noting the position in England since *Woolmington* as to burden of proof in criminal cases and the possibility that, because *Woolmington* effected a change in the law, the law embodied in Stephen's Evidence Act in 1872 may differ from the post-*Woolmington* English law, the Court proceeds to examine the relevant legislative provisions. As to these it concludes as follows:—

> 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 section 101; on the other hand there is the presumption of the non-existence of provocation which arises from section 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 the offence as proved against him.[88]

The proper direction to a jury is accordingly stated to be that for the defence of provocation to succeed there must be evidence capable of making it out, either from the prosecution or the defence, to support it, but that if there is such evidence "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." [89] The Court then quotes from *Woolmington* and notes with satisfaction that it is not compelled to reduce in this country the fineness of the gold in the golden thread.[90] The Court notes that its reasoning is similar to that which led the Rangoon Court to the same conclusion in *Damapala.* The Court also refers to *Soh Cheow Hor* and quotes the passage from that case that is reproduced above.[91]

87. F.M.S. Laws, 1935, cap. 6. The Illustration reads:— "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."

88. (1962) 28 M.L.J. 337 at p. 340,

89. *Ibid.*

90. An allusion to the statement in the *Woolmington* judgment that "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 . . . ." [1935] A.C. 462 at p. 481.

91. *Supra* at p. 262.

The Court expressly denies any necessary application of what it says in this case to the defence of insanity. Why this should be so if the provisions of the Evidence Ordinance rather than the English law are to be applied, is not clear.

There are two main objections that can be raised against *Looi Wooi Saik.* The first, as already suggested, is that it constitutes a clear departure from the pre-existing case law in the jurisdiction requiring proof of exceptions to a probability. The only case that supports *Looi Wooi Saik's* conclusions is *Alang Mat Nasir,* but that, ironically, was an insanity case. It is true that two of the remaining three Court of Appeal decisions were on insanity, but the other *(Ng Lam)*, like *Looi Wooi Saik*, involved provocation. And there are (or were) five single justice decisions inconsistent with *Looi Wooi Saik.* The second objection goes to the reasoning in *Looi Wooi Saik.* That reasoning proceeds on the premise that an allegation of crime involves an assertion of the existence of the ingredients of the crime, plus a denial of any defence. When the presumption of innocence under section 101 is applied to this premise, the result is that the accused is not guilty of the crime alleged against him if there is a reasonable doubt, either as to the ingredients of the crime or as to the existence of any defence, and any presumption under section 105 cannot affect this position. In fact, section 105 becomes superfluous. It is not even treated as involving an evidential burden, because the distinction between a persuasive and an evidential burden is not really made in the judgment. The section is used as an alternate way of expressing the burden on the prosecution. This reasoning, it is submitted, has two weaknesses. As a matter of common usage, an allegation of crime normally involves no more than an assertion of the existence of the ingredients of the crime,[92] it being a matter of practicality that the prosecution should not have to negative in advance all possible defences. Also, section 105, when read with the definition of "proved", clearly requires persuasion to at least a probability of matter of defence, and the prudent man is bound by this. As already suggested, much of the difficulty associated with the question we are considering seems to arise from a failure to distinguish between defences which simply put in issue the existence of the ingredients of the crime charged and defences which are by way of confession and avoidance, or which purport to justify or excuse. To give simple examples, the defence of accident would fall within the former category and the defence of private defence within the latter. All the exceptions covered by section 105 can be divided in this way with the result that proof of those falling into the former category becomes no more than the converse function of proof by the prosecution of its case. This leaves those falling into the latter category to be "proved" according to the definition of that word as previously understood in relation to section 105. This would avoid the "conflict of presumptions" with which the Court took itself to be faced in *Looi Wooi Saik.*

92. Illustration (a) to s. 152 of the C.P.C. does not purport to deal with any question as to the burden of proof on a charge of murder. If it did, in the way implied, it would be in clear conflict with s. 105.

(c) *Cases on Burden of Proving Facts Especially within Knowledge (Section 106)*

The Privy Council, in *Attygalle* v. *R.*,[93] held that the effect of section 106 of the Ceylon Evidence Ordinance[94] was not that "the burden is cast upon an accused person of proving that no crime has been committed".[95] The accused in this case were thus not required to disprove a charge of illegal operation where the patient, the only other occupant of the room used, was unconscious. This decision was given soon after *Woolmington,* which was cited to the Board in argument. *Attygalle* was applied by the Privy Council in *Mary Ng* v. *R.*,[96] an appeal from Singapore. This was a cheating case, one of the issues being as to proof of deceit. It was held that the section did not place a burden on the appellant to prove there had been no deceit, but that the burden was on the prosecution to prove affirmatively that there had been.

These two decisions clearly limit the scope of section 106 in criminal cases. There have, however, been decisions in Malaya giving effect to the section in other circumstances. In *Lim Ah Tong* v. *P.P.*,[97] the Court of Appeal of the Federation of Malaya[98] held that, on a charge of possession of a firearm contrary to the Emergency Regulations, 1948, it is for the accused to show that he had a licence for the firearm. In *Khoo Teck Yam* v. *P.P.*,[99] Buhagiar J. held, on a charge of permitting the use of a vehicle without the prescribed insurance, that the section placed the burden of proving the existence of the necessary insurance policy on the accused. In both these cases the prosecution was required to give *prima facie* evidence of the charge before the burden under section 106 would fall on the accused.[1] In *P.P.* v. *Lim Kwai Thean,*[2] Good J., on a charge under the Emergency Regulations of failing to produce an identity card on demand to a police officer, held that by virtue of section 106 the onus of proving that he was not a person required under the Regulations to be registered lay on the accused. These three cases resemble Illustration (b) to section 106 (accused to prove he had a railway ticket). They would seem not to be inconsistent with the Privy Council decisions in *Attygalle*

93. [1936] A.C. 338.

94. No. 14 of 1895.

95. [1936] A.C. at p. 341. *Attygalle* was followed in *Seneviratne* v. *R.* [1936] 3 All E.R. 36, another Privy Council appeal from Ceylon. Denning, *op. cit.*, at pp. 382-3, has suggested that the Privy Council in *Attygalle* treated the burden under s. 106 as provisional only, and not legal (persuasive). Rankin, *op. cit.*, at pp. 136-7, contests this saying that the burdens under ss. 101-111 must be discharged at the peril of the party bearing them failing, and that s. 105, with a burden and a supporting presumption, is too plain to be misconstrued.

96. [1958] A.C. 173; (1958) 24 M.L.J. 108.

97. [1948-9] M.L.J. Supp. 158.

98. Comprising Spenser Wilkinson, Russell and Briggs JJ.

99. (1955) 21 M.L.J. 112.

1. This would not seem to be necessary in England as a result of the decision in *R.* v. *Oliver* [1944] K.B. 68. See Glanville Williams, *op. cit.*, at pp. 901-905 for a discussion of this case and the topic now under consideration.

2. (1959) 25 M.L.J. 179.

and *Mary Ng.* The three cases clearly put a persuasive burden on the accused to the degree, it would seem, at least of probability.

One final case under section 106 illustrates the confusion between doubt and probability similar to that already seen in *Alang Mat Nasir.* This was *Thurairajah* v. *P.P.*,[3] decided by the Straits Settlements Court of Criminal Appeal[4] in 1940. It was an appeal against a Magistrate's conviction of a public servant for receiving a gratification contrary to section 165 of the Penal Code. The issue was whether the accused had rebutted the presumption under section 107 of the Evidence Ordinance,[5] from the proved receipt of the money, that the money was received as a gratification. The Magistrate found the probabilities as to this equiponderant and held that the accused had not discharged the burden upon him. The conviction was quashed on the basis that, as the accused had raised a doubt as to whether his story was not correct, he had tilted the scale of probability in his favour. Thus a doubt as to the non-existence of a fact (possible though improbable) is equated with the probability of its existence.

DAMAPALA AND THE INDIAN DECISIONS

Damapala,[6] decided by a Full Bench of the Rangoon High Court soon after *Woolmington,* has often been cited by the Malaysian Courts, and the interpretation of section 105 it adopts has been sometimes accepted, sometimes rejected. The Court in *Looi Wooi Saik* noted that its reasoning was similar to that in *Damapala. Damapala* was a case of murder, the accused alleging private defence. Questions as to the interpretation of section 105 and the consistency of *Woolmington* with that section were referred to the Full Bench. Roberts C.J. (with whom Leach J. agreed) stated as his opinion that in British India, as in England, where there was "a reasonable doubt as to the guilt of an accused" he was entitled to an acquittal, that it was not for the prosecution to negative all possible defences for section 105 required the accused to introduce evidence of defences he wished to raise where there was nothing to support that defence in the evidence adduced by the prosecution, but that if the evidence introduced by the accused "established a reasonable doubt in the case for the prosecution" the accused was entitled to an acquittal. His Lordship concluded by stating that *Woolmington* was in no way inconsistent with the law in British India and that, indeed, it formed a valuable guide to the correct interpretation of section 105. Similarly, Dunkley J. considered that the burden under section 105 involved no more than a duty to introduce evidence (if not already given by the prosecution witnesses) such as will satisfy the Court that the circumstances grounding the exception may have existed and that this burden never shifts the major burden on the prosecution under section 101 "of establishing on the whole case the guilt of the accused beyond reasonable doubt", or "to establish the charge

3. (1940) 9 M.L.J. 58.

4. Comprising McElwaine C.J. (S.S.), Poyser C.J. (F.M.S.) and Gordon-Smith Ag.J.

5. Of Johore (from whence the appeal), equivalent to s. 106 of the Malayan Ordinance.

6. A.I.R. 1937 Rang. 83.

against the accused beyond reasonable doubt". Dunkley J. would go so far with *Woolmington* as to treat it as a binding authority on every criminal Court in British India. It is clear that both the above opinions treat the burden under section 105 as no more than an evidential burden, requiring no more than evidence sufficient to raise a doubt.[7] No distinction is drawn, however, between a doubt as to the ingredients of the prosecution's case and a doubt as to defences in confession and avoidance. Indeed, it would seem from the two sets of words quoted from both opinions that the two things just distinguished are treated there as one and the same.

It will be recalled that the Court in *Looi Wooi Saik* considered its reasoning similar to that in *Damapala.* Although the result in the two cases is much the same, *Damapala* reaches it by treating section 105 as placing an evidential burden on an accused dischargeable with evidence that will establish a doubt, while *Looi Wooi Saik* relies on a conflict of presumptions theory that results in an accused having only to persuade that there is a doubt to rebut the light presumption on him under section 105. Section 105 is thus being treated somewhat differently in the two cases, though with generally the same results.

The *Woolmington — Damapala* position on burden of proof in criminal cases has been adopted in some Indian jurisdictions, while others have adhered to a less liberal but more natural interpretation of section 105 and required proof at least to a probability. In still others it would be difficult to characterise the position as at all clear. To canvass the various jurisdictions briefly, in Allahabad, the Full High Court Bench in *Parbhoo* v. *Emperor*,[8] where the exception in question was private defence, decided by a 4-3 majority to take the *Woolmington — Damapala* position and allow proof of the exception if a doubt was raised as to its existence.[9] This position appears also to have been taken in Pepsu,[10] Punjab,[11] Oudh,[12] and Himachal Pradesh,[13] and, perhaps, Sind,[14] and Bhopal.[15] Bombay, on

7. Dunkley J. states that the burden of introducing evidence "may shift constantly" (at p. 87), which indicates a provisional burden rather than a true evidential burden.
8. A.I.R. 1941 All. 402.
9. But note also in Allahabad, *Saraswati Prasad* A.I.R. 1949 All. 412 where an accused charged with criminal breach of trust was required to establish *prima facie* his "special" defence that he had been robbed of the property entrusted.
10. See *Sarwan Singh* A.I.R. 1954 Pepsu 160 (provocation, decision by 2-1 majority, *Damapala* followed).
11. See *Balbir Singh* A.I.R. 1959 Punj. 332 (private defence, *Woolmington* adopted).
12. See *Gopi Krishna,* A.I.R. 1943 Oudh 272 (private defence, *Damapala* followed). But see also *Bindra* 1934 Oudh 485 (identity, s. 105 shifting burden to accused).
13. See *Gopal* A.I.R. 1950 Him. Pra. 18 (private defence, introduce evidence to prove a *prima facie* case, *Woolmington* and *Damapala* cited in support).
14. See *Waroo* A.I.R. 1948 Sind 40 (private defence, *Woolmington* and *Damapala* followed). But see also *AH Muhammad* A.I.R. 1936 Sind 31 (provocation, burden on accused and must discharge it satisfactorily), and *Shewaram* A.I.R. 1939 Sind 209 *(obiter* on s. 105 that if the accused fails to prove an exception he may still be acquitted if there results a doubt as to any necessary element of the offence charged).
15. See *Choteylal* A.I.R. 1956 Bho. 57 (insanity, *Damapala* followed).

the other hand, would seem to require proof by an accused to a probability at least. In *Government of Bombay* v. *Sakur,*[16] a decision of a Special Bench of the Bombay High Court, again with private defence as the exception in question, it was held that, in accordance with the definition of "proved" in section 3, the exception had been made out if the existence of circumstances giving rise to a right of private defence were so probable that a prudent man should for the purposes of the case act on the supposition the right existed. A reasonable doubt as to the existence of the circumstances was held insufficient. The minority in *Parbhoo* were followed and *Damapala* rejected as a way of interpreting section 105.[17] This position or its equivalent appears also to have been reached in Calcutta[18] (it is submitted), Madras,[19] Saurashtra,[20] Orissa,[21] and Jammu

16. A.I.R. 1947 Bom. 3S.

17. Also in Bombay see *Harprasad Ghashiram Gupta* A.I.R. 1952 Bom. 184 (denial of false declaration, *Sakur* reasoning preferred to *Woolmington — Damapala),* and *Jairam Chandrabhan* A.I.R. 1959 Bom. 463 (provocation, accused has to prove exceptions and his uncorroborated word will often not be enough).

18. The leading Calcutta case seems to be *Yusuf* A.I.R. 1954 Cal. 258, a private defence plea, where Milter and Sen JJ. both took the view that "proved" had the same meaning in s. 105 as in any other burden of proof provision (including s. 101), and that meaning was as given in s. 3. There was disagreement, however, as to whether an earlier Calcutta case, *Ashiruddin Ahmed* A.I.R. 1949 Cal. 182, which required less "proof" by an accused than by the prosecution, was binding on them. This question was referred to a third judge, K.C. Das Gupta J., who, apparently misunderstanding the reference (and a part of Sen J.'s thorough and convincing judgment), held that an accused need only raise a doubt. *Ashiruddin Ahmed* and *Chang Chung Ching* A.I.R. 1945 Cal. 363, relied on by Das Gupta J. for his conclusion, appear to have been misapplied by him. The view of the majority in *Yusuf* is similar to that taken in *Mahommed Yunus* A.I.R. 1923 Cal. 517 (private defence, "proved" not affected by incidence of burden, which is discharged if evidence is believed), *Chang Chung Ching, supra,* (proof of lawful possession by standards of prudent man, *Carr-Briant* referred to in support), *Dhirendra Nath* A.I.R. 1952 Cal. 621 (private defence, *prima facie* and probable case) and *Nishikanta Ghosh* A.I.R. 1953 Cal. 401 (exculpating provisos to adulteration of food provisions to be proved by accused). *Wauchope* A.I.R. 1933 Cal. 800, which is often cited against the above view, was a criminal breach of trust case with none of the exceptions involved and the holding was that the prosecution had to prove its case beyond a reasonable doubt.

19. See *Kakumara Anjaneyalu* A.I.R. 1917 Mad. 600 (exceptions to defamation section (s. 499) must be affirmatively established), *Gampala Subbigadu* A.I.R. 1941 Mad. 280 (private defence, accused under s. 105 to prove defence and in absence of proof not possible to presume truth of defence).

20. See *Jadeja Danubha Vanubha* A.I.R. 1952 Sau. 3 (provocation, "proved" has one meaning though prudent man might require a lower degree of probability under s. 105), *Bhima Devraj* A.I.R. 1956 Sau. 77 (private defence, burden under s. 105 not discharged by raising a doubt).

21. See *Sudhu Kumbhar* A.I.R. 1951 Orissa 354 (provocation, no scope for benefit of doubt as to the existence of s. 105 circumstances), *Tustipada Mandal* A.I.R. 1951 Orissa 284 (mistake, primarily of law; court must be satisfied of requisite circumstances). But see also *Chaitan Charan Das* v. *Raghunath Singh* A.I.R. 1959 Orissa 141 (exceptions to defamation, sufficient if may possibly apply).

and Kashmir.[22] In Nagpur,[23] Patna,[24] and Lahore,[25] the position seems unclear.

It will be seen that there is a variety of judicial attitudes among the Indian States as to the nature and extent of the burden on an accused under section 105. It will accordingly be obvious that it is difficult to arrange these various attitudes in two groups as has been attempted above. The attempt is, however, given justification by the fact that the cases evidence a split between the *Woolmington — Damapala — Parbhoo* (majority) position *(i.e.*, a reasonable doubt as to an exception is sufficient and section 105 provides the requirement for the necessary evidence), and the *Sakur — Parbhoo* (minority) position *(i.e.*, section 105 requires proof of an exception at least to a probability). It is not possible to say from the authorities relied on above which side has the better of it, although the better-known jurisdictions appear to take the latter position. One thing is tolerably clear though, and that is that it cannot be accepted, as was stated in *Looi Wooi Saik,*[26] that *Damapala* "has been generally followed in India."

The Supreme Court of India has recently indicated that it might take a view of section 105 not in accordance with *Damapala's* should the point

22. See *Hakim Singh* A.I.R. 1958 J. & K. 23 (provocation, case to be stated with clarity and proved).

23. In *Surajmal* v. *Ramnath* A.I.R. 1928 Nag. 58, the exceptions to defamation were held to be statutorily presumed not to exist until the accused proved them, while in *Baswantrao Bajirao* A.I.R. 1949 Nag. 66 it was held that insanity had to be strictly proved, there being no entitlement to the benefit of a doubt. However, in *Holia Budhoa* A.I.R. 1949 Nag. 163, a provocation case, it was held that if the accused's explanation was reasonable and consistent with innocence although not establishing the defence beyond reasonable doubt, he was to have the benefit of the defence. *Woolmington* and *Damapala,* rather surprisingly, were cited in support of this holding.

24. In *Narayan Raut* A.I.R. 1948 Pat. 294, on a plea of private defence, it was held, purportedly adopting *Carr-Briant,* that a *prima facie* case or a probability was sufficient. However, in *Kamla Singh* A.I.R. 1955 Pat. 209, an insanity case, it was said, with apparent internal inconsistency, that if in trying to rebut the presumption of sanity the accused raised a doubt in the prosecution's case he was entitled to an acquittal, but then that the accused was also entitled to an acquittal if there was a reasonable doubt whether or not he was entitled to the exception.

25. Up until 1949 at least, *Woolmington* appeared to have been accepted in Lahore, but by medium of accident cases where, because the defence is generally in denial of a necessary element in the prosecution's case, the result would be the same under the Evidence Act burden of proof provisions as under *Woolmington* — see *Mohammad Saddiq* A.I.R. 1949 Lah. 85, *Daulat Ram* A.I.R. 1947 Lah. 244 and *Pir Hasan Din* A.I.R. 1943 Lah. 56. There has been some variation on private defence. In *Bhag Singh* A.I.R. 1940 Lah. 54 it was held that s. 105 was a statutory exception as excluded from *Woolmington,* but that even if the defence was rejected the prosecution still had to prove its case. In *Gulab Amor Singh* A.I.R. 1941 Lah. 333 it was held that a doubt as to the defence was sufficient. And in *Muzaffar Hussain* A.I.R. 1944 Lah. 97 there was a possible compromise with the requirement that the defence be established or *prima fade* made out. Finally, as to the general exception of infancy it was said in *Abdul Sattar* A.I.R. 1949 Lah. 51 that the accused had to establish by evidence and prove lack of maturity.

26. (1962) 28 M.L.J. 337 at p. 340.

be in issue. In *Narain Singh* v. *State of Punjab,*[27] a court of three,[28] in dealing with the question whether an explanatory statement made by an accused during a trial could be used to help establish the prosecution's case, stated:—

> Where a person accused of committing an offence sets up at his trial a plea that he is protected by one of the exceptions, general or special, in the Indian Penal Code, or any other law defining the offence the burden of proving the exception undoubtedly lies upon him.[29]

The Court continued that this burden need only be undertaken by the accused if the prosecution case established that in the absence of such a plea he would be guilty of the offence charged. The Supreme Court has also held, in a criminal breach of trust case in which section 106 was raised, that the prosecution does not have to eliminate all possible defences or circumstances which may exonerate an accused for if they are within his knowledge he has to prove them, although the prosecution must first establish a *prima facie* case.[30]

STATUTORY REVERSALS OF ONUS ON SPECIFIC MATTERS

Section 105 of the Evidence Ordinance may be treated as a general reversal of onus provision in so far as it purports to reverse in relation to criminal defences generally the onus normally on the prosecution. An accused is also required under some kinds of penal legislation to prove particular matters to avoid their contrary being incriminatingly presumed against him. A brief examination of the judicial interpretation of some of these specific reversal of onus provisions in Malaysia and in England may serve to illuminate the problem of interpreting section 105.

(a) *In Malaysia*

Section 131 (2) of the Malayan Customs Ordinance, 1952, provides that uncustomed goods shall be deemed to be uncustomed to the knowledge of the defendant "unless the contrary be proved by such defendant". In prosecutions for knowingly harbouring uncustomed goods the Malayan Courts have generally held that an accused has proved lack of knowledge that goods were uncustomed if he has raised a reasonable doubt as to his having had that knowledge. These holdings follow the English common law decisions as to the effect of an explanation by a person accused of larceny or receiving on evidence only of possession of recently stolen property. Thus in *Lok Chak Wan* v. P.P.[31] it was stated, in the terminology of *R.* v. *Schama; R.* v. *Abramovitch,*[32] that if an explanation is given

27. [1963] S.C.D. 297.

28. Imam, Shah (who delivered the judgment) and Amdholkar JJ.

29. [1963] S.C.D. at p. 303.

30. *Krishnan Kumar* A.I.R. 1959 S.C. 1390.

31. (1939) 8 M.L.J. 84.

32. (1914) 84 L.J.K.B. 396.

by a defendant consistent with innocence the Court must consider whether it might reasonably be true although not convinced of its truth. Also in *Wang Kai Heng* v. P.P.[33] it was held, following *R.* v. *Aves,*[34] that if the defendant's explanation leaves the Court in doubt as to his guilty knowledge the case against him has not been proved and he is entitled to an acquittal. In *Kee Kim Chooi* v. P.P.,[35] following particularly *Lok Chak Wan,* though citing *Wang Kia Heng* and *Aves* in support, the criterion was stated to be whether the story told by the defendants might reasonably be true. Reference was also made to the English Court of Criminal Appeal decision in *R.* v. *Cohen,*[36] also a case of harbouring uncustomed goods and with a reversal of onus provision similar to section 131(2) of the Malayan Customs Ordinance applicable. In that case, Lord Goddard C.J. drew an analogy between these cases and those of receiving inferred from the possession of recently stolen goods and suggested that in both sorts of cases if the accused's explanation left the court in doubt whether he had guilty knowledge he was entitled to an acquittal. It should, however, be noted that, unlike the customs cases, there is no express statutory provision requiring proof of lack of guilty knowledge operative in the possession of recently stolen property cases. By equating the "proof" required of a defendant in the customs cases with that required of an accused in cases where larceny or receiving is alleged on the basis of possession of recently stolen property, the reversal of onus provision in the former cases is rendered nugatory and superfluous. The decisions in the above three Malayan cases were approved by the Court of Appeal in *Looi Teik Lan* v. P.P.[37] This case involved the interpretation of section 53 of the Excise Enactment (cap. 133) which was stated to be similar as to the degree of proof required of a defendant to section 131(2) of the Customs Ordinance. It was held, following *Kee Kim Chooi, Cohen* and *Aves,* that it was sufficient for the defendant to raise a doubt as to whether duty had been paid. By contrast there have been two recent single justice decisions,[38] one before and one after *Looi Teik Lan,* in which it has been held that proof on the balance of probabilities is required of a defendant under section 131(2) of the Customs Ordinance. Finally we may note Buhagiar J.'s view as to the interpretation, specifically, of section 131 (2). In accordance with the analysis in *Saminathan,*[39] his Lordship would require an accused "to prove he did not know the goods were uncustomed or adduce such evidence as to make the existence of the fact that the accused had no knowledge the goods were uncustomed so probable that a prudent man ought under the circumstances of the case to act on the supposition that the fact exists".[40] This would seem to

33. (1951) 17 M.L.J. 109.

34. [1950] 2 All E.R. 330.

35. (1952) 18 M.L.J. 180.

36. [1951] 1 K.B. 505; [1951] 1 All E.R. 203.

37. (1961) 27 M.L.J. 12.

38. *P.P.* v. *Fatimah* (1960) 26 M.L.J. 109 (Hepworth J.) ; *Lim Kim Chai* v. *P.P.* (1963) 29 M.L.J. 26 (Adams J.).

39. (1955) 21 M.L.J. 121. See *supra* at pp. 265 - 6.

40. *Chee Shih Kwang* v. *P.P.* (1955) 21 M.L.J. 126 at p. 127.

require an accused to prove he had no guilty knowledge at least to a probability. However, Buhagiar J. twice[41] held the standard of proof laid down in *R.* v. *Cohen* to be sufficient under section 131(2), stating expressly that if the accused could by his explanation raise a doubt in the mind of a prudent man that it might be true, he had discharged his burden. It should, perhaps, be noted that Lord Goddard's statement in *Cohen* that if the accused's explanation leaves the Court "in doubt whether he knew the goods were uncustomed"[42] could be interpreted as requiring the accused to prove to a probability, though not beyond doubt, that he did not know the goods were uncustomed.[43] This interpretation would better accord with Buhagiar J.'s view as to the minimum requirement for proof laid down by the Evidence Ordinance. As seen above, this interpretation has not prevailed in the other Malayan cases[44] that have adopted *Cohen.*

Section 11 of the Malayan Common Gaming Houses Ordinance, 1953, provides that a person in possession of any of a variety of materials relating to lotteries "shall be presumed until the contrary is proved to be assisting in a public lottery then in progress". It would seem that an accused can prove the contrary by raising a doubt as to any of the three matters presumed *(i.e.*, assisting, a public lottery in progress). This is as a result of the Court of Appeal's decision in *P.P.* v. *Neoh Boon Cheong.*[45] There Ong J., speaking on this point for the rest of the Court,[46] stated that the presumption of assisting arising from possession of a memorandum of stakes "may be rebutted by any explanation casting doubt upon the fact of the memorandum being related to any lottery at all, or to any lottery then in progress".[47] In an earlier case, *Chan Pean Leon* v. P.P.,[48] Thomson J. would seem to have been placing a heavier burden on an accused by requiring him to "give some innocent explanation which is believed or ... point to something in the material found which in itself is sufficient to rebut the presumption . . . ."[49] In a still earlier case, *P.P.* v. *Lee Ee Teong,*[50] Thomson J. may have been suggesting an evidential burden only, and so a position closer to *Neoh Boon Cheong,* when he stated that when the presumption arises "it is for the accused to produce, if he can, evidence in rebuttal."[51]

41. *Lee Guek Hon* v. *P.P.* (1953) 19 M.L.J. 17, and in *Saminathan* itself.

42. [1951] 1 All E.R. at p. 206.

43. But see Glanville Williams, *op. cit.*, at p. 901 n. 3 and at p. 903 n. 15.

44. *Kee Kim Chooi, supra* n. 35, and *Looi Teck Lan, supra* n. 37.

45. (1960) 26 M.L.J. 31.

46. Good and Barakbah JJ. (as the latter then was).

47. (1960) 26 M.L.J. at p. 34.

48. (1956) 22 M.L.J. 237.

49. *Ibid.*, at p. 238.

50. (1953) 19 M.L.J. 244.

51. *Ibid.*, at p. 246.

Finally, under section 14 of the Malayan Prevention of Corruption Ordinance, 1961, a gratuity given and received in certain circumstances is deemed to be given and received corruptly "unless the contrary is proved." The burden under this section has recently been stated by Hepworth J. in *P.P.* v. *Gurbachan Singh*[52] to be "no higher than that on a party to a civil action to prove his case on the balance of probabilities".[53] This is stated to be the *Carr-Briant* and not the *Saminathan* burden. It is hard to know what his Lordship took the *Saminathan* burden to be, for strictly it is that degree of probability of a fact's existence that a prudent man should require in the circumstances for acting on the supposition that the fact exists. This could be above a balance of probability, though it is difficult to see how it could be below. However, for the purposes of the *Saminathan* decision Buhagiar J. does appear to have stretched the criterion he annunciated to cover raising a doubt in a prudent man's mind that something to be proved might be true, and perhaps this is what Hepworth J. meant by the "*Saminathan* burden".

It would seem from the interpretation of the above three provisions that there is no more uniformity of views as to the extent of a burden reversed on specific matters than there was as to the extent of the burden reversed more generally by section 105. It is perhaps noticeable, though, that the shift to a lighter burden under section 105 is not being paralleled in the interpretation of specific reversals of onus.

(b) *In England*

After some fluctuation in the matter, the presently prevailing judicial attitude to statutory reversals of onus in criminal cases in England appears to be that they place a persuasive burden on the accused dischargeable by proof of a probability in his favour. Three such statutory provisions and their interpretation may be noted, (i). Section 2 of the Prevention of Corruption Act, 1916, provides that a consideration given in specified circumstances shall be deemed to have been given corruptly "unless the contrary is proved". In *R.* v. *Evans-Jones; R.* v. *Jenkins*[54] it was held that if there were a doubt about the consideration not having been given corruptly there should be a conviction. This would require the same degree of proof of an accused as is required of the prosecution. In *R.* v. *Carr-Briant,*[55] however, the Court of Criminal Appeal held that proof by the accused to a probability would be sufficient. The Court, stated:—

> 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

52. (1964) 30 M.L.J. 141.

53. *Ibid*., at p. 144. *Goh Leng Sai* v. *R.* (1959) 25 M.L.J. 121, in which Ambrose J. confirmed that the onus was on the appellant to show money was not given corruptly, could perhaps be said to have anticipated *Gurbachan Singh.*

54. (1923) 17 Cr. App. Rep. 121.

55. [1943] K.B. 607; [1943] 2 All E.R. 156.

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.[56]

(ii). By section 28(2) of the Larceny Act, 1916, it is an offence for a person to be found by night in possession of housebreaking implements "without lawful excuse (the proof of which shall lie upon such person)." In *R.* v. *Ward,*[57] the Court of Criminal Appeal held that the accused need only establish a *prima facie* case of lawful excuse to shift the onus to the prosecution to satisfy the jury that the accused's possession was without lawful excuse. That is the accused has only an evidential burden and the persuasive burden remains on the prosecution. This interpretation of the burden on the accused has, however, now been rejected by the Court of Criminal Appeal in *R.* v. *Patterson.*[58] It was held in that case that, on proof of possession by the prosecution, the burden shifted to the accused to prove lawful excuse on the balance of probabilities, or, in other words, the accused had a persuasive and not just an evidential burden as to lawful excuse. (iii). Under section 2(2) of the Homicide Act, 1957, it is "for the defence to prove" diminished responsibility to reduce what would otherwise be murder to manslaughter. In *R.* v. *Dunbar*[59] the Court of Criminal Appeal held that the defence was proved if the balance of probabilities as to the necessary circumstances was in favour of the accused.

As the defence of diminished responsibility is now available in Singapore on a charge of murder, an interesting question arises as to the burden of proving it. If the all-embracing rule in *Soh Cheow Hor* is applied the accused need only raise a doubt. If that rule is read subject to the defence of insanity, as in *Looi Wooi Saik,* the question will be whether insanity should be read as including diminished responsibility. If yes, the accused will have to prove diminished responsibility on the balance of probabilities; if no, he need only raise a doubt as to the defence. There will be irony in the situation if the accused is required only to raise a doubt, as under statutory provisions of the same kind, accused persons in England and Singapore will have different burdens in attempting to prove diminished responsibility. There will also be a problem facing the legislature if it wishes to require an accused to prove diminished responsibility to the degree of probability, for it seems the words used in section 106 could not be relied on to achieve this purpose.

CONCLUSION

Three matters may be mentioned in conclusion. The first is that for the purpose of interpreting section 105, a distinction should be drawn between those exceptions which go to negative essential ingredients of the prosecution's case and those which admit the prosecution's case but

56. *Ibid.*, at p. 612 and at p. 158.

57. [1915] 3 K.B. 696.

58. [1962] 2 Q.B. 429; [1962] 1 All E.R. 340.

59. [1958] 1 Q.B. 1.

allege justification or excuse, or exceptions in confession and avoidance. In the former category could be put, for example, mistake, accident and drunkenness, and in the latter, private defence and the exceptions to defamation, and, probably, compulsion, necessity and consent. Insanity, provocation and infancy are less easy to place, but they also should probably be placed in the second category. If this distinction were drawn, the basic rule that the prosecution must prove its case beyond reasonable doubt would not be mitigated and section 105 not treated as meaning something other than it says *(i.e.* proof of exceptions to at least a probability) or worse, treated as without effect. It has never been accepted that the prosecution must negative in advance all possible defences.[60] What it has to do is prove its case, that is the ingredients of the offence charged, and it is better to talk in this way than to talk, over-generally, of proving guilt and presuming innocence.

The second matter is as to how *Woolmington* has influenced the interpretation of section 105. It is not easy to see why an English case changing the law on which section 105 was based is allowed virtually to change the meaning of that section in the same way. This is perhaps an illustration of the way in which the parent English law still tends to be referred to in the purported interpretation of its legislative offspring in the (now ex—, in this case) colonies.[61] Or, to look at the matter in another way, the impact of *Woolmington* on the Malaysian and Indian legislation can be seen as an evidence of the primarily common law spirit of those jurisdictions, a spirit that is ever prepared to refashion (or just plain get around) legislation in accordance with the needs of the time.

The final matter is itself something of a confession and an avoidance as to all that has been said above. It is that the writer would personally prefer to see the benefit of the doubt doctrine being generally applied in favour of an accused in criminal cases, but he believes that the presently governing legislation (section 105 of the Evidence Ordinances) does not permit this. What is suggested is the repeal of section 105, or at least its replacement with a provision requiring no more than the introduction of evidence capable of raising a doubt in order that any exception not already in issue shall be considered by the court.

BRON MCKILLOP*

60. In addition to Illustration (a) to s. 152 of the Criminal Procedure Code, referred to in *Looi Wooi Saik* (see *supra* n. 87), some support for the contrary view can be obtained from s. 6 of the Penal Code which provides that all the offences defined in the Code are to be understood subject to the general exceptions. But these provisions are not directed to the question of who proves what, which question is specifically dealt with in the Evidence Ordinance.

61. Another illustration is provided by *Cheow Keok* v. *P.P.* (1940) 9 M.L.J. 82, which holds that s. 304A of the Penal Code enacts the English law of manslaughter by negligence.

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