

(32) 1945 Oudh 210). We are of opinion that an executing Court has inherent powers to dismiss the application for execution and also to restore it to the file under S. 151, Civil P. C., though, save in the most exceptional cases, it ought not resort to S. 151, Civil P. C., in so far as restoration is concerned. This does not cause any hardship as the decree-holder can always file a fresh application.

[12] We are now in a position to discuss the powers of the Collector. At the outset, it should be noticed that though R. 12 of Revenue Book Circulars 3-8 invests the Collector with all the powers of the civil Court executing a decree, the powers are not entirely conterminous with those of the civil Court. He cannot amend the 'C' Form, nor can he cancel the 'C' Form and draw one up for himself. He cannot review the orders of the civil Court attaching the property and he cannot hear objections under O. 21, R. 58, Civil P. C. This last disability is pointedly mentioned in a note in the Revenue Book Circulars which reads thus :

"In no case has the Deputy Commissioner power to dispose of objections under R. 58 in O. 21, of Sch. 1, Civil P. C."

The Collector's powers commence at the stage a 'C' Form is drawn up and he cannot go behind 'C' Form and his action can have no operation on anything which is prior to the 'C' Form. It is relevant to notice at this stage, that R. 12 of the Revenue Book Circulars (which reproduces the words of S. 70 (1) (b)) merely invest the Collectors with the powers which the Court might exercise *in the execution of the decree*. The rule is enabling and does not substitute the Collector for the Court for *all purposes*. In *Kalka Prasad v. Mt. Sahidabi*, 1943 N.L.J. 509: Binney F. C. held that there was no provision in the rules enabling the Collector to dismiss the case in default. There is nothing to prevent the Collector from terminating proceedings before him and reporting the matter to the civil Court. But dismissing an application for execution, which was not before him, is an entirely different matter. We are, therefore, of opinion that the order of the Collector must be interpreted as merely signifying his inability to proceed with the case. There is nothing to prevent the Collector from resuming the proceedings before he has reported the matter to the civil Court. The termination of the proceedings by him has not the result in law which O. 21, R. 57 contemplates, and his restoration of the proceedings to the file is permissible under his inherent powers which he derives from s. 151, Civil P. C.

[13] It was next argued on the authority of *Dalchand v. Narayan*, 2 N. L. J. 111 : (A.I.R. (6) 1919 Nag. 91) that the Collector ought to have

issued notices to the judgment-debtor before restoring the case to the file and his omission to do so makes the proceedings *ultra vires* and void. We do not agree. We cannot do better than quote a passage from *Hari Singh v. Bulaqui Mal & Sons*, 11 Lah. 93 : (A.I.R. (17) 1930 Lah. 20) which answers this objection :

"It may be observed in this connection that, where a suit or an appeal is dismissed for default in the absence of both parties, notice to the defendant or respondent of the application for restoration is not provided for. But such notice is expressly provided for where the dismissal should have been ordered in the presence of the defendant or respondent. On the analogy of this procedure relating to suits and appeals, it may safely be inferred that, where an application for execution is dismissed for default in the absence of the judgment-debtor, it can be restored without notice to him."

In the case before us, on both occasions, the judgment-debtor was absent. No notice was necessary to him.

[14] The appeal is allowed and the decree of the lower appellate Court is set aside and the decree of the trial Court dismissing the suit is restored. The respondents will bear the costs of the appellants in all the three Courts.

K.S.

Appeal allowed.

A. I. R. (36) 1949 Nagpur 163 [C. N. 67.]

SEN AND SARWATE JJ.

Holia Budhoo Gowara — Accused — Appellant v. Emperor.

Criminal Appeal No. 85 of 1948, Decided on 8th July 1948, from order of Addl. Sessions Judge, Seoni, D/- 28th February 1948.

(a) Evidence Act (1872), S. 105 — Burden is on accused to prove that his case falls under one of exceptions—It is sufficient if he creates reasonable doubt in case for prosecution.

In criminal cases the general rule is that the accused person must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. Section 105 is, however, an important qualification of this rule. In view of it, the prosecution is not obliged to prove absence of facts which might bring the case within a special exception which the accused might set up in his defence. Under S. 105, Evidence Act the burden of proving the existence of circumstances which bring the case of the accused within one of the exceptions in the Penal Code is upon the accused and the Court must presume absence of such circumstances. But even if the legislature has but upon the accused the burden of proving these matters, he is in a much more favourable position than the prosecution because he is not in general called upon to prove them beyond a reasonable doubt, but it is sufficient if he succeeds in proving a *prima facie* case and establish a reasonable doubt in the case for the prosecution: 1935 A. C. 462 ; A. I. R. (20) 1933 Cal. 800 ; A. I. R. (23) 1936 Nag. 160 ; A. I. R. (24) 1937 Bom. 83 (F. B.); A. I. R. (28) 1941 Bom. 139 and A. I. R. (28) 1941 All. 402 (F.B.), *Considered*. [Paras 6, 7 and 12]

Annotation : ('46-Man.) Evidence Act, S. 105, N. 2.

(b) Criminal P. C. (1898), S. 342 (3) — Statement of accused is not affirmative evidence — Statement should be considered along with prosecution evidence—Criminal P. C. (1898), S. 287.

Provisions of S. 287 and S. 342 (3) do not make the statements made by the accused before the committing Magistrate and also in answer to the questions put to him in the Sessions Court, an affirmative evidence in the case. What they mean is that the Court should not shut out the statements of the accused from its view when considering the effect of the evidence adduced on behalf of the prosecution but such statements must be taken into consideration along with the evidence of the prosecution to see if in conjunction with them there can be any reasonable explanation of the prosecution evidence which may be consistent with the innocence of the accused. [Para 14]

Where the accused in these statements says that he killed his wife upon grave and sudden provocation, the point for consideration for the Court would be whether in view of these statements it would be reasonable to infer from the prosecution evidence itself that the accused could not have acted in the manner he did without receiving the provocation to the extent he has alleged. [Para 15]

Annotation: ('46-Com) Criminal P. C., S. 287, N. 1; S. 342, N. 23 and 29.

S. K. Deshpande—for Appellant.

W. B. Pendharkar, *Addl. Government Pleader*—
for the Crown.

Judgment.—Holias, son of Budhoo Gowara of mauza Gondegaon was tried before the Additional Sessions Judge, Seoni, on a charge of murder of his wife Mt. Yamuni. He has been found guilty under s. 304, Part I, Penal Code and sentenced to 7 years' rigorous imprisonment. He has appealed against this conviction and sentence. There is also a counter-appeal by the Provincial Government that the accused should have been convicted on the charge of murder under s. 302, Penal Code. Both appeals are disposed of by this judgment.

[2] Holia lived with his wife, Mt. Yamuni in Gondegaon. On 27th November 1947 the accused assaulted Mt. Yamuni in the house and killed her and threw the spear with which he had assaulted her in a well from where it was later recovered by the police. The parents of Mt. Yamuni had come to stay with Holia about two days before this occurrence and they wanted that Yamuni should be sent with them to their house. The accused was not willing to send his wife to her parents and on the day of occurrence in the morning Yamuni's father and mother prepared to go away. The father had proceeded ahead and Yamuni's mother Mt. Naja was also going out when Yamuni seems to have insisted that she would also go with her parents. It is in the evidence of Mt. Naja (P. W. 6) that the accused was enraged at her insistence on going and taking up a spear he violently assaulted Mt. Yamuni and killed her. In the committing Magistrate's Court as also in the Sessions Court the accused admitted that he had killed Mt. Yamuni. Before the Sessions Court he even pleaded guilty to the charge but the learned Additional Sessions Judge decided to hold the

trial in order to find out if the case was not within one of the exceptions to s. 300, Penal Code, and whether any extenuating circumstances existed in the case.

[3] The plea taken on behalf of the accused was that he did not want his wife to go with her parents because their child had been recently vaccinated and was running temperature. He says that the wife was very insistent on going and even abused him filthily and gave him a kick also. That he was put out by this conduct of hers and in a fit of rage he took up the spear and killed her. The Additional Sessions Judge has accepted this statement of his and has found that he committed the murder upon grave and sudden provocation given by the wife and the case was therefore brought within exception 1 to s. 300, Penal Code.

[4] There is no doubt that the act of the accused in causing injuries to his wife which resulted in her death amounts to an offence of murder and the only question is whether the accused has been able to show that the case could be brought within exception 1 to s. 300, Penal Code.

[5] At the time of the assault Mt. Naja (P. W. 6) was near the deceased and she says that all that Mt. Yamuni did was that she wept and insisted that she would also go. Nothing has been elicited in her evidence to suggest that Yamuni had used any abusive language or kicked the accused.

[6] After committing this assault on his wife the accused went out. It is in the evidence of Mulchand (P. W. 5) that when he saw the accused he found some blood on his clothes and questioned him to which the accused only replied that whatever was destined had happened. Subsequently Mulchand, who is the mukaddam of the village went with the kotwar Ugdaya (P. W. 4) to the house of the accused. There Dadu (P. W. 7) and Dulichand (P. W. 8) were also present and when the accused was questioned by them he stated that the wife was insisting on going which annoyed him and so he had killed her. The accused does not deny that he was questioned by these persons and that he had stated to them that he had killed his wife. It is significant, however, that these witnesses were not questioned at all whether the accused had also stated at that time that the wife had abused or kicked him. If the cause of provocation had been such conduct on the part of the wife, we expect the accused to have disclosed to these persons that the wife had behaved in such a rude manner as to give him provocation. Nothing absolutely has been elicited from the evidence of any of the prosecution witnesses to show that the wife had used any abusive language.

uage or given any kind of provocation except the insistence that she must go. The learned Additional Sessions Judge in paragraph 13 of his judgment thinks that there could be no reason for the accused to commit such deadly assault upon his wife except upon some provocation which he must have received and he thinks that the statement of the accused about the manner in which she gave provocation must be accepted as quite probable. He has referred to the fact that three of the four assessors were also of the opinion that the accused might have received such provocation. The opinions of the assessors are not based upon any facts elicited in the evidence and therefore they are of no value. The learned Additional Sessions Judge seems to have treated their opinions as evidence on which to find that there was grave and sudden provocation. He appears to have overlooked the provision in S. 105, Evidence Act, which lays down that the burden of proving the existence of circumstances which bring the case of the accused within one of the exceptions in the Penal Code is upon the accused and the Court must presume absence of such circumstances.

[7] The question therefore arises how far it was incumbent upon the accused in view of S. 105, Evidence Act, to lead evidence to satisfy the Court that the case was brought within Excep. 1 to S. 300, Penal Code. In criminal cases the general rule is that the accused person must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. Section 105 is, however, an important qualification of this rule. In view of it, the prosecution is not obliged to prove absence of facts which might bring the case within a special exception which the accused as in the present case might set up in his defence. In *Woolmington v. The Director of Public Prosecutions*, 1935 A. C. 462: (104 L. J. K. B. 433) the rule laid down is that in a trial for murder the Crown must prove death as the result of a voluntary act of the prisoner and malice of the prisoner. When evidence of death and malice has been given, the prisoner is entitled to show by evidence or by examination of circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked, and if the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

[8] In *Robert Stuart Wauchope v. Emperor*, 61 Cal. 168 : (A.I. R. (20) 1933 Cal. 800 : 35 Cr. L.J. 156) Lord-Williams J. has expressed the view

that even when the legislature has put upon the accused the burden of proving certain matters he is in a much more favourable position than the prosecution because he is not in general called upon to prove them beyond a reasonable doubt, but it is sufficient if he succeeds in proving a *prima facie* case.

[9] In *Bapurao v. King Emperor*, I. L. R. (1937) Nag. 38 : (A. I. R. (23) 1936 Nag. 160 : 39 Cr. L. J. 349) Bose J., accepts the position that all that may be necessary for the accused is to offer a reasonable explanation which may be true, then, even though the Judge or the jury, as the case may be, is not convinced that it is true, he is entitled to an acquittal.

[10] In *King-Emperor v. U. Damapala*, 14 Rang. 666 : (A. I. R. (24) 1937 Rang. 83 : 38 Cr. L. J. 524 (F. B.)) a Full Bench of the Rangoon High Court has accepted the rule in *Woolmington v. The Director of Public Prosecutions*, 1935 A. C. 462 : (104 L. J. K. B. 433) as laying down the law which is in no way inconsistent with the law in India and with reference to S. 105, Evidence Act, has held that the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal.

[11] In *Emperor v. Basangouda Yamanappa*, I. L. R. (1941) Bom. 315 : (A. I. R. (28) 1941 Bom. 139 : 42 Cr. L. J. 697) the Bombay High Court expresses a similar view that if the accused can offer an explanation of the evidence which is consistent with the innocence of the accused, the Court will not be justified in convicting him.

[12] According to all these cases all that may be necessary for the accused is to offer some explanation of the prosecution evidence, and if this appears to the Court to be reasonable, even though not beyond doubt and to be consistent with the innocence of the accused, he should be given the benefit of it.

[13] The question has been considered at length by a Full Bench of the Allahabad High Court in *Emperor v. Parbhoo*, I. L. R. (1941) ALL. 843 : (A. I. R. (28) 1941 ALL. 402 : 43 Cr. L. J. 177.) Here also the majority of the Judges constituting the Full Bench accept the decision of the House of Lords in *Woolmington v. The Director of Public Prosecutions*, 1935 A. C. 462 : (104 L. J. K. B. 433) as laying down the law which is not inconsistent with the law of British India as enacted in S. 105, Evidence Act.

[14] The accused in this case made a statement before the Committing Magistrate about

grave and sudden provocation received by him from the wife by her abusing and kicking him. This according to S. 287, Criminal P. C., is tendered by the prosecution and read as evidence. In Sessions Court also he made a similar statement in answer to the questions put to him and sub-s. (3) of S. 342, Criminal P. C., lays down that the answers given by the accused may be taken into consideration by the Court. These provisions do not however make the mere statements of the accused an affirmative evidence in the case. What they mean is that the Court should not shut out the statements of the accused from its view when considering the effect of the evidence adduced on behalf of the prosecution but such statements must be taken into consideration along with the evidence of the prosecution to see if in conjunction with them there can be any reasonable explanation of the prosecution evidence which may be consistent with the innocence of the accused.

[15] The definition of 'proved', 'disproved' and 'not proved' in S. 3, Evidence Act, shows that the question has to be decided after considering the matter before the Court which will necessarily include the examination of the accused before the Committing Magistrate and the Sessions Court. The point for consideration therefore is whether in view of those statements it would be reasonable to infer from the prosecution evidence itself that the accused could not have acted in the manner he did without receiving the provocation to the extent he has alleged. We think it not unlikely that the accused was provoked into assaulting his wife simply because she was insisting on going away with her parents and there is no need to go further and assume that he should have received graver provocation. The evidence produced on behalf of the prosecution read in conjunction with the statements of the accused can only establish a case falling under cls. 1 to 3 of S. 300, Penal Code. They do not even raise a reasonable doubt that the special circumstances of grave and sudden provocation as he has alleged may have been present. It was therefore necessary for the accused to prove their existence by producing other evidence than the matters which are here before the Court. In the absence of any such evidence, it is not proper to find that the case is brought within Ex. 1 to S. 300, Penal Code.

[16] In our view the accused has entirely failed to bring his case within Exception 1 to S. 300, Penal Code. His conviction should therefore have been under S. 302, Penal Code, and should not have been under S. 304 part I. We accordingly dismiss the appeal of the accused and on the appeal of the Provincial Government alter the conviction of the accused to one under S. 302,

Penal Code. In view of the fact that the accused had received some provocation, though it was not sufficient to bring the case within Exception 1 to S. 300, we think that he should receive the lesser penalty of transportation for life. We accordingly sentence him to transportation for life.

R. G. D.

Order accordingly.

A. I. R. (36) 1949 Nagpur 166 [C. N. 68.]
SHEVDE J.

Dhannusao and another—Defendants—Appellants v. Mt. Sitabai w/o Latariyasao—Plaintiff—Respondent.

Second Appeal No. 273 of 1944, Decided on 13th January 1948, from appellate decree of Addl. District Judge, Balaghat, D/- 2nd March 1944.

Tort—Nuisance—Intent or negligence of defendant need not be proved as separate ingredient—Natural user of property is not per se good defence—Operation of natural forces, how far good defence, indicated.

In an action in tort founded upon nuisance, the plaintiff need not prove intent or negligence of the defendant as a separate ingredient in the cause of action. Nor is the want of intent or negligence by itself a defence. The defendant would be liable if there was a breach of duty on his part to prevent a nuisance arising or continuing. Natural or ordinary user is also no defence *per se* to ordinary liability for nuisance. The occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for all the natural and probable consequences of its escape even if he has been guilty of no negligence. The operation of natural forces would not be a new or independent cause, if it follows from the defendant's wrongful conduct in the ordinary course of things and it could not be a defence to any action for nuisance, if that nuisance were found to be actionable nuisance otherwise. Hence the fact that the overflow of water upon the plaintiff's land, from the defendant's tank was due to the law of gravitation is no defence, if the action of the defendant was found to be actionable nuisance otherwise. A. I. R. (15) 1931 Mad. 561, *Dissent.*; (1868) 3 H. L. 330 and other case law, *ref.* [Para 10]

M. R. Bobde and K. B. Tare—for Appellants.

J. P. Dwivedi—for Respondent.

Judgment.—This second appeal has been filed by the defendants against the decree of Mr. S. C. Rai, Additional District Judge, Balaghat, affirming the decree of the Court of first instance for damages in the plaintiff's favour.

[2] Plot No. 1, measuring 6.56 acres originally belonged to the plaintiff's husband Latariya, Sao, now deceased. The defendants bought a portion of it measuring 3.30 acres from Latariya Sao, on 5th May 1934. The rest of the area was split up into two sub-divisions and was separately recorded as 1/2 and 1/3 respectively. The portion bought by the defendants was recorded as 1/1. It is no longer disputed that plot No. 1/1 is a water tank or *munda*, which was used by the plaintiff's husband during his life-time for collecting rain water therein, for the purpose of irrigating his own neighbouring fields. The defendants