

has not been suggested in the plaint how the appellant's windows on the other side of the lane in any way constitute a nuisance. It was, admittedly, suggested in the evidence of the respondent that the appellant's tenants were in the habit of throwing rubbish into the lane, but there is no such plea in the plaint and the fact was never in issue. Moreover, it is manifest that if the appellant or his tenants do commit a nuisance in this form, they may be restrained by appropriate action.

[32] In the result, we have no hesitation in allowing this appeal with costs throughout. Order accordingly.

K.S.

Appeal allowed.

A. I. R. (35) 1948 Sind 40 [C. N. 14.]

O'SULLIVAN J.

on difference between

TYABJI AND MEHER JJ.

Waroo — Appellant v. Emperor.

Confirmation Case No. 36 of 1946 (Criminal Appeal No. 174 of 1946), Decided on 23-10-1946, from the judgment of Tyabji and Meher JJ.

(a) Criminal P. C. (1898), Ss. 221 and 237—Charge specifying housebreaking in order to commit offence of hurt—Conviction for housebreaking with intent to commit adultery is bad.

Where the accused was charged of "having made preparations to cause hurt, etc., committed housebreaking by night by entering into the building belonging to complainant and used as dwelling house in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts etc. . . ." and there was no reference to and much less any definite allegation of any intention to commit adultery with any married woman in the charge, and no allegation was made by any of the prosecution witnesses in their examination-in-chief that the accused had gone to the house that night for purpose of committing adultery; and the question of adultery with married woman was not in issue:

Held, that the accused could not be convicted of housebreaking with intention of committing adultery.

[Para 48]

(b) Criminal P. C. (1898), S. 233 — Charge must be for distinct offence.

There must be a charge for every distinct offence and it must be formulated with precision. The precise charge framed is to be tried and tried separately, except in the cases mentioned in Ss. 234 to 236 and S. 239.

[Para 17]

Annotation : ('46-Com.) Cr. P. C., S. 233, Notes 3 and 4.

(c) Penal Code (1860), S. 451—Adultery, ingredients of—Charge under S. 451—Facts to be proved—Onus.

To sustain a conviction for adultery, it must be established *inter alia* that sexual intercourse was committed without the consent or connivance of the husband, and to sustain a conviction under S. 451, Penal Code, for offence of house-trespass with intent to commit an offence, the offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman : 19 All. 74, *Ref.*

[Para 22]

The onus to show that there was no connivance or consent of the husband is on the prosecution.

[Para 23]

(d) Criminal P. C. (1898), Ss. 237 and 537 — Applicability.

Where it is not a case of conviction for an offence other than the one for which the accused was charged, S. 237 has no application. The section does not cover the case of a conviction for another or more aggravated form of the same offence but for another offence. No prejudice is deemed to arise when conditions referred to in this section and S. 238 are fulfilled : 5 S. L. R. 16, *Ref.*

[Para 28]

Annotation : ('46-Com.) Cr. P. C. S. 237 Note 2.

(Applicability of S. 238 indicated.) [Paras 30, 34]

(e) Penal Code (1860), S. 441 — Intention is necessary element.

Obiter : — Intention is necessary essential in the offence of criminal trespass and the charge should specify the intention.

[Para 36]

(f) Evidence Act (1872), Ss. 105 and 106, 102—Scope of.

The burden of proving the existence of circumstances bringing the case within a general or special exception is no doubt cast upon the accused by S. 105 but this does not in any way absolve the prosecution of the burden laid on it by S. 102 so far as the entire "proceeding" is concerned. If at the close of the whole evidence, there is reasonable doubt as to the guilt of the accused, the benefit of that doubt should be given to the accused and he is entitled to be acquitted : (1935) A. C. 462, *Expl. and Foll.*; 26 A. I. R. 1939 Sind 209, 28 A. I. R. 1941 All. 402 (F. B.) and 24 A. I. R. 1937 Rang. 83 (F. B.), *Foll.*

[Para 61]

Annotation : ('46-Com.) Cr. P. C. S. 237, Note 2.

(g) Criminal P. C. (1898), Ss. 225, 232 and 537—Applicability—Charge not irregular but conviction not warranted by charge—Sections, if apply.

Where the charge is quite in order, it cannot be said that there is an "error" in charge because the evidence for the prosecution is subsequently at the trial found to be false or insufficient to establish the charge. When conviction is had in such case for offence not included in the charge Ss. 225, 232 or 537 would not apply, for the reason that there is nothing irregular in the charge as such.

[Paras 19, 20 and 25]

Cases referred:—

- (31) 54 Mad. 515 : 18 A. I. R. 1931 Mad. 231 : 131 I. C. 455 : 32 Cr. L. J. 749, *Chinna v. Kesamma*.
- (34) 35 Cr. L. J. 964 : 21 A. I. R. 1934 Oudh 281 : 149 I. C. 368, *Baldeo Prasad v. Emperor*.
- (38) I. L. R. (1938) 19 Lah. 462 : 25 A. I. R. 1938 Lah. 514 : 176 I. C. 410 : 39 Cr. L. J. 734 (F. B.), *Mahomedyar v. Emperor*.
- (95) 22 Cal. 391, *Balmakand v. Ghansham Ram*.
- (11) 12 Cal. L. J. 453 : 11 I. C. 797 (Mad.), *In re Kurnam Seshayya*.
- (01) 28 Cal. 434, *Reilly v. Emperor*.
- (97) 19 All. 74, *Brij Basi v. Queen-Empress*.
- (11) 5 S. L. R. 16 : 10 I. C. 168, *Ganesh Krishna v. Emperor*.
- (74) 11 Bom. H. C. R. 240, *Reg. v. Chand Nur*.
- (17) 44 Cal. 358 : 4 A. I. R. 1917 Cal. 824 : 35 I. C. 984 : 17 Cr. L. J. 424, *Karalli Prasad v. Emperor*.
- (1900) 27 Cal. 990, *Rahimuddin v. Asgar Ali*.
- (09) 36 Cal. 865 : 4 I. C. 19 : 10 Cr. L. J. 471, *Silajit Mahto v. Emperor*.
- (14) 41 Cal. 743 : 1 A. I. R. 1914 Cal. 663 : 22 I. C. 766 : 15 Cr. L. J. 190, *Mahomed Hassain v. Emperor*.
- (12) 16 C. W. N. 696 : 14 I. C. 320 : 13 Cr. L. J. 224, *Jharu Sheikh v. Emperor*.

15. ('06) 33 Cal. 295 : 3 Cr. L. J. 153, Pores Nath Sirdar v. Emperor.
 16. ('85) 11 Cal. 106, Behari Mahton v. Queen-Empress.
 17. ('22) 26 C. W. N. 344 : 71 I. C. 247 : 24 Cr. L. J. 119, Hajari Sonar v. Emperor.
 18. ('01) 23 All. 82, Queen-Empress v. Kanglee.
 19. ('15) 37 All. 395 : 2 A. I. R. 1915 All. 178 : 29 I. C. 67 : 16 Cr. L. J. 435, Mulla v. Emperor.
 20. ('20) 7 A. I. R. 1920 Pat. 590 : 56 I. C. 592 : 21 Cr. L. J. 496, Raghu Singh v. Emperor.
 21. ('21) 8 A. I. R. 1921 Pat. 217, Jadav Mahton v. Emperor.
 22. ('35) 22 A. I. R. 1935 Pat. 129 : 155 I. C. 629 : 36 Cr. L. J. 829, Nihora Kahar v. Emperor.
 23. ('28) 22 S. L. R. 466 : 16 A. I. R. 1929 Sind 17 : 111 I. C. 459 : 29 Cr. L. J. 875, Wali Mahomed v. Emperor.
 24. (1935) 1935 A. C. 462 : 104 L. J. K. B. 433 : 153 L. T. 232, Woolmington v. Director of Public Prosecutions.
 25. ('36) 14 Rang. 666 : 24 A. I. R. 1937 Rang. 83 : 168 I. C. 193 : 38 Cr. L. J. 524 (F. B.), Emperor v. U Damapala.
 26. ('37) 41 C. W. N. 65 : 23 A. I. R. 1936 P. C. 289 : 164 I. C. 545 : 37 Cr. L. J. 963 (P. C), Stephen Seneviratne v. The King.
 27. ('40) I. L. R. (1940) Kar. 249 : 26 A. I. R. 1939 Sind 209 : 184 I. C. 474 : 41 Cr. L. J. 28, Shewaram v. Emperor.
 28. ('41) I. L. R. (1941) All. 843 : 28 A. I. R. 1941 All. 402 : 197 I. C. 525 : 43 Cr. L. J. 177 (F. B.), Emperor v. Parbhoo.

K. H. Nagrani — for Appellant.
Fatehchand Assudomal, Advocate-General of Sind — for the Crown.

Judgment.— This criminal appeal and confirmation case comes before me in consequence of a difference of opinion between my brothers Tyabji and Meher.

[2] The facts of the case, the findings of the Court below and the main points taken in the Appellate Court are set out in the judgment of Tyabji J. as follows :

"The appellant Waroo s/o Juman has been convicted by the Additional Sessions Judge, Larkana, at Hyderabad of offences under Ss. 458, 324 and 302, Penal Code. He has been sentenced to death under S. 302, to 12 months rigorous imprisonment under S. 458 and 18 months rigorous imprisonment under S. 324. He has appealed and the case also comes up before us for confirmation of the death sentence passed.

The offence, it is alleged, took place after mid-night during the early hours of 29-12-1945, at Hala, and the facts of the case are as follows: Deceased Misri lived in a house, consisting of a covered hall with a court-yard in front of it, with his wife Khatul, and three sons of Khatul by her former husband, Ali Mahomed. Of these, Abdullah and Kassim were in Misri's house on the night in question. Mussamat Wasul, a daughter of Khatul and Alimahomed, had also been staying for some days in the house. Alimahomed, the previous husband of Khatul, had died many years ago, and after his death Khatul had married Misri some 8 or 10 years ago. Thereafter Khatul and her sons lived in Misri's house. Misri had a cow which used to be kept in his courtyard. To the west and adjoining Misri's house was a house belonging to Jurio, who was a brother of Alimahomed and had died about a year before the incident. Jurio's house, as the sketch (Ex. 6) shows, consisted of two rooms, a 'sofo' (hall) in front of the two rooms and a court-yard

in front of the hall. Misri's house was divided from Jurio's house by a wall, but there was an open space between the courtyard of Misri's house (called "verandah" in Ex. 6) and the court-yard of Jurio's house. The only entrance to Jurio's house was through the court-yard of Misri's house, which was to the south of the 'hall' in which the inmates of Misri's household lived, and the only entrance to Misri's house from the outside was through a door on the eastern side of the court-yard in front of Misri's house. The result was that any one wishing to go to Jurio's house had to enter through the door leading to Misri's court-yard and pass across the court-yard in front of Misri's house and then enter the court-yard of Jurio's house. Jurio's house was lying vacant. The tapedar in his deposition described Jurio's house in Sindhi as "sunjo" and "Wiran," (deserted and in ruins) which was inaccurately recorded in English : "not occupied by any one." Abdulla stated : 'At the time of this incident no one was living in his (Jurio's) house.' Wasul, (Ex. 11) described the house as 'Jurio's unoccupied house.' The Sindhi word actually used by Wasul, which was translated as 'unoccupied,' was 'phital,' which means in ruins, abandoned, deserted. On the death of Jurio, Jurio's daughter, who was 12 or 13 years old, became the owner of Jurio's house. At the time of the incident she was living with her mother, who had remarried, at Old Hala. Abdulla stated that the house of Jurio was 'in our possession' at the time of the incident. To the west of Jurio's house was the house of one Hamid Memon. There was a wall dividing Jurio's house and Hamid's house, which was 5½ feet high. To the south of the houses of Misri and Jurio was the house of Saleh. The southern and the eastern walls of the court-yard of Jurio's house divided the houses of Jurio and Saleh, and this wall was 6 feet and 10 inches in height.

The inmates of the house of Misri, namely Misri, Khatul, Abdullah, Kassim and Wasul, went to sleep in their house on the night of 28-12-1945, after closing the door by which one could enter into Misri's house. Khatul was waked up at about midnight and saw something as a result of which she waked up her husband Misri and her sons Abdullah and Kassim. Khatul has described what happened in these words :

'At midnight I woke up to give grass to the cow. I took the lamp and went into the court-yard. I saw my daughter in our court-yard. She had her child on her lap. I saw 4 persons in front of the room of Jurio's house. I enquired from my daughter what it was. She made no reply and went to the hall of our house. I followed her there. I woke up Misri, Kassim and Abdullah'

Wasul (Ex. 11) in her examination-in-chief, after stating that she had been intimate with the appellant about a year and a half before but had given up that connection some 5 or 8 months before the incident, explained the circumstances in which her mother Khatul woke up on that night and called out her brothers and Misri, in these words :

'At about 2 a. m. accused Waru came and woke me up and asked me to go out to the court-yard. He then went out to the court-yard. I took up my boy who was 1½ year old and followed him to the court-yard of Jurio's house. I saw accused 2, 3 and 4 there. Waru said that he had brought these three men to take me away. At that time my boy wept and I told Waru that I would give him reply after making the boy stop from crying. I then went to the court-yard of my house. At that time I saw my mother in the court-yard with the lamp. She inquired what it was. I made no reply. My mother went and woke up Misri, Abdullah and Kassim and brought them. We then went to Jurio's court-yard where . . . ' What happened thereafter was described by Abdullah, Kassim, Khatul and Wasul in very similar

terms. They alleged that Misri, Abdullah and Kassim, on receiving the information from Khatul, immediately ran up to the court-yard of Jurio's house unarmed and carrying a lamp with them. There they saw the appellant and three of the relations of the appellant, Sono s/o Juman, Allahdino s/o Saleh and Mahomed s/o Kadirbux, of whom all except the appellant on seeing the witnesses, jumped over the wall into the house of Saleh. The appellant, also tried to run away, but deceased Misri, who was ahead of Abdullah and Kassim, reached and tried to catch the appellant, whereupon the appellant gave Misri two blows with a hatchet as a result of which Misri fell down seriously injured. Abdullah then tried to catch the appellant, who also struck Abdullah with the hatchet. Then Abdullah with the assistance of Kassim caught hold of the hatchet, which was in the hands of the appellant, and wrested it from the appellant. On this the appellant took out a knife from the folds of his salwar and struck Abdullah and Kassim with the knife. Thereupon Abdullah struck the appellant on the head with the hatchet, which Abdullah had snatched from the appellant. After this the appellant scaled over the wall, jumped into the compound of Saleh and thereafter ran away, getting out of Saleh's compound by jumping over the wall of Saleh's compound on the eastern side. Witness Hamid, whose house was to the west of Jurio's house, stated that he was sleeping in his house, when he heard cries coming from Misri's house, whereupon he got up and saw everything that took place in Jurio's courtyard, from the time that Misri ran up to the appellant, up to the time when the appellant ran away. Witness Waru Sand (Ex. 18) lived in a house some 150 paces to the east of Misri's house. He stated that he woke up on hearing cries, and, taking up a hatchet, ran towards Misri's house and saw the appellant, as he jumped over the eastern wall of Saleh's house, and left Saleh's compound. This witness Waru Sand, stated that he did not see any weapon in the hand of the appellant when he ran away. These witnesses, Hamid, and Waru, immediately went to Misri's house where they were told all that had happened. A little later Abdullah went to the Hala Police station, which was a short distance away, and made a report about the incident at 3-30 a. m. in which he stated:

"The complaint is that I with my relations, uncle Misri Kassim and other members of my family after closing the outer gate and locking it at about 10 p. m., went to sleep. Around this house there is a small compound of Katcha bricks. At about 2 at night my mother Musammat Khatul got up to give fodder to cow. She saw one person near Sufa in the compound of house of my deceased uncle Jurio's house which was lying vacant. She informed me. Upon this I informed my uncle Misri and brother Kassim. After taking the lantern which was burning in our house we all three went to the thieves. We saw three persons coming out of the vacant sufa (main hall) of my uncle Jurio's house and tried to run away. The sufa has no door. In the light of the lantern we identified the three persons. They were Sono son of Juman, Saleh son of Kassim and Allahdino son of Saleh Junani and lived nearby. These three ran away by jumping over the wall. There remained Waru who had been caught by our uncle Misri. We two brothers had also reached the place. In the meantime Waru who had hatchet in hand gave a hatchet blow to uncle Misri which fell on his neck. Due to this blow uncle Misri fell down. We cried 'thief thief.' Kassim my brother tried to catch hold of Waru. Waru tried to strike hatchet blow to him also but my brother caught his hatchet and we snatched hatchet from him. Waru then gave 2-3 injuries of a knife which was in his hand to my brother. He also gave me one injury on my shoulder, with the knife. My brother also due to injuries fell down. I also gave one hatchet blow to Waru.

By this time Hamid Memon on our cries came in our house by jumping over the wall. Seeing him coming Waru also ran away by crossing the wall. Hamid saw him scaling. After a short time Waru Sand also came there. On being asked by Waru Sand, I and Hamid Memon narrated the story of thieves. The condition of uncle Misri and brother Kassim is serious and they are lying on the scene of offence. I went to Fateh Mahomed my brother-in-law who lives here at Hala and told him about the occurrence and thereafter I have come here to lodge a report. I am making this report. Investigation may be held. The hatchet secured from Waru accused is also lying on the scene of offence. Nothing has been stolen.

It may be noted here that there is no reference to Wasul, or to any intimacy between the appellant and Wasul in this report, in which the allegation, against the four offenders, was that they had entered Jurio's house for the purposes of committing theft, that they had been seen there before anything was stolen, that three of the offenders had then run away, but the fourth, the appellant who had been caught by Misri, had caused injuries to Misri, Abdullah and Kassim.

After recording the report, the Head Constable in charge went to the scene where he found Misri lying in a very serious condition. Misri died very shortly thereafter as a result of his injuries. Kassim and Abdullah were sent to the Hala dispensary for treatment. Two of the persons mentioned in the first information and one Mahmood s/o Kadirbux were arrested in their houses at 5 a. m. The appellant was not found in his house and the Head Constable on receiving information that the appellant had gone to his brother who lived at Khandu village, went to Khandu. On the way, when the Head constable was some 2 miles away from the scene of offence, he met the appellant, who appeared to be coming from the direction of Khandu. The appellant had an injury on his head and was wearing a shirt which was blood-stained. The Head constable then arrested the appellant and secured the shirt. The appellant then took the police and mashirs to Khandu village where he produced a pair of blood stained trousers and socks, which were also secured by the Head constable. The appellant was brought back to Hala by 9-30 or 10 a. m. and produced before the Sub-Inspector, who took charge of the investigation. The Sub-Inspector then proceeded to the scene of offence and made a mashirnama. A blood-stained hatchet, alleged to be the hatchet used by the appellant, was produced before the Sub-Inspector and was secured by him. The Sub-Inspector also found two keys lying at the scene in Jurio's courtyard. On visiting the house of the appellant later two locks were secured from the house and it was found that the keys secured at the scene fitted them.

The Medical evidence in the case shows that Misri had two injuries:

1. A curved incised wound $1\frac{1}{2}'' \times \frac{1}{2}''$ skin deep on the left angle of mandible.

2. An incised wound $4\frac{1}{2}'' \times 2''$ cutting the muscles and blood vessels of the 4th and the 5th cervical vertebrae extending from the middle part of the cervical part of the left side vertebral column up to 1" above the junction of the middle third and the inner third of the left clavicle.

The second injury which was on the neck was clearly sufficient to cause death, and there could be no question about this injury having actually caused the death of Misri.

Witness Kassim had two incised wounds on his shoulders, and one, an incised wound $\frac{3}{4}'' \times \frac{1}{4}'' \times 1''$ on the right scapula and the other $\frac{3}{4}'' \times \frac{1}{4}''$ skin deep on the left scapula; and a longitudinal contusion $6'' \times 10''$ on the left lumber region. The doctor who was examined

(Ex. 30) stated that the two incised wounds could have been caused by a hatchet and the contusion would have been caused by a blunt weapon such as a lathi.

Witness Abdullah had one incised wound $1\frac{1}{2}$ " x 2" x 2" on his left shoulder, which, in the opinion of the doctor, "had been caused by some weapon such as hatchet."

The appellant had an incised wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " cutting the bone on the left parietal region, which was caused, in the opinion of the doctor, by a "sharp weapon such as hatchet." The doctor described this as a very serious injury, which was 'sufficient in ordinary course of nature to cause death,' and which would require more than three weeks to cure.

The charge framed by the Committing Magistrate against the four accused in this case was as follows: 'I, Harbuxrai Radhakrishin, Magistrate First Class, hereby charge you (1) Waroo Juman Junani, (2) Sono Juman Junani, (3) Allahdino Saleh Junani and (4) Mahmood Kadir Bux Junani as follows: That you, on or about the 29-12-1945, at Hala New, having made preparations to cause hurt, etc., committed house-breaking by night by entering into the building belonging to the complainant Abdullah and used as human dwelling in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts, etc., and that you Waroo did commit murder by knowingly causing death of Misri and caused (voluntarily) hurts with sharp weapon such as hatchet to Abdullah and Kassim, and thereby committed an offence punishable under Ss. 302, 324 and 458, Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the Court of Sessions, Hyderabad, on the said charge.

Dated this 26th day of February 1946.'

This charge was not amended and was the charge on which the appellant and the other accused were tried before the Sessions Court.

The three other accused who were tried along with the appellant pleaded that they were not guilty as they were not present at the time of the alleged incident. The appellant in his statement before the Committing Magistrate attempted to show that the incident had taken place not in Jurio's courtyard, but on the street near the appellant's own house, a considerable distance away, where Kassim, Misri and Abdullah had gone in order to fight with the appellant, and where Abdullah had struck him with a hatchet. The appellant explained that Wasul was intimate with him and had gone to his house on that day. In the Sessions Court the appellant admitted that he had gone to Jurio's house on receiving a message from Wasul. His account of what took place was as follows: 'Wasul was intimate with me since 6 or 7 years. On the day of this incident she had sent me a message to meet her in Jurio's house. I went at 10 P. M., and was standing in front of the house of Saleh who is my brother-in-law, when Misri and Kassim came out from their house and fought with me. While grappling with each other I, Misri and Kassim fell inside the courtyard of Misri's house. I got up when Abdullah came and gave me a blow and Misri got on me and we fell down. When Misri was on my top he received an axe blow and he called out 'You killed me.' I do not know who gave him that blow. I was under him. I then got myself released from his hold and climbed over the wall between Jurio's house and Saleh's house and went to Saleh's house and from there I ran away to the Khad and fell down there after I had run a short distance. I became unconscious. In the morning I recovered consciousness. I then went to my house, saw the Jamadar and other police there. The Jamadar arrested me and secured my shirt, trousers and socks, articles K and M. I had no weapon. I did not cause any injury to any one. I have nothing more to say.'

The first information in the case and the charge framed by the Committing Magistrate have already been set out above. The intention with which the house, in which criminal trespass was alleged to have been committed, was entered, was stated in the charge as: "in order to the commission of certain offence punishable with imprisonment to wit an offence of causing hurts." It has already been pointed out before that the first information in substance showed that an offence of criminal trespass had been committed by four persons, who had entered the compound of the house of Jurio in order to commit theft, but who had run away, on being seen, before any theft had actually been committed. The evidence given by the prosecution witnesses in the case was entirely in accordance with these allegations. For instance, witness Abdulla stated: 'We went to the courtyard of Jurio's house, which adjoins our courtyard, taking the lamp with ourselves and saw 4 men there. They were present 4 accused in Court. Waru and Sono had axes, while Allahdino and Mahmood had ringed loris. We raised cries of 'thief thief' and on that Sono Allahdino and Mahmood ran away to Saleh's house by jumping over the intervening southern wall, Misri tried to catch Waru who'

There was no allegation in Abdullah's evidence of the appellant or any of the other accused having gone to the house, in which criminal trespass, it was alleged, had been committed, in order that any one of the accused should commit adultery with any married woman. As a matter of fact this suggestion was repudiated by Abdullah in his examination-in-chief, and he stated: "I was not aware of Wasul's intimacy with Waru." Similarly witness Kassim stated: 'When we went to Jurio's compound, I saw 4 thieves. They were the present four accused in Court. When we proceeded 2 or 3 paces towards them, accused 2, 3 and 4 jumped over the southern wall and ran away to Saleh's house. Misri was ahead. As he proceeded'

He also stated: "I do not know if Wasul was intimate with accused Waru." Khatul (Ex. 15) made an evasive reply when she was cross-examined with regard to the intimacy between the appellant and Wasul, when she stated: "I had heard a rumour that Wasul was intimate with Waru. I heard this about a month or two before this incident." It is clear from the facts, that (1) there was no reference to, and much less any definite allegation of, any intention to commit adultery with any married woman in the charge, and (2) that no allegation was made by any of the prosecution witnesses in their examination-in-chief that the appellant had gone to Jurio's house that night for the purpose of committing adultery, that it was not the prosecution case that this was the intention of the appellant upon which the prosecution relied for the purpose of proving the charge against the appellant. On the contrary it was the appellant, who, in order to disprove the prosecution allegation, as set forth in the charge, that the appellant and the three other accused had gone that night to the house in question in order to cause hurt, tried to prove that he had not only gone that night in order to meet Wasul, but had done so by appointment with Wasul. The defence got Wasul to admit: "Waru used to meet me in Jurio's unoccupied house at night secretly." The defence also obtained an admission from witness Hamid: "About 20 days before this incident Khatul had told me that I should speak to Waru not to come to their house. Wasul was intimate with Waru since 2 or 3 years." This statement also shows that Wasul had been living in Misri's house for a much longer period than 2 or 3 days before the incident. From the notes of arguments kept by the learned Judge (Ex. 41) it is clear that the Assistant Public Prosecutor, who appeared for the Crown in the case, relied on the intention set out in the charge, and argued, that it was proved that the

intention with which the accused had committed criminal trespass was "to cause hurt." It is also clear from the notes of the arguments of the advocate who appeared on behalf of the defence (Ex. 42), that the advocate argued that there was no criminal trespass, because even according to the prosecution (witnesses) the appellant had gone to meet Wasul by invitation.

One other fact with regard to the evidence at the trial deserves to be mentioned. One of the offenders mentioned in the first information was "Saleh s/o Kassim." During the investigation Mahmood s/o Kadirbux was substituted for Saleh s/o Kassim. The explanation given by Abdullah was: "There I have given the name of Saleh which is a mistake for Mahmood. In fact Saleh was not there and Mahmood was there. My head was reeling at the time when I made that statement."

The other witnesses similarly implicated Mahmood and not Saleh. Accordingly Mahmood and not Saleh was challaned and tried along with the appellant.

The learned Sessions Judge came to the conclusion that the other accused, who were tried along with the appellant, were not at all present at the time of the incident and took no part in it, and he held: "It appears that Abdullah falsely implicated them, because they are near relations of accused Waroo. This sort of thing is not unusual." It may be mentioned that it was not only Abdullah who implicated the other three accused, but also Kassim, Khatul and Wasul. With regard to the case against the appellant, the learned Judge was of the opinion that the appellant had been clearly proved to be guilty of the offences with which he was charged. In arriving at this conclusion, the learned Judge accepted the defence allegation, that the appellant had gone that night to meet Wasul by previous appointment, for the learned Judge concluded: "She (Wasul) admits that she was intimate with Waroo but had given up the connexion with him about a few months before this incident. I do not believe her on that point. To me it appears that she was still carrying on her love affairs with him and accused Waroo had come to meet her by previous appointment. In cross-examination she says that Waroo used to meet her in Jurio's house at night secretly and her relations did not know of it. It appears that on the night of this incident also he had come to meet her there and her child started crying, her mother woke up and saw them and informed her husband and sons who went and tried to catch Waroo and in the scuffle, Waroo first used his axe and when it was snatched from him, he took out a knife and caused injuries with it to them and then ran away."

With regard to the question whether the appellant had committed an offence of house-breaking, the learned Judge concluded: "I have no doubt in my mind that accused Waroo went to Jurio's house by climbing over the wall between Saleh and Jurio's house. The only entrance to that house is from the courtyard of Misri's house. As accused Waroo went to meet a married woman Wasul who was living with her brothers and mother at that time, who were surely not a party to this intrigue of hers, his offence would clearly be of housebreaking."

It is clear that in the opinion of the learned Judge the intention of the appellant, which made his entry into Jurio's house a case of criminal trespass, was his intention to meet a married woman. On behalf of the appellant the words used 'to meet a married woman,' are stressed, and it is argued that the learned Judge did not even find that the intention of the appellant was to commit adultery with a married woman. But it is clear that that was what the learned Judge meant. As it was admitted that the appellant was attempting to run away and was not allowed to do so by Misri, who tried to catch him, in the first information it was stated

that Misri had caught the appellant before the appellant struck Misri—the question, whether the appellant had the right to resist arrest in the exercise of the right of private defence, necessarily arose. The learned Sessions Judge dealt with this question in this manner: "It may be mentioned here that some of the prosecution witnesses very foolishly tried to make out a case that Misri was struck before he had made any attempt to catch accused Waroo. Their original version, however, as shown in the first report and brought out in cross-examination from the police statements, is that Waroo was trying to climb over the wall when Misri reached him and on that he struck Misri. I think that is the correct version. This, however, does not give Waroo any right of private defence. He was a trespasser and he cannot plead right of private defence."

With regard to the details of what actually took place, when Misri, Abdullah and Kassim approached the appellant and attempted to prevent him from escaping, the learned Sessions Judge accepted the evidence given by the witnesses in its entirety. He accepted their allegation that Misri, Abdullah and Kassim were wholly unarmed. He accepted their version that it was after the appellant had struck down Misri that Abdullah, who was unarmed, snatched the hatchet from the appellant. He accepted their allegation that the appellant thereafter took out a knife and caused injuries to Abdullah and Kassim with the knife, and that it was by way of self-defence that Abdullah then struck the appellant with the hatchet, which Abdullah had snatched from the appellant. The learned Judge's conclusion on these matters was stated by him in these words: "We have had in evidence that Misri was not armed with any weapon. It appears that these three persons at dead of night hearing of Waroo having come to their house left their beds hurriedly and went to Jurio's house and tried to catch him. None of them appears to have been armed with a weapon, otherwise Waroo would have surely received some injuries besides the one which Abdullah gave him with his own hatchet after having snatched it from him. I am not prepared to believe the defence theory that in the dark either Abdullah or Kassim caused injuries to Misri when they actually wanted to hit Waroo. I have no doubt in my mind that the neck injury to Misri was caused by Waroo. His offence would clearly be that of murder. As regards the injuries caused to Abdullah and Kassim, there can also be no doubt that these injuries were caused to them by accused Waroo who after the axe was snatched from him took out a knife which he was carrying. The offence with regard to these injuries would fall under S. 324, Penal Code. It may be mentioned here that besides the incised injuries, Kassim had received one contused injury also which appears to have been caused with a blunt weapon. The defence, however, attached no importance to it and no questions were asked about this injury from Kassim. At the time of arguments I pointed out this to the Assistant Public Prosecutor in charge of prosecution, and he suggested that this injury may have been caused by a fall on some hard substance lying there. Considering the entire evidence I have no doubt that accused Waroo is guilty of having committed offences punishable under Ss. 302, 324 and 458, Penal Code."

The learned Judge considered that the appellant was clearly guilty of murder, and passed the sentence of death under S. 302, because 'the evidence does not show that there was any mitigating circumstance.' He also passed the sentences under Ss. 324 and 458, which have already been mentioned before.

Mr. Nagrani, the learned advocate who appears on behalf of the appellant in this case, has in the main argued (1) that the learned Judge went beyond the charge

when he found that the appellant was guilty because his intention was 'to meet a married woman,' which was not the intention in the charge or alleged by the prosecution witnesses; (2) that on the evidence in the case the conviction for house-breaking under S. 458 could not be maintained; (3) that the appellant had acted in the exercise of the right of private defence; and (4) that he had not exceeded his right. He argued, therefore, that the appellant had committed no offence."

[3] With regard to the first argument, referred to in the last preceding paragraph, Tyabji J. was of the view that since the appellant (and others) had been charged with house-breaking in order to the commission of the particular offence of causing hurt, he could not properly be convicted of house-breaking with the intention of committing adultery with Wasul. My learned brother summed up his discussion on this aspect of the case in the following words:

"The appellant is entitled to contend that, as the prosecution case stood, he was not at all called upon to show that Wasul was in fact not married to Phatu. It was enough for him to show that he had gone to Jurio's house by appointment with Wasul, and that the intention with which he was charged had not been proved by the prosecution. On the other hand, if it had been a part of the prosecution case that the appellant had gone to Jurio's house in order to commit adultery with Wasul, who was lawfully married to Phatu, it would have been necessary for the prosecution to allege and prove the marriage strictly as part of their case. The appellant is entitled to say that if he had been charged with such an accusation, it would have been incumbent upon him to meet it, and he would then have proved that Wasul was not in fact married to Phatu. In view of the prosecution evidence as actually given and the charge framed, it was quite unnecessary for the appellant to disprove the allegation that Wasul was married to Phatu. It was made quite clear that the marriage was disputed. The case could not, therefore, be dealt with as if the marriage was admitted or an undisputed fact. In my view there is great force in this argument. It may or it may not be true that Wasul was the married wife of Phatu. The marriage was not admitted and formed no part of the prosecution case, either as stated in the charge or as presented by the prosecution witnesses. Had I been otherwise satisfied that the appellant was guilty of the offences of which he has been convicted, I would still have regarded this defect in the charge and in the presentation of the Crown case as a very grave one, and the convictions, in so far as they were based on the allegation, that the appellant's intention was to commit adultery, as illegal, and would have considered it necessary to order a retrial. I do not think that an essential element in a crime, without proof of which the conviction for the crime cannot be maintained, which was not admitted but was clearly disputed, should be held to be proved against an accused person, in the manner done in this case, without the accused having clear notice of the fact that it was alleged against him as part of the offence with which he was charged, and for which he was being tried. The grave prejudice likely to be caused by such a procedure is, I think, quite obvious."

[4] With regard to the second point urged on behalf of the appellant, that on the evidence in the case the conviction for house-breaking could not be sustained. Tyabji J. was of the view that no house-trespass had been proved because

Jurio's house was not a building used as a human dwelling at the time of the offence. He emphasised that the terms of S. 442 must be satisfied, and came to the conclusion that since Jurio's house was unoccupied and in a state of dilapidation, it was not a building used as a human dwelling at the material time. He was further of the view that Jurio's house and the courtyard was not properly in the possession of Misri within the meaning of S. 441, Penal Code. In this connection he distinguished the right to possession from actual possession. For these reasons, Tyabji J. came to the conclusion that the offence of house-breaking was not proved.

[5] On the third and fourth points urged by Mr. Nagrani, my brother Tyabji, was of the view that the appellant had acted in the exercise of the right of private defence. This conclusion is based on a finding that no house-trespass having been proved, the prosecution witnesses Misri, Abdullah and Kassim had no right to arrest the appellant, and that the appellant was entitled to resist arrest and to defend himself; and that in the circumstance of the case the appellant had reasonable ground for apprehending that he would be grievously hurt or murdered and had, therefore, not exceeded his right.

[6] On the facts relating to this aspect of the case Tyabji J. was of the opinion that at least one and probably more of the prosecution witnesses had been armed with a hatchet in trying to apprehend the appellant. I would refer on these points to the following observations of Tyabji J.:

"Further I agree with the learned advocate for the appellant that the appellant's right of private defence in this case was not merely that of a person who was under a risk of being unlawfully arrested for the purpose of being taken forthwith to a police officer or to a police station by private persons, who intended nothing more. In considering the extent of the appellant's right, it seems to me that it would be wholly (wrong?) to overlook the realities of this case, if one were to deal with this case on that footing. Clearly that was not the purpose which Misri, Abdullah and Kassim had in mind that night, when they made the very determined effort at grave risk to themselves to catch the appellant (who was armed with a hatchet and was ready to use it), and did not desist until Misri was struck down, and Abdullah and Kassim were both injured. For reasons which I shall presently explain, it seems to me to be probable that at least one of the witnesses, and probably Misri, was armed with a hatchet, and inflicted the extremely dangerous wound upon the appellant. The passions that are aroused and the dangers that a karo runs when caught with a kari in this Province hardly need to be emphasised. In my view the appellant clearly was in great danger of suffering death or grievous hurt at the hands of Misri and his companions from the moment when they attempted to catch him, and it is clear that in spite of all that the appellant could do, by using his hatchet, he was not able to get away without receiving a very grave injury, which might easily have been fatal. It is clear that the apprehension of danger

to the appellant's life continued right up to the moment when he was able to clear the wall and jump into Saleh's compound and thereby save himself

I also consider the account given to be an extremely improbable one intrinsically. If Abdullah and Kassim were able to wrest the hatchet from the appellant, after the appellant had struck down Misri, how was it that they did not then catch the appellant? I find it equally impossible to believe under these circumstances that after the hatchet was wrested from his hands, and when Abdullah and Kassim were right upon the appellant, the appellant was still able to take a knife out of the folds of his shalwar, and use it against Abdullah and Kassim who were now armed with hatchet, and that the appellant should have been able, after receiving a severe hatchet blow on the head, to get away from Abdullah and Kassim after scrambling over a 6'-10" wall. The hatchet injury received by the appellant, the injuries caused to Abdullah and Kassim, and the escape of the appellant are facts which cannot, in my view, be explained credibly on the assumption that the prosecution witnesses were unarmed, and were able to wrest the hatchet from the appellant. On the facts proved, it seems to me to be far more probable that Misri and/or his companions were also armed, that at least one of them had a hatchet, and that the injuries inflicted upon Misri, Abdullah and Kassim were all inflicted with a hatchet by the appellant. The story of the snatching of the hatchet, and of the use of a knife, in the manner alleged, appear to me to be pure inventions, calculated to show that the prosecution witnesses were unarmed, and had only struck the appellant with the appellant's own hatchet in self defence. The appellant was able to disable Misri who, I think, was the most likely person to have had a hatchet and to have struck the appellant and was then able to keep Abdullah and Kassim sufficiently away, by striking at them with his hatchet, to be able to take an opportunity to make good his escape. That the prosecution witnesses should not like to admit that they were also armed, and had struck the appellant is exactly what one would expect. When faced with the fact that they had to explain how the appellant had received the very serious hatchet wound, which in fact was inflicted upon him, the first thing that was likely to occur to them, was to allege that they were themselves unarmed, that they had caused the injury to the appellant with the appellant's own hatchet after it had been snatched from him, and that they had done nothing more than act in self-defence, and explain the other circumstances accordingly. In order to make up a story of that kind, it was obviously necessary for them to allege that even after the hatchet had been snatched away from the appellant, the appellant had acted in such a way as to compel them to strike the appellant with the hatchet in self-defence. The story that the appellant, after his hatchet had been snatched, had taken out a knife and struck Abdullah and Kassim, had thus necessarily to be a part of the story, justifying the hatchet blow inflicted on the appellant. Once it is clear, as I think it is, that Misri and his companions also had at least one hatchet and used it, it is impossible in the circumstances of this case to say who was more likely to have struck first, the appellant or Misri or one of his companions. My conclusion, therefore, is that the version given by the prosecution witnesses cannot be accepted; because the witnesses are unreliable and their story is improbable. The appellant had a hatchet, and also at least one of the prosecution witnesses. It seems to me to be clear that the appellant was under a reasonable apprehension that at least grievous hurt was likely to be caused to him from the moment when Misri and his companions approached him and attempted to catch him.

The appellant was able to disable Misri, and keep Abdullah and Kassim at a distance only by the use of his hatchet. It is clear that he was unable even so to avoid a very serious injury, being inflicted upon himself. It is clear that the appellant only wished to get away, and did get away by jumping over the wall as soon as he was able to do so. I do not think that the appellant did anything more than was necessary to save himself. There is no reason whatever to think, and it is not even suggested, that after he had disabled his opponents and assured his own safety, he had inflicted any further harm by way of retaliation. In my view, therefore, the appellant did not exceed his right."

[7] On these findings, Tyabji J. was of the opinion that the appellant is entitled to acquittal on both charges. He considered the question of a retrial on the house-breaking charge and came to the conclusion that it was inexpedient in the circumstances of the case to direct a retrial.

[8] Meher J. was of the view with regard to the first two arguments of Mr. Nagrani, that relating to the charge and also to the propriety of the conviction for house-breaking, that the charge was unexceptionable, that even though it specified that the intention of house-breaking was to cause hurt, the appellant was properly convicted on the finding that his intention was to commit adultery with Wasul, and that, on the facts, house-breaking with intention to commit adultery was proved. He was further of the view that even assuming that there was any defect in the charge or that the finding as to the intention was at variance with the specific intention imputed in the charge, there had been no prejudice to the appellant, and the defect was, therefore, immaterial.

[9] In arriving at these findings, Meher J. thought that the story told by the prosecution witnesses, except as to the presence of the three accused who were acquitted, was substantially true. He thought the witnesses Abdullah, Kassim, Wasul and Khatul were substantially corroborated by the evidence of Hamid and Waroo Sand, who in his opinion were witnesses to be relied upon. The learned Judge had no doubt that in the circumstances of the case house-breaking had actually been proved as Jurio's house and the court-yard were, at the time of the offence, in the possession of Misri.

[10] I would refer to the following observations of Meher J.:

"On that night Misri was in actual possession of the room and courtyard of Jurio's house in which there was property, and the entrance to which could only be effected through the closed door of Misri's house. I do not think it necessary to go into the case-law whether possession for the purposes of S. 441, Penal Code, may include constructive possession, for I am of the opinion for the reasons given above, that Misri was in actual possession of the whole house. The indicia of actual possession are not actual physical presence in every part of the house. Corporeal property is in a person's possession when he has such power over it that

he can exclude others from it, and intends to exercise, if necessary, that power on behalf of himself or some other person.

In the present case, the entrance to the portion of the building known as Jurio's house was closed at night by closing from inside the door of the court-yard of Misri's house. Assuming, however, for argument that Misri was not in possession of Jurio's house, still the act of the appellant would amount to house-trespass, even though Jurio's daughter was away on that night. It is not necessary to constitute trespass into a house used as human dwelling that on that particular night it must have been used as a human dwelling. Can it be said that house-trespass cannot be committed in a house because the owner has locked it and gone to a hill station for two months, or because a landlord has not been able to find a tenant after the last tenant left. In *R. v. Kirham* (quoted in *Russell on Crimes*, p. 748, Edn. 9) it was held that the offence of stealing in a dwelling house had been committed, although the owner and family had left six months before, having left furniture and intending to return.

A point is made by the learned advocate for the appellant about a vernacular word used by only one witness (the woman Wasul) in referring to Jurio's house as "phital" which may mean deserted or in ruins. The learned Judge translated it as "Jurio's unoccupied house." I have no doubt that the learned Judge, whose mother tongue is Sindhi, understood correctly what the witness stated and translated it correctly. The other witnesses and the tapedar have referred to it as unoccupied. It is true that a dilapidated house which is not used as a human dwelling nor for the custody of property would not come under the definition of S. 442, Penal Code. The mashirnama shows that in Jurio's courtyard, one foot from the scene of offence where there was a pool of blood, there was a cot on which there were blood stains; three paces from there was the entrance to the hall of Jurio's house in which there were one cradle, one box and other household things, and in the inside room there were jars and a jar stand. Can it be said that this was house not used as a human dwelling or even a place for the custody of property? Would theft of any of these articles not amount to theft in a building used as a human dwelling or a place for the custody of property within the meaning of S. 380, Penal Code because the legal owner, Jurio's daughter, was away that night, though the building was in the actual possession of Misri, and the entrance to it was closed from inside by Misri's people.

In the case reported in 54 Mad. 515,¹ it was held that the offence of criminal trespass may be committed even when the person in possession of the property is absent, provided that the entrance into the property is done with intent to do any of the acts mentioned in the section. In that the learned Judge stated: "Can it be pretended, if a man in Madras locks his house and goes for a walk to the beach and comes back a few minutes later, that anyone in his absence in circumstances from which an intention to annoy may be otherwise drawn cannot be guilty of criminal trespass because he was absent? The proposition has only to be stated to show how absurd the result would be if that were the law."

A similar view has been held by the Oudh Chief Court, 35 Cr. L. J. 964.² In the Full Bench case in I. L. R. (1938) 19 Lah. 462³ where the facts were that at night time the accused unchained the outer door of the courtyard of M's house and was passing through it in order to reach the adjoining house occupied by a married woman K (with whom he had intimacy) with the object of committing adultery with her when he was seen by M's wife who raised an alarm and he was arrested in M's courtyard, it was held that he was guilty of lurking house trespass. On that case, the learned

Judges observed: "The section (of criminal trespass) means that if a person enters upon property with intent to commit an offence on that property or any other property, or with respect to a person who is, or is not, in possession of the property entered upon, he is guilty under it."

As regards the argument that the intent specified in the charge "to cause hurt, etc." is not proved, it may be that the Committing Magistrate framed the charge thus because he did not feel sure whether the entry into the house was in order to commit theft or adultery, but he framed the charge thus because the intention of the accused that could be inferred from his acts in going armed with a hatchet and knife and causing injuries to Misri, Abdulla and Kassim left it in no doubt that he did intend to cause hurt. The intent has to be judged from a man's acts and there may be a two-fold intent. Can it be said that a burglar who enters a house at night armed with a loaded pistol does not intend to cause hurt because his motive is only to commit theft and because he may even wish to avoid coming across the occupant, though he is prepared to use the pistol only if confronted? In *Russell on Crimes*, it is stated at page 756 (Edn. 9). "If the indictment charges a burglary with intent to commit felony, it will be supported by evidence of a felony actually committed. And in all cases where a felony has actually been committed, it is enough to allege the commission of it; as that is sufficient evidence of the intention." It might be mentioned here that S. 441, Penal Code also makes it an offence if a person "having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit an offence" so that it would appear that the primary motive with which a person enters upon property in the possession of another is not the only one to be taken into consideration for the purposes of S. 441.

In this case the appellant, who must have known that it was a risky thing to enter into some one's house to commit adultery with a married woman, went armed with a hatchet and knife prepared to cause hurt, if necessary. There was an intent to cause hurt, and he did actually murder Misri as soon as Misri (who had no weapon) reached him. The intent specified in the charge has, therefore, been proved. Intention is to be distinguished from "motive" or "desire" but assuming for argument that for the purposes of S. 441, Penal Code, the law will only take into consideration the primary intent, the evidence on record clearly proves that the primary intent was to commit adultery with a married woman. Clearly he did not break into the house at dead of night armed with a hatchet merely to say, "How do you do?" to Wasul with whom he had contracted intimacy; obviously he intended to commit adultery and not merely to meet her. All the witnesses have referred to Wasul as Phattu's wife. Phattu, husband of Wasul, has been examined and has stated that Wasul is his wife and has three children by her. There is nothing in his cross-examination or in the cross-examination of the other witnesses to suggest that Wasul was not lawfully married to Phattu. The application (Ex. 12) relied upon by the defence purported to have been made by Wasul, was not proved to have the thumb impression of Wasul, and was produced not from the custody of the District Magistrate to whom the application purports to be made. It is a piece of paper having no evidentiary value and should not have been admitted in evidence without proof. The principal charge against the appellant was that of murder and it was not necessary in this case for the prosecution to examine as witnesses the priest who officiated at the marriage or other persons who attended the marriage of Wasul to prove the

marriage. Nor has the appellant been prejudiced in any way by the omission to state in the charge "with intent to commit adultery with Wasu." Section 537, Criminal P. C., cures any error or omission in the charge which has not in fact occasioned a failure of justice.

In the case reported in 22 Cal. 391⁴ the facts were that the accused was found at night in the room of the complainant in which he and his wife were sleeping. Upon being detected, the accused was subjected to severe treatment but did not utter a word of protestation of innocence. In the charge the criminal intention alleged was that of committing theft, but the Magistrate found that the complainant had suppressed some facts, and that the intention was to commit adultery. It was urged in the High Court that such intention was not specified in the charge nor specifically proved. The High Court upheld the conviction and held that the contention was unsupportable for even if it had been necessary to specify the intention in the charge, it would have to be shown that the omission had occasioned a failure of justice, that though it was not certain what the precise intention of the accused was, it was clear that it must have been with one or other of the intents specified in S. 441, Penal Code, that it was impossible to suppose that the trespass could have been committed with any innocent intention, and that it must have been committed with the intention of committing some offence. In that case the learned Judge observed :

Though the prosecution must prove the existence of someone or more of the intentions mentioned in S. 441, Penal Code, the proof need not be direct, that is, by the confession of the accused, showing that his intention was one of those mentioned in the section, or by the evidence of witnesses proving that he admitted to them that such was his intention. It will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances.

In a Madras case also 12 Cr. L. J. 453⁵ it was held that it is sufficient if evidence leaves no reasonable doubt that the accused wanted to commit an offence. It is not necessary for the Magistrate to find what specific offence the accused wanted to commit. In the present case, it is impossible to say that that appellant was prejudiced in his defence by the omission in the charge about intention to commit adultery. The appellant's defence was not that he had innocently trespassed into the house in a fit of somnambulism or for any purpose other than that which the character and circumstances of his acts suggest. His defence was that he wanted to meet Wasul, but before he went to that house, Wasul's relations fought with him in the street, and while fighting he and they fell in the house of Misri and Misri received a blow with the hatchet from someone."

Meher J. accepted the finding of the learned Sessions Judge that there was an attempt by Misri and his companions who were all unarmed to exercise the right to arrest an armed intruder who in their presence was committing the offence of house-breaking by night. In arriving at this conclusion Meher J. referred to the provisions of S. 105, Evidence Act, and emphasised that the appellant had not pleaded the right of private defence, but had denied striking Misri. He was, therefore, in the result, of opinion that the conviction on all counts should be sustained.

[11] I will now proceed to deal with the first point, that the charge having specified that house breaking was in order to the committing

of the offence of causing hurt, the appellant could not be properly convicted of house-breaking with the intention of committing adultery.

[12] The first head of the charge appears to involve a combination of offences under ss. 457 and 458, Penal Code. It is of an offence under S. 457 with the addition that it states that the accused had made preparations for causing hurt which comes within the purview of S. 458, Penal Code.

[13] To establish any form of criminal trespass, it must be shown that entry upon the property in possession of another is with one of the intentions specified in S. 441, Penal Code, that is to say, an intention to commit an offence or to intimidate, insult or annoy any person in possession of such property. The offence under S. 457 is merely an aggravated form of house-trespass or house-breaking by night and the intent must be the committing of an offence punishable with imprisonment. The offence under S. 458 is an aggravated form of the offences referred to in ss. 452 and 455, Penal Code, house-trespass and lurking house-trespass or house-breaking, in each case after preparation for hurt or wrongful restraint.

[14] For offences under ss. 452, 455 and 458, Penal Code, the initial intention need not necessarily be that of committing an offence; it may be one of the other intentions specified in S. 441, Penal Code. In this case, however, the prosecution have elected to frame a charge involving an offence under S. 457, Penal Code, and have in terms specified the intention of committing an offence punishable with imprisonment, to wit, that of causing hurt.

[15] A charge is defined in 28 Cal. 234⁶ at p. 437 as "a precise formulation of the specific accusation made against a person, who is entitled to know its nature at the very earliest stage."

[16] Chapter XIX, Criminal P. C., relates to charges. Sections 221 to 232 cover matters relating to the form of the charge and also include provisions as to the alteration of charges and the effect of material errors and omissions. Sections 233 to 240 relate to the joinder of charges and provide for such matters as the conviction for an offence not charged and for a minor offence not charged and for a minor offence included in the offence charged.

[16a] In Chap. XLV which relates to irregular proceedings, is to be found S. 537 which, subject to the provisions of the Code therein before contained, cures an error, omission or irregularity in *inter alia* a charge, when such error, omission or irregularity has not in fact occasioned a failure of justice.

[17] These various provisions of the Code of Criminal Procedure contemplate that there shall be a charge for every distinct offence and that it shall be formulated with precision; that the precise charge framed is to be tried, and tried separately, (S. 233), except in the cases mentioned in Ss. 234 to 236 and S. 239; that where there is an imperfect charge or an erroneous charge, or where no charge has been framed, the Court may amend or add to the existing charge or frame a charge at any time before the judgment or in a case of a trial by jury before the verdict, or in a case of a trial by assessors upto the delivery of the assessor's opinion, but not thereafter. (Sections 226-231); that apart from a case of an erroneous or imperfect charge, or where no charge has been framed the defect is curable, an accused may only be convicted upon the precise charge framed and no other, except in the cases provided for in Ss. 237 and 238, Criminal P. C.; and that no mere errors or omissions may vitiate a charge, unless they are material in the sense that prejudice has been caused. (Sections 225, 232, 537.) In the trial of a criminal case, it is obviously not permissible to resort to procedure not sanctioned by law, and, in my view, the provisions of the Criminal Procedure Code, to which I made reference are exhaustive of the matters to which they relate.

[18] There is no doubt that in the present case the prosecution have failed to establish the house-breaking charge as laid against the appellant. The charge specified the offence of house-breaking by night by four armed persons with the intention of causing hurt. The finding of the Sessions Judge, upon which the conviction under S. 458 is based, is that one of the accused persons, the appellant, entered premises in the possession of Misri with intent to commit adultery. Both my learned brothers agree with this finding to the extent that the appellant had entered premises, not in his possession, with the object of having sexual intercourse with the woman, Wasul.

[19] The plain question which arises, therefore, on this aspect of the case, is whether, in the circumstances, the appellant can be convicted on the house-breaking charge, and this must be decided by reference to the provisions of the Code of Criminal Procedure alone. The charge as such is unexceptionable. It is based on the prosecution case as led, and fulfils the conditions as to the formulation of charges. It contains no error in the sense in which that expression is apparently used in Ss. 225, 232 and 537, Criminal P. C. The error referred to in these sections must, it appears to me, relate to the allegations of the prosecution upon which the charge is founded, and there cannot, I

think, be said to be an "error" in a charge because the evidence for the prosecution is subsequently at the trial found to be false, or insufficient to establish the charge. The sense in which the word "error" is used in S. 225 in relation to the particulars of the offence is shown by illustration (d) to that section which reads:

"A is charged with the murder of Khoda Bakhsh on 21st January 1882. In fact, the murdered person's name was Haider Bakhsh and the date of the murder was 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haider Bakhsh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial."

[20] The reference in this illustration to the enquiry before the Magistrate indicates that the error in question arose because of the failure to frame the charge in consonance with the prosecution allegations.

[21] The word "error" in Ss. 232 and 537 is, in my opinion, used in the same sense, Chapter 45 in which S. 537 is included is headed, "Of irregular proceedings." There is nothing irregular in the present proceedings by reason of the charge. I, therefore, entertain grave doubts that Ss. 225, 232 or 537, Criminal P. C. have any application to the present case, and the question does not arise for determination as to whether a failure of justice has been occasioned by any error or omission in the charge. In my view, however, were these sections applicable, there must be deemed to have occurred a failure of justice in the circumstances of the case. The question of adultery with a married woman was not in issue between the appellant and the Crown. Some of the witnesses including Phatu did incidentally mention that Wasul was the wife of Phatu, but it is manifest, in my opinion, from the trend of the trial that the point was never properly in issue. The appellant set up a liaison with Wasul but never admitted that she was a married woman, and the question of her being the wife of Phatu was never, in my view, attempted to be met by the appellant. The point would obviously have been contested had it been in issue.

[22] Another point arises in this connection. To sustain a conviction for adultery, it must be established *inter alia* that sexual intercourse was committed without the consent or connivance of the husband, and there is authority for saying that to sustain a conviction under S. 451, Penal Code for the offence of house-trespass with intent to commit an offence, the offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman. I would refer

in this connection to the judgment of Sir John Edge, C. J. and Aikman J. in 19 ALL. 74.⁷

[23] In the present case, the alleged husband, Phātu, who was examined as a prosecution witness, was asked no question at all on the point of consent or connivance. According to the evidence, Wasul had with Phātu's consent stayed with her relations 3 or 4 days before the offence, but is by no means certain that she had not been away from Phātu for a longer time than this. The witness Hamid stated that twenty days before the incident one Khalil (not Phātu, the woman's husband) had asked him to ask the appellant not to come to the complainant's house, and that Wasul had been intimate with the appellant for 2 or 3 years. It may possibly be the case that the husband, Phātu, did consent to or connive; at any rate, the onus as to this point was on the prosecution, and there is nothing on the record to show that Phātu was not a consenting or conniving party to this wife's liaison with the appellant. Had the prosecution sought to put in issue the question of adultery with a married woman, it would have been open to the appellant to establish consent or connivance.

[24] In circumstances such as these which arise in this case, the prosecution could not be said to have been at a disadvantage with reference to the charge. They could have applied for the framing of an additional charge or an alternative charge or an amendment of the existing charge at any time before the assessors expressed their opinion. It would be illegal, however, to amend the charge after that stage.

[25] Were I of the view, therefore, that there had been an error or omission in the charge within the purview of ss. 225, 232 or 537, I would have no hesitation in saying that it was a material error which had prejudiced the appellant and it would presumably have been necessary under s. 232 to direct a retrial, but, in the view I take, this question does not arise and it remains for me to consider whether a conviction may follow upon the charge as framed.

[26] In the words of Professor Kenny in his well known work 'Outlines of Criminal Law' p. 468 (12th Edn.) :

"As a logical rule, the evidence should of course establish, and the conviction also be for, the actual offence stated in the count which it concerns."

There are, however, exceptions to this rule, and in India they are embodied in ss. 237 and 238, Criminal P. C. to which I will now refer.

[27] At the outset it may be observed that sections 237 and 238, Criminal P. C. say nothing about prejudice to the accused and the obvious implication is that no prejudice can be deemed to arise when the conditions referred to in the

sections are fulfilled. They relate to cases in which the formulation of the charge is ~~un~~exceptionable. For example, with reference to s. 238, when the minor offence does in fact come within the purview of the major offence charged the question of prejudice does not arise.

[28] Section 237 manifestly has no application to the present case because it is not a case of conviction for an offence other than the one for which the appellant was charged. He was charged with an offence coming within ss. 457 and 458, Penal Code and convicted of an offence under s. 458, Penal Code. Section 237, Criminal P. C. does not, I think, cover the case of a conviction for another or more aggravated form of the same offence, but for another offence. Apart from this, s. 236, Criminal P. C. to which s. 237 is related does not, generally speaking, contemplate a case where there may be a doubt as to facts, which include the facts which constitute one of the elements of the offence.

[29] Pratt J C. in 5 S. L. R. 16,⁸ expressed the view that offences charged in the alternative arise out of the same delictum and are, therefore, necessarily cognate offences, and that an alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree, i. e. as to the intention imputed to the accused as to some circumstance of aggravation. It was further held in that case that alternative offences must be such that can reasonably be inferred from the same set of facts.

[30] Section 238, Criminal P. C. is also, I consider, inapplicable to the present case. The principle underlying s. 238 was in my view correctly stated by West J. in 11 Bom. H. C. R. 240.⁹ He said with reference to s. 457, Criminal P. C. analogous to the present s. 238, Criminal P. C. :

"That section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The graver charge in such a case gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case, where the circumstances, embodied in the major charge, do not necessarily, and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter. The section is not intended to apply to a collateral offence."

[31] It is true that in the case before West J. the accused had been charged with murder and had been convicted for abetment for murder, but nevertheless I consider that what he has stated is applicable in principle, and applying that principle, it seems to follow that s. 238 does not cover the present case because the circumstances embodied in the major charge under s. 458

i. e. house breaking with the intention to commit an assault do not constitute the offence of house-breaking with the intention of committing adultery. The latter is not arrived at by mere subtraction from the former.

[32] I do not consider that s. 238 has any application to a case in which the specific intent embodied in the charge is not established, but the conviction is based upon an another and altogether different intent.

[33] Section 238, Criminal P. C. has been relied upon in certain reported cases as justifying a conviction for house-breaking or house-trespass where the intent specified in the charge has not been established. These include 44 Cal. 358¹⁰ to which more detailed reference will later be made. I would merely say at this stage that unless my view is correct, a considerable body of cases in which it has been ruled that a conviction under s. 147, Penal Code cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge, must be deemed to have been erroneously decided.

[34] I would refer in this connection particularly to the judgment of Princep J. in 27 Cal. 990,¹¹ and that of Sir Lawrence Jenkins and Mookerjee J. in 36 Cal. 865.¹² In the former case, Princep J. said :

"The Sessions Judge has accordingly dismissed the appeal confirming the conviction and sentence, but on a different finding of fact from that to which the petitioners were called upon to plead and to defend themselves at the trial. *The petitioners have accordingly been convicted by the appellate Court of an offence for which they have never been tried. They are consequently entitled to an acquittal.*"

In the latter case it was said :

"It cannot be laid down as a general proposition of law that a conviction under S. 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is *whether the common object established agrees in essential particulars with the common object as stated in the charge.* In the present case, there can be no doubt that the common object, as stated in the charge, has not been substantially established."

In neither of these cases in quashing the conviction was any reference made to the curative provisions of s. 537, Criminal P. C. •

[35] I will now refer to certain decisions in which this question has arisen with regard to the offence of house-breaking or house trespass. 22 Cal. 391⁴ is a case in which the accused had been arrested upon a charge under s. 456, Penal Code, the allegation being that his intention was to commit theft. In the charge framed by the Magistrate no intention was specified. The Magistrate came to the conclusion that trespass had not been committed by the accused with the intention to commit theft, but nevertheless convicted the accused. In appeal, the Sessions

Judge found that the Magistrate's views were against the evidence. He upheld the conviction without finding what specifically the intention was. In revision it was contended that the conviction was bad (1) because no guilty intention was set out in the charge; (2) because no intention was proved by the evidence and (3) because no such intention was specifically found by the Sessions Judge. As to the first point, it was held that it was not necessary in the case of an offence under s. 456, Penal Code, to specify the intention and that, in any event, the provisions of s. 537, Criminal P. C. applied, and there had been no miscarriage of justice.

[36] With regard to the second contention, it was held that though it was not certain what the accused's precise intention was, it must have been one of those specified in s. 441, Penal Code. And as regards the third point, it was held that the High Court exercising jurisdiction under s. 439, Criminal P. C. would not be justified in setting aside the conviction merely because the view taken of the evidence by the lower Court is not sustainable or that some fact which ought to have been found by that Court was not found or found incorrectly. That case is one of a series in which it has been held that it was not necessary to specify the intention of the accused in a charge under s. 456, Penal Code. It was however, pointed out that a charge under s. 457, Penal Code, would be bad for want of specification of intention in the charge. It has no application to the circumstances before me because the charge here was not under s. 456 but under s. 458 and it does specify the intention. I would in passing, however, observe that I am not satisfied that in any of the offences involving criminal trespass it is not necessary to set out the intention. As I have already pointed out, the entry into premises in possession of another is not punishable, unless it is made with one of the intentions set out in s. 441, Penal Code. In other words, intention is an essential element in the offence of criminal trespass and I consider that in all cases where this is so, the charge should specify the intention.

[37] It has been stated in Halsbury's Laws of England, Vol. 9, p. 134, para. 174 :

"Where any particular intent is a necessary ingredient of an offence, the intent must be stated in the indictment."

[38] Justice need never be defeated in a case in which the intention of the accused is uncertain, bearing in mind always that an accused person is the best judge of his own intentions, because, as I have already pointed out, charges may be framed in the alternative and the charge may be amended or added to at any time up to the ultimate stage of the trial. Moreover the

omission to set out the intention would always be curable provided no miscarriage of justice has occurred.

[39] In 41 Cal. 749,¹³ it was held that where the case against the accused is one of theft or house-breaking to commit theft, and the Magistrate finds that it has broken down, but that there is another object apparent on the evidence, it is his duty to give the accused notice of that by drawing up a charge clearly stating what it is that he is accused of doing. The accused had been charged under S. 457 and the Magistrate had convicted him under S. 456. The Calcutta High Court held the trial to have been vitiated.

[40] In 16 C. W. N. 696,¹⁴ it was held that an accused person who was being tried on a charge under S. 457 for house-breaking with intent to commit theft, could not be convicted of a charge under S. 456, Penal Code with an object unspecified but which was obviously of having intercourse with a woman, without amendment of the original charge. In the judgment it was observed :

"We think that there can be no doubt on the authorities that the charge under S. 456 of entering the house with an object not specified but which is presumed to be criminal cannot be sustained when the person is being tried for the specific charge of theft in a dwelling-house and house-breaking with intent to commit theft. It is obvious that he must be seriously prejudiced by not knowing what really is the charge against him. *Although it is not necessary under S. 456 to specify any particular offence when such particular offence is specified under S. 457 it is incompetent in our opinion, to convict of house-breaking with some other intent.*"

[41] In 44 Cal. 358,¹⁰ already referred to above, the accused was tried for offences under ss. 458 and 380, Penal Code on the allegation that he had entered the room of a widow to commit theft. He was tried summarily and he set up the defence of previous intrigue and that he had entered the room at the widow's invitation. The Court disbelieved the stories of theft and intrigue and found the entry to have been without her consent and in order to make immoral proposals to her to her annoyance. The accused was convicted under S. 456 and it was held by the High Court that the conviction was proper on the ground that s. 238, Criminal P. C. applied. It was sought to distinguish the last mentioned case, 16 C. W. N. 696,¹⁴ but I am unable to discern any material point of difference such as to justify a different conclusion on principle. The only possible ground of distinction may be that *Karali Prasad's case*¹⁰ was tried summarily and there may have been no charge although if this was so, it is difficult to see why s. 238, Criminal P. C. was invoked. One passage in the judgment, however, suggests that there was a charge because their Lordships have observed:

"We cannot consequently hold that merely because the intent imputed to the accused to sustain a conviction under S. 457 has failed, no conviction can be made under S. 458."

If there was no charge and the intent referred to was imputed in the evidence, the passage is comprehensible. If there was a charge imputing the specific intent, the passage is not comprehensible in view of the apparently irreconcilable observations which immediately follow, for their Lordships go on to say :

"We are not now concerned with the question whether a conviction under S. 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved. We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under S. 147 cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge : 36 Cal. 865¹² ; 33 Cal. 295¹⁵ ; 27 Cal. 990.¹¹ In that class of cases, the weighty observations in 11 Cal. 106,¹⁶ may be borne in mind : 'an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more specially true in cases where (as in a case under S. 147) it is sought to implicate him for acts not committed by himself but by others with whom he was in company'."

Although their Lordships have relied on S. 238, Criminal P. C. there has been no discussion of the principles underlying that section.

[42] In 26 C. W. N. 344,¹⁷ following 41 Cal. 749¹³ and 16 C. W. N. 696,¹⁴ it was held that although it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged, the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge, unless the Court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge.

[43] In 23 ALL. 82,¹⁸ where on a charge under S. 457, Penal Code, it was proved that the accused entered the complainant's house in order to have sexual intercourse with a woman whom he knew was the wife of the complainant, and that he did so without the husband's consent, it was held that the conviction was proper and that it was not necessary that the complainant should bring a specific charge of adultery. It is clear from the facts of that case that the appellant admitted house-trespass with intent to commit adultery with a married woman and the facts are, therefore, not in point.

[44] In 37 ALL. 395,¹⁹ the accused was apparently charged with having committed lurking house-trespass by night, the allegation being that

he intended to commit theft. He stated that he had entered the complainant's house as he was on intimate terms with the widowed aunt of the complainant and that he had been invited to the house by her. It was not proved that the intention of the accused had been to commit theft, but he was convicted and sentenced under S. 457, Penal Code. The High Court refused to interfere with the conviction in revision on the ground that the intent with which the appellant entered upon the complainant's premises was a matter within his own knowledge, the burden of proving which lay upon him, and that having failed to establish any illegal intimacy of any kind between him and the Brahmin widow, the conviction was proper. There was no discussion in the judgment as to whether there could be a conviction in a case of house-breaking where the charge specified an intention to commit theft, which allegation had been discredited, and the decision is at variance with 16 C. W. N. 696¹⁴ and 41 Cal. 743.¹³

[45] In A. I. R. 1920 Pat. 590,²⁰ it was the case against the accused that he had committed lurking house-trespass by night in order to commit theft. It was found in appeal that it was not proved that the object of the trespass was to commit theft, and the Sessions Judge altered the conviction from one under S. 457 to one under S. 456, Penal Code. The High Court set aside the conviction, Das J. making the following observations :

"It seems to me that the petitioner has really not been tried for an offence of which he has now been convicted. The case in A. I. R. 1914 Cal. 663,¹³ is in point."

[46] In A. I. R. 1921 Pat. 217,²¹ Jwala Prasad J. took the view that if the accused was charged under S. 457 for house trespass with the intention to committing theft, he could be convicted under S. 456 of house-trespass with the intention of committing adultery if he was not prejudiced.

[47] Varma J. in A. I. R. 1935 Pat. 129,²² referring to the conflict of opinion on the point, followed the case last referred to above and expressed the view that S. 238, Criminal P. C. was applicable.

[48] The decisions to which I have made reference indicate that there is no unanimity of opinion, on the point involved and, for the reasons I have already given, I am in agreement with 16 C. W. N. 696,¹⁴ 41 Cal. 743,¹³ and the other cases in which a similar view has been taken. I am, therefore, of opinion that the conviction under S. 458, Penal Code cannot be sustained.

[49] It is unnecessary in this view to consider in any detail the question as to whether the appellant's entry in the premises amounted to

house-trespass or house-breaking. "Building" has not been defined in the Penal Code, but it is coupled with "tent" or "vessel" in S. 442, and is apparently used in a comprehensive sense. It was held in 22 S. L. R. 486,²³ and other cases that a courtyard annexed to living rooms, the whole being entirely surrounded by a wall constitutes a building within the meaning of S. 442, Penal Code and this seems to be a reasonable view of the matter considering the climate, conditions of life and the types of dwellings in use in India. The place in which the appellant was found seems to fulfil the conditions mentioned in 22 S. L. R. 466²³. There were living rooms to which were annexed open courtyards each courtyard leading into the other and the whole was surrounded by a comparatively high brick or mud wall provided with a door leading to the street.

[50] It does not seem to me to make any material difference that Jurio's courtyard and living room, i. e. the particular part of the premises formerly occupied by him, were at the time of the offence unoccupied. The point is that there was one common wall round the whole premises and one common outlet to the street.

[51] It seems to me, therefore, that it cannot be said that the first charge was not sustainable because there was no house-trespass or house-breaking.

[52] In view of my finding as to the charge under S. 458, Penal Code, it is not necessary to consider the question as to whether, had there been a charge correctly specifying the intention, the evidence on record is sufficient to sustain a conviction. I do not consider the point in this form arises at all, although a consideration of the entire evidence is involved when dealing with the murder charge to which I will now direct my attention.

[53] The appellant was properly charged and tried for murder and no fault can be found with the charge under S. 302, Penal Code. It does not follow that because the house-breaking charge has failed, the murder charge need necessarily fail. It is a separate charge to be treated separately on its merits although by reason of S. 235, Criminal P. C. there has been one trial.

[54] There is no doubt that the appellant did intentionally strike Misri with an axe and caused his death and did intentionally strike Abdullah and Misri causing certain incised wounds. The question is as to whether in inflicting these injuries he was acting in the exercise of the right of private defence within the meaning of S. 96 and ancillary sections of the Indian Penal Code. It has not, and with justification, been suggested that any of the exceptions to S. 300,

Penal Code apply. Under s. 105, Evidence Act, the onus lies upon the appellant to establish the existence of circumstances bringing his case within the general exception provided for in s. 96, Penal Code, but the principles underlying s. 105 are sometimes difficult of application.

[55] Before dealing with the particular facts of this case, I will make some reference to these principles. In 1935, the case in 1935 A. C. 462,²⁴ came up before the House of Lords and there appears in the judgment of Viscount Sankey, in regard to the burden of proof in criminal cases, the following well-known passage :

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

[56] The effect of the decision in 1935 A. C. 462²⁴ in relation to s. 105, Evidence Act, has been the subject of discussion by certain High Courts in India, and in particular, has been considered by Full Benches of the Rangoon and Allahabad High Courts.

[57] In 14 Rang. 666,²⁵ two of the four points of reference submitted to the High Court were:

(1) Where a person is accused of any offence and alleges the existence of circumstances which bring the case within the General Exceptions of the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, does s. 105, Evidence Act or any other rule of law provide that when facts *prima facie* constituting the offence are proved by the prosecution, and from the examination of the accused or evidence tendered by the defence in attempted discharge of the burden of proof then laid upon the accused by the said section (105), the Court has a reasonable doubt as to whether the said burden of proof has been discharged by the accused person, or as to the truth of the statement of the accused, or evidence tendered, the Court should convict the accused?

(2) Is the decision of the House of Lords in (1935) A. C. 462²⁴ inconsistent with the law of British India, or should it be regarded as explaining the meaning of the phrase 'the burden of proving the circumstances is upon him, and the Court shall presume the absence of such circumstances' in s. 105, Evidence Act, 1872?"

[58] The answer to the first question was found in the negative. On this point I refer to the following observations of Roberts C. J.:

"The answer to the first question is one of great importance because it involves a fundamental principle of Criminal law common to England and to British India. The main proposition may be laid down simply as follows: *in all criminal cases where there is a reasonable doubt as to the guilt of an accused person at the close of the whole of the evidence the accused is entitled to be acquitted.*"

Section 105, Evidence Act, runs thus: 'When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.'

There has been in some quarters much confusion as to the meaning of the words "burden of proof." In criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case: if on a review of all the evidence the prosecution has failed to establish the guilt of the accused beyond reasonable doubt, he is entitled to be acquitted. Some references were made in the argument to a popular theory that Courts give to the accused what is known as "the benefit of the doubt;" the phrase is misleading and should be avoided in any attempt at accurate expression. The accused does not receive a benefit, nor does humanity grant him some boon dictated by the instinct of mercy in opposition to the ends of justice. Where there is an element of genuine doubt then there must be an acquittal as a matter of right and not as a matter of grace or favour.

Now, it is not for the prosecution to examine all the possible defences which might be put forward on behalf of an accused person and to prove that none of them applies. In order to make this clear, s. 105, Evidence Act, says that the Court shall presume the absence of such circumstances as may bring the case within the ambit of a possible defence. *But if the evidence adduced by the prosecution is itself consistent not only with the guilt of the accused but with his possible innocence, it is clear that there can be no conviction.* In the same way if such evidence is consistent not with innocence but with the commission of a lesser offence than that with which the accused person is charged, it is clear that the conviction (if any) must be restricted to a conviction for such lesser offence.

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

doubt in the case for the prosecution and has thereby earned his right to an acquittal.

By S. 106, Evidence Act, when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The burden of proof referred to here is that of introducing evidence merely and the phrase is used in the same sense as in S. 105. Section 106 does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge: *nor does it warrant the conclusion that if anything is unexplained which the Court thinks the accused could explain, he ought therefore to be found guilty*: 41 C. W. N. 65, 26.

I would answer the first question in the negative."

[59] As to the second point, it was held that the decision in 1935 A. C. 462²⁴ is in no way inconsistent with the law in British India, but that on the contrary the principles there laid down form a valuable guide to the correct interpretation of S. 105, Evidence Act.

[60] This Court in I. L. R. (1940) Kar. 249²⁷ (by which decision I am bound) also took the same view as to the effect of *Woolmington's case*.²⁴

[61] In I. L. R. (1941) ALL. 843,²⁸ the effect of the decision in *Woolmington's case*²⁴ and its bearing upon the interpretation of S. 105, Evidence Act, came up for consideration before a Full Bench consisting of not less than 7 Judges. Four of these, including the Chief Justice, Sir Iqbal Ahmed, took the view in consonance, generally speaking, with that of the Rangoon High Court in 14 Rang. 666²⁵ that the decision in *Woolmington's case*²⁴ is in no way inconsistent with the law in British India, and that it furnishes a valuable guide to the correct interpretation of S. 105, Evidence Act, and it was further held that, to quote a portion of the head-note:

"The burden of proving the existence of circumstances bringing the case within a general or special exception is no doubt cast upon the accused by S. 105, Evidence Act, but this does not in any way absolve the prosecution of the burden laid on it by S. 102, so far as the entire 'proceeding' is concerned. There is nothing in the Evidence Act to justify the conclusion that the failure of the accused to discharge the burden under S. 105 is tantamount to 'disproof' of the existence of circumstances bringing the case within the general or special exception pleaded: all that can be said is that those circumstances are 'not proved.' The presumption laid down in S. 105 might come into play, but it does not follow therefrom that the accused must be convicted even when the reasonable doubt under the plea of the right of private defence or any other general or special exception pervades the whole case. The Court at the end of the trial, has still to see whether having regard to the entire evidence and the circumstances of the case, the charge is proved beyond reasonable doubt."

[62] The dissenting Judges (Collister, Allsop and Braund) took a more restricted view of S. 105, Evidence Act.

[63] There is no doubt that the principles stated in 14 Rang. 666²⁵ and by the majority of

the Court in I. L. R. (1941) ALL. 843²⁸ apply also to the situation which arises when the accused denies *in toto* the actual act alleged and does not, whether owing to ignorance or bad advice, plead the exception. Whether the exception is actually pleaded is immaterial so long as on all the facts of the case, including admissions made by the prosecution witnesses, there is reasonable doubt as to the guilt of the accused at the close of the whole evidence. I refer on this point to the observations of Dunkley J. in the Rangoon case.

[64] Being guided, therefore, in the interpretation of S. 105, Evidence Act by the decision in 1935 A. C. 462²⁴ and accepting the principles stated in 14 Rang. 66,²⁵ and the majority view in I. L. R. (1941) ALL. 843,²⁸ the question before me resolves itself into whether upon a consideration of the evidence as a whole, a reasonable doubt has been created as to whether the appellant is entitled to the benefit of the general exception as to the right of private defence; or put another way, whether the prosecution case is itself consistent not only with the guilt of the accused, but with his possible innocence.

[65] In this connection a difficulty immediately arises because the eye-witness evidence for the prosecution is deliberately false in material particulars and cannot, in my view, be relied upon in any respect. All the eye-witnesses support the story that there were four armed intruders whom they have named. The reluctance to conceal the true reason for the appellant's visit is comprehensible though not justifiable but that all these witnesses were prepared to inculpate three innocent persons in a case involving a long term of imprisonment is some indication of the extent to which they were prepared to prevaricate. The learned Sessions Judge found that this part of the story was untrue, but he and Meher J. were prepared nevertheless to place some reliance on the evidence of these eye-witnesses as to the circumstances in which Misri was assaulted. Meher J. thought that whereas Abdulla, Kassim, Wasul and Khatul might be said to be interested and false witnesses, their evidence received corroboration from two 'independent' witnesses, Hamid and Waru Sand. Hamid's evidence is, to my mind, manifestly false, because he supports the story of the four armed intruders. He is also shown in cross-examination to be interested in Abdulla. He admits that his mistress Saran is Abdulla's father's sister. The evidence of Waru Sand carries the case no further because he is not an eye-witness. He is said to have come after the appellant had escaped over the wall.

[66] Certain admissions made by Wasul, her mother Khatul and the witness Hamid, indicate,

beyond any doubt, that Wasul had been carrying on an intrigue for a considerable time with the appellant and that this must have been known to the prosecution witnesses. Wasul admitted that she used to meet the appellant secretly in Jurio's unoccupied house. Hamid has admitted that some 20 days before the incident, he had been asked to remonstrate with Waroo. Although the prosecution witnesses have sought to make out that the woman Wasul had only been living in Misri's house for 2 or 3 days before the incident, it appears to be the case that she had been living there much longer.

[67] The story put forward by Wasul and corroborated by the prosecution witnesses, as to the circumstances in which Wasul went to the outer courtyard to talk to the appellant on the night in question, and how the crying of her child aroused her mother, is dubious. Perhaps the most material point on this aspect of the case was however, as to whether Misri and/or his companions were armed, and I am unable to accept the prosecution evidence that they were unarmed. I am in entire agreement with Tyabji J. that at least one of the witnesses must have been armed with a hatchet when they went to apprehend the appellant. Apart from the cogent reasons put forward by Tyabji J., I cannot conceive that in the conditions prevailing in Sind Mahomedan rustics would set out unarmed to apprehend intruders at night. Axes and lathis are readily available and are invariably taken up on such occasions. The fact is that the appellant did receive a blow from a hatchet and the witnesses have put forward the specious story that this was caused by the appellant's own hatchet which Abdulla was able to seize from him.

[68] In my opinion, the relations of Wasul knowing of her intrigue with appellant, in all probability either lay in wait for him or discovered during the course of the night that Wasul was with him, and three of them, Misri, an able-bodied man of 40 and Abdullah and Kassim, both young men, made a concerted onslaught upon the appellant who was then in the outer courtyard. There is no doubt that they knew it was the appellant they were attempting to attack or seize and that his presence was only accountable by the fact that he had come there to meet Wasul.

[69] With regard to what actually took place in the ensuing struggle therefore, I consider that no reliance of any kind can be placed upon the oral testimony of the prosecution witnesses. Not only is the whole fabric of their story entirely untrustworthy as indicated above but material details as to what occurred during the struggle are, I consider, false as, for ins-

tance, the alleged seizing of appellant's hatchet by Abdulla and the appellant then extracting a knife from the folds of his trousers and the use of it on the witnesses. None of them are proved to have sustained any stab wounds which is the normal type of wound inflicted by a knife. If Abdulla were standing by appellant armed with appellant's hatchet he would obviously neither permit appellant to fumble in his trousers for a penknife nor indeed permit him to escape over the wall at all, and particularly so when the appellant is said already to have seriously injured and knocked down Misri.

[70] The only safe and reasonable course in this case is to fall back upon the circumstantial evidence and to decide whether upon it the conviction can be sustained. The circumstances are that there was a pool of blood in Jurio's courtyard and blood on the wall. Of the four men engaged in the struggle, two of them, the appellant and Misri, had sustained serious incised injuries which in the opinion of the medical officer had been caused by a weapon such as a hatchet. The appellant received a cut on the left parietal region cutting the bone, and in the opinion of the doctor, it was sufficient in the ordinary course of nature to cause death. Misri in addition to a serious injury on the neck, which caused his death, had a simple cut. Kassim had a simple incised injury and small contusion. Abdulla had one simple incised injury.

[71] Assuming as I do that Misri's party knowing of the presence of appellant in the outer courtyard (for the purposes of his intrigue with Wasul) advanced to seize or attack him, at least one of them being armed with a hatchet and that it was the appellant's desire to escape, the circumstances indicate nothing more than that a fight ensued in which each side sustained injuries. There is nothing to show who struck the first blow. The circumstances are consistent with the appellant having been struck first and then by use of his hatchet having extracted himself from a very dangerous position, and escaped. In the circumstances I consider the appellant had reasonable cause to apprehend death.

[72] It is true that there is no right of private defence under the Penal Code against an act which is not in itself an offence under the Code, and if the facts had indicated that Misri and his companions were entitled to arrest the appellant, and in attempting to do so, did not resort to more force than was necessary, the case might be different.

[73] But I am not prepared in the particular circumstances of this case to hold that Misri and his companions had the right to arrest the

appellant under S. 59, Criminal P. C. For the reasons already given, I have no doubt that they were aware of the appellant's liaison with Wasul and that the appellant was in the habit of meeting Wasul secretly in Jurio's abandoned premises. Assuming the marriage of Phatu and Wasul to have been proved, I am not prepared also to assume without some evidence that Wasul was carrying on her intrigue without the knowledge or assent of Phatu. The prosecution, as I have said, examined Phatu but failed to ask him any question on the point of consent or connivance. The right of arresting appellant has certainly not been established by the prosecution and it cannot be assumed in this case. This is not a case where there could have been any uncertainty in the minds of the prosecution witnesses as to appellant's intention in entering Jurio's courtyard. They have elected to conceal the true state of affairs and even when the facts of Wasul's intrigue were elicited in cross-examination, the prosecution made no attempt to establish that it was without Phatu's consent.

[74] I consider, however, that even assuming Misri and his companions had the right to arrest the appellant, the facts are consistent with an attack upon him in which they resorted to excessive violence justifying the appellant in apprehending that he would be killed. The appellant was doing what to the knowledge of the prosecution witnesses he had often done before—meet Wasul in Jurio's court-yard—when he was set upon by three of them one of whom at least was armed with an axe.

[75] This case might have assumed an entirely different aspect had it been possible to place some reliance on the testimony of the eye-witnesses as to the circumstances in which Misri and the appellant were injured and in particular as to who struck the first blow. But I wish again to emphasise that the whole fabric of the prosecution case is false and I am not prepared to sustain the conviction for murder because of appellant's failure to establish any more circumstances in his favour than those already on record. In my view the murder charge must fail on the ground that the guilt of the appellant has not been established beyond all reasonable doubt.

[76] Concurring, therefore, with Tyabji, J., I acquit the appellant of all the offences with which he has been charged and direct that he be set at liberty.

R.G.D.

Appellant acquitted.

A. I. R. (35) 1948 Sind 57 [C. N. 15.]

O'SULLIVAN AND THADANI JJ.

The Municipality of Kotri — Applicant v. Abdul Rahman M. Qureshi — Opponent.

Criminal Revh. App'n. No. 55 of 1947, Decided on 26-5-1947, to revise order of First Class Magistrate, Kotri, D/-16-12-1946.

(a) Bombay District Municipal Act 43 [III] of 1901), S. 77 (2)—Terminal tax levied by Kotri (Sind) Municipality in pursuance of S. 59 (1) (xi) — Non-payment of, if punishable under S. 77 (2).

When the Bombay District Municipal Act, 1901, came into force, the word "octroi" meant octroi as defined or decribed in cl. (iv) of S. 59 (1), and the same meaning must be given to word "octroi" in S. 77 (2) of the Act. The word "octroi" used in the rules and bye-laws framed by the Kotri Municipality in Sind in describing terminal tax levied in pursuance of cl. (xi) of S. 59 (1) is nothing more than a tax as described in S. 73 (1) (v), Bombay Municipal Boroughs Act, 1925. The word "octroi" used in the description of terminal tax is an octroi which is not liable to be refunded, on the other hand, "octroi" referred to in cl. (iv) of S. 59 is clearly refundable. The connotation of the word "octroi" in the description of terminal tax in the rules and bye-laws of the Kotri Municipality is something quite different from the connotation of the word octroi used in cl. (iv) of S. 59 (1). It is a recognised canon of construction that where in an enactment a word is defined or decribed, it must have the same meaning wherever it occurs in the enactment. Manifestly the word "octroi" used in rules and bye-laws of the Kotri Municipality in Sind has not the same meaning as it has in cl. (iv) of S. 59 (1), Bombay District Municipal Act. Consequently, what is punishable under S. 77 (2), Bombay District Municipal Act is the non-payment of octroi with the particular intention described in sub-s. (2) of S. 77, and not the non-payment of terminal tax which the Kotri Municipality is competent to levy: 22 Bom. 843; 13 A. I. R. 1926 Bom. 231; 26 A. I. R. 1939 All. 736, *Disting.*

[Paras 6, 7 and 8]

(b) Bombay District Municipal Act (3 [III] of 1901), S. 77 (2)—Intention to defraud is essential.

Before a person can be convicted of an offence under S. 77 (2), it must be proved that the person importing the goods had intention to defraud the municipality. [Para 13]

Cases referred to:—

1. (198) 22 Bom. 843, In re Rahim Bhanji.
2. (26) 50 Bom. 174; 13 A. I. R. 1926 Bom. 231; 98 I. C. 407; 27 Cr. L. J. 1335, Emperor v. Harjivai Valji.
3. (40) I. L. R. (1940) All. 4; 26 A. I. R. 1939 All. 736; 187 I. C. 468, Hardwarimal Harnathdas Firm v. Municipal Board, Dehra Dun.

Kishinchand T. Bijlani—for Applicant.

Hardayal Hardey—for Opponent.

Fatehchand Assudomal, Advocate-General of Sind —for the Crown.

Thadani J.—This is an application by the Kotri Municipality under the provisions of Ss. 435 and 439, Criminal P. C. to set aside the judgment of acquittal passed by the learned Magistrate and first class Magistrate of Kotri in which he acquitted one Mr. Abdul Rahman, M. Qureshi, proprietor of Messrs. Qureshi and Company, of an offence punishable under the provisions of S. 77 (2), Bombay District Municipal Act, 1901.