THE question of proper method of directing the Jury concerning the standard of proof in criminal cases was brought ahead by the judgment of the Court of Criminal Appeal in R v. Summers (1952) 1 All E.R. 1059. It will, therefore, be convenient to begin by considering the authorities before and after that decision.

Several judgments delivered in the course of second half of the 19th century indicated the existence of the twin standards of proof recognised by the law. One, proof of a preponderance of probabilities, which is the standard appropriate to civil cases; two, proof beyond reasonable doubt, which is the standard recognised for deciding criminal cases. Willes J., while advising the House of Lords in Cooper v. Slade said that incivil cases the preponderance of probability may constitute sufficient ground for verdict; but in a criminal proceeding, which took place some seven years latter the Jury were told that they may be satisfied of the accused's guilt beyond any reasonable doubt and this is a conviction created in their minds and not merely as a matter of probability and if it was only an impression from probability, their duty was to acquit. This proposition finds support from the authority in Flower v. Ebbw Valve Steel Iron and Coal Company Limited (1936) A.C. 206, in which Lord Alness gave the verdict, in the first half of the twentieth century, the House of Lords sanctioned a reference to proof beyond reasonable doubt by a judge when summing up in a criminal
case, and the distinction between the two standards was stated as clearly as it can be stated by DENNING, J., as he then was, in Miller v. Minister of Pensions (1947) 2 All.E.R. 372.

Dwelling upon the degree of cogency, the evidence on a criminal charge was required to reach, Denning J., observed:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence & 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Referring the degree of cogency required to be reached in a civil case, His Lordship said:

"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but if the
probabilities are equal it is not."

Despite this clear distinction between two standards applicable to criminal and civil cases, the law was held to be not very well settled on two grounds. It was suggested that the onus borne by the plaintiff in civil litigation was the same as that undertaken by a prosecutor on a criminal charge. Sir Carlton Allen observed that it would startle the legal world and the public if, when trying an action for damages the judge were to say to the jury, "You need not be as careful in arriving at your conclusions as if you were trying a criminal case","w-while judges occasionally spoke of the necessity of proof beyond reasonable doubt in relation to such issues as those of contributory negligence and causation arising in the course of civil proceedings. Secondly, it seems to be fairly certain that confusion was sometimes occasioned by judicial endeavours to elucidate the nature of a reasonable doubt when directing juries in criminal cases. Remark made by Lord Goddard C.J., on the point is pertinent;

"Once a judge begins to use the words 'reasonable doubt' and try to explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language, 'It is the duty of the prosecution to satisfy you of the prisoner's guilt."

The two very important authorities need to be
attended to to understand the law developed on the point in this period. In Woolmington v. Director of Public Prosecutions (1935) A.C. 462, the appellant was convicted at Bristol Assizes before the Swift J., and a Jury. The appellant's wife left him and went to live with her mother. The appellant wanted her to go back to him and for that he made efforts, but in vain. On the fateful day, that is, December 10th 1934, the appellant Mr. Woolmington appeared at the house of his wife's mother and in the absence of her mother, he entered the house, took out the gun under his overcoat and shot his wife. In defence he gave evidence, without denying the fact that his wife was shot dead by the bullet fired by him from the gun he carried under his overcoat, that on his wife's refusal to come back to him, he said to her that he would shoot himself if she would not come back to him and to explain how he meant to do this and to show her the gun with which he meant to do it, he unbuttoned his overcoat, and brought the gun across his waist. The gun went off; he did not know it was pointing at his wife. She fell to the ground. He did not know what to do. There was a witness in the neighbour Mrs. Braine, his wife's aunt, who had heard the sound of the gun so fired. Swift J., in his summing up to the Jury gave the following directions:

"A charge is made against Reginald Woolmington, the prisoner at the bar, of
wilful murder. It is said that on the morning of December 10, about half-past nine, he murdered his wife. That she died whilst he was in that house you will, I should think, have little doubt. It is a matter entirely for you. If you accept his evidence, you will have little doubt that she died in consequence of a gun-shot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse or justification. In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth." That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody had died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter,
or was something which was accidental, or was something which could be justified."

Then after reviewing and commenting upon the evidence, the learned Judge added these words:

"The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case, which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

The Jury returned the verdict of guilty of wilful murder. The leave for appeal to the Court of Criminal Appeal was refused. On the certification of the Attorney General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought, the appeal was brought before the House of Lords.

The exception taken before the Court of Criminal Appeal was presided over by Averys J., that in the summing-up the trial Judge did not anywhere use the expression that the Jury should acquit the accused altogether, or convict him only of manslaughter if they entertain any reasonable
doubt about the truth of his explanation of how his wife came by her death. It may be that it would have been better that if they entertain reasonable doubt whether they should accept his explanation, they should either acquit him altogether or convict him of manslaughter only. Simply stated, the complaint of the appellant was that the learned Judge of the Court of Criminal Appeal did not take a more serious view of the omission of the trial Judge to make it quite clear that the onus still lay upon the prosecution.

A circumstance, which appears to be rather significant, in the matter of formulating the belief resulting in such a charge to the Jury, appears to be to the opinion held by the authorities in Sir Michael Foster, who himself was a Judge besides being the author of the work Interpretation to Discourse of Homicide. Sir Michael's description of murder is repeated in Archbold's Criminal Pleading and Evidence and Russell on Crimes. Sir Michael Foster, although a distinguished Judge, was to be regarded as a text book writer only, for he did not lay down the authority in any case before him but in an article which is described as "Interpretation to the Discourse of Homicide" in the folio edition, published at Oxford at Clarendon Press in 1762, he states:

"In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or informity are to be satisfactorily proved by the prisoner, unless
they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in the malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth; the matters tending to justify, excuse or alleviate, must appear in evidence before he can avail himself of them."

The first para of this passage had held recognition finding place in almost every text book since written to the passage coming down to the modern times appears in Stephen's Digest of the Criminal Law; also in the well known treatise of Archbold, Criminal Pleading, Evidence and Practice 29th Edition (1934) which is the companion of lawyers who practise in the criminal Courts. It also appears almost textually in Russell on Crimes and in the second edition of Halsbury's Laws of England (1933) which purports to state the law as on May 1, 1933 where it is said:

"When it has been proved that one person's death has been caused by another, there is a prima facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder."
The authority for the purpose is given as Foster, pp.255,290 and also the case of Rex v. Greenacre & C. & P. 35. The question arose as to whether the statement made by Foster was correct or wrong posing a further question as to whether he means to lay down that there may arise, in the course of criminal trial, a situation at which it is incumbent upon the accused to prove his innocence? It was observed by the House of Lords that what Sir Michael Foster meant is not a proposition backed by any previous authority. While surveying the previous position of law right from the year 1907 and also by referring the authority in Reg v. Mawridge (1843) 4 St Tr.(N.S.) 847, it was observed that only general rule that could be laid down was that in support of defence of insanity the defendant, that is, the accused was under obligation to establish the factum, that is, the insanity. Bearing these considerations in mind Viscount Sankey L.C., speaking for the House of Lords, doubted whether any of the cases decided earlier and decided before him dealt with the question of burden of proof. Realising that the Law of Evidence in English courts in that period was in a very fluid condition, he observed that it was only latter that the Courts began to discuss such things as presumption and onus. All this culminated into the proposition that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish innocence, but the
prosecution has to establish his guilt just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case he is entitled to the benefit of 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. The same proposition was laid down in Rex v. Abramovitch (1914) 11 Cr.App.R.45.

Disagreeing with the opinion of Sir Michael Foster, it was ruled that the Crown must prove the death as result of voluntary act of the accused and malice of the accused either expressly or by implication. It is only on receiving evidence from the Crown, that is, the prosecution of both these points the accused could be called upon to explain and only after such an explanation is forwarded, was the Jury must once again see if there/left any reasonable doubt irrespective of the acceptance or otherwise of such explanation from the accused.

Ultimately it was ruled emphatically addressed to the Jury in the summing-up of the present case:

"If the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found
in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident."

was not the law of the land. In the end, refusing to apply the provisions of the Section 4 of the Criminal Appeal Act 1907, which says; "the court may, notwithstanding that they are of opinion that the point raised in the appeal might be considered in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.", the House of Lords ruled that the Jury was not properly charged and if properly charged, it would not have come to the same conclusion as to hold the appellant-accused guilty.

The entire ratio of this important decision lies on the foundation of charging the Jury in a proper manner.

While referring and elaborating upon the celebrated case of Woolmington v. The Director of Public Prosecutions (1935) A.C. 462, the House of Lords once again considered the appropriate manner in which a Jury should be charged in a case of murder. Again here we find the shade of the belief more or less in the form of a presumption in the English Law that once the unnatural death at the hands of the prisoner or the accused is established, the Mens Rea that the death was intentional as to cause a murder
and keeping in view that factor too, the entire proceedings depicting the trial of the appellant were re-examined only to find that there was no error or the defect in the matter of charging the Jury. The objection was raised that the Jury were not charged about the offence converting itself to mere manslaughter if there be no evidence to believe so or a doubt peeping in in the matter of entertaining the belief. It was ruled that unless there was material enough on the record for allowing the possibility of mere manslaughter to emerge, a specific direction to the Jury on the point was necessary. The appeal was dismissed turning down the plea that the appellant had committed the act in self-defence.

What needs to be realised and understood at this stage is the defect in the charge or charging of the Jury in Woolminton's case supra was located by the House of Lords while no such defect in the matter of charging was found in the Mancun's case above. In the absence of a Jury, the principle laid down in the above authorities has to be understood to mean that the Judge holding a trial without the assistance of a Jury must instruct himself on the line of charging the Jury as elaborated in these cases. The impression, or I should say a prejudice in the mind of the Judge about the presence of Mens Rea or the proof of it automatically coming out on the proof of the physical act of killing, that is, Actus Reus, must
serve as a distinguishing factor when we choose to compare the position, that is, the position of the Judge instructing himself of and about the correct view of law. Simply stated, under the Indian Penal Code or under any other law applicable to our country, incidentally, we do not have any such presumption or assumption as suggested by Sir Michael Foster in his commentaries with which, if I may say so, the English Judges, rightly or wrongly, were found to be very much prejudiced. With this distinction, it may be said that a Judge, not working under the English Law, was not required to instruct himself especially about the higher standard to be applied in scrutinising the evidence covering the offence-physical and intentional part both inclusive.

The apprehension on the part of Lord Goddard, C.J., expressed once again in R v. Kritz (1950) 1 K.B. 82 also reported in (1949) 2 All E.R. 406 relates to the confusion sometimes occasioned by judicial endeavours to elucidate the nature of reasonable doubt when directing Juries in criminal cases. Lord Goddard, C.J., went so far as to say that:

"Once a judge begins to use the words 'reasonable doubt' and to try to explain what is a reasonable doubt and what is not, he is much more likely to confuse the jury than if he tells them in plain language, 'it is the duty of prosecution to satisfy you of the prisoner's guilt.'"
Lord Goddard returned to this theme of his again in R. v. Summers (1952) 1 All E.R. 1059, which added emphasis and a stronger plea amounting to prohibition on the use of the phrase 'Reasonable Doubt' by trial Judges when summing-up in criminal cases. He said:

"If the jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty, that is much better than using the expression 'reasonable doubt' and I hope in future that, that will be done."

Lord Goddard has since shown that his objection to the old formula is the difficulty of following --- explanations of what does and does not constitute a reasonable doubt. He thought that no real guidance is afforded by saying; it must not be a fanciful doubt, and to say it must be such a doubt as would make jurymen hesitate in their own affairs, does not suggest any particular standard because one juryman might hesitate where another would not do so.

The idea of a doubt which would cause jurymen to hesitate in their own affairs is traceable to the summing-up of Pollock, C.B., in R v. Manning (1849) C.C.C. Sess. Pap.654 in these words:

"If the conclusion to which you are conducted be that there is that degree of
certainty in the case which you would act upon in your grave and important concerns, that is the degree of certainty which the law requires and which will justify you in returning a verdict of guilty."

Lord Maugham once defined a reasonable doubt as "the doubt which men of good sense may reasonably entertain not the doubt of a fool or of a person of weakness of mind." (17 Canadian Bar Review 472). In other case R v. Onufrejczyk, (1955) Q.B. 388 at p.391; (1955) 1 All E.R. 247, Lord Goddard observed:

"Let us leave out of account, if we can, any expression such as 'giving the prisoner the benefit of a doubt; if the jury are left with any degree of doubt whether the prisoner is guilty, then the case has not been proved."

The objection regarding the failure to charge the Jury to give to the accused the benefit of the doubt was discussed in R v. Blackburne (1955) 39 Cr.App.Rep.84, where a direction, which did no more than stress the point, that the Jury must be satisfied of the accused's guilt was approved.

In R v. Murtagh and Kennedy (1955) 39 Cr.App.Re.72, on the other hand, the appeal was allowed because the summing-up had not made it sufficiently clear that the Jury must acquit if they were left in doubt concerning the
accused's explanation of the facts. Referring back to the observations in _R. v. Hepworth and Fearnley_, it may be recalled that the appeal was allowed on the ground that a direction to the effect that the Jury must be satisfied of the accused's guilt was inadequate when the charge was one of receiving. The judgment of the Court of Criminal Appeal was delivered by Lord Goddard, C.J., after confessing that he had some difficulty in understanding how there can be two standards of proof, he continued:

"One would be on safe ground if one said in a criminal case to a jury: 'you must be satisfied beyond reasonable doubt', and one could also say, 'you the jury, must be completely satisfied', or better still, 'you must feel sure of the prisoner's guilt."

While considering the effect of authorities discussed above in favour of and against the view that there are two standards of proof in English Law, what we find is that neither _R v. Summers (1952) 1 All E.R. 1059_ nor any other decision including _R v. Carrbriant (1943) K.B. 607_, expressly speak about the existence of two standards of proof. The convictions were quashed on the ground that the trial Judge had not told the Jury that it was only necessary for the accused's evidence to confirm to the standard appropriate to the discharge of a legal burden in a civil suit when by way of an exception to the general rule
such burden is borne by the prisoner in criminal proceedings.
Humpherys, J., in the above case observed;

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

This view was confirmed in Sodeman v. R (1936) 2 All E.R. 1138 by the Privy Council. The controversy concerning the standard of proof in matrimonial causes and the question of the appropriate measure to apply to an issue concerning the commission of a crime when it occurs in a civil suit, could hardly have arisen were it not for the fact that the existence of two standards of proof is something which is firmly embedded in English Law. All that has happened is scepticism as said in the case of R v. Hepwarth and Fearnley (1955) 2 Q.B. 600. It was also felt that the language under consideration obscures the nature of the typical directions to the Juries in criminal cases concerning the significance of any reasonable doubt that it may entertain with regard to the guilt of the accused.
In effect the Jurors are told that although they come to the conclusion, after considering all the evidence, that accused probably committed the crime charged, they must not act on that conclusion by returning a verdict of guilty if they recognise that reasonable grounds exist for taking the contrary view. The essential difference between the two standards of proof consists in the effect which those who ex hypothesis believe in the existence of a certain state of affairs must give to their doubts on the subject. This point has been made with great clarity by Professor Coote, who says:

"Normally, in a civil case, account must be taken of a doubt only if it results in a rational opinion that a fact in issue is less likely than not, whereas in a criminal case account must be taken of a doubt if it results in a rational opinion that the contradictory of the issue is more than a remote possibility."

A little deeper probe into the English authorities on the point would rake out and expose the mental process the Judges have undergone while experiencing the thought, which may be, in technical terms, described as standard of proof as is observed in R v. Hobson (1823) 1 Lew.C.C.261, as serious offences are committed more rarely than less serious ones, it is true to say that "the greater the crime, the stronger is the proof required for the purpose."
conviction. As observed by Denning L.J. (as is then was) in *Bater v. Bater* (1951) p.35, "In criminal cases the charge must be proved beyond reasonable doubt, but there may be degree of proof within that standard." In *Preston-Jones v. Preston-Jones* (1951) A.C. 391 Lord Oaksey said, "From the theoretical point of view the standard is always the same—proof beyond reasonable doubt, but "What is a reasonable doubt .... varies in practice according to the nature of the case and the punishment which may be awarded". In *Bater v. Bater*, we come across the observations of Denning L.J., to say that the standard of proof on the normal issues in a civil suit is likewise always the same in theory—proof on a preponderance of probability, but, in practice, "there may be degrees of probability within that standard. The degree depends on the subject matter. The Civil Court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established."

To the observation of Morris L.J., in *Hornal v. Neuberger Products Limited* (1957) 1 Q.B. 247, "Though no Court and no Jury would give less careful attention to issues lacking gravity than to those arked by it, the very element of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities."