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The Burden of Proving Self-Defense in Homicide Cases

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The Burden of Proving Self-Defense in Homicide Cases

Instructions which appeared to have the effect of placing the burden on the defendant of proving self-defense in a murder prosecution were held to be grounds for reversal in *Jones* v. *Commonwealth*,[1] recently decided by the Supreme Court of Appeals of Virginia. According to the uncontroverted evidence, on the day of the killing the deceased had provoked an argument with defendant in a restaurant, had given him a severe and malicious beating when they stepped out to the street, and had threatened to kill him that day. Returning to his home, defendant had then armed himself with a gun, and taken a stand upon the rear steps of his house. Soon thereafter the deceased came down an alley towards defendant, stopped immediately upon seeing the defendant about eighteen to twenty-four feet away, and made a motion as if to draw something from his right pocket, whereupon defendant shot and killed him. That the defendant had armed himself after the fight may have been, as he claimed, in order to defend himself, or may have been to perpetrate a deliberate killing, as contended by the prosecution.

At the trial, the defendant objected to the instruction that "the accused must show to the jury that the defense reasonably appeared to the accused to be necessary to protect his own life, or to protect himself against serious bodily harm."[2] The Supreme Court of Appeals of Virginia held this instruction to be erroneous and not cured by other instructions[3] in that it imposed upon the defendant the burden of establishing the fact of self-defense. It held that "must show to the jury" has the same import to the lay mind as "must prove to the satisfaction of the jury"[4] or

1 ——Va.——, 45 S.E. (2d) 908 (1948). For a general discussion of the law of homicide, see Perkins, The Law of Homicide (1946) 36 J. Crim. L. & Criminology 391.

2 45 S.E. (2d) at page 911. The complete instruction, No. 6 at the instance of the Commonwealth, is as follows: "The Court instructs the jury that the law of self-defense is the law of necessity, or apparent necessity, and that to make out a case of self-defense in a case of homicide, the accused *must show to the* jury that the defense reasonably appeared to the accused to be necessary to protect his own life, or to protect himself against serious bodily harm; and that with regard to the necessity that will justify the slaying of another in self-defense, the accused must not have wrongfully occasioned the necessity." (The court's italics.)

3 *Accord,* that erroneous instructions on the burden of proving self-defense are not cured by other instructions which generally place on the prosecution the burden of proving the defendant guilty beyond a reasonable doubt, Covington v. Commonwealth, 136 Va. 665, 116 S.E. 462 (1923); People v. Asbury, 257 Mich. 297, 241 N.W. 144 (1932); *cf.* Lamb v. Commonwealth, 141 Va. 481, 126 S.E. 3 (1925) (in prosecution for assault with intent to kill, erroneous instruction on self-defense was not prejudicial in view of defendant's admission that he was the aggressor).

4 Held erroneous in Covington v. Commonwealth, 136 Va. 665, 116 S.E. 462 (1923); *cf.* Lamb v. Commonwealth, 141 Va. 481, 126 S.E. 3 (1925) (prosecution for assault with intent to kill). *But cf.* Potts v. Commonwealth, 113 Va. 732, 73 S.E. 470 (1911), holding that it is for the defense to satisfy the minds of the jury that the killing was not done with malice.

"must prove by a preponderance of the evidence,"[5] both of which had previously been condemned by the court.[6] The court found that nothing in the instruction limited it to the burden of going forward with the evidence,[7] and therefore that it took from the accused his right to acquittal if the jury entertained a reasonable doubt whether or not he had acted in self-defense.[8]

The last two lines of the same instruction were "that with regard to the necessity that will justify the slaying of another in self-defense, the accused must not have wrongfully occasioned the necessity."[9] The court held that this, too, was erroneous in that it suggested, without supporting evidence, that the necessity of self-defense did not exist, and emphasized the erroneously heavy burden of the phrase "must show to the jury." It would seem, therefore, that the defendant does not have to prove that he did not wrongfully occasion the necessity of killing,[10] although this point is not definitely answered.[11]

Thus, in a prosecution for murder in Virginia the defendant has the duty of bringing up the issue of his having acted in self-defense,[12] but need only establish this defense to the extent of leaving a reasonable

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5 Held erroneous in Hale v. Commonwealth, 165 Va. 808, 183 S.E. 180 (1936).

6 *Accord,* People v. Arcabascio, 395 Ill. 487, 70 N.E. (2d) 608 (1947) ("satisfactorily to establish any defense which he may rely upon"); Males v. State, 199 Ind. 196, 156 N.E. 403 (1927) ("appear to the reasonable satisfaction of the jury"); People v. Asbury, 257 Mich. 297, 241 N.W. 144 (1932) ("satisfy the jury"); State v. Malone, 327 Mo. 1217, 39 S.W. (2d) 786 (1931) ("shown to your reasonable satisfaction"). *Contra:* State v. Robinson, 36 Atl. (2d) 27 (Del. O. & T. 1944) ("establish to the satisfaction of the jury"); Ison v. Commonwealth, 304 Ky. 517, 211 S.W. (2d) 914 (1947) ("satisfy the jury"); State v. Grainger, 223 N.C. 716, 28 S.E. (2d) 228 (1943) ("establish to the satisfaction of the jury"); State v. Urick, 58 N.E. (2d) 216, (Ohio App. 1944) ("establish that the killing was justifiable or excusable"); Commonwealth v. Troup, 302 Pa. 246, 153 Atl. 337 (1931) ("satisfy the jury by a fair preponderance of the testimony"); State v. Mellow, 107 Atl. 871 (R. I. 1919) ("burden of proving by a preponderance of the evidence"); *cf.* Szalkai v. State, 96 Ohio St. 36, 117 N.E. 12 (1917) (shooting with intent to kill—"must be established by a preponderance of the evidence").

7 It has been said, however, that the burden of proving self-defense generally rests upon the defendant, Baugh v. State, 218 Ala. 87, 117 So. 426 (1928); Commonwealth v. Nelson, 294 Pa. 544, 144 Atl. 542 (1929) ("familiar rule"). *But see* Frank v. United States, 42 F. (2d) 623, 627 (C.C.A. 9th, 1930).

8 If any evidence raises a reasonable doubt in the minds of the jury whether or not the defendant acted in self-defense, he is entitled to acquittal, State v. Quinn, 186 Minn. 242, 243 N.W. 70 (1932); State v. Hubbard, 351 Mo. 143, 171 S.W. (2d) 701 (1943); Frank v. United States, 42 F. (2d) 623 (C.C.A. 9th, 1930). On the whole, however, only where the evidence clearly establishes the killing to have been in self-defense can the homicide be said to be excusable as a matter of law, Ison v. Commonwealth, 304 Ky. 517, 200 S.W. (2d) 914 (1947). And the verdict of a jury on the question of self-defense will not be set aside unless manifestly against the weight of the evidence, State v. Banks, 99 W.Va. 711, 129 S.E. 715 (1925).

9 45 S.E. (2d) at page 911. For the complete text of the instruction see note 2 *supra.*

10 *Accord,* Buffalow v. State, 219 Ala. 407, 122 So. 633 (1929) (burden on state to show defendant at fault in bringing on difficulty); Huff v. State, 23 Ala. App. 426, 126 So. 417 (1930) (burden on state to prove defendant not free from fault in provoking difficulty). *Contra:* State v. Floyd, 160 S.C. 420, 158 S.E. 809 (1931) (one who pleads self-defense must show he was without fault in bringing on difficulty).

11 In People v. Asbury, 257 Mich. 297, 241 N.W. 144 (1932), the court held that a similar error could not be excused by other language of the charge.

12 It has been held that there must be substantial evidence of self-defense before it can become an issue, State v. Davis, 342 Mo. 594, 116 S.W. (2d) 110 (1938) (felonious assault).

doubt in the minds of the jury whether or not he so acted.[13] This view regarding the obligation of a defendant in a self-defense case is not uniformly accepted, however, but varies from one jurisdiction to another. At one extreme, the defendant does not have to prove anything,[14] and the prosecution must prove beyond a reasonable doubt that the homicide was criminal and not excusable on the ground of self-defense,[15] or was felonious and therefore not committed in self-defense.[16] At the other extreme, self-defense is held to be an affirmative defense[17] which, therefore, must be proved by a preponderance or greater weight of the evidence, and the prosecution does not have the burden of proving that the accused did not act in self-defense.[18] In between these extremes, some jurisdictions hold that the burden of proof devolves upon the defendant where the killing is admitted,[19] or is clearly proved by the evidence.[20] In others, this burden does not shift where the evidence for the prosecution raises the issue of self-defense,[21] even where the killing is admitted or clearly proved.[22] In some states, statutes require the accused to prove circumstances in mitigation or justification where the homicide is proved,[23] unless the evidence of the prosecution goes to prove but manslaughter.[24] In others, where murder is by statute divided into two

13 *Accord*, Hubbert v. State, 32 Ala. App. 477, 27 So. (2d) 228 (1946); Patton v. State, 55 Okla. Cr. 92, 25 P. (2d) 74 (1933); De Groot v. United States, 78 F. (2d) 244 (C.C.A. 9th, 1935); Mullins v. Commonwealth, 174 Va. 472, 5 S.E. (2d) 499 (1939). It has been held that it becomes the duty of the prosecution to establish beyond a reasonable doubt that the defendant did not act in self-defense, where the defendant has raised this issue, Mullis v. State, 196 Ga. 569, 27 S.E. (2d) 91 (1943); State v. Powell, 237 Iowa 1227, 24 N.W. (2d) 769 (1946); People v. Asbury, 257 Mich. 297, 241 N.W. 144 (1932); People v. Stern, 195 N.Y.S. 248 (1922). And even where the prosecution's evidence alone raised this issue, Turley v. State, 74 Neb. 471, 104 N.W. 934 (1905); *cf.* State v. Davis, 342 Mo. 594, 116 S.W. (2d) 110 (1938) (felonious assault).

14 Zipperian v. People, 33 Colo. 134, 79 Pac. 1018 (1905); State v. Hubbard, 315 Mo. 143, 171 S.W. (2d) 701 (1943); State v. Quinn, 186 Minn. 242, 243 N.W. 70 (1932). And he need but raise a reasonable doubt in the minds of the jury whether or not he acted in self-defense, People v. Duncan, 315 Ill. 106, 145 N.E. 810 (1924); People v. Stern, 195 N.Y.S. 348 (1922).

15 State v. Sedig, 235 Iowa 609, 16 N.W. (2d) 247 (1944); State v. Turner, 59 N.D. 239, 229 N.W. 7 (1930).

16 State v. Thornhill, 188 La. 762, 178 So. 343 (1937).

17 Jenkins v. State, 80 Okla. Cr. 328, 161 P. (2d) 90 (1945); Commonwealth v. Troup, 302 Pa. 246, 153 Atl. 337 (1931); *cf.* Thomason v. Commonwealth, 178 Va. 489, 17 S.E. (2d) 374 (1941).

18 Parkman v. State, 191 S.W. (2d) 743 (Tex. Cr., 1945); *see* State v. Roberts, 294 Mo. 284, 301, 242 S.W. 669, 674 (1922), criticized in State v. Malone, 327 Mo. 1217, 1231-1232, 39 S.W. (2d) 786, 792 (1931).

19 Cooley v. State, 233 Ala. 407, 171 So. 725 (1936); Barker v. Commonwealth, 304 Ky. 13, 199 S.W. (2d) 713 (1947); State v. Fleming, 202 N.C. 512, 163 S.E. 453 (1932); *cf.* Jenkins v. State, 80 Okla. Cr. 328, 161 P. (2d) 90 (1945).

20 Saulsbury v. State, 172 P. (2d) 440 (Okla. Cr. 1946); State v. Turpin, 158 Wash. 103, 290 Pac. 824 (1930).

21 People v. Willy, 301 Ill. 307, 133 N.E. 859 (1921); State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200 (1873).

22 People v. Fowler, 178 Cal. 644, 174 Pac. 892 (1918); *see* Patton v. State, 55 Okla. Cr. 92, 25 P. (2d) 74 (1933). *But cf.* Jenkins v. State, 80 Okla. Cr. 328, 161 P. (2d) 90 (1945) ("this, in a sense, is a shifting of the burden of evidence").

23 It may be noted in passing that little if anything is left of the distinction between mitigation or excuse and justification of a homicide by a defendant. This distinction has been completely abolished by statute in some states, as for example, the Code of Georgia of 1933, Ch. 26, §1011.

24 For example, Cal. Penal Code, Tit. 7, §1105; Nev. Comp. Laws 1929, §10081; Okla. Stat. Ann., Tit. 22, §745; Texas Penal Code, Tit. 1, Art. 46. Typical of these

classes, it is often held that where the killing is admitted or clearly proved, the homicide is presumed to be murder in the second degree, with the burden on the prosecution to prove murder in the first degree, and on the accused to justify his act or to reduce the charge to manslaughter.[25]

Notwithstanding the varied decisions by the jurisdictions throughout the United States, it must be conceded that, excepting the extreme ones, there is little actual difference between these holdings.[26] Many contradictions arise from a confusion in the use of the term "burden of proof." Its obvious and generally accepted meaning is that of the "duty to make out a case on a given proposition." Too often, however, it is used to mean the "duty of going forward with the evidence."[27] Where the prosecution rests with a bare proof of homicide, the accused, in order to justify his act upon the ground of self-defense, has the duty of going forward with the evidence upon this issue; he does not have the burden of proof upon this point, however, the prosecution having the duty to prove beyond a reasonable doubt the guilt of the accused. No doubt this is the intention of those jurisdictions which speak in terms of the burden of proof "shifting" under certain conditions and at specific stages of the trial.[28] If the distinction is remembered, most of the decisions, as in the *Jones* case, can be resolved into the following two propositions: (1) the defendant has the burden of going forward with the evidence to the extent of raising the issue of self-defense,[29] where the evidence of the prosecution has not already done so; whereupon, (2) the state has the burden of proving beyond a reasonable doubt that the defendant did not commit the homicide in self-defense. As thus understood, most of the jurisdictions agree with the decision in the *Jones* case, whereby the defendant suffers no unreasonable hardship, and the burden placed upon the prosecution is but one phase of the general burden upon it to prove beyond a reasonable doubt that the defendant is guilty as charged.

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statutes is the following from Illinois, Ill. Rev. Stat. (1947), Ch. 38, §373: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." This statute seems to have been disregarded in Illinois, however, as witness, for example, People v. Duncan, 315 Ill. 106, 145 N.E. 810 (1924); and People v. Arcabascio, 395 Ill. 487, 70 N.E. (2d) 608 (1947).

25 State v. Grainger, 223 N.C. 716, 28 S.E. (2d) 228 (1943); State v. Martin, 176 Wash. 637, 30 P. (2d) 660 (1934). Although Virginia has such a statute, it would seem from the principal case that the presumption of murder in the second degree is sufficiently rebutted if the jury entertains a reasonable doubt whether or not the defendant acted in self-defense. *But cf.* Martin v. Commonwealth, 143 Va. 479, 129 S.E. 348 (1925).

26 An excellent analysis of the subject-matter can be found in De Groot v. United States, 78 F. (2d) 244 (C.C.A. 9th, 1935).

27 See Note (1931) 21 J. of Crim. L. & Criminology 609.

28 See notes 19, 20, 21 and 22, *supra.*

29 A mere statement by the defendant that he acted in self-defense would not be sufficient, De Groot v. United States, 78 F. (2d) 244 (C.C.A. 9th, 1935). However, few jurisdictions hold self-defense to be an affirmative defense. See note 17, *supra.*