

CONSTITUTIONALITY OF REVERSE BURDEN OF PROOF IN POCSO ACT, 2012

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“Safety and security don't just happen; they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.”

- *Nelson Mandela*

Introduction

Children are more vulnerable and scope for their exploitation and abuse being far more, given their tender age and innocence. Protection of Children from Sexual Offences (POCSO) Act was enacted by the Indian Parliament in 2012 to protect the children from all possible kinds of situation in which they could be used, abused or misused. It also helps the development of child jurisprudence in the country.

One of the main objectives of POCSO Act is for child friendly trials, children's trials were getting mixed with adults because the Criminal Justice Administration System was more geared to dealing with the crimes and

investigation against adults.¹ It was very difficult to safeguard the interests of the child both as a victim and as a witness. In order to ensure that POCSOA has put up few steps like in camera proceedings, speedy trials, special courts and also a presumption has been provided that the accused in case of sexual assault has committed the offence unless proved contrary.

§29 of the Act, states that whenever a person is prosecuted for committing an offence under the Act, the Court shall presume that the accused is guilty unless and until proved guilty, and §30 (2) says that , the defence has to prove the innocence of the accused beyond reasonable doubt and not on the

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¹ 240th Report on The Protection of Children from Sexual Offences Bill, 2011 Introduction, Department related Parliamentary Standing Committee on Human Resource Development (2011).

basis of preponderance of probabilities. These are contrary to the entire criminal jurisprudence.² But at the same time, in the present legislation, these fair trial principles are not contrary to the fundamental rights and thereby can be held constitutionally valid.

§§ 29 and 30 are in Consensus with Article 14 of the Constitution

In order to say that any statutory provision is in aligns with Art. 14 it should pass the test of reasonable classification constituting the twin tests of intelligible differentia and rational nexus.³

Application of Intelligible Differentia test

To pass the intelligible differentia test for a provision, it is necessary to check whether the way in which these provisions classified from other standard or practised pattern, as intelligible differentia means distinguishing persons or things that are grouped together from others left out from the group.⁴

The intelligible differentia for imposing reverse burden in POCSO Act can be justified on three grounds.

Firstly, the distinction qualifies as a positive discrimination. According to Art. 15(3), the State is empowered to make special provisions for safeguarding the interests of women and children.⁵ The said Act is such an enactment brought into force to curb sexual exploitation and sexual abuse of children.⁶

Secondly, the distinction from other criminal offences has been attributed to acknowledge the seriousness of the offence. The offences are so severe and appalling that this presumption had to be put in place to act as a safety valve, to secure the interests of the victim and in turn to protect the morale of the society.⁷

Thirdly, these clauses are also perceived as securing a higher conviction rate than under the rigid standard of proof beyond reasonable doubt, thereby furthering the goal of deterrence.⁸ According to the NCRB⁹ records as relied on by the Standing Committee Report¹⁰ had revealed that there

² Juhi Gupta, *Interpretation of Reverse Onus Clauses*, 5 NUJS L. Rev. 49, 50 (2012).

³ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).

⁴ N SHUKLA, CONSTITUTION OF INDIA 217 (12th ed., Eastern Book Company, 2013).

⁵ INDIA CONST. art.15 cl. 3.

⁶ Protection of Children from Sexual Offences Act, Preamble, 2012, No. 32, Acts of Parliament, 2012 (India).

⁷ *Noor Aga v. State of Punjab*, (India), MALIK, COMMENTARIES ON NARCOTICS DRUGS

AND PSYCHOTROPIC SUBSTANCES ACT 278 (4th ed., Law Publishers (India) Pvt. Ltd, 2019)

⁸ Byron M. Sheldrick, *Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses*, 204 U. Toronto Fac. L. Rev. 179, 180 (1986).

⁹ National Crimes Record Board, 2010.

¹⁰ 240th Report on The Protection of Children from Sexual Offences Bill, 2011 ¶1.13, Department related Parliamentary Standing Committee on Human Resource Development (2011).

had been a significant increase in sexual offences against children. Shockingly, the conviction rates were also coming down.¹¹ This trend was concluded as the reason for increasing tendency to commit offences. Whereas, in the case of sexual offences against women, this was not the case.

Application of Rational nexus

A statutory provision must have a rational relation to the object sought to be achieved by the statute in question.¹² The legislative intent of the Act as obtained from Statement of Objects and Reasons,¹³ is to equip the law to cater to best interests of the children, ensuring protection and prevention from sexual abuse and exploitation. The sections are an extension of the same which pursues a fair and speedy justice. They favour the victim, recognizing the plight and trauma of the hapless child.

The sections at hand aid the victim in two ways.

Firstly, it encourages reporting of offences which otherwise would have gone unreported.

Secondly, it relieves the child from the burden to prove the guilt of the accused and also

resolves the issue of difficulty in collecting evidence in such cases. It will be like creating a double traumatising situation on the child's family as they have to prove the offence (physical trauma), at the same time when the child is already going through the mental trauma.

Thus, there exists a rational nexus between the object sought by the Act and §§ 29 and 30 along with intelligible differentia thereby making the section constitutionally valid under Art.14.

§§ 29 and 30 are in Consensus with Article 21 of the Constitution

The object of Art.21 is to prevent encroachment upon personal liberty, save in accordance with the law.¹⁴ The State is obliged to protect the life of every person and cannot wash its hands off from the responsibility.¹⁵ Hence, the State enforces proportional checks and restraint on liberty to ensure the same. These act as a safeguard to the individual rights and interests.¹⁶

The concept of fair trial as envisaged under Art.21¹⁷ entails the familiar triangulation of the interest of the accused, victim and the society. Interests of the society are not to be

¹¹ *Id.* at ¶1.12.

¹² *Roop Chand Adlakha v. DDA*, AIR 1989 SC 307. (India).

¹³ Protection of Children from Sexual Offences Bill, 2011, Statement of Objects and Reasons, No. 14, 2011.

¹⁴ *G. Gurunadha Reddy v. A. P. Road Transport Corporation*, AIR 1999 AP 179.

¹⁵ *Jagar Dhar Sharma v. State of Assam*, AIR 2003 Gau 101. (India).

¹⁶ *Maneka Gandhi v. Union of India*, AIR 1978 SC 697. (India).

¹⁷ *Dwarka Prasad Agarwal (D) By LRs. v. B.D. Agarwal and Ors.*, (2003) 6 SCC 230. (India).

treated completely with disdain.¹⁸ A fair trial is aimed at ascertaining truth for all concerned.¹⁹

Presumption of innocence indeed is key to the principle of a fair trial²⁰ and it is the basis of the burden of proof.²¹ However, this principle is not absolute. It is subjected to exceptions, and the validity of its non-application can be verified by the compatibility test.

Presumption of innocence is not an absolute right

Indian criminal jurisprudence offers allegiance to the concept of presumption of innocence, and the same has been recognised under Art. 20 and 21 of the Constitution.²² However, it is to be noted that presumption of innocence is not an absolute right.²³ It is not a constitutional guarantee and can be dispensed with by legislative imperatives and action.²⁴ This golden rule is subject to the defence of insanity, and also to any statutory exception²⁵ subject to the satisfaction of the two-prong test of compatibility,²⁶ i.e.,

whether the reversal is proportionate, necessary and reasonable to achieve the legitimate objective for which the reversal is employed.²⁷

Existence of a 'legitimate public objective'

The SC held that the extraordinary measure of reverse burdens is constitutional in *Noor Aga v. State of Punjab*²⁸ while upholding the Constitutional Validity of Reverse Burden of Proof in NDPS Act. However, it must be justifiable by social control concerns.²⁹

Presumption of innocence is an element of personal liberty, but individual liberty must be subject to social interest to ensure security of the State. Sexual exploitation and sexual abuse of children are heinous crimes that need to be effectively addressed.³⁰ Express statutory provisions are necessary to tackle such atrocities. Therefore, a reverse burden is justified by its pressing necessity,³¹ where society is threatened with imminent and

¹⁸ D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 4672 (9th ed., Lexis Nexis, 2015).

¹⁹ *Zahira Habibulla H Sheikh v. State of Gujarat*, (2004) 4 SCC 158 (India).

²⁰ *Babu v. State of Kerala*, (2010) 9 SCC 189 (India).

²¹ *Jose v. The Sub-Inspector of Police, Koyilandy and Ors.*, AIR 2016 SC 4581 (India).

²² KAILASH RAI, CONSTITUTIONAL LAW OF INDIA 215 (11th ed., Central Law Publications, 2015)

²³ *Krishna Janardhan Bhat v. Dattatreya G. Hegde*, AIR 2008 SC 1325 (India).

²⁴ *P. N. Krishnalal v. Government of Kerala*, 1995 SCC (Cri) 466 (India).

²⁵ *Woolmington v. DPP*, [1935] UKHL 1 (U.K.).

²⁶ Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67(3) Mod. L. Rev. 402, 407 (2004).

²⁷ *Sheldrake v. DPP*, [2005] 1 AC 264 (Austl.).

²⁸ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417. (India).

²⁹ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417. (India).

³⁰ Protection of Children from Sexual Offences Act, Preamble, 2012, No. 32, Acts of Parliament, 2012 (India).

³¹ D Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66 C.L.J 142, 148 (2007).

severe harm, heightening the need for law enforcement.³²

Further, in case of a significant proof imbalance, reverse burdens stand justified.³³

The most crucial factor in deciding if a proof imbalance associated with an offence supports a reversal of the legal burden of proof is the degree of the burden placed on the prosecution. That is, for crimes under POCSO Act, the prosecution would find it exceptionally difficult to prove guilt to the usual standard. On the other hand, here the innocent accused would be able to discharge the reverse burden easily. It is due to the existence of peculiar knowledge.³⁴ Here, peculiar knowledge is the accused's state of mind.³⁵ This aids the accused to disprove his culpability by expending facts exclusively within his knowledge.³⁶ Hence, the reversal of burden, with respect to the culpable mind of the accused is valid as it levels the proof imbalance

Satisfies the proportionality test

Though the sections employ the reverse burden of proof, manifestly they do not

dispense the prosecution from its burden.³⁷ The prosecution still has to prove the charges beyond all reasonable doubt. This standard of proof makes the provisions equally beneficial to the accused, creating a balance between the state resources and the accused. Although the negation of the accusations placed is also beyond reasonable doubt, the legislators are compelled to impose a greater standard of proof as the gravitas of the offence and its impact on the society are significant. Thereby these sections are deemed to be appropriate.

Further, the accused can submit proof of reasons for false claims³⁸ under §22 of the Act.³⁹ In essence, reverse burden serves the same goals as the presumption of innocence in its ordinary operation. Both aim to achieve a fair balance between the general interest of the community and the personal rights of the individual.⁴⁰ Thus, in cases of crimes that gravely affect and harm society, it is necessary to dispense with the burden of the prosecution.⁴¹ The offences which the Indian judiciary has recognised as public welfare

³² Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67(3) Mod. L. Rev. 405 (2004).

³³ D Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66 C.L.J 142, 158 (2007).

³⁴ *Id.*

³⁵ Regina v. Edwards, [1975] 1 Q.B. 27 (U.K.).

³⁶ S. E. Salako, *Strict Criminal Liability: A Violation of the Convention?*, 70 JCL 531, 533 (2006).

³⁷ Naresh Kumar v. State of Himachal Pradesh, (2017) 15 SCC 684. (India).

³⁸ Subrata Biswas & Anr. v. The State, 2019 SCC OnLine Cal 1815 (India).

³⁹ Protection of Children from Sexual Offences Act, §22, 2012, No. 32, Acts of Parliament, 2012 (India).

⁴⁰ Brown v. Stott, [2003] 1 A.C. 681, 704 (Austl.); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 435 (1st ed., Cambridge University Press, 2012).

⁴¹ The Trial and Punishment of Social and Economic Offences, Law Commission of India 47th Report 96 (1972), <http://lawcommissionofindia.nic.in/1-50/Report47.pdf>.

offences, it has deemed reverse onus clauses to be necessary to prevent such crimes.

Conclusion

The principle that a person should be presumed innocent until proven guilty is a fundamental principle of procedural fairness in penal law jurisprudence.⁴² Its justifications lie in the socio-legal consequences of convicting an individual for the commission of a crime. This principle of burden of proof acts as a protection against erroneous convictions and ensures that an accused is not oppressed by the immense power and resources of the State.⁴³

The opposite rule – a presumption of guilt – imposes an unfair burden on the accused that requires him to prove his innocence, failing which he is convicted.⁴⁴ Such a burden is

envisaged by reverse onus clauses or reverse burdens, which supplant the deified presumption of innocence with the grossly unjust presumption of guilt.⁴⁵

Here, the provisions §§ 29 and 30 seek to achieve a greater legislative object by striking a balance between State obligations and the right of the accused. The test of compatibility and the test of proportionality are the two tests used in analysing the fairness of the reversal of burden and can easily be proved.

Secondly, the procedure established by law is reasonable. It prescribes a procedure and it is in consonance with Art. 14. The procedure satisfies the requirement of Art. 14; hence, it is a constitutionally valid procedure.

Therefore, it can easily be settled that the provisions are constitutionally valid.

⁴²ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 72 (2009).

⁴³Victor Tadros & Stephen Tierney, *The Presumption of Innocence and the Human Rights Act*, 67(3) Mod. L. Rev. 402 (2004).

⁴⁴ LAW COMMISSION OF INDIA, 47TH REPORT- THE TRIAL AND PUNISHMENT OF SOCIAL AND ECONOMIC OFFENCES 2, 4 (1972)

⁴⁵ Juhi Gupta, *Interpretation of Reverse Onus Clauses*, 5 NUJS L. Rev. 49, 50 (2012).