

PRESUMPTIONS IN POCSO ACT AND THE PROTECTION OF CHILD RIGHTS: A CRITICAL LEGAL ANALYSIS

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The Protection of Children from Sexual Offences Act (POCSO) was enacted in the year 2012 to curb and protect the Children from various sexual offences and to provide for the establishment of special courts to try such offences.¹ This Legislation treats the offence as distinct from Sexual Offences against the Adults in view of the seriousness of the crime in the former kind. This Legislation meets the International Standards prescribed in the Convention on the Rights of Child. Article 15(3) of the Constitution of India² obliges the State to enact special provisions for the Development of Women and Children and Article 39(e)³ provides that the State shall direct policy towards securing the tender age of children from abuse and their childhood and youth are protected against exploitation

and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. This Constitutional Obligation is realized in accordance with the International Standards via the Protection of Children from Sexual Offences Act, 2012.⁴

An important feature incorporated within the Act is the application of pair presumptions under Section 29 and Section 30 of the POCSO Act, 2012. Section 29 deals with the presumption as to committing certain offences, are read as follows:

“Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the

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¹ Preamble to the Protection of Children from Sexual Offences Act, 2012(Act 32 of 2012).

² Art. 15(3) of the Constitution of India, 1950.

³Article 39(e) of the Constitution of India, 1950.

⁴ Art. 224 of the Constitution of India, 1950.

offence, as the case may be unless the contrary is proved.”

Section 30 of the Act provides for Presumption as to culpable mental state of the Accused, which is read as follows:

In any Prosecution for any offence under this Act which requires a culpable mental state on the part of the Accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.”

The Pair presumptions enshrined in this Act are based on the Doctrine of “Reverse Burden of Proof” as opposed to the Doctrine of “*Innocence until the Guilt is proved*”. The incorporation of these presumptions are not alien to the Indian Legislations but, are also incorporated in the Essential Commodities Act of 1955⁵, Foreign Exchange Management Act of 1999⁶, Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act⁷, Narcotic Drugs and Psychotropic substances Act, 1985⁸, Section 304B IPC⁹, etc., These Reverse onus clauses even though goes against golden thread of Criminal

Jurisprudence i.e., “Doctrine of innocence until the Guilt is Proved”, the former has stood the test of Constitutionality in India.

In **P. N. Krishnalal v. State of Kerala**,¹⁰ **Noor Aga v. Union of India**¹¹ and in **Seema Silks and Sarees v. Directorate of Enforcement**¹² the respective Division benches of the Hon’ble Supreme Court held that, reverse onus clauses are not onerous and unconstitutional per se. The Constitutional Courts have begun taking a different view that the Presumption of Innocence is not a Constitutional Guarantee and it can be controlled by the Legislative imperatives and actions.¹³ Time and again the Courts held that the Presumption is always in favour of Constitutionality of the Statute and such a presumption is very strong that the Burden is casted upon the person who challenges the Legislation to prove the same. However, the Learned Courts also held that the Legislations should stand the test of Due Procedure established by Law while applying the reverse presumption clauses.

In **Joseph Shine v. Union of India**¹⁴, a case of Non- resident Keralite, the Constitutional bench of the Hon’ble Supreme Court held

⁵ The Essential Commodities Act, 1950, (Act 10 of 1955).

⁶ Foreign Exchange Management Act, (Act 42 of 1999).

⁷ The Scheduled Castes and Scheduled Tribes (Atrocities prevention) Act, 1989, (Act 33 of 1989).

⁸ Narcotic Drugs and Psychotropic substances Act, 1985, (Act 61 of 1985).

⁹Section 304B of Indian penal Code, 1860, (Act 1 of 1860).

¹⁰ P.N. Krishnalal v. State of Kerala, 1995 SCC (Cri) 466.

¹¹ Noor Aga v. Union of India, 2008 16 SCC 417.

¹² Seema silks and Sarees v. Directorate of Enforcement, 2008 5 SCC 580.

¹³ P. N. Krishnalal v. Government of Kerala, 1995 SCC (Cri) 466.

¹⁴ Joseph Shine v. Union of India, 2018 SCC Online SC 1676.

that the penal provision's constitutionality needs to be tested on the anvil of the State's responsibility to protect innocent citizens and hence, the rights of the accused and societal interest need to be balanced and¹⁵ for the crimes that gravely affect and harm society and for such crimes it is necessary to dispense with the burden of the prosecution.¹⁶

The Doctrine has stood the test of Constitutional validity in India and other Jurisdictions. The Supreme Court of Canada in **Robert Mathew Chauk v. Her Majesty, the Queen**¹⁷ and in **R. v. Oakes**,¹⁸ and the Supreme Court of South Africa in **The State v. Abraham Coetzee Hendrik**¹⁹ upheld the vires of the Reverse Onus Clauses.

The vires of Pair Presumption in Section 29 and 30 of POCSO Act was tested by the Hon'ble Gauhati High Court in **In Re., Govt of India**²⁰, reported in 2017 SCC OnLine Gau 53 and by the Hon'ble Kerala High Court in **V.S. Joy v. State of Kerala**, reported in 2019 SCC Online Ker 783²¹ and

held the provisions to be *intravires* the Constitution of India.

The Presumption of Innocence is envisaged in Art.14(2) of ICCPR,²² Art.11(1) of UDHR,²³ Art.6(2) of ECHR²⁴ and Art. 14(2) of ICCPR²⁵ which enshrines the right to be presumed innocent until the guilt is proved. However it cannot be equated with Right to Personal Liberty under Art.21. A right to be presumed innocent is subject to establishment of certain foundational facts and thus it cannot be said to be perse unconstitutional. The legal position has undergone a drastic change in the United Kingdom wherein the Doctrine of Reverse Burden of Proof passed the test of constitutionality in the House of Lords in the decision of **R. v. Lambert**.²⁶ It is recollected that the Foundation of reverse onus of proof is hunched upon the doctrine of Due process as adumbrated under Art.21 which requires striking of balance between the need of law and enforcement thereof, on the one hand and protection of citizen from oppression and injustice on the other.

It is to be understood that the terms of the impugned provisions are very wide and a

¹⁵Noor Aga v. State of Punjab, 2008 16 SCC 417.

¹⁶ The Criminal Law Amendment Act No. 43 of 1986, 43rd and 91st LCR.

¹⁷Robert Mathew Chauk v. Her Majesty the Queen, 1990 SCC OnLine Can SC 128.

¹⁸ R. v. Oakes, [1986] 1 S.C.R. 103.

¹⁹The State v. Abraham Coetzee Hendrik Schalk Coetzee Pleter Le Roux, 1197 SCC OnLine ZACC 2.

²⁰ In Re., Govt of India, 2017 SCC OnLine Gau 53.

²¹ V S Joy v. State of Kerala, 2019 SCC Online Ker 783.

²² International Covenant on Civil and Political Rights.

²³ Art. 11(1) of the Universal Declaration of Human Rights, 1948.

²⁴ Art. 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms(1950).

²⁵ Art.14(2) of the International Covenant on Civil and Political Rights, 1966.

²⁶ R. v. Lambert, 2002 2 AC 545.

plain reading thereof indicates the said provision to be contrary to the basic and normal principles of criminal jurisprudence.²⁷ Hence, the courts have evolved procedural safeguards to prevent the same.²⁸ Accordingly, the presumption does not come directly into play. The prosecution cannot relieve from its duty to prove the case rather the duty is cast upon the Prosecution to prove the primary facts as to the occurrence of the crime.²⁹ If the Courts are satisfied with the evidentiary value of the primary facts then the burden shifts upon the Accused that he/she has committed the offence³⁰. The Presumption is very strong however; it is a rebuttable presumption which is lighter for the Accused to relieve from the Presumption based on the Preponderance of probabilities.³¹ Once, the Accused has discharged his burden on preponderance of probabilities, the Burden of proof again shifts to the prosecution to prove the case.³² Hence, it cannot be rejected that the statutory presumption strengthens the prosecution evidence.

²⁷ Robert Mathew Chauk v. Her Queen Majesty the Queen, 1990 SCC OnLine Can SC 128.

²⁸ Yogesh Arjun Maral v. State of Maharashtra, 2015 SCC Online Bom 4928.

²⁹ Raj Kumar v. State of H.P., 2014 SCC Online HP 5027.

³⁰ Subrata Biswas v. State, 2019 SCC OnLine Cal 1815.

³¹ Sagar Dinanath Jadav v. State of Maharashtra, MANU/MH 1751/2018.

³² Naresh Kumar v. State of H.P., 2017 15 SCC 684.

The instant Legislature passes the tests under Art. 14 of the Constitution of India namely the 1) Intelligible Differentia³³ and the 2) Rational Nexus to the Object sought to be achieved has been proved.³⁴ The Classification is a reasonable classification since the shift in legal burden is not automatic and occurs only once the prosecution has met the threshold of establishing the *actus reus* and foundational facts in accordance with the procedure stipulated. Reasonable nexus refers to the existence of a rational connection between the law's intended object³⁵ and the means used to achieve that end.³⁶ In the impugned Legislation there exists internal rational connection, which establishes a nexus between the proof of the basic fact i.e., the *actus reus*, and the presumed fact i.e., the *mens rea*.

Art. 21 mandates the procedure to be just, fair and reasonable.³⁷ The term '**Life**' in Art.21 does not mean a mere animal existence but it rather describes a dignified and meaningful life so as to develop a human being physically, mentally, socially and psychologically.³⁸ The term Life denotes a bundle of rights and does not only mean

³³ E.P. Royappa v. State of TamilNadu, AIR 1974 SC 555.

³⁴ Art. 14 of the Constitution of India, 1950.

³⁵ K. Thimmappa v. Chairman, Central Board of Directors, AIR 2001 SC 467.

³⁶ Sunita Bugga v. Director of Education, 2010 5 SLR 535.

³⁷ Maneka Gandhi v. Union of India, 1973 3 SCR 530.

³⁸ Munn v. Illinois, 94 U.S. 113 (1876).

the Fair Trial of the Accused but also the desire of the Victim to bring Justice to the case. The Rights of the Accused and the societal needs are to be harmoniously constructed so as to strike a balance of Art. 21 of the Constitution of India.

The United Nations Convention on the Rights of Children³⁹, ratified by India on 11th December, 1992, requires State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity, (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials and the same is binding by virtue of Art.254, COI⁴⁰. The Records of National Crime Records Bureau⁴¹ states that there had been increase in cases of sexual offences against children and the same is corroborated by the ‘Study on Child Abuse: India 2007’⁴² conducted by the Ministry of Women and Child Development. Sexual offences against children were not adequately addressed and the interests of the child, both as a victim as well as a witness, needed to be protected.

³⁹ United Nations Convention on the Rights of Children, 1989, (G.A.Res. 44/25 of 20 November 1989).

⁴⁰ Article 254 of the Constitution of India, 1950.

⁴¹ NCRB Report on Crime against Children, 2015.

⁴² Study on Child Abuse: India 2007 by Ministry of Women and Children, 2007.

The offences of Sexual Assault are increasing in the society day by day and the sexual assault upon the Children is a stigma upon the society. It is well settled that the Courts are under a legal obligation to protect the minors where a murder destroys the body of the human being but the assaulters degrade the soul of the Children of tender age.⁴³ The Sexual Offences on Children are seldom reported citing numerous factors such as modesty, family reputation, coercion by the Accused, etc., and as such these offences are very harder to prove. It is in this aspect the Presumptions are very helpful to have a toll over the offences.

At this juncture, we cannot leave aside by giving paltry consideration for other side of the coin. The Act has undergone a drastic change with the introduction of 2019 Amendment to the Act, 2019,⁴⁴ which provides for capital punishment for certain offences and also it cannot be ignored that Human Rights of the Accused are merely cosmetic rights. The cases of POCSO accusation needs a high quality lawyering and as a result the Accused person has to spend Lakhs of rupees for his pocket. The 2018 Centre for Death Penalty report⁴⁵ published by the NLU Delhi reports that

⁴³ Raj Kumar v. State of H.P., 2014 SCC Online HP 5027.

⁴⁴ The Protection of Children from Domestic Violence Amendment Act, 2019, (Act 25 of 2019).

⁴⁵ Death Penalty Report by the Centre for Death Penalty, NLUDELHI, 2018.

98.5% of the Death penalty convicts are below poverty line. It is highly miserable that the Lower judiciary is still not aware of the Safeguards reiterated by the Hon'ble Apex Court in dealing with the presumptions and as a result they apply presumptions in a whimsical manner. With the introduction of Death sentence, the mistaken conviction may result in execution of lives whilst the POCSO Act does not

suggest any procedural safeguards for application of Presumption unlike the other Acts. It is in this backdrop, it is highly suggested that time has come for the Supreme Court to interfere and settle the law relating to the procedural safeguards in applying pair presumptions in POCSO Act for which a fair Trial can be ensured in a win-win situation.