

CONSTITUTIONALITY OF REVERSE ONUS UNDER THE POCSO ACT, 2012 AND ITS IMPACT ON MINORS : A CRITICAL ANALYSIS

Parvez Mallick¹

Abstract

The article elucidates the concept of reverse onus embodied under Sections 29 and 30 of the Protection of Children From Sexual Offences Act, 2012, providing an analysis of its constitutional validity in the parameter of presumption of innocence and the same time the impact of the application of the principle in relation to an offence against minors. The very fundamental principle in a trial is the presumption of innocence in favour of the accused, until proven guilty. However, when an accused falls under the rigor of the certain sections of the Protection of Children From Sexual Offences Act, 2012, he is presumed to be guilty from the commencement of the trial. That is, the burden shifts to the accused himself, to prove his innocence. The article also poses the question as to whether existence of these provisions would truly benefit the minors, in times when the safety of children should be the utmost concern or if these provisions could be fatal weapon against the accused in the hands of the prosecution, in gross violation of human rights.

I. Introduction

The primary meaning of the term ‘burden of proof’ refers to the obligation of a party to persuade and prove the trier of the party’s assertion of the case. This Burden of Proof remains on the

¹ Amity University, Kolkata, B.B.A. LL.B(H).

prosecution, throughout the trial². It is only the onus of production that shifts. That is to say, besides having the right to remain silent³, the defense is not required to present any evidence, except for when raising a defense and yet can argue that the prosecution has failed to prove the charge beyond a reasonable doubt.

However, certain recent developments in the Indian legal system have introduced the concept of 'Reverse Onus' in various Acts. It signifies that the burden of proof is placed on the accused at the inception of the trial. It is an exception to the principle associated with fair trial that an accused is presumed to be innocent until proven guilty beyond a reasonable doubt. Presumption of innocence is a well established human right that cannot be wished away⁴ and has always been carried through criminal jurisprudence ensuring that an accused is given a fair opportunity to prove his innocence.

Moreover, the principle of presumption of innocence falls under the wide purview of Article 20(3) which protects a person from self incrimination as well as Article 21 of the Indian Constitution which guarantees the protection of life and liberty and mandates a fair procedure to be followed. Therefore, a presumption of guilt would be a fatal blow to a democracy which encompasses the concept of fair trial and human rights.

II. The genesis and legitimacy of presumption of innocence

² *Jarnail Singh vs State of Punjab*, AIR 1996 SC 755

³ The Constituion of India, art. 20(3)

⁴ *Kailash Gour & Ors vs State Of Assam*, AIR 2012 (SC) 786

Presumption of Innocence has been referred to as ‘golden thread principle of criminal law’ in the landmark case of **Woolmington v. Director of Public Prosecutions**⁵. In light of this principle, the prosecution has to prove its case beyond all reasonable doubt. This principle draws its roots from the Common Law system and has been widely accepted in the common law countries. Though, in India, this principle has not been laid down in a legislation, it has still formed an integral part of the criminal law system in the country. It is considered as an essential element of a fair trial without which, the trial could be considered to be in contravention of Article 21 of the Indian Constitution.

Besides being a fundamental part of the common law, the principle of presumption of innocence has been recognized in various declarations such as under **the Universal Declaration Of Human Rights**⁶, which states that,

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

⁵ (1935) UKHL 1

⁶ UN General Assembly, *Universal Declaration of Human Rights*, G.A. Res. 217 (III) A, UN GAOR, U.N. Doc. A/Res/217(III) (Dec. 10, 1948), art. 11

Further, the principle is enshrined in **the International Covenant on Civil and Political Rights, 1966**⁷ which ensures every person charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law. The same has also been laid down in **The European Convention for the Protection of Human Rights and Fundamental Freedom**⁸ which states that every person charged has a right to a fair trial and that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

III. Constitutional validity of reverse onus clauses in the POCSO Act, 2012

Contrastingly, over time, the courts and the legislature have introduced an exception to the principle of presumption of innocence. Various Acts have been incorporated with provisions underlying the principle of reverse onus such as Sections 29 and 30 of the POCSO Act⁹, Sections 35 and 54 of the Narcotics Drugs and Psychotropic Substances NDPS Act¹⁰. The nature of this principle can also be seen in certain provisions of the Indian Evidence Act, 1872. For the purpose of this paper, only the provisions of the POCSO Act, 2012 in relation to reverse onus would be discussed.

Section 29 of the POCSO Act, 2012 states the when a case has been filed under the purview of sections 3,4,5 and 9 (penetrative and aggravated sexual assaults), the court ‘shall’ presume the accused to be guilty. While, under Section 30 of the Act, the court presumes that the accused had a ‘culpable mental state.’ The presence of the term ‘shall’ in lieu of ‘may’ in these provisions

⁷ International Covenant on Civil and Political Rights, 1966, art. 14(2)

⁸ European Convention on Human Rights, 1953, art. 6

⁹ The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012)

¹⁰ Narcotics Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985)

make it obligatory for the court to presume that the accused had a criminal intention and is guilty. The aftermath of which is that the entire burden is conferred upon the accused to prove his innocence at the initiation of the trial. Such reversal of burden is not only a gross violation of the fundamental rights of the accused but also defies the due and fair procedure of law¹¹.

In the case of **A.K. Gopalan v. State of Madras**¹², Justice Fazal Ali held a dissenting view from the majority, that the Principles of Natural Justice are closely associated and incorporated under Article 21 of the Indian Constitution and it was the duty of the courts to ensure that the procedures established by law should be reasonable and not arbitrary. The same view was later upheld by the majority in the landmark case of **Maneka Gandhi v. Union of India**¹³.

According to the Law Commission of India¹⁴, there are three facets of the right to remain silent under Article 20(3) of the Constitution. Firstly, the prosecution is under the burden to prove the facts of the case and the guilt of the accused. Secondly, the accused is to be presumed innocent until proven guilty beyond all reasonable doubt. Thirdly, the recognition of the right of the accused to remain silent and the right to withhold himself from self incrimination. The Supreme Court has emphasized that, to interpret Article 20(3) a close relationship have to drawn between right against self incrimination under Article 20(3) and the multiple facets of ‘personal liberty’ under Article 21 such as the right to a ‘fair trial’ and ‘substantive due process.’¹⁵

¹¹ The Constitution of India, art. 21

¹² AIR 1950 SC 27

¹³ AIR 597

¹⁴ Law Commission of India, “180th Report on Article 20(3) of the Constitution of India and the Right to Silence” (May, 2002)

¹⁵ *Selvi vs State of Karnataka*, AIR 2010 SC 1974

In a country like India, which derives its roots from the Rule of Law, the Constitution is considered to be the supreme law of the land. Any law that contravenes the provisions of the constitution stands invalid¹⁶. Further, Article 20(3) is complemented by Section 161(2) of The Code of Criminal Procedure, 1973, which highlights that, during an examination by the police, a person acquainted with the facts and circumstances of the case cannot be compelled to provide statements that would be self incriminating. The aforementioned two provisions of the POCSO Act, 2012 not only deprive the accused of his right to a fair trial but also compel him to incriminate himself instead of requiring the prosecution to lead evidence to prove his guilt, and thus, should be held ultra vires to the Constitution.

Within the ambit of Article 14 of the Constitution, a law may bring a person under a reasonable classification and be treated differently provided there is a reasonable nexus between such classification and its objective¹⁷. The question to be asked is, whether the differential treatment meted to the accused under sections 29 and 30 of the POCSO Act, 2012 satisfies the objective of such provisions of reverse burden. The intention of the legislature behind these provisions may have been to curb grave offences under the POCSO Act, 2012, however, it seems the hefty burden upon the accused to prove his innocence at the onset of the trial is quite tangential and disproportionate to the impact the legislature seeks.

It was established in the case of **R v. Oake**¹⁸, that the object of the legislation and classification should have a rational nexus and test of proportionality where there should be rationality,

¹⁶ The Constitution of India, art. 13

¹⁷ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75

¹⁸ (1986) 1 SCR 103.

minimum impairment of the right of freedom and proportionality with regards to means and effect. The argument can further be enumerated through the case of **Rubinder Singh v. Union of India**¹⁹. It was held that it is a vital element of the rule of law that no person shall be subjected to harsh and discriminatory treatment in the court of law. Even when in the interest of the public, it should be gravely unjustified for the accused and shall not deprive him equal protection in the eyes of law as enshrined under Article 14 of the Constitution of India.

IV. Position of minors and its relation to reverse onus under POCSO Act, 2012

In spite of the stringent laws in the country, children as well as women have been victims to trafficking, harassment, rape and various other heinous crimes, and the rising number further aggravates the issue. It would not be staggering to find the position of females always being considered inferior as compared to males owing to the fact that India draws an attribute of patriarchy from the ancestral past. With this deep rooted patriarchy, misogyny exhibits through objectification and commodification of women and other forms of violence²⁰. Minors are trafficked and are forced into prostitution or are made to beg on the streets. Trafficking of children is more prevalent in the families belonging to a marginalized sector struck with poverty²¹. Traffickers see this as an opportunity to exploit these families who due to their poor conditions and lack of awareness eventually sell their children off with the hope of a better livelihood.

¹⁹ AIR 1983 SC 65

²⁰ Jean Chapman, "Violence Against Women in Democratic India: Let's Talk Misogyny" 42 *Social Scientist* 50 (2014)

²¹ Dr. Prateep Roy, *Situation of Children and Child Rights in India*, 84 (Butterflies, New Delhi, 2015)

Myriads of incidents of rape of women and children take place every year of which most are not reported or are investigated, which may be due to factors such as police inaction, threats, or fear of humiliation. Often the accused are acquitted due to lack of evidences, which further makes the victims hesitant to report a case and to believe whether justice would be served. The National Crime Records Bureau (NCRB) reported a significant rise in crimes against children. From 2018, crimes against children have gone up by 4.5% in 2019. A total of 1.48 lakh cases of crime against children were registered in 2019. As per the report, there was also an increase of 18.9 % in the registration of cases under the POCSO Act.²²

To address the issue of the rise in crimes against minors, there is a need for stringent laws. Though recently, following the rape and murder of a minor girl by a group of men in Kathua²³, The Criminal Law (Amendment Act) 2018 was introduced, which stipulates increased term of imprisonment of not less than 20 years for the rape of a minor girl and imprisonment for life in case of gang rape. Besides, provisions have been made for death penalty in certain cases as well. The Criminal Law (Amendment) Act 2018 not only amended The POCSO Act, 2012 but also the Indian Penal Code, 1860 and Code of Criminal Procedure, 1973 in matters of rape.

In spite of the efforts of all the pillars of the government to curb such grave offences, there exists certain loopholes which only lead to fueling the number of these cases with a low conviction rate. A recent study found that the national conviction rate for child rape is 28.2% and pendency

²² Reethu Ravi, Crimes Against Children Increased 4.5% In 2019: NCRB Data, THE LOGICAL INDIAN (Sept. 29, 2020, 10:00 PM), *available at*: <https://thelogicalindian.com/crime/crimes-against-children-increased-24102> (Last visited on June 29, 2021)

²³ President gives assent to the Criminal Law (Amendment) Act, THE ECONOMIC TIMES *available at*: <https://economictimes.indiatimes.com/news/politics-and-nation/president-gives-assent-to-the-criminal-law-amendment-act/articleshow/65374343.cms?from=mdr> (Last visited on June 29, 2021)

in these cases is at 89.6%²⁴.The judiciary is bound by a rigid procedure of law. The accused is only to prove his case to the extent of bringing about a reasonable doubt and he is acquitted. Often, the prosecution faces difficulty to enter and investigate private spaces and eventually fails to procure evidences against the accused. Again, there are instances favoring the accused where only the accused has special knowledge of the facts and there are no witnesses to the case. However, in such cases, the essence of the principle of reverse onus can be manifested in section 106 of the Indian Evidence Act, 1872 which places a burden on the accused to prove the facts within his knowledge.

Section 29 and 30 of the POCSO Act, 2012 are extreme provisions that place an undue burden on the accused by presuming him to be guilty even before the prosecution has proved any fact of the case. Though the underlying principle can be seen as ultra vires to the Constitution, it can be argued that it sheds an advantage to the victims of a case. The initial burden being on the accused could make a significant impact by not only encouraging victims to report an incident but also promising increased conviction rates. It was held in the case of **P. N. Krishnalal v. Government of Kerala**²⁵ where the court held that the presumption of innocence is not a constitutional guarantee and can be dispensed with by legislative imperatives and action.

However, the cost of the presence of reverse onus, on the other side, is unparalleled. Presumption of guilt from the very inception of the trial would mean any person would have an opportunity to maliciously file a case against another under the rigor of the sections specified in Section 29 of

²⁴ Shireen Vakil, How India Can Get Better at Delivering Justice for Children, THE WIRE *available at:* <https://thewire.in/law/children-abuse-pocso> (Last visited on June 29, 2021)

²⁵ (1995) SCC (Cri) 466.

the POCSO Act, 2012 that would place the accused in a dreadful position owing the arbitrary and unreasonable burden to prove his innocence. There have been numerous cases where the POCSO Act has been misused. According to Justice N. Anand Venkatesh, the consequences of prosecuting a person are extremely grave, as the person not only faces the risk of stringent punishments but also falls down in the eyes of the society²⁶.

The author believes that the courts and the legislature have to strike a balance between the convenience derived from reverse onus clauses in POCSO Act and risks associated with the same. The Act should not seek to protect the children at the cost of victimization of the accused.

V. Validating reverse onus through conditions and judicial pronouncements

Over the years, there have numerous cases where a reverse onus provision has been called upon. However, different courts have interpreted these provisions in their own way leading to an inconsistency and vagueness in their usage. In the case of **Yogesh Maral v. State of Maharashtra**²⁷, the Court stated that the ambit of Section 29 of the POCSO Act is quite wide and due care and protection shall be used before applying it to any of the cases hinted towards its unconstitutionality. The Court further stated that a plain reading of Section 29 would suggest that it is beyond the normally accepted principles of Criminal Jurisprudence.

²⁶ J STALIN, Madras high court shocked over woman misusing Pocso Act, DECCAN CHRONICLE *available at*: [shttps://www.deccanchronicle.com/nation/current-affairs/210819/madras-high-court-shocked-over-woman-misusing-pocso-act.html](https://www.deccanchronicle.com/nation/current-affairs/210819/madras-high-court-shocked-over-woman-misusing-pocso-act.html) (Last visited on June 30, 2021)

²⁷ (2016) (1) Bom.C.R (Cri) 474 (Bombay High Court)

Further, the court, in the case of **Noor Aga v. State of Punjab**²⁸, acknowledged with reference to the NDPS Act, that the provisions of reverse burden are valid provided the prosecution has proved the initial facts of the case and enabled the court to presume the accused is guilty. Only then, the reverse onus provisions come into operation and the burden is conferred upon the accused to prove his innocence. It was emphasized that reverse burdens provisions neither absolve the prosecution of establishing a prima facie case against the accused nor deprive the accused of his right to a fair trial. It was also noted that the threshold of burden of proof was higher on the prosecution as it has to prove its case beyond all reasonable doubt whereas the accused is to prove its defence on the “preponderance of probability.”

In contrast, the court opined in the case of **Bhupen Kalita v. State of Assam**²⁹, that the legal position emerging from any proceeding under the POCSO Act, is that the prosecution is to prove the foundational facts of the charge against the accused on the basis on preponderance of probability and not based on proof beyond reasonable doubt. The accused could rebut the same on the basis of preponderance of probability, however, if there lays a question on the absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

²⁸ (2008) 16 SCC 417

²⁹ 2020 (3) GLT 403

A four fold comprehensive test was devised by Justice Gupte in the case of **Sheikh Zahid Mukhtar v State of Maharashtra**³⁰, to examine the validity of any provision of reverse onus, which are as follows:

1. Is the State required to prove enough basic or essential facts constituting a crime so as to raise a presumption of balance facts (considering the probative connection between these basic facts and the presumed facts) to bring home the guilt of the accused, and to disprove which the burden is cast on the accused?
2. Does the proof of these balance facts involve a burden to prove a negative fact?
3. Are these balance facts within the special knowledge of the accused?
4. Does this burden, considering the aspect of relative ease for the accused to discharge it or the State to prove otherwise, subject the accused to any hardship or oppression?

In each case the court should seek if the provision satisfies the aforementioned conditions, it is deemed to be constitutionally valid. The four fold test seeks to prevent an arbitrary usage of the reverse onus provisions and ensures there is no unreasonable burden upon the accused.

VI. Conclusion

³⁰ (2016) SCC OnLine Bom 2600

The status of the reverse onus provisions under the POCSO Act, 2012 is rather vague due to different interpretations formed by different courts. It is often misused by initiating malicious prosecution against a person. Courts have from time to time warned that the reverse onus clauses should be exerted with extreme caution due to its severe and detrimental nature. Each case has different circumstances associated with it and the courts are to use their wise discretion in examining the case through the four fold test. The intention of the legislature is of paramount importance in drawing a nexus to the compromise in the rights of the accused as well as the true impact of the reverse onus clause as had been intended by the legislature. Both the judiciary as well as the legislature are to ensure that there is no dilution of the right to remain silent or the right to a fair trial, as the cost of arbitrary and unreasonable provision.