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# Guilty Until Proven Innocent! Analysis of Reverse Onus Under POCSO ACT

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## ABSTRACT

*The golden thread of criminal law places the onus of proving the accused guilty beyond any reasonable doubt on the prosecution. The reverse onus clause jeopardises this golden rule and is said to infringe the accused's fundamental rights. While the legislature justifies its intent stating the reverse onus clause is brought into the picture after considering the 'gravity of the offence'; 'difficulties that will show up if the prosecution tries to prove the offence' and the 'gist of the offence committed'. It can be accepted that shifting the burden of proof onto the accused is a two-way sword. As on his head-the principal onus of proof is now on the accused, and if he is unsuccessful in proving the same beyond any reasonable doubt, he will be convicted. Consequently, only while keeping in mind the accused person's rights, the rules of natural justice, and other fundamental human rights can the reversal of the onus clause be undertaken. The legality of the reverse onus clause in POCSO cases has been answered ahead.*

## I. INTRODUCTION

The assumption of innocence in any criminal trial is intricately connected to the burden of proof. The burden of proof, in simpler terms, commands which party bears the responsibility to prove an inevitable fact during a trial. The point as mentioned above has been defined in the following words:

"On every issue, there is an obligation on one party to convince the tribunal of the truth of some proposition of fact which is in issue and which is vital to his case."<sup>2</sup>

Since the presumption of innocence is the vital component of a trial, the legal or ultimate burden of proof is permanently on the prosecution to assert the accused's guilt. Therefore, the prosecution must institute a concurrence between mens rea and actus reus beyond any reasonable doubt to discharge its burden. Ordinarily referred to as the reverse evidential burden, it merely requires proof from the accused, which satisfies the 'prudent man' standard or creates reasonable doubt regarding one or more essential elements of the felony. The prosecution will

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<sup>2</sup> L. Phipson & Michael Howard, Phipson on Evidence 51 (2000)

remain to bear the legal burden to refute the discharge of the accused. If the accused succeeds in creating any reasonable doubt, he will be in the clear because the prosecution could not prove his guilt<sup>3</sup>. The legal burden of proving that the accused committed the crime beyond any reasonable doubt is on the prosecution from initiation to trial cessation.

The famous Lord Sankey speech in the case of *Woolmington* in the House of Lords; *"Throughout the web of the English Criminal Law one golden thread is always to be seen that the prosecution has to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. The prosecution has not made the case, and the prisoner is entitled to an acquittal. the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England, and no attempt to whittle it down can be entertained."*

One would imagine that given the near-sacred status of the presumption of innocence, it cannot be negotiated in any status quo whatsoever. The reverse onus clause shreds the principle of its spirit. It replaces 'innocent until proven guilty' with 'guilty until proven innocent, making the accused a convincing criminal who needs evidence against his guilt. Reverse onuses water down the prosecution's legal burden to the magnitude that the prosecutor must prove only a minimum threshold, the actus reus<sup>4</sup>. The accused's guilt is presumed, and the burden to establish the absence of mens rea is then shifted to the respondent. The responsibility upon the accused in such cases is also known as the persuasive burden. The persuasive burden is ultimate because failure to discharge it will result in the sentencing of the accused. In the State of Tamil Nadu v. A. Vaidyanatha Iyer<sup>5</sup>, the concept of mandatory presumptions creating reverse burdens has been pointed out.

The presumption of innocence has been reversed on the pretext of public interest and speedy justice. Consequently, explaining the inclusion of reverse onus clauses in socio-economic legislation. A few statutory provisions using reverse onus clauses in India are- the Essential Commodities Act, 1955; the Customs Act, 1962; the Narcotic Drugs and Psychotropic Substances Act, 1985; the Wealth Tax Act, 1957; the Prevention of Corruption Act, 1988 and the Protection of Children from Sexual Offences Act, 2012. The threat to the community's health and welfare caused by the violation of these statutes calls for extraordinary and stricter efforts for their enforcement. Reverse onus burdens are not restricted to socio-economic

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<sup>3</sup> Dahyabhai Chhaganbhai Thakkar v. the State of Gujarat, AIR 1964 SC 1563

<sup>4</sup> Byron M. Sheldrick, Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses, 44(2) U. Toronto Fac. L. Rev. 179, 180 (1986)

<sup>5</sup> AIR 1958 SC 61

offences and have subsequently been incorporated into the Indian Penal Code, 1860, for rape and dowry death. An examination of the specific statutory provisions utilising reverse onus clauses is outside the scope of the paper, and it would suffice to say that these clauses mandate the accused to prove the absence of mens rea in the form of intention, motive, knowledge, or belief concerning the actus reus of a crime.

As reflected in the Law Commission of India's 47th Report, the justification acknowledged by the legislature for the implication of the clause was of the exigency demands that countless socio-economic crimes be put down with a heavy hand, consequently justifying a departure from the traditional requirements of criminal procedure. Such an approach endeavours to achieve the goal of deterrence, which could reduce the occurrence of these offences. Another justification is the practical difficulty encountered by the prosecution in obtaining proof. In this respect, it is argued that it is difficult for the prosecution to put forward evidence about matters within the accused's exclusive or peculiar knowledge. This justification also encompasses the rationalisations of judicial economy and administrative expediency since reverse burdens appear to facilitate shorter, more accessible and less expensive legal proceedings, in this manner conserving resources otherwise spent in reconnoitring facts that are solely within the knowledge of the defendant. These clauses are also alleged as securing a higher conviction rate than under the rigid standard of proof beyond any reasonable doubt, thereby furthering the goal of deterrence.

## **II. CONFLICT WITH THE INDIAN CONSTITUTION (ARTICLE 14 AND 21)**

The reverse onus clause pursues to provide a sense of balance between the accused's fundamental rights and society's more significant interest in law enforcement. In *Noor Aga v. the State of Punjab*, the Supreme Court held that reverse burdens are constitutional, both policy considerations and social control concerns justifying this extraordinary measure. Although the presumption of innocence is recognised as an element of personal liberty, *Sinha J.* held that individual liberty must be subject to social interest to ensure the security of the State. In addition, he stated that a penal provision's constitutionality needs to be tested on the anvil of the State's responsibility to protect innocent citizens. Hence, the rights of the accused and societal interests need to be balanced. The Court seemed to justify the shift in the legal burden because the shift is not automatic and occurs only once the prosecution has met the threshold of establishing the actus reus and foundational facts according to the procedure stipulated.<sup>33</sup> Although the Court cautioned that the prosecution needs to strictly comply with a statute's procedural requirements and establish the actus reus beyond any reasonable doubt, it is

alarming that despite acknowledging the significance of the presupposition of innocence in maintaining public confidence in the legal system, the Court still upheld the constitutionality of reverse burden. While it recognised the need to protect innocent citizens and the higher degree of certainty needed to secure convictions in serious offences, it failed to realise the higher likelihood of reverse burdens convicting innocent individuals even when a reasonable doubt subsists.

In *KS Puttasawmi vs UOI* test of proportionality propounded by Justice Sikri can be used to determine the validity of the reverse onus clause:

- a) A measure restricting a right must have a legitimate goal (legitimate goal stage).
- b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).
- c) There must be no less restrictive but equally effective active alternative (necessity stage).
- d) The measure must not have a disproportionate impact on the right holder (balancing stage)<sup>6</sup>

Article 14 consists of the essential element of **reasonable Nexus and intelligible differentia**. **The above implies there** must be reasonable Nexus for which there has been a classification or a differentiation, and that differentiation can be understood. There is no legitimate link between the actus reus and mens rea in reverse onus. It gives rise to grave injustices, as can be seen in the case of the NDPS Act, where the accused is held to be guilty merely based on physical possession, and the concept of conscious possession is overlooked. The reverse onus is insufficient protection for the accused because a basic fact may tend to prove a presumed fact but not prove it beyond reasonable doubt. Therefore, an accused could be convicted despite the presence of a reasonable doubt if he is unable to satisfy the persuasive burden, which contravenes the presumption of innocence. The debate that reversal of burden is violative of Articles 14 and 21 on the constitution of India is a legitimate one; they cannot be used as a weapon to dilute the intent of the legislation.

### **III. PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012**

Protection of Children from Sexual Offences Act, 2012 [from now on POCSO] was legislated with an extensive objective to avert the exploitation of children and child sexual abuse. It was

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<sup>6</sup> AIR 2017 SC 4161

also supplemented by the belief that a robust prosecutorial mechanism is essential for tackling these crimes. To this end, it was acquainted with a slew of measures to simplify the prosecutorial burden in cases dealing with this issue, including establishing Special Courts to deal with crimes under the POCSO Act. Also worth mentioning are the two presumptions provided under s—29 and s. 30 of the Act. When a person is charged under section 29 of the POCSO Act, he is presumed to have committed the offence.

Similarly, section 30 presumes that a person charged under the Act had the culpable mental state necessary to commit the offence while Section 29 of the POCSO is about conjecture about certain offences covered under the said Act. It shapes that when an individual commits or abets or attenuates to commit any offence under section 3, section 5, section 7 or section 9 of the POCSO Act, the Special Judge, shall presume the guilt of the said person during the prosecution of the said person accused unless the accused proves his innocence. This Section incorporates the principle of the reverse onus clause. In the *Sri Joubansen Tripura* case, the Court observed that there will always be an auxiliary advantage with the prosecution whenever a trial is commenced. The advantage is the presumption of guilt against the accused. It pointed out that the tricky fragment is that when this becomes the sole reason for the sentencing of the accused, it will be hit by Articles 20(3) and 21 of the Constitution of India.

The Court interpreted the concise wording of the provision. It held that even though the Section is silent regarding the prosecution's part to adduce evidence, the prosecution has to prima facie establish specific foundation facts before the Court. After the prosecution has established such facts, the burden moves on the accused to refute those facts. The Court stated that the presumption clause of Section 29 and Section 30 does not cast a shadow on the primary duty of the prosecution to establish fundamental facts. This observation has been supported by different judicatures. The High Court of Calcutta said that when the prosecution fails to establish the primary facts constituting the offence, the statutory presumption of Section 29 of the POCSO Act is not applicable. The Delhi High Court held that a suspect could not be obligated to prove their innocence until the prosecutor has presented before the Court with the foundational charges and supporting evidence that indicates the accused is guilty. On the other hand, the Kerala High Court upheld that these provisions do not violate any fundamental rights in any manner whatsoever. The courts said that precondition is necessary for the reverse onus clauses to instil reasonableness and procedural fairness under Article 21 of the Constitution of India. Divergence from this prevailing opinion was seen in a new case brought in front of the High Court of Bombay. The Court stated that even if the victim turns hostile, the burden of proving innocence will still lie on the shoulders of the accused. Subsequently, this Court upheld

the presumption under Section 29 for the sentencing of the accused. To support their stance, the Court also brought the statute's legislative intent into the picture. In *Sheikh Zahid Mukhtar v The State of Maharashtra* established a four-fold test for considering the burden of any reverse burden clause. First, is the State required to prove basic or essential facts to raise a presumption of balance as to the facts? Second, does the proof of those facts involve a burden to prove adverse facts? Third, are these facts within the special knowledge of the accused? Fourth, does this burden subject the accused to any hardship or oppression?<sup>7</sup> Only if the reverse onus clause satisfies all the aforementioned conditions will it be considered valid. This comprehensive test is a tremendous advancement in supporting the presumption of innocence principle. It confines the parliament from banking on upon the reverse onus clauses at the drop of a hat and necessitates the clause to placate this test to be constitutionally valid.

In the case of *Namit Sharma v. Union of India*<sup>8</sup> Court stated that 'to test the Constitutionality of a statute or its provision, one of the most relevant factors would be the object and reasons as well as the legislative history of the statute, which would turn helpful in assessing the reasons as to the enactment of a statute to find an ultimate impact vis-à-vis the constitutional provisions.' Therefore, taking these alarming facts into record, it is apparent that the lawmakers deliberately enacted Section 29, i.e., the presumption of guilt. Section 29 and section 30 mention 'shall presume,' which is a rebuttable presumption; this implies that the prosecution gets an opportunity to prove its case. It is not that accused only based on the presumption is considered guilty. The accused is given a chance to rebut the presumption to prove his innocence. Hence, the POCSO Act gives a chance to the accused to prove his innocence. Reversed burden of proof in Section 29 and 30 of POCSO Act in which there is presumption regarding commission and abetment of certain offences and presumption of the mental state of the accused, respectively is, due to the pervasive nature of crimes committed upon a vulnerable soul who in many cases are also not in a pose to comprehend the gravity of these crimes. Due to this, the legislature deemed it apt to employ a reversed burden of proof in these cases.

#### IV. CONCLUSION

Thus, under Section 29 of the POCSO Act, the statutory presumption does not intend for the prosecution version to be handled as gospel reality or authenticity in each case. The presumption does not do away with the imperative responsibility of the Court to analyse the

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<sup>7</sup> 2016 SCC OnLine Bom 2600

<sup>8</sup> AIR 2014 SC 122

proof on record in the mild of unique functions of a specific case such as natural infirmities within the prosecution version or exercise of entrenched enmity between the accused and the victim giving upward thrust to an impossible inference of falsehood inside the prosecution case at the time of figuring out whether or not the accused has discharged his onus and mounted his innocence within the given records of a case. The Term 'Unless the Contrary is proved' in Section 29 needs to be examined first, and its miles the duty of the prosecution to set up & show its case, and only then a presumption below fragment of Section 30 may be drawn. The presumption under POCSO Act is an essential provision to ensure the well-being of a child who has limited capacities and capabilities of positive reception and understanding the mental states of others and even of himself. The presumption seeks to ease the burden and vulnerabilities of an already vulnerable child.

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