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Presumption of Innocence v. Presumption of Absence of Consent: Exploring the Impact of Section 114-A on Sexual Offence Cases

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ABSTRACT

Under Section 114A, Indian Evidence Act, 1872 (hereinafter referred to as “IEA”), absence of consent in rape cases is presumed. This legislature aims to benefit and protect alleged rape victims. However, its implementation is fraught with obstacles, particularly with respect to its hypothetical clash between with the globally accepted legal principle of presumption of innocence (i.e., every defendant in a criminal trial is presumed to be innocent until the prosecutor has presented sufficient evidence and arguments to prove beyond a reasonable doubt that the accused has committed the crime.)

This article is descriptive in nature and aims to objectively provide a detailed account of the subject matter and establish a baseline understanding of Section 114A of the IEA and its clash with the principle of the presumption of innocence in cases of sexual offence. It discusses the rationale behind Section 114A, the unique challenges in evidentiary procedures in rape cases and this section’s implications on the rights of an accused person. As an important matter related to human rights, striking a balance between protecting sexual assault victims and upholding the rights of the accused is paramount to ensure justice and fairness in the legal system.

Keywords: *Section 114-A, Indian Evidence Act, presumption of innocence, sexual offence, consent, burden of proof, fair trial.*

I. INTRODUCTION

(A) Consent is a *Conditio Sine Qua Non* For Qualifying A Sexual Act As An Offence Of Rape

Chapter IV of the Indian Penal Code, 1860 (“hereinafter referred to as “IPC”) exempts certain acts from criminal liability. Though the act of the accused may *prima facie* fall within the definition and conditions of an offence, the person committing the act cannot be held criminally liable if it is covered by any of the exceptions given under this chapter (as inferred by Section 6, IPC², which states that:

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² Pen. Code § 6

“Throughout this Code, every definition of an offence, every penal provision, and every illustration of every such definition or penal provision shall be understood subject to the exceptions contained in the chapter entitled “General Exceptions,” though those exceptions are not repeated in such definition, penal provision, or illustration.”)

The legal maxim ‘*actus non facit reum nisi mens sit rea*’ means an act does not make a man guilty of a crime until and unless his mind is equally guilty. *Mens rea* is one of the fundamental elements of a crime but even if *mens rea* in the form of intention or knowledge is present, it is the victim’s consent that ultimately plays the paramount role in establishing liability in most criminal cases. **Sections 87³, 88⁴, and 89⁵ under Chapter IV of the IPC** provide for the defense of consent. If mentally competent adults willingly and freely provide valid consent to an act committed, provided they understand what they are consenting to, an injury caused as an outcome of said consent cannot bring criminal charges against the accused.

It is evident from the case laws of both national legal systems and international judicial bodies that consent is a *conditio sine qua non* for qualifying a sexual act as rape.⁶ In simpler words, lack of consent is an essential prerequisite for considering an act of sexual intercourse as an offence of rape. The offence of rape is well defined under **Section 375 of the IPC⁷** and punishments for different forms of rape are provided in detail under **Section 376, IPC⁸**. The punishment for this heinous offence ranges from rigorous imprisonment to death sentence which is why it is essential to understand the consequences of strict compliance with Section 114A, IEA at the risk of the rights and life of an innocently accused individual.

II. RATIONALE BEHIND SECTION 114A, INDIAN EVIDENCE ACT, 1872

In a court of law, opposing parties present evidence to refute each other’s allegations. **The Indian Evidence Act, 1872** governs the law of evidence in India and applies to all judicial proceedings in or before any Court in India, including Courts-martial (except those convened under the Army Act, 1950⁹, the Navy Act, 1957¹⁰, and the Air Force Act, 1950¹¹).

Section 114A was added to the Indian Evidence Act, 1872 as a result of the Criminal

³ Pen. Code § 88

⁴ Pen. Code § 88

⁵ Pen. Code § 89

⁶ Presumption of Consent, *supra* note 3, at 4

⁷ Pen. Code § 375

⁸ Pen. Code § 376

⁹ The Army Act, 1950, No. 46, Acts of Parliament, 1950 (India).

¹⁰ The Navy Act, 1957, No. 62, Acts of Parliament, 1957 (India).

¹¹ The Air Force Act, 1950, No. 45, Acts of Parliament, 1950 (India).

Amendment Act of 1983¹², which states that if an offence is said to be committed under any of the clauses specified in Section 376(2) of the IPC¹³, and the victim explicitly denies giving consent to the committed sexual act, the court shall presume absence of consent and so, the burden of proof will shift to the accused party to prove beyond reasonable doubt that the sexual act was consensual.

Ultimately, it is the evidence that can be proven beyond a reasonable doubt and what cannot be proven in court that plays a crucial role in determining the liability of the accused. In the well-known 1996 case of *State of Punjab v. Gurmit Singh*¹⁴, the Supreme Court stated that in alleged rape cases, presumption in favour of the victim (that is, to assume that victim did not consent to the said sexual act) is a must. If this assumption is not considered, it will become difficult to ensure justice for rape victims. It reiterated that the presumption of innocence should not be taken to an extent that it would hamper the interests of justice for sexual assault victims.

“Rape is not merely a physical assault- it is often destructive of the whole personality of the victim. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity and should examine the broader probabilities of a case without getting swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.”

Before the Criminal Law (Second Amendment) Act, 1983, if there were no marks on the body of the victim or accused caused due to the alleged rape, it was assumed that there was no resistance, hence the victim’s consent was assumed. This wrong assumption led to the acquittal of alleged rape offenders in many cases.

The Supreme Court’s verdict on the **Mathura rape case** (*Tukaram v. State of Maharashtra*)¹⁵ in 1979 was a watershed moment eventually leading to the enactment of Section 114A, IEA in 1983. This case of custodial rape took place on 26 March 1972, wherein Mathura, a young tribal girl, was allegedly raped by two police officers on the premises of Desaijanj Police Station in Gadchiroli district, Maharashtra. The case was heard before the Sessions Court on 1 June 1974. It was assumed that Mathura could have consented to the act on the presumption that she was “habituated to sexual intercourse.” Since whether the sexual act was consensual or not could not be proven, the accused were acquitted. On appeal, the Bombay High Court,

¹² Criminal Law (Second Amendment) Act, 1983, No. 46, Acts of Parliament, 1983 (India).

¹³ Pen. Code § 376 (2)

¹⁴ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 (India).

¹⁵ *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143 (India).

Nagpur Bench overturned the Sessions Court's verdict, ruling that passive submission induced by fear of injury could not be considered as valid consent.

In September 1979, the Supreme Court overturned the Bombay High Court's verdict and acquitted the accused police officers ruling that since Mathura had not raised alarm and there were no obvious marks of injury on her body, it implied no resistance and hence, implied consent to the sexual act committed.

"The onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish, and such onus never shifts."

Following the acquittal of the accused by the Supreme Court, there was public outrage and protests demanding a review of the decision, which received extensive media coverage and eventually resulted in amendments in Indian rape laws via the Criminal Law (Second Amendment) Act, 1983, which made a statutory provision in the face of Section 114A of the IEA on 25 December 1983.

Without necessitating proof of vices of the victim's consent, the presumption of absence of consent under **Section 114A, IEA** considers the psychology of victims of sexual violence to a larger extent, considering that these victims are often unable to physically resist or explicitly object to sexual acts (for example, Stockholm syndrome). In addition, this presumption protects rape victims to a greater extent by avoiding societal prejudices about rape victims, the culture of violence and rape culture. As studied by several sociological theories, rape culture is a setting where rape is pervasive and normalized due to societal attitudes toward gender and sexuality. The culture of violence theory is an important concept which seeks to explain the prevalence and regularity of violent patterns which manifest in a societal dimension. Rape myths and victim blaming are two examples of culture legitimizing violence. Rape myths are pervasive and widely accepted false beliefs about sexual assault that help to perpetuate rape culture by shifting the blame from the perpetrator onto the victim. These deeply rooted yet false beliefs lead to further trauma for the victims.

Furthermore, cases of sexual offences are characterised by lack of sufficient evidence and scepticism regarding the testimonies of alleged rape victims in most legal systems¹⁶. This is a pervasive issue that leads to many accused of sexual offences going unpunished. When the presumption of absence of consent is invoked, the vice of consent of an alleged rape victim is omitted from the subject matter of the case. This approach significantly reduces the burden of

¹⁶ Presumption of Consent, supra note 3, at 30

evidence necessary to prove guilt of the accused, and its implementation is justified in terms of protecting rape victims.

III. BURDEN OF PROOF ON THE ACCUSED UNDER POCSO ACT

Section 29 of the Protection of Children from Sexual Offences Act, 2012¹⁷ (POCSO Act) states that *"Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3¹⁸, 5¹⁹, 7²⁰ and 9²¹ of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*

Here the burden of proof is on the accused rather than the prosecution, as it is in Section 114A of IEA. Considering the conviction rate of accused was lower in sexual offences against minors, the legislature shifted the burden of proof on the accused with the aim of ensuring justice.

In the well-known case of *Badrinath v. Union Territory of Jammu and Kashmir*²², the High Court elaborated on the definition of "prosecute" relying upon the judgement of *Thomas Dana v. The State of Punjab*²³ and concluded that prosecution begins with the presentation of a challan before the court. The use of the word "prosecuted" in Section 29 indicates that the presumption applies from the initiation of the proceedings, not just during the trial.

"The Legislature has used the word "prosecuted" in Section 29 of the POCSO Act. If the Legislature intended to bring the presumption contained in Section 29 of the POCSO Act into operation at the commencement of trial of the case, it would have certainly used the word "tried" instead of word "prosecuted", as has been done in the case of Section 54 of the NDPS Act²⁴."

In *Maqbool Hussain v. The State of Bombay*²⁵, the Court observed:

"..... and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."

The Court in the **Badrinath case (supra)** disagreed with the interpretation given by the Delhi

¹⁷ The Protection of Children from Sexual Offences Act, 2012, § 29, No. 32, Acts of Parliament, 2012 (India).

¹⁸ The Protection of Children from Sexual Offences Act, 2012, § 3, No. 32, Acts of Parliament, 2012 (India).

¹⁹ The Protection of Children from Sexual Offences Act, 2012, § 5, No. 32, Acts of Parliament, 2012 (India).

²⁰ The Protection of Children from Sexual Offences Act, 2012, § 7, No. 32, Acts of Parliament, 2012 (India).

²¹ The Protection of Children from Sexual Offences Act, 2012, § 9, No. 32, Acts of Parliament, 2012 (India).

²² *Badri Nath v. Union Territory of J&K*, Bail App. No. 139/2020 (India).

²³ *Thomas Dana v. State of Punjab*, 1959 Supp (1) SCR 274 (India).

²⁴ The Narcotic Drugs and Psychotropic Substances Act, 1985, §54, No. 61, Acts of Parliament, 1985 (India)

²⁵ *Maqbool Hussain v. State of Bombay*, (1953) 1 SCC 736 (India).

High Court in the case of *Dharmander Singh v. State (Govt. of NCT of Delhi)*²⁶ and stated:

“The learned Judge in the case of Dharmander Singh case (supra) has opined that the word ‘prosecution’ must be interpreted as ‘trial’ to make the latter part of provision of Section 29 of POCSO Act meaningful. I am afraid such an interpretation cannot be given to the Section 29 of the Act because the Legislature has clearly used the expression “prosecuted” and not “tried” in the said provision. So far as the principles of reasonable, just, and fair procedure are concerned, the same can be taken care of even at the time of considering the bail application at pre-trial stage by analysing the material that is collected by the investigating agency during the course of investigation for ascertaining whether or not the foundational facts that would give rise to the presumption in terms of Section 29 of the Act are, prima facie, in existence.”

The Supreme Court, in the case of *State of Bihar v. Rajballav*²⁷, held that the presumption of innocence does not apply when there is a contrary statutory of presumption of guilt.

However, in such cases where Section 29 of POSCO Act or Section 114A of IEA applies, the burden of proof lies on the accused party to get the charges dismissed. Does this clash with the globally accepted legal principle of presumption of innocence?

IV. PRACTICAL COMPLEXITIES AND HINDRANCS IN EXECUTING SECTION 114A, IEA

Shortcomings of the presumption of absence of consent under Section 114A, IEA, relate to the challenges and complexities of the evidentiary procedure in cases involving sexual offences. In cases of sexual offence, the primary evidence are the testimonies of the alleged victim and accused, which are typically opposed. Because the presumption of guilt under Section 114A, IEA does not necessitate proof like material traces of abuse or other corroborative evidence to support the victim’s testimony, there is an increased risk of false denunciations in cases of sexual offences.²⁸ In the case of *State of Maharashtra v. Chandraprakash Keval Chand Jain*²⁹, the Court held that a rape victim is undoubtedly a competent witness under **Section 118, IEA** and that it is not necessary that her testimony should be corroborated with a competent witness.

Hence, the presumption under Section 114A, IEA, has great risk of being abused by victims resulting in a grave violation of the accused’s rights and liberties. Especially in cases where consent may have been ambiguous or there is no concrete evidence to corroborate the accused’s

²⁶ *Dharmander Singh v. State (Govt. of NCT of Delhi)*, 2020 SCC OnLine Del 1267 (India).

²⁷ *State of Bihar v. Rajballav*, (2017) 2 SCC 178 (India).

²⁸ *Presumption of Consent*, *supra* note 2, at 31

²⁹ *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550 (India).

defence, the accused may face grave challenges in proving their innocence. In the case of *State of Rajasthan v. Om Prakash*³⁰, the Supreme Court cautioned that while protecting the interests of rape victims, it is also important that care must be taken to avoid false accusations and unnecessary burden on and harassment of innocent persons. The implementation of Section 114A, IEA, is fraught with obstacles particularly concerning the potential bias it creates by giving rise to an environment where the accused is seen as guilty way before guilt has been established beyond reasonable doubt, resulting in an unfair trial, and potentially ruining an innocent person's reputation.

The presumption of innocence is a legal principle that states that every person accused of a crime is presumed innocent until proven guilty beyond reasonable doubt, and the burden of proof rests squarely on the shoulders of the prosecution. If the prosecution cannot prove the charges are accurate, the accused is acquitted. The presumption of innocence is a fundamental principle of justice that is globally accepted and is enshrined in the **United Nations Declaration of Human Rights**³¹ under **Article 11**. The presumption of innocence is essentially a rule of evidence that establishes standards for determining guilt of accused.

The very nature of the consequences of being found guilty of sexual offences necessitates protecting the accused persons from wrongful convictions. The principle of "*in dubio pro reo*," i.e., "in doubt for the accused" is a fundamental tenet in our legal system ensuring fair treatment for accused persons.³² This principle states that an accused must not be convicted if there are lingering doubts about their guilt. This principle is a cornerstone of justice as it recognizes the inherent value of an individual's liberty and safeguards against wrongful convictions. By emphasizing the need for certainty in determining guilt, it promotes a cautious approach to convictions of the accused persons. The concept of the burden of proof resting on the prosecution's shoulders plays a crucial role in upholding the presumption of innocence. These principles form the bedrock of a just legal system, instilling confidence in the administration of justice by ensuring thorough and meticulous evaluation of evidence to protect individuals from wrongful punishments.

³⁰ State of Rajasthan v. Om Prakash, (2007) 12 SCC 381 (India).

³¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 18 January 2023]

³² Pooja Amravati & Ananya Mishra, The Presumption of Innocence and Its Role in the Criminal Process, 4 IJLMH 1135, 1136 (2021).

V. BALANCING PRESUMPTIONS: ANALYZING SECTION 114-A OF THE INDIAN EVIDENCE ACT AND THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN CASES OF SEXUAL OFFENCE

While the principles of presumption of innocence and the principle of absence of consent may appear to be in tension, it is important to understand that they operate in different contexts and have different purposes. Hence, it is paramount to examine the interplay between these two principles to understand their significance and implications. As observed by the Supreme Court in the case of *Zahira Habibullah Sheik v. State of Gujrat*³³ “...*The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim must be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.*”

The presumption of innocence applies universally to criminal trials to ensure that the accused is treated as innocent until guilt is established beyond reasonable doubt to protect individuals from arbitrary and unjust convictions.

In contrast, Section 114A, IEA acknowledged the unique evidentiary challenges faced by rape victims in proving lack of consent. By shifting the burden of proof on the accused to prove innocence, this provision addresses the inherent disadvantages faced by rape victims and encourages a more nuanced approach to evaluate evidence in such cases. The HP High Court in the case of *State of Himachal Pradesh v. Manga Singh*³⁴ relying on the observations made in *Bharwada Boginbhai Hirjibhai v. State of Gujrat*³⁵ stated that “...*The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In the Bharwada case (supra) this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief, or suspicion.*”

It is important to note that Section 114A, IEA, instead of entirely negating the principle of presumption of innocence rather places an evidential burden on the accused given the unique dynamics surrounding sexual offences. In *Rachna v. NCT of Delhi*³⁶, the Delhi High Court

³³ *Zahira Habibullah Sheikh v. State of Gujarat*, (2004) 5 SCC 353 (India).

³⁴ *State of H.P. v. Manga Singh*, (2019) 16 SCC 759 (India).

³⁵ *Bharwada Boginbhai Hirjibhai v. State of Gujrat* (1983) 3 SCC 217 (India).

³⁶ *Rachna Malaviya v. State (NCT of Delhi)*, 2020 SCC OnLine Del 442 (India).

stated that to prove the presumption of guilt under Section 114A of the IEA, one needs to prove the existence of sexual intercourse. Based on the victim's conduct throughout the trial in the ***Rachna case (supra)***, the Court held that her conduct did not match with her allegations and since sexual intercourse could not be proven, hence accused cannot be held guilty.

VI. CONCLUSION

By understanding the nuanced relation between the principle of presumption of innocence and the presumption of absence of guilt, we can appreciate the careful balance struck by the legal system in an attempt to protect the rights of both the accused and victims of sexual assault. They both collectively aim to contribute to a fair and equitable legal framework, ensuring justice is served while upholding the fundamental principles of fairness and human rights. Both the principles of presumption of innocence and the principle of absence of consent under Section 114A, IEA, although with varying perspectives and objectives, strive to ensure justice and safeguarding human rights. Justice should be of paramount importance. Our judiciary and legislature ensure the same by adopting such laws which live up to the spirit of the constitution. The legislature is trying to solidify the anti-rape laws and shifting the onus of proof on the accused is just a step taken in pursuit of that effort.
