

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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ISSN

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# **AN ANALYSIS OF EVIDENTIAL STANDARDS OF SECTIONS 29 AND 30 UNDER THE POCSO ACT**

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## **Introduction**

When there is a society there exists social deviations. Such deviations are prevented and eradicated through sanctions, incentives, and punishments. Law is a tool that helps the state reach out to the subjects and mandates them to follow the rules and regulations of the state. But certain laws may not be sufficient to create a social order in society. Most of the time, it has to be clubbed with morality and ethics. Likewise, one of the major issues to be addressed is sexual abuse and harassment in society. This issue is an interdisciplinary matter that has its touch on law, society, economics, psychology, etc. At the same time, it has two components that create this issue, namely, the internal – inner consciousness - and external components – other factors. Regardless of age and gender, many people across the globe are being a victim of this offence. But, when children, who are below the age of eighteen become a victim, the crime spot needs more care and cautiousness because of their maturity and vulnerability.

Once in India, it was believed that only girl children are being a victim and hopefully this mentality of the society has changed to some extent and people have started to view this from another angle also, that is, regardless of gender, children are being abused. That too is not the fact that only a male will be abusing a female and female abuses a male. There could be abuse by the same gender also. As well as it's not that only an adult will be abusing a minor. Even a minor can abuse another minor or even a major. This led to the introduction of the Juvenile Justice Amendment Act, by which children who conflict with the law, if they are above the age of sixteen and below the age of eighteen, their maturity will be cross-checked and will be decided how they are to be treated, either as an adult or child. POCSO Act, as the title itself, states, deals with the sexual abuse of children. When we have a child as a victim, we cannot expect single-lined evidence which is beyond any reasonable doubt. That too in a sexual harassment case, expecting all the evidence to be very accurate is impossible. So, what sort of privileges are given to such a victim? Are these privileges very much needed? Are these

exceptions used in proper means to attain the right ends? All these questions are debatable and their answer lies in the collective consciousness of both the victim and the accused. Let us see in detail about these evidential standards under POCSO in this article.

## **Literature Review**

In the late nineteenth century, there were discussions in India about the appropriate age for consent. It analyses the new laws' effects on adolescents and their sexuality, assesses them in light of the recent legislative revisions, and decides on sexual assault cases. They argue that the legal changes have created several difficulties, both for young people who are exploring their sexuality and for the court's ability to rule on cases of elopement, love, and romance (Pitre, 2021).

The study aims to advance theoretical and empirical knowledge of gender, sexual assault, patriarchy, and the criminal justice system. All rape cases that were resolved in 2012 (n=55) were examined due to the ongoing attention given to rape legislation and the legislature's adoption of stiffer penalties for rape and aggravated rape. This date marked the 20th anniversary of the 1983 implementation of the obligatory minimum sentences for rape and aggravated rape (Kumari, 2017).

The former Bombay High Court judge Dr Justice Shalini Phansalkar Joshi's book, *Decoding Child Sexual Abuse*, addresses the social ill of child sexual abuse from a socio-legal standpoint. The secondary victimisation that occurs throughout the trial and the investigative phase is one of the topics covered in the book. The importance of sensitising all those engaged in the trial process is highlighted while outlining the procedural laws that apply in cases of child sexual abuse (Joshi, 2021).

## **Chapter 2. The burden of Proof under the Evidence Act, 1872**

### **Burden of Proof**

Section 101 of the Indian Evidence Act, states that when a person is required to prove certain facts, the burden of proof rests on him. Provisions that call for proof are covered by Chapter 7 of the Act. Although the legal definition of "bearing of evidence" is not provided, the core concept of the system is that the accused is presumed innocent until and unless proven guilty. Which, the court substantiated by stating what the prosecution must prove, that the prosecution

can prevail by convincingly establishing the exact account that it charges. It must be able to stand by itself. It cannot take advantage of the defence's shortcomings. Additionally, the court cannot find a new basis for the prosecution's evidence and find the defendant guilty on that ground (Narain Singh v. State, 1997).

Thus, if A states that B has committed a crime, A must prove that B has made such a mistake. So, the burden of proof lies on A.

### Burden of Proof in Criminal Cases

In the case of a criminal case, where Mens reus, as well as actus rea, plays the key role, the accused enjoys the status of innocence in the eyes of law, unless and until he/she is proven to

Beyond reasonable doubt } Accused not able to produce } Conviction of  
 proved by the prosecution + preponderance of probability = the accused

*Source: Computed*

be guilty. The most challenging legal issue is deciding who is responsible for evidence in criminal prosecutions. This is reasonable and there can be no question about it. This burden of proof was not defined by the judges. As Chief Justice Shaw pointed out nearly a century ago, "Do you have any reasonable doubts?" (Law Corner, 2021). It is a broadly understood yet difficult-to-describe idea. This is not merely a hypothetical concern. Because there is always room for doubt when it comes to human affairs and reliance on moral proof. Prosecutors must overturn the defendant's presumption of innocence, which the constitution ensures in a proper legal process (In re Winship, 1970).

### Reverse burden of Proof

Although the presumption of innocence of the accused is a long-standing principle recognised in common law and upheld in Indian law as well, jurists have developed a counterargument to the presumption of innocence according to which an accused may initially be presumed guilty and the burden of proof for proving his innocence or raising suspicions about his guilt rests with the defence. A reverse onus clause is defined as "one that shifts the burden of proof from the prosecution to the accused after the prosecution establishes the existence of a radically new

fact" (Verma, 2020).

### ***Onus when the defendant seeks general defence***

But when the accused come within the exceptions, the burden of proof shifts to the defendant as discussed under section 105 of the Indian Evidence Act, 1872. The onus is on the accused to prove their claim of self-defence, and this duty is discharged by demonstrating a preponderance of the evidence in their favour (Rizan v. State of Chhattisgarh, 2003).

### ***The principle behind Section 105***

Section 105 has a unique quality. Only when an accused is eager to take advantage of "the general exceptions of the Indian Penal Code or any of the specific laws" is it pertinent in criminal trials. The general tenets of the burden of proof are (i) that the accused is always presumed innocent and (ii) that the burden of proving the accused's guilt rests with the prosecution. Only when the prosecution has successfully met its initial, customary burden of proving the accused's involvement. The burden is on the accused following section 105.

### ***Presumption under specific cases***

In the case of dowry death, there is a presumption of the death of the woman due to the demand of dowry by the husband and his relatives, under section 113B of the Indian Evidence Act, 1872, provided that it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry. Legislation that excludes men's reus or that defines crimes as having strict liability is prevalent, but that fact alone does not render it unlawful. Furthermore, it is not uncommon in Indian Criminal Law for statutes to place a modest duty on the accused to prove certain facts that are particularly within his knowledge. This fact does not, by itself, render such statutory provisions unlawful.

It is crucial to read the justification provided in Naresh Kumar v. State of Himachal Pradesh (Naresh Kumar @ Nitu vs The State Of Himachal Pradesh, 2017), where the Supreme Court determined that presumptions against the accused of guilt under sections 35 and 54 of the NDPS for failing to clearly explain possession are rebuttable. It does not relieve the prosecution of its duty to establish the charge beyond a reasonable doubt. The presumption clause with the reverse burden of proof prohibits convictions based solely on the preponderance of the evidence (CRLRR BLOG, 2021).

## Chapter 3. Presumption for Sexual Offences

### Presumption under IPC and POCSO

Under Indian Penal Code and POCSO, rape is made an offence, when the question arises about the consent of the women, it is presumed that there was no consent of the women according to section 114A of the Indian Evidence Act. Of course, there is a disparity in gender neutrality in section 375 of the Indian Penal Code.

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#### **Section 29. Presumption as to certain offences.**

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

(Prevention of Children from Sexual Offences Act, 2012)

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Section 29 goes with presumption as to certain offences, whereby the special court presumes that the person prosecuted under sections 3, 5, 7, and 9 of the POCSO Act, will be presumed to have either committed or abetted or attempted to commit the crime. This presumption given here is purely to create a comfort zone for the child, who is in a vulnerable position. Expecting the child to explain the crime spot becomes meaningless because a child may not be left with sufficient words to express what has happened and what is all the mental trauma the child has undergone. Interrogating the child as to whether he/she restricted himself herself or himself while the crime was happening is a mess to the child's mental health. Such adult-centred questions might disturb the child to a great extent.

The intention of the accused on the crime spot, that is the Mens reus part, is a hard part to be proved to any victim, unless he comes out of the shock of the crime and analyses the scenario from a third person's point of view. In such a situation, expecting an immature child who might have zero or very minimal knowledge about sex, to explain and prove the offender's criminal intention is inhuman. Thus, the legislation has inserted section 30 in the Prevention of Children from Sexual Offences Act, 2012, whereby, the Special Court shall presume the existence of such mental state on the prosecution of any offence under this Act.

Here the concept of "Prosecution" is still not detailed explained as to whether the term prosecution starts at once when the complaint has been filed or charge-sheet has been filed or

when the evidence is produced or when the trial has been started.

### **Constitutionality of Sections 29 and 30**

The Constitutionality of this burden was recently upheld in a judgement passed by the Kerala High Court in Justin @ Renjith v. UOI (Justin @ Renjith vs Union of India, 2020)

#### ***Background***

the Kerala High Court in this judgement after a thorough reading and examination of the precedents of various high courts and the Hon'ble Supreme Court dealt with a writ petition filed by the accused in S.C.No.590 of 2016 of the Additional Sessions Court-I, Thrissur. The petitioner claimed that sections 29 and 30 were unconstitutional and violated Articles 14, 19, 20(3), and Article 21 of the Constitution of India.

The main defence of the petitioner was to challenge the constitutionality of the prosecution, which was brought against him for offences punishable under sections 3(a), 5(b), 5(i), 5(m), 5(o), 5(u), 4, 5, and 12 of the Protection of Children from Sexual Offences Act, 2012 (commonly known as the "POCSO Act").

#### ***Ratio decendi***

In addressing the constitutionality of sections 29 and 30, this court reiterated *Andhra Pradesh & Merchant's Association*, making that in deciding whether absolute liability amounts to imposing unreasonable restrictions, the court must strike a balance between the individual right and the interest of the public. Additionally, this court reiterated *K. Veeraswami v. UOI* (*K. Veeraswami vs Union Of India And Others*, 1991) and *Nikesh Tara Chand Shah v. UOI* (*Nikesh Tarachand Shah vs Union Of India*, 2017), holding that strict liability may be appropriate in situations where it is necessary.

The POCSO Act cannot be challenged. After all, it violates Article 14 of the Constitution because it was established to fulfil the requirement under Article 15(3) of the Constitution for giving special protection to children. Additionally, classifying child victims as a distinct class is based on an understandable differentiation and serves to fulfil the Statute's purpose. The statutory provisions, therefore, do not violate Article 14.

In addition, it was decided that the presumption of innocence is a human right and cannot be

compared with the Fundamental Right under Article 21 of the Indian Constitution. This decision was made in *Noor Aga v. State of Punjab & Ors.* (*Noor Aga v. State of Punjab & Ors.*, 2008) The court also pointed out that while a statute may be legitimate, a prosecution brought following it may not be. Fundamental Rights are not unqualified in any way. The Supreme Court ruled in the same case that merely being questioned by police does not breach an accused person's fundamental right under Article 20(3), only when the accused is forced to testify against himself. Hence, the contention of the Petitioner claiming cross-examination as a violation of Article 20(3) would stand invalid.

The reverse burden of proof provisions can be distilled down to a single principle by reading the ratio and the supported view of the aforementioned judgement. Section 29 would only be put into effect when the prosecution can establish the facts that would serve as the basis for the presumption u/s 29 of POCSO.

As the Bombay High Court correctly held in *Navin Dhaniram Baraiye v. State of Maharashtra* (*Navin Dhaniram Baraiye v. State of Maharashtra*, 2018), the prosecution would only need to file a charge sheet against the accused by the provisions of the said Act and then assert that the testimony of the prosecution witnesses must be accepted as the gospel truth regardless of the defence offered by the Accused.

### ***Significance***

Every accused person must be presumed innocent until and unless they are proven guilty, although this is not absolute. Strict liability is an exception to this rule in circumstances of significant offences, such as those falling under POCSO's purview. Under sections 29 and 30 of POCSO, the accused has a reversal burden of proof, meaning that it is now on to him to refute both his guilt and the prosecution's version of events. This decision affirms the principle that the burden of proof shifts to the accused only if the prosecution establishes the essential elements beyond a reasonable doubt; otherwise, the accused is exempt from the obligation to refute the asserted facts.

### **Special privilege under section 30**

Here, yet another explanation is to be noted. That is, the presumption of Men's reus under section 30 of POCSO if defended by the accused under any general grounds, then he has to prove beyond a reasonable doubt. Here, this case of POCSO gets differed from other criminal

offences, where a simple preponderance of probability established by the defendant is more than enough.

This provision has been misused to the same extent as how it is beneficial to society. We find various fake and defaming cases filed. Trying to rectify this condition, we may land up in a situation where we do injustice to the aggrieved person.

### **Conclusion**

This ruling serves as an already decided precedent to cite and preside as a noteworthy reference in the future for cases arising out of similar facts and circumstances. This is because several special statutes that contain presumptions have been challenged on the grounds of unconstitutionality, such as NDPS and PCA. In light of the above-discussed judgment in which the court's wisdom has confirmed the legality of the reverse burden of proof under the POCSO as well as other criminal statutes, it would be a severe mistake to dismiss the connection between constitutional law and criminal law (Justin @ Renjith vs Union of India, 2020).

As a way forward, there should be a clear definition of the term prosecution, when it comes to offences where there is a presumption of guilt based on the prosecution. This could allow the defender to prove his innocence at the very instant. At the same time, there must be relief mechanisms for children who open their miserable situation after many years. As a next step towards equality, male children and female children should not be weighed in different cadres. If a male child is harassed, the punishment period for the offender should be equal to that of an offender who harasses a female child. This disparity brought by the Criminal Amendment Act, 2018 (Ministry of Law and Justice , 2018) should be addressed.

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