



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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EVALUATING THE REVERSE ONUS CLAUSE AND REFORMATIVE ASPECT IN NDPS ACT,1985

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Abstract

The most sacred principle of criminal jurisprudence remains undisputed for aeons. It is many criminals may escape the clutches of law but not even one innocent shall be punished. In a recent judgment, the honourable high court has stressed upon the principle stating, “99 culprits can escape but not one innocent shall be punished.”¹ The rationale behind the principle is to protect the accused person from the powers of the state. To prevent the suppression of the accused by the mighty state, the burden of proof is always upon the shoulders of the State. This principle can be understood by the Latin maxim “actori incumbit onus probandi.” One of the recent developments in the criminal jurisprudence arena is the contravention of the above said principle – reverse onus clause. The burden of proof is shifted on the accused to prove his innocence. From the commencement of the trial, the presumption is that the accused is guilty. Narcotic Drug and Psychotropic Substance, 1985 is one of such legislation which incorporates reverse onus clause. This article evaluates reverse onus clause and the reformatory approach adopted by the Narcotic Drug and Psychotropic Substance, 1985.

Keywords: *burden of proof, reverse onus clause, reformation, rehabilitation, constitutionality*

INTRODUCTION

Presumption of innocence is one of the fundamental principles followed across the globe which ensure fair and just trial in criminal jurisprudence. This principle can be seen in many international conventions such as International Covenant on Civil and Political Rights² and the

¹ Pinkoo alias Jitendra v. State of UP (2022)

² Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law.

European Convention on Human Rights³. It is most important because it is better to allow a man who is guilty to walk free than convicting and punishing an innocent. This principle is invaluable as it protects an accused in an unequal playing field opposed against the mighty state and its system. The state is under an obligation to prove the crime and guilt beyond any reasonable doubt. It can be, in other words, termed as burden of proof. Simply explained as, this principle dictates the party who bears the burden to prove certain facts during the trial. The ultimate burden of proof lies on the prosecution to prove their claim beyond any reasonable doubt and not preponderance of probability. Conviction in a criminal trial result in depravity of life and personal liberty, thus this principle acts as a cautious step to prevent any erroneous conviction. With the introduction of reverse onus clause, the intent behind this principle is defeated. This paper evaluates the reverse onus clause to Narcotic Drug and Psychotropic Substance Act,1985, its constitutionality and reformative approach in the said Act.

GENERAL PRINCIPLE OF CRIMINAL JURISPRUDENCE

The principles followed in criminal jurisprudence can be summarised as following:

1. Innocence until proven guilty.
2. Burden of proof on prosecution to prove beyond reasonable doubt.
3. When not proved beyond any reasonable doubt, benefit of doubt given to the accused.
4. Onus of proving general or special exception is on the accused. Only preponderance of probability enough.
5. Nine criminals go unpunished but not one innocent be punished.

It can be observed that the prime principle followed is the presumption of innocence of the accused. The burden is on the prosecution to prove a rational nexus between the *actus reus* and *mens rea* on the part of the accused beyond the reasonable doubt to ensure conviction of the accused. It must be noted that the prosecution must prove beyond any reasonable doubt and the accused must create a reasonable doubt in the minds of the court to rebut the claims charged against him.⁴ This principle can be seen as the balance to limit the limitless power of the state in convicting any accused without confirming his guilt. Most of the criminal trial system tend to adhere to the above-mentioned principle to warrant for fair, just and even-handed trial between the accused and the influential state.

³ Article 6(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to the law. The words are identical to that of ICCPR.

⁴ Victor Tadros & Stephen Tierney, *The Presumption of the innocence and the Human Rights Act, 2004*

When it comes to India, the presumption of innocence is a human right⁵ and more specifically told, the presumption of innocence is a fundamental right guaranteed under Part III of the Constitution of India⁶. It is highly difficult to separate the presumption of innocence from the right to fair trial which is incorporated in the Article 21⁷ of Constitution of India⁸. In *D. Rama Subba Reddy v. P.V.S. Rama Das*, the court emphasised on the onus to prove everything being on the shoulders of the prosecution. The court quoted, "it is the fundamental doctrine of criminal law relating to onus of proof that the prosecution must establish all the ingredients of the offence with which the accused was charged, by independent evidence for convicting the accused, irrespective of the fact whether the accused is able to adduce evidence bringing his case within any one of the exceptions, or not. The nature and the extent of the onus of proof that lies on the prosecution to prove the guilt of the accused is absolute"⁹ the following list of cases decided by the Indian Judiciary highlights the presumption of innocence of accused until proven guilty. Like England, India too has a presumption of innocence for the accused, and as the court noted in *K.M. Nanavati v. State of Maharashtra*¹⁰, it is the prosecution's responsibility to establish the accused's guilt. Similarly in *Babu v. state of Kerala*¹¹ restated that the principle of presumption of innocence is a human right¹². "For this purpose, the nature of the offence, its seriousness and gravity thereof must be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction."¹³ In every legal society, wrongful conviction is seen as far searing injustice than acquitting a criminal¹⁴. The presumption of innocence until proven guilty is constitutionalised in many countries like Canada and South Africa. The Canadian Charter of Rights and Freedoms has recognised the presumption as a fundamental right¹⁵. The Constitution of South Africa in Section 35(3)(h)¹⁶ has given the presumption, the constitutional status as fundamental right. In United States, there is no clear mention of presumption of innocence in the Constitution but the court in

⁵ *Narendra Singh v. State of Maharashtra* 2004 SCC (Cri) 699

⁶ *Noor Aga v. State of Punjab* (2008) 16 SCC 417

⁷ Constitution of India, Article 21: No person shall be deprived of their life except according to procedure established by law.

⁸ *Hussainara Khatoon v. Home Secretary, State of Bihar* 1981 SC 928 (4)

⁹ *D. Rama Subba Reddy v. P.V.S. Rama Das* 1970 Cr.L.J. 83

¹⁰ AIR 1962 SC 605

¹¹ (2010) 9 SCC 189

¹² *Narendra Singh v. state of MP* (2004) 10 SCC 699

¹³ *Binoy Kumar Mishra v State of Jharkhand* (2017) 13 SCC 636

¹⁴ *Van der Meer v. The Queen* (1988) 82 A.L.R. 10, 31

¹⁵ Canadian Charter of Rights and Freedoms, 1982 Art 11(d)

¹⁶ Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during proceedings.

*Samuel Winship*¹⁷ held that for compelling reasons, the burden of proof must be proven beyond a reasonable doubt to proceed with a criminal case. The accused is one of the most important parties involved in a criminal case, not only because he stands to lose his freedom if found guilty but also because a conviction would undoubtedly result in stigma. As a result, a society that respects each person's integrity and right to privacy should not hold someone accountable for a crime they have committed if there is a legitimate basis to suspect their guilt. It incorporated the presumption of innocence-implying due process of law requirement of proving anything beyond a reasonable doubt. When India is concerned, the Supreme Court in *Maneka Gandhi v. Union of India*¹⁸, the court asserted that the 'procedure established by the law' as encompassed under Article 21 of the Constitution of India, deprivation of life and personal liberty must be 'just, fair, reasonable and right'. In the later period of Indian Judiciary, the court verified that 'procedure established by the law' includes due process of law as recognised in the US Constitution.

REVERSE ONUS CLAUSE

The Supreme Court of United States in the case of *Coffin v. United States*¹⁹ highlighted the following to show that it was substantially embodied in the law of Sparta and Athens, "Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day"²⁰. There are many references which supports the presumption of the innocence and milder construction in case of doubts. "A passionate man," Delphidius, could not contain his emotions when he saw the allegation would not succeed. He cried, "Oh, illustrious Caesar, if it is sufficient to deny, what hereafter will become of the guilty?". To which Julian retorted, "If it suffices to accuse, what will become of the innocent?"²¹ this exchange shows two polar ends of how an accused can be brought to justice. Even though the presumption lies on the prosecution, there is a reverse onus clause which places the burden of proof on the accused to prove his innocence. He is presumed to be guilty until he proves his innocence. Like presumption of innocence, the presumption of guilt is also recognised in the statute of Indian Law. The presumption of innocence is so highly regarded that it is hard to

¹⁷ 25 L Ed (2d) 368

¹⁸ (1978) 1 SCC 248

¹⁹ 156 U.S. 432 (1895)

²⁰ Quote by Mascardius Do Probationibus

²¹ *Coffin v. United States* 156 U.S at page 455

imagine the "golden thread"²² norm ever being broken. When the presumption of guilt is recognised, it also results in the dilution of prosecution's burden to only establish a minimum threshold of *actus reus*. The burden of proof shifts to the accused, who is tasked with proving the lack of mens rea once he presents enough evidence. The accused will be found guilty if this reverse persuasive burden is not met. This means that, unlike a reverse evidential burden, where the prosecution's duty does not finish with the shift of the burden to the accused, a reverse persuasive burden does.²³

JUSTIFICATION OF REVERSE ONUS CLAUSE

The ultimate desire of any civilised society is to ensure the punishment of guilty person as it satisfies the starvation for the justice and shows compassion to the victims of the crime. To achieve this, we now and then, take on short route which is legalised based on increasingly lower conviction rates. There are seen at first in socio economic crimes where the victim is not identified as a single individual but the entire society who is affected. Other statutes which have reverse onus clauses are those of anti-national themes. Some statutes which employ reverse onus clause on the pretence are Food Adulteration Act, 1954, Section 10(7-B); the Customs Act, 1962, Section 123,138A and 139; the Essential Commodities Act, 1955, Section 10C; the Foreign Exchange Management Act, 1999, Section 39; the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985, Section 35, 54 and 66; the Wealth Tax Act, 1957, Section 35-O; and the Prevention of Corruption Act, 1988, Section 20; the Indian Evidence Act, 1872, Section 113A and 113B. The justification given to the presumption of guilt is always based on the magnitude of crime that is expected to suppress and the effect it has the society. public interest and swift delivery of justice is the key arguments advanced to justify the reverse onus. The law commission report,1972 suggested that certain offences obliterate health and material welfare of the society in its entirety such as drugs related offences and many more²⁴. The injury a society facing due to these offences are far greater than traditional crimes. Therefore, adhering to traditional methods to incriminate the criminal and regulate the crimes may become difficult. The supporters of this principle often take shade in the shadow of the idea, it will be difficult to prove facts which are within exclusive knowledge of the accused. The ultimate object of the principle of reverse onus

²² *Woolmington v. Director of Public Prosecutions* (1935) UKHL 1

²³ Bryon M. Sheldrick, "Shifting Burdens and required Inferences: The Constitutionality of Reverse Onus Clauses," Univ. Toronto Fac. L. Rev (1986) 44(2) at pages 181-182

²⁴ Law Commission on India, "47th Report- The Trial and Punishment of Social and Economic Offences"

clause is same as that of presumption of innocence in its ordinary course i.e., “fair balance between the general interest of the community and the personal rights of the individual”²⁵. The presumption of innocence ordinarily places far greater responsibility on the prosecution and favours accused’s rights. But the presumption of guilt favours law enforcement and that state. There are required to establish the *actus reus* and the burden shifts on the accused to prove the absence of *mens rea*.

EVALUATION OF REVERSE ONUS CLAUSE IN NDPS ACT

Narcotic Drug and Psychotropic Substance Act,1985 (NDPS) contains reverse onus clause in Section 35, 54 and 66 legalising the presumption of the guilt. The provisions can be summarised in following words;

SECTION 35: PRESUMPTION OF CULPABLE MENTAL STATE; The court presumes the existence of a culpable mental state in any prosecution for an offense requiring it, but the accused can defend themselves by proving they did not have such a mental state in relation to the charged act. "Culpable mental state" includes intention, motive, knowledge of a fact, and belief in a fact. A fact is proven only when the court believes it exists beyond a reasonable doubt, not just by a preponderance of probability.

SECTION 54²⁶: PRESUMPTION FROM POSSESSION OF ILLICIT ARTICLES; In trials under this Act, it is presumed that the accused has committed an offense related to a narcotic drug, psychotropic substance, or controlled substance, an opium poppy, cannabis plant, or coca plant growing on their land, a specially designed apparatus or group of utensils for the manufacture of such substances, or any materials that have undergone any process towards the manufacture of such substances or residue left of the materials, for which the accused fails to account satisfactorily.

SECTION 66: PRESUMPTION AS TO DOCUMENTS IN CERTAIN CASES; If a document is produced, furnished, seized, or received from outside India during an investigation of an offense under this Act or any other law, and is tendered in a prosecution as evidence against

²⁵ *Brown v. Scott* (2003) 1 A.C. 681

²⁶ Subs, by Act 9 of 2001, s.25, for sec. 54 (w.e.f. 2-10-2001)

the person or another person who is tried jointly, the court must presume that the signature and other parts of the document are in the handwriting of the person, unless the contrary is proven. If the document is executed or attested, the court must assume it was executed or attested by the person by whom it purports to have been executed or attested. If the document is not duly stamped, it can be admitted in evidence. The court must also examine the document's contents if circumcontrary is proved.

It can be understood from the words of the statute that the intention of the legislature to make stringent measures to prevent drug related offences and ensure conviction. The constitutionality of these provisions has been raised in the past where the court has upheld its constitutionality. The presumption of innocence is a human right as defined by Article 14(2) of the international covenant on civil and political rights, according to the Supreme Court's ruling in *Noor aga v. State of Punjab*²⁷. It cannot, by itself, be equated with the fundamental right to liberty guaranteed by Article 21 of the Indian Constitution. Considering its scope, it would not conflict with other legal requirements (which, naturally, must be interpreted in the context of the fundamental rights outlined in Articles 20 and 21 of the Indian Constitution). Regarding sections 35 and 54 of the NDPS Act of 1985, the Supreme Court ruled in *Noor aga v. State of Punjab*²⁸ that the reverse onus provision does not go beyond the bounds of the constitution. The court determined that reverse burdens are constitutional and that they are supported by social control issues as well as policy considerations. although it was acknowledged that the presumption of innocence was a component of individual liberty, *Sinha. J* held that to ensure the security of the state, individual liberty must be subject to social interest. He believed that the constitutionality of a penal provision should be examined considering the state's obligation to protect innocent citizens, and that, as a result, the accused's right and the interests of society should be balanced. The court has clearly stated that "An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is 'preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established. With a view to bring within

²⁷ 2008 AIR SCW 5964

²⁸ *ibid*

its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself.” Section 35 & 54 of the N.D.P.S Act outlines the rule of conscious possession in prosecutions for offences where the mental element is of primary importance. The court presumes a mental state, which is open to the accused to rebut by proving they had no such mental state in relation to the offense. The court must prove a fact that will only be proven when the prosecution can prove its case beyond a reasonable doubt. The court is bound to presume a mental state, such as intention, knowledge, or motive, in prosecutions for offences where culpable mental state is required. The accused could rebut this presumption by adducing evidence in their favour. The prosecution is only required to prove physical possession, or control over the illicit article, beyond a reasonable doubt. The onus shifts to the accused to prove their innocence, as it is on the accused as to how they came to possess the article. The Supreme Court observed that it is practically impossible for the prosecution to prove the 'knowledge', as the accused's knowledge of how they came in the physical custody of the contraband is within their knowledge²⁹. Section 35 only applies when the prosecution has proven all essentials beyond reasonable doubt against the accused. In *Madan Lal and Ors. V. State of Himachal Pradesh*³⁰, the court held that once the possession of substances prohibited under NDPS Act was established, it would be presumed as conscious possession.

REFORMATIVE ASPECT IN NDPS

The NDPS Act, 1985 aimed to control and punish drug traffickers while providing health and welfare services for users, but many provisions hinder their implementation, leading to excessive time and resources spent by law enforcement. Whenever reformation aspect of NDPS Act, 1985

²⁹ *Inder Sain vs. the State of Punjab* (1973) AIR 2309

³⁰ 2003 7 SCC 465

is to be evaluated we need to analyse the history of enactment of the Act and its objective. Narcotic Drugs and Psychotropic Substance Act, 1985 was enacted after 25 years into India signing the Single Convention on Narcotic Drug treaty, 1961. When the act was ratified by India, the ultimate objective of the Legislative enactment is to deter the use of drug and its trafficking. Thus, it casted a blanket prohibition on any activities related to drug such as manufacture, production, use, trade, sell and consumption except for medical purposes. The 1985 Act prescribed minimum punishment of six-month imprisonment for all the individual who had found in possession of Narcotic drugs and may extend to 30 years. The Act also prescribed mandatory capital punishment for repeated offenders. However, in 2011, in an unprecedented judgment, the Hon'ble High Court struck down the mandatory capital punishment for drug offences becoming the first Court in the world to do so. In the *Indian Harm Reduction Network v. Union of India* case, Ghulam Mohammad Malik was sentenced to death for smuggling charas in 2008. The IHRN challenged the mandatory death penalty, arguing it was arbitrary, excessive, and disproportionate to drug dealing. The Mumbai High Court declared Section 31A of the NDPS Act unconstitutional, indicating the court's recognition of human rights principles and harm reduction in relation to drugs. The President of IHRN praised this positive development. However, Narcotic Drug and Psychotropic Substance Amendment Act, 2014 has made capital punishment as discretion of the court to award in rarest of rare cases³¹. Death cannot be seen as the reformatory approach to drug related offences. But the Act is not void of rehabilitation and reformation to drug addicts.

- Section 64A³²: The provision can be understood as an addict charged with a small quantity of narcotic drugs or psychotropic substances can voluntarily undergo medical treatment for de-addiction from a recognized institution, but this immunity from prosecution can be withdrawn if the addict does not complete the treatment.

Section 71³³: The government has the authority to establish and approve centres for the identification, treatment, management, education, after-care, rehabilitation, and social re-integration of addicts. These centres may also supply narcotic drugs and psychotropic substances to registered addicts and others as medical necessity. The government can establish rules for the establishment, appointment, maintenance, management, and superintendence of these centres, as well as the appointment, training, powers, duties, and personnel employed.

³¹ AIR 1980 SC 898

³² Immunity from prosecution to addicts volunteering for treatment

³³ Power of Government to establish centres for identification, treatment, etc., of addicts and for supply of Narcotic drugs and psychotropic substances.

The NDPS Act's foundation is flawed in its assumption that punitive measures deter drug trafficking and use, leading to individuals being pushed to the margins of society due to their wrong side of the law. therefore, they still lack adequate reformative measures to reduce drug related offenders and facilitate rehabilitation.

SUGGESTION TO FACILITATE REFORMATION

The following can be implemented to achieve the objective of drug free society

1. The decriminalisation of Section 27 from the Narcotic Drugs and Psychotropic Substance Act (NDPS Act) is a response to the increasing prevalence of drug use and addiction, particularly in India. The NDPS Act, which provides stringent penalties for drug use, has not effectively deterred drug use. India has the largest number of repeat offenders, with 63% of prisoners having a history of drug use and 23% apprehended for drug-related offenses. In contrast, countries have moved towards full decriminalization of drug use and possession, with no reported negative consequences on individuals and society. Studies show a significant decline in petty crimes related to drug consumption, HIV incidence among injecting drug users, and reduction in recidivistcrimes. India also faces an alarming spike in the consumption and injection of illicit drugs among young adults and teenagers, particularly synthetic drugs like heroine, ephedrine, and methaqualone. Incarceration of drug users and subsequent criminal charges destroys their rehabilitation or re-integration into society. The proposal recommends the deletion of Section 27, which prescribes incarceration for drug consumers, and advocates for evidence-based harm-reduction approaches and counselling as an alternative to incarceration. One viable alternative is to divert nonviolent felony drug offenders to community-based residential treatment facilities.
2. The NDPS Act currently uses the term "addict," which is considered stigmatizing by the scientific community. However, all provisions for "addicts" equally apply to those who consume narcotic drugs and psychotropic substances without addiction. The term should be replaced with generic terms like "people affected by drug," "person with drug disorder," and "drug user."
3. Section 35 which deals with presumption of culpable mental state, the burden of proof can be justifies on the effective measure to control illicit trafficking. However, there can be an exception to individual drug users where prosecution has burden of proof to prove guilt.

4. Section 64A provides immunity from prosecution to addicts volunteering for the treatment. This proves reformatory only for drug addicts and initial drug user who is convicted under this Act may be sent to prison where it is hardly a place for reformation. There are instances where a separate drug cartel is running inside the prison. In such circumstances the convict may be influenced by hardcore criminals and develop severe drug addiction and related illicit activities. Therefore, the section should also include drug user and those with drug disorder.
5. Referring a person having drug disorder to treatment by any authorised officer under the Act.

CONCLUSION

Whenever the validity of reverse onus clause is questioned, the Supreme Court tried to employ Ronald Dworkin³⁴'s adjudicative principle of integrity which signifies the fairness and justice in determining the rights of the citizens. He tests legislation from society's current commitment to a political morality and legal principles. On such basis, the reverse onus clause contravenes the fundamental principles of the criminal jurisprudence. The reformatory measures adopted by the Act is inadequate and requires further amendments. Presumption of culpable mental state should be toned down and reformation must be the goal and not punishing the offender. Punishments fail to create the desired deterrent effect among the society as the crime rate of drug related offences tend to increase every day.

³⁴ Ronald Dworkin, LAW'S EMPIRE 218 – 219, 225-254 (1986)