

“Refresher Course for POCSO Courts [P-1044]”

STANDARD OF PROOF



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Concept of Reverse Burden
And
Law Relating to Presumption

Section 29 and 30 of POCSO Act

What is 'Presumption' ?

How many kinds of presumptions ?

Section 4 – may presume

shall presume

conclusive proof

Presumptions of facts are inferences from certain fact patterns drawn from the experience and observation of the common course of nature.

Section 114 – Discretionary 'may' presume

Presumptions of Law

- Mandatory and goes so far as to shift the legal burden of proof.
- Conclusive proof / presumption – Section 13 C.P.C. [Foreign Judgements]

- Presumption in itself – not evidence, but only rule of evidence,
- Making a prima facie case for the party in whose favour it exists,
- Indicating the person on whom the burden of proof lies.

Basic Presumptions Under Criminal Jurisprudence

➤ Accused is presumed to be innocent unless proved guilty;

And

➤ Entire burden of proof lies on the prosecution to prove the guilt of Accused.

Certain Exceptions to these 'Presumptions'

➤ Section 106 – Facts, especially, within the knowledge of the Accused, the burden to prove them lies on Accused, though initial burden is on the Prosecution to prove the charge.

➤ Plea of *alibi*.

Section 113A – Presumption of Abatement to Suicide.

Section 113B – Presumption of Dowry Death.

Section 114A – Absence of Consent on the part of Prosecutrix etc.

In all these cases, initial burden on Prosecution.
Only on proof of certain facts, onus shifts on Accused.

Why the necessity of 'presumptions' ?

- Difficulty in proving certain facts.
- Negative burden.
- Prosecution cannot be asked to do impossible.
- Certain facts exclusively within knowledge of Accused alone.
- To plug the loopholes and gaps in evidence.
- To get best possible evidence.

Burden of Proof

Prosecution – beyond reasonable doubt – through positive evidence.

Accused – on preponderance of probability – through cross-examination, other material, statement u/s. 313 Cr.P.C. Etc.

What is reverse burden of proof ?

Casting the burden of proof of innocence on the Accused himself.

To balance personal rights of Accused with community's broader interest in law enforcement.

Illustration of of 'Reverse Burden'

Mostly in Socio-Economic and Socio-Legal Offences

- Section 35 - NDPS Act
- Section 139 - Negotiable Instruments Act
- Section 138A - Customs Act
- Section 278E - Income Tax Act etc.

Section 29 of POCSO Act

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.

Section 30 of POCSO Act

30. Presumption of culpable mental state -

(1) In any prosecution for any offence under this Act, which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Pair of “Presumptions”

Section 29 and 30 of POCSO Act

Section 29

A radical shift from
“Presumption of Innocence”
to
“Presumption of Guilt”?

Section 30

A Singular Exception
to
Fundamental Rule
That burden on Accused –
lighter to prove only on
preponderance of probability.

Whether these two provisions mean that Prosecution need not adduce any evidence as there is already presumption that the offence alleged is committed by the Accused and it will be for the Accused to 'prove' that he has not committed an offence and he has to prove it beyond reasonable doubt ?

Whether Accused can be convicted on the basis of presumption alone ?

Dhanwantrai Balwantrai Desai Vs. State of Maharashtra

[1964 (1) Cr.L.J. 437 (SC)]

“Presumptions, are rules of evidence and do not conflict with the presumption of innocence of the accused, for, the burden, on the prosecution, to prove its case, beyond all reasonable doubt, still remains intact.”

Dhanwantrai Balwantrai Desai Vs. State of Maharashtra

[1964 (1) Cr.L.J. 437 (SC)]

“When the facts give rise to a presumption of law, the prosecution shall be taken to have discharged its obligation to prove its case beyond reasonable doubt. In such a case, the onus shifts to the accused to prove the contrary. What is, now, of immense importance to note is that while a presumption of fact can be rebutted by an accused by offering an explanation, which is reasonable and plausible, a presumption of law cannot be discharged by explanation alone. What must be proved is that the explanation is true.”

- Presumptions, after all, are not evidence, but rules of evidence.
- The function of Presumption is often to “fill a gap” in evidence.
- It is to be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it.

[Narayan Govind Gavate Vs. State of Maharashtra, AIR 1977 SC 183]

Mr. J.S. Choudhary Vs. Mr. Mahesh Bora

[S.B. Criminal Revision Pet. No.192/2014]

“Presumption under Section 29 is different from the general jurisprudential practice under the Code of Criminal Procedure that the prosecution is to prove allegations against the accused. If it fails, then the accused is not required to show his innocence. If the prosecution succeeds to prove the guilt of the accused even in that case, the accused is asked if he can rebut the prosecution's case through his defence evidence. It is a conjoint happening of two events, first the prosecution succeeds to prove the guilt of the accused and secondly, the accused fails to rebut the veracity of prosecution's case that he is called to face the punishment.”

Necessity of Presumptions ?

- To take care of child – who has limited capacities and capabilities of appreciation and understanding mental states of others and even of himself.
- To lighten the burden and vulnerabilities of already vulnerable child.
- To ensure proper and smooth implementation of the Act, to achieve its object of protection of children.

Presumption u/s. 31(1) rebuttable

- In its ultimate effect, child is required just to give account of the physical act of the accused.
- This account has to stand the test of proof beyond reasonable doubt.
- Once this test is complete, the Statute would fill the required *mens rea* in the alleged act.
- Then, it will be for the Accused to disprove culpable mental act.
- Accused can prove that child had misunderstood or misinterpreted his good acts.

Abdul Rashid Vs. State of Gujarat

[AIR 2000 SC 821]

Section 35 of NDPS Act :-

- The Court shall presume the existence of such mental state.
- Accused is held guilty on physical possession.
- Burden on Accused to rebut “conscious possession”.

Constitutional validity of Section 35 of NDPS Act challenged in ***Noor Aga Vs. State of Punjab, (2008) 6 SCC 417.***

Upheld :-

- Presumption of Innocence – Human Right;
but
- Not equated to Fundamental Right and Liberty.
- Must be subject to certain restrictions.
- Enforcement of law and protection of citizens – need to be balanced.
- It must be tested on the anvil of State's responsibility to protect its innocent citizens.

Sher Singh @ Partapa Vs. State of Haryana

[Criminal Appeal No.1592 of 2011 dt. 9.1.2015]

While dealing with S.304B IPC and S.113B Evidence Act *inter alia* held as follows :-

1. The Prosecution can discharge the initial burden to prove the ingredients of S.304B even by preponderance of probabilities.
2. Once the presence of the concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt.

Sher Singh @ Partapa Vs. State of Haryana

[Criminal Appeal No.1592 of 2011 dt. 9.1.2015]

3. Keeping in perspective that Parliament has employed the amorphous pronoun/noun “it” (which we think should be construed as an allusion to the prosecution), followed by the word “shown” in Section 304B, the proper manner of interpreting the Section is that “shown” has to be read up to mean “prove” and the word “deemed” has to be read down to mean “presumed”.”

