

# “ Refresher Course for POCSO Courts ”

## STANDARD OF PROOF



Presented by :

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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 ?

**Dhanwantraï Balwantraï 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 ]*

# 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.

# 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.

## 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.”

## **Presumption u/s. 30 (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.

# **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 ]

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”.”

Subrato Biswas VS. State of West Bengal  
CRA 011/2018 Cal.SDB dated 11-06-2019

“A Proper interpretation of Section 29 is that Prosecution is absolved from proving its case beyond reasonable doubt but is only required to lead evidence to establish ingredients of offence on a pre-ponderance of probability. Only when Prosecution lays foundation of its case by leading cogent and reliable evidence, the onus shifts on Accused to prove the contrary. If Prosecution fails to do so, no question arises of invoking Section 29.

Any other interpretation would lead to absurdity and render the section Constitutionally suspect.”

Amol Dudhram Barsagade v/s State of Maharashtra , in  
Criminal Appeal No.600/2017 Decided on 23.04.18 by  
Nagpur Bench of Bombay High Court

The submission that statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution

# Navin Dhaniram Baraiye vs State Of Maharashtra dated 25 June, 2018, Bombay H.C.

The presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption

Lingappa vs The State of Karnataka  
Criminal Petition No.200659 OF 2014

The Court refused to apply the presumption at the stage of bail, by holding that,

“it cannot be said that there can be any presumption of forcible acts on the part of the petitioner. It is only if the minority of the girl is established then the letter of the law will have to be applied. Till such time, to proceed on the basis that the girl was a minor and to incarcerate the petitioner, virtually punish him for the offences which are necessarily have to be established at the trial and would lead to miscarriage of justice.”

Sugathan V/s State of Kerala  
Bail Application No. 325/2017

when the accused was charged for the offences under section 3 and 4 of the Act, and section 377 IPC, though he was in jail for more than 65 days, in addition to other factors like investigation was not complete and accused was neighbor of the accused, it was held that in view of section 29 of the Act, the innocence of the accused cannot be presumed. Hence his bail application came to be rejected.

Taking a similar view the Karnataka High Court has also, in the Special Case of Zaibulla v/s Channrayapatna P. St. rejected the bail of the accused, charged for the offences punishable under sections 3 and 4 of the Act and section 342,366 and 376 IPC.

