

Presumption Under POCSO Act

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PRESUMPTION TO OFFENCES

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.

SPECIAL PRESUMPTION

Some scholars are not happy with the wording of this section. Based on their understanding of law in this provision and their individual they find a bad logic in this provision. And hence they have come to the conclusion that this presumption coded in this provision in conjunction to the presumption given in the next provision Section 30 has created a shift away from one of the cardinal principle of Indian jurisprudence called the "Presumption of Innocence". They argue that this pair of provisions has started the era of legal "Presumption of Guilt".

In their view when the prosecution is initiated against a for committing or abetting or attempting to commit any offence under section 3, 5, 7 and 9 of this Act then that person will be presumed to have committed or abetted or attempted the offence unless the contrary is proved. The scholars produce a legal fiction to demonstrate it.

The police files a charge-sheet against an accused under the aforesaid provisions of the POCSO Act. Under the scheme of Section 29 of this Act the Court has to presume that the offence as alleged was committed by the accused. The Public Prosecutor does not offer to call and examine any prosecution witness because there is already a presumption that the offence as alleged was committed or abetted or attempted. Now, to rebut this presumption the accused has "to prove" that he had not committed the offence. The scholars contend that if the innocence of the accused is not proved¹ then he is liable to face the conviction. Hence, this presumption under section 29 this Act has created a jurisprudential change from the "Presumption of Innocence" to the "Presumption of Guilt".

A careful appraisal of this provision would clear that this shift of presumption from innocence to guilt is not based on previous experience of the Indian judicial system. The conviction of the accused is not pronounced on presumption but it is always founded on the basis of 'Proof' beyond reasonable doubt. Hence, this presumption against the accused would not provide a basis for his conviction unless this presumption is proved beyond reasonable doubt. It has

¹ As a general principle of Criminal Jurisprudence in India all proofs in criminal cases need to be "proof beyond reasonable doubt"

nowhere been mandated in the POCSO Act that an accused has to be convicted on the basis of the presumption only.

Moreover, in a combined mechanism of Section 4 Code of Criminal Procedure and Section 31 POCSO Act the provisions of CrPC would be resorted to where there is a need of a legal principle and the same is not available in the body of the POCSO Act. In this manner, the apprehension that there is any change in the fabric of presumption from the innocence to the guilt.

Secondly, the meanings of the legal terms are always interpreted by the Courts having reference to the sound principles of the jurisprudence those have stood the test of time and remained helpful over the ages in developing the meanings out of the legal grey areas. In a similar Special Legislation called the *Protection of Women Against the Domestic Violence*, 2005 the Supreme Court of India was also of the view that the provisions of that Act were not very happily worded². The Supreme Court gave a particular interpretation to that concept of 'shared household'. Thereafter in one case³ the same point of determination of 'shared household' again came before the Delhi High Court for its interpretation. Delhi High Court gave this concept a slightly different meaning, holding that the merits of the case had a distinction in comparison to *Batra* (*supra*). This Navneet Arora (*supra*) has been a distinguished case which has founded its conclusion on such deep and intensive analysis of the law. It had references to previous judgments from the Supreme Court of India, other High Courts in India from different Courts of England, Courts of America, Treatises, Books, Newspapers, authorities and opinions etc. These reference made were also from an ancient time⁴ to the latest judgments⁵. For the present purpose it is not very important to study both the views i.e. taken by the Supreme Court and the Delhi High Court but this discussion is important from an another point of view. The whole process shows that the interpretation of a statutory terms is not an independent existence. It has a relative meaning in reference to the *Established Fundamental Principles* of that specific legal regime.

If those established fundamental principles are available for interpreting the 'shared household' then why the same principles are not available for interpreting the confusion of this so-called '*Presumption-Shifting Provisions*' in Section 29 of this Act. Some such established in the next portion after Section 30 of this Act, including the principle of presumption laid down by the Supreme Court in *Dhanwantrai Balwantrai Desai v. State of Maharashtra*⁶ where it was laid down that

² S.R. Batra and Anr vs Smt. Taruna Batra AIR 2007 SC 1118

No doubt, the definition of 'shared household' in Section 2(s) of the Act [Domestic Violence Act] is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society.

³ Navneet Arora vs Surender Kaur FAO (OS) 196/2014

⁴ the case of Lincoln College- (1595) 3 Co. Rep. 58b; Canada Sugar Refining Co. Ltd. v. R- [1898] A.C. 735

⁵ Md. Rajab Ali v. Manjula Khatoon 2014 Cri. L.J. 2162

⁶ 1964 (I) Cr. LJ 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.

In *Narayan Govind Gavate Etc. vs State Of Maharashtra*⁷ it was held that:

Presumptions of fact which can be used by Courts in the course of administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence.

True presumptions, whether of law or of fact, are always rebuttable. In other words, the party against which a presumption may operate can and must lead evidence to show why the presumption should not be given effect to.

In *Mr. J.S. Choudhary vs Mr. Mahesh Bora*⁸ the vires of the POCSO Act was challenged before the High Court of Gujrat. One of the grounds of challenge included the presumption under section 29 -30 of this Act. The High Court held that:

It 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.

These judgments of the Courts in India show the *Established Fundamental Principles* of Indian jurisprudence. These *Established Fundamental Principles* can simply pave the way of the smooth working of Section 29 POCSO Act.

PRESUMPTION OF MENS REA

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

⁷ AIR 1977 SC 183

⁸ S.B. Criminal Revision Pet. No. 192/2014

reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation. - In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

PRESUMPTION AND PREJUDICE

In *Mr. J.S. Choudhary vs Mr. Mahesh Bora*⁹ (The Famous Case of the Infamous Asharam @ Ashumal and Others¹⁰) a question of inconvenience caused by the presumptions under sections 29 & 30 POCSO Act was raised before the High Court of Rajasthan. The accused-petitioners feared a prejudice to them during trial because of the presumptions arising out of 29 & 30 POCSO Act.

The observation of the Supreme Court in *Rajveer @ Raju v. State of Haryana*¹¹ were relied upon:-

"We further direct all the trial courts in India to ordinarily add Section 302 to the charge of Section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to Registrar Generals/Registrars of all High Courts, which will circulate it to all trial courts."

The thrust of the accused-petitioners in their arguments was to the effect that if charges under POCSO Act, 2012 did not survive then the case from the Special Court might be transferred to the regular Sessions Court where presumption under Sections 29 and 30 of POCSO Act, 2012 would not be acting against the petitioner and the accused petitioners would be benefited accordingly.

The court observed: "By this order, I have to decide the criminal revision filed by the prosecutrix also. In her petition, it was argued on her behalf that the charge under section 5(p) of the POCSO Act, 2012 should also have been framed against the accused-petitioners but this argument has been raised perhaps because of the apprehension that the place where the alleged main offences were committed by accused Asharam, may or may not come within the definition of the "institution under the management of accused-petitioners", but Section 5(p) of the POCSO Act, 2012 is a minor offence of Section 5(f) of the POCSO Act, 2012 and so at the time of the judgment, if the trial court is convinced that Section 5(f) of the POCSO Act, 2012 is not made out, then the trial court will be free to take help of Section 5(p) of the POCSO Act, 2012 also without amending the charge, if need arises to save the cause of justice. Prayer regarding charge under Section 26 of the JJ Act, 2000 has not been pressed by the learned counsel for the prosecutrix in criminal revision petition."

⁹ S.B. Criminal Revision Pet. No. 192/2014

¹⁰ An observation made by the High Court

¹¹ 2011 AIR SC 568

PAIR PRESUMPTION OF POCSO ACT

Section 29 and 30 of this Act jointly make a pair of presumptions. This pair presumption is complementary. Sections 29 and 30 of POCSO Act in their cumulative action give rise to presumptions of law against the accused. Section 29 raises a presumption, if the allegation was related to offences under section 3, 5, 7 and section 9 of the POCSO Act that such person had committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. It 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.

This analysis shows that in POCSO Act there are two presumptions under sections 29 & 30 POCSO Act. The first is the presumption under section 29 where the commission of the offence/ its abetment/ its attempt will be presumed to have taken place when the allegation pertains to the offences defined under sections 3, 5, 7 and section 9 of this Act are made and consequent to it a prosecution has been launched. These offences are punishable under sections 4, 6, 8 and Section 10 respectively.

The second is the presumption under section 30 and it talks about the existence of *mens rea* or the culpable mind, on the part of the accused whenever it is so required under the provisions the POCSO Act. This culpable mental state of the accused includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact (vide ***Explanation*** to Section 30). But the legislature has specifically provided in Section 30(1) itself that this is a rebuttable presumption and it is open for the accused to prove that he was not having such intention, motive, knowledge or belief as was required to prove the offence.

Section 30(2) is basically the same time tested jurisprudential value of the Indian Legal System which was underlined by the Apex Court in ***Dhanwantrai Balwantrai Desai***¹² (*supra*)

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. 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,

¹² ***Dhanwantrai Balwantrai Desai v. State of Maharashtra*** 1964 (1) Cr. LJ 437 (SC)

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.

In order to prove the guilt of the accused the prosecution has to discharge its liability to prove its case beyond reasonable doubt rather than proving it by mere preponderance of probabilities. The initial burden of the prosecution is still in its place and has not been changed.

This pair-presumption under section 29 & 30 POCSO Act is a complementary set of presumptions. This pair at first place makes a presumption in favor of the victims who are children under the age of eighteen years to absolve their burden of making their stand intact during the legal intricacies during the course of trial. The first set out of this pair-presumption takes care of the child who is victim of a sexual offence and has limited capacities and capabilities of appreciation and understanding. A child is quite incapable of appreciating and understanding the mental states of others and even of himself. In all cases or most of the cases, in absence of such a pair-presumption the victim might not find itself to give a complete account of mental state and mental elements of the accused the victim might have come across during the commission of the offence. Such contingencies would have frustrated the legislation of the POCSO Act. The legislature with a view to ensure the proper and smooth functioning of the Act has provided this pair-presumption. This is just to ensure the just ends of the statute.

But at the same time the legislature was also wary for ensuring the requirement of a fair trial in which the accused are not meted with prejudice it has specifically provided that 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. On the strength of this provision the accused can go to prove that the allegation was false or that the accusation was motivated or that he was incapacitated to do the alleged act or that he did not possess the *mens rea* i.e. the culpable state of mind which was required to constitute the offence. The accused can also seek to prove that the child had misunderstood or misinterpreted his good acts. In its ultimate effect the child is required just to give account of the *actus reus* or the physical act of the accused. This account has to stand the test of 'proof beyond all reasonable doubt'. Once this test is complete the statute would fill the required *mens rea* in the alleged act. The combination of the *actus reus* and the *mens rea* so available will then be considered as complete to constitute the offence defined in the POCSO Act.

Once this constitution of the offence on the basis of account given by the child is complete the accused would be given a chance, legally, that he did not possess that *mens rea* or the culpable mental state as it was provided by the action of the statute under section 30(1) POCSO Act. This provision talks only of the disproof of 'culpable mental state' and not the physical act i.e. the *actus reus* because the same had already withstood the cross examination by the accused.

PAIR-PRESUMPTION WAS NOT ALLOWED AT THE TIME OF BAIL

Karnataka High Court in *Lingappa vs The State of Karnataka*¹³ did not deem it fit to allow the pair-presumption under POCSO Act to work in case under section 4 of the Act.

It was alleged that on 17.11.2013 at about 10.00 PM the complainant's daughter was said to have been abducted by the petitioner with the help of two others and the complaint however was lodged only one month after the incident. The petitioner had persuaded the girl to go with him to Bangalore and they left Hulagunchi village and went to Bangalore. They stayed in Mudupalya in a labourer's shed for three weeks and it is thereafter have returned to Manvi and it is claimed that the petitioner had tied a Tali to the victim at a temple in Manvi. She had made a statement to the effect that she was deeply in love with the petitioner and went away with him and have married and had sex thereafter.

The learned Additional State Public Prosecutor would however submit that given the tenor of the law, in so far as the offence punishable under Section 4 of the POCSO Act is that there shall be a presumption of commission of the offence in so far as a minor is concerned and the very object of the POCSO Act is to protect children from such offences. The alleged consent and complicity has no relevance when the victim is a minor and the assertion that the age cannot be determined by virtue of the radiological report is an incorrect contention as prima facie that is an ample evidence to establish the minority of the child.

The court held that the alleged victim had wilfully joined the petitioner, though there is much difference in their age and had resided together and it is only later that she has been forced to come home and she has refused to stay with her parents, 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 latter 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.

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¹³ CRIMINAL PETITION NO.200659 OF 2014