



## The Burden of Proof under Protection of Children from Sexual Offences Act, 2012

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### Introduction

Sexual offence against a child is, sexual activity where a child is involved, in which he is not aware of the act and thus, unable to consent to it. It has been also considered against child rights. The vulnerable situation of children, lead to introducing an exclusive legal structure concerning the issue. Thus, Protection of Children from Sexual Offences Act, 2012 (“POCSO”) was embraced as a legislation that fulfils India’s responsibility as a signatory to the United Nations Convention on the Rights of The Child, which talks about the crime of sexual offences against children.

Other than satisfying the International norms, POCSO was formulated by considering Article 39 of the Constitution which is a part of Directive Principles of State Policy that states that the State shall make and implement policies for children to safeguard their interest and promoting development in safe and dignified environment.

POCSO has notion of reverse onus which is not quite usual in criminal proceedings. Reverse onus means transferring the burden of establishing innocence on the defendant. Under the POCSO Act, Section 29 and 30 mention about ‘reverse onus’.

Section 29 of POSCO talks about presumption as to certain offence as “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 the Act mentions about the presumption of culpable mental state- “In 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.”

The fundamental doctrine of ‘presumption of innocence’ aims to protect the rights and interest of the accused, while on the other hand the objective of ‘reverse onus clauses’ is to prevent the victim and help the prosecutor in a case. There exists conflict between these two notions. As the reverse onus clause can be misused and this can lead to false allegations resulting into mushrooming of a high number of frivolous cases.

In the present scenario, the concept of



reverse onus is objected on the grounds of two fundamental rights, against right to equality and right to life and personal liberty.

### **Against Right to Equality**

Right to equality is an intrinsic right that has been conferred by the Constitution of India on all persons. This right displays the acceptance of rule of law in the Indian jurisprudence. It ensures equal treatment without discrimination. In the case of *Meenakshi Mills Ltd v AV Vishwanatha Shastri*,

Supreme Court quoted that

*“Article 14 of this Part guarantees to all persons the right of equality before the law and equal protection of the laws within the territory of India. This article not only guarantees equal protection as regards substantive laws, but procedural laws also come within its ambit.”*

As absolute equality is unachievable in any sense, thus classifications are made for wellbeing of the unprotected section of the society. Thus, reasonable classification test has been developed in the case of *State of West Bengal vs. Anwar Ali Sarkar*, wherein it has been mentioned that *“differentiation shall done only on the grounds of intelligible differentia and the differentiation should have a nexus or relation with the objective of the legislation.”* On analysing, it can be inferred that there is no reasonable nexus between clause of reverse onus and purpose of the legislation. The rationale of the statute is to provide shield to children from sexual exploitation and sexual abuse while the reverse onus is promoting the conviction rate which can be fallacious.

Article 14 of the Constitution which scrutinizes anti-majoritarian nature of

constitutional law and anti-authoritarian nature of administrative law curbs arbitrariness and unreasonableness, but the reverse burden can be against reasonableness of laws.

The Rule of Law states that no one shall be subject to discrimination. It imposes an affirmative obligation of fair treatment on the state authorities. An important constituent of principles of Rule of Law in Criminal Administration is ‘presumption of innocence’. The opposition of general rule of “innocent until proven guilty”, is disturbing the inherent principle of Rule of Law. The consequence of acceptance of this perspective can be arbitrary and can subsequently infringe the fundamental rights of the accused.

### **Against Right to Life**

Article 21 of the Constitution emphasizes on the ‘*Procedure established by law*’ which shall be reasonable, just, and fair as well as the right to fair trial is also revered. The Apex Court in the case *Kartar Singh v. State of Punjab*, stated that for ensuring a procedure to be true, unbiased and fair, it should run in parallel to the principles of natural justice. Furthermore, it was opined in *Rupinder Singh v Union of India* that even when the purpose is pertaining to the regency in matters of law, no person shall be imperilled by harsh, uncivilized or discriminatory treatment.

In the case *Yogesh Maral v State of Maharashtra*, the Court was of the view that the scope of Section 29 of POSCO is broad in a sense and prudence shall be observed while its implementation because clue of unconstitutionality can be inferred.



### **Accused is assumed guilty until proved his innocence**

The Union Cabinet has approved amending the Protection of Children from Sexual Offences Act, 2012 (POCSO), to introduce the death penalty as a punishment for offences of penetrative sexual assault and aggravated penetrative sexual assault under Sections 4, 5 and 6. Cases of sexual assault by police officers, members of the armed forces, public servants, gang-penetrative sexual assault, and relatives are treated as “aggravated” cases, as are cases where the survivor is less than 12 years old. The reason given for introducing the death penalty is that it will deter child sexual abuse. POCSO is already a stringent act, carrying presumptions of guilt of the accused. Imposing the death penalty for offences that already carry such stringent presumptions violates the right to life guaranteed under the Constitution. Further, it is especially difficult for the poor or disadvantaged groups to overturn these presumptions. And, studies show that most death row prisoners are from poor, lower caste or religious minority communities.

Usually, in criminal cases, the burden of proof lies on the prosecution, and the guilt must be proved beyond reasonable doubt. Under POCSO, however, there is a presumption that a person who is prosecuted for an offence has actually committed the offence, unless the contrary is proved (Section 29). Instead of “innocent until proven guilty”, the court assumes that the accused is guilty once the prosecution lays the foundation of the case. The Act also presumes that the accused person had a sexual intent when touching the child (Section 30).

The 262nd Law Commission Report has

recommended universal abolition of the death penalty, except in terror cases. The report excluded terror cases not because it found any penal or national security justification for retaining the death penalty, but because there was a sharp division amongst law makers on this question. Under Article 21 of the Constitution, a person can only be deprived of their life or liberty in accordance with the procedure established by law. This procedure must be just, fair and reasonable. Without quality legal representation, it is virtually impossible for an accused to overcome the presumption of guilt. Imposing death penalty in an offence with a presumption of guilt cannot be a just or fair procedure.

Rebutting these presumptions requires either that the accused bring witnesses and documents in their defence or conduct a stellar cross-examination. Both require high quality lawyering. In my experience defending indigent POCSO accused as a lawyer for the Delhi High Court Legal Services Committee, overcoming these statutory assumptions is difficult and expensive for the poor. For daily-wage earners, the legal process means loss of income as well. If the accused is in jail, their family will have to collect evidence and find witnesses. And neighbours or employers may not readily give evidence for migrant workers.

A 2016 report by the Death Penalty Project, National Law University, Delhi found that death row prisoners are overwhelmingly poor, lower caste, or religious minorities. Seventy six per cent of death row inmates were poor. The report found that 17.4 per cent of death row convicts were aged 18-21 years at the time of the incident, 18.5 per cent of



this group had never attended school and 59.2 per cent had not completed their secondary education. Researchers identified “economic vulnerability” based upon occupation (including manual casual labourers, marginal and small cultivators, low paying public and salaried employment, small own account enterprises, students, unemployed, religious occupations, salaried public and private employment) and landholding (medium and large cultivators). Based on this criterion, 74.1 per cent of death row prisoners were found to be economically vulnerable.

Economic vulnerability impacted the experience of the prisoner during the investigation and trial. About half of the sample of 383 prisoners spoke about lack of access to lawyers. Of these, 97 per cent did not have access to a lawyer during interrogation. Eighty per cent of those who did not have access to a lawyer were economically vulnerable. One hundred and fifty five persons spoke of their experience of custodial violence, and 128 of being tortured in police custody.

Seventy six per cent of death row prisoners were from backward classes and religious minorities. Although the report noted that its “purpose was not to suggest any causal connection or direct discrimination”, it suggested that the “disparate impact of the death penalty on marginalised and vulnerable groups must find a prominent place in the conversation on the death penalty”. At the national level, 24.5 per cent of those on death row were from Scheduled Castes and Scheduled Tribes with Maharashtra, Karnataka, Madhya Pradesh, Bihar, Jharkhand and Delhi being above the national average. The

report also found that as cases travelled up the court hierarchy, the proportion of general category prisoners fell, and the proportion of Scheduled Caste and Scheduled Tribe prisoners increased.

Introducing the death penalty in POCSO is likely to send more poor, lower caste and religious minority accused to death row. Sexual violence is a grave problem in India, and child sexual abuse has been described as an epidemic. Introducing the death penalty may grab headlines, but it is not the solution.

Kerala High Court upholds Constitutionality of Reverse Onus of Proof under Sections 29 & 30, Read Judgment

In the judgment titled *Justin @ Renjith v. Union of India and 3 others in WP (C) No. 15564 of 2017 (U)*, Kerala HC upheld the constitutional validity of Sections 29 and 30 of the Protection of Children from Sexual Offences Act (POCSO Act) which creates a reverse burden of proof on the accused. Honourable Justice Sunil Thomas rejected the arguments that these provisions violated fundamental rights under Articles 14, 20(3) and 21 of the Constitution of India.

High Court noted that statutes imposing limited burden on the accused to establish certain facts which are specifically within his knowledge are not rare in Indian Criminal Law.

Bench further held that such provisions cannot be held to be unconstitutional due to the fact that they reverse the burden of proof from the prosecution to the accused if they are “justifiable on the ground of predominant public interest”.



First and foremost Bench observed in Para 1 that, “Petitioner in W.P(C) is the accused in S.C.No.590 of 2016 of the Additional Sessions Court-I, Thrissur. He faces prosecution for offences punishable under sections 3(a), 5(b), 5(i), 5(m), 5(o), 5(u), 4, 5 and 12 of Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), section 23 of Juvenile Justice (Care and Protection of Children) Act, 2000 and Section 201 of Indian Penal Code.”

While laying the background facts, Bench stated that, “Crux of the prosecution allegation was that Petitioner being the caretaker of an orphanage, sexually assaulted three inmates of the orphanage. On the basis of the information laid, Crime No.689 of 2015 was registered by the Koratty Police. After investigation, final report was laid. According to the petitioner, he is absolutely innocent of the crime, that a close relative of the victim had assaulted them and he has been wrongly roped in. Petitioner challenges his prosecution, mainly on the ground that sections 29 and 30 of the POCSO Act are unconstitutional, infringes his valuable right of defence and violative of Articles 14, 19, 20(3) and Article 21 of the Constitution of India. He prayed for striking down sections 29 and 30 of the POCSO Act as arbitrary and infringing Constitutional provisions.”

To put things in perspective, it is then brought out in para 3 that, “In CrI.M.C.No.3104 of 2018, petitioner is the sole accused in S.C.No.1097 of 2017 pending before the Additional District Court (POCSO Court), Ernakulam, for offences punishable under sections 9(e) and 10 of POCSO Act, 2012. The petitioner is a Physiotherapist by

profession. The prosecution allegation was that, on 20.06.2016 at about 11.30 a.m, while the first respondent/victim was undergoing physiotherapy in the clinic of the petitioner, the accused made the victim to touch his private part, over his dress. She laid the complaint on 14.11.2016, pursuant to which FIR No.1089 of 2016 was registered by Infopark Police. After investigation, final report was laid and the petitioner is facing prosecution.”

His Lordship also observed that, “In the above cases, various High Courts, except the High Court of Bombay in Yogesh Arjun Maral's case (supra) which has expressed a different view, have consistently held that, though the presumption under section 29 of the POCSO Act was a rebuttable presumption, it does not absolve the prosecution of its duty to establish the foundational facts. None of the above courts was of the view that the presumptions under sections 29 and 30 of the POCSO Act violate the Fundamental Rights of the accused.”

It is then rightly observed in para 70 that, “Evaluation of the above judicial pronouncements lead to the conclusion that, statutory provisions which exclude mens rea, or those offences which impose strict liability are not uncommon and that by itself does not make such statutory provisions unconstitutional. Further, Statutes imposing limited burden on the accused to establish certain facts which are specifically within his knowledge, is neither rare in Indian Criminal Law and nor do they, by itself make such statutory provisions unconstitutional. However, the statutory burden on accused should only be partial and should not thereby shift the primary duty of prosecution to



establish the foundational facts constituting the case, to the accused. Such a provision should also be justifiable on the ground of predominant public interest. Hence, sections 29 and 30 of the POCSO Act, do not offend Articles 14 and 19 of the Constitution of India. They do not in any way violate the Constitutional guarantee, and hence not ultra vires to the Constitution.”

The Bench enunciated that, “It is stated that Art.21 will be infringed if the right to life or liberty of a person is taken away, otherwise than by due process of law. It has been judicially affirmed that Article 21 affords protection not only against executive action, but also against legislations which deprive a person of his life and personal liberty otherwise than by due process of law. When a statutory provision is challenged alleging violation under Art.21 of Constitution of India, State is bound to establish that the statutory procedure for depriving the person of his life and personal liberty is fair, just and reasonable. The main contention of the petitioners based on the alleged violation of Articles 20(3) and 21 of the Constitution of India on the ground that the presumption under the POCSO Act imposes a burden on the accused to expose himself to cross examination which amounts to testimonial compulsion and that, it amounts to breach of his right to silence, and that the burden of proof is heavily tilted against him has to be considered in the light of the law laid down by the Supreme Court in Kathi Kalu Oghad's case (supra). The larger Bench held that the bar under Art.20(3) of the Constitution will arise only if the accused is compelled to give evidence. To bring such evidence within the

mischief of Art.20(3), it must be shown that accused was under a compulsion to give evidence and that the evidence had a material bearing on the criminality of the maker. Supreme Court explained that, compulsion in the context must mean duress. The law as explained by the Larger Bench holds the field even now.”

### **Delhi High Court ruled out that Section 29 of POCSO Act applicable only after trial begins**

The Delhi High Court has clarified that the presumption of guilt engrafted in Section 29 of the Protection of Children from Sexual Offences (POCSO) Act gets triggered and applies only once trial begins, that is after charges are framed against the accused.

Section 29 of the POCSO Act says that when a person is prosecuted for committing an offence of sexual assault against a minor, the special court trying the case “shall presume” the accused to be guilty.

This reverse burden on the accused to prove his innocence was incorporated in the POCSO Act keeping in view the low conviction rate of sexual offences against children.

The question of whether the presumption of guilt applies only at the stage of trial or does it also apply when a bail plea is being considered cropped up while hearing the bail plea of a 24-year-old man arrested for alleged sexual assault of a minor.

Justice Anup Jairam Bhambhani clarified that if a bail plea is being considered before charges have been framed, Section 29 has no application. ‘Trial’ commences when charges are framed against an accused and not



before that, Justice Bhambhani said.

Only at the stage when charges are framed does the court apply its judicial mind to whether there is enough evidence on record to frame a precise allegation, which the accused must answer, Justice Bhambhani said.

“Therefore, it is only once charges are framed that the accused knows exactly what he is alleged to be guilty of; and therefore, what guilt he is required to rebut,” he said, adding an accused cannot be asked to disprove his guilt even before the foundational allegations with supporting evidence that suggest guilt are placed by the prosecution before the court.

“It would be anathema to fundamental criminal jurisprudence to ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence,” the High Court said.

Justice Bhambhani also set out fresh norms while deciding a bail plea at the post-charge stage. “In addition to the nature and quality of the evidence before it, the court would also factor in certain real- life considerations,” Justice Bhambhani said.

This include whether the offence alleged involved threat, intimidation, violence or brutality. Also the court, hearing the bail would consider, whether the offence was repeated against the victim.

The Protection of Children from Sexual Offences Act (POCSO) came into force on November 14, 2012, and was specifically formulated to deal with offences including child sexual abuse and child pornography. The Act through its 46 provisions increased the scope of

reporting offences against children, which were not earlier covered under the Indian Penal Code (IPC). This expanded the criminal penalty for aggravated penetrative sexual assault to include punishment for abuse by a person in position of trust or authority including public servants, police, armed forces, and management or staff of an educational or religious institution.

It also defined the procedure for reporting cases, including a provision for punishment for failure to report a case or false complaint. It provided procedures for recording of the statement of a child by the police and court, specifically requiring that it should be done in a child-friendly manner, and by the establishing special courts.

The POCSO Act defines offences of sexual assault, sexual harassment, pornography and safeguarding the interest and well-being of children. It also sets out a child-friendly procedure regarding the recording of evidence, investigation and trial of offences, establishment of special courts and speedy trial of cases. The aim of the act is to provide protection to the child at every stage of judicial process.

### **I. Features of POCSO:**

POCSO is gender neutral, meaning that crimes of this nature committed against children will be handled by this act regardless of the gender of the child. This Act sets a burden of proof of “guilty until proven innocent” rather than the general rule of “innocent until proven guilty.” Simultaneously, in order to prevent misuse of the law, the law contains punishments for false complaints and false information with malicious intent. The recording of abuse



is mandatory under this Act. It is mandatory for the police to register a First Information Report (FIR) in all cases of child abuse. A child's statement can be recorded at the child's residence or a place of their choice and should be preferably done by a female police officer not below the rank of sub-inspector. This act lists all possible sexual offences against children including various types of sexual assault, sexual harassment, use of minors for pornographic purposes. The Act additionally prescribes punishments for attempted crimes under this act as well as aiding-and-abetting these crimes or failure to report these crimes. If there is any suspicion that an offence should be reported, the Act advises reporting because failure to report alone may result in up to 6 months of imprisonment and/or fines.

The Act also prescribes for special courts to be created to handle these trials, each of which should be completed within one year. The Act requires that the minor is not exposed in any way to the accused during the recording of evidence and their identity is not disclosed at any time during the investigation or trial. The minor is not made to repeat their testimony in court, and they may give the testimony using a video stream instead. The defense asks all questions through the judge and is not allowed to ask them in an aggressive manner. An interpreter, translator, special educator or any other expert may be present in court for the minor's assistance. There is also defined criteria for awarding compensation by the Special Court which includes: loss of educational and employment opportunities along with disability, disease or pregnancy as the consequence

of the abuse.

The POCSO Act has also changed consensual sex under the Indian Penal Code. The age of consent has been raised from 16 years of age to 18 years of age. This means that any person (including a child) can be prosecuted for engaging in a sexual act with a child irrespective of whether the latter consented. Additionally, A husband/wife can be prosecuted for engaging in a sexual act with their spouse under 18 years of age. The POCSO Act, 2012 does not recognize consensual sexual acts among children or between a child and an adult.

## II. Lacunas in the Act

Upon a preliminary reading the POCSO Act may qualify as the ideal legislation to protect children from sexual offences. However, there are certain conceptual problems in it.

The Act does not leave any possibility of consent given by persons under 18. This would mean that if a seventeen year old boy or girl had a nineteen year old sexual partner, the partner would be liable to be booked under the provisions of the POCSO Act. The Act also does not provide any clarity on what happens when two minors engage in any kind of sexual activity. Technically, they are both Children in Need of Care and Protection (CNCP) and Children in Conflict with Law (CCLs). In practice though, the police declare girls to be CNCPs and the boys to be CCLs.

Another problem faced by victims is proving the age of the child. Since the POCSO Act is silent on what documents are to be considered for determining the age of the child victim, the provisions of Rule 12 of the Juvenile Justice Rules





have been read by Courts as applying to child victims as well. This rule recognizes only the birth certificate, the school certificate of the child, or the matriculation certificate. However, children who are only able to produce other documents – even a legal document such as a passport – have to undergo a bone ossification test. This test can give a rough estimate of the age of the child at best. There needs to be a clear provision in the POCSO Act that lays down what documents should be considered for proving the age of the child, and whether the benefit of the doubt should be given to the child if the ossification test cannot provide an exact assessment.

Similar to the law of rape under the IPC. The pronoun used for the accused is “he”, thus, again, only a male can be booked for the offences under the relevant provisions of the POCSO Act. Though, unlike rape, a victim under the POCSO Act can be any child irrespective of the gender, the accused still can only be a male and females are again given a protective shield, for reasons unknown. Saying that females do not subject children to forceful sexual assault is untrue.

These are clear examples of the unexplained gender bias in the laws relating to sexual intercourse in India. Also, since the POCSO Act only looks into the age aspect, a teenage girl below the age of 18 who experiences coercive sexual assault may later have the boy booked under the IPC. But, vice-versa won't be true due to the biased definition. A woman who commits a like offence can be booked only for sexual assault under the POCSO Act, the punishment therein being much less compared to sexual assault under the

IPC.

### **Perils in Judiciary and Delivery of Justice:**

One of the cornerstones of the POCSO Act is its mechanism to provide speedy justice to children who are victims of sexual assault. However, many serious institutional bottlenecks affect the legal protection of children below the age of 18 years.

An obvious example is the timeline for child testimony and conclusion of the trial laid down in Section 35 of the POCSO Act. This requires the child testimony to take place within a month of cognizance by the Court, and the trial within a year of the same. However, these provisions are more often flouted than complied with due to the overburdened nature of courts in India.

A related issue is the tendency of the lawyer's to take adjournments, or adjournments caused due to external factors such as strikes in Court. In such situations, the victim ends up getting called repeatedly to court, or the hearing can be delayed as much as six or seven months after the incident is reported. This reduces the chances of the victim being able to recollect the facts of the incident accurately.

Interim compensation is another important issue. The child victim is entitled to interim compensation to meet their immediate needs. However, it is necessary for all stakeholders to understand that interim compensation should not be restrictively interpreted to mean only his or her medical needs. It includes every need of the child necessary for rehabilitation.

Under Section 33(2) of the POCSO Act, the Special Public Prosecutor while



recording the examination-in-chief, cross-examination or re-examination of the child, should first communicate the questions to the Special Court and then those questions should be put to the child. The child should also be given frequent breaks between questions.

The role of the lawyer for the child is also pivotal. The mandate of the lawyer is to assist the prosecution. This will require proper coordination between the Public Prosecutor and the child's lawyer. Further, in our adversarial justice system, while the Public Prosecutor and defense lawyer have well-defined roles, there needs to be an examination of how the lawyer for the child victim fits into this scheme.

#### **Administrative hurdles:**

There are three main administrative hurdles when it comes to POCSO.

Firstly, despite their best efforts, the police face a lot of barriers in conducting a proper investigation in POCSO cases. It begins with the registration of the FIR. The police must ensure that there is no delay in the registration of the FIR, and the conducting of the Medico-Legal Case (MLC).

Secondly, the MLC of the victim is often not conducted because the victim's family is given inaccurate information on the long term ill-effect of the MLC on the child's health. When the child has to go for an MLC or an abortion, he or she often faces a hostile atmosphere in the hospital. Doctors therefore need to be educated on how to communicate with the child with sensitivity about what he or she is going through to prevent further trauma. Furthermore, the forensic samples taken by the police often end up getting contaminated, or

putrefied due to improper storage. The police need to be acquainted with the best methods of collecting forensic evidence, so that the appreciation of the evidence can take place smoothly during the trial.

Finally, under Section 43-44 and Rule 6 of POCSO Act institutions such as the National and State Commissions for the Protection of Child Rights are required to monitor and evaluate the implementation of the Act on a regular basis in addition to generating public awareness to the provisions of the Act. However, the functioning of such departments and their monitoring and evaluation procedures have not been open to public scrutiny. To this extent, it is imperative to study the procedures established by such bodies and evaluate their effectiveness in generating impactful outcomes.

#### **Conclusion**

The present legislation for criminalizing sexual offences against children was a much-needed piece of legislation. The adjudication process for the same should be made more transparent and the role of police in such offences much more prompt, so that people sense a feeling of contention and credibility in the whole process from initiation to adjudication. The deterrent effect which this act renders is also sufficient, but to overcome and eradicate this issue from the grassroots level, the collective consciousness among the masses should be pure and must include the feelings of love and affection.

The Legislature in spite of including this provision had the knowledge that there can be possibility of false accusations and thus had a provision of Section 22 in POCSO which punishes those who



dishonestly allege the accused for offences under the Act. Interest of not only child but also victim should be considered and thus balance has to be maintained. The presumption under Section 29 POSCO doesn't collaborate with the punishment. The punishment which is mentioned "*rigorous imprisonment for a minimum period of 10 years which can extend up to life imprisonment and fine.*" The *right to a fair trial* is an intrinsic right of people and its infringement can lead to injustice. Presumption of innocence ensures the absence of prejudice and bias. The presumption seeks to ease the burden and vulnerabilities of an already vulnerable child.