IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 07TH DAY OF OCTOBER 2020 / 15TH ASWINA, 1942

WP(C).No.15564 OF 2017(U)

PETITIONER/S:

JUSTIN @ RENJITH
29 YEARS, S/O.GOPI @ OUSEPH, CHINGATTUPURATHU HOUSE, MALAVANA DESOM, ELANTHIKKARA, PUTHENVELIKKARA VILLAGE, ERNAKULAM DISTRICT.

BY ADVS.
SRI.V.JOHN SEBASTIAN RALPH
SMT.P.V.DENCY
SRI.K.J.JOSEPH (ERNAKULAM)
SRI.V.JOHN THOMAS
SRI.JACOB J. ANAKKALLUNKAL
SMT.PREETHY KARUNAKARAN

RESPONDENT/S:

1 UNION OF INDIA
REPRESENTED BY THE SECRETARY, MINISTRY OF LAW AND JUSTICE, FOURTH FLOOR, A- WING, SHASTRY BHAWAN, NEW DELHI, PIN - 110 001

2 SECRETARY,
MINISTRY OF WOMEN AND CHILD DEVELOPMENT, SHASTRI BHAWAN, NEW DELHI, PIN - 110001

3 CHIEF SECRETARY TO THE STATE OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, PIN-695 001.

4 CIRCLE INSPECTOR OF POLICE,
CHALAKKUDY, THRISSUR DISTRICT, PIN - 680307

R1 BY SRI.SUVIN R.MENON, CGC
R1 BY ADV. SRI.SUVIN R.MENON CGC
R1 BY GOVERNMENT PLEADER
R1 BY SRI.V.MANU SR. GOVT. PLEADER
R3-4 BY SRI.V.MANU, SENIOR GOVT. PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07.10.2020, ALONG WITH Crl.MC.3104/2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 07TH DAY OF OCTOBER 2020 / 15TH ASWINA, 1942

Crl.MC.No.3104 OF 2018

AGAINST THE ORDER/JUDGMENT IN SC 1097/2017 OF ADDITIONAL SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN) CRIME NO.1089/2016 OF Infopark Police Station , Ernakulam

PETITIONER/S:

ASHLY TOMI AGED 32 YEARS,
S/O. TOMI C.J., CHIRAMEL HOUSE,
KURIACHIRA, THRISSUR.

BY ADVS. **SRI.P.VIJAYA BHANU (SR.)**
SRI.AJEESH K.SASI
SRI.C.JAYAKIRAN
SMT.MITHA SUDHINDRAN
SMT.POOJA PANKAJ
SRI.P.M.RAFIQ
SRI.M.REVIKRISHNAN
SRI.V.C.SARATH
SRI.VIPIN NARAYAN

RESPONDENT/S:

1 **PAVITHRA KAMALA**
D/O. CHITHRA KRISHNAN, RESIDING AT 8C, FACE - II,
SILVER LAWN APARTMENT, MAROTTICHODU BHAGAM,
EDAPPALLY SOUTH VILLAGE, ERNAKULAM DISTRICT,
PIN - 682 041.

2 **STATE OF KERALA**
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM - 682 031.

R1 BY ADV. SRI.GILBERT GEORGE CORREYA
R1-2 BY ADV. ADDL.DIRECTOR GENERAL OF PROSECUTION
R1 BY ADV. SRI.GEORGIE JOHNY
R1 BY ADV. SRI.NISHIL.P.S.
R1 BY ADV. SRI.A.VELAPPAN NAIR

OTHER PRESENT:
PP SRI.V.MANU

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 07.10.2020, ALONG WITH WP(C).15564/2017(U), THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

'CR'

COMMON JUDGMENT

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.

2. The crux of the prosecution allegation was that the 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.

3. In Crl.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 11.30a.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.

4. Prosecution of the accused is challenged by him contending that the allegation is baseless, facts disclosed are inherently improbable and the complaint was highly belated. He challenged the prosecution on the specific ground that, sections 29 and 30 of the POCSO Act were unconstitutional, since it takes away the valuable defence available to the accused. It was contended that, in the light of presumptions available under sections 29 and 30 of the POCSO Act, virtually the accused is defenceless, that he is called upon to adduce negative evidence and is thus compelled to tender evidence and expose him to cross examination which may incriminate himself. It was hence contended that the provisions are violative of Articles 14, 19, 20(3) and 21 of the Constitution

of India. It was also contended that, the above sections are ultravires the Constitution and hence liable to be stuck down.

5. Since WP(C) and Crl.M.C raises identical questions of law, touching on the Constitutional and statutory validity of sections 29 and 30 of POCSO Act, both sides were heard in extenso and both the matters are disposed of by this common judgment.

6. Mr.John S. Ralph, learned counsel for the writ petitioner contended that every accused is entitled to Constitutional right to a fair trial guaranteed under Article 21 of the Constitution. Specific provisions are incorporated in the Code of Criminal Procedure and the Evidence Act, which are intended to ensure that, accused gets a reasonable opportunity for a fair trial. The mandatory presumptions under sections 29 and 30 of the POCSO Act impose restrictions on the discretion of the trial court and it casts a very heavy burden on the accused to prove certain facts. The accused is liable to rebut the presumptions by mounting the box and thereby he is exposed to self incrimination. It was further contended that, the life and liberty of a person can be restricted only by procedure established by law, which must be fair, just and reasonable.

7. It was further contended that, section 29 of the POCSO Act was in contravention of right of fair trial guaranteed under Article 21 of the Constitution of India and was hit by Article 13(2) as ultravires to

Constitution and hence void. It was further contended that, Section 30 of the POCSO Act creates a presumption against the accused and a reverse burden in the matter of defence. The argument was that in a prosecution under the POCSO Act, accused was under an obligation to prove beyond reasonable doubt that he had no culpable state of mind, which according to the counsel was a fact which is a manifestation of mind, not perceivable by visible indicators and establishing it by cogent evidence in a court of law will be a near impossibility. It was also argued that, sections 29 and 30 of the POCSO Act cumulatively creates a reverse burden of proof on the accused, which was contrary to the basic and well guarded tenents of criminal jurisprudence, the principle of presumption of innocence of accused, right to silence available to accused and the principle that prosecution has to establish the guilt of the accused beyond any reasonable doubt. It was contended that the accused is virtually defenceless and conviction is most likely in almost all cases of POCSO Act, by virtue of sections 29 and 30 of the Act.

8. Mr.Revi Krishnan, learned counsel appearing for the accused in Crl.M.C.No.3100 of 2018, reiterated all the contentions set up by the writ petitioner and further contended that, both the presumptions under the POCSO Act were unconstitutional, since it took away the Fundamental Right of fair trial available to the accused. The wording of section 29 of

the Act was directly at the teeth of the rigor of Article 21 of the Constitution and run against the various procedural safeguards contemplated under the Cr.P.C and the Evidence Act, it was argued. According to the learned counsel, though the safeguards coupled with the Constitutional guarantee ensure right to fair trial, but the mandatory presumptions under sections 29 and 30 of the POCSO Act impose a restriction on the above right. To substantiate this contention, learned counsel relied on the decision reported in ***Nikesh Tara Chand Shah v. Union of India ((2018)11 SCC 1)***.

9. Mr.Suvin Menon, learned ASG and Mr.V.Manu, learned senior Government Pleader contended that the statute is a unique one, intended to effectively tackle the malice of child abuse. It was contended that, rigorous provisions are incorporated in the Statute having regard to the gravity of offence, young age of the victim involved, increasing incidents of child abuse, impact of abuse on the psychological and physical well being of the victim child, the mental trauma which the child and family undergoes and the likely absence of direct eye witnesses to such incidents. Considering these facts, special provisions have been incorporated by the Parliament in its wisdom after taking note of the sensitive nature of the crime and effective safeguards are provided in the matter of investigation and trial, keeping in mind the well being of the

victim child. It was contended by both the counsel that, such presumptions are not unknown to law and identical provisions are available in several other statutes also. It was contended by the learned ASG that, challenge to a statutory provision on the ground of unconstitutionality should be grounded on an initial presumption of the Constitutionality of the Statute and not otherwise. It was further contended that POCSO Act was intended to give effect to Article 39(f) of the Constitution as empowered by Art.15(3) of the Constitution of India. A challenge of that Statute on the ground that it takes away or abridges or is inconsistent with the rights conferred under Articles 14 and 19 of Constitution of India, is not sustainable in the light of saving clause under Article 31-C of the Constitution of India. It was hence contended that the only ground of challenge available can be infringement of Articles 20 or 21 of the Constitution. It was contended that, above statutory provisions are not ultravires the Constitution or the guarantee of fair trial available to an accused. It was contended that, there was no restriction on the Fundamental Rights. The accused is not entitled to any Fundamental Right to be presumed to be innocent, except that, he is entitled to a right of fair trial. To substantiate it, learned ASG relied on the decisions reported in ***K.Veeraswami v. Union of India (1991 KHC 1162), Abdul Rashid Ibrahim v. State of Gujarat (2000)2 SCC 513, Sarbananda***

Sonowal v. Union of India (2005) 5 SCC 665, Childline Foundation and Another v. Alan John Waters (2011)6 SCC 261, Nanit Sharma v. Union of India (2013)1 SCC 745 and ***Sher Singh @Partapa v. State of Haryana (2015 KHC 4020).***

10. Mr.Manu referred to the decisions reported in ***Om Narain Agarwal and Others v. Nagar Palika, Shahjahanpur and Others 1993(2) SCC 242), Hindustan Latex Ltd. v. Mariamma (1994 KHC 308), Anoop M S v. State of Kerala (2017(1) KHC 499)State of Bombay v. Kathi Kalu Oghad (1961 KHC 343), Andhra Pradesh Grain and Merchants Association v. Union of India (1970 KHC 238), Mohan Krishna B. v. Union of India and Ors. (1996 KHC 2784), P N Krishna Lal and Ors. v. Govt. of Kerala and Ors. (1995(1) KLT 172(SC), Chandran and Ors. v. State of Kerala and Ors. (AIR 2011 SC 1594), Swastik Oil Industries v. State of Gujarat and Anr. ((1978)19 GLR 1117), State of M.P. v. Narayan Singh and Another (1989 KHC 953), K.Veeraswami v. Union of India and Ors. (supra), Noor Aga v. State of Punjab and Ors. (JT 2008(7) SC 409), Federation of Obstetrics and Gynaecological Societies of India (FOGSI) v. Union of India and Ors. (2019 KHC 6528)***

11. Mr.Gilbert Correya, learned counsel for the first respondent in Crl.M.C.No.3104 of 2018 supporting the prosecution contended that the

statutory provision was valid. It was contended that, none of the statutory or Constitutional Rights available to the accused was infringed by the above provisions. Learned counsel referred to the significance of Constitutional Rights and how it was well guarded in a criminal trial.

12. In the light of the rival contentions advanced by all the counsel, the crucial question that arises is whether sections 29 and 30 of the POCSO Act satisfy the procedure established by law as contemplated under Article 21 of the Constitution of India. Ancillary question is whether the shifting of burden from the prosecution to accused limited to the presumptions contained in sections 29 and 30 of the POCSO Act was permissible in the light of Article 20(3) of the Constitution of India.

13. Since the contention of the petitioners was that, sections 29 and 30 of the POCSO Act take away the valid defences available to the accused and there is substantial shifting of burden of proof to accused and whether it was an unusual and unique procedure contrary to the settled legal principles, it has to be considered whether similar provisions are available in other statutes. It has also to be analyzed whether the concept of mens rea should be an essential ingredient of such crimes and whether any provision which declares an act done without even an iota of criminal intent as offence, would stand Judicial scrutiny.

14. Section 138A of the Customs Act, 1962 provides for a

presumption regarding culpable state of mind. It was provided that, in any prosecution of an offence under the above Act, which requires a culpable state of mind on the part of the accused, the 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. Culpable mental state includes intention, motive or knowledge of a fact or belief in or reason to believe a fact. Identical presumptions regarding culpable mental state is available in section 10(c) of the Essential Commodities Act. Section 278E of the Income Tax Act, 1995 also provides for a presumption regarding culpable mental state. Under section 64 of the Kerala Abkari Act, presumption is available in certain types of prosecution, that the accused person has committed an offence in respect of any liquor or intoxicating drug, if it is established that accused was in possession of such items, which he is unable to account. Presumption regarding culpable mental state is available under section 35 in a prosecution under the NDPS Act. Section 54 of the above Act, provides that, if the accused is found in possession of a contraband, possession of which he fails to account satisfactorily, a presumption that the accused has committed an offence under the Act can be drawn, unless and until the contrary is proved. Certain presumptions are available under section 21 of the Terrorist and Disruptive Activities

(Prevention) Act (TADA), Section 20 of the Prevention of Corruption Act, 1988 and under section 57 of the Wild Life (Protection) Act 1972. Under the Negotiable Instruments Act, 1881, presumptions regarding negotiable instruments are available under section 118 of the Act as well as under section 139 of the Act. Evidently, there are several statutes which envisages certain presumptions available to the prosecution, similar to sections 29 and 30 of the POCSO Act.

15. The general principle of Criminal Law provides that mens rea or guilty mind is an essential ingredient of every offence. The legality of section 10(c) of the Essential Commodities Act came up for consideration before a Single Bench of Gujarat High Court in ***Swastik Oil Industries v. State of Gujarat and Anr.*** (supra). In that, it was contended that whenever a Statute creates an offence, the element of mens rea must be read into the Statute, unless a contrary intention is expressed or implied. It was argued by the accused that, as a general rule, every crime requires mental element and unless the language of the statute in unmistakable language either expressly or by necessary implication excludes it, proof of the existence of such mental element is a sine-qua-non to a conviction. Referring to the statutory provisions, it was held by the learned Single Judge that, it was not unusual for the legislature to impose strict liability in relation to offences which are not truly criminal. In determining

whether or not such a liability is intended by the legislature, regard shall be had to the language of the statute, to the nature of the mischief sought to be curbed, the character of the offence and protection of public interest. Having regard to the ultimate objective of the Essential Commodities Act and the legislative intent, it was held by the learned Single Judge that it was difficult to hold that mens rea was an essential element of the offence under section 6A of the Act, which was only a quasi criminal offence.

16. The above view is completely in consonance with the earlier decision of the Supreme Court in ***Nathulal v. State of M.P.(1966 KHC 368***), wherein an identical question came up. In that, the dealer in foodgrains was prosecuted on finding him in possession of certain items without license. It was contended by the accused that he stored the said grains, after applying for a license and was on a belief that license would be issued to him. The learned ADM found on evidence that appellant had no guilty mind and consequently acquitted him. This was reversed by the Division Bench of the High Court holding that in such prosecution, the idea of guilty mind is different from a case of theft and he had only contravened the provisions of the statute. The Court relied on the presumption provided under section 7(2) of Essential Commodities Act which provided that, the person who stores any foodgrains in excess

quantity shall be deemed to store foodgrains for the purpose of sale, unless the contrary was proved. Supreme Court held that having regard to the object of the Act, namely, to control among others, trade in certain commodities, in general public interest, it cannot be said that the object of the Act would be defeated if mens rea was read as an ingredient of the offence. The provisions of the Act do not lead to any such exclusion. It was held that, it would be legitimate to hold that a person commits an offence under section 7 of the Act, if he intentionally contravenes any order made under section 3 of the Act. Hence, the Court set aside the conviction on the ground that he did not therefore intentionally contravene the provisions of section 7 of the Act. Justice Shah, in his separate judgment held that, an offence under section 7 of the Essential Commodities Act involves a guilty mind as an ingredient of the offence. It was held that, normally full definition of every crime predicates a proposition, expressly or by implication, as to the state of mind and if the mental element of any conduct alleged to be a crime is absent in any given case, the crime so defined is not committed. It is pertinent to note that in ***State of M.P. v. Narayan Singh and Another*** (supra) the decision in ***Swastik Oil Industries v. State of Gujarat and Anr.*** (supra) was referred to and approved. However, it is worthwhile to note that, in none of the above cases, the Constitutional validity of any statutory

provision was challenged.

17. According to the learned counsel for the petitioners, mens rea is an essential ingredient of every offence and if the ingredient of mens rea is not established in any crime, there cannot be any conviction. Sections 29 and 30 of the POCSO Act runs contra to the above principle, it was argued. The apprehension of the petitioners was that by virtue of section 29 and 30 of the Act, the rigour of mens rea was diluted and accused charged for an offence under POCSO Act can be punished, if proof of commission of act was established, even if mens rea was not established.

18. To substantiate the above contention, the learned counsel referred to the Division Bench decision of the Andhra Pradesh High Court in ***Mohan Krishna B. v. Union of India and Ors.*** (supra). In the above case, two questions were raised with regard to the prosecution under section 138 of the Negotiable Instruments Act. First question was, whether mens rea was a necessary ingredient of a criminal offence. The contention was that section 138 of the Negotiable Instruments Act dispensed with that indispensable ingredient and hence the section was arbitrary, being violative of Articles 14, 19(1), 20 and 21 of the Constitution of India. The next question that arose was, whether presumption incorporated under section 139 of the NI Act was violative of

the Constitutional guarantee of an accused person under Article 20(3) of the Constitution of India. Regarding the question of mens rea, it was contended by the learned Standing Counsel for the Union, supporting the statute that mens rea can be excluded and such exclusion may be necessary, considering the object of the statute. Whenever mental element was statutorily excluded, such exclusion need not necessarily be explicit, but can be by necessary implication also. The Division Bench considered the question whether the legislation creating a penal offence by excluding mens rea as a necessary ingredient was arbitrary and therefore, violative of Article 14 of the Constitution. Division Bench referred to the one of the earliest decision, that had come up before the Queens Bench in ***Sherras v. De Rutzen (1895)(1) QB 918).*** In that case, the licensee of a public house was convicted under section 16(2) of Licensing Act, 1872 for having supplied unlawfully liquor to a police constable on duty. The Queens Bench held that, there was a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, was an essential ingredient in every offence; but that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject mater with which it deals and both must be considered. It was held that, the exclusion of the word “knowingly” from the section was to shift the burden of proof as a result

of which the defendant has to prove that, he did not have guilty knowledge which was necessary to constitute an offence. In the above case, conviction was set aside on the view that the appellant did not have the guilty mind which was necessary to constitute an offence. This principle was reiterated later in ***Brend v. Wood ((1946)62 TLR 462)*** as well as in ***Harding v. Price (1948)(1) KB 695)***. It was noted by the Division Bench of the Andhra Pradesh High Court that, although guilty mind was the necessary ingredient of every offence, it can be displaced either by the words of the statute creating the offence or by the subject matter with which the offence deals and both these aspects must be considered by the court. According to the Division Bench, same was the position in India also. Applying the above principle, it was held that, section 138 of the Negotiable Instruments Act excludes mens rea by creating liability. Ultimately it was concluded that the absence of mens rea in Section 138 of the Negotiable Instruments Act for fastening criminal liability was not arbitrary and not violative of Art.14 of the Constitution of India.

19. The same view was followed in ***P N Krishna Lal and Ors. v. Govt. of Kerala and Ors.***(supra). In that case, the accused faced prosecution under the Kerala Abkari Act, with the aid of presumptions under sections 57A and 57B of the Abkari Act. Under Section 57A(4)(b),

it was provided that, where a person was prosecuted for an offence under subsection (3) for being in possession of any liquor or intoxicating drug in which any substance referred to in subsection (1) was mixed, the burden of proving that, he did not know that such substance was mixed with such liquor or intoxicating drug, shall be on the accused.

20. It was held that the question of intention bears no relevance to an offence under section 57A of the Abkari Act and equally of culpability or negligence. According to the Honourable Judges, mixing or permitting to mix noxious substance or any other substance with liquor or intoxicated drug or omission to take reasonable precaution or being in possession without knowledge of its adulteration for the purpose of unjust enrichment would be without any regard for loss of precious human lives or grievous hurt. The legislature has noted the inadequacy and deficiency in the existing law to meet the menace of adulteration of liquor etc and provided for new offences, and the question of intention was not relevant for the above consideration.

21. An appreciation of these expositions of law leads to a conclusion that, mens rea may not be absolutely essential in all the offences and the Statute may make exceptions, having regard to the peculiar nature of the offence by diluting the above principles explicitly or by necessary implication. Partial burden can also be fastened on the

accused in cases where there are special facts falling within the knowledge of the accused. That by itself will not make the provisions unconstitutional or violative of any International Conventions.

22. Reference to the penal provisions under Chapter II of the POCSO Act clearly shows a distinction between the definition of sexual harassment under section 11 of the Act and the definitions of other offences under the Act, namely, sexual assault, aggravated sexual assault, penetrative sexual assault and aggravated penetrative sexual assault. In the case of sexual harassment under section 11, if any act mentioned therein is committed with a sexual intent it will constitute a sexual harassment. Evidently, mens rea is statutorily made an important constituent of sexual harrassment. On the other hand, such an element of mens rea is not incorporated in the offences of sexual assault (S.7), aggravated sexual assault (S.9), penetrative sexual assault (S.3) or aggravated penetrative sexual assault (S.5). Evidently, the distinction is not without any reason. In the case of sexual harassment, those acts mentioned in S.11 includes certain acts, which may be done by a person innocuously and without sexual intent and it is possible that such acts may be misunderstood to be acts of sexual harassment, unless sexual intent is made an important ingredient of the offence. This being the position, Statute demands the existence of a mental state of mind or

sexual intent as an essential condition precedent for an offence under section 11 of the POCSO Act. However, in the case of all other offences under the Act, sexual intent is not statutorily an important ingredient. Such offences involve varying degree of physical interference on the victim or penetrative act, which if done, by itself explicitly exhibits a sexual intent and hence, mens rea is implied in the conduct of the agressor itself. Hence it need not even be specifically established by the prosecution. Hence Parliament has consciously omitted the ingredient of sexual intent from the above offences, since that mental element is implied in the very nature of the crime. Hence the contentions of the learned counsel for the petitioners that, mens rea is not made as an important ingredient of offence and hence the Act is contrary to the basic tenents of criminal jurisprudence is not sustainable.

23. The objects and reasons of the POCSO Act indicate that it is intended to protect children from offences of sexual assault, sexual harassment and pornography and also to provide for establishment of special Courts for the trial of such offences. It is specifically mentioned in the object that, it was passed on the mandate of Art.15(3) of the Constitution, which empowers the State to make special laws for children. The convention on the Rights of Child adopted by the General Assembly of United Nations on 20.11.1989, laid down a set of standards to be followed

by public in securing the best interest of the child. India being a party to the convention was under an obligation to give effect to the Declaration. It was for that purpose, POCSO Act was brought into force.

24. Both sides extensively referred to the various clauses of the above Convention on Rights of Child, which was intended to protect the interest of the children and to create an environment conducive for the proper and healthy upcoming of the child. Hence, the various provisions of the POCSO Act has to be interpreted, having regard to the object of the Statute and the malady it aims to remedy.

25. Among the various clauses of the Convention, Articles 16, 19, 34 and 39 are relevant. They read as follows:

> Art.16 :
>
> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation
>
> 2. The child has the right to the protection of the law against such interference or attacks.
>
> Art.19:
>
> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse,

neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Art.34:

States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity

(b) The exploitative use of children in prostitution or other unlawful sexual practices

(c) The exploitative use of children in pornographic performances and materials.

Art.39 :

States Parties shall take all appropriate measures to

promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

26. Article 15(3) of the Constitution of India empowers the State to enact special laws for children. Article 15 provides that, State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(3) provides an exception that nothing in the article shall prevent the State from making any special provision for women and children. Article 39 incorporates certain directive principles of state policy which are also relevant in this regard. Article 39(e) provides that, State shall direct its policy towards securing the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39(f) provides that, children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Part IV of Constitution which declares

the Directive Principles of State Policy mandates that the directive principles are fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws. POCSO Act, as discernible from its statement of objects and reasons is a legislation introduced to give effect to the Directive Principles of State Policy and also to discharge the mandate of the Constitution of India and the international convention.

27. The gravamen of the contention of the petitioners was that Sections 29 and 30 of the POCSO Act, in so far as it takes away the valuable defences available to the accused, and creates presumptions against accused imposes a reverse burden of proof and hence are void. These two provisions are challenged on the ground that, they are ultravires the Constitution in so far as it violates Articles 14, 19, 20(3) and 21 of the Constitution.

28. Before delving into the various rival contentions, it is essential to refer to sections 29 and 30 of the Act, which read as follows:

> 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 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.
>
> 30. Presumption of culpable mental state:
>
> (I) 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.

29. According to the learned counsel for the petitioners, sections 29 and 30 of the POCSO Act by reason of the presumptions, imply a distinct and separate procedure for recording evidence which are unknown to criminal jurisprudence. It was contended that, a distinction is made between the accused involved in POCSO cases and accused who are involved in other identical offences charged under various provisions of IPC or other penal statutes. The distinction based on the age of the victim alone is irrational and makes a fictional distinction between two classes, which has no rational nexus with the object sought to be achieved. Such a distinction of the accused is contrary to Article 14 of the Constitution of India, that the classification was not based on any intelligible or rational differentia and the classification has no nexus with the object sought to be achieved, which was to punish the guilty. It was contended that, if an act alleged against the accused in a POCSO case is attributed to an accused who has committed it on an adult, the latter is tried without the aid of presumptions and the burden of proving the case

is heavier on the prosecution than in the trial of an accused in POCSO case. In the former case, the trial starts from an initial premise that the accused is guilty, whereas no such presumption is drawn in the case of an accused who is involved in identical offences under the other statutes.

30. Replying to this, learned Government Pleader contended that, it was trite and settled law that, Articles 14, 15 and 16 supplement each other and that, clause (3) of Art.15 was an exception to Article 14 and clause (1) and (2) of Article 15 of Constitution. It was contended that, validity of a law even apparently offending Article 14 can be upheld, if it falls within ambit of clause (3) of Article 15.

31. To supplement the above contention, learned Government Pleader referred to the decision reported in ***Om Narain Agarwal and Others (supra)*** wherein it was held that, Clause (3) of Art.15 itself was an exception to Art.14 and clauses (1) and (2) of Art.15 of the Constitution. Under Art.14, a duty is enjoined on the State not to deny any person equality before law and the equal protection of laws within the territory of India. Art.15(1) provides that, the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Art.15(2) provides that no citizen shall on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition. Art.15(3) provides an

exception that, it shall not prevent the State from making any special provision for women and children. It implies that, in case a special provision is made for women, same would not be violative on the ground of sex, which is prohibited under clauses (1) and (2) of Article 15 of the Constitution.

32. To supplement the above contention that a law is valid if it falls within the ambit of Article 15(3) of the Constitution, even if it offends Art.14, the learned Government Pleader relied on the decisions of the Division Bench of this Court in ***Hindustan Latex Ltd.***(supra) and ***Anoop M.S's case (supra)***.

33. Since POCSO Act was implemented to achieve the mandate under Article 15(3) of the Constitution for providing special protection to children, POCSO Act cannot be challenged on the ground that it offends Article 14 of the Constitution. Further, treating the child victims as constituting a class by itself, is based on an intelligible differentia, and is meant to achieve the object of the Statute. Hence the statutory provisions do not offends Article 14.

34. The next limb of contention advanced by the accused was based on Article 20(3) of the Constitution. According to the learned counsel, Article 20(3) of the Constitution provides for protection in respect of conviction for offences which ensures that, no person accused

of any offence shall be compelled to be a witness against himself. The scope and ambit of Article 20(3) of the Constitution was elaborately considered by the Constitution Bench of the Supreme Court in ***State of Bombay v. Kathi Kalu Oghad (1961 KHC 343).*** It was held that the bar under Art.20(3) of the Constitution will arise only if the person is compelled to give evidence. Supreme Court held that in order to bring the evidence within the mischief of clause 3 of Art.20 of the Constitution, it must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement. Compulsion, in the context must mean what in law is called duress. Supreme Court concluded that the compulsion is a physical, objective act and the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore extorted. It was held that, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Art.20(3) of the Constitution.

35. The question whether presumptions similar to sections 29 and 30 of the POCSO Act, impose an absolute liability on the accused, or a

reverse burden of proof and whether it offends his right of defence came up for consideration in ***Chandran and Ors. v. State of Kerala and Ors.*** (supra). In that, the accused faced prosecution for offence under sections 302 and 307 IPC for mixing noxious substance with liquor resulting in death of several persons. Scope of section 57A of the Kerala Abkari Act and the question of intention also came up. It was held that, it was the cardinal rule of criminal jurisprudence that the burden of proof in relation to any offence and to establish all facts constituting the ingredients of the offence beyond reasonable doubt would lie upon the prosecution. If there is any reasonable doubt, the accused is entitled to the benefit of it. At no stage of the prosecution case, the burden to disprove the fact would rest on the defence. However, exceptions have been provided in sections 105, 106 and 113(a) of the Evidence Act, which also raises a presumption about abetment of suicide. Similarly, section 114A of the Evidence Act raises presumption of absence of consent in a rape case. Several statutes also provide burden of proof on the accused. Referring to the other decisions, it was indicated that, providing exceptions or to place partial burden on the accused was not violative of Universal Declaration of Human Rights or even International convention on civil and political rights.

36. The above issue was again considered by a two Judges Bench

of the Supreme Court in ***Andhra Pradesh Grain and Merchants Association's case (supra)***. In that section 16(1)(a) of the Food Adulteration Act was challenged on the ground that, it amounted to unreasonable classification. The presumption incorporated in section 16(1)(a) of the Food Adulteration Act was that, every trader charged with an offence was imposed with the burden of proving that he was not guilty of the offence charged by establishing facts which are within his knowledge.

37. It was held by Supreme Court that in considering whether absolute liability amounts to imposing unreasonable restrictions, the Court has to strike a balance between the individual right and public interest. It was also held that the Act does not infringe the guarantee of Art.20(3) of the Constitution. It was held that, a vendor charged with an offence under the Act is not compelled to be a witness against himself. The provision has been made with a view to secure formal evidence of facts.

38. This issue came up for consideration before the 5 Judges Bench of the Supreme Court in ***K.Veeraswami's case*** (supra). One of the contention raised in the above case was regarding the nature of offence created under 5(1)(e) of the PC Act, 1947. It was contended that under section 5(1)(e) of the Prevention of Corruption Act, 1947, reverse liability

was imposed on the accused to establish his innocence. Supreme Court referred to its earlier decision in ***State of Maharashtra v. Wasudeo Ramachandra Kaidalwar (1981(3) SCC 199).*** In that case, Supreme Court held that the terms and expressions appearing in section 5(1)(e) of the Act were the same as those used in the old section 5(3) of same Act.

39. Section 5(1)(e) of the PC Act, provided that if a public servant was in possession of pecuniary resources or property disproportionate to his known sources of income, for which the public servant cannot account, he is liable for punishment. Interpreting the scope of the provision, Supreme Court held that, the provision contained in section 5(1)(e) of the Act was a self contained provision. The first part of the section casts a burden on the prosecution and the second on the accused. When section 5(1)(e) uses the words, 'for which the public servant cannot satisfactorily account', it is implied that the burden is on such public servant to account for the sources for the acquisition of disproportionate assets.

40. After analyzing the above provision the Supreme Court held;

> “to substantiate the charge, the prosecution must prove the following facts before it can bring a case under section 5(1)(e), namely (1) it must establish that the accused is a public servant, (2) the nature and extent of the pecuniary resources or property which were found in

> his possession, (3) it must be proved as to what were his known sources of income I.e. known to the prosecution, and (4) it must prove, quite objectively that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence of criminal misconduct under section 5(1)(e) is complete, unless the accused is able to account for such resources of property. The burden then shifts to the accused to satisfactorily account for his possession of disproportionate assets. The extent and nature of burden of proof resting upon the public servant to be found in possession of disproportionate assets under section 5(1)(e) cannot be higher than the test laid by the Court in Jhingan case, (V.D.Jhingan v. State of U.P.(1996(3) SCR 736) : AIR 1996 SC 1762) i.e, to establish his case by a preponderance of probability.

In K.Veeraswami's case (supra), doubt was raised by the accused regarding the correctness of law laid down in Ramachandra Kaidalwar Case (supra). Rejecting that contention, it was held that, the decision did not require any reconsideration. It was held that, as per the interpretation, there is useful parallel found in section 5(3) and clause (e)

of section 5(1). Clause (e) creates a statutory offence which must be proved by the prosecution. It is for the prosecution to prove that the accused or any person on his behalf, has been in possession of pecuniary resources or property disproportionate to his known sources of income. When that onus is discharged by the prosecution, it is for the accused to account satisfactorily for the disproportionality of the properties possessed by him.

The Supreme Court also held that,

> "this procedure may be contrary to the well known principle of criminal jurisprudence laid down in Woolmington v. Director of Public Prosecutions, (1935 AC 462) that the burden of proof is always on the prosecution and never shifts to the accused person. But Parliament is competent to place the burden on certain aspects on the accused as well and particularly in matter "specially within his knowledge". (S.106 of the Evidence Act). Adroitly, as observed in Swamy case, 1960(1) SCR 461 : 1960 CriLJ 131 (at p.469) and reiterated in Wasudeo case, 1981 (3) SCC 199 : 1981 (3) SCR 675 (at p.683 : SCC p. 205), the prosecution cannot, in the very nature of things, be expected to know the affairs of a public servant found in possession of resources or property disproportionate to his known sources of income. It is for

> him to explain. Such a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Art.21 of the Constitution as contended for the appellant. It may be noted that the principle reaffirmed in Woolmington case (1935 AC 462) is not a universal rule to be followed in every case. The principle is applied only in the absence of statutory provision to the contrary (See the observation of Lord Templeman and Lord Griffiths in Rig. v. Hunt (1986(3) WLR 1115, 1118, 1129)".

41. Another decision, referred to by both sides which was directly on the issue, though, in relation to another statute was ***Noor Aga v. State of Punjab and Ors. (MANU/SC/2913/2008)***. In that case, the legality of section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was challenged on the ground that it imposes a reverse burden on the accused and hence was unconstitutional and against the human rights ethos.

42. The accused in Noor Aga's case contended that the provisions of section 35 and 54 of the NDPS Act being draconian in nature imposing reverse burden on an accused and, thus, being contrary to Art.14(2) of the International Covenant on Civil and Political Rights ensuring that an accused shall be deemed to be innocent until proved guilty, must be held

to be ultravires Articles 14 and 21 of the Constitution of India. It was further argued that, the burden of proof under the Act being on the accused, a heightened standard of proof in any event was required to be discharged by the prosecution to establish the foundational facts .

43. The above contention was considered in detail by the Supreme Court. It was held that, Presumption of innocence was a human right as envisaged under Article 14(2) of the International Covenant on Civil and Political Rights. It, however, cannot per se be equated with the Fundamental Right and liberty adumbrated in Article 21 of the Constitution of India. It, having regard to the extent thereof, would not militate against other statutory provisions, which, of course, must be read in the light of the Constitutional guarantees as adumbrated in Articles 20 and 21 of the Constitution of India.

44. The Court proceeded to hold that the Act contained draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain circumstances was placed on the accused, the same, by itself would not render the impugned provisions unconstitutional, it was held.

45. The Court further held that a right to be presumed innocent,

subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld. Fundamental Right is not absolute in terms, it was held.

46. The Court held that the provision for reverse burden is not only provided under special Acts like the present one, but also under the general statutes like the Indian Penal Code. The Indian Evidence Act provides for such a burden on an accused in certain matters, as, for example, under section 113A and 113B thereof. Supreme Court noticed that, having regard to the factual scenario involved in cases, e.g., where husband is said to have killed his wife when both were in the same room, burden is shifted to the accused. It was the consistent view of Supreme Court that 'reason to believe', as provided in several provisions of the Act and as defined in Section 26 of the Indian Penal Code was essentially a question of fact.

47. The view of the Court was that constitutionality of a penal provision placing burden of proof on an accused, must be tested on the anvil of the State's responsibility to protect innocent citizens. The issue

of reverse burden vis-a-vis the human rights regime must also be noticed. The approach of the Common Law was that it was the duty of the prosecution to prove a person guilty. This common law principle was subject to Parliamentary Legislation to the contrary. The Court noted that, in Article 11(1) of the Universal Declaration of Human Rights (1948), it was stated that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. Similar provisions have been made in Article 6.2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (1950) and Article 14.2 of the International Covenant on Civil and Political Rights (1966).

48. Supreme Court noticed that in Seema Silk & Sarees and Anr. v. Directorate of Enforcement and Ors. (2008(226) ELT 673 (SC), the Constitutionality of Sections 18(2) and 18(3) of the Foreign Exchange Regulation Act, 1973 were questioned on the ground of infringing the 'equality clause' enshrined in Article 14 of the Constitution. The Court held that, a legal provision does not become unconstitutional only because it provides for a reverse burden. Referring to Hiten P. Dalal v. Bratindranath Banerjee (2001 CriLJ 4647) and M.S.Narayan Menon v. State of Kerala (2006 CriLJ 4607), it was held that the question as regards burden of proof is procedural in nature.

49. According to the Court, the presumption raised against the accused was a rebuttable one. Reverse burden, as also statutory presumptions, have been envisaged in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. Evidently, any presumption has to emanate on establishment of certain foundational facts and presumption cannot arise from a vacuum.

50. Supreme Court held that, provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question. The provisions of section 35 of the NDPS Act as also Section 54 thereof, in view of the decisions of this Court, therefore, cannot be said to be ex facie unconstitutional.

51. According to the learned counsel for the accused, in Noor Aga's case (supra) the present contention regarding constitutionality of the Statute was not raised and consequently, Supreme Court did not get an opportunity to look into those aspects. On the other hand, learned ASG and learned Public Prosecutor specifically contended that, all the legal points were considered by the Supreme Court in that case and it

directly applied to the facts of this case. Analysis of the above precedents indicate that, judicial view is consistent that the procedure of reverse burden even if to a limited extent is justifiable. It is available in several other statutes, and such statutes have survived the test of challenge.

52. Regarding interpretation of statutes in the nature of the POCSO Act, which has a sociological content, Supreme Court had suggested for a purposive construction in M/s.Eera, through Dr.Manjula Krippendorf v. State (Govt. of NCT fo Delhi) and Anr. (AIR 2017 SC 3457) the Supreme Court held that,

> "to highlight Legislative intention and purpose of legislation regard being had to fact that context has to be appositely appreciated. It is foremost duty of Court while construing provision to ascertain intention of legislature, for it is an accepted principle that legislature expresses itself with use of correct words and in absence of any ambiguity or resultant consequence does not lead to any absurdity, there is no room to look for any other aid in name of creativity. Method of purposive construction to be adopted keeping in view text and context of legislation, mischief it intends to obliterate and fundamental intention of legislature when it comes to social welfare legislations..

> ..... Legislative intention must be gatherable from text, content and context of statute and purposive approach should help and enhance functional principle of enactment."

53. Same view was aired by another two Judges Bench of the Supreme Court in ***Independent Thought v. Union of India and Another ((2017) 10 SCC 800)*** and ***K.B.Nagur, M.D. (Ayurvedic) v. Union of India ((2012)4 SCC 483)***. Though, in the context of a different statute, Supreme Court held that the construction in such type of statutes should be preferred which makes the machinery workable.

54. According to the learned counsel for the accused, Art.21 of the Constitution which enshrines an essential and valuable Fundamental Right, steps in the interference in the life and liberty of a person otherwise than by due process of law. According to the learned counsel, due process of law as provided under the statute should be tested against Arts.14, 19 and 21 of the Constitution. To support this contention, learned counsel relied on the decision in ***Nikesh Tarachand Shah v. Union of India and Another ((2018)11 SCC 1)***. With reference to the significance of Art.21, it was held that,

> "Art.21 was the repository of a vast number of substantive and procedural rights post *Maneka Gandhi, (1978)1 SCC 248)*. The decision in *Maneka Gandhi case*

> has substantially infused the concept of due process in our constitutional jurisprudence. True, our Constitution has no "due process" clause. But after the decision in *Maneka Gandhi case,* Art.21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the court, it is for the Court to determine whether such procedure is reasonable, just and fair and if the court finds that it is not so, the Court will strike down the same."

55. In the above case, Section 45 of the Prevention of Money Laundering Act, 2002 was challenged on the ground that, it was violative of Art.21 of the Constitution. It provided that, no person accused of offence punishable for more than three years under any of the offence in part A of the schedule shall be released by the Court unless the Public Prosecutor was given an opportunity to oppose and unless, where Public Prosecutor opposes, the Court was satisfied that there are reasonable grounds for believing that the person is not guilty of such offence and that he is not likely to commit any offence while on bail. Analyzing the scope

of this protection, Supreme Court held that,

> "section 45 was a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental rights of personal liberty guaranteed by Art.21 of the Constitution, the Court must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. In the absence of any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Art.21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."

56. Ultimately, Supreme Court held that section 45(1) of the Prevention of Money Laundering Act, 2002 insofar as it imposed two further conditions for release on bail was unconstitutional as it violated Art.14 and 21 of the Constitution. Supreme Court had noted that though there are provisions akin to section 45 in other statutes also, their Constitutionality had been upheld on the ground that, there was a compelling State interest in tackling crimes of extremely serious nature.

However, restrictions under the Prevention of Money Laundering Act could not satisfy the test of predominant State interest in tackling crime of extremely serious nature. In the case of POCSO Act, the principle laid down in Nikesh Tarachands Case (supra) clearly will not apply in the case of POCSO Act due to the predominant state interest in tackling crimes against child, which are of extremely horrendous nature.

57. The scope of presumptions under the various statutes had come up before the Honourable Supreme Court in ***Kumar Exports v. Sharma Carpets ((2009)2 SCC 513), Abdul Rashid Ibrahim Mansuri v. State of Gujarat (supra) and Sher Singh @ Partapa v. State of Haryana (2015 KHC 4020)***. In Kumar Exports case (supra), the question of presumption under the Negotiable Instruments Act, sections 138 and 139 came up for consideration before the Supreme Court. Analyzing the scope of the Statute, vis-a-vis the presumption incorporated therein, it was noticed by the Supreme Court that in a significant departure from the general rule applicable to contracts, Section 118 of the NI Act provided certain presumptions to be raised. It also lay down some special Rules of evidence relating to presumptions which were justifiable since the NI passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are incorporated.

Legally, Supreme Court indicated that application of presumptions can apply if certain essential preconditions are satisfied, required under that Act and the provisions of the Evidence Act, thereby the persons against whom presumptions are raised are not prejudiced.

> "Applying the definition of the word, "proved" in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument was executed by the accused, the rules of presumptions under sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability."

58. Referring to the standard of proof required for rebuttal, it was held by the Supreme Court that rebuttal does not require proof beyond reasonable doubt. Something probable has to be brought on record, so that burden of proof can be shifted to the complainant by producing

convincing circumstantial evidence. Supreme Court explained as follows,

> "the accused in a trial under Section 138 of the Act has two option. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither probable nor contemplated. At the same time, bare denial of the passing of the consideration and existence of debt, apparently does not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court

> may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under sections 118 and 139 of the NI Act."

59. In ***Abdul Rashid Ibrahim Mansuri*** (supra), 3 Judges Bench analyzed the presumption regarding the culpable state of mind of an accused under section 35 of the NDPS Act. It was held that, if it is established prima facie that accused was in possession of contraband, burden of proof is on him to prove that he had no knowledge about the contents of such substance held in a bag or packet. The standard of proof was delineated in subsection (2) as "beyond reasonable doubt". If the court, on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of

substance concealed in the gunny bags, then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt un-dispelled. Even so, it is for the accused to dispel any doubt in that regard. The burden of proof cast on the accused under section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that, he can elicit answers from prosecution witnesses through cross examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the Court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

60. In Sher Singh's case (supra) the scope of the presumption under section 304B of the Indian Penal Code in the context of section 113A and 113 of the Evidence Act, 1872 came up for consideration. It was held that,

"in section 113 of the Evidence Act, Parliament has, in the case of a wife's suicide, "presumed" the guilt of the husband and the members of his family. Significantly, in section 113B which pointedly refers to dowry deaths, Parliament has again employed the word "presume". However, in substantially similar circumstances, in the event of a wife's unnatural death, Parliament has in section 304B "deemed" the guilt of the husband and the members of his family..... Art.20 of Constitution while not affirming the presumption of innocence, does not prohibit it, thereby, leaving it to Parliament to ignore it whenever found by it to be necessary or expedient. A percutaneous scrutiny reveals that some legal principles such as presumption of innocence can be found across a much wider legal system, ubiquitously in the Common Law system, and restrictively in the Civil Law system, it seems to us that the presumption of innocence is one such legal principle which strides the legal framework of several countries owing allegiance to the Common Law; even international Law bestows its imprimatur thereto. Art.11.1 of the Universal Declaration of Human Rights, 1948 states - "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public

trial at which he has had all the guarantees necessary for his defence." Art.14(3) of the International Covenant on civil and political Rights, 1966, assures as a minimum guarantee that everyone has a right not to be compelled to testify against himself or to confess guilt. Art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, firstly, promises the right to a fair trial and secondly, assures that anyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. We may immediately emphasize that the tenet of presumed innocence will always give way to explicit legislation to the contrary. The presumption of innocence has also been recognized in certain circumstances to constitute a basic human right. Parliament, however, has been tasked with the responsibility of locating myriad competing, if not conflicting, societal interests. It is quite apparent that troubled by the exponential increase in the incidents of bride burning, Parliament thought it prudent, expedient and imperative to shift the burden of proof in contradistinction to the onus of proof on to the husband and his relatives in the cases where it has been shown that a dowry death has occurred. The inroad into or dilution of

> the presumption of innocence of an accused has, even de hors statutory sanction, been recognized by Court in those cases where death occurs in a home where only the other spouse is present; as also where an individual is last seen with the deceased. The deeming provision in section 304B is, therefore, neither a novelty in nor an anathema to our criminal law jurisprudence."

61. In the interpretation of various provisions, the Courts have held consistently that wherever such presumption are provided under the statute against the accused, it does not absolve the duty of the prosecution to establish the foundational facts. In ***Naresh Kumar v. State of Himachal Pradesh (AIR 2017 SC 3859)*** , Supreme Court held that the presumption against the accused of culpability under section 35 and under section 54 of the NDPS Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. To hold that, the right of the accused to a fair trial could not be whittled down under the Act, Supreme Court relied on the decision in Noor Aga's case (supra). In the above

case, on facts, Supreme Court found that prosecution failed to establish the foundational facts beyond all reasonable doubt and consequently, the accused was acquitted.

62. The question of reverse burden in the context of sections 35 and 54 of the NDPS Act again came up for consideration in ***Gangadhar @ Gangaram v. State of Madhya Pradesh (2020(5) KLT 294 (SC).*** Explaining the scope, Supreme Court held that the presumptions of culpability against the accused under sections 35 and 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. It was further held that the stringent provisions of NDPS Act does not dispense with the requirements of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. It was held that the gravity of the sentence and the stringency of the provisions will therefore call for a heightened scrutiny of the evidence for establishment of foundational facts by the prosecution.

63. The operational field of the presumptions, specifically under

the POCSO Act have come up for consideration before the various High Courts in India. In ***David v. State of Kerala (2020(5) KLT 92)***, learned Single Judge of this Court had occasion to consider the scope of presumption and the duty of the prosecution, to establish the foundational facts. It was held that the standard of proof of innocence that is expected from the accused in a case under the POCSO Act was only on the touchstone of preponderance of probability. Section 30 of POCSO Act clarifies that the culpable state of mind on the part of accused was to be proved by the accused beyond reasonable doubt and not merely on the preponderance of probability, such requirement was absent in section 29 of the POCSO Act. In ***Yogesh Arjun Maral v. State of Maharashtra (2016(1) Bom CR(crl) 474)***, the learned Single Judge was skeptical about the presumption under section 29 of the POCSO Act and held the view that it was contrary to the basic and normal principles of criminal jurisprudence. The Honourable Judge held that the terms of the said section was very wide and a plain reading thereof indicates that the said provision is contrary to the basic and normal principles of criminal jurisprudence. It was opined that the ambit and scope of the presumption enacted by section 29 and its true meaning would certainly need a detailed discussion in an appropriate case.

64. However, the above view of the learned Single Judge does not

appear to be in consonance with the settled legal principles. Honourable Supreme Court in Nikesh Tarachand Shah's case (supra) had observed that such presumptions are justifiable in larger state interest and was not unknown to the criminal jurisprudence. It has also been reiterated that it does not absolve the prosecution of its duty to establish the foundational facts of the prosecution beyond all reasonable doubts.

65. In ***Ragul v. State (Crl.Appeal.No.391 of 2016)*** learned Single Judge of the Madras High Court had occasion to consider the scope of the presumptions under the POCSO Act, at the instance of the accused who challenged the conviction . It was held that section 29 of the POCSO Act has to be strictly construed in as much as penal consequences are involved. It was held that, Section does not say that it was irrebutable presumption and in this context, it can be safely concluded that the presumption to be drawn under the provision is a rebuttable presumption. The Court proceeded to consider whether the prosecution has put forth and established the foundational facts to draw presumption under section 29 of the POCSO Act.

66. In ***Navin Dhaniram Baraiye v. The State of Maharashtra (2018 CriLJ 3393)*** learned Single Judge of the High Court of Bombay held the view that section 29 of the POCSO Act imposes a duty on the accused to prove the contrary and in case he fails to do so, presumption

would operate against him leading to his conviction under the provisions of the POCSO Act. It was held that there was no dispute that no presumption is absolute and every presumption is rebuttable. Section 29 would come into operation only when the prosecution is able to establish the facts that would form the foundation for the presumption under section 29 of the POCSO Act. Otherwise, all that the prosecution would be required to do was to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted, as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under section 29 of the POCSO Act cannot be accepted as it would clearly violate the Constitutional mandate that no person shall be deprived of his liberty except in accordance with procedure established by law. It was held that, once the foundation of the prosecution case was laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that, a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through

effective cross examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version was to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyze the evidence on record in the light of the special features of the particular case, e.g., patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be. It was held that, if prosecution is successful in laying the foundational facts, the presumption is raised against the accused and he can rebut the same either by discrediting the prosecution witnesses through cross examination, demonstrating that the prosecution case is improbable and absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of

preponderance of probability.

67. In ***Sahid Hossain Biswas v. State of West Bengal ((2017)2 CALLT 243(HC))*** the same view was expressed by a learned Single Judge of Calcutta High Court. According to the learned Judge, statutory presumptions under the POCSO Act creates an exception to the ordinary rule of innocence available to the accused in a criminal trial and puts the onus on the accused to rebut the presumption and establish his innocence. Regarding the operational field of presumption, it was held that, once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross examination or by exposing the patent absurdities or inherent infirmities in their version. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version was to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyze the evidence on record in the light of the special features of a particular case.

68. The same view was expressed by the Division Bench of the Honourable High Court in ***Subrata Biswas and Ors. v. The State (MANU/WB/1440/2019)***.

69. 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.

70. 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 ultravires to the Constitution.

71. 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.

72. Hence the presumptions under sections 29 and 30 of the POCSO Act have to be examined on the anvil of tests laid down in ***Kathi Kalu Oghad's*** case (supra). While considering similar statutory provisions, Supreme Court, in ***Veeraswami***'s case, ***Ramachandra Kaidalwar's*** case, ***Noor Agas*** case, ***Kumar Export's*** case and ***Abdul Rashid Ibrahim's*** case has consistently held that the presumptions considered therein, which are similar to sections 29 and 30 of the POCSO Act do not take away the primary duty of prosecution to establish the foundational facts. This duty is always on the prosecution and never shifts to the accused. POCSO Act is also not different. Parliament is competent to place burden on certain aspects on the accused, especially those which are within his exclusive knowledge. It is justified on the ground that, prosecution cannot, in the very nature of things be expected to know the affairs of the accused. This is specifically so in the case of

sexual offences, where there may not be any eye witness to the incident. Even the burden on accused is also a partial one and is justifiable on larger public interest.

73. In Noor Aga's case (supra) it was held that, presumption of innocence is a human right and cannot per se be equated with the Fundamental Right under Art.21 of the Constitution of India. It was held that, subject to the establishment of foundational facts and burden of proof to a certain extent can be placed on the accused. However, Supreme Court in various decisions referred above has held that, provisions imposing reverse burden must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the Statute. Hence, prosecution has to establish a prima facie case beyond reasonable doubt. Only when the foundational facts are established by the prosecution, the accused will be under an obligation to rebut the presumption that arise, that too, by adducing evidence with standard of proof of preponderance of probability. The insistence on establishment of foundational facts by prosecution acts as a safety guard against misapplication of statutory presumptions.

74. Foundational facts in a POCSO case include the proof that the victim is a child, that alleged incident has taken place, that the accused has committed the offence and whenever physical injury is caused, to

establish it with supporting medical evidence. If the foundational facts of the prosecution case is laid by the prosecution by leading legally admissible evidence, the duty of the accused is to rebut it, by establishing from the evidence on record that he has not committed the offence. This can be achieved by eliciting patent absurdities or inherent infirmities in the version of prosecution or in the oral testimony of witnesses or the existence of enmity between the accused and victim or bring out the peculiar features of the particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour, or bring out material contradictions and omissions in the evidence of witnesses, or to establish that the victim and witnesses are unreliable or that there is considerable and unexplained delay in lodging the complaint or that the victim is not a child. Accused may reach that end by discrediting and demolishing prosecution witnesses by effective cross examination. Only if he is not fully able to do so, he needs only to rebut the presumption by leading defence evidence. Still, whether to offer himself as a witness is the choice of the accused. Fundamentally, the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial; except that in a trial under the POCSO Act, the prosecution is additionally armed with the presumptions and the corresponding obligation on the accused to rebut the

presumption.

75. In POCSO cases, considering the gravity of sentence and the stringency of the provisions, an onerous duty is cast on the trial court to ensure a more careful scrutiny of evidence, especially, when the evidence let in is the nature of oral testimony of the victim alone and not corroborated by any other evidence-oral, documentary or medical.

76. Legally, the duty of the accused to rebut the presumption arises only after the prosecution has established the foundational facts of the offence alleged against the accused. The yardstick for evaluating the rebuttable evidence is limited to the sale of preponderance of probability. Once the burden to rebut the presumption is discharged by the accused through effective cross examination or by adducing defence evidence or by the accused himself tendering oral evidence, what remains is the appreciation of the evidence let in. Though, it may appear that in the light of presumptions, the burden of proof oscillate between the prosecution and the accused, depending on the quality of evidence let in, in practice the process of adducing evidence in a POCSO case does not substantially differ from any other criminal trial. Once the recording of prosecution evidence starts, the cross examination of the witnesses will have to be undertaken by the accused keeping in mind the duty of the accused to demolish the prosecution case by an effective cross

examination and additionally to elicit facts to rebut the statutory presumptions that may arise from the evidence of prosecution witnesses. Practically, the duty of prosecution to establish the foundational facts and the duty of accused to rebut presumptions arise, with the commencement of trial, progresses forward along with the trial and establishment of one, extinguishes the other. To that extent, the presumptions and the duty to rebut presumptions are co-extensive.

77. The discussion of above shows that, with the inbuilt safeguards in the Act, the limited presumption do not upset the basic features of criminal law. Tendering of the oral evidence by accused is not mandatory or essential. To that extent, the apprehension of the petitioners that, sections 29 and 30 of POCSO Act violate Art.20(3) of the Constitution is misplaced.

In the result,, sections 29 and 30 of the POCSO Act is held to be Constitutional and they do not violate the Fundamental Rights, nor are they contrary to the basic criminal Principles.

W.P(C) and Crl.M.C fails and are dismissed.

Sd/-

SUNIL THOMAS

JUDGE

Sbna

APPENDIX OF WP(C) 15564/2017

PETITIONER'S EXHIBITS:

EXHIBIT P1	**CERTIFIED COPY OF THE FINAL REPORT IN 590/2016 ON THE FILE OF ADDL SESSION COURT-I, THRISSUR**
EXHIBIT P2	**CERTIFIED COPY OF THE FIR IN CR.761/2015 OF ELOOR POLICE STATION**
EXHIBIT P3	**TRUE COPY OF THE COMMON ORDER OF KERALA STATE HUMAN RIGHTS COMMISSION IN HRMP NOS.6260/2015, 6318/2015, AND 6750/2015 DATED 11.11.2015**
EXHIBIT R2 A	**A COPY OF THE JUDGMENT DATED 25.01.2017 OF GAUHATI HIGH COURT IN CRIMINAL REFERENCE (TAKEN UP) NO.1 OF 2015**

APPENDIX OF Crl.MC 3104/2018

PETITIONER'S EXHIBITS:

ANNEXURE A	**TRUE COPY OF THE FINAL REPORT IN CRIME NO. 1089/2016 OF INFO PARK POLICE STATION, KOCHI CITY.**
ANNEXURE B	**TRUE COPY OF THE COMPLAINT PREFERRED BY THE 1ST RESPONDENT HEREIN BEFORE THE INSPECTOR GENERAL OF POLICE, ERNAKULAM RANGE.**
ANNEXURE C	**TRUE COPY OF THE F.I.R. IN CRIME NO. 1089/2016 OF INFO PARK POLICE STATION, KOCHI CITY.**