
A CRITICAL STUDY ON BURDEN OF PROOF

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ABSTRACT

There lies a presumption that an accused is innocent until proved otherwise. There is no need to establish the innocence of the accused but to prove him guilty the prosecution has to hand in the best evidences. The criminal justice system of the country is very well organised with the provisions in legislations. It covers almost every aspect of the process right from the planning of an offence; attempt to commit an offence to the conviction of the accused. The court needs strict and reliable evidences to get to a conclusion of the case. For covering the aspects of evidences in court India has the act known as Indian Evidence Act, 1872. It is necessary to have better understanding of the evidences that can be presented before the court which will be considered relevant and admissible. The question of relevancy comes first and then the admissibility of that relevant evidence is questioned. The main object of the law is to avoid the irrelevant, misleading and unfair evidences to get into court and affect the justice system of the court. The concept of burden of proof and the principle 'innocent until proven guilty' requires prosecution to prove beyond any reasonable doubt that the accused has committed the offence. The prosecution has to rely on relevant evidence obtained legally. This paper focuses on principles surrounding the concept of burden of proof and critically analyses the provisions related to it.

Keywords: Evidence, Guilty, Judicial, onus of proof

1. INTRODUCTION

The law of evidence is a critical piece of legislation which supplements the working of Indian courts. Evidence is presented before the court by the respective parties to assert some fact or support a claim. These evidences allow court to come to a decision. The concept of burden of proof involves the responsibility to provide an evidence for a certain fact or claim. This concept is based on the principle that until and unless an exception is provided, the burden of proof will rest on the person who has asserted a fact or is making a claim.

In criminal cases, the initial burden is always on the prosecution that the accused has committed a crime. If the prosecution fails to establish beyond reasonable doubt that the accused is guilty, the accused is entitled to an acquittal. In civil cases, the plaintiff's burden of proof is called preponderance of evidence. Preponderance of evidence means that plaintiff has to produce slightly more or better evidence than the defendants in the court. It can be as low as 51 per cent plaintiff to 49 per cent defendant. Preponderance is merely a standard but plaintiff has to produce better evidence compared to defendant to convince the court that it is more likely than not that the defendant is liable for plaintiff's loss or injuries. If the quality of evidence provide by the plaintiff does not meet the standards then court can find that burden of proof is not met and the plaintiff loses the case.

The burden of proof has two principles-

- Onus probandi - it is a general rule which means that a party who alleges the affirmative has to prove it.
- Factum probans - it generally means proving a fact. The facts that are required to be proved are those which are not self-evident in nature.

1.1 STATEMENT OF PROBLEM

The present research intended to focus on the provisions related to burden of proof in Indian courts. It critically analyse the laws related to it and loopholes. It focuses on getting an overview of the working of criminal justice system. It attempts to recognize the complexity which leads to delay in justice.

1.2 RESEARCH OBJECTIVE

The objectives of this research are:

- To gain knowledge about the provisions of burden of proof.
- To analyze status of law related to burden of proof.
- To research thoroughly beyond the principle of innocent until proven guilty.
- To analyze provision related to rape in light of women empowerment.
- To analyze recent amendments in this field of law.

1.3 RESEARCH METHODOLOGY

For this research paper, only doctrinal method has been used.

For doctrinal research, various articles, law journals, books, case laws etc. were studied. This type of research is done to gain more knowledge about the topic and to critically analyze the legal implications of every provisions in justice system. This type of research is helpful in analyzing the theoretical aspect of law and then comparing it to the actual practice and implementation.

2. ONUS OF PROOF AND BURDEN OF PROOF

- There is distinction between both the terms. The burden of proof lies upon the person who has to prove a fact and it remains constant. Whereas onus of proof is the burden to provide actual evidence which can shift from one party to another and such shifting is the continuous process in the evolution of the evidence.
- Burden of proof is the burden to prove the main contention of the party requesting the action court whereas onus of proof is burden to provide actual evidence.
- Burden of proof assumes importance in early stage of the case whereas onus of proof has the greater force where the question is which party to begin.

The term burden of proof has two different meanings-

- Burden of persuasion or plea- This burden rests upon the single party who asserts the issue. It is called burden of establishing the case. It is fixed at beginning of trials by statements of pleading and remains unchanged under any circumstances. The party carrying the burden have success in its claims only if it satisfied the tier of fact. It is embodied under section 101 of the Indian evidence Act, 1872. It is the duty to convince the jury or judge to a certain level, beyond the reasonable doubt.
- Evidential burden- It is the obligation to present evidence to judge or jury. This burden of proof is always unstable and keeps changing between the parties as proceedings go on. It is provided in section 102 of the Indian Evidence Act. It is basically the concept of onus of proof.¹

3. PROVISIONS

3.1 BURDEN OF PROOF

Section 101: It simply lays down the general rule that one who is bound to prove the existence of the fact, the burden of proof lies on him. If a person wants a judgement to be in his favour on the basis of the existence of evidence that he argues must show that those facts exists.²

Illustrations

A desire that court gives judgement declaring him the rightful owner of the land in possession of B, on the basis of reason of facts he asserts and B denies. He must prove the existence of those facts.

¹INDIAN LEGAL SOLUTION, <https://indianlegalsolution.com/burden-of-proof-and-onus-of-proof/>(last visited on January 22, 2022)

² The Indian Evidence act, 1872, § 101, No.1, Acts of Parliament, 1872 (India).

3.2 ON WHOM BURDEN OF PROOF LAYS

Section 102: This section aims to locate the party on which the responsibility falls. The burden of proof lies on the party whose stance will fail if none of the parties provide evidence. The burden of prove lies on the party who asserts the affirmative of the issue rather than on the party who denies it.³

Illustration

A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to retain his possession. Therefore the burden of proof is on A.

A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B.

Sometimes the defendant party provide evidences in the form of admissions or conduct or failure to controvert, they tend to strengthen plaintiff's case so much that the heavier burden of proving a case as distinguished from the mere duty of introducing or showing the existence of some evidence on record stated in section 102 is itself discharged.

3.3 BURDEN OF PROOF AS TO A PARTICULAR FACT

Section 103: The rule laid down in this section is that if a person wishes that court believe in existence of some fact then he has the burden to prove the existence of it.⁴

One exception is that if it is provided by any law that burden of proof of that fact shall lie on any particular person.

³ The Indian Evidence act, 1872, § 102, No.1, Acts of Parliament, 1872 (India).

⁴ The Indian Evidence act, 1872, § 103, No.1, Acts of Parliament, 1872 (India).

For instance, if a person takes the plea of alibi and he wants the court to believe that he was not at the place of crime when it was committed then he has the responsibility to prove it. He can show documents like receipts and tickets and provide witnesses.

Illustration

A stole B's car. B wishes that court believes it so he has to provide evidence for the same before the court.

3.4 BURDEN OF PROVING FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE

Section 104: This section talks about the burden of proving a fact that is necessary to be proved to allow the person to provide an evidence of any other fact. Such burden is on the person who wishes to produce such evidence.⁵

Illustrations

A wants to provide a dying declaration by B. To provide that, he first must prove the fact that B is dead.

This section put a general burden on the plaintiff to prove any facts pleaded by him. Apart from this, it also puts a burden on the person who pleads fraud or other similar factors to prove them without any scope of shifting of onus.

3.5 BURDEN OF PROOF THAT THE CASE ACCUSED COMES WITHIN EXCEPTIONS

Section 105: When a person is accused of any offence, burden of proving existence of circumstances bringing the case within any

- General exceptions in IPC, or
- within any special exception or proviso contained in any other part of same code, or
- in any law defining the offence is upon him and court shall presume absence of such circumstances.⁶

⁵ The Indian Evidence act, 1872, § 104, No.1, Acts of Parliament, 1872 (India).

⁶ The Indian Evidence act, 1872, § 105, No.1, Acts of Parliament, 1872 (India).

The general principle requires the court to presume innocence of accused until guilt is proved beyond reasonable doubt but when the guilt is established the onus shifts on accused to take defence under general exceptions of Indian penal Code or any other special law.

The standard of proof on accused to claim an exception under section 105 is lower than it would be in case of prosecution in similar circumstances. He needs not to provide evidence to prove innocence beyond the reasonable doubt.

Illustration

1. If A is accused of murder and he comes under exception of unsoundness of mind. The burden of proving this fact is on A.

2. Section 325 of the Indian Penal Code (45 of 1860) provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325. The burden of proving the circumstances bringing the case under section 335 lies on A.

3.6 BURDEN OF PROVING FACT ESPECIALLY WITHIN KNOWLEDGE

Section 106: When any fact is confined to the knowledge of a person then the burden of proving that fact is upon him.

The section uses the term “especially within knowledge” denoting that the possession of such knowledge also shifts the burden of proof upon the possessor.⁷

Illustration

If a man and woman were present in the bedroom of the person who was severally injured and killed, the burden of proving the rationale behind their presence in bedroom was upon them. It is to be assumed if they are present at the scene of crime they would especially have knowledge regarding the circumstances under which death of person was caused.

⁷ The Indian Evidence act, 1872, § 106, No.1, Acts of Parliament, 1872 (India).

3.7 BURDEN OF PROVING THE DEATH A PERSON KNOWN TO HAVE BEEN ALIVE UNDER 30 YEARS

Section 107: If a person affirms that a person is dead but he is known to be alive within 30 years then the person who affirms such fact has the burden to prove it.⁸

This section is based on principle of continuity of things. Once a state of things is shown to exist, the law presumes that it continues to exist for a certain period of time. This principle also applies to continuity of life for at least 30 years.

3.8 BURDEN OF PROVING THAT A PERSON IS ALIVE WHO HAS NOT BEEN HEARD OF FOR SEVEN YEARS

Section 108: “Provided that when question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, burden of proving that he is alive is shifted to person who affirms it.”⁹

This section is a proviso of section 107. It is not a requirement of section 108 of the Indian Evidence Act that the date of death of the person whose death is presumed must be established. All that is said is that if a person is not heard of for a period of seven years, his death may be presumed. There is no presumption as to the time of death at any particular time within that period.

3.9 BURDEN OF PROOF AS TO RELATIONSHIP IN CASES OF PARTNERS, LANDLORD AND TENANT, PRINCIPAL AND AGENT

Section 109: When the question is persons concerned are partners, principal and agent, landlord and tenant and it has been shown that they have been acting as such then the burden of proving that they are not more in those relationships or have ceased to stand is on the person who affirms it.¹⁰

This section lays down that the principle of continuity of certain relationships between persons. It is presumed that's such relationship continues unless the contrary is proved. If one of the parties says that they are not more related, he must be prove the non-existence of relationship.

⁸ The Indian Evidence act, 1872, § 107, No.1, Acts of Parliament, 1872 (India).

⁹ The Indian Evidence act, 1872, § 108, No.1, Acts of Parliament, 1872 (India).

¹⁰ The Indian Evidence act, 1872, § 109, No.1, Acts of Parliament, 1872 (India).

3.10 BURDEN OF PROOF AS TO OWNERSHIP

Section 110: If a person is in possession of anything to which any other person claims that he is the rightful owner of such thing then the burden of proving such ownership is on the person who claims to be the owner.¹¹

This section is related to the principle that possession is prima facie evidence of complete title and anyone who intends to drive out the possessor then he must establish the right to do so. But this principle does not apply when the possession is obtained by fraud or force.

The presumption under section 110 would apply only if two conditions are satisfied-

- (i) that the possession of the plaintiff is not wrongful, and
- (ii) that the title of the defendant is not proved.

3.11 PROOF OF GOOD FAITH IN TRANSACTIONS WHERE ONE PARTY IS IN RELATION OF ACTIVE CONFIDENCE

Section 111: When the good faith of the transaction is in question, the burden of proving the same stands on the shoulders of that party who is in position of active confidence.¹²

Illustration

The good faith of a sale between client and attorney is in question in the suit brought up by client. The burden of proving the good faith in transaction lies on the attorney.

The active confidence means that the relationships between persons are such that one is bound to protect the interest of the other. The law requires that party enjoying confidence must act in good faith and burden lie upon him that he did act in good faith. Such relationships exist in cases such as doctor and patient, advocate and client, father and son, husband and wife etc.

¹¹ The Indian Evidence act, 1872, § 110, No.1, Acts of Parliament, 1872 (India).

¹² The Indian Evidence act, 1872, § 111, No.1, Acts of Parliament, 1872 (India).

Section 111 applies to a valid transaction where one of the parties are accruing benefit from the other without acting in a good faith or who is taking advantage. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant, the burden would lie on him as he had alleged fraud.¹³

If a Pardanashin woman enters into an agreement with her managing agent then the onus is completely on the agent to prove the good faith of transaction. This rule strictly applies to Pardanashin woman who do not appear in public and do not have any knowledge to understand the business affairs.

3.12 PRESUMPTION AS TO CERTAIN OFFENCES

Section 111A: This section is applicable to specific sections namely-

- (a) an offence under section 121, Section 121A Section 122 or Section 123 of the Indian Penal Code (45 of 1860);
- (b) criminal conspiracy or attempt to commit, or abatement of, an offence under section 122 or Section 123 of the Indian Penal Code (45 of 1860).

If any person commits any of the above mentioned offences in –

- (a) any area declared to be a disturbed areas under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or
- (b) Any area in which there has been, over a period of more than one month, extensive disturbance of the public peace

And it is shown that-

- a) person was present in that area at that time when explosives or firearms were used at
- b) person was at that place to resist or attack the members of armed forces or forces employed for maintenance of public order

It shall be presumed that such person committed the offence unless and until the contrary is proved.¹⁴

3.13 BIRTH DURING MARRIAGE CONCLUSIVE PROOF OF LEGITIMACY

Section 112: This section stipulates that any person born during the continuance of valid marriage of his/her mother and a man or within 280 days of its dissolution should be treated as the child of that man. The mother should have remained unmarried during those 280 days of period.¹⁵

It is the general presumption drawn by all the courts but if the parties can prove they had no access to each other at the time the child should have been conceived then the presumption stands rebutted.

This section is based on the maxim 'Pater rest quern nuptioe' which means that he is the father whom the marriage indicates. All the children born in wedlock are legitimate children of husband and wife.

3.14 PROOF OF CESSION OF TERRITORY

Section 113: This provision says that a publication in the Official gazette that any portion of British territory has before the commencement of part III of the government of India Act, 1935 been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a legal transfer of that territory took place on the date specified in that notice.¹⁶

3.15 PRESUMPTION AS TO ABETMENT OF SUICIDE BY MARRIED WOMAN

Section 113A: This section and 13B creates presumptions against husband and his family in cases of cruelty, harassment and dowry death of the wife. The burden of proof is on the husband and family to prove that they have no part in the death of the wife.

¹⁴ The Indian Evidence act, 1872, § 111A, No.1, Acts of Parliament, 1872 (India).

¹⁵ The Indian Evidence act, 1872, § 112, No.1, Acts of Parliament, 1872 (India).

¹⁶ The Indian Evidence act, 1872, § 113, No.1, Acts of Parliament, 1872 (India).

Section 113A states that if a woman commits suicide under 7 years of her marriage and there is a question whether the commission of suicide has been abetted by her husband or relatives of husband, the court will presume that the husband and relatives abetted the suicide taking into consideration all the other circumstances of the case.

This section was inserted Criminal Law (second amendment) act 46 of 1983. This was introduced because there were increasing numbers of dowry deaths.

3.16 PRESUMPTION AS TO DOWRY DEATH

Section 113B: When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.

Dowry death is defined in section 304 Indian Penal code. On proof of all the ingredients mentioned above in this section, the court shall raise a presumption that the accused caused the dowry death. The court has no discretion in this regard to raise a presumption or not.

3.17 PRESUMPTION OF CERTAIN FACTS

Section 114: This section states that court may presume existence of certain facts which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in relation to the facts of particular case.¹⁷

- Common course of natural events: This signifies that an event can take place only when certain circumstances becomes favourable or unfavourable. For example: gestation period, continuance of life etc.
- Human conduct: Human conduct means conduct or action taken by a person who can judge what is wrong and right. That conduct can be negative or positive and can be determined by his actions in a particular case. For example, if a man and woman are living together for a long period but are not married they can be regarded as married couple for particular matters
- Public and private business: It is a common presumption that everything is performed

¹⁷ The Indian Evidence act, 1872, § 114, No.1, Acts of Parliament, 1872 (India).

rightly and regularly until the contrary is proved. If a letter was sent and it had the correct address, it can be presumed that letter got received. Mere denial of not receiving it is not enough.

Presumption is not mandatory under this section. The section gives enough discretionary power to the court to draw inferences from the fact. The presumptions are 'may presume' and are rebuttable.

Presumption is not evidence or proof

If living relationship between the parties continued for long time, it cannot be termed as 'walk in walk out' relationship. There is presumption of marriage between them. From certain fact or facts, the court can draw an inference and that inference will remain until it is dispelled or disapproved.

The presumption under this section only applies in case of absence of evidences. When facts are ascertained it will disappear.

Illustrations

The provision is not only applicable to certain illustrations provide in the section but can be equally applied to similar cases. A very wide application has been intended by makers by giving these illustrations although these are not exhaustive.

Illustration A presumption of possession of stolen goods

When a person was found in possession of stolen goods soon after theft it gives rise to two presumptions-

- i) either he is thief or
- ii) he has received goods knowing them to be stolen

All other factors are to be taken into consideration in arriving at a decision. If the person can give a reasonable reason for the possession of such goods then the presumption gets rebutted. Unexplained possession of goods is sufficient to create a presumption of guilt.

The presumption can be drawn only if fact of recovery is proved beyond reasonable doubt.

The section clarifies that there must be particular cases where such presumption cannot be drawn. To support this, another illustration is given which is not exhaustive:

‘A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business’

Illustration B Accomplice

An accomplice is a person who has taken part in the commission of crime. This illustration lay down that an accomplice is unworthy of credit unless he is corroborated in material particular.

It is absolute discretion of the court to raise any assumption. The corroboration need not to be direct evidence. It can be circumstantial and indirect evidence of the connection of the accused with the crime. It is unsafe to act solely on the evidence of co-accused unless it is corroborated with material evidence.

It is well settled principle that rule of prudence requires that evidence of accomplice should ordinarily be corroborated by some other evidence.

Accomplice evidence is regarded untrustworthy and that is why it should be corroborated for the following reasons-

1. An accomplice is likely to give false evidence in order to shift the guilt from himself.
2. An accomplice is a participator in crime and thus an immoral person.
3. He gives evidence under the promise of pardon or in the expectation of an implied pardon.
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7. An accomplice is likely to give false evidence in order to shift the guilt from himself.
8. An accomplice is a participator in crime and thus an immoral person.
9. He gives evidence under the promise of pardon or in the expectation of an implied pardon.

Illustration C Presumption as to bill of exchange

This section is based on the maxim 'Omnia praesumuntur rite esse acta' which means all things are presumed to be rightly done. This maxim is also applicable to private businesses.

According to this section if a bill of exchange accepted or endorsed was accepted the court may presume that bill of exchange was accepted for good consideration.

Section 18 of the Negotiable Instruments act also provides for much like presumption. It extends the presumption to all kinds of instruments. When an instrument is endorsed, negotiated or transferred, the presumption is that it was endorsed, negotiated or transferred for consideration.

Section 14 of Evidence act is general in nature whereas section 18 of Negotiable Instruments applies only to parties in instrument.

Under section 14 of Evidence act the court has discretion to draw a presumption whereas under section 18 of Negotiable Instruments the court is bound to start with presumption.

There can be particular cases where such presumption cannot be drawn. To support this, another illustration is given which is not exhaustive:

A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence

In such case there is no logical basis to draw a presumption that bill of exchange was drawn for good consideration.

Illustration D Presumption of continuity of things

The presumption is that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence.

There can be particular cases where such presumption cannot be drawn. To support this, another illustration is given which is not exhaustive:

If a river is known to run in a certain course 5 years ago and now it is known there have been lot of floods in that area then river might have changed its course. It would be wrong to presume that river stayed the same as it was 5 years ago.

Illustration E Presumption of performance of judicial and official acts

The presumption is that a judicial or official act is done regularly. This rule is also based on the maxim that all things are presumed to be rightly and regularly done.

The statements of facts happened at the hearing and recorded in the judgement of the judge are presumed to be correctly done.

In case of official acts, for instance, if there are entries made in the revenue records, the presumption is that entries are correct unless contrary is proved.

If a marriage between catholic Christian wife and Hindu husband is in question. It can be presumed that priest must not have performed the rituals of marriage without the conversion of catholic wife.

Illustration F Presumption of transaction in usual course of business

The presumption is that the course of business is followed by the parties in commercial transaction. For instance, if a letter correctly posted did not come back it can be presumed that in the course of business it was received by the addressee.

Where a registered letter or notice of an appeal deemed to have been served, the mere statement of not receiving it cannot rebut the presumption.

But it can be shown that usual course of the post was interrupted due to certain circumstances then the presumption cannot be drawn.

Illustration G Presumption of withholding evidence

It deals with presumption arising from withholding evidence. It gives discretion to the court to presume that if evidence is withheld by the party, it goes against that party.

If merely evidence is not examined in the court, then the court cannot presume that if they had examined the witness he would have given contrary.

For instance, if anti adulteration authorities did not produced sample sent for analysis before the court then it can be presumed that that sample must have something against them.

Illustration H Refusal to answer

The presumption is that if a person refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him.

But there might be cases where a person refuses to answer because it will cause him any kind of loss unconnected with matters in relation to which it is asked.

Illustration I Presumption as to document in hand of obligator

According to this illustration, it is natural presumption that a man will protect his interests by securing his document before or at the time of discharging it.

Where an instrument of debt or security for it is in the hands of debtor, the presumption can be drawn that debt must have been discharged.

There must be circumstances when such presumption cannot be drawn like if there are chances that obligator might have stolen it.

10. CASE LAWS

Jarnail Singh v. State of Punjab¹⁹

The honourable Supreme Court clarified the position of burden of proof in all criminal cases. The court stated that the initial responsibility of proving if accused had committed the crime beyond all reasonable doubts is on the prosecution. It cannot rely on the evidence provided by the accused in defence if it fails to provide evidence to shed off the burden.

Banwari Lal v Road Transport²⁰

In this case, the goods were lost by carrier. The burden of proving that there was no negligence on the part of carrier is initially on prosecution.

The defendants can come up with evidence and it may be false but prosecution has to give their version with evidence showing that there was no negligence on their part.

Special Development Area v. Pooran Lal²¹

The plaintiffs filed a case to get back the property which they claimed to being used by defendants in unauthorized manner.

The burden of proof lies on the party whose stance will fail if none of the parties provide evidence. The burden of prove lies on the party who asserts the affirmative of the issue rather than on the party who denies it.

In this case it was the plaintiff who was claiming and only they will lose the property if none of the parties provided the evidence. Therefore, the burden of proving that defendants have no authority over the property is on the prosecution.

¹⁹ Jarnail Singh v. State of Punjab, AIR 1996 SC 755.

²⁰ Banwari Lal v Road Transport, AIR 1989 Pat. 303.

²¹ Special Development Area v. Pooran Lal, 1997 CriLJ 3484.

*Samuthram Alias Samudra Rajan v. State of Tamil Nadu*²²

In this case the defendants wanted to take advantage of the exception 4 of section 300 of Indian Penal Code. It talks about when there was sudden fight between the parties and there was no intention of either of the parties to kill the other one. It was in the heat of the moment that the defendants caused death or grave bodily injury.

The court stated with regard to section 105 of Indian Evidence Act that an accused is presumed to be innocent till his guilt is proven and burden lies on the prosecution to prove his guilt. But when accused want to take the benefit of exceptions the burden of proof lies upon him that the offence done by him come under exceptions.

*Pratap v. State of Uttar Pradesh*²³

The Supreme Court held that burden of proving that case comes within any of the exception can be discharged by showing preponderance of probability.

The standard of proof on accused to claim an exception under section 105 is lower than it would be in case of prosecution in similar circumstances. He needs not to provide evidence to prove innocence beyond the reasonable doubt. However, he alone has this burden to prove that his case comes under exceptions.

*Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*²⁴

In this case the question was whether Nandlal was actually the father of the daughter of his wife. A test shows that he is not the father of the child.

There was conclusive proof proving the legitimacy of the child. Whereas through analysis of DNA samples of husband, wife and daughter, it was proved that husband was not the father.

Hence, there was clash between conclusive proof of legitimacy and DNA test results. Under these circumstances, the Supreme Court relied upon the scientific proof.

The husband was granted relief from paying the maintenance to wife and her child on the basis of scientific evidence which is accepted to prevail over conclusive proof under law.

²² Samuthram Alias Samudra Rajan v. State of Tamil Nadu, (1997) 2 Crimes 185 (Mad).

²³ Pratap v. State of Uttar Pradesh, 1973 AIR 786.

²⁴ Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576.

11. ANALYSIS OF SECTION 114A THROUGH FEMINIST PERSPECTIVE

Section 114A Presumption as to absence of consent in certain prosecution of rape

This section provides for presumption which favours women in cases of rape. The section reads as follows-

“In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the I.P.C where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.”¹⁸

The following three conditions must be satisfied before the presumption contained herein can be raised:

1. It should be proved there was sexual intercourse or an attempt to do the same.
2. The question before the court should be whether such intercourse was with or without the consent of the woman.
3. The woman should have made the statement that she did not consent to sexual intercourse.

This section was not originally present it was added in the year 1983 under Criminal Law (Amendment) Act. There was a case in the Supreme Court which led to this addition.

Tuka Ram and Anr v. State of Maharashtra¹⁹

It is widely known as Mathura rape case. This case was revolutionary as it sparked public protests and led to sexual assault laws being reformed. After this case, the women empowerment movement rose to another level and people begin to see the gender based stereotypes and prejudices women have to face on daily basis.

¹⁸ The Indian Evidence act, 1872, § 114A, No.1, Acts of Parliament, 1872 (India).

¹⁹ Tuka Ram and Anr v. State of Maharashtra, 1979 AIR 185.

Facts

- Mathura was an orphan girl aged between 14 to 16 years lived with her brother Gama. She was under employment under Munshi and developed into relationship with munshi's cousin.
- On March 26, 1972 Gama complained that her sister had been kidnapped by munshi and his cousin. All the parties were asked to report to the police station.
- The head constable Tukaram directed Mathura to wait in the police station and they bolted the doors and switched off the lights of police station.
- After that, ganpat took Mathura to the chapri and raped her. Then Tukaram tried to rape her but failed to do so due to intoxication.
- The crowd started gathering in front of police station and haring this Tukaram told the crowd that Mathura already left.
- Shortly after Mathura came out of the police station and told everyone that she has been raped by Ganpat.

Held

- The sessions court acquitted the two accused for two major reasons. First reason was that she was a shocking liar and her testimony was filled with falsehood and improbabilities.
- The other reason given by the court was most shocking and misogynist in nature. It was tat since she was habitual to sexual intercourse as deduced from medical examination she could have consented to do the same with Ganpat.
- The high court reversed the acquittal of the session court.
- However, Supreme Court acquitted both the accused once again. The Supreme Court not only agreed with the session court but also added that there was no injury marks on the body of Mathura. There was no retaliation from Mathura while she was being raped.

This Judgment passed by the Apex court of the country was highly disappointing and was a huge blow to the women of the country. It raised an outraged because court made sexist and patriarchal comments while deciding this case.

The case was not decided on the facts and circumstances it was majorly decided on the ridiculous perspective that if Mathura was sexually active before this incident it might have been the case that she also consented to the rape.

The court placed an enormous burden on the victim to prove that she did not consented to the sexual intercourse. The resulting protests and movements led to introduction of Criminal Law (Amendment) Act and 144A was added to the Indian Evidence Act, 1872.

This section transferred the burden of proof as regard to consent on to the accused instead of victim.

OTHER REFORMS OF RAPE LAWS AND WEAK IMPLEMENTATION

*Nirbhaya case: Mukesh and Anr v. State for NCT of Delhi*²⁷

This was other infamous case law that led to reforms in rape laws of India. This case also resulted in protests across the country and it further led to introduction of Criminal Law (Amendment) Act, 2013. This amendment defined consent as unequivocal voluntary agreement when women by words, gestures, or any form of verbal or non-verbal communication, communicates a willingness to participate in specific sexual act.

This definition further clarified that if victim did not physically resisted enough during the act it does not amount to consent.

*Mahmood Farooqui v State (Govt of NCT of Delhi)*²⁸

The complainant was an American PhD student who met mahmood during her research several times.

Mahmood and his wife invited her to the wedding and when mahmood was intoxicated he forcibly performed oral sex on her.

The complainant told him she did not want him to perform oral sex on her but he kept pulling her underwear down and went on with it.

²⁷ Mukesh and Anr v. State for NCT of Delhi, (2017) 6 SCC 1.

²⁸ Mahmood Farooqui v State (Govt of NCT of Delhi), CRL.A. 944/2016.

Then she went home and wrote him an email clearly stating her anger towards the act. She told him that what he did was wrong and to which he replied 'my sincerest apologies.'

Despite having this evidence the accused was acquitted by the court.

The reforms made in the rape laws seem strengthening but in reality the implementation is very much different from the intended outcome. This case of mohmood gave archaic interpretation to the word consent and it set a dangerous precedent.

It gave a new interpretation which diluted the concept of consent in rape cases. The first interpretation given by the court in this case was based on patriarchal narrative that it is common that women's feeble 'NO' means 'YES'. The court further added that if parties are no strangers to each other and have been physical before then it might be difficult to decide whether a feeble 'No' meant no consent.

Even after all the reforms, this case again based its judgment on woman's character and previous instances of sexual activity rather than on evidence and facts of the case.

The court completely disregarded section 14A of the Indian Evidence Act and placed an extra burden of proof on the victim that she must prove that her lack of consent reached to the knowledge of accused. If she cannot do that, she must show any physical harm inflicted on her by the accused.

The society is male dominated and thus it is often decided by male perception that whether a woman felt violated or not. The dynamic of submission also plays an important law and sometimes law facilitates such inequality between men and women.

The courts practice to put a woman's character on pedestal while deciding the rape law is very much sexist. The woman's past sexual relationships and even her education comes into play while deciding that whether her feeble no meant yes.

From the face of it, the section might be deemed to have effect in women's favour as it puts the burden of proof on the accused and favours the victims. It might be argued by men or even women that this burden of proof on men is inappropriate but women needs such protection in such cases. There might be false accusations but still the presumption can be rebutted by showing evidence. It would be highly disheartening to pressurize rape survivors to prove their consent.

Already the reforms are made and the section is added but still the courts are following misogynist perspectives and stereotype women based on their choices. This section was very much needed but it also needs implementation by the court. The law has to rely on the evidence and not on the character of woman and certain sexist and out-dated concepts which show that a woman's 'no' might mean 'yes' to men to continue.

In conclusion, this country has seen various horrific and outrageous cases of rape and as a result many reforms including the section 144A of Indian Evidence Act came into picture but still these are just words written on paper nothing more than that when it comes to implementation.

6. CONCLUSION

In conclusion the burden of proof is quite clear and simple in most of the cases. the burden is on the party who affirms a fact or claims a fact. The one who asserts the affirmative of issue rather than a party who denies it. The onus of proof tends to shift but initial burden of proof is always on the prosecution. The one who wants the court to believe something he has to prove it. The defendants have burden of proof in some circumstances such as to prove their case falls within the exceptional circumstances. The Indian Evidence Act, 1872 has covered every aspect of burden of proof in detail. It is the latest developments with regard to electronic evidence and burden of proof which needs clarity.

The burden of proof on the accused in case of rape needs better implementation. As it is a sensitive issue court needs to consider all facts and circumstances and to be more reluctant to not set dangerous precedents as previously done in Mahmood farooqui case. This case has shattered the understanding of consent from a gendered perspective. It should not follow the section 114A with the intention of biasness towards one gender. The accused should have initial burden of proving that he received the consent and then the presumption gets rebutted. It sounds like too anti- men approach to some people but it is about equality and they have to understand there are number of instances when women are prejudiced and character assassinated to prove they did gave the consent. If someone has to prove that other party has the unauthorized possession in property cases then it should be the same in rape cases where initially accused have to show that he did the act with consent. It should not be presumed that women gave consent based on flawed and patriarchal concepts.