

Principle of Evidence: Appreciation in Civil and Criminal Cases

Evidentiary Presumptions: Onus and Burden of Proof

**By Justice U.C. Dhyani,
Chairman,
Public Services Tribunal Dehradun**

AT NJA, Bhopal

Date:

18.1.2023

- Voyage for Discovery of Truth
- Reconstruction of past events

S-101

BURDEN OF PROOF

One who asserts must prove
(the fact)

Standard of Proof

1. Preponderance of Probability
2. Proof beyond reasonable doubt

Sir James Stephen

Falsus in uno falsus in omnibus

**It is not a rule of evidence in
criminal trial .**

**Court has to sift the chaff from the
grain**

- **Direct- Indirect**
- **Oral** (Who saw it, Who heard it, Who perceived it, Who holds the opinion) – Should be direct-
Corroboration is a rule of prudence.
- Deaf and Dumb Witness (section 119)
- May scribe his statement on a piece of paper in the court
- But it will tantamount to oral evidence

- **Documentary Evidence**
- **Circumstantial– Every link in the chain should be complete**
- **Suspicion, However Grave cannot take the place of Proof**
- **Distance between “May be – Must Be”**
- **Should be of conclusive Nature**
- **Exclude every other hypothesis**
- **Last seen evidence**

- Evidence Act does not apply to arbitrators.
- Affidavit is not evidence within section 3.
- Child witness should require corroboration.
- Supposition of a prudent man.
- S.25,26 and 27
- S 32- Dying Declaration

- S.118- Who may testify? All, unless the court considers that they are prevented from understanding the questions put to them , or from giving rational answers to those questions

- S.137- Examination in Chief
 - Cross Examination
 - Re examination
- S.154 – Questions by the party to his own witness
- S.159 – Refreshing memory
- S.161- Right of adverse party as to writing used to refresh memory (Like police diaries)

- S.141- Leading questions suggesting an answer
- S. 145- Cross-examination as to previous statements in writing

- **Medical Evidence- Post Mortem Report**
- **Interplay of Oral Evidence With Medical Evidence**
- **Modi's Medical Jurisprudence**

- S. 53A- evidence of character of victim or previous sexual experience not relevant in S.354,376 I.P.C. etc.

**Eye-witness, child witness,
injured witness, interested
witness, Dumb witness**

**Reliable, unreliable, partly reliable,
wholly reliable, wholly unreliable.**

Extra Judicial Confession

Plea of Alibi (S-11)

**Handwriting expert, ballistic expert,
Firearm expert, Fingerprint expert,
Public analyst as expert**

O XVIII CPC

Hearing of the Suit and Examination of Witnesses

Recording of evidence.—(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

O XVIII CPC

Rule 11: Questions objected to and allowed by Court- The Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Rule 12: Remarks on demeanour of witnesses.—The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. 280 CrPC Remarks respecting demeanour of witness.

O XVIII CPC

Rule 17

Court may recall and examine witness.—The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

137 /138 of the Indian Evidence Act 1872.

311 Crpc Power to summon material witness, or examine person present..

What ?

Why ?

Where ?

Whom ?

How ?

When ?

CROSS EXAMINATION (Sec. 165)

- **Counsel:** Is it a fact that you are sharing your apartment with a woman.
- **Witness:** Yes, that is a fact.
- **Counsel:** I put it to you that woman is not your wife.
- **Witness:** No she is not my wife.
- **Counsel:** I put it to you that woman is not your Mother.
- **Witness:** No she is not my mother.
- **Counsel:** she is not your daughter either.
- **Witness:** She is not my daughter.
- **Counsel:** Nor your sister.
- **Witness:** No, She is not my Sister.

- At this point the counsel stated that he has no further questions to ask. While witness was leaving the witness box the judge asked him, “Who is that woman?”
- Witness: She is my grandmother.

BUT, PLEASE DON'T ASK

- **'Did you close your legs?'**

US judge asked a rape survivor

Judge was Shown the Exit Door

PRESUMPTIONS AND REVERSE BURDEN OF PROOF

- May presume – Unless and until it is disproved or the court may call for proof of it
- Shall presume – Unless and until it is disproved
- Conclusive proof – Shall not allow the evidence to be given for disproving it

**S-113-A— PRESUMPTION AS TO
ABETMENT OF SUICIDE BY A
MARRIED WOMAN**

The court may presume

S-113-B— PRESUMPTION AS TO DOWRY DEATH

The Court shall presume

S-114-A— PRESUMPTION AS TO ABSENCE OF CONSENT IN CERTAIN PROSECUTION FOR RAPE

**The Court shall presume that she
did not consent**

- 114A. Presumption as to absence of consent in certain prosecution for rape. –
–In a prosecution for rape 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 such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

- S.112- Birth during marriage, conclusive proof of legitimacy – during the continuance of a valid marriage or within 280 days of its dissolution

CULPABLE MENTAL STATE

Culpa — blame

Culpable— deserving blame

**CULPABLE MENTAL STATE HAS TO
BE PROVED AS A FACT BEYOND
REASONABLE DOUBT**

S-35— NDPS ACT, 1985

Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state 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 as an offence in that prosecution

INCLUDES

- Intention— *mens rea*
- Motive
- Knowledge of a fact and belief
- Reason to believe a fact

Normally it is in procedural laws
In NDPS, it is in substantive law

Criminal appeal No. 1206/2013
HANIF KHAN @ ANNU KHAN VS.
CENTRAL BUREAU OF NARCOTICS

Decided on 20.08.2019

**Reverse burden of proof does not
absolve the prosecution from
establishing a *prima facie* case**

NOOR AGA VS. STATE OF PUNJAB

(2008) 16 SCC 417

Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied.

The Protection of Children from Sexual Offences Act, 2012

- S.29 Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

- Section 3. Penetrative sexual assault
- Section 5 - Aggravated penetrative sexual assault
- Section 7. Sexual assault.
- Section 9. Aggravated sexual assault.

- S.30 - Presumption of culpable mental state
- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court **shall presume the existence of such mental state** but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

THE PREVENTION OF MONEY LAUNDERING ACT, 2002

Sec24: Burden of proof.—In any proceeding relating to proceeds of crime under this Act,—

(a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) in the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.

I am aware of the chains that bind me as a judge. I view my office as a mission. Judging is not a job. It is a way of life.

Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial.

THANK YOU

Q & A