THEME : STATUTORY PRESUMPTION / CULPABILITY –

A CONSTITUTIONAL PERSPECTIVE

As per the Constitutional mandate – Society is to be governed by rule of law for just and disciplined social order. Justice has to be balanced and administered in accordance with law. Every crime though it involves individual or group of individuals, is ultimately an offence against a society. The State has to secure justice to those affected and also to sustain the faith of the society in the rule of law.

Constitutional guarantee of right to equality and equal protection of laws (Article 14), protection in respect of conviction of offence (Article 20), right to life (Article 21) and protection against arrest and detention in certain cases (Article 22) has been provided to every citizen by the Constitution of India as Fundamental Rights. The framers of our constitution in the constitutional assembly debates visualised the object of fundamental rights as two – fold. The first, that every citizen must be in a position to claim those rights. And secondly, that they must be binding upon every authority. The word "authority" means every authority which has got power to make laws or the prerogative to have discretion vested in it.

In the modern times, every matured legal system of the world accords certain basic protections to accused persons – who may be deprived of their personal liberty by way of legal confinement for the commission of an offence, and a 'right to be presumed innocent' is a cardinal principle of human rights jurisprudence. Every person who is alleged formally to commit an offence – commonly known as 'accused' has a 'right to be presumed innocent' until the charges' leveled against him are finally proved and he is convicted by a competent court in accordance with the prescribed procedure of law. This right arises as soon as the formal accusation is thrust upon an accused and continues throughout the continuance of the criminal proceeding until the court declares him to be guilty and punishes him.

Principles of 'Presumption of Innocence' and 'Fair Trial'

'Fair Trial' is the foundation of the adversarial system of criminal trial. Although it is difficult to explain the concept with precision as the notion is a relative one, there is now universal consensus on the attributes of fair trial. The principle of presumption of innocence is an essential attribute of fair trial. The rights of the accused in relation to defence and other rights and the venue and the modes of conduct of the trial are inextricably related to the notion of fair trial. The presumption ensures a fair trial which is a

valuable right of an accused against State which has enormous power and huge resources. Public hearing in open court as embodied in Section 327 of Cr. P. C., 1973, is undoubtedly essential for fair administration of criminal justice. Similarly fair trial also requires that all evidence taken in the course of criminal proceedings must be taken in the presence of the accused as per provisions of Section 273 of Cr. P. C., 1973. Amongst various procedural safeguards ensuring fair trial, presumption of innocence is one of the important protections available to an accused.

The "presumption of innocence" – the doctrine that the prosecution must both produce evidence of the defendant's guilt and persuade the fact-finder of that guilt "beyond a reasonable doubt" – is a fundamental tenet of Anglo-American criminal law.

One of the cardinal principles which has always to be kept in view in our system of administration of justice in criminal cases is that a person arraigned as an accused is presumed to be innocent and that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he charged.

The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the court cannot record a finding of guilt of the accused. There are however certain cases in which statutory

presumption arise regarding the guilt of the accused but the burden even in those cases is upon the prosecution to prove the existence of basic facts which have to be present before the presumption can be drawn.

There is no dispute that under criminal jurisprudence a person is presumed to be innocent until he is convicted. In cases of acquittal, the presumption of innocence is valuable to such accused under the fundamental principles of criminal jurisprudence, i.e. that every person is presumed to be innocent unless proved guilty before the court and secondly that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for the higher court to interfere with the order of acquittal.

The penal laws in India are primarily based upon certain fundamental procedural values, which are, right to fair trial and presumption of innocence. A person is presumed to be innocent till proved guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption and which can be interfered only for valid and proper reasons.

The Concept and Genesis of the Right of an Accused to be Presumed Innocent

Our adversarial system of Judicial Dispensation in Criminal Administration of Justice which we have inherited from Anglo Saxon Jurisprudence is based on presumption of not guilty until one is found to be guilty.

"The principle of presumption of innocence" which is a cardinal principle of the human rights law applicable to pre-trial detention of an accused finds a place of pride in many International Human Rights instruments in Article 11 (1) of the Universal Declaration of Human Rights, 1942, Article 14 (2) of the International (Covenant of Civil and Political Rights, 1966, Rule 84 (2) of the Standard Minimum Rules for the Treatment of Prisoners, 1955. Article 6 (2) of the European Convention of the Protection of Human Rights and Fundamental Freedom, Section 11 (d) of the Canadian Charter of Rights and Freedom & Section 25 (C) of the New Zealand Bill 7 Rights Act 1990. [here; are two systems, i.e., accusatorial and inquisitorial system, followed in different: parts of the world in administration of criminal justice. The accusatorial system is followed in common law countries, viz, England, Canada, Australia, U.S.A. and India, whereas the inquisitorial system is followed in some European countries like France. In India, where the accusatorial system is followed, the principle of 'presumption of innocence' is followed which requires that

pre-trial detainees should be distinguished from convicted persons and should be provided "separate treatment appropriate to their status as unconvicted person[1]." It imposes burden of proof of charge on the prosecution and the accused has the benefit of doubt. Article 43 of the Year Book of International Law Commission, 1955, provides that 'a person shall be presumed innocent until proved guilty[2]. Sir Stephen explains the rationale of the 'rule of presumption of innocence' in the following words:

"In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences... If it be asked why an accused person is presumed innocent... The true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous[3]."

The principle of 'presumption of innocence of the accused' applicable in English Law is applied in India through the statutory law of criminal procedure and evidence and it also gave birth to the rule of immunity from

[1] International Covenant on Civil and Political Rights, 1966, Article 10(2)(a)
[2] Vol. II Part 2 A/C N4/SER.A// 1993/Add. 1, United Nations (1995)

[3] Stephen, J.F., Sir. 'A History of Criminal Law of England', Vol. I, London, 1883, p. 384; quoted by A.N, Chaturvedi, Rights of accused under Indian Constitution, 1984, 1st edition, at p. 167.

self-incrimination embodied in Article 20 (3) of the Constitution which provides that "no person accused of any offence shall be compelled to be a witness against himself."

Constitutionalising the Presumption of Innocence

It would be an interesting question whether the right to be presumed innocent is a fundamental right enshrined in Part III of our Constitution. In this regard it will be worth noting that the US Supreme Court has raised the presumption of innocence to the level of a fundamental right by reading it into the "Due Process" Clause[1].

Now, presumption of "not guilty" at the very threshold of a criminal trial also gets countenanced from our constitutionally guaranteed protection in respect of offences as envisaged in Article 20 (1) of the Constitution of India, which postulates that no person shall be convicted of any offence except for violation of a law in force at the time of commission of an act, charged as an offence and he must not be subjected to a penalty greater than which might have been inflicted under a law in force when it was committed.

[1] In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), the US Supreme Court read the presumption of innocence into the "Due Process" clause of the US Constitution. In both cases the Court struck down provisions of penal statutes which laid down that particular offences could be proved on preponderance of probabilities.

In the Indian Constitution, Art. 20(3) provides that no person shall be compelled to be a witness against himself. A Five Judge Bench of the Supreme Court held "The object of Art. 20(3)….. is in consonance with the basic principle of criminal law accepted in our country that an accused person is entitled to rely on the presumption of innocence in his favour[1]." This suggests that the presumption of innocence has been accorded constitutional recognition.

Another argument stems from the broad interpretation given to Art. 21[2]. In *Maneka Gandhi v. Union of India, AIR 1978 SC 597* a Seven-Judge bench of the Supreme Court clearly laid down that the procedure contemplated in Art. 21 to deprive a person of personal liberty has to be a "right, just, fair and reasonable" one. This led Sarkaria, J. in *Bachan Singh v. State of Punjab, AIR 1980 SC 898 : 1980 Cri LJ 636* to say that Art. 21 virtually meant, "No person shall be deprived of life or personal liberty except according to just, fair and reasonable procedure established by valid law." In logical sequence, Krishna Iyer, J. in *Sunil Batra v. Delhi Administration, AIR 1980 SC 1579: 1980 Cri LJ 1099* declared that after the Maneka Gandhi decision, the due process clause should be read into Art.21 with Art. 14.

[1] K. Joseph Augusthi v. Narayanam, AIR 1964 SC 1552

[2] Art. 21 reads, "No person shall be deprived of life or personal liberty except according to procedure established by law"

This raises a question of serious constitutional importance. If Art. 21 incorporates the due process clause, then right to be presumed innocent until proved guilty beyond all reasonable doubt becomes a part of Art.21 and therefore a fundamental right.

There is another argument to the same end. Even before the Maneka Gandhi judgment, the right to fair trial has been recognized under Art.21. The question is whether the right to fair trial includes a right to be presumed innocent till proven guilty. In other words, the question is, does a fair trial necessarily include a presumption of innocence in favour of the accused. It is now an established principle of constitutional interpretation that where municipal law is silent on a particular issue, international humanitarian law should be resorted to for interpretation[1]. Presumption of innocence is expressly mentioned as a right in various covenants of international law that include the International Convention of Civil and Political Rights, 1963[2] and the Universal Declaration on Human Rights, 1948[3]. Both of these, having been ratified by the Parliament are binding law in India and even otherwise are customary rules of international law. Therefore, since there is no Indian law to the contrary, Art.21 will have to be interpreted in consonance with the ICCPR and UDHR. This

[1] Vishaka v. State of Rajasthan, AIR 1997 SC 3011; Jolly George Verghese v. Bank of Cochin, AIR 1980 SC 470.
[2] Art. 14(2).
[3] Art. 11(1).

will again mean that presumption of innocence is part of Art.21. Thus, 'presumption of innocence' is a fundamental right forming part of Art.21 of the Constitution. A right, which is part of Art. 21 thus can be subject to statutory restriction only if the statute is just, fair and reasonable. The oft-repeated statement that presumption of innocence can be excluded by statute is now to be read with this important restriction. What are popularly called 'reverse onus' clauses, therefore, would be unconstitutional unless they satisfy the criteria of justness, fairness and reasonableness.

The classic statement of the importance of the presumption of innocence appears in the House of Lords decision in Woolmington v. Director of Public Prosecutions where the court referred to it as the "golden thread" running through English criminal law, subject to the defence of insanity and "subject to any statutory exception'. The House went on to conclude that 'no attempt to whittle it down can be entertained'. Whilst this is a sound affirmation of the importance of such a right, it perhaps elides the fact that during earlier times when trial by ordeal or compurgation occurred, particularly prior to the use of jury, there was no such presumption. More importantly for present purposes, while it allows that statutory exceptions might be made to the presumption, this is in the context of general common law acceptance of the doctrine of

parliamentary supremacy, by virtue of which no legal rights are sacred, and are liable to be taken away by Parliament.

In United States also, the Bill of Rights does not expressly contain and enshrine Right to Presumption of Innocence but it has been held that the Fifth and Fourteenth Amendments, guaranteeing a right not to be deprived of life, liberty or property, improved the presumption of innocence.

The American Courts by majority view still confirm that anything that attracts the penalty for a criminal offence must be proved by the standard of beyond reasonable doubt *and*, it has not permitted transfer of a legal burden of proof to the defence. In essence, the American Supreme Court has robustly defended the presumption of innocence against legislative incursion, including the use of presumptions against the accused.

In this respect, law commission in its 180th report has dealt with the arguments regarding "Rule against adverse inference from silence" while surveying certain foreign statutes and decisions. The Law Commission took note of the fact that Section 342(2) of erstwhile Code of Criminal Procedure, 1898 permitted trial judge to draw adverse inference from silence of the accused. However, this position changed with the enactment of new Code of Criminal Procedure in the year 1973 thereby prohibiting

the making of comments as well as the drawing of inference from the fact of an accused's silence. The conclusion of the law Commission Report on that issue is summarised below:

> "We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review we find that no changes in law relating to silence of accused are necessary, and if made they will be *ultra vires* of Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly."

Statutory Presumption

To prove the guilt of the accused, one of the basic tools is of legal presumption and as per Indian Evidence Act, there are two types of legal presumption viz. presumption of facts and of law. Presumption of facts is inferenced from certain facts drawn from experience and observation of the common course of nature, the constitution of human action, usage and habits of society and ordinary course of human affairs. Section 114 of the Evidence Act is a general provision dealing with a presumption of this kind and the Court has the discretion on the facts of each case to draw such presumption of facts. On the other hand, there is no discretion in the case of presumption of law. Section 4 of the Act provides that whenever it is directed by this Act that Court shall presume a fact, it shall record such fact as proved, unless and until

it is disproved. This distinction affects the burden of proof. While presumption of fact merely affects the burden of going forward with the evidence, the presumption of law is mandatory and signifies shift of the legal burden of proof so that in the absence of evidence sufficient to rebut it on a balance of probability, verdict must be directed.

Statutory presumption means a rebuttable or decisive presumption created by a statute. It does not shift the burden of proof. It is merely an evidentiary rule whereby the accused must offer an explanation to rebut the permissive presumption. A statutory presumption cannot be sustained:

- If there be no rational or perceptible connection between the fact proved and the ultimate fact presumed; or
- If the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

In State v. Haremza, 213 Kan. 201 (Kan. 1973), the court observed that "Statutory presumptions are ordinarily rebuttable. A rebuttable statutory presumption governs only the burden of going forward with the evidence and, even when it operates against the defendant, it does not alter the ultimate burden of proof resting upon the prosecution, nor deprive the defendant of the benefit of the presumption of innocence."

Once the facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to repel the presumption.

The absoluteness of the notion of presumption of innocence has been partially whittled down in recent times. Now some offences are defined in such a way that the prosecution has to prove some basic facts relatable to the offence and then the defence has to bear the burden of exculpation. After the late 70's, legislative bodies in India realized the need of making provisions for "**Statutory Presumption**" in the specific legislations. In India, many Centre and States Acts has made provisions for "**Statutory Presumption**" of the guilt of accused.

Some of the important Centre and States Legislations in India which have made provision for statutory presumption are as under:

Sl. No.	**Name of the Act**	**Sections Providing "Statutory Presumptions" Under the Act**
1.	Indian Evidence Act, 1872	S. 113 – B, 106, 9 S. 113 –A, 114 A S. 3 (Proved) S. 101 – 117

2.	Indian Penal Code	S. 304 B, 498 A S. 304 I & II S. 304 A, 304 B S. 306
3.	Juvenile Justice Act	S. 49
4.	Juvenile Justice Care & Protection of Children Rules 2007	R 12 R 12(3)(9), (I) – (III)
5.	NDPS	S. 37, 35, 54, 60(3) S. 80, 8-10, 2 (XIV) S. 25, 35 r/w 54, 53 – A
6.	Cr. P. C.	S. 313, 228, 128 (1)
7.	Prevention of Corruption Act	S. 20, 7
8.	TADA, 1987	S. 21 (2)
9.	Prevention of Money – Laundering	S. 22, 24, 23 S. 3&4
10.	Unlawful Activities 1967	S. 17, 18, 10
11.	Negotiable Instruments Act	S. 118 (a), 139
12.	General Clauses Act	S. 27
13.	Wildlife Protection Act,	S. 69

	1972	
14.	Income Tax Act	S. 271(I)C Exp.1

Noticeably, the statutory presumptions incorporated in laws are those which deal with offences impacting upon public morality, health, security and discipline. The statutory presumptions have thus been selectively applied depending upon the changing scenario, and the strategy of those crimes, committed either in secrecy or with the aid of sophisticated and advanced scientific and technical devices, denying access to any evidence/clue of the perpetration thereof. Another factor is impossibility of collecting evidence of said crimes depending on the modus operandi, absence/ disinclination of witnesses for variety of reasons, which often result in exoneration from guilt, causing gross injustice which though apparent, goes unremedied.

The objects and reasons of two third of such laws which incorporate statutory presumption of culpability would reveal the compulsion of maintenance of a disciplined social order for this shift from the stand point of presumption of innocence to that of guilt in a limited way.

Presumption if taken is always rebuttable and arises on the proof of certain basic facts relevant to the offence,

whereupon the onus shifts to the accused to rebut the presumption of guilt. Thus this apportionment of the obligation in quest of justice, having regard to the overall demand of an orderly law abiding social set up, governed by the rule of law is an exception to the starting premise of innocence of accused, the otherwise overwhelming and supervening fundamental precept of criminal jurisprudence.

Though it is the cardinal principle of criminal jurisprudence that the burden of proof of an offence would always lie on the prosecution, exceptions have also been provided in Sections 105 and 106 of the Evidence Act. Section 105 says that if a person is accused of an offence, the burden of proving the existence of circumstances, bringing the case within all the general exemptions in the Indian Penal Code or within any special exception or proviso contained in any other law defining the offence, is upon him and the Court shall presume the absence of such circumstances.

Though law has given sanction of presumption of innocence until guilt is declared by a Court of law in certain cases including the cases say, relating to Prevention of Corruption Act, placing the burden of proof on the accused is reasonable and not unjust, or unfair nor is to be regarded as violative of Article 21 of the Constitution of India as propagated in *Veerasami* v. *Union of India* reported

in **(1991) 3 SCC 655.**

One of the controversial aspects of *Malimath Committee Report*, which has not been accepted by the Government of India, is the invaluable rule as to the right to silence of accused at all times and in all cases. As a matter of fact, the accused is the good source of information if not, the best source about the commission of offence but this source is not tapped for fear of infringing the right to silence guaranteed by Article 20(3) which states that no person accused of any offence shall be compelled to be a witness against himself. Therefore, the conclusion, I may quote, of the *Malimath Committee* on the Right to Silence is as follows:

> "In the considered view of the Committee, drawing of adverse inference against the accused on his silence or refusing to answer will not offend the fundamental right granted by Article 20(3) of the Constitution, as it does not involve any testimonial compulsion. Therefore, the committee is in favour of amending the code to provide for drawing appropriate inferences from the silence of the accused."

However, these conclusions are at variance with the law as is presently enacted in the Criminal Procedure Code, 1973 which prohibits adverse inference being drawn from the deliberate silence of the accused.

Article 21 of Constitution of India guarantees every citizen protection of life and liberty as a fundamental right. It casts a duty on State to maintain law and order in the society for securing peace and security to citizens. The State is required to take appropriate preventive and punitive measures essential for the maintenance of law and order and for protection of life, liberty and property of citizens. To achieve the said objectives, State enacts substantive penal laws, instrumental and symbolic, prescribing punishment in case of breach of law and order in society. When any person is found guilty of committing breach of right to life, liberty or property guaranteed to citizens, then it becomes the duty of State to apprehend such a person, put him to fair trial and punish him if found guilty. It is equally necessary that there must be efficient procedural laws for effectiveness of the substantive penal laws. This is the primary function of Criminal Justice System. The aim of Criminal Justice System is to punish the guilty and to protect the innocent. Every offence is a crime against the society.

As a corollary, although, the basic principle of Rule of Law - the presumption of innocence, the importance of fair trial and guaranteeing the rights of individual accused remain constant, in grave situations, as for instance, in heinous or terrorist related situations, the Rule of Law should take into account the importance of what is at stake

i.e., the demand of justice, while maintaining the basic rights of the defence.

Questions arise: Is the concept of Rule of Law strong enough or elastic enough to devise means which would help maintain a balance of justice? Justice for victims, as well as fairness to those charged? In this context, it is the function of the Court to seek a proper balance to secure that the rights of individuals are properly preserved. One argument that can be put forth against the concept of reverse onus provisions is that if it is permissible in law to obtain evidence from the accused persons by legislative precepts, why tread the hard path of laborious investigation and prolonged examination of other men, materials and document? It has been well criticised that an abolition of this privilege would be an incentive for those in charge of enforcement of law to sit comfortably in the shade rather than to go about the sun hunting up evidence. Therefore, it can be said that no less serious is the danger that some accused person at least may be induced to furnish evidence against himself which is totally false – out of sheer despair and anxiety to avoid the unpleasant present.

Nevertheless, it has been judicially observed that the **presumption of innocence** needs effective modification. A right to keep silent does no more give privilege to tell lies

and take up false defence. In *Pershadilal v. State of U.P.*[1], 'while construing Section 114 of the Evidence Act, 1872, the Supreme Court observed, that where in a murder charge, the accused falsely denied several relevant acts which have been conclusively established, the court would be justified in drawing an adverse inference from this against the accused.' The limits on the privilege of an accused person not to open his mouth has further been explained in *Deonandan v. State of Bihar*[2]. In this case the appellant accused was charged with murder and was convicted on the basis of only circumstantial evidence which pointed the accused as the assailant with reasonable definiteness as regards time and situation for which the accused did not offer an explanation. The absence of any explanation or false explanations was treated as an additional link in the chain of circumstances which went against the accused. In *M.G. Agarwal v. State of Maharashtra*[3], the Apex court has held that 'a conviction can be reasonably founded on circumstantial evidence and an inference of guilt can be drawn if the proved facts are wholly inconsistent with the innocence of the accused and are consistent with his guilt.' In the case of *Andhra Pradesh v. I B S Prasad Rao*[4], the Supreme Court has gone a step further in holding that 'even if one or more of the

[1] AIR 1957 SC 211
[2] (1955) Cri. L. J. 1647 (S.C.)
[3] (1963) 2 SCR 405
[4] (1970) Cr. L. J. 733 (S.C.)

circumstances in the chain of circumstantial evidence is inconsistent with the guilt, but the combined effect of the facts is conclusive of the guilt, a conviction will be justified.'

There is a danger to the excessive devotion to the rule of presumption of innocence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community. In the context of escalating crime, the doctrine that it is better that ten guilty men should escape than one innocent may be convicted' is a false dilemma. In this context the following observations of Justice Krishna Iyer, who has been a strong supporter of Human Rights of accused, made in the case of *Shivaji Shabra Babade v. State of Maharashtra*[1], warn against the excessive reliance on the presumption of innocence:

"The cherished principle or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to enhance every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that let a thousand guilty men go out but one innocent martyr shall not suffer, is a false dilemma. Only reasonable doubt belongs to the accused. Otherwise, any practical system of justice will then break down and lose credibility with the community."

[1] (1973) 2 SCC 793

However, in *Kali Ram v. State of H.P.,* [1]the Supreme Court reemphasized the importance of the principle of presumption of innocence and observed that "It is no doubt that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system; much worse, is, however, the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society.

While discussing all these issues we, however, should not remain unmindful of the fact that standard of proof to uphold the guilt of the accused in today's societal structure is often very difficult to achieve in all types of cases since in the current scenario, the unwillingness, non availability of witnesses to come forward to tell the truth, huge dockets of cases in the courts of law, procedural prolixity leading to procrastination of trial are some of the serious impediments. Therefore, a measured reform in the approach of accepting and using presumptive laws engrafted in the statutes is necessary, in a more liberal way, which will not otherwise be an affront to the constitutional guarantee of right to life and liberty.

[1] (1973) 2 SCC 808

Conclusion

Every statute that shifts the burden of proof on to the accused has to satisfy the test of justness, fairness and reasonableness of the procedure established by law as enshrined in Article 21. The question is whether there can be any test to see if a statute satisfies this test or whether it has to be determined on a case-by-case analysis. Though no strait jacket rule can be prescribed in this regard, the Court in deciding the constitutionality of a statute that shifts the burden of proof ought to keep certain criteria amongst others the nature of the offence, socio economic realities and cause of even handed justice in mind.