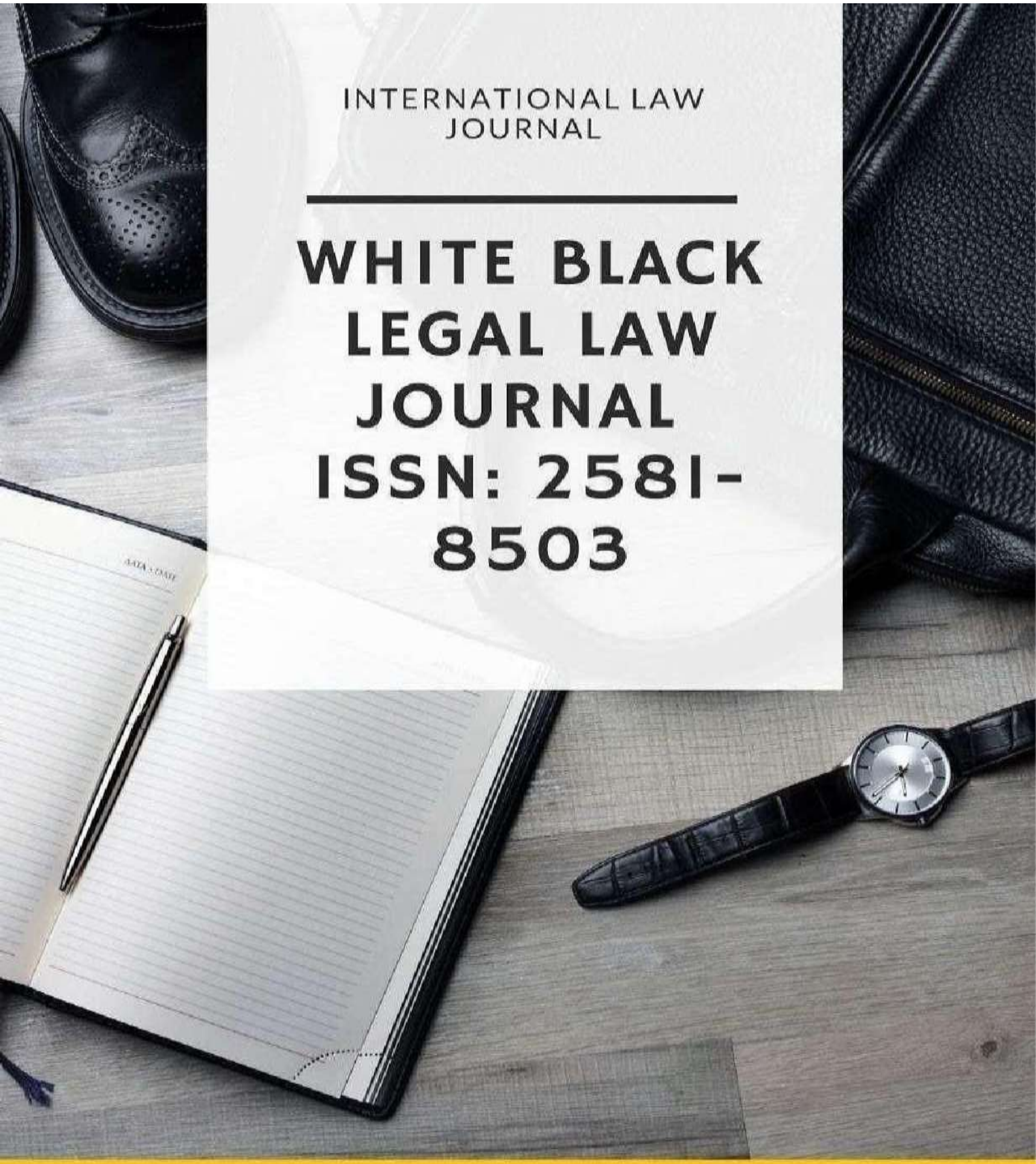

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

PRESUMPTION OF GUILT: ISSUES AT THE PRE-TRIAL STAGE

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Abstract:

In layman terms, a presumption denotes an idea that is taken to be true on the basis of probability. In law, a presumption is a logical inference made in furtherance of a particular question of fact. "Presumption" or "presumed" means that "the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence."[1] It literally means "taking as true without examination or proof". Further, "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted… A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence."[2] There is a general classification of presumptions into "conclusive presumption" and "rebuttable presumption". The former is constituted where the standards of proof met in lieu of a question of fact are so high that it renders that fact conclusive; i.e., it cannot be rebutted.

For readers and ardent researchers that would like to explore the inherent issues at the pre-trial stage, recognition of grounds on which bail is granted, and the role played by presumptions in deciding the guilt of an accused, this article explores the rules of presumption at the trial and pre-trial stages, general presumptions under the Indian Evidence Act, and lacunae in circumstances of presumption under Protection of Children from Sexual Offences Act, 2012 (POCSO hereinafter). The mantle-piece of this paper the presumption in POCSO offences whereby bail is rejected based on reverse onus, breaking the general rule of a presumptive clause and its subsequent operation.

[1] Section 1-206, Uniform Commercial Code.
[2] Black's Law Dictionary, 6th Ed.

Keywords: derivative presumption, rebuttable presumption, reverse onus, *suo moto* cognizance, presumption of innocence

Kinds of Presumption:

As per the analysis, statutory law recognises two main types of presumption namely derivative presumption and foundational presumption. A general presumptive clause takes the form of a "derivative presumption" if it is derived from establishment of certain other facts which are in consonance with the fact in question.

For instance, Section ABC states, "If facts X, Y and Z are proved, then the Court shall presume a certain fact M unless the contrary is proved."

Instances of such derivative presumptions are Section 139 of the Negotiable Instruments Act (NI Act), Section 113B and 114A of the Indian Evidence Act, 1872, and Section 35 of the Narcotic-Drugs and Psychotropic Substances Act (NDPS, for brevity). The true nature of a general presumptive clause can be understood upon examining the language in Section 35 of the NDPS Act.

Section 35(1) of the NDPS Act states:

> (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."*[3]

A bare perusal of the section reveals that there is an element of *'reverse onus'* whereby the court presumes the existence of the *'culpable mental state'*, the contradiction of which may be availed as a defence by the accused.

Elements of a General Presumption:

It is argued that a presumption may arise only from a fact that has been proved beyond all probability. No presumption can arise from a rebuttable fact, a fact pending consideration, or another presumption. A rebuttable fact is one which could be disproven to be false, or exposed for its falsity. The term "rebuttable presumption" appears self-explanatory at this point. The proof of the occurrence or non-

[3] Section 35, Narcotic-Drugs and Psychotropic Substances Act, 1985.

occurrence thereof is not high enough to render it conclusive, thus being 'rebuttable' or disprovable. The term was defined by the Supreme Court as *"devices by use of which courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or, insufficient evidence"*[4].

Considering what Section 113B of the Evidence Act states, in light of a presumption,

> "**113B. Presumption as to dowry death.** -- 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 had 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."

A bare perusal of this section reveals a presumption of guilt imputed to any person accused of causing the death of his wife or any other woman in connection to dowry. The presumption of guilt may be rebutted to prove the innocence of the accused.

However, a scrupulous analysis would reveal that this provision consists of certain elements. Firstly, there is a question of fact to be proved or established, "*whether the person has committed the offence of dowry death*." Then, a fact (basic or foundational fact) that has already happened must be established beyond all probability, namely *soon before the death of the woman, she was subjected to cruelty and harassment*. The rule of reverse burden operates based on the two elements and the presumption thus arises.

A Division Bench of the Supreme Court in a landmark decision[5] has held verbatim –

> *"5. A conjoint reading of Section 113B of the Evidence Act and Section 304B, IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113B of the Evidence Act and Section 304B, IPC are pressed into service."*

[4] M/s. Kumar Exports v. M/s. Sharma Carpets, 2009 2 SCC 513.
[5] Kaliyaperumal v. State of Tamil Nadu, (2004) 9 SCC 157.

For further analysis, the instance of Section 139 of the NI Act is considered –

> "**139. Presumption in favour of holder. –** It shall be presumed, unless is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability."

A bare perusal of the section provides that the presumption arises out of a fact that must be specifically proved beyond all probability, in this case being the complainant holding a cheque "*of the nature referred to in Section 138*." The presumption that would arise is that the cheque was received "*for the discharge... of any debt or other liability*." The foundational facts are provided in clauses (a), (b) and (c) of Section 138. A conjoint reading of both the sections adequately establishes that the rule of presumption arises only upon establishment of the fact that the cheque was issued to discharge any debt or liability in part or in whole. The said presumption may be rebutted and a contrary fact may be proved instead. This casts a benefit on the side of the complainant and a disadvantage on that of the opposite party. The offence is already deemed to have been committed by the opposite party until he proves otherwise but the framework of the presumption remains the same. The presumption is inferred directly and without much deviation from the proof of an independent and established fact. The established fact usually maintains a strong nexus with the presumption but is of such character that it can exist independent of the other facts of the case or the fact under presumption itself.

Rule of Bail – Natural Right Lauded by Discretion:

The stage of Bail is the most common pre-trial stage in every criminal case. It means release of an accused person. The general rule is that every accused must get bail. The exception is denial of bail by a Session Judge. The ratio behind the general rule is to prevent overcrowding of prisons in judicial custody. Under-trial prisoners occupy most of the jail cells when the offence committed by them is non-bailable and heinous enough to attract judicial custody. The Supreme Court has categorically held, with regard to granting of bail:

> *"Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home… is an exception… There is no doubt that the grant or denial of bail is entirely the discretion of the Judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by the Supreme Court and by every*

High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case."[6]

Although the Judge has the final say on the granting of bail to an accused, it must be denied only where "a *prima facie* case has been made out" against the accused. The Judge must observe an offence having been committed by the accused even at the pre-trial stage. Only under such circumstances, bail may be refused. There lies a conflict with respect to offences chargeable under the POCSO Act, to be dealt with under subsequent sections of this article. This will apply with respect to granting of bail in the pre-trial stage, to an accused booked under POCSO Act. Before that, a deeper understanding of the rule of reverse onus is necessary.

Key Analysis on Reverse Onus/Reverse Burden:

It is key to understand, theoretically as well as using illustrative cases, the rule of presumption of innocence in order to efficiently analyse the rule of reverse onus. The general rule of presumption in all criminal cases in the Indian scenario is that an accused is "*presumed innocent until he is proven to be guilty beyond all reasonable doubt*." The phrase "presumed innocent until proven guilty" was coined by Sir William Garrow, a British barrister. His view gave birth to the right of an accused person to be subjected to robust tests in a court of law, the results of which would establish his guilt in front of every juror and Judge. The English Court of Appeal upheld the phrase to be "the *golden thread* running across the web of English criminal law."[7]

The Supreme Court of India had its doubts in considering the right to be presumed innocent as a fundamental right according to the Indian Constitution. But the Court afforded a more elemental construction which was distinguished from the fundamental nature of the rights under Part III. It held verbatim:

"It is now a well-settled principle that presumption of innocence as contained in Article 14(2) of the International Covenant on Civil and Political Rights is a human right although per se it may not be treated to be a fundamental right within the meaning of Article 21 of the

[6] Dataram Singh v. State of Uttar Pradesh and Anr., (2018) 3 SCC 22.
[7] Woolmington v. Director of Public Prosecutions, (1935) UKHL 1.

Constitution of India."[8]

Even then however, the general principles of criminal jurisprudence is to presume a person innocent until his guilt is proven beyond all reasonable doubt. Many countries afford every accused person his right to be presumed innocent, in the form of a fundamental right. In India however, it is not a fundamental right, but a human right that may be subject to certain exceptions.

For instance, the Session Judge hearing a case of dacoity must be convinced that the accused person is innocent first, until his guilt is proved beyond all reasonable doubt by the prosecution in a trial proceeding using relevant facts, Material Objects, Statement of Witnesses (as under Section 161, CrPC) and Statement to the Magistrate (under Section 164(5), CrPC), and other corroborative evidence, if any. In event of a *suo moto* cognizance of an offence, the court may advise a probe to be conducted to investigate that arena of offences to the maximum extent.

> In the instance where Magistrate X, on her way to court, witnessed A snatching a chain with his accomplice B from the neck of the victim C, Magistrate X cannot initiate a case against A and B *suo moto*. This is because Magistrate X has an opinion of guilt on the part of A and B with respect to the offence of theft. In other words, her presumption of innocence of the accused A and B will be tainted by her understanding of their guilt as she had witnessed the act of theft committed by them.

Article 21 contains the exception through which a person's right to life and personal liberty may be violated by "procedure established by law". The general rights under "right to life" far outnumber the exceptions thereto, which is appropriate in lieu of natural rights to be granted to all human beings. An obvious analogy could be drawn that another such natural right to bail could be subject to exceptions through procedure established by law. But presumptions present a case of anomaly in that the rule of law statutorily contains exceptions to the presumption of innocence, and a special expanse for the same has been built in the foundations of criminal jurisprudence in India.

The exception to the general rule of presumption of innocence is the rule of *reverse burden.*

[8] Vinod Solanki v. Union of India and Anr., (2008) 16 SCC 537.

Essentially, the presumption of innocence is replaced with presumption of guilt. A reverse onus is placed on the accused person to prove his innocence instead of placing the same on the prosecution to prove his guilt. The Supreme Court has categorically held:

> *"A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences…"*[9]

There have been attempts to test the constitutional validity of legal burdens of reverse onus. In a judicial indication of the vainness of such attempts, the Supreme Court has declared such clauses to be constitutional irrespective of the imposition of such burdens.[10] The idea of double presumptions in reverse onus occurs in the NDPS Act. Section 35 thereof operates as a presumption of "culpable mental state" necessary for the offence. Adding on to that, section 54 operates as a presumption with regard to possession of contraband. An accused's guilt is presumed if he fails to 'satisfactorily account' for the possession of contraband. The case of *Inder Sain v. State of Punjab*[11] along with other cases[12] clarified how the double presumption operates. The Supreme Court emphasised the general rule of birth of a presumption. An initial fact must be proved firstly – *that there was a contraband*, and then that it was in the *"conscious possession of the accused"*. A combined establishment of these two facts creates the presumption, which must subsequently be rebutted by the accused to prove his innocence.

Section 29, POCSO – Antithetical Views:

The cornerstone object of this article is the position with respect to presumption in section 29 of the POCSO Act. This section of the article aims at analysing the presumption under section 29 and comparing the same to general presumptive clauses. Further, the right to bail is affected by one key decision of an Hon'ble High Court.

Beginning with a bare perusal of the provision,

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[9] Dataram Singh v. State of Uttar Pradesh and Anr., (2018) 3 SCC 22, *ibid.*
[10] Noor Aga v. State of Punjab, (2008) 16 SCC 417.
[11] (1973) 2 SCC 372.
[12] Noor Aga's case, *supra*, note 10; Dharampal Singh v. State of Punjab, (2010) 9 SCC 608; Bhola Singh v. State of Punjab (2011) 11 SCC 653.

"Section 29. – Presumption as to certain offence.

Where a person is prosecuted for committing or abetting or attenuating 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"

The conflict appears with the interpretation of the term '*prosecuted'* in the section. When the section is strictly construed, it can be said that there are two elements to the presumption:

- A precursor event – i.e., in this case the prosecution of a person for offences under Sections 3, 5, 7 or 9.
- A fact to be presumed on those grounds – i.e., the prosecuted person has committed the offence.

A Special Court can take cognizance of, and is allowed to find a *prima facie* case automatically when a person is 'prosecuted' for any of the offences committed under Sections 3, 5, 7 or 9. Sometimes this discretion becomes mandatory because of the heinousness of the offence under the POCSO Act. However, courts have taken polarly opposite views on the interpretation of the term 'prosecuted.'

A Division Bench at the High Court of Calcutta interpreted the term and observed the following in the process –

> *"It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is 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 liberty*

except in accordance with procedure established by law."[13]

The High Courts of Madhya Pradesh and Kerala have taken a similar view from the above holding. But, the Karnataka High Court, in a bail application took the opposite view in that the bail was refused to the accused. The rebuttal of the presumption during the course of the trial was to take place, and then his innocence was to be proved. In other words, bail was denied because the presumption arose in the pre-trial stage itself, and that is the cornerstone of this article.

Analysing the elements of the presumption under section 29 and comparing them to the elements of a general presumption, it unfolds that the presumption under section 29 does not arise from a proven or established fact, rather it arises from the words of accusation of the victim, drawing initial presumption of guilt even at the pre-trial stage. This affects the accused by denying him his right to bail. As already established using precedents above, the right to bail is the general rule and the denial of the same is the exception, but the general right is overridden by this presumption at the pre-trial stage.

To add on to this, a recent decision of the High Court of Jammu and Kashmir in the case of ***Mubarak Ali Wani v. Union Territory***[14] has extraordinarily been passed. The Court observed as following:

> "The first ground urged in the application is that the final report does not disclose the commission of alleged offence by the petitioner. However, a bare perusal of the statement made by the victim under Section 164 Cr.P.C. in explicit terms implicates the petitioner in the commission of offence along with the co-accused which statement cannot be overlooked by this court at this stage, as such, the ground is turned down."[15]

The Court went on to hold that the conclusion as to whether sexual intercourse was committed or not, was a *'legal conclusion and not a medical one'.*

> "Insofar as the next ground urged by the petitioner is concerned that the medical opinion has not categorically opined about the happening of the alleged intercourse with the victim may not be attracted at this stage while considering the instant bail application, in that, the said

[13] Navin Dhaniram Baraiye v. State of Maharashtra, 2018 Cri LJ 3393
[14] 2022 SCC OnLine J&K 112.
[15] Para 15, *ibid.*

issue would be gone into by the trial court during the course of trial before the trial court, while taking into account any other corroborative evidence, more so in view of settled law that whether rape has occurred or not is a legal conclusion and not a medical one. This court, as such, will not be in a position to express any opinion in this regard while considering the instant bail application. The ground accordingly is rejected."[16]

This Court relied on a decision of the Apex Court to conclude at this, wherein it was held:

> *"It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing there from. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a women would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are."*[17]

Conclusion:

Bias is understood to be a negative element in most circumstances. But bias shares the other side of the coin as justice and equity. Bias arises out of a pre-conceived notion, experience, or belief, or any combination of the three. Bias can and almost always will be present in every Judge's mind. But what bias cannot do is deprive an accused person of his liberty. Such bias that was born merely out of a victim's statement to the police, the state of mind of the victim not being known, the nature of the past relationship between the victim and the accused being undisclosed, leading to a presumption of the guilt of that accused. His position in such a circumstance is nothing but unreasonable, unfair, and arbitrary. This is antithetical to justice and fairness, and overall, in contravention to the principles established by the Supreme Court in ***Maneka Gandhi v. Union of India***[18] and ***E.P. Royappa v. State of Tamil Nadu***[19].

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[16] Para 16, *ibid.*
[17] Wahid Khan v. State of Madhya Pradesh, (2010) 2 SCC 9.
[18] AIR 1978 SC 597.
[19] AIR 1974 SC 555.

But on the other end of the spectrum, protection of children and minors from sexual acts, advances, manipulations, and wrongful intentions has become the cornerstone of the Indian judicial system simply because of the enormous number of such incidents in the past half decade. Such a circumstance warrants strict laws and procedure protecting that sector of the society.

One solution to this could be to vest less discretion in judicial authorities where the stakes are soaring high as in the instant set of circumstances. Preventing law or procedure from having a "chilling effect" is a critical requisite to ensure a blithe application of Part III of the Indian Constitution. Where judicial discretion suffers from a vice of arbitrariness or vagueness, statute must intervene to fix the 'mischief'[20] inherent to such discretion and uplift the endangerment to the enjoyment of fundamental rights.

[20] Sewantilal v. Income Tax Commissioner, 1968 AIR 697.