PRINCIPAL DISTRICT COURT, EAST GODAVARI, RAJAMAHENDRAVARAM: DATED 29-01-2026.

***

Communicated the copy of the Hon'ble High Court letter of ROC.NO.81/SO/2020, dated 23-01-2026 & 29-01-2026 for all the **Judicial Officers** of all cadres working in the Unit of East Godavari District, for information and compliance.

The Hon'ble High Court has proposed a training program to sensitize the stakeholders on **Vulnerable Witness Deposition Centers** which is scheduled to be held on 01-02-2026 at Guntur. In this regard, the Live streaming of the training program will be live telecast by the **I & PR Department** and same will be shared in due course through whatsapp.

As directed by the Hon'ble High court, I am circulating the following materials for ready reference and can access from the Hon'ble High Court Website Url: **https://aphc.ap.gov.in/training-material.php**

I. A copy of the PowerPoint presentations related to the training.

II. Eight (8) judgments that are detailed below.

S.N	Parties Name	Citation
1.	State of Maharashtra vs Bandu Alisa Daulat	2018 (11)SCC 163
2.	Mahender Chawla Vs Union Of India & Ors.	2019 (14) SCC 615
3.	Virender vs The State of NCT of Delhi	2009 [4] JCC 2721
4.	State of Punjab vs Gurmit Singh and Others	1996 (2)SCC 384
5.	Sakshi vs. Union Of India & Ors.	2004(5) SCC 518
6.	Smruti Tukaram Badade v. State of Maharashtra	2022 SCC Online SC 78
7.	State vs Rahul	ILR (2013) III Delhi 1861
8.	State vs Jagtar	2014:DHC:3645-DB

III. Additionally, four (4) videos have been uploaded in the official web site of East Godavari District in Media at Video gallery.
URL: **https://eastgodavari.dcourts.gov.in/video-gallery.**

D's 90/
30/1/26

Prl. District Court,East Godavari,
Rajamahendravaram, Dt.30-01-2026.

30.1.26
PRINCIPAL DISTRICT JUDGE

Encl: As stated.

To
All the Judicial officers working in the unit of East Godavari District.

Y.V.S.B.G. PARDHA SARADHI
REGISTRAR GENERAL

AMARAVATI
(Off):0863 2372613
(Telefax) : 0863 2372631

ROC No.81/SO/2020 **Dated:29.01.2026**

To

All the Unit Heads in the State of Andhra Pradesh.

Sir/ Madam,

Sub: High Court of Andhra Pradesh – Vulnerable Witness Deposition Centres – Proposal to conduct training programe to sensitize the stakeholders on 1st February, 2026 - Reg

Ref : Letter dt:17.10.2025 from Director, Vulnerable Witness Committee, along with the letter of the Hon'ble Chairperson, Vulnerable witness Committee.

*****

Adverting to the subject and reference cited, I am to inform that the Hon'ble Justice Gita Mittal, Chairperson, Vulnerable Witness Committee, Hon'ble Supreme Court of India and the High Court have proposed to conduct training programe on "Creation/conversion of Court rooms into Vulnerable Witness Deposition Centers" to sensitize the stakeholders i.e., Judicial Officers, Police Officers, R&B Officials, LADC members, Public Prosecutors, etc., on 1st February, 2026, at 10.00 A.M in Sankaran Hall, located in the premises of the office of District Collector, Guntur District.

In this regard, I am to inform that all the Judicial Officers of Guntur, Krishna and Prakasam are participating in the Physical training programme and the Judicial Officers of remaining Districts are directed to participate virtually in the training program.

Further, I am to inform that judgments relevant to Vulenrable Witnesses/Victims, Power Point Presentation and videos (1. Play at slide 3 – Bytes of Dr. Achal Bhagat.mp4, 2. Play at Slide 16--- Bytes of Suzettee Jordan.mp4, 3. Play at slide 25 -- New, 4. Play at slide 29---Judges Bytes.mp4) are placed in the official website of the High Court in the link given below:

https://aphc.ap.gov.in/training-material.php

Further I am to inform that the Training Program would be broadcasted by the I & PR Department, through live streaming and link of the live streaming would be shared one day in advance in WhatsApp Group.

Therefore, I request you to instruct all the Judicial Officers in Your Unit to download (not to view) by clicking the link or from the 'Important Announcements' of the official website of the High Court and to read the material before attending the training program and make necessary arrangements for watching the live streaming for the Judicial officers together at same station.

Yours sincerely,

REGISTRAR GENERAL

V.SREENIVASA SIVA RAM
REGISTRAR (VIGILANCE)
I/c.REGISTRAR GENERAL

AMARAVATI
(Off) : 0863 2372613
(Telefax) : 0863 2372631

ROC No.81/SO/2020 **Dated: 23 .01.2026**

To

All the Unit Heads in Andhra Pradesh

Sir/ Madam,

Sub: High Court of Andhra Pradesh – Vulnerable Witness Deposition Centres – Proposal to conduct training programe to sensitize the stakeholders on 1st February, 2026 - Reg

Ref : E-mail letter dt:22.01.2026 from Director, Vulnerable Witness Committee, along with enclosures.

*****

Adverting to the subject and reference cited, as directed, I am herewith forwarding the letters dt:22.01.2026 of the Director, Vulnerable Witness Committee, Supreme Court of India, along with softcopies of judgments, Power Point Presentation and video links for the training programme scheduled to be held on 1st February, 2026, at Guntur and request you to circulate the same among all Judicial Officers.

Yours sincerely,

I/c. REGISTRAR GENERAL

Vulnerable witnesses in the court room

Justice Gita Mittal

Former Chief Justice,
High Court of Jammu and Kashmir

Former Acting Chief Justice,
High Court of Delhi

Chairperson,
Vulnerable Witness Committee, constituted by the Supreme Court of India

Chairperson,
Committee constituted by the Supreme Court of India in Manipur matters

The embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. **The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.**

Ref: Virender v. State of NCT of Delhi, 2010 (3) AD (Delhi) 342; MANU/DE/2606/2009

Bytes of Dr. Achal Bhagat, Mental Health Expert
(Video to play here)

Who is a vulnerable witness?

- Child witnesses shall include children who have attained the age of 18 years;
- Age neutral victims of sexual assault read with Sections 273 and 327* of the Code of Criminal Procedure 1973 and Section 354# of the Indian Penal Code 1860;
- Gender neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act 2012;
- Age and gender neutral victims of sexual assault under Section 377^ of the Indian Penal Code 1860 read with paragraph 34(1) of the decision in ***Sakshi v. Union of India,*** *(2004) 5 SCC 518;*

Ref: Smruti Tukaram Badade v. State of Maharashtra, 2022 SCCOnline SC 78

Now* Section 308 and section 366 of BNSS, 2023

 # Section 74 of BNS, 2023

^ No section prescribed

...

- Witnesses suffering from “mental illness” as defined under Section 2(s) of the Mental Healthcare Act 2017 read with Section 118* of the Indian Evidence Act 1872;
- Any witness deemed to have a threat perception under the Witness Protection Scheme 2018 of the Union Government as approved by the Supreme Court in ***Mahender Chawla v. Union of India,*** *(2019) 14 SCC 615;*
- Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a vulnerable witness by the competent court; and
- **Any other witness deemed to be vulnerable by the concerned court.**

Ref: Smruti Tukaram Badade v. State of Maharashtra, 2022 SCCOnline SC 78

* ***Now Section 124 of BSA, 2023***

A vulnerable witness could be in court

- in a civil or criminal case
- in a family matter
- in a custody dispute
- as a victim of sexual abuse
- in a paternity action
- before Juvenile Justice Boards
- before Children's Courts

A VWDC facilities can be used in other jurisdictions

"3. ***The use of VWDCs should, in addition to criminal cases, be allowed for other jurisdictions, including, civil jurisdictions, family courts, juvenile justice boards and Childrens' courts.*** *Permission should be granted for recording the evidence of vulnerable witnesses in cases across all jurisdictions. This suggestion in the report is appropriate and is accepted."*

Ref: Smruti Tukaram Badade v. State of Maharashtra, order dated 08.04.2022

- **The legal systems are adversarial. This is particularly problematic for vulnerable witnesses.**

- **Justice systems were NOT developed with children or vulnerable witnesses in mind**

Special issues regarding children…

- Children are often the only material witnesses in cases of child sexual abuse (CSA).
- Children may also be witnesses to domestic violence and crimes of other kinds.



“Why is everyone dressed like penguins”?

- A Child Witness



Children may be unable to give a full and proper account of their evidence because of…

i. multiple interviews
ii. long wait before trial goes to court
iii. court delays
iv. confronting the accused
v. Questions framed in difficult language *(“legal language” / “legalese” / “age inappropriate”)*
vi. unnecessary questioning about irrelevant details by the defence lawyer
vii. honest answers used to make the child appear to be unreliable

…

Unable to give a full account because….

…

viii. Inappropriate questioning about abstract concepts *(eg. the conceptual difference between the truth and a lie)*

ix. interruptions by the lawyers

x. directions by adults about how they could answer (as '*just answer the question that is asked*')

xi. the use of cross-examination which is designed to "catch witnesses out".

xii. admissibility issue constraints and having to edit their stories

xiii. Trauma

"I am upset that as a result I could not tell the truth, the whole truth and nothing but the truth."

Judicial pronouncements and literature on the subject are unanimous on the

- **terrifying impact** of the foreboding criminal justice system, the **court environment** and **complicated legal procedures** on vulnerable victims/ witnesses.

- **confrontation** with the offender; **recounting** and **repetition** of violent and intrusive offensive experiences; facing **aggressive** and **humiliating cross-examinations** in court room resulting in **secondary traumatization** of the vulnerable witness.

The court environment – formal and austere – inhibits even adults and would result in terrified silence or confusion of a child witness.

Best interests of the vulnerable witness requires the concerns of the physical environment being addressed and sensitive treatment of the witness from home, to and in, the Vulnerable Witness Deposition Complex.

We are not miniature adults and cannot morph suddenly into adults either



Experience of a Vulnerable Witness_ Suzette Jordan (video to play here)

The Indian experience

Guidelines for the several stages from investigation to adjudication have been laid down in several judicial pronouncements which are to be followed by

- police conducting investigations
- doctors in medical examinations
- magistrates recording pre-trial statements
- trial judges during victim/witness appearances and depositions
- reintegration of victims

Ref: Virender v. State of NCT of Delhi, 2010 (3) AD (Delhi) 342;MANU/DE/2606/2009

Justice J.S. Verma Commission Report, Chapter XI, Paras 23, 24, https://spuwac.in/pdf/jsvermacommittereport.pdf

"Guidelines For Recording Of Evidence Of Vulnerable Witnesses In Criminal Matters"

The Guidelines draw from legislations and guidelines from all over the world including the United Nations Guidelines, International instruments, legislations in India and judicial precedents from India, New Zealand, Australia, Canada, South Africa, UK, USA, Philippines.

Provision has been made for:

- **support person**, **facilitator**, **guardian** ad litem, **legal aid**
- **pre-trial visit** to court complex
- **Interaction** with judge and prosecutor

...

...

- In-camera proceedings (Section 366 of BNSS, 2023)
- concealment of **witness identity**
- **developmentally appropriate** questioning
- use of screens, one way mirrors and other devices to enable Vulnerable Witnesses to give their best evidence
- **no adverse inference to be drawn from special measures**
- **competency** of vulnerable witness ...

...

- recommend giving high priority – to be handled as expeditiously as possible, **minimizing unnecessary delays** and continuances (whenever necessary & possible, court schedule to be altered to ensure that the testimony of Vulnerable Witness is recorded on sequential days, without delays).
- ensuring that **developmental needs** of Vulnerable Witnesses are recognized and accommodated in the arrangement of the courtroom
- provision of **separate and safe passage** and **waiting areas**

...

...

Identification, **recognition** and **addressal** of the **developmental stages and needs** of Vulnerable Witnesses throughout court process by requiring usage of appropriate language; timing of hearings & testimony to meet the attention span and **physical needs** of such witness and allowing use of **testimonial aids** as well as *interpreters, translators,* when necessary.

...

...

- **<u>Flexibility</u>** in allowing presence of *support person* for the Vulnerable Witness to & guarding against unnecessary sequestration of support persons

- **<u>Scheduling hearings</u>** involving Vulnerable Witnesses on days/time when the witness is not inconvenienced or the routine/regular schedule of child is not disrupted

Important to minimize secondary victimization

Please keep in mind our unique requirements with reference to ***Language, Memory, Disposition, Cultural Context and the Environment*** while asking us for information



Concept of Vulnerable Witness Court Room

The ***Vulnerable Witness Court Room*** has been conceptualized and operationalized to overcome these several disadvantages and barriers.

- Guided by **preventing any interface** of the vulnerable witness with the offender or public exposure.

- Using a **video link and intermediary to avoid a physical confrontation** between the witness and the offender, court and lawyers.

Conversion of existing court into VWDC
(video to play here)

Some barriers to an enabling witness experienc

- Law teachers, judges, prosecutors and defence lawyers are all from the same social – cultural milieu and carry with them prejudice, bias, discomfort, etc.
- Understanding of the dynamics of violence, trauma and development not given the attention/importance it warrants.
- Training of judges and prosecutors is inadequate to address lacunae – e.g. to assess competency of a vulnerable witness - child or a witness with disabilities.

Intimidating experience for witness which compromises justice dispensation

Success of the Programme Depends on

Judicial leadership by actively engaging with the witness in pre-visit, court appearance and during testimony and cross-examination

Judicial intervention must ensure that the vulnerable witness in the court room is treated with respect, questioning is fair, and developmentally appropriate, that the dignity and self respect of the witness is preserved throughout the court room appearance.

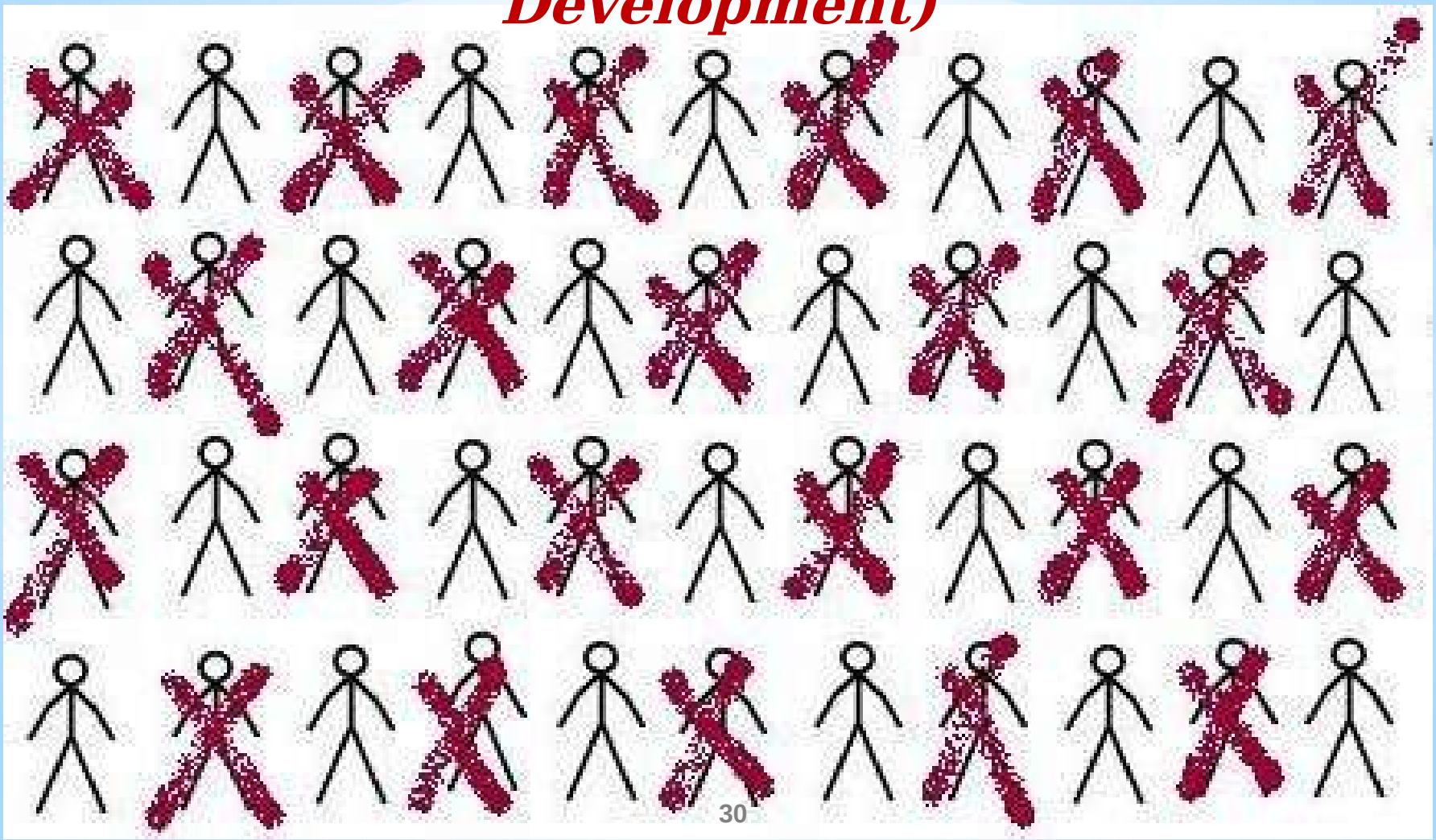
Research showing how special measures are alleviating witness stress

Measure	Very effective	Effective	Ineffective	Very ineffective	No answer
Screens	13	14	3	1	6
Live link	20	12	0	1	4
Evidence in private	4	14	5	0	14
Removal of wigs and gowns	7	8	9	2	11
Video recorded evidence-in-chief	26	6	1	0	4
Aids to communication	13	9	2	0	13
Interpreters	8	15	0	0	14
Escorts	10	14	2	0	11
Separate waiting areas	25	3	2	1	6
Liaison officers	19	7	1	0	10
Pagers	4	6	8	4	15

Source: https://blogs.salford.ac.uk/made-in-salford/2019/07/06/law-blog-savannah-how-do-special-measures-help-vulnerable-witnesses/

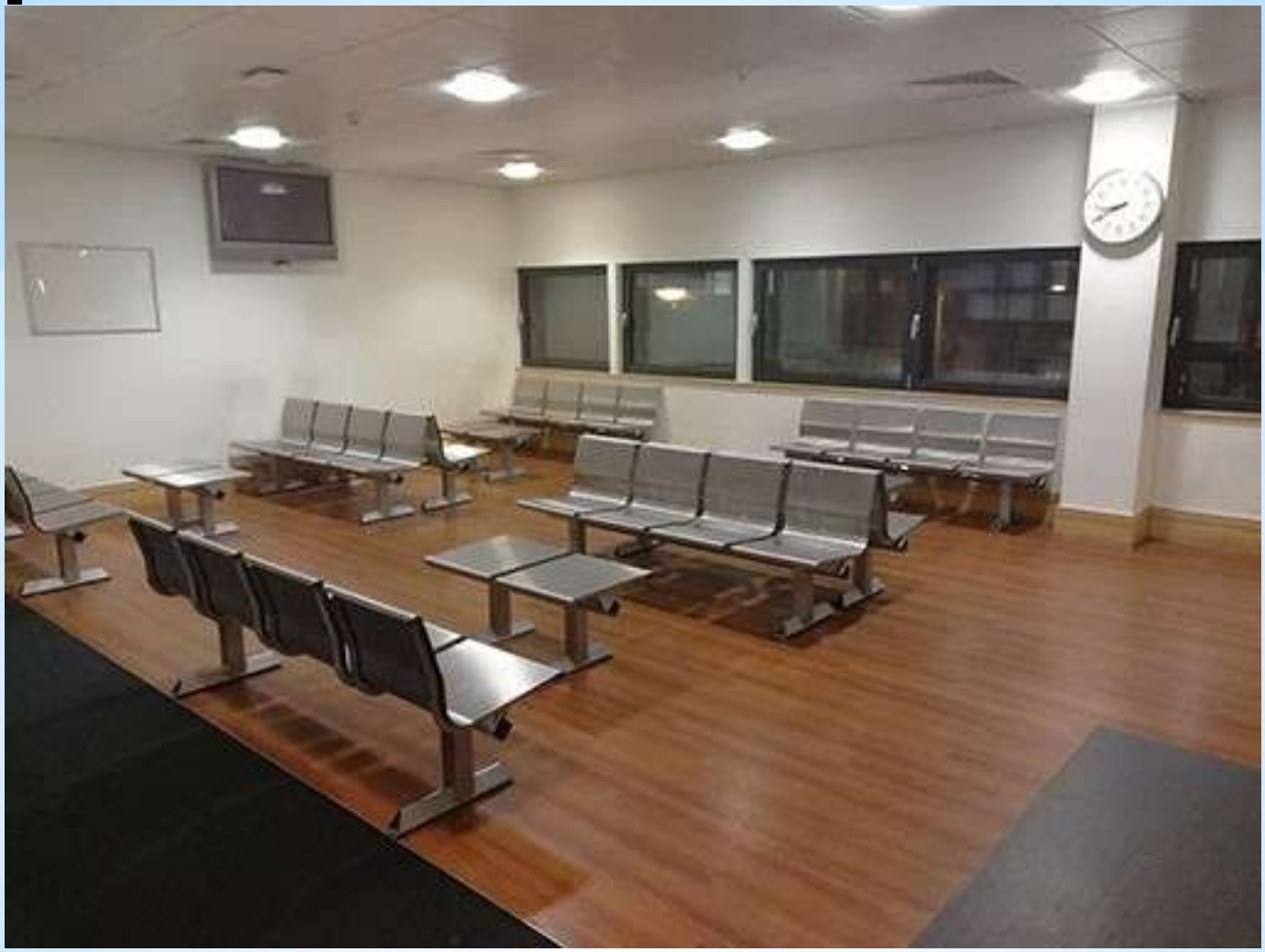
Judges' Bytes
(Video to play here)

Every second child/ young person reported some form of sexual victimization… (Ministry of Women and Child Development)



Screen as an alternative measure





...



"No violence against children is justifiable and all violence against children is preventable."

Prof. Paulo Pinheiro

"Even a minor event in the life of a child is an event of that child's world and thus a world event." –

Gaston Bachelard, French Philosopher 1884-1962'

Way Forward

- Section 715.1 of the *Criminal Code of Canada* permits a pre-recorded video taped statement of a child witness to be read as his testimony.

- Some day our legislation shall meaningfully incorporate such provisions, especially in view of the scientific development !!!

Some Comments…

- Justice Altamas Kabir, Chief Justice of India at the inauguration ceremony said: "*When we get intimidated, think of how a child would feel when faced with lawyers and judges.”*

- Justice A K Sikri, Former Supreme Court Judge when he was Acting Chief Justice of the Delhi High Court, said: "*The witness is the eyes and ears of the court. As such, it is our job to see that children are treated fairly, their voice is heard and their confidence in judicial services is maintained.”* (As quoted by Times of India)

…

...

- "*It is a very positive step as the whole concept of a court is very intimidating for a child,*" said Ramesh Gupta, senior criminal lawyer. (As quoted by Daily Pioneer)

- "*This will be less intimidating for the child*" a source was quoted in Indian Express

Thank You

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 156 OF 2016

MAHENDER CHAWLA & ORS. .....PETITIONER(S)

VERSUS

UNION OF INDIA & ORS. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

The instant writ petition filed by the petitioners under Article 32 of the Constitution of India raises important issues touching upon the efficacy of the criminal justice system in this country. In an adversarial system, which is prevalent by India, the court is supposed to decide the cases on the basis of evidence produced before it. This evidence can be in the form of documents. It can be oral evidence as well, i.e., the deposition of witnesses. The witnesses, thus, play a vital role in facilitating the court to arrive at correct findings on disputed questions of facts and to find out where the truth lies. They are, therefore, backbone in decision

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DEEPAK SINGH
Date: 2019.02.19
16:24:05 IST
Reason:

making process. Whenever, in a dispute, the two sides come out with conflicting version, the witnesses become important tool to arrive at right conclusions, thereby advancing justice in a matter. This principle applies with more vigor and strength in criminal cases inasmuch as most of such cases are decided on the basis of testimonies of the witnesses, particularly, eye-witnesses, who may have seen actual occurrence/crime. It is for this reason that Bentham stated more than 150 years ago that "witnesses are eyes and ears of justice".

2) Thus, witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts. This evidence in the form of documentary and oral is given by the witnesses. A witness may be a partisan or interested witness, i.e., a witness who is in a near relation with the victim of crime or is concerned with conviction of the accused person. Even his testimony is relevant, though, stricter scrutiny is required while adjudging the credence of such a victim. However, apart from these witnesses or the witnesses who may themselves be the victims, other witnesses may not have any personal

interest in the outcome of a case. They still help the judicial system. In the words of ***Whittaker Chambers***, a witness is *"a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences*[1]."

3) The importance of the witness, particularly in a criminal trial is highlighted in a book in the following manner:

> "In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion.
>
> xxx xxx xxx
>
> The value of witnesses can't be denied, keeping in view the dependency of the criminal proceedings on the testimonies and cooperation of witnesses in all the stages of the proceedings, especially in those cases where the prosecution has to establish the guilt with absolute certainty via oral cross-examination of witnesses in hearings open to the world at large. In such cases, the testimony of a witness, even if not as an eye witness, may prove to be crucial in determining the circumstances in which the crime might have been committed..."[2]

Notwithstanding the same, the conditions of witnesses in Indian Legal System can be termed as 'pathetic'. There are many threats faced by the witnesses at various stages of an investigation and then during the trial of a case. Apart from facing

1 Whittaker Chambers, WITNESS QUOTES (January 7, 2014, 10.30 am), http://www.brainyquote.com/quotes/keywords/witness.
2 Witness Protection in Criminal Trial in India by Girish Abhyankar & Asawari Abhyankar

life threatening intimidation to himself and to his relatives, he may have to face the trauma of attending the court regularly. Because of the lack of Witness Protection Programme in India and the treatment that is meted out to them, there is a tendency of reluctance in coming forward and making statement during the investigation and/or testify in courts. These witnesses neither have any legal remedy nor do they get suitably treated. The present legal system takes witnesses completely for granted. They are summoned to court regardless of their financial and personal conditions. Many times they are made to appear long after the incident of the alleged crime, which significantly hampers their ability to recall necessary details at the time of actual crime. They are not even suitably remunerated for the loss of time and the expenditure towards conveyance etc.

4) In ***Swaran Singh vs. State of Punjab***[3], this Court speaking through Wadhwa, J. expressed view on conditions of witnesses by stating that:

> "The witnesses are harassed a lot. They come from distant places and see the case is adjourned. They have to attend the court many times on their own. It has become routine that case is adjourned till the witness is tired and will stop coming to court. In this process lawyers also play an important role. Sometimes witness is threatened, maimed, or even bribed. There is no

3 (2000) 5 SCC 68 at 678.

protection to the witnesses. By adjourning the case the court also becomes a party to such miscarriage of justice. The witness is not given respect by the court. They are pulled out of the court room by the peon. After waiting for the whole day he sees the matter being adjourned. There is no proper place for him to sit and drink a glass of water. When he appears, he is subjected to prolong stretched examinations and cross examinations. For these reasons persons avoid becoming a witness and because of this administration of justice are hampered. The witnesses are not paid money within time. The High Courts must be vigilant in these matters and should avoid harassment in these matters by subordinate staff. The witnesses should be paid immediately irrespective of the fact whether he examines or the matter is adjourned. The time has come now that all courts should be linked with each other through computer. The Bar Council of India has to play important role in this process to put the criminal justice system on track. Though the trial judge is aware that witness is telling lie still he is not ready to file complaint against such witness because he is required to sign the same. There is need to amend section 340(3)(b) of Cr.P.C."

5) It hardly needs to be emphasised that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorize or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective

measure to ensure the safety of these witnesses, commonly known as 'witness protection'.

6) Over the last many years criminal justice system in this country has been witness to traumatic experience where witnesses turn hostile. This has been happening very frequently. There may be many causes for this sordid phenomena.

7) In ***Ramesh and Others*** vs. ***State of Haryana***[4], this Court had indicated some of the reasons which make witnesses turn hostile, as can be discerned from the following discussion.

> "**40.** In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In *Krishna Mochi* v. *State of Bihar* [*Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220] , this Court observed as under: (SCC p. 104, para 31)
>
> > "*31.* It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

4 (2017) 1 SCC 529

"**41.** Likewise, in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court highlighted the problem with the following observations: (SCC pp. 396-98, paras 40-41)

> "*40.* "Witnesses" as Bentham said: "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface.... Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.... There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and that the trial is not reduced to a mockery. ...
>
> *41.* The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from

this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

"**42.** Likewise, in *Sakshi* v. *Union of India* [*Sakshi* v. *Union of India*, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645] , the menace of witnesses turning hostile was again described in the following words: (SCC pp. 544-45, para 32)

"*32.* The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC."

43. In *State* v. *Sanjeev Nanda* [*State* v. *Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Civ) 899] , the Court felt constrained in reiterating the growing disturbing trend: (SCC pp. 486-87, paras 99-101)

"*99.* Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in *State of U.P.* v. *Ramesh Prasad Misra* [*State of U.P.* v. *Ramesh Prasad Misra*, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In *K. Anbazhagan*v. *Supt. of Police* [*K. Anbazhagan* v. *Supt. of Police*, (2004) 3 SCC 767 : 2004 SCC (Cri) 882] , this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [*Sanjeev Nanda* v. *State*, 2009 SCC OnLine Del 2039 : (2009) 160 DLT 775] and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma* v. *State (NCT of Delhi)* [*Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in *Zahira Habibullah Sheikh (5)* v. *State of Gujarat* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to

intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:
(*i*) Threat/Intimidation.
(*ii*) Inducement by various means.
(*iii*) Use of muscle and money power by the accused.
(*iv*) Use of stock witnesses.
(*v*) Protracted trials.
(*vi*) Hassles faced by the witnesses during investigation and trial.
(*vii*) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "*witnesses are the eyes and ears of justice*". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in *Zahira Habibullah case* [*Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

"11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. ... Time has come for a comprehensive law being enacted for protection of the witness and members of his family."

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report [Report on "witness identity protection and witness protection programmes".] , as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several

general statutes in other countries provide for victim and witness protection."

8) All this has created problems of low convictions in India. This has serious repercussions on the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender. In this whole process, protection of witnesses assumes significance to enable them to depose fearlessly and truthfully. That would also ensure fair trial as well, which is another concomitant of the rule of law.

9) Since this case relates to the issue of protection of witnesses, we are eschewing any further discussion on other miseries faced by the witnesses, though we emphasise the need for addressing other problems as well, at appropriate level, if the criminal justice system in this country is to succeed. Adverting to the importance of witness protection, we may mention that it has been highlighted and emphasised by the courts in India, including this Court, time and again. Issues of protection of identity of witnesses and witness protection programme have been raised in

number of judgments like ***NHRC vs. State of Gujarat***[5]***, People's Union for Civil Liberties (PUCL) vs. Union of India***[6]***, Zahira vs. State of Gujarat***[7]***, Sakshi vs. Union of India***[8] **and** ***Zahira Habibulla Sheikh vs. Gujarat***[9].

10) In ***People's Union for Civil Liberties***, wherein constitutionality some of the provisions of the Prevention of Terrorism Act (POTA), 2002, were challenged, the Court carefully analyzed Section 30 of the Act, which had mentioned about the protection of witnesses. This provision provides for the proceedings to be held *in camera* in order to keep the identity of witness confidential. The Court felt the reality that very often witnesses do not come forward to testify before court in serious crimes. Witnesses are not ready to give evidence mainly because their lives might be in danger. In the court's view, Section 30 of the Act maintains a balance between the rights of a witness, the rights of an accused and the interest of the public. However, secrecy of the witness is an exception and not a rule under this section.

11) The protection of a child witness, who may also be a victim,

5 2003 (9) SCALE 329
6 2003 (10(SCALE 967
7 (2004) 4 SCC 158
8 (2004) 5 SCC 518
9 2006 (3) SCALE 967

becomes all the more important. In ***Sakshi vs. Union of India***[10], the Court stressed that there is a dire need to come up with a legislation for the protection of witnesses. The Court also had issued certain guidelines on the procedure of taking of evidence from a child witness. The Court also pointed out the need for special protection to a victim of sexual abuse at the time of recording her statement in court. The petitioner in that case had given certain suggestions for effectively dealing with the special provisions for testimony in child sexual abuse cases, which were as follows:

a) The judges shall allow the use of a videotaped interview of the testimony of the child in the presence of a child-support person.

b) A child could be permitted to testify through closed circuit television or from behind a screen to acquire an honest and frank account of the acts complained of without any fear.

c) Only the judge should be allowed to cross-examine a minor on the basis of the questions given by the defence in writing after the examination of the minor.

d) During the testimony of the child, sufficient interval should be provided as and when she requires it.

10 (2004) 5 SCC 518

12) In some other judgments, this Court gave some more guidelines, in the following manner:

a) Sections 354 and 377 of the Indian Penal Code should **be tried and inquired on the same principles mentioned under sub-section** (2) of Section 327 Cr.P.C.

b) While holding the trial of rape or child sex abuse, some sort of arrangements like a screen or something like it may be used so as to make sure that victim or witnesses (who are equally vulnerable and need protection like the victim) do not confront the accused;

c) Questions raised during the cross-examination by the counsel of the accused that are directly related to and be reminiscent to the victim or the witnesses of the incident should be written down and given to the presiding officer of the court in advance. The presiding officer must put forth those questions to the victim or witness in simple and clear language and as far as possible without making her uncomfortable;

13) It hardly needs to be emphasised that failure to hear material witness is denial of fair trial. The practice, however, to give protection to the witnesses is based on *ad hocism*, i.e., on case

to case basis. The Courts have also, in the process, adopted different means to ensure witness protection, which can be stated in brief detail:

(a) Publication of evidence of the witness only during the course of trial and not after ***[Naresh Shridhar Mirajkar and Others vs. State of Maharashtra and Another; [1966 (3) SCR 744]***

(b) Re-trial allowed due to apprehension and threat to the life of witness ***[Sunil Kumar Pal vs. Phota Sheikh and Other; AIR 1984 SC 1591]***

(c) Necessity of anonymity for victims in cases of rape [***Delhi Domestic Working Women's Forum vs. Union of India; (1995) 1 SCC 14)]***

(d) Discouraging the practice of obtaining adjournments in cases when witness is present and accused is absent. ***[State of U.P. vs. Shambhu Nath Singh; (2001) 4 SCC 667]***

(e) Making threatening of witnesses as a ground for cancellation of bail ***[Ram Govind Upadhyay v. Sudarshan Singh; II (2002) SLT 587]***

(f) **Cross-examination by video conferencing** — This is one of the innovative methods devised, which is specifically helpful to the victims of sexual crimes, particularly, child witnesses who are

victims of crime as well.

14) In the instant case itself the petitioners have approached this Court with the allegations that in the trials that are going on against Asaram, who is charged with the offence of committing rapes in numerous cases, the witnesses have been threatened with serious consequences in case they depose against Asaram. It is alleged that as many as 10 witnesses have already been attacked and three witnesses have been killed.

15) There are four petitioners in this petition. These petitioners include a witness, father of a murdered witness, father of the child rape victim and a journalist who escaped a murder attempt by goons of godman Asaram and his son Naryana Sai and still faces death threats by a jailed sharpshooter of Asaram and Narayan Sai. It is stated that Petitioner No. 1 Mahender Chawla miraculously survived a murder attempt on his life for daring to testify against so called godman, Asaram Bapu and his son Narayan Sai in horrifying cases of rape of a child and two sisters. Petitioner no. 1 also witnessed Narayan Sai doing Tantrik Practice on a dead body of a child in an Asaram in Madhya Pradesh, in which till date there has not been any investigation due to the influence of Asaram. Petitioner no. 2 Naresh Gupta is

the father of a murdered witness, named, Akhil Gupta. Akhil was killed for daring to be a witness against Asaram. Petitioner no. 3 Karamvir Singh is the father of a child, who was raped by Asaram. Petitioner no. 3's son Somvir was threatened by 2 attackers despite having State police security. The attackers were apprehended and released on bail. Shockingly the same attacker, named Narayan Pandey, later killed a rape-case prosecution witness Kripal Singh. The child rape victim's family has been attacked, threatened and lives in constant fear. It is also alleged that despite being threatened, the Uttar Pradesh Police shockingly withdrew half of their security. Petitioner no. 4, Narendra Yadav is a journalist who survived a murder attempt on his life because he dared to write articles to the dislike of Asaram Bapu and Narayan Sai. He now lives in constant fear of being killed as the Uttar Pradesh Police has given him a solitary security guard for just eight hours a day, leaving him to fend for himself through the remaining 16 hours. It is also averred that the sharp shooter of Asaram, Narayan Pandey, who is in jail for murdering a witness Kripal Singh, writes threatening letters to him from inside the jail.

16) The petitioners have prayed for a court monitored SIT or a CBI

probe. It is stated by the petitioners that the prevailing feeling of fear amongst witnesses in the country seriously impairs the right of the people of this country to live in a free society governed by rule of law. The right to testify in courts in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution. The right to life guaranteed to the people of this country also includes in its fold the right to live in a society, which is free from crime and fear and right of witnesses to testify in courts without fear or pressure.

17) The petitioners had initially impleaded Union of India as Respondent No. 1 and States of Haryana, Uttar Pradesh, Rajasthan, Gujarat and Madhya Pradesh as Respondent Nos. 2 to 6.

18) Appreciating the importance and seriousness of the matter, this Court issued show cause notices in the petition on November 18, 2016. After the service of the notice when the matter came up for hearing on March 24, 2017, this Court also directed the States of Uttar Pradesh and Haryana to ensure full and proper protection to the petitioners by providing adequate security.

19) When the matter was again listed on August 28, 2017, Mr. K.K. Venugopal, learned Attorney General appeared on behalf of the Union of India, along with Ms. Pinky Anand, Additional Solicitor General. It was pointed out that since this Court was primarily dealing with the issue pertaining to witness protection programme, it would be appropriate that other States are also impleaded inasmuch as the issue had PAN India significant and witness protection programme should be available in all the States. The petitioners were, accordingly, directed to implead other States as well and they be served with the notice of this petition. This is how the coverage of the petition has been extended to the entire country, encompassing all the States and Union Territories.

20) The petition was amended and all the States and Union Territories have been served and are represented through their respective counsel. When the matter was thereafter taken up for hearing on November 17, 2017 all the respondents were called upon to file their responses indicating as to what steps could be taken to have the witness protection programme in place.

21) Mr. Venugopal, learned Attorney General for India was also

requested to give suggestions in the form of a draft scheme. It is heartening to note that Union of India did not take this petition as adversarial and understood the necessity of having such a scheme in the larger public interest. With this sensitivity in mind, Ministry of Home Affairs have prepared a draft witness protection scheme, 2018 and placed the same on record of this case. This was noted in the orders dated April 13, 2018 and the State Governments as well as Union Territories, who had already been supplied with the copy of the draft scheme by the Ministry itself, were asked to furnish their comments by May 31, 2018 to the Ministry of Home Affairs. The Union Government was impressed upon to finalise the scheme after receiving the comments/suggestions from the various Governments. Order dated April 13, 2018, incorporating the aforesaid aspects, is reproduced below:

> "We are informed that the Ministry of Home Affairs has prepared a draft Witness Protection Scheme 2018. A copy of the said draft scheme is handed over to us in the court today. Vide letter dated 22nd March, 2018, a copy of the said scheme is also provided to all the State Governments and the Union Territories Administration requesting them to furnish their comments by 9th April, 2018. Thereafter, again by reminder dated 11th April, 2018 all the State Governments and Union Territories were asked to furnish their comments by 31st May, 2018.
> We expect all the State Governments as well as the Union Territories to furnish their comments by the aforesaid stipulated date of 31st May, 2018 to the Ministry of Home Affairs. After receiving the comments/suggestions the draft

Witness Protection Scheme 2018 shall be finalized by the Government, Ministry of Home Affairs before the next date.

List the matter in the second week of August, 2018.

Learned amicus curiae is also at liberty to furnish his suggestions."

22) When the matter was taken up on November 19, 2018, the learned Attorney General informed that after taking the inputs from various States and Union Territories, Central Government had finalized the scheme and filed it in this Court on November 06, 2018 supported by its affidavit. He was also candid in his submission that this Court can pass appropriate orders directing all the States to adopt that scheme and provide a witness protection in accordance therewith till the time appropriate legislation in this behalf is passed.

23) We may place on record that as per the affidavit of the Central Government, the Witness Protection Scheme, 2018 is based on the inputs received from 18 States/Union Territories, 5 States Legal Services Authorities and open sources including civil society, three High Courts as well as from Police personnel. It is also stated that the scheme has been finalised in consultation with National Legal Services Authority (NALSA). It is mentioned that the aim and objective of the scheme is to ensure that the

investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of justice.

24) The affidavit further emphasises that the witnesses need to be given the confidence to come forward to assist law enforcement and judicial authorities with full assurance of safety and the present Scheme is aimed to identify the series of measures that may be adopted to safeguard witnesses and their family members from intimidate and threats against their lives, reputation and property.

25) At this stage, we reproduce Witness Protection Scheme, 2018 as filed, in its entirety:

> **"Witness Protection Scheme, 2018**
>
> **PREFACE**
>
> Aims & Objective:
>
> The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is

essential in maintaining the rule of law. The objective of this Scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice. Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authorities with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.

Need and justification for the scheme:

Jeremy Bentham has said that "Witnesses are the eyes and ears of justice." In cases involving influential people, witnesses turn hostile because of threat to life and property. Witnesses find that there is no legal obligation by the state for extending any security.

Hon'ble Supreme Court of India also held in State of Gujrat v. Anirudh Singh (1997) 6 SCC 514 that: "It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence." Malimath Committee on Reforms of Criminal Justice System, 2003 said in its report that "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth". Zahira Habibulla H. Shiekh and Another v. State of Gujarat 2004 (4) SCC 158 SC while defining Fair Trial said "If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial".

First ever reference to Witness Protection in India came in 14th Report of the Law Commission of India in 1958. Further reference on the subject are found in 154th and 178th report of the Law Commission in India. 198th Report of the Law Commission of India titled as "Witness Identity Protection and Witness Protection Programmes, 2006" is dedicated to the subject.

Hon'ble Supreme Court observed in *Zahira case* supra,

"country can afford to expose its morally correct citizens to the peril of being harassed by anti-social elements like rapists and murderers". The 4th National Police Commission Report, 1980 noted 'prosecution witnesses are turning hostile because of pressure of accused and there is need of regulation to check manipulation of witnesses."

Legislature has introduced Section 195A IPC in 2006 making Criminal Intimidation of Witnesses a criminal offence punishable with seven years of imprisonment. Likewise, in statues namely Juvenile Justice (Acre and Protection of Children) Act, 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Sexual Castes and Tribes (Prevention of Atrocities) Act, 1989 also provides for safeguarding witnesses again the threats. However no formal structured programme has been introduced as on date for addressing the issue of witness protection in a holistic manner.

In recent year's extremism, terrorism and organized crimes have grown and are becoming stronger and more diverse. In the investigation becoming and prosecution of such crimes, it is essential that witnesses, have trust in criminal justice system. Witnesses need to have the confidence to come forward to assist law enforcement and prosecuting agencies. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups might seek to inflict upon them in order to discourage them from co-operating with the law enforcement agencies and deposing before the court of law. Hence, it is high time that a scheme is put in place for addressing the issues of witness protection uniformly in the country.

Scope of the Scheme:

Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video means) for recording of testimony. In other more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis

depending upon their vulnerability and threat perception.

1. SHORT TITLE AND COMMENCEMENT:

(a) The Scheme shall be called **"Witness Protection Scheme, 2018"**
(b) It shall come into force from the date of Notification.

Part I

2. DEFINITIONS:

(a) **"Code"** means the Code of Criminal Procedure, 1973 (2 of 1974);

(b) **"Concealment of Identity of Witness"** means and includes any condition prohibiting publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage;

(c) **"Competent Authority"** means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.

(d) **"Family Member"** includes parents/guardian, spouse, live-in partner, siblings, children,grandchildren of the witness;

(e) **"Form"** means "Witness Protection Application Form" appended to this Scheme;

(f) **"In Camera Proceedings"** means proceedings wherein the Competent Authority/Court allows only those persons who are necessary to be present while hearing and deciding the witness protection application or deposing in the court;

(g) **"Live Link"** means and include a live video link or other such arrangement whereby a witness, while not being physically present in the courtroom for deposing in the matter or interacting with the Competent Authority;

(h) **"Witness Protection Measures"** means measures spelt out in Clause 7, Part-III, Part-IV and Part V of the

Scheme.

(i) **"Offence"** means those offences which are punishable with death or life imprisonment or an imprisonment up to seven years and above and also offences punishable punishable under Section 354, 354A, 354B, 354C, 354D and 509 of IPC.

(j) **"Threat Analysis Report"** means a detailed report prepared and submitted by the Head of the Police in the District Investigating the case with regard to the seriousness and credibility of the threat perception to the witness or his family members. It shall contain specific details about the nature of threats by the witness or his family to their life, reputation or property apart from analyzing the extent, the or persons making the threat, have the intent, motive and resources to implement the theats.

It shall also categorize the threat perception apart from suggesting the specific witness protection measures which deserves to be taken in the matter;

(k) "Witness" means any person, who posses information or document about any offence;

(l) "Witness Protection Application" means an application moved by the witness in the prescribed form before a Competent Authority for seeking Witness Protection Order. It can be moved by the witness, his family member, his duly engaged counsel or IO/SHO/SDPO/Prison SP concerned and the same shall preferably be got forwarded through the Prosecutor concerned;

(m) "Witness Protection Fund" means the fund created for bearing the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority under this scheme;

(n) "Witness Protection Order" means an order passed by the Competent Authority detailing the witness protection measures to be taken

(o) "Witness Protection Cell" means a dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order.

Part II

3. **CATEGORIES OF WITNESS AS PER THREAT PERCEPTION:**

Category 'A' : Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B' : Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

Category 'C' : Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

4. STATE WITNESS PROTECTION FUND:

(a) There shall be a Fund, namely, the Witness Protection Fund from which the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority and other related expenditure, shall be met.

(b) The Witness Protection Fund shall comprise the following:-

i. Budgetary allocation made in the Annual Budget by the State Government;
ii. Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the Witness Protection Fund;
iii. Donations/contributions from Charitable Institutions/ Organizations and individuals permitted by Central/State Governments.
iv. Funds contributed under Corporate Social Responsibility.

(c) The said Fund shall be operated by the Department/Ministry of Home under State/UT Government.

5. FILING OF APPLICATION BEFORE COMPETENT AUTHORITY:

The application for seeking protection order under this scheme can be filed in the prescribed form before the Competent Authority of the concerned District where the offence is committed, through its Member Secretary along with supporting documents, if any.

6. PROCEDURE FOR PROCESSING THE APPLICATION:

(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e) While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held *in-camera* by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness

Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT.

However the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the concerned Police Sub-Division.

7. TYPES OF PROTECTION MEASURES:

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration not exceeding three months at a time. They may include:

(a) Ensuring that witness and accused do not come face to face during investigation or trial;

(b) Monitoring of mail and telephone calls;

(c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;

(d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc;

(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

(f) Emergency contact persons for the witness;

(g) Close protection, regular patrolling around the witness's house;

(h) Temporary change of residence to a relative's house or a nearby town;

(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;

(j) Holding of *in-camera* trials;

(k) Allowing a support person to remain present during recording of statement and deposition;

(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

(m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

(o) Any other form of protection measures considered necessary.

8. MONITORING AND REVIEW:

Once the protection order is passed, the Competent Authority would monitor its implementation and can review the same in terms of follow-up reports received in the matter. However, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly follow-up report submitted by the Witness Protection Cell.

Part III

9. PROTECTION OF IDENTITY :-

During the course of investigation or trial of any offence, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority through its Member Secretary.

Upon receipt of the application, the Member Secretary of the Competent Authority shall call for the Threat Analysis Report. The Competent Authority shall examine the witness or his family members or any other person it deem fit to ascertain whether there is necessity to pass an identity protection order.

During the course of hearing of the application, the identity of the witness shall not be revealed to any other person, which is likely to lead to the witness identification. The Competent Authority can thereafter, dispose of the application as per material available on record.

Once, an order for protection of identity of witness is passed by the Competent Authority, it shall be the responsibility of Witness Protection Cell to ensure that identity of such witness/his or her family members including name/parentage/occupation/address/digital footprints are fully protected.

As long as identity of any witness is protected under an order of the Competent Authority, the Witness Protection Cell shall provide details of persons who can be contacted by the witness in case of emergency.

Part IV

10. CHANGE OF IDENTITY:-

In appropriate cases, where there is a request from the witness for change of identity and based on the Threat Analysis Report, a decision can be taken for conferring a new identity to the witness by the Competent Authority.

Conferring new identities includes new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The

new identities should not deprive the witness from existing educational/ professional/property rights.

Part V

11. RELOCATION OF WITNESS:

In appropriate cases, where there is a request from the witness for relocation and based on the Threat Analysis Report, a decision can be taken for relocation of the witness by the Competent Authority.

The Competent Authority may pass an order for witness relocation to a safer place within the State/UT or territory of the Indian Union keeping in view the safety, welfare and wellbeing of the witness. The expenses shall be borne by the Witness Protection Fund.

Part VI

12. WITNESSES TO BE APPRISED OF THE SCHEME:

Every state shall give wide publicity to this Scheme. The IO and the Court shall inform witnesses about the existence of "Witness Protection Scheme" and its salient features.

13. CONFIDENTIALITY AND PRESERVATION OF RECORDS:

All stakeholders including the Police, the Prosecution Department, Court Staff, Lawyers from both sides shall maintain full confidentiality and shall ensure that under no circumstance, any record, document or information in relation to the proceedings under this scheme shall be shared with any person in any manner except with the Trial Court/Appellate Court and that too, on a written order.

All the records pertaining to proceedings under this scheme shall be preserved till such time the related trial or appeal thereof is pending before a Court of Law. After one year of disposal of the last Court proceedings, the hard copy of the records can be weeded out by the Competent Authority after preserving the scanned soft copies of the same.

14. RECOVERY OF EXPENSES:

In case the witness has lodged a false complaint, the Home Department of the concerned Government can initiate proceedings for recovery of the expenditure incurred from the Witness Protection Fund.

15. REVIEW:

In case the witness or the police authorities are aggrieved by the decisions of the Competent Authority, a review application may be filed within 15 days of passing of the orders by the Competent Authority.

Witness Protection Scheme, 2018
Witness Protection Application
under
Witness Protection Scheme, 2018

Before, (To be filed in duplicate)
The Competent Authority,
District.....

Application for:

1. Witness Protection
2. Witness Identity Protection
3. New Identity
4. Witness Relocation

1.	Particulars of the Witness (Fill in Capital): 1) Name 2) Age 3) Gender (Male/Female/Other) 4) Father's/Mother's Name 5) Residential Address 6) Name and other details of family members of the witness who are receiving or perceiving threats 7) Contact details (Mobile/e-mail)	---------- ---------- ---------- ---------- ---------- ---------- ---------- ----------
2.	Particulars of Criminal matter: 1) FIR No. 2) Under Section 3) Police Station	---------- ---------- ---------- ----------

	4) District 5) D.D. No. (in case FIR not yet registered) 6) Cr.Case No. (in case of private complaint)	---------- ----------
3.	Particulars of the Accused (if available/known): 1) Name 2) Address 3) Phone No. 4) Email id	---------- ---------- ----------
4.	Name & other particulars of the person giving/suspected of giving threats	---------- ----------
5.	Nature of threat perception. Please give brief details of threat received in the matter with specific date, place, mode and words used	---------- ---------- ----------
6.	Type of witness protection measures prayed by/for the witness	----------
7.	Details of Interim / urgent Witness Protection needs, if required	----------

• Applicant/witness can use extra sheets for giving additional information.

(Full Name with signature)

Date: .....

Place:.....

UNDERTAKING

1. I undertake that I shall fully cooperate with the competent authority and the Department of Home of the State and Witness Protection Cell.
2. I certify that the information provided by me in this application is true and correct to my best knowledge and belief.

3. I understand that in case, information given by me in this application is found to be false, competent authority under the scheme reserves the right to recover the expenses incurred on me from out of the Witness Protection Fund.

(Full Name with signature)

Date: .....

Place:....."

26) As is clear from its reading, the essential features of the Witness Protection Scheme, 2018 include identifying categories of threat perceptions, preparation of a "Threat Analysis Report" by the Head of the Police, types of protection measures like ensuring that the witness and accused do not come face to face during investigation etc. protection of identity, change of identity, relocation of witness, witnesses to be apprised of the scheme, confidentiality and preservation of records, recovery of expenses etc.

27) Since it is beneficial and benevolent scheme which is aimed at strengthening the criminal justice system in this country, which shall in turn ensure not only access to justice but also advance the cause the justice itself, all the States and Union Territories also accepted that suitable directions can be passed by the court to enforce the said Scheme as a mandate of the court till the

enactment of a statute by the Legislatures.

28) It is clear from the aforesaid events that the Scheme is the outcome of the efforts put in by the Central Government with due assistance not only from the State Governments as well as Union Territories but other stakeholders including Police personnel, NALSA and State Legal Services Authorities, High Courts and even civil society. There is no reason not to accede to the aforesaid submission of the learned Attorney General and other respondents.

29) As pointed out above, in ***Sakshi's*** case, the Court had insisted about the need to come up with a legislation for the protection of witnesses. It had even requested the Law Commission to examine certain aspects, which resulted to 172nd review of rape laws by the Law Commission. However, the Court specifically rejected the suggestion of the Law Commission regarding examination of vulnerable witnesses in the absence of accused. Having regard to the provisions of Section 273 of the Code of Criminal Procedure, which is based on the tenets of principle of natural justice, that the witness must be examined in the presence of the accused, such a principle cannot be sacrificed in trials and in inquiries regarding sexual offences. In such a

scenario examination of these witnesses through video conferencing provides the solution which balances the interest of the accused as well as vulnerable witnesses.

30) Part II(7)(L) of the Witness Protection Scheme, 2018 provides for usage of specially designed court room having special arrangements like live links, one way mirrors, and screens apart from separate passages for witnesses and accused with the option to modify the image of the face of the witness and to modify the audio feed of the witness's voice, so that he/she is not identified.

31) In consonance with the same, the Delhi Judiciary has already established four Vulnerable Witness Deposition Complexes in the National Capital Territory, the latest one being at the Dwarka District Court, which was established in February, 2017. This complex provides facilities like separate witness room, separate accused room, play area for the child witnesses, pantry, separate toilet and an exclusive & comfortable waiting area and is equipped with all facilities of audio-visual exchange for a free interface between the presiding Judge, the witness and the accused without witness facing the accused. The complex has a separate entry for vulnerable witnesses, so that they do not come

in direct contact with accused at any point of time. There are provisions for support persons, pre-trial court visit and facilities for pick and drop of the witnesses from their residence. In this way, all possible efforts have been made for providing comfortable environment to vulnerable witnesses at this complex in order to enable them to give their best evidence in criminal proceedings.

32) One of the main reasons behind establishing these Vulnerable Witness Deposition Complexes was that a large percentage of acquittals in criminal cases is due to witnesses turning hostile and giving false testimonies, mostly due to lack of protection for them and their families, especially in case of women and children.

33) In fact, the Supreme Court too, in ***The State of Maharashtra v. Bandu @ Daulat*** **(Order dt. 24.20.2017 in Crl. Appeal No. 1820/2017)** has directed as follows:

> "10. ... there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres ought to be set up with all necessary safeguards. Our attention has been drawn to guidelines issued by the Delhi High Court for recording evidence of vulnerable witnesses in criminal matters and also the fact that four special centres have been set up at Delhi for the purpose.
>
> *****
>
> 12. The directions of Delhi High Court and setting up of special centres for vulnerable witnesses as noted above

> are consistent with the decision of this Court and supplement the same. We are of the view that all High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary. Setting up of one center for vulnerable witnesses may be perhaps required almost in every district in the country. All the High Courts may take appropriate steps in this direction in due course in phases. At least two such centres in the jurisdiction of each High Court may be set up within three months from today. Thereafter, more such centres may be set up as per decision of the High Courts."

34) One thing which emerges from the aforesaid discussion is that there is a paramount need to have witness protection regime, in a statutory form, which all the stakeholders and all the players in the criminal justice system concede. At the same time no such legislation has been brought about. These are the considerations which had influenced this Court to have a holistic regime of witness protection which should be considered as law under Article 141 of the Constitution till a suitable law is framed.

35) We, accordingly, direct that :

(i) This Court has given its imprimatur to the Scheme prepared by respondent No.1 which is approved hereby. It comes into effect forthwith.

(ii) The Union of India as well as States and Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and

spirit.

(iii) It shall be the 'law' under Article 141/142 of the Constitution, till the enactment of suitable Parliamentary and/or State Legislations on the subject.

(iv) In line with the aforesaid provisions contained in the Scheme, in all the district courts in India, vulnerable witness deposition complexes shall be set up by the States and Union Territories. This should be achieved within a period of one year, i.e., by the end of the year 2019. The Central Government should also support this endeavour of the States/Union Territories by helping them financially and otherwise.

36) Writ petition stands disposed of in the aforesaid terms.

.....J.
(A.K. SIKRI)

.....J.
(S. ABDUL NAZEER)

NEW DELHI;
DECEMBER 05, 2018.

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(2018) 11 Supreme Court Cases 163

(BEFORE ADARSH KUMAR GOEL AND UDAY U. LALIT, JJ.)

STATE OF MAHARASHTRA .. Appellant;

Versus

BANDU ALIAS DAULAT .. Respondent.

Criminal Appeal No. 1820 of 2017†, decided on October 24, 2017

A. **Penal Code, 1860 — S. 376 — Rape — Victim being deaf and dumb and mentally challenged to some extent, was 14 years of age — Identity of accused not in dispute — Victim and accused seen together on date of incident — Rape confirmed by medical evidence — Respondent-accused was landlord of the house in which victim was living — She was lured away by respondent by offering some sweetmeat — She did not return home and it was at 9.30 p.m. in the night that two boys brought her home — Victim explained to her mother (PW 1) by gesture as to what happened — On such version, FIR was registered the next day — Medical examination of victim confirmed commission of rape — Reversal of conviction by High Court on ground of non-examination of victim herself — Not correct — Conviction restored**

— Held, evidence of victim's mother clearly shows that it was respondent who took victim away — Victim and accused were seen together by PW 2, on the date of commission of offence Victim immediately after occurrence narrated the same to her mother as to what happened as reflected in FIR and PW 1's version Rape was confirmed by medical evidence Identity of accused is not in dispute In such circumstances, High Court was not justified in setting aside conviction of respondent by trial court, on ground that since victim was not examined, factum of rape and involvement of accused was not proved Therefore, conviction of respondent under S. 376 IPC, stands restored — Respondent-accused sentenced to RI for 7 years (Paras 7 and 8)

Bandu v. *State of Maharashtra*, 2013 SCC OnLine Bom 1966, *reversed*

B. **Criminal Procedure Code, 1973 — S. 327 — Recording of evidence of vulnerable witnesses in criminal matters — Necessary directions issued to High Courts**

In instant case, suggestion was given that there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in court, so as to encourage a vulnerable victim to make a statement — That, such centres ought to be set up with all necessary safeguards — Attention was also drawn to guidelines issued by Delhi High Court for recording evidence of vulnerable witnesses in criminal matters and setting up of four special centres at Delhi for the purpose

† Arising out of SLP (Crl.) No. 2172 of 2014. Arising from the Judgment and Order in *Bandu* v. *State of Maharashtra*, 2013 SCC OnLine Bom 1966 (Bombay High Court, Criminal Appeal No. 325 of 2012, dt. 18-7-2013)

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— Held, directions of Delhi High Court and setting up of special centres for vulnerable witnesses, as noted above, are consistent with decision of Supreme Court and supplement the same All High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary Setting up of one centre for vulnerable witnesses may be perhaps required almost in every district in India All High Courts may take appropriate steps in such direction in due course in phases At least two such centres in the jurisdiction of each High Court may be set up within three months from present Thereafter, more such centres may be set up as per decision of High Courts — Copy of instant order to be sent to all High Courts for necessary action — Criminal Trial — Witnesses — Witness protection and support (Paras 10 to 12)

Sakshi v. *Union of India*, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645, *relied on*

State of Punjab v. *Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316, *cited*

Appeal allowed Y-D/59424/SR

Chronological list of cases cited ***on page(s)***

1. 2013 SCC OnLine Bom 1966, *Bandu* v. *State of Maharashtra* **(reversed)** 164*e*
2. (2004) 5 SCC 518 : 2004 SCC (Cri) 1645, *Sakshi* v. *Union of India* 165*e f*
3. (1996) 2 SCC 384 : 1996 SCC (Cri) 316, *State of Punjab* v. *Gurmit Singh* 166*a b*

ORDER

1. Leave granted. We have heard the learned counsel for the parties and perused the record.

2. The respondent was tried and convicted under Section 376 IPC by the trial court for the alleged offence of rape committed on 29-6-2008 but has been acquitted[1] by the High Court.

3. The victim is deaf and dumb and mentally challenged to some extent. Main evidence on record is of PW 1, Asha Ramratan Bangar alias Asha Panchu Dhurve, the mother of the victim. She lodged FIR on the next day i.e. 30-6-2008 to the effect that the accused was the landlord of the house in which they were living. The victim was lured away by the accused by offering some sweetmeat and was taken to the market. She did not return home and it was at 9.30 p.m. in the night that two boys brought her home. The victim explained to her mother by gesture as to what happened. On this version, FIR was registered and investigation was carried out. Medical examination of the victim confirmed the commission of rape. The age of the victim at the time of the commission of the offence was about 14 years.

4. The High Court held that since the victim herself was not examined, the factum of rape and involvement of the accused could not be held to have been proved. This is the basis of the order of the High Court.

5. Mr Nishant R. Katneshwarkar, learned counsel for the State, submitted that even though the victim may be the best witness to establish the charge of rape, having regard to the fact that the victim in the present case was deaf and

1 *Bandu* v. *State of Maharashtra*, 2013 SCC OnLine Bom 1966

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dumb and mentally retarded, even in the absence of her being examined as a witness, there was sufficient evidence warranting conviction of the accused.

6. Though the respondent was served, he has not put in appearance in this Court. We requested Ms Shirin Khajuria, Advocate, to assist the Court as Amicus. Accordingly, Ms Khajuria assisted the Court after thorough preparation. We record our appreciation for Ms Khajuria for the painstaking assistance.

7. The evidence of the mother of the victim clearly shows that it was the respondent-accused who took away the victim. The victim and the accused were seen together by PW 2, Gajanan Marutrao Sonule on the date of commission of offence. The victim immediately after the occurrence narrated the same to her mother as to what happened as reflected in the FIR and the version of PW 1. Rape has been confirmed by medical evidence. Identity of the accused is not in dispute. In these circumstances, the trial court having convicted the respondent, the High Court was not justified in setting aside the conviction.

8. Accordingly, we restore the conviction of the respondent under Section 376 IPC and sentence him to undergo rigorous imprisonment for seven years. He may be taken into custody to serve out the remaining sentence.

9. The appeal is accordingly allowed.

10. Before parting with this order we may deal with the suggestion of the learned Amicus that there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres ought to be set up with all necessary safeguards. Our attention has been drawn to guidelines† issued by the Delhi High Court for recording evidence of vulnerable witnesses in criminal matters and also the fact that four special centres have been set up at Delhi for the purpose.

11. We find merit in the above suggestion. In *Sakshi* v. *Union of India*[2] this Court, after due consideration of the above issue, issued the following directions: (SCC p. 545, para 34)

> "(*1*) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
>
> (*2*) In holding trial of child sex abuse or rape:
>
> (*i*) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
>
> (*ii*) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing

† See Annexure A for Guidelines. These Guidelines are also available at <http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_LCWCD2X4.PDF>

2 (2004) 5 SCC 518 : 2004 SCC (Cri) 1645

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to the Presiding Officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(*iii*) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab* v. *Gurmit Singh*[3]."

12. The directions of the Delhi High Court and setting up of special centres for vulnerable witnesses as noted above are consistent with the decision of this Court and supplement the same. We are of the view that all High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary. Setting up of one centre for vulnerable witnesses may be perhaps required almost in every district in the country. All the High Courts may take appropriate steps in this direction in due course in phases. At least two such centres in the jurisdiction of each High Court may be set up within three months from today. Thereafter, more such centres may be set up as per decision of the High Courts. A copy of this order be sent to all the High Courts for necessary action.

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3 (1996) 2 SCC 384 : 1996 SCC (Cri) 316

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CAs Nos. 1727 and 4602 of 1999 are dismissed and the judgment and order dated 1-2-1999 of the High Court is affirmed;

CA No. 4685 of 1997 is allowed and the judgment and order dated 4-2-1997 of the High Court is set aside and the writ petition is remitted back to the High Court for fresh consideration in accordance with law;

CA No. 6065 of 2001 and SLP (C) No. 1363 of 2002: leave granted in SLP (C) No. 1363 of 2002. The appeals are allowed; the writ petitions are remitted back to the High Court for fresh consideration.

CAs Nos. 8117-22 of 2001 and SLP (C) No. 16851 of 2001: leave granted in SLP (C) No. 16851 of 2001. The appeals are allowed; the writ petition is remitted back to the High Court for fresh consideration.

TCs Nos. 21-22 of 2003: these transferred cases are disposed of; SLP (C) No. 948 of 2003: the special leave petition is dismissed;

IA No. 3 of 2002 in CA No. 460 of 1997 is dismissed;

CA No. 932 of 2001 is disposed of; and

CAs Nos. 1639-45 of 1999, CP No. 63 of 2002 in CA No. 932 of 2001 and IAs Nos. 13-14 in CAs Nos. 3512-13 of 1997: list before an appropriate Bench.

(2004) 5 Supreme Court Cases 518

(BEFORE S. RAJENDRA BABU, C.J. AND G.P. MATHUR, J.)

SAKSHI .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 33 of 1997† with SLPs (Crl.) Nos. 1672-73 of 2000, decided on May 26, 2004

A. Penal Code, 1860 — S. 375 — Rape — Meaning and definition of — Petitioner, a social organisation, filing PIL expressing deep concern against non-traditional modes of sexual abuse and violations against children and women which though equally traumatic are treated as lesser offences under Ss. 354 and 377 IPC — Hence the plea for enlarging the scope and meaning of "sexual intercourse" to cover such non-traditional sexual offences — Held, meaning is to be confined in narrow terms to include penile/vaginal penetration only and cannot be enlarged to include penile/anal, penile/oral, finger/vaginal, finger/anal or object/vaginal penetration — Intention of the legislature to be gathered from the language used — Attention to be paid to what is being said and what is not being said — Giving a wider meaning to Section 375 IPC will lead to serious confusion in the minds of prosecuting agencies and courts, which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on society as a whole, and therefore, held, it will not be in the larger interest of the State or the people to alter the definition of "rape" by a process of judicial interpretation — Parliament

† Under Article 32 of the Constitution of India

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requested to address the issue — Words and phrases — "Sexual intercourse", "rape" — Judicial activism — Limits of

a **B. Interpretation of Statutes — Basic Rules — Literal or strict construction — A statute enacting an offence or imposing a penalty, held, is to be strictly construed — Further held, a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided — It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so — Basic Rules — Purposive construction**

b **C. Constitution of India — Art. 20(1) — Enlarging the definition of rape under S. 375 IPC, 1860, held, would violate the constitutional guarantee under**

D. Precedents — Foreign Precedents — Precedential value of — Held, must be construed in the context in which they are decided

E. Precedents — Stare decisis — Doctrine of, reiterated — Constitution
c **of India — Art. 141 — Words and phrases — "Stare decisis"**

F. Interpretation of Statutes — External aids — International Treaties — Held, subsequent ratification of international treaties would not render existing municipal laws ultra vires those treaties in case of inconsistency

The petitioner under Article 32, sought *inter alia*, in view of increase of sexual violence against women and especially children, an enlarged definition of
d rape under Section 375 IPC to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration.

Dismissing the petition on this ground, the Supreme Court

Held :

The dictionary meaning of the words "sexual intercourse" is heterosexual
e intercourse involving penetration of the vagina by the penis. If the hymen is ruptured by inserting a finger, it would not amount to rape. (Paras 16 and 18)

State of Punjab v. *Major Singh*, AIR 1967 SC 63 : 1966 Supp SCR 286 : 1967 Cri LJ 1, *referred to*

Halsbury's Laws of England, para 514, Vol. 11; *Corpus Juris Secundum*, para 10 (Vol. 75), *cited*

f It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by
g substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is to be strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Para 19)

Justice G.P. Singh: *Principles of Statutory Interpretation*, pp. 58 and 751, 9th Edn., *referred to*

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It is also a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute and that the courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act and a purposive approach is necessary. (Para 12.1)

S. Gopal Reddy v. *State of A.P.*, (1996) 4 SCC 596 : 1996 SCC (Cri) 792; *Seaford Court Estates Ltd.* v. *Asher*, (1949) 2 All ER 155 (CA); *Directorate of Enforcement* v. *Deepak Mahajan*, (1994) 3 SCC 440 : 1994 SCC (Cri) 785, *distinguished*

Bennion, F.A.R.: *Statutory Interpretation* (Butterworths, 1984), pp. 355-57, *referred to*

Prosecution of an accused for an offence under Section 376 IPC on radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (Para 20)

Moreover, the entire legal fraternity of India, lawyers or judges, have the definition as contained in Section 375 IPC ingrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment, is bound to result in a good deal of chaos and confusion, cause delays and will not be in the interest of the society at large. (Paras 22 and 26)

The decisions [of foreign courts] cited by the petitioner cannot be used to enlarge the definition of rape as given in Section 375 IPC, which has been consistently so understood for over a century throughout the country. (Para 21)

R. v. *R.* (*rape : marital exemption*), (1991) 4 All ER 481 : (1992) 1 AC 599 : (1991) 3 WLR 767 (HL); *R.* v. *Ireland*, sub nom *R.* v. *Burstow*, (1997) 4 All ER 225 : 1998 AC 147 : (1997) 3 WLR 534 (HL); *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs*, Case CCT 10 of 1999, *distinguished*

When laws are already existing, subsequent ratification of international treaties would not render existing municipal laws ultra vires those treaties in case of inconsistency. In such an event the State through its legislative wing can modify the law to bring it in accord with treaty obligations. Such matters are in the realm of State policy and are, therefore, not enforceable in a court of law. (Para 15)

Vishaka v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *Lakshmi Kant Pandey* v. *Union of India*, (1984) 2 SCC 244, *referred to*

Brownlie, Ian: *Principles of Public International Law*; Dicey and Morris: *The Conflict of Laws*, *cited*

Stare decisis is a well-known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by a court of competent jurisdiction authorised to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the courts and should be followed in similar cases. It is

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a wholesome doctrine which gives certainty to law and guides the people to mould their affairs in the future. (Para 23)

Mishri Lal v. *Dhirendra Nath*, (1999) 4 SCC 11; *Admiralty Commrs.* v. *Valverda (Owners)*, 1938 AC 173 : (1938) 1 All ER 162 (HL); *Button* v. *Director of Public Prosecution*, 1966 AC 591 : (1965) 3 All ER 587 (HL), *relied on*

Maktul v. *Manbhari*, AIR 1958 SC 918, *referred to*

Nevertheless, the suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. It is hoped that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves. (Para 35)

G. **Criminal Procedure Code, 1973 — Ss. 164, 273 and 327(2) — Recording of statement of a victim of sexual abuse — Precautions in, and protection to — Use of a screen to shield the victim, or the use of videotaping or closed-circuit camera to record evidence — Recording of evidence in the presence of the accused — Does not necessarily imply that the accused should have full view of the victim or the witness — Held, rules of procedure are the handmaiden of justice, meant to advance not obstruct justice — Therefore courts can enlarge the meaning of such provisions in order to elicit the truth and do justice — Recording of evidence by way of video-conferencing vis-à-vis S. 273 has been held to be permissible**

H. **Criminal Procedure Code, 1973 — S. 327(2) — Inquiry or conduct of trial in-camera — Applicability of, to offences committed under Ss. 354 and 377 IPC — Deposition of the victims for said offences can at times be very embarrassing and therefore S. 327(2) CrPC ought to be applicable to offences under the said sections — Failure of amending Act 43 of 1983 to include these provisions noted — Judicial activism — Instance of**

The petitioner requested that the below-mentioned precautions be followed while recording statements of victims of sexual abuse, since mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses, or can put them in a state of shock and since questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse.

The petitioner requested that especially in the cases of child sexual abuse the following precautions be followed:

(*i*) Permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child-support person).

(*ii*) Allow a child to testify via closed-circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(*iii*) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(*iv*) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

Allowing this request, the Supreme Court

Held :

The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire

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incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by video-conferencing has already been upheld. Moreover, there is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties. (Para 31)

Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible. (Para 31)

The writ petition be disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(*i*) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(*ii*) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(*iii*) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required. (Para 34)

These directions are in addition to those given in *State of Punjab* v. *Gurmit Singh*. (Para 34)

State of Maharashtra v. *Dr. Praful B. Desai*, (2003) 4 SCC 601 : 2003 SCC (Cri) 815; *State of Punjab* v. *Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316, *followed*

Her Majesty The Queen v. *D.O.L. and the Attorney General of Canada*, (1993) 4 SCR 419 (Canada SC), *referred to*

S-M/AZJ/30169/CR

Advocates who appeared in this case :

R.N. Trivedi, Additional Solicitor General and F.S. Nariman, Senior Advocate (Amicus Curiae) [Ms Naina Kapoor, Ms Meenakshi Arora, Ms Honna Chettri, Tara Chandra Sharma, P. Parameswaran, Sujit Kr. Bhattacharya, Goodwill Indeevar, Ms Shashi Kiran, Ms Anil Katiyar, D.N. Goburdhun, Ms Pinky Anand, Ms Geeta Luthra, Syed Ali Ahmad, Syed Tanweer Ahmad, G.G. Upadhyay and R.D. Upadhyay, Advocates] for the appearing parties.

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2. (1999) 4 SCC 11, *Mishri Lal* v. *Dhirendra Nath* 539*b-c*
3. Case CCT 10 of 1999, *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs* 533*e f*
4. (1997) 6 SCC 241 : 1997 SCC (Cri) 932, *Vishaka* v. *State of Rajasthan* 534*d e*

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9. (1993) 4 SCR 419 (Canada SC), *Her Majesty The Queen* v. *D.O.L. and the Attorney General of Canada* 542*g*
10. (1991) 4 All ER 481 : (1992) 1 AC 599 : (1991) 3 WLR 767 (HL), *R.* v. *R.* (*rape: marital exemption*) 532*f*, 537*h*
11. (1984) 2 SCC 244, *Lakshmi Kant Pandey* v. *Union of India* 534*e*
12. AIR 1967 SC 63 : 1966 Supp SCR 286 : 1967 Cri LJ 1, *State of Punjab* v. *Major Singh* 535*a*
13. 1966 AC 591 : (1965) 3 All ER 587 (HL), *Button* v. *Director of Public Prosecution* 540*e*
14. AIR 1958 SC 918, *Maktul* v. *Manbhari* 539*c*
15. (1949) 2 All ER 155 (CA), *Seaford Court Estates Ltd.* v. *Asher* 531*f*
16. 1938 AC 173 : (1938) 1 All ER 162 (HL), *Admiralty Commrs.* v. *Valverda (Owners)* 540*d*

SUBMISSIONS ON BEHALF OF UNION OF INDIA BY SHRI R.N. TRIVEDI, ADDITIONAL SOLICITOR GENERAL OF INDIA

(*A-1*) In absence of municipal laws, international treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights. Ref: *Vishaka*[a], SCC pp. 12, 13, 16, 18; *Lakshmi Kant Pandey*[b], SCC para 10.

(*A-2*) When laws are already existing, subsequent ratification of international treaties would not render existing laws ultra vires of treaties in case of inconsistency.

In such an event, the State (through its legislative wing) can modify the law to bring it in accord with treaty obligations. Such matters are in the realm of State policy (Entry 14 List I, Article 253) and therefore, not enforceable.

(*A-3*) No mandamus can be issued to amend any law including bringing it in accord with treaty obligations.

Ref: *Supreme Court Employees' Welfare Assn.* v. *Union of India*[c], SCC para 51.

(*B-1*) A petition under Article 32 of the Constitution would not lie to indicate policy preference.

Ref: *Hindi Hitrakshak Samiti* v. *Union of India*[d], SCC para 6.

(*C*) The decision of the Yugoslav Tribunal cannot be used for interpretation of Sections 354 and 376 IPC and other provisions. Even decisions of ICJ are binding only on the parties to a dispute or interveners. Reference in this connection may be made to Articles 92, 93 and 94 of the UN Charter and Articles 59 and 63 of the ICJ Statutes.

a *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932
b *Lakshmi Kant Pandey* v. *Union of India*, (1984) 2 SCC 244
c (1989) 4 SCC 187 : 1989 SCC (L&S) 569
d (1990) 2 SCC 352

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(*C-2*) In international law, ratified treaties can be deemed incorporated in customary law unless the former are inconsistent with domestic laws or decisions of its judicial tribunal. Reference may be made to *Chung Chi Cheung* v. *R.*[e], All ER para 790(*a*) which has been followed in *Thakrar* v. *Secy. of State for Home Deptt.*[f], All ER paras 266(*b*) and (*d*), paras 272(*c*) and (*d*), 273(*f*) and (*g*).

Brownlie, Ian: *Principles of Public International Law*, 5th Edn., p. 45.

(*C-3*) Treaties are not self-executing — *Littrell* v. *USA (No. 2)*[g], All ER at p. 204.

If treaties themselves are not enforceable (when there is an existing law) their interpretation in a foreign jurisdiction is equally inapplicable.

(*C-4*) Foreign judgments cannot be made use of for interpretation of domestic laws nor are such judgments binding.

Ref: Dicey & Morris: *The Conflict of Laws*, 13th Edn., Vol. 1, para 5 001, p. 81 and para 5 025, pp. 92-93; *Oppenheim*, Part I, Vol. 1, p. 1211.

(*D-1*) Sections 376 and 354 IPC have been interpreted in a large number of decisions of various High Courts and this Hon'ble Court. The consistent view is that in order to hold a person guilty of rape, penile penetration is essential. Similar is the position in England and USA.

Ref: *Halsbury's Laws of England*, Vol. 11(1) Reissue, para 515, p. 387; 75 *Corpus Juris Secundum*, para 10, p. 472.

(*D-2*) This Hon'ble Court in *State of Punjab* v. *Major Singh*[h] (a three-Judge decision) has held on pp. 293-94, that if the hymen is ruptured by inserting a finger it would not amount to rape.

(*E*) Writ petition under Article 32 would not lie for reversing earlier decisions of this Hon'ble Court on the ground that a restrictive interpretation has been given to a particular statute. This can be done only in a given fact situation arising out of a case of conviction or acquittal under Section 354 or 376.

(*F*) This Hon'ble Court except in cases of advisory opinion under Article 143 is ill-equipped to go into abstract questions.

(*G*) Wherever the legislature wanted a preadjudication opinion, it has been so provided, for instance, Section 245(*n*) of the Income Tax Act and Chapter 5 of the Customs Act.

(*H*) The Sri Lankan Constitution also provides a decision on validity of a bill before it becomes an Act (Acts 161-64 of the Sri Lankan Constitution).

The Judgment of the Court was delivered by

G.P. MATHUR, J. This writ petition under Article 32 of the Constitution has been filed by way of public interest litigation, by Sakshi, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particular

e (1938) 4 All ER 786
f (1974) 2 All ER 261
g (1994) 4 All ER 203
h AIR 1967 SC 63 : 1966 Supp SCR 286

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those who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation and is a violence-intervention centre. The respondents arrayed in the writ petition are: (*1*) Union of India; (*2*) Ministry of Law and Justice; and (*3*) Commissioner of Police, New Delhi. The main reliefs claimed in the writ petition are as under:

> (*A*) Issue a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that "sexual intercourse" as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration.
>
> (*B*) Consequently, issue a writ, order or direction in the nature of a direction to the respondents and its servants and agents to register all such cases found to be truly on investigation, offences falling within the broadened interpretation of "sexual intercourse" set out in prayer (*A*) aforesaid as offences under Sections 375, 376 and 376-A to 376-D of the Indian Penal Code, 1860.
>
> (*C*) Issue such other writ, order or direction as this Hon'ble Court may deem appropriate in the present facts and circumstances.

1.1. The petition is thus restricted to a declaratory relief and consequential directions.

2. It is set out in the writ petition that the petitioner has noticed with growing concern the dramatic increase of violence, in particular, sexual violence against women and children as well as the implementation of the provisions of the Indian Penal Code, namely, Sections 377, 375/376 and 354 by the respondent authorities. The existing trend of the respondent authorities has been to treat sexual violence, other than penile/vaginal penetration, as lesser offences falling under either Section 377 or 354 IPC and not as a sexual offence under Sections 375/376 IPC. It has been found that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Sections 375/376, have been treated as offences falling under Section 354 IPC as outraging the modesty of a woman or under Section 377 IPC as unnatural offences.

3. The petitioner through the present petition contends that the narrow understanding and application of rape under Sections 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution.

4. The petitioner submits that a plain reading of Section 375 would make it apparent that the term "sexual intercourse" has not been defined and is,

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therefore, subject to and is capable of judicial interpretation. Further, the Explanation to Section 375 IPC does not in any way limit the term penetration to mean penile/vaginal penetration. The definition of the term rape as contained in the Code is extremely wide and takes within its sweep various forms of sexual offences. Limiting the understanding of "rape" to abuse by penile/vaginal penetration only, runs contrary to the contemporary understanding of sexual abuse law and denies a majority of women and children access to adequate redress in violation of Articles 14 and 21 of the Constitution. Statistics and figures indicate that sexual abuse of children, particularly minor girl children by means and manner other than penile/vaginal penetration is common and may take the form of penile/anal penetration, penile/oral penetration, finger/vaginal penetration or object/vaginal penetration. It is submitted that by treating such forms of abuse as offences falling under Section 354 IPC or 377 IPC, the very intent of the amendment of Section 376 IPC by incorporating sub-section (2)(*f*) therein is defeated. The said interpretation is also contrary to the contemporary understanding of sexual abuse and violence all over the world.

5. The petitioner submits that there has for some time now been a growing body of feminist legal theory and jurisprudence which has clearly established rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration. Restricting an understanding of rape in terms sought to be done by the respondent authorities and its agents reaffirms the view that rapists treat rape as sex and not violence and thereby condone such behaviour especially when it comes to sexual abuse of children.

6. In this regard, reference is invited to the observations of a renowned expert on the issue of sexual abuse:

> "... in rape ... the intent is not merely to 'take', but to humiliate and degrade.... Sexual assault in our day and age is hardly restricted to forced genital copulation, nor is it exclusively a male-on-female offence. Tradition and biologic opportunity have rendered vaginal rape a particular political crime with a particular political history, but the invasion may occur through the mouth or the rectum as well. And while the penis may remain the rapist's favourite weapon, his prime instrument of vengeance ... it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the 'natural' thing. And as men may invade women through other orifices, so too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?" (Brownmiller, Susan: *Against Our Will*, 1986.)

7. The petitioner further submits that the respondent authorities and their agents have failed to take into consideration the legislative purpose of Section 377 IPC. Reference has also been made to The Law Commission of India

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Report (No. 42) of 1971, p. 281. While considering whether or not to retain Section 377 IPC, the Commission found as under:

> "There are, however, a few sound reasons for retaining the existing law in India. First, it cannot be disputed that homosexual acts and tendencies on the part of one spouse may affect the married life and happiness of the other spouse, and from this point of view, making the acts punishable by law has social justification. Secondly, even assuming that acts done in private with consent do not in themselves constitute a serious evil, there is a risk involved in repealing legislation which has been in force for a long time.... Ultimately, the answer to the question whether homosexual acts ought to be punished depends on the view one takes of the relationship of criminal law to morals. ... We are inclined to think that Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offence even where adults indulge in it in private."

7.1. In view of the Commission's conclusions regarding the purview of Section 377 IPC, the said section was clearly intended to punish certain forms of private sexual relations perceived as immoral. Despite the same, the petitioner submits, the respondent authorities have, without any justification, registered those cases of sexual violence which would otherwise fall within the scope and ambit of Sections 375/376 IPC, as cases of moral turpitude under Section 377 IPC. It is submitted that the respondent authorities and their agents have wrongly strained the language of Section 377 IPC intended to punish "homosexual" behaviour to punish more serious cases of sexual violence against women and children when the same ought to be dealt with as sexual offences within the meaning of Sections 375/376 IPC in violation of Articles 14 and 21 of the Constitution of India.

8. It is submitted that Article 15(3) of the Constitution of India allows for the State to make special provision for women and children. It follows that "special provision" necessarily implies "adequate" provision. Further, that the arbitrary and narrow interpretation sought to be placed by the respondent authorities and their agents on Sections 375/376 renders the effectiveness of redress under the said sections and in particular, under Section 376(2)(*f*) meaningless in violation of Article 15(3) of the Constitution of India. The petitioner has also referred to the UN Rights of the Child Convention ratified by Respondent 1 on 11-12-1993 as well as the UN Convention on the Elimination of Discrimination Against Women which was ratified in August 1993. In view of the ratification, Respondent 1 has created a legitimate expectation that it shall adhere to its international commitments as set out under the respective conventions. In the present case, however, the existing interpretation of rape sought to be imposed by the respondent authorities and their agents is in complete violation of such international commitments as have been upheld by this Court.

9. By an order passed on 3-11-2000 the parties were directed to formulate issues which arise for consideration. Accordingly, the petitioner

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has submitted the following issues and legal propositions which require consideration by the Court:

(*a*) Given that modern feminist legal theory and jurisprudence look at rape as an experience of humiliation, degradation and violation rather than an outdated notion of penile/vaginal penetration, whether the term "rape" should today be understood to include not only forcible penile/vaginal penetration but all forms of forcible penetration including penile/oral penetration, penile/anal penetration, object or finger/vaginal and object or finger/anal penetration.

(*b*) Whether all forms of non-consensual penetration should not be subsumed under Section 375 of the Indian Penal Code and the same should not be limited to penile/vaginal penetration only.

(*c*) In particular, given the widespread prevalence of child sexual abuse and bearing in mind the provisions of the Criminal Law (Amendment) Act, 1983 which specifically inserted Section 376(2)(*f*) envisaging the offence of "rape" of a girl child, howsoever young, below 12 years of age, whether the expression "sexual intercourse" as contained in Section 375 of the Indian Penal Code should correspondingly include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration; and whether the expression "penetration" should not be so clarified in the Explanation to Section 375 of the Indian Penal Code.

(*d*) Whether a restrictive interpretation of "penetration" in the Explanation to Section 375 (rape) defeats the very purpose and intent of the provision for punishment for rape under Section 376(2)(*f*): "Whoever ... commits rape on a woman when she is under twelve years of age."

(*e*) Whether penetration abuse of a child below the age of 12 should no longer be arbitrarily classified according to the "type" of penetration (ignoring the "impact" on such child) either as an "unnatural offence" under Section 377 IPC for penile/oral penetration and penile/anal penetration or otherwise as "outraging the modesty of a woman" under Section 354 for finger penetration or penetration with an inanimate object.

(*f*) Whether non-consensual penetration of a child under the age of 12 should continue to be considered as offences under Section 377 ("unnatural offences") on a par with certain forms of consensual penetration (such as consensual homosexual sex) where a consenting party can be held liable as an abettor or otherwise.

(*g*) Whether a purposive/teleological interpretation of "rape" under Sections 375/376 requires taking into account the historical disadvantage faced by a particular group (in the present case, women and children) to show that the existing restrictive interpretation worsens that disadvantage and for that reason fails the test of equality within the meaning of Article 14 of the Constitution of India.

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(*h*) Whether the present narrow interpretation treating only cases of penile/vaginal penetration as rape, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution of India.

10. Counter-affidavit on behalf of Respondents 1 and 2 has been filed by Mrs G. Mukherjee, Director in the Ministry of Home Affairs. It is stated therein that Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983. The same Act has also introduced several new sections viz. Sections 376-A, 376-B, 376-C and 376-D IPC. These sections have been inserted with a view to provide special/adequate provisions for women and children. The term "rape" has been clearly defined under Section 375 IPC. Penetrations other than penile/vaginal penetration are unnatural sexual offences. Stringent punishments are provided for such unnatural offences under Section 377. The punishment provided under Section 377 is imprisonment for life or imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. Section 377 deals with unnatural offences and provides for a punishment as severe as that provided for rape in Section 376. Sections 354 and 506 have been framed with a view to punish lesser offence of criminal assault in the form of outraging the modesty of a woman, whereas Sections 376 and 377 provide stringent punishment for sexual offences. The types of several offences as mentioned by the petitioner i.e. penile/anal penetration, penile/oral penetration, finger/anal penetration, finger/vaginal penetration or object/vaginal penetration are serious sexual offences of unnatural nature and are to be covered under Section 377 which provides stringent punishment. Therefore, the plea of the petitioner that offences under Section 377 are treated as lesser offences is incorrect. It is also submitted in the counter-affidavit that penetration of the vagina, anus or urethra of any person with any part of the body of another person other than penile penetration is considered to be unnatural and has to be dealt with under Section 377 IPC. Section 376(2)(*f*) provides stringent punishment for committing rape on a woman when she is under the age of 12 years. Child sexual abuse of any nature, other than penile penetration, is obviously unnatural and is to be dealt with under Section 377 IPC. It is further submitted that Section 354 IPC provides for punishment for assault or criminal force to woman to outrage her modesty. Unnatural sexual offences cannot be brought under the ambit of this section. Rape defined under Section 375 is penile/vaginal penetration and all other sorts of penetration are considered to be unnatural sexual offences. Section 377 provides stringent punishment for such offences. It is denied that provisions of Sections 375, 376 and 377 are violative of fundamental rights under Articles 14, 15(3) and 21 of the Constitution of India. Sexual penetration as penile/anal penetration, finger/vaginal and finger/anal penetration and object and vaginal penetration are most unnatural forms of perverted sexual behaviour for which Section 377 provides stringent punishment.

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11. Ms Meenakshi Arora, learned counsel for the petitioner has submitted that the Indian Penal Code has to be interpreted in the light of the problems of the present day and a purposive interpretation has to be given. She has submitted that Section 375 IPC should be interpreted in the current scenario, especially in regard to the fact that child abuse has assumed alarming proportions in recent times. Learned counsel has stressed that the words "sexual intercourse" in Section 375 IPC should be interpreted to mean all kinds of sexual penetration of any type of any orifice of the body and not intercourse as understood in the traditional sense. The words "sexual intercourse" having not been defined in the Penal Code, there is no impediment in the way of the court to give it a wider meaning so that the various types of child abuse may come within its ambit and the conviction of an offender may be possible under Section 376 IPC. In this connection, she has referred to the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979* and also *Convention on the Rights of the Child* adopted by the General Assembly of the United Nations on 20-2-1989 and especially to Articles 17(*e*) and 19 thereof, which read as under:

Article 17

State parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, State parties shall—

(*a*)-(*d*) * * *

(omitted as not relevant)

(*e*) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18.

Article 19

1. State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

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

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12. In support of her submission, learned counsel has referred to the following passage of *Statutory Interpretation* by F.A.R. Bennion (Butterworths, 1984) at pp. 355-57:

> "While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.
>
> It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed.
>
> In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the enactment as to minimise the adverse effects of the counter-mischief.
>
> *The ongoing Act*
>
> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing in law, social conditions, technology, the meaning of words, and other matters.
>
> An enactment of the former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

12.1. In this connection, she has also referred to *S. Gopal Reddy* v. *State of A.P.*[1] where the Court referred to the following words of Lord Denning in *Seaford Court Estates Ltd.* v. *Asher*[2]: (All ER p. 164 F-H)

> "It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ... A judge should ask himself the question how, if the makers of the Act had themselves come across this

1 (1996) 4 SCC 596 : 1996 SCC (Cri) 792
2 (1949) 2 All ER 155 (CA)

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> ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

And held that it is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute and that the courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act and a purposive approach is necessary. Accordingly, the words "at or before or after the marriage as consideration for the marriage" occurring in Section 2 of the Dowry Prohibition Act were interpreted to mean demand of dowry at the "negotiation stage" as a consideration for proposed marriage and "marriage" was held to include the "proposed marriage" that may not have taken place. Reference is also made to *Directorate of Enforcement* v. *Deepak Mahajan*[3] wherein it was held that a mere mechanical interpretation of the words devoid of concept or purpose will reduce most of the legislation to a futility and that it is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole. Accordingly, certain provisions of the FERA and the Customs Act were interpreted keeping in mind that the said enactments were enacted for the economic development of the country and augmentation of revenue. The Court did not accept the literal interpretation suggested by the respondent therein and held that sub-sections (1) and (2) of Section 167 CrPC are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of the FERA and Section 104 of the Customs Act and that a Magistrate has jurisdiction under Section 167(2) CrPC to authorise detention of a person arrested by an authorised officer of the Enforcement Directorate under the FERA and taken to the Magistrate in compliance with Section 35(2) of the FERA.

13. Ms Meenakshi Arora has submitted that this purposive approach is being adopted in some of the other countries so that the criminals do not go unscathed on mere technicality of law. She has placed strong reliance on some decisions of the House of Lords to substantiate her contentions and the most notable being *R.* v. *R. (rape: marital exemption)*[4] where it was held as under: (All ER p. 481)

> "The rule that a husband cannot be criminally liable for raping his wife if he has sexual intercourse with her without her consent no longer forms part of the law of England since a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances or that it is an incident of modern marriage that the wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. In Section 1(1) of the Sexual Offences (Amendment) Act, 1976, which defines rape as having "unlawful"

3 (1994) 3 SCC 440 : 1994 SCC (Cri) 785

4 (1991) 4 All ER 481 : (1992) 1 AC 599 : (1991) 3 WLR 767 (HL)

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intercourse with a woman without her consent, the word "unlawful" is to be treated as mere surplusage and not as meaning "outside marriage", since it is clearly unlawful to have sexual intercourse with any woman without her consent."

13.1. The other decision cited by learned counsel is *R.* v. *Ireland*[5] where a person accused of repeated silent telephone calls accompanied on occasions by heavy breathing to women was held guilty of causing psychiatric injury amounting to bodily harm under Section 42 of the Offences Against the Person Act, 1861. In the course of the discussion, Lord Steyn observed that criminal law has moved on in the light of a developing understanding of the link between the body and psychiatric injury and as a matter of current usage, the contextual interpretation of "inflict" can embrace the idea of one person inflicting psychiatric injury on another. It was further observed that the interpretation and approach should, so far as possible, be adopted which treats the ladder of offences as a coherent body of law. Learned counsel has laid emphasis on the following passage in the judgment: (All ER p. 233*h-j*)

> "The proposition that the Victorian legislator when enacting Sections 18, 20 and 47 of the 1861 Act, would not have had in mind psychiatric illness is no doubt correct. Psychiatry was in its infancy in 1861. But the subjective intention of the draftsman is immaterial. The only relevant inquiry is as to the sense of the words in the context in which they are used. Moreover the 1861 Act is a statute of the 'always speaking' type: the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury."

It has thus been contended that the words "sexual intercourse" occurring in Section 375 IPC must be given a larger meaning than as traditionally understood having regard to the monstrous proportion in which the cases of child abuse have increased in recent times. She has also referred to a decision of the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs*[6] wherein it was held that Section 25(5) of Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic. Such unfair discrimination limits the equality rights of such partners guaranteed to them by Section 9 of the Constitution and their right to dignity under Section 10. It was further held that it would not be an appropriate remedy to declare the whole of Section 25(5) invalid. Instead, it would be appropriate to read in, after the word "spouse" in the section, the words "or partner, in a permanent same-sex life partnership".

14. Ms Meenakshi Arora has also placed before the Court the judgments rendered on 10-12-1998 and 22-2-2001 by the International Tribunal for the

5 (1997) 4 All ER 225 : 1998 AC 147 : (1997) 3 WLR 534 (HL) sub nom *R.* v. *Burstow*
6 Case CCT 10 of 1999

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Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Under Article 5 of the statute of the International Tribunal, rape is a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war or an act of genocide, if the requisite elements are met, and may be prosecuted accordingly. The Trial Chamber after taking note of the fact that no definition of rape can be found in international law, proceeded on the following basis:

"Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(*i*) the sexual penetration, however slight:

(*a*) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(*b*) of a mouth of the victim by the penis of the perpetrator;

(*ii*) by coercion or force or threat of force against the victim or a third person."

14.1. In the second judgment of the Trial Chamber dated 22-2-2001, the interpretation which focussed on serious violations of sexual autonomy was accepted.

15. Shri R.N. Trivedi, learned Additional Solicitor General, appearing for the respondents, has submitted that international treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights but only in absence of municipal laws as held in *Vishaka* v. *State of Rajasthan*[7] and *Lakshmi Kant Pandey* v. *Union of India*[8]. When laws are already existing, subsequent ratification of international treaties would not render existing municipal laws ultra vires of treaties in case of inconsistency. In such an event the State through its legislative wing can modify the law to bring it in accord with treaty obligations. Such matters are in the realm of State policy and are, therefore, not enforceable in a court of law. He has further submitted that in international law, ratified treaties can be deemed interpreted in customary law unless the former are inconsistent with the domestic laws or decisions of its judicial tribunals. The decision of the International Tribunal for the Crimes Committed in the Territory of the Former Yugoslavia cannot be used for interpretation of Sections 354 and 375 IPC and other provisions. Even decisions of the International Court of Justice are binding only on the parties to a dispute or interveners in view of Articles 92, 93 and 94 of the UN Charter and Articles 59 and 63 of the ICJ Statutes. Learned counsel has also submitted that no writ of mandamus can be issued to Parliament to amend any law or to bring it in accord with treaty obligations. He has also submitted that Sections 354 and 375 IPC have been interpreted in innumerable decisions of various High Courts and also of the Supreme Court and the consistent view is that to hold a person guilty of rape,

7 (1997) 6 SCC 241 : 1997 SCC (Cri) 932
8 (1984) 2 SCC 244

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penile penetration is essential. The law on the point is similar both in England and USA. In *State of Punjab* v. *Major Singh*[9] it was held that if the hymen is ruptured by inserting a finger, it would not amount to rape. Lastly, it has been submitted that a writ petition under Article 32 of the Constitution would not lie for reversing earlier decisions of the Court on the supposed ground that a restrictive interpretation has been given to certain provisions of a statute.

16. In support of his submission Shri Trivedi has placed reliance on Vol. 11(1) of *Halsbury's Laws of England*, para 514 (Butterworths, 1990) wherein unlawful sexual intercourse with a woman without her consent has been held to be an essential ingredient of rape. Reference has also been made to Vol. 75, *Corpus Juris Secundum*, para 10, wherein it is stated that sexual penetration of a female is a necessary element of the crime of rape, but the slightest penetration of the body of the female by the sexual organ of the male is sufficient. Learned counsel has also referred to Brownlie, Ian: *Principles of Public International Law* where the learned author, after referring to some decisions of English courts has expressed an opinion that the clear words of a statute bind the court even if the provisions are contrary to international law and that there is no such thing as a standard of international law extraneous to the domestic law by a kingdom and that international law as such can confer no rights cognisable in the municipal courts. Learned counsel has also referred to Dicey and Morris: *The Conflict of Laws* wherein in the chapter on the enforcement of foreign law, the following rule has been stated:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law."

With regard to penal law, it has been stated as under:

> "The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed.... Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: 'The courts of no country execute the penal laws of another.' "

17. This Court on 13-1-1998 referred the matter to the Law Commission of India for its opinion on the main issue raised by the petitioner, namely, whether all forms of penetration would come within the ambit of Section 375 IPC or whether any change in statutory provisions needs to be made, and if so, in what respect? The Law Commission had considered some of the matters in its 156th Report and the relevant extracts of the recommendation made by it in the said report, concerning the issue involved, were placed before the Court. Para 9.59 of the report reads as under:

9 AIR 1967 SC 63 : 1966 Supp SCR 286 : 1967 Cri LJ 1

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"9.59. Sexual child abuse may be committed in various forms such as sexual intercourse, carnal intercourse and sexual assaults. The cases involving penile penetration into vagina are covered under Section 375 IPC. If there is any case of penile/oral penetration and penile penetration into anus, Section 377 IPC dealing with unnatural offences i.e. carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed Section 354 IPC whereunder a more severe punishment is also prescribed can be invoked and as regards the male child, the penal provisions of IPC concerning 'hurt', 'criminal force' or 'assault', as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract Section 354 IPC within the ambit of 'rape' which is a distinct and graver offence with a definite connotation. It is needless to mention that any attempt to commit any of these offences is also punishable by virtue of Section 511 IPC. Therefore, any other or more changes regarding this law may not be necessary."

17.1. Regarding Section 377 IPC, the Law Commission recommended that in view of the ongoing instances of sexual abuse in the country where unnatural offence is committed on a person under age of eighteen years, there should be a minimum mandatory sentence of imprisonment for a term of not less than two years but may extend to seven years and fine, with a proviso that for adequate and special reasons to be recorded in the judgment, a sentence of less than two years may be imposed. The petitioner submitted the response on the recommendations of the Law Commission. On 10-2-2000/18-2-2000, this Court again requested the Law Commission to consider the comments of representative organisations (viz. SAKSHI, IESHA and AIDWA).

18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375 IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration within its ambit. Section 375 uses the expression "sexual intercourse" but the said expression has not been defined. The dictionary meaning of the words "sexual intercourse" is heterosexual intercourse involving penetration of the vagina by the penis. The Indian Penal Code was drafted by the First Indian Law Commission of which Lord Macaulay was the President. It was presented to the Legislative Council in 1856 and was passed on 6-10-1860. The Penal Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman

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(which in view of Section 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376-A to 376-D were inserted by the Criminal Law (Amendment) Act, 1983 but sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of "rape" as given in Section 375 IPC. Similarly, Section 354 which deals with assault or criminal force to woman with an intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment.

19. It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Justice G.P. Singh: *Principles of Statutory Interpretation*, pp. 58 and 751, 9th Edn.)

20. Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one-and-a-half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375 IPC so that the same may become an offence punishable under Section 376 IPC has neither been considered nor accepted by any court in India so far. Prosecution of an accused for an offence under Section 376 IPC on a radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

21. The decision of the Constitutional Court of South Africa cited by learned counsel for the petitioner does not commend to us as the court there treated "gays and lesbians in permanent same-sex life partnerships" on a par with "spouses" and took upon itself the task of Parliament in holding that in Section 25(5) of the Aliens Control Act, after the word "spouse", the words "or partner in a permanent same-sex life partnership" should be read. The decision of the House of Lords in *R.* v. *R.*[4] was given on its own facts which

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deserve notice. Here the wife had left her matrimonial home with her son on 21-10-1989 and went to live with her parents. She had consulted solicitors about matrimonial problems and had left a letter for the husband informing him that she intended to petition for divorce. On 23-10-1989 the husband spoke to his wife on telephone indicating that it was his intention also to seek divorce. In the night of 12-11-1989 the husband forced his way into the house of his wife's parents, who were out at that time and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. On the facts of the case the conviction of the husband may not be illegal. It is very doubtful whether the principle laid down can be of universal application. In *R.* v. *Ireland*[5] psychiatric injury was held to be bodily harm under Section 20, having regard to the meaning of the word in the usage of the present day. In our opinion the judgment of the International Tribunal can have no application here as the Tribunal itself noted that no definition of rape can be found in international law and it was dealing with prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia. The judgment is not at all concerned with interpretation of any provision of domestic law in peacetime conditions. The decisions cited by the learned counsel for the petitioner, therefore, do not persuade us to enlarge the definition of rape as given in Section 375 IPC, which has been consistently so understood for over a century throughout the country.

22. It may be noted that ours is a vast and big country of over 100 crore people. Normally, the first reaction of a victim of a crime is to report the incident at the police station and it is the police personnel who register a case under the appropriate sections of the Penal Code. Such police personnel are invariably not highly educated people but they have studied the basic provisions of the Indian Penal Code and after registering the case under the appropriate sections, further action is taken by them as provided in the Code of Criminal Procedure. The Indian Penal Code is a part of the curriculum in the law degree and it is the existing definition of "rape" as contained in Section 375 IPC which is taught to every student of law. A criminal case is initially handled by a Magistrate and thereafter such cases as are exclusively triable by the Court of Session are committed to the Court of Session. The entire legal fraternity of India, lawyers or judges, have the definition as contained in Section 375 IPC ingrained in their mind and the cases are decided on the said basis. The first and foremost requirement in criminal law is that it should be absolutely certain and clear. An exercise to alter the definition of rape, as contained in Section 375 IPC, by a process of judicial interpretation, and that too when there is no ambiguity in the provisions of the enactment, is bound to result in a good deal of chaos and confusion, and will not be in the interest of the society at large.

23. Stare decisis is a well-known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and

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known, and that, when the law is declared by a court of competent jurisdiction authorised to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by a court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the courts and should be followed in similar cases. It is a wholesome doctrine which gives certainty to law and guides the people to mould their affairs in future.

24. In *Mishri Lal* v. *Dhirendra Nath*[10] importance of this doctrine was emphasised for the purpose of avoiding uncertainty and confusion and paras 14, 15, 16 and 21 of the Report read as under: (SCC pp. 18-19 & 20-21)

> "*14.* This Court in *Maktul* v. *Manbhari*[11] explained the scope of the doctrine of stare decisis with reference to *Halsbury's Laws of England* and *Corpus Juris Secundum* in the following manner:
>
> 'The principle of stare decisis is thus stated in *Halsbury's Laws of England*, 2nd Edn.:
>
> "Apart from any question as to the courts being of coordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the Supreme Appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside the statute and outside the common law, when no title and no contract will be shaken, no persons can complain, and no general course of dealing be altered by the remedy of a mistake."
>
> The same doctrine is thus explained in *Corpus Juris Secundum*—
>
> "Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable."
>
> *15.* Be it noted however that the *Corpus Juris Secundum* adds a rider that

10 (1999) 4 SCC 11
11 AIR 1958 SC 918

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'previous decisions should not be followed to the extent that grievous wrong may result; and accordingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result.'

16. The statement though deserves serious consideration in the event of a definite finding as to the perpetration of a grave wrong but that by itself does not denude the time-tested doctrine of stare decisis of its efficacy. Taking recourse to the doctrine would be an imperative necessity to avoid uncertainty and confusion. The basic feature of law is its certainty and in the event of there being uncertainty as regards the state of law the society would be in utter confusion the resultant effect of which would bring about a situation of chaos — a situation which ought always to be avoided.

* * *

21. In this context reference may also be made to two English decisions:

(*a*) in *Admiralty Commrs.* v. *Valverda (Owners)*[12] (AC at p. 194) wherein the House of Lords observed that even long-established conveyancing practice, although not as authoritative as a judicial decision, will cause the House of Lords to hesitate before declaring it wrong, and

(*b*) in *Button* v. *Director of Public Prosecution*[13] the House of Lords observed:

'In *Corpus Juris Secundum*, a contemporary statement of American law, the stare decisis rule has been stated to be a principle of law which has become settled by a series of decisions generally, is binding on the courts and should be followed in similar cases. It has been stated that this rule is based on expediency and public policy and should be strictly adhered to by the courts. Under this rule courts are bound to follow the common law as it has been judicially declared in previously adjudicated cases and rules of substantive law should be reasonably interpreted and administered. This rule has to preserve the harmony and stability of the law and to make as steadfast as possible judicially declared principles affecting the rights of property, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument. It is a

12 1938 AC 173 : (1938) 1 All ER 162 (HL)
13 1966 AC 591 : (1965) 3 All ER 587 (HL)

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salutary rule, entitled to great weight and ordinarily should be strictly adhered to by the courts. The courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one, or equitable considerations might suggest a different result and although it has been erroneously applied in a particular case. The rule represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations, but it is a principle of policy and not a mechanical formula of adherence to the latest decision however recent and questionable when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience.' "

25. It may be noticed that on 26-7-1966, the House of Lords made a departure from its past practice when a statement was made to the following effect:

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House."

26. While making the above statement a rule of caution was sounded that while departing from a previous decision when it appears right to do so, the especial need for certainty as to criminal law shall be borne in mind. There is absolutely no doubt or confusion regarding the interpretation of provisions of Section 375 IPC and the law is very well settled. The inquiry before the courts relates only to the factual aspect of the matter which depends upon the evidence available on the record and not on the legal aspect. Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to a serious confusion in the minds of the prosecuting agency and the courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people

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to alter the definition of "rape" as contained in Section 375 IPC by a process of judicial interpretation as is sought to be done by means of the present writ petition.

27. The other aspect which has been highlighted and needs consideration relates to providing protection to a victim of sexual abuse at the time of recording his statement in court. The main suggestions made by the petitioner are for incorporating special provisions in child sexual abuse cases to the following effect:

(*i*) Permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child-support person).

(*ii*) Allow a child to testify via closed-circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(*iii*) The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(*iv*) Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

28. The Law Commission, in its response, did not accept the said request in view of Section 273 CrPC as in its opinion the principle of the said section which is founded upon natural justice, cannot be done away with in trials and inquiries concerning sexual offences. The Commission, however, observed that in an appropriate case it may be open to the prosecution to request the court to provide a screen in such a manner that the victim does not see the accused while at the same time provide an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his counsel for an effective cross-examination. The Law Commission suggested that with a view to allay any apprehensions on this score, a proviso can be placed above the Explanation to Section 273 of the Criminal Procedure Code to the following effect:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused."

29. Ms Meenakshi Arora has referred to a decision of the Canadian Supreme Court in *Her Majesty The Queen* v. *D.O.L. and the Attorney General of Canada*[14] wherein the constitutional validity of Section 715.1 of the Criminal Code was examined. This section provides that in any proceeding relating to certain sexual offences in which the complainant was under age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged

14 (1993) 4 SCR 419 (Canada SC)

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offence in which the complainant describes the act complained of, is admissible in evidence, if the complainant while testifying adopts the contents of the videotape. The Court of Appeal had declared Section 715.1 unconstitutional on the ground that the same contravened Sections 7 and 11(*d*) of the Canadian Charter of Rights and Freedoms and could not be sustained under Section 1. The Supreme Court took note of some glaring features in such type of cases viz. the innate power imbalance which exists between abuser and the abused child; a failure to recognise that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age; and that the court cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions without the criminal justice system which hold stereotypical and biased views about the victimisation of women. The Court accordingly held that the procedures set out in Section 715.1 are designed to diminish the stress and trauma suffered by child complainants as a by-product of their role in the criminal justice system. The "system-induced trauma" often ultimately serves to revictimise the young complainant. The section was intended to preserve the evidence of the child and to remove the need for them to repeat their story many times. It is often repetition of the story that results in the infliction of trauma and stress upon a child who is made to believe that she is not being believed and that her experiences are not validated. The benefit such a provision would have is in limiting the strain imposed on child witnesses who are required to provide detailed testimony about confusing, embarrassing and frightful incidents of abuse in an intimidating, confrontational and often hostile courtroom atmosphere. Another advantage afforded by the section is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand. The videotape testimony enables the court to hear a more accurate account of what the child was saying about the incident at the time it first came to light and the videotape of an early interview if used in evidence can supplement the evidence of a child who is inarticulate or forgetful at the trial. The section also acts to remove the pressure placed on a child victim of sexual assault when the attainment of "truth" depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. The Court also observed that the rules of evidence have not been constitutionalised into unaltered principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time. The Court accordingly reversed the judgment of the Court of Appeal and upheld the constitutionality of Section 715.1.

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30. We will briefly refer to the statutory provisions governing the situation. Section 273 CrPC lays down that:

> "273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader."

Sub-section (1) of Section 327 CrPC lays down that any criminal court enquiring into or trying any offence shall be deemed to be open court, to which the public generally may have access, so far as the same can conveniently contain them. Sub-section (2) of the same section says that:

> "327. (2) Notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted *in-camera*."

Under the proviso to this sub-section

> "the Presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court".

It is rather surprising that the legislature while incorporating sub-section (2) to Section 327 by amending Act 43 of 1983 failed to take note of offences under Sections 354 and 377 IPC and omitted to mention the aforesaid provisions. Deposition of the victims of offences under Sections 354 and 377 IPC can at times be very embarrassing to them.

31. The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible in a recent decision of this Court in *State of Maharashtra* v. *Dr. Praful B. Desai*[15]. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to

15 (2003) 4 SCC 601 : 2003 SCC (Cri) 815

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embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

33. In *State of Punjab* v. *Gurmit Singh*[16] this Court had highlighted the importance of provisions of Sections 327(2) and (3) CrPC and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in-camera. It was also pointed out that such a trial in-camera would enable the victim of the crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge its duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(*i*) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(*ii*) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(*iii*) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab* v. *Gurmit Singh*[16].

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and

16 (1996) 2 SCC 384 : 1996 SCC (Cri) 316

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rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.

36. Before parting with the case, we must place it on record that Ms Meenakshi Arora put in a lot of efforts and hard labour in placing the relevant material before the Court and argued the matter with commendable ability.

Special Leave Petitions (Crl.) Nos. 1672-73 of 2000

37. For the reasons given in WP (Crl.) No. 33 of 1997 decided today, special leave petitions are dismissed.

|CONNECTED ORDERS|

(1)

(2004) 5 Supreme Court Cases 546(I)

(*Record of Proceedings*)

(BEFORE J.S. VERMA AND S.P. KURDUKAR, JJ.)

SAKSHI .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 33 of 1997, dated February 28, 1997

ORDER

1. Shri F.S. Nariman, learned counsel for the petitioner submits that the purpose of this petition is not to assail the correctness of the decision of the Delhi High Court dated 23-5-1996 *Sudesh Jhaku* v. *K.C.J.*[1] against which the special leave petition has been dismissed but is to focus attention on the existing Sections 375/376 IPC and its true interpretation in the current State of the Society. The emphasis is primarily on this aspect of the matter. He, therefore, also prays for permission to amend the petition by inserting clause (*n*) in para 10 of the petition in the manner indicated. The permission is granted to amend the petition accordingly.

2. Issue notice.

Court Masters

(2)

(2004) 5 Supreme Court Cases 546(II)

(BEFORE DR. A.S. ANAND, C.J. AND B.N. KIRPAL AND K.T. THOMAS, JJ.)

SAKSHI .. Petitioner;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition (Crl.) No. 33 of 1997, February 18, 2000

Law Commission — Responses and recommendations of — Commented upon by petitioner — Comments brought to notice of Commission by directing that copy of comments be forwarded to Law Commission (Para 1)

1 (1996) 62 DLT 563

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Miscellaneous Application No 1852 of 2019 in
Criminal Appeal No 1101 of 2019

Smruti Tukaram Badade **.... Appellant(s)**

Versus

State of Maharashtra & Anr **....Respondent(s)**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1 The need for and importance of setting up facilities which cater to the need for creating a safe and barrier free environment for recording the evidence of vulnerable witnesses has engaged the attention of this Court over two decades. In **Sakshi** v **Union of India**[1], this Court issued directions in addition to those which were contained in the decision in **State of Punjab** v **Gurmit Singh**[2]. The relevant extract from the decision in **Sakshi** (supra) reads thus:

> "34. […]
>
> (1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
>
> (2) In holding trial of child sex abuse or rape:

Signature Not Verified
Digitally signed by Sanjay Kumar
Date: 2022.01.22 11:52:24 IST
Reason:

1 (2004) 5 SCC 518
2 (1996) 2 SCC 384

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required."

2 More recently, in **State of Maharashtra** v **Bandu @ Daulat**[3], directions were issued by this Court for setting up "special centres for examination of vulnerable witnesses" in criminal cases so as to facilitate a conducive environment for recording the statements of vulnerable witnesses. This Court dwelt on the guidelines which have been issued by the High Court of Delhi for recording the evidence of vulnerable witnesses in criminal matters and noted that special centres have been set up in Delhi for that purpose. While observing that the direction of the High Court of Delhi for setting up special centres for vulnerable witnesses is consistent with the earlier decisions of this Court and supplement the principles which have been laid down, this Court issued the following directions:

> "12. […] all High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary. Setting up of one centre for vulnerable witnesses may be perhaps required almost in every district in the country. All the High Courts may take appropriate steps in this direction in due course in phases. At least two such centres in the jurisdiction of each High Court may be set up within three months from today. Thereafter, more such centres may be set up as per decision of the High Courts."

3 The fairness of the process of trial as well as the pursuit of substantive justice are determined in a significant measure by the manner in which statements of vulnerable witnesses are recorded. The dignity of person, which is an intrinsic

3 (2018) 11 SCC 163

element of Article 21 of the Constitution, cannot be left to the vagaries of insensitive procedures and a hostile environment. Access to justice mandates that positive steps have to be adopted to create a barrier free environment. These barriers are not only those which exist within the physical spaces of conventional courts but those which operate on the minds and personality of vulnerable witnesses. There is a pressing need to facilitate the salutary purpose underlying the creation of a barrier free environment where depositions can be recorded freely without constraining limitations, both physical and emotional. This requires not just the creation of infrastructure but sensitizing all stakeholders.

4 This Court issued notice to all the High Courts in pursuance of which they have appeared through Counsel. Based on the material which has been placed before the Court, Ms Vibha Datta Makhija, *amicus curiae*, has prepared a tabulated statement of the position of infrastructure in various High Courts as of 25 October 2021. A copy of the tabulated statement is annexed as a broad indicator at Annexure 'A' to this order. Based on the deliberations which have taken place during the course of proceedings in the Court, the suggestions which have been proposed by the *amicus curiae* and the responses of some of the Counsel who have appeared on behalf of the High Courts, the following directions are issued under Article 142 of the Constitution in furtherance of the earlier decisions of this Court. These are intended to facilitate the implementation of the directions which were rendered on 24 October 2017 in **Bandu** (supra) and earlier in other decisions.

5 The directions are enumerated below:

(i) The definition of "vulnerable witness" contained in Clause 3(a) of the 'Guidelines for recording evidence of vulnerable witnesses in criminal

matters'[4] of the High Court of Delhi shall not be limited only to child witnesses who have attained the age of 18 years and should be expanded to include, *inter alia*, the following categories of vulnerable witnesses:

(a) Age neutral victims of sexual assault read with Sections 273 and 327 of the Code of Criminal Procedure 1973 and Section 354 of the Indian Penal Code 1860[5];

(b) Gender neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act 2012;

(c) Age and gender neutral victims of sexual assault under Section 377 of the Indian Penal Code 1860 read with paragraph 34(1) of the decision in **Sakshi** (supra);

(d) Witnesses suffering from "mental illness" as defined under Section 2(s) of the Mental Healthcare Act 2017 read with Section 118 of the Indian Evidence Act 1872;

(e) Any witness deemed to have a threat perception under the Witness Protection Scheme 2018 of the Union Government as approved by this Court in **Mahender Chawla** v **Union of India**[6];

(f) Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a vulnerable witness by the competent court; and

4 "**VWDC Scheme**" *available at* http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf.

5 "**IPC**"

6 (2019) 14 SCC 615

(g) Any other witness deemed to be vulnerable by the concerned court.

(ii) The High Courts shall adopt and notify a Vulnerable Witnesses Deposition Centres[7] Scheme within a period of two months from the date of this order unless a scheme is already notified. The High Courts which already have existing VWDC Schemes in place may consider making suitable modifications in conformity with the guidelines which are indicated in the present order. In formulating the VWDC Scheme, the High Courts shall have due regard to the scheme which has been formulated by the High Court of Delhi, which has been duly approved in the judgment of this Court in **Bandu** (supra);

(iii) Every High Court should set up an in-house permanent VWDC Committee for continuously supervising the implementation of the present directions and making a periodic assessment of the number of VWDCs required in each district proportionate to the time required for recording evidence of vulnerable witnesses and to coordinate the conduct of periodic training programmes;

(iv) Every High Court is requested to make an estimation of costs towards manpower and infrastructure required to set up at least one permanent VWDC in every establishment of the District Court (or additional Sessions Court establishments) and estimate the optimal number of VWDCs required for the entire State within a period of three months;

(v) Having due regard to the importance of conducting periodic training programmes for manning and managing the VWDCs and sensitizing all stake

[7] "**VWDC**"

holders, including judicial officers, members of the Bar and the staff of the court establishment, we constitute a Committee chaired by Justice Ms Gita Mittal, former Chief Justice of the Jammu and Kashmir High Court. The Committee shall devise and implement an All India VWDC Training Programme, besides engaging with the High Courts on the creation of infrastructure for VWDCs. The initial tenure of the Chairperson shall be for a period of two years. All High Courts or concerned role assignees shall facilitate and give full cooperation in conducting training programmes in terms of the module which may be prepared by the Chairperson;

(vi) Upon the estimation of costs prepared by the VWDC Committee of each High Court, the State Government shall expeditiously sanction the requisite funds within a period of three months from the date of the submission of the proposal or the end of the financial year, whichever is earlier, and disburse the funds to the High Court in accordance with the project plan. The State Government shall nominate a nodal officer of the Finance Department who shall be associated *ex officio* with the work of the VWDC Committee of the High Court, to facilitate the implementation of the proposal submitted by the High Court in terms of these directions;

(vii) The High Courts shall ensure that at least one permanent VWDC is set up in every District Court establishment (or additional Sessions Court establishments) within a period of four months. The Registrars General of the High Courts shall file compliance reports before this Court;

(viii) In many States, ADR Centres have been set up by the High Courts in close proximity to the court establishments in the districts. Where such ADR Centres are in place, the High Courts would be at liberty to ensure that the VWDC is

made available within the premises of the ADR Centre so as to secure a safe, conducive and barrier free environment for recording the depositions of vulnerable witnesses;

(ix) The National Legal Services Authority[8] as well as the State Legal Services Authorities[9] have a vital stake and role, particularly in devising and implementing sensitization and training programmes. The Chairperson of the Committee appointed by this Court is requested to engage with NALSA and SLSAs (subject to the directions which may be issued by the Hon'ble Executive Chairperson of NALSA) so as to provide an effective interface for implementing the scheme for training;

(x) The Hon'ble Chief Justices of the High Courts would be at liberty to take all appropriate steps either on the administrative side or on the judicial side in furtherance of the present directions and to monitor compliance on a periodic basis;

(xi) The Chief Justice of the High Court of Delhi is requested to make available a work space/room for the office of the VDWC Committee Training Centre and requisite staff, preferably personnel who have previously assisted in the development and implementation of the Training Modules of the Delhi High Court and to designate a Coordinator of the programme in consultation with the Chairperson. Appropriate secretarial and logistical support staff and equipment may be made available to the Committee on a reasonable remuneration as fixed by the Chairperson. The expenses in that regard, including the honorarium payable to the Chairperson shall be defrayed by

8 "**NALSA**"
9 "**SLSAs**"

the Ministry of Women and Child Development to the Director of the Delhi Judicial Academy. The Chairperson may fix a reasonable honorarium for the work assigned to her under the terms of this order. In the event that any further directions are necessary, the Chairperson may seek them before this Court and any communication in that regard shall be placed for further directions; and

(xii) The Ministry of Women and Child Development of the Union Government shall designate a nodal officer for coordinating the implementation of these directions and for providing all logistical support to Justice Ms Gita Mittal, the Chairperson of the Committee appointed by this Court. This would include the payment of honorarium to the Chairperson in terms as fixed by the Chairperson and meeting the expenses, including those towards engaging domain experts for training programmes. The Union Ministry of Women and Child Development and all Ministries of Women and Child Development in the States shall coordinate with the Chairperson and extend logistical support. The High Courts shall, in consultation with the Chairperson of the Committee, enlist experts in the field to facilitate proper training and development of all stake holders.

6 A copy of this order shall be forwarded by the Secretary General of this Court to the Secretary, Ministry of Women and Child Development of the Union Government and to the Secretaries of the Ministries of Women and Child Development of all the State Governments for compliance. A copy of this order shall also be emailed to Justice Ms Gita Mittal for information and also to the Registrars General of all the High Courts for implementation by the High Courts.

7 We conclude by recording our appreciation of the dedicated effort of the *amicus*

curiae.

8 The Miscellaneous Application is accordingly disposed of.

9 Pending application, if any, stands disposed of.

……..…..…..…....……..…....J.
[Dr Dhananjaya Y Chandrachud]

…..…..…..…..…..……..…....J.
[Surya Kant]

New Delhi;
January 11, 2022
-s-

Annexure 'A'

IN THE SUPREME COURT OF INDIA
M.A. No. 1852 of 2019
IN
Crl. App. No. 1101 of 2019

IN THE MATTER OF:-

Smruti Tukaram Badade **……Petitioner**

Versus

State of Maharashtra & Anr. **……Respondents**

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1.	Status Report Submitted by Vibha Datta Makhija, Senior Advocate on Reports from various High Courts in compliance of order dated 4.10.2019 passed by the Hon'ble Supreme Court for the establishment of Vulnerable Witness Deposition Centers (VWDC) for hearing on 25.10.2021.	1-15

Dated: 25.10.2021

Smruti Tukaram Badade v. State of Maharashtra & Anr.
M.A. No. 1852 of 2019 in Crl. App. No. 1101 of 2019

Reports from various High Courts in compliance of order dated 4.10.2019 passed by the Hon'ble Supreme Court for the establishment of Vulnerable Witness Deposition Centers (VWDC).

HIGHLIGHTS:

- **24 out of 25 High Courts have submitted status reports regarding establishment of Vulnerable Witness Deposition Centers. Report from Manipur High Court has not been filed as per office report dated 25.10.2021.**
- In 15 out of 25 High Courts, at least 1 Permanent Vulnerable Witness Deposition Centre has been established. In 9 remaining High Courts, not even 1 Permanent Vulnerable Witness Deposition Centre has been established.
- Delhi has established at least 1 Permanent Vulnerable Witness Deposition Centre in all its functional District Courts. Delhi High Court has also formulated guidelines for recording of evidence of vulnerable witnesses in criminal matters. This has been adopted by other High Courts as well.
- Maharashtra has the most number of Permanent Vulnerable Witness Deposition Centers in its District and Subordinate Courts.

<table>
<tr><th>S.No. / Ranking</th><th>Concerned High Court</th><th>Date of Status Report</th><th>Number of vulnerable witness deposition s centers established - permanent</th><th>Number of vulnerable witness deposition centers – temporary/ insufficient infrastructure</th><th>GUIDELINES</th><th>Status of compliance regarding establishment of Vulnerable Witness Deposition Courts</th><th>Financial Status/Funds Requested</th></tr>
<tr><td>1.</td><td>Bombay High Court
[Pg. No. 5-10A

[No. of District Courts =33]</td><td>6.9.2019</td><td>116 [INCLUDING AT SUBORDINATE COURTS]</td><td>NIL</td><td>AS PER THE DIRECTIONS IN CRL. APPEAL NO. 1101 OF 2019, NOTICE WAS ISSUED BY THE BOMBAY HIGH COURT TO THE REGISTRAR</td><td><u>WORK COMPLETED FOR 116 VULNERABLE WITNESS DEPOSITION COURTS IN THE STATE</u>

• Status of establishment of Vulnerable Witness Deposition Courts as on 1.8.2019
<table><tr><th>S.No.</th><th>Particulars</th><th>Total</th><th>Grand Total</th></tr><tr><td>1.</td><td>Work Completed</td><td>115+1</td><td>116</td></tr><tr><td>2.</td><td>Work in Progress</td><td>72</td><td>72</td></tr><tr><td>3.</td><td>Tender Stage</td><td>9</td><td>9</td></tr></table></td><td>DIFFERENT DISTRICTS HAVE FORWARDED THEIR FUND REQUIREMENTS TO THE GOVERNMENT OF MAHARASH</td></tr>
</table>

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<tr>
<td></td>
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<td>GENERAL TO ESTABLISH VWDCS.</td>
<td>
<table>
<tr><td>4.</td><td>Estimate Stage</td><td>6</td><td>6</td></tr>
<tr><td></td><td>Total</td><td>203</td><td>203</td></tr>
</table>

Proposal for construction of a new Court building with the provision of a Vulnerable Witness Deposition Court is pending at Thane Headquarters.

<u>82 FUNCTIONAL VULNERABLE WITNESS DEPOSITION CENTERS OUT OF A TOTAL OF 227</u>
<table>
<tr><th rowspan="2">No. of Places</th><th colspan="4">Vulnerable Witness Deposition Centre</th><th colspan="2">On way glass to witness box</th></tr>
<tr><th colspan="2">Functional</th><th colspan="2">Work in Progress</th><th colspan="2"></th></tr>
<tr><td></td><td>With full-fledged facilities</td><td>With partial facilities</td><td>With full-fledged facilities</td><td>With partial facilities</td><td>Functional</td><td>Work in Progress</td></tr>
<tr><td>227</td><td>33</td><td>49</td><td>32</td><td>31</td><td>49</td><td>23</td></tr>
</table>
</td>
<td>TRA. SOME DISTRICTS HAVE RECEIVED FUNDING AND IT IS PENDING FOR OTHERS.</td>
</tr>
<tr>
<td>2.</td>
<td>Rajasthan High Court [Pg. No. 43-52

[No. of District Courts = 36]</td>
<td>09.01.2020</td>
<td>24</td>
<td>10</td>
<td>NO GUIDELINES AVAILABLE.</td>
<td>
<u>TOTAL DISTRICTS = 35</u>
<u>CENTERS PERMANENTLY ESTABLISHED = 24 DISTRICTS</u>
<u>CENTERS TEMPORARILY ESTABLISHED = 10 DISTRICTS</u>

Vulnerable Witness Deposition Courts/Centers set up in the Court premises in 24 Districts – Ajmer, Balotra, Baran, Bhilwara, Bikaner, Bundi, Chittorgarh, Dausa, Dholpur, Ganganagar, Hanumangarh, Jhunjhunu, Jaipur District, Jaipur Metropolitan, Jodhpur District, Jodhpur Metropolitan, Karauli, Merta, Pali, Sawai Madhopur, Sikar, Sirohi, Tonk and Udaipur

</td>
<td>SOME DISTRICTS HAVE ASKED FOR FUNDS FOR MAKING THE CENTRES WHICH ARE CURRENTLY TEMPORARY INTO</td>
</tr>
</table>

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<td></td>
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<td></td>
<td>• Temporary arrangements for Vulnerable Witness Deposition Courts made in 10 Districts - Alwar, Banswara, Bharatpur, Churu, Jaisalmer, Jalore, Jhalwar, Kota, Pratapgarh and Rajsamand.
No Centre established - Dungarpur</td>
<td>PERMANENT. NO INFORMATION AVAILABLE ON GRANT OF FUNDS.</td>
</tr>
<tr>
<td>3.</td>
<td>Gujarat High Court [SEPARATE VOLUME 9

[No. of District Courts = 34]</td>
<td>05.02.2020</td>
<td>24</td>
<td>NIL</td>
<td>NO GUIDELINES AVAILABLE</td>
<td><u>24 VULNERABLE DEPOSITION CENTERS FUNCTIONAL</u>
• In 33 Judicial districts, vulnerable deposition centers have been planned.
• 7 district deposition centers are ready for inauguration by the end of February 2020.
• 2 districts Mahisagar and Narmada, new building for district and sessions court is under construction and vulnerable deposition centers under construction in newly constructed court buildings.</td>
<td>NO INFORMATION AVAILABLE</td>
</tr>
<tr>
<td>4.</td>
<td>Delhi High Court [SEPARATE VOLUME 2

No. of District Courts = 6]</td>
<td>20.01.2020</td>
<td>10</td>
<td>NIL</td>
<td>DELHI HIGH COURT HAVE CREATED THEIR OWN GUIDELINES. GUIDELINES FOR RECORDING OF EVIDENCE OF VULNERABLE WITNESSES IN CRIMINAL MATTERS.</td>
<td><u>6 COURT COMPLEXES VULNERABLE DEPOSITION CENTRES ARE ESTABLISHED – TOTAL 10 WITNESS DEPOSITION COURTOOMS</u>
• Rouse Avenue District Court – vulnerable witness deposition centre is not established because at present, only CBI and Labour court are functioning.
<table>
<tr><th>S.No</th><th>Court Complex</th><th>District</th><th>No. of vulnerable witness deposition courtrooms established</th><th>No. of vulnerable witness deposition courtrooms to be established</th></tr>
<tr><td rowspan="2">1.</td><td rowspan="2">Tis Hazari</td><td>Central</td><td>1</td><td rowspan="2">3</td></tr>
<tr><td>West</td><td>0</td></tr>
<tr><td>2.</td><td></td><td>East</td><td>2</td><td>6</td></tr>
</table>
</td>
<td>NO INFORMATION AVAILABLE</td>
</tr>
</table>

								Karkardooma	North-East	0		
									Shahdara	0		
							3.	Dwarka	South-West	2	NIL	
							4.	Rohini	North-West	2	NIL	
									North	0		
							5.	Patiala House	New Delhi	1	NIL	
							6.	Saket	South	2	NIL	
									South-East	0		
							7.	Rouse Avenue (not yet district court)	New Delhi	N/A	N/A	
5.	**Orissa High Court** [Pg. No. 53 [No. of District Courts = 30]	21.01.2020	**9**	**NIL**	NO GUIDELINES AVAILABLE	**<u>9 VULNERABLE WITNESS DEPOSITION COMPLEXES HAVE BEEN SET UP</u>** • **9 districts where vulnerable witness deposition complexes have already been set up –** e.g., **Boudh, Cuttack, Dhenkanal, Ganjam, Jajpur, Khurda, Phulbani, Sambalpur and Sonepur.** • **In 7 districts, no space** is available for setting up such complexes – e.g., **Bhadrak, Deogarh, Jagatsinghpur, Jharsuguda, Keonjhar, Nuapada, Rayagada.** Collector and the executive engineer of other districts have been requested to take necessary steps for construction of vulnerable witness deposition complexes in their districts.				NO INFORMATION AVAILABLE
6.	**Madras High Court** [Pg. No. 37-42	02.01.2020	**6**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>6 CHILD FRIENDLY DEPOSITION COURT ESTABLISHED</u>** • ***Child Friendly Deposition Court established*** at City Civil Court Complex, Chennai						GOVERNMENT HAS SANCTIONED AMOUNT ONLY FOR

	[No. of District Courts = 32]					• ***Work completed for creation of Child Friendly Environment*** in Mahila Courts in 5 districts *viz.* Coimbatore, Salem, Madurai, Trichy, Tirunelveli • ***Funds sanctioned for setting up Vulnerable Witness and Child Witness Examination Centers*** in the Combined Court Building Campus at Tiruvannamalai - Construction to be commenced • ***Proposal for sanction of funds pending*** for construction of Vulnerable and Child Witness Examination Centers in Combined Court Building Campus at Salem, Karur, Tiruvallur, Trichy and Krishnagiri • ***Construction of Centers*** at Combined Court Building Campus at Vellore, Theni and Perambalur are ***pending consideration before High Court*** ***Committee for 15th Finance Commission approved establishment of 70 Vulnerable Witness Deposition Courts in 61 places*** in the State – All Principle District Judges/District Judges directed to set up Centers	SOME DISTRICTS WHILE OTHERS ARE STILL AWAITING FUNDS.
7.	**Punjab & Haryana High Court** [SEPARATE VOLUME 6 [No. of District Courts in Punjab = 22]	21.12.2019	**1** **5**	**NIL** **NIL**	NO GUIDELINES AVAILABLE	**<u>CHANDIGARH – 1 VULNERABLE WITNESS CENTER ESTABLISHED</u>** • Vulnerable Witness Center ***established*** in the Judicial Courts Complex, Chandigarh **<u>PUNJAB - VULNERABLE WITNESS CENTERS ESTABLISHED IN 5 OUT OF 20 DISTRICTS</u>** • Vulnerable Witness Centers ***established in 5 districts*** – Patiala, Bathinda, Fatehgarh Sahib, Kapurthala and S.A.S. Nagar • ***Cost estimate has been approved*** by the Building Committee, Punjab for establishment of a Vulnerable Witness Center at Sangrur • ***Cost estimates under consideration*** by the Building Committee, Punjab for establishment of Vulnerable Witness	STATE HAS GRANTED FUNDS FOR SOME DISTRICTS. COST ESTIMATE PENDING IN SOME DISTRICTS. IN OTHER DISTRICTS, FINANCIAL SANCTION YET TO BE GRANTED.

	[No. of District Courts in Haryana = 21]		**2**	**NIL**		Centers ***at 5 districts*** – Ferozepur, Gurdaspur, Barnala, Mansa and Sri Mukatsar Sahib • ***Cost estimate under preparation for 4 districts*** – Moga, Fazilka, Tarn Taran, Pathankot • ***Provision to be made for establishment of Vulnerable Witness Deposition Centers*** in the Judicial Courts Complexes under construction/proposed in 5 districts- Hoshiarpur, Jalandhar, Ropar, S.B.S. Nagar and Khanna **HARYANA – 2 VULNERABLE WITNESS DEPOSITION CENTERS HAVE BEEN ESTABLISHED** • ***Centers established*** at Kurukshetra and Sirsa • ***Architectural drawing approved*** by the Building Committee, Haryana at Bhiwani, Faridabad and Rohtak • ***Architectural drawing pending*** before the Building Committee, Haryana at Narnaul • ***Architectural drawing under consideration by the Court*** at Palwal • ***Layout plan approved*** by the Building Committee, Haryana at Kaithal • ***Cost estimate pending approval before the Building Committee, Haryana*** for establishment of Vulnerable Witness Centers at the Judicial Court Complex at Jagadhri in District Yamuna Nagar and at Jhajaar • ***Cost estimate*** for audio-video conferencing system at the Vulnerable Witness Centre in the Judicial Courts Complex, Panipat has been approved by the Building Committee, Haryana and is ***pending before the Government of Haryana for administrative approval and allotment of funds*** ***For other Districts in Haryana***, ***matter is under consideration before the Building Committee*** of the Court	
8.	**Karnataka High Court**	20.12.2019	**4**	**1**	NO GUIDELINES AVAILABLE.	**AVAILABILITY OF VULNERABLE WITNESS DEPOSITION COURTS IN 4 OUT OF 30 DISTRICTS**	NO INFORMATION AVAILABLE

	[SEPARATE VOLUME 4 [No. of District Courts = 30]					• Vulnerable Witness Deposition Court Rooms ***available in 3 districts (out of 30 districts)*** i.e. ***Bengaluru City, Bengaluru Rural and Ballari District, Raichur*** • **DISTRICT HASSAN** - ***Court room designated to try POCSO Act cases*** (provided with child friendly environment, partition room in the Court hall with one-way glass, attached waiting room with toilet) ***can be used as a Vulnerable Witness Deposition Court*** • **DISTRICT KODAGU-MADIKERI** - ***1 Court Room in the newly constructed District Court building*** (scheduled to be completed by December 2019) ***can be used as a Vulnerable Witness Deposition Court*** • **DISTRICT SHIVAMOGGA** - ***Modifications proposed to court room designated to try POCSO Act cases to function as a Child Friendly as well as Vulnerable Witness Deposition Court*** • **DISTRICT CHAMARAJANAGAR** - ***Cost estimate*** has been ***prepared and submitted by PWD***, Chamarajanagar ***for alteration of ADR room into a Vulnerable Witness Deposition Court*** **REMAINING 22 DISTRICTS** – ***Provisions have been made***, in consultation with the State Govt., ***for suitable space/accommodation for establishing Vulnerable Witness Deposition Courts***	
9.	**Madhya Pradesh High Court** [SEPARATE VOLUME 5 [No. of District Courts = 50]	16.1.2020	**4**	**NIL**	MADHYA PRADESH HAS FORUMLATED ITS OWN GUIDELINES: NORMS FORMULATED REGARDING CONSTRUCTI	**VULNERABLE WITNESS DEPOSITION CENTERS ESTABLISHED = 4 DISTRICTS** • ***Vulnerable Witness Deposition Centers established in 4 Districts*** – Jabalpur, Katni, Bhopal and Ujjain • ***Construction of 15 Vulnerable Witness Deposition Centers in progress in 8 Districts*** – Vidisha, Rewa, Dewas, Indore, Shajapur, Hoshangabad, Mandla and Umaria • ***Tender process pending completion*** for 11 Centers – ***6 Districts*** • Proposal for 19 Centers in ***12 Districts – Pending Administrative and Financial Sanction***	STATE HAS GRANTED FUNDS FOR SOME DISTRICTS. TENDER PROCESS PENDING IN SOME DISTRICTS. IN OTHER

					ON OF CHILD-FRIENDLY COURTS/VULNERABLE WITNESS COMPLEX IN VARIOUS DISTRICT AND TEHSIL PLACES OF THE STATE OF MP – APRIL 2017	***Detailed Project Report (DPR)/Plans – Pending*** in other Districts	DISTRICTS, FINANCIAL SANCTION YET TO BE GRANTED.
10.	**Jharkhand High Court** [Pg. No. 16-22 [No. of District Courts = 24]	11.12.2019	**3**	**4**	NO GUIDELINES AVAILABLE.	**<u>TOTAL = 24 DISTRICTS</u>** **<u>COURTS PERMANENTLY ESTABLISHED = 3</u>** **<u>TEMPORARY ARRANGEMENTS MADE = 4</u>** • ***Vulnerable Witness Deposition Court set up*** – Khunti (complete provisions yet to be made); Pakur; Ramgarh • ***Temporary arrangement done*** for Vulnerable Witness Deposition Courts at Deoghar; Dumka (temporarily POCSO Court being used); Latehar (temporary arrangements made in Court of District & Addnl. Sessions Judge and District & Addnl. Sessions Judge-I, Latehar) • ***POCSO Courts established as Vulnerable Witness Deposition Courts*** – Garhwa • ***No provision for Vulnerable Witness Deposition Courts*** – Dhanbad; Giridh (POCSO Court established); Godda; Hazaribag (temporarily using curtains); Lohardaga (temporarily using curtains); Jamtara (presently using video conferencing room); Palamau at Daltonganj (temporarily video conferencing hall being used); Seraikella Kharsawan; Simdega • ***Cost estimate sent*** for setting up Vulnerable Witness Deposition Courts at Civil Court, Bokaro (2 Courts) and Sub-	ESTIMATION COST HAS BEEN SENT FOR SETTING UP VULNERABLE WITNESS DEPOSITION CENTRES IN SOME DISTRICTS. THEY ARE STILL AWAITING THE FUNDS.

						Divisional Civil Courts, Bermo at Tenughat (2 Courts); Chatra; Koderma; Sahibaganj (temporarily using POCSO Court) – ***pending approval*** • ***Map planning pending*** for Vulnerable Witness Deposition Courts - East Singhbhum, Jamshedpur • ***Map approved*** for Vulnerable Witness Deposition Court – Gumia • ***Construction in progress*** of Vulnerable Witness Deposition Court in new Civil Courts, Ranchi – Likely to be completed soon (temporarily using curtains) ***Lay out plan submitted*** for construction of new Court Complex – West Singhbhum, Chaibasa	
11.	**Uttarakhand High Court** [Pg. No. 27-28 [No. of District Courts = 13]	13.12.2019	**2**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>VULNERABLE WITNESS DEPOSITION COURTS ESTABLISHED IN 2 OUT OF 13 DISTRICTS</u>** • ***Vulnerable Witness Deposition Courts established in 2 districts out of 13 Districts*** in the State of Uttarakhand– Chamoli and Champawat Not yet established in remaining 11 districts – Almora, Bageshwar, Dehradun, Haridwar, Nainital, Pauri, Pithoragarh, Rudraprayag, Tehri Garhwal, Udham Singh Nagar and Uttarkashi	NO INFORMATION AVAILABLE
12.	**Tripura High Court** [Pg. No. 36 [No. of District Courts = 8]	09.12.2019	**2**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>2 VULNERABLE WITNESS DEPOSITION CENTER ESTABLISHED</u>** • ***Vulnerable Witness Deposition Center established*** at Udaipur, Gomati Judicial District • ***State Government approached for release of funds*** for setting up the Vulnerable Witness Deposition Center at Agartala, West Tripura Judicial District Vulnerable Witness Deposition Centers to be established gradually in other Districts.	STATE GOVERNMENT HAS RELEASED FUNDS ONLY FOR TWO DISTRICTS AND WAS APPROACHED FOR RELEASE OF FUNDS IN

							OTHER DISTRICTS.
13.	**Meghalaya High Court** [Pg. No. 30-35 [No. of District Courts = 11]	25.10.2019	**2**	**NIL**	GUIDELINES FOR RECORDING OF EVIDENCE OF VULNERABLE WITNESSES IN CRIMINAL MATTERS HAVE BEEN DRAFTED BUT HIGH COURT HAS STILL NOT YET NOTIFIED THE GUIDELINES.	**<u>2 VULNERABLE WITNESS CENTERS HAVE BEEN ESTABLISHED</u>** • ***2 Vulnerable Witness Centers established at Shillong and Tura District Courts*** [Govt. of Meghalaya, Law Dept. Notification No. LR (B)43/2017/Pt.I/1064 dated 19.1.2018] Registrar General, High Court of Meghalaya has written to Commissioner and Secretary, Govt. of Meghalaya, Law Dept. to set up Vulnerable Witness Centers in other Districts in the State [Letter No. HCM II/214/2017/Estt. /31 dated 22.10.2019]	NO INFORMATION AVAILABLE
14.	**Jammu and Kashmir High Court** [Pg. No. 12-15 [No. of District Courts = 20]	25.10.2019	**1**	**NIL**	NO GUIDELINES AVAILABLE	**<u>1 VULNERABLE WITNESS DEPOSITION COURT ESTABLISHED</u>** • ***1 Vulnerable Witness Deposition Court established*** – District Court, Srinagar Steps undertaken for setting up Vulnerable Witness Deposition Courts in other Districts	NO INFORMATION AVAILABLE
15.	**Patna High Court** [Pg. No. 1-4]	10.12.2019	**1**	**NIL**	HIGH COURT LETTER NO. 87051/SUPREME COURT	**<u>1 VULNERABLE WITNESS DEPOSITION COURT ESTABLISHED</u>**	NOT AVAILABLE

	[No. of District Courts = 37]				DEPARTMENT DATED 15.12.2017 AND HIGH COURT LETTER NO.91669/SUPREME COURT DEPARTMENT DATED 02.12.2019.	• ***Vulnerable Witness Deposition Court established*** – Civil Court, Patna ***Architectural Map pending*** for construction of Vulnerable Witness Deposition Court – Civil Court, Bhagalpur	
16.	**Himachal Pradesh High Court** [SEPARATE VOLUME 3 [No. of District Courts = 11]	4.1.2020	**NIL**	**3**	HIMACHAL PRADESH ADOPTED THE GUIDELINES AS FRAMED BY THE HIGH COURT OF DELHI.	**<u>VULNERABLE WITNESS DEPOSITION CENTER ESTABLISHED – NIL</u>** • ***No Vulnerable Witness Deposition Center established*** – Chamba (presently examined *in camera* in child friendly environment); Solan (Layout plan approved for construction of child friendly environment in POCSO Court); Kullu (no provision for Vulnerable Witness Deposition Centers or child-friendly courts); Bilaspur and Ghumarwin in District Bilaspur; Shimla (child friendly courts are functional); Mandi (Issue regarding establishment of Vulnerable Witness Deposition Centers being discussed with District Administration); Hamirpur (no provision for Vulnerable Witness Deposition Centers or child-friendly courts); Kinnaur at Rampur Bushahr (temporary provisions made for child-friendly courts); ***Vulnerable Witness Deposition Centers temporarily set up*** – Kangra at Dharamshala; Sirmaur at Nahan (no provision for child friendly courts to try POCSO Act case – presently cases of juveniles are taken up in chamber by the Principal Magistrate, Juvenile Justice Board/ Judicial Magistrate, 1st Class); Una (no separate provision for child-friendly courts – presently cases of juveniles are taken up by the Principal Magistrate, Juvenile Justice Board/Addnl. CJM at Observation Home, Una)	NO INFORMATION AVAILABLE

17.	**Chhattisgarh High Court** [Pg. No. 11 [No. of District Courts = 25]	17.12.2019	**NIL**	**3**	NO GUIDELINES AVAILABLE	**<u>3 TEMPORARY VULNERABLE WITNESS DEPOSITION CENTERS ESTABLISHED</u>** ***3 temporary Vulnerable Witness Deposition Centers established***– Bilaspur, Raipur, Dantewada District (equipped with witness box with curtains, separate waiting room with drinking water facility, toilet, sofa/chairs for sitting, female attendant) **<u>3 SPECIAL CENTERS SET UP</u>** • **3 Special Centers at Bilaspur, Raipur, and Dantewada districts** • Infrastructure available at these special centers - Witness box covered with curtains. - Friendly environment for the vulnerable witnesses during deposition. Presence of Family members and female attendants during deposition/evidence for vulnerable witnesses in criminal matters as well as POCSO, and offences relating to women cases.	NO INFORMATION AVAILABLE
18.	**Guwahati High Court** [SEPARATE VOLUME Pg. No. 1, 1A] [No. of District Courts in Assam = 27 Nagaland =11	07.02.2020	**NIL**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>ASSAM: VULNERABLE WITNESS DEPOSITION CENTER ESTABLISHED = NIL</u>** • ***Construction of Vulnerable Witness Deposition Centers is in progress*** – Udalguri and Goalpara (80% complete); Bijni in Chirang District (50% complete) • ***Construction work of Vulnerable Witness Deposition Centers has just been allotted*** – Tinisukia (70% complete); Mangaldoi (30% complete)	ALL DISTRICTS HAVE ASKED FOR THE FINANCIAL ASSISTANCE. EACH DISTRICT HAS REQUESTED AN AMOUNT OF RS. 50 LAKHS.

	Mizoram =8 Arunachal Pradesh = 16]		**NIL**	**NIL**		**<u>NAGALAND: VULNERABLE WITNESS DEPOSITION CENTER CONSTRUCTED = NIL</u>** • ***No Vulnerable Witness Deposition Center constructed***	NO INFORMATION AVAILABLE
			NIL	**5**		**<u>MIZORAM: VULNERABLE WITNESS DEPOSITION CENTER CONSTRUCTED = NIL</u>** • ***No Vulnerable Witness Deposition Center constructed*** • Temporary arrangements made in 5 District Courts	NO INFORMATION AVAILABLE
			NIL	**NIL**		**<u>ARUNACHAL PRADESH: VULNERABLE WITNESS DEPOSITION CENTER CONSTRUCTED = NIL</u>** ***No Vulnerable Witness Deposition Center constructed***	NO GRANTS HAVE BEEN RECEIVED IN ARUNACHAL PRADESH FOR VWDC.
19.	**Sikkim High Court** [Pg. No. 25-26 [No. of District Courts = 4]	19.12.2019	**NIL**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>VULNERABLE WITNESS DEPOSITION CENTRE ESTABLISHED – NIL</u>** • ***Construction of Vulnerable Witness Deposition Center at District & Sessions Court Complex, Sichey, Gangtok, East Sikkim*** – Construction commenced in September 2018 and is 90% complete • ***Construction of Juvenile Justice Board at Namchi – Will include Vulnerable Witness Deposition Center & Waiting Room***- Construction commenced in September 2018 and work is in progress - 16% complete • ***Redesigning of District & Sessions Court at Namchi – Will include Vulnerable Witness Deposition Center & Waiting Room***- Construction commenced in October 2018 and is scheduled to complete in September 2020 • ***Construction of Addnl. Court building at Gyalshing - Will include Vulnerable Witness Deposition Center, Witness***	AMOUNT HAS BEEN SANCTIONED AND WORK IS IN PROGRESS. HOWEVER, STILL SOME BALANCE FUNDS ARE REQUIRED FOR COMPLETING THE WORK.

						Room & Waiting Room - Construction commenced in August 2019 and is scheduled to complete in August 2020 – 35% work complete	
20.	**Calcutta High Court** [Pg. No. 29 [No. of District Courts = 22]	06.12.2019	**NIL**	**NIL**	NO GUIDELINES AVAILABLE.	**<u>VULNERABLE WITNESS DEPOSITION CENTRE ESTABLISHED – NIL</u>** • State Govt. decided to construct Vulnerable Witness Deposition Centers in Kakdwip, Baruipur, Diamond Harbour Court Complexes in District South 24 Parganas • ***State Govt. granted administrative approval and sanction of funds*** for Baruipur and Kakdwip Courts • ***Reminder sent to District Judge, South 24 Parganas for issuing cost estimate*** for establishment of Vulnerable Witness Deposition Center at Diamond Harbour Court	FUNDS HAVE BEEN SANCTIONED FOR SOME COURTS.
21.	**Kerala High Court** [Pg. No. 23-24 [No. of District Courts = 14]	20.11.2019	**NIL**	**NIL**	NO GUIDELINES AVAILABLE	**<u>VULNERABLE WITNESS DEPOSITION CENTRE ESTABLISHED – NIL</u>** • Approval of uniform plan for Vulnerable Witness Deposition Centers in Subordinate Courts is pending with 'Committee for Establishment of Courts, Tribunals and Construction of Court Buildings in the State' • Refurbishing work commenced in POCSO Court, Ernakulam to incorporate child friendly features • Proposal for modification of POCSO Court, Thiruvananthapuram and Kozhikode to incorporate child friendly features is pending before High Court	NO INFORMATION AVAILABLE
22.	**Andhra Pradesh High Court** [Pg. No. 54	17.02.2020	**NIL**	**NIL**	NO GUIDELINES AVAILABLE	**<u>NO VULNERABLE WITNESS DEPOSITION CENTERS ARE ESTABLISHED IN SUBORDINATE COURTS IN STATE OF ANDHRA PRADESH</u>**	NO INFORMATION AVAILABLE

	[No. of District Courts = 13]						
23.	**Telangana High Court** [SEPARATE VOLUME 8 [No. of District Courts = 10]	24.02.2020	**NIL**	**NIL**	NO GUIDELINES AVAILABLE	**<u>NO VULNERABLE WITNESS DEPOSITION CENTERS ARE ESTABLISHED IN SUBORINATE COURTS IN STATE OF TELANGANA</u>** • They have given the estimates for the setup of the vulnerable witness deposition centers in subordinate courts.	FINANCIAL ESTIMATES HAVE BEEN SUBMITTED BY THE DISTRICT COURTS.
24.	**Allahabad High Court** [SEPARATE VOLUME 7 [No. of District Courts = 75]	20.12.2019	**NIL**	**NIL**	NO GUIDELINES AVAILABLE	**<u>NO VULNERABLE WITNESS DEPOSITION CENTERS ARE ESTABLISHED IN SUBORINATE COURTS</u>** • **Two judgeships at Allahabad and Lucknow have been identified** for Child Witness Friendly Court cum Vulnerable Witness Deposition Centers. • Drawings and design made by Delhi High Court to be followed for establishment of these centres.	STATE GOVERNMENT HAD RELEASED AMOUNT FOR LUCKNOW BUT IT IS PENDING FOR ALLAHABAD.

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(1996) 2 Supreme Court Cases 384

(BEFORE DR A.S. ANAND AND S. SAGHIR AHMAD, JJ.)

STATE OF PUNJAB .. Appellant;

Versus

GURMIT SINGH AND OTHERS .. Respondents.

Criminal Appeal No. 616 of 1985†, decided on January 16, 1996

A. Penal Code, 1860 — Ss. 376, 363, 366 and 368 — Evidence of a victim of sexual assault — Corroboration not necessary — Conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration — Court may look for some assurance of her statement to satisfy its judicial conscience — Her evidence is more reliable than that of an injured witness — She is not an accomplice — On facts, even though no corroboration is required yet there is sufficient corroboration from the medical evidence and report of the chemical examiner

B. Penal Code, 1860 — S. 376 — Cases involving sexual molestation — Duty of court to deal with such cases with utmost sensitivity — Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case

The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken

† From the Judgment and Order dated 1-6-1985 of the Additional Judge, Special Court, Ludhiana in Sessions Case No. 69/51 of 1984 and Trial No. 56 of 1985

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as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. (Para 8)

Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. (Para 21)

State of Maharashtra v *Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550 : 1990 SCC (Cri) 210, *followed*

C. Penal Code, 1860 — Ss. 376, 363, 366 and 368 — Abduction and rape — Appreciation of evidence — Principles — Course of normal human conduct of an Indian woman in such a situation to be kept in mind — Prosecutrix abducted by three young men in a car when she was coming out of examination centre and after committing rape leaving her at the same place next morning — Ignorance of the prosecutrix about the make, etc. of car in which she was abducted or failure to give colour of the car, though given in the FIR, does not affect reliability of her testimony — Prosecutrix abducted under threat of death — Hence she cannot be discredited for not raising an alarm when being abducted — Negligence of the police officer in not tracing out the driver or car cannot be a ground to reject her testimony — Conduct of the prosecutrix in not complaining to the teachers or other girl students not unnatural — Held, in the circumstances of the case testimony of the prosecutrix suffers from no infirmity and can be acted upon without looking for corroboration

The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. (Para 8)

The prosecutrix was a village girl. She was a student of Xth class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial

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that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. (Para 8)

The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on that account. (Para 8)

A girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down upon by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female (Para 8)

D. **Penal Code, 1860 — Ss. 376, 363, 366 and 368 — Age of victim — Prosecutrix abducted and forcibly subjected to sexual intercourse by the accused persons without her consent and against her will — Question of age of the victim not relevant — However, on facts, evidence of father and mother of the victim that she was below 16 years of age on the date of incident is fully corroborated by medical evidence and school leaving certificate (Para 13)**

E. **Criminal Procedure Code, 1973 — S. 154 — Delay in filing FIR in sexual offences — Reluctance of the prosecutrix or her family members must be taken into consideration — On facts, delay not only properly explained but also found natural — Penal Code, 1860, S. 376**

The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. (Para 8)

F. **Criminal Procedure Code, 1973 — S. 327(2) & (3) — Trial in camera — Rape cases — Courts obliged to hold the trial in camera — Trial of rape cases in camera should be the rule and an open trial an exception — High Courts directed to impress upon the Presiding Officers to invariably hold the trial in camera — Cases of sexual assault should be tried by lady Judges, if available — Court should, as far as possible, avoid to disclose names of the victims in its**

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orders to maintain anonymity of the victim — Press or anyone else not to print or publish any matter in relation to the proceedings except by permission under S. 327(3), CrPC — Contempt of Courts Act, 1971, S. 7

Sub-sections (2) and (3) of Section 327 inserted by Act 43 of 1983 are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of this amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 CrPC is not only significant but very important. It casts *a duty* on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Sections 327(2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of the public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 CrPC and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open court as envisaged by Section 327(2) CrPC. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) CrPC. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts in properly discharging their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. The trial courts should take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases *in camera* should be the rule and an *open trial* in such cases an exception. (Para 24)

G. **Evidence Act, 1872 — Ss. 137, 146, 148, 151, 152 and 155(4) — Cross-examination of the victim of sexual assault — Duty of court to see that she is not harassed or humiliated — Penal Code, 1860, S. 376**

The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the

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defence to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence. (Para 22)

H. **Penal Code, 1860 — Section 376 — Casting stigma on the character of a victim of rape deprecated — Trial judge not justified in characterising a rape victim as a girl of loose character — Court must use self-restraint while recording such finding even if the girl is found to be habituated to sexual intercourse — Evidence Act, 1872, S. 155(4)**

I. **Penal Code, 1860 — Ss. 375 Secondly, 376, 376-B, 376-C, 376-D — Past promiscuous behaviour of the prosecutrix held is no ground to condone rape — Even such a prosecutrix has a right to refuse to submit herself to sexual intercourse**

The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as "a girl of loose morals" or "such type of a girl". We express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Suchlike stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole — where the victim of crime is discouraged — the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court. (Paras 10, 14 and 16)

J. **Penal Code, 1860 — Ss. 376, 363, 366 and 368 — Abduction and rape — Sentence — Mitigating factors — The three respondent accused acquitted by the trial court more than a decade ago and since then not involved in any other offence — They aged between 21-24 years at the time of occurrence and by now all of them and the prosecutrix got married and settled down in life — Held, sentence of 5 years' RI and a fine of Rs 5000 each is appropriate for offence under S. 376 — But, in the circumstances of the case, it is not desirable to award any compensation particularly as no scheme as suggested in Delhi Domestic Working Women's Forum case has been drawn up (Paras 17 to 19)**

Delhi Domestic Working Women's Forum v. *Union of India*, (1995) 1 SCC 14: 1995 SCC (Cri) 7, *referred to*

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Advocates who appeared in this case :
Ms Amita Gupta, R.S. Suri and R.L. Rao, Advocates, for the Appellant;
Ujagar Singh, Senior Advocate (Davender Verma and Ms Naresh Bakshi, Advocates, with him) for Respondents 1-2.
C.S. Ashri, Advocate, for Respondent 3.

Chronological list of cases cited ***in para(s)***

1 (1995) 1 SCC 14: 1995 SCC (Cri) 7, *Delhi Domestic Working Women's Forum* v. *Union of India* 18
2. (1990) 1 SCC 550 : 1990 SCC (Cri) 210, *State of Maharashtra* v. *Chandraprakash Kewalchand Jain* 8

The Judgment of the Court was delivered by

DR ANAND, J.— This appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984 is directed against the judgment and order of Additional Judge, Special Court, Ludhiana dated 1-6-1985 by which the respondents were acquitted of the charge of abduction and rape. For what follows, the judgment impugned in this appeal presents a rather disquietening and a disturbing feature. It demonstrates lack of sensitivity on the part of the court by casting unjustified stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking human psychology and behavioural probabilities. An intrinsically wrong approach while appreciating the testimonial potency of the evidence of the prosecutrix has resulted in miscarriage of justice. First a brief reference to the prosecution case.

2. The prosecutrix (name withheld by us), a young girl below 16 years of age, was studying in the 10th class at the relevant time in Government High School, Pakhowal. The matriculation examinations were going on at the material time. The examination centre of the prosecutrix was located in the Boys' High School, Pakhowal. On 30-3-1984 at about 12.30 p.m. after taking her test in Geography, the prosecutrix was going to the house of her maternal uncle, Darshan Singh, and when she had covered a distance of about 100 karmas from the school, a blue Ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh @ Bawa and Ranjit Singh accused were sitting. The car stopped near her. Ranjit Singh accused came out of the car and caught hold of the prosecutrix from her arm and pushed her inside the car. Accused Jagjit Singh @ Bawa put his hand on the mouth of the prosecutrix, while Gurmit Singh accused threatened the prosecutrix, that in case she raised an alarm she would be done to death. All the three accused (respondents herein) drove her to the tubewell of Ranjit Singh accused. She was taken to the 'kotha' of the tubewell. The driver of the car after leaving the prosecutrix and the three accused persons there went away with the car. In the said kotha Gurmit Singh compelled the prosecutrix to take liquor, misrepresenting to her that it was juice. Her refusal did not have any effect and she reluctantly consumed liquor. Gurmit Singh then got removed her salwar and also opened her shirt. She was made to lie on a cot in the kotha while his companions guarded the kotha from outside. Gurmit Singh committed rape upon her. She raised roula

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as she was suffering pain but Gurmit Singh threatened to kill her if she persisted in raising alarm. Due to that threat, she kept quiet. After Gurmit Singh had committed rape upon her, the other two accused, who were earlier guarding the kotha from outside, came in one by one and committed rape upon her. Jagjit Singh alias Bawa committed rape on her after Gurmit Singh and thereafter Ranjit Singh committed rape on her. Each one of the accused committed sexual intercourse with the prosecutrix forcibly and against her will. They all subjected her to sexual intercourse once again during the night against her will. Next morning at about 6.00 a.m., the same car arrived at the tubewell kotha of Ranjit Singh and the three accused made her sit in that car and left her near the Boys' High School, Pakhowal nearabout the place from where she had been abducted. The prosecutrix had to take her examination in the subject of Hygiene on that date. She, after taking her examination in Hygiene, reached her Village Nangal-Kalan, at about noon time and narrated the entire story to her mother, Smt Gurdev Kaur PW 7. Her father Tirlok Singh PW 6 was not present in the house at that time. He returned from his work late in the evening. The mother of the prosecutrix, Smt Gurdev Kaur, PW 7, narrated the episode to her husband Tirlok Singh PW 6 on his arrival. Her father straightaway contacted Sarpanch Joginder Singh of the village. A panchayat was convened. Matter was brought to the notice of the Sarpanch of Village Pakhowal also. Both the Sarpanches tried to effect a compromise on 1-4-1984 but since the panchayat could not give any justice or relief to the prosecutrix, she along with her father proceeded to the Police Station, Raikot to lodge a report about the occurrence with the police. When they reached the bus adda of Village Pakhowal, the police met them and she made her statement, Ex. PD, before ASI Raghubir Chand PW who made an endorsement, Ex. PD/1 and sent the statement Ex. PD of the prosecutrix to the Police Station Raikot for registration of the case on the basis of which formal FIR Ex. PD/2 was registered by SI Malkiat Singh. ASI Raghubir Chand then took the prosecutrix and her mother to the primary health centre Pakhowal for medical examination of the prosecutrix. She was medically examined by lady doctor, Dr Sukhwinder Kaur, PW 1 on 2-4-1984, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair were also found matted. According to PW 1 intercourse with the prosecutrix could be "one of the reasons for laceration which I found in her hymen". She went on to say that the possibility could not be ruled out that the prosecutrix "was not habitual to intercourse earlier".

3. During the course of investigation, the police took into possession a sealed parcel handed over by the lady doctor containing the salwar of the prosecutrix along with 5 slides of vaginal smears and one sealed phial containing pubic hair of the prosecutrix, vide memo Ex. PK. On the pointing out of the prosecutrix, the investigating officer prepared the rough site plan Ex. PF, of the place from where she had been abducted. The prosecutrix also led the investigating officer to the tubewell kotha of Ranjit Singh where she had been wrongfully confined and raped. The investigating officer prepared

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a rough site plan of the kotha Ex. PM. A search was made for the accused on 2-4-1984 but they were not found. They were also not traceable on 3-4-1984, in spite of a raid being conducted at their houses by the ASI. On 5-4-1984 Jagjit Singh alias Bawa and Ranjit Singh were produced before the investigating officer by Gurbachan Singh PW 8 and were placed under arrest. Both Ranjit Singh and Jagjit Singh on the same day were produced before Dr B.L. Bansal PW 3 for medical examination. The doctor opined that both the accused were fit to perform sexual intercourse. Gurmit Singh respondent was arrested on 9-4-1984 by SI Malkiat Singh. He was also got medically examined on 9-4-1984 by Dr B.L. Bansal PW 3 who opined that Gurmit Singh was also fit to perform sexual intercourse. The sealed parcels containing the slides of vaginal smears, the pubic hair and the salwar of the prosecutrix, were sent to the chemical examiner. The report of the chemical examiner revealed that semen was found on the slides of vaginal smear though no spermatozoa was found either on the pubic hair or the salwar of the prosecutrix. On completion of the investigation, respondents were challaned and were charged for offences under Sections 363, 366, 368 and 376 IPC.

4. With a view to connect the respondents with the crime, the prosecution examined Dr Sukhwinder Kaur, PW 1; prosecutrix, PW 2; Dr B.L. Bansal, PW 3; Tirlok Singh, father of the prosecutrix, PW 6; Gurdev Kaur, mother of the prosecutrix, PW 7; Gurbachan Singh, PW 8; Malkiat Singh, PW 9 and SI Raghubir Chand, PW 10, besides, some formal witnesses like the draftsman etc. The prosecution tendered in evidence affidavits of some of the constables, whose evidence was of a formal nature as also the report of the chemical examiner, Ex. PM. In their statements recorded under Section 313 CrPC the respondents denied the prosecution allegations against them. Jagjit Singh respondent stated that it was a false case foisted on him on account of his enmity with the Sarpanch of Village Pakhowal. He stated that he had married a Canadian girl in the village gurdwara, which was not liked by the Sarpanch and therefore, the Sarpanch was hostile to him and had got him falsely implicated in this case. Gurmit Singh respondent took the stand that he had been falsely implicated in the case on account of enmity between his father and Tirlok Singh, PW 6, father of the prosecutrix. He stated that there was long-standing litigation going on between his father and the father of the prosecutrix and their family members were not even on speaking terms with each other. He went on to add that on 1-4-1984 he was given a beating by Tirlok Singh, PW 6, on grounds of suspicion that he might have instigated some persons to abduct his daughter and in retaliation he and his elder brother on the next day had given a beating to Tirlok Singh, PW 6 and also abused him and on that account Tirlok Singh PW, in consultation with the police had got him falsely implicated in the case. Ranjit Singh respondent also alleged false implication but gave no reasons for having been falsely implicated. Jagjit Singh alias Bawa produced DW 1 Kuldip Singh and DW 2 MHC, Amarjit Singh in defence and tendered in evidence Ex. DC, a photostat copy of his passport

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and Ex. DD copy of a certificate of his marriage with the Canadian girl. He also tendered into evidence photographs marked 'C' and 'D', evidencing his marriage with the Canadian girl. The other two accused however did not lead any defence evidence.

5. The trial court first dealt with the prosecution case relating to the abduction of the prosecutrix by the respondents and observed:

> "The first point for appreciation before me would arise whether this part of the prosecution story stands fortified by any cogent or reliable evidence or not. There is a bald allegation only of (prosecutrix — name omitted) that she was forcibly abducted in a car. In the FIR she stated that she was abducted in an Ambassador car of blue colour. After going through the evidence, I am of the view that this thing has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence. (prosecutrix — name omitted) was tested about the particulars of the car and she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful. She stated in her cross-examination at page 8 that the make of the car was Master. She was pertinently asked whether the make of the car was Ambassador or Fiat. The witness replied that she cannot tell the make of the car. But when she was asked as to the difference between Fiat, Ambassador or Master car, she was unable to explain the difference amongst these vehicles. So, it appears that the allegations that she was abducted in a Fiat car by all the three accused and the driver is an imaginary story which has been given either by the thanedar or by the father of the prosecutrix.
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> * * *
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> If the three known accused are in the clutches of the police, it is not difficult for the IO to come to know about the car, the name of its driver etc., but strange enough, SI Raghubir Chand has shown pitiable negligence when he could not find out the car driver in spite of the fact that he directed the investigation on these lines. He had to admit that he made search for taking the car into possession allegedly used in the occurrence. He could not find out the name of the driver nor could he find out which car was used. In these circumstances, it looks to be improbable that any car was also used in the alleged abduction." (Omission of name of the prosecutrix — ours)

The trial court further commented:

> "On 30-3-1984 she was forcibly abducted by four desperate persons who were out and out to molest her honour. It has been admitted by the prosecutrix that she was taken through the bus adda of Pakhowal via metalled road. It has come in the evidence that it is a busy centre. In spite of that fact she had not raised any alarm, so as to attract persons that she was being forcibly taken. The height of her own unnatural conduct is that she was left by the accused at the same point on the next morning. The accused would be the last persons to extend sympathy to

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the prosecutrix. Had it been so, the natural conduct of the prosecutrix would have been first to rush to the house of her maternal uncle to apprise him that she had been forcibly abducted on the previous day. The witness after being left at the place of abduction lightly takes her examination. She does not complain to the lady teachers who were deployed to keep a watch on the girl students because these students were to appear in the centre of Boys' School. She does not complain to anybody nor her friend that she was raped during the previous night. She prefers her examination rather than go to the house of her parents or relations. Thereafter, she goes to her Village Nangal-Kalan and informs for the first time her mother that she was raped on the previous night. This part of the prosecution story does not look to be probable."

6. The trial court, thus, disbelieved the version of the prosecutrix basically for the reasons: (*i*) "she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful" particularly because she could not explain the difference between a Fiat car, Ambassador car or a Master car; (*ii*) the investigating officer had "shown pitiable negligence" during the investigation by not tracing out the car and the driver; (*iii*) that the prosecutrix did not raise any alarm while being abducted even though she had passed through the bus adda of Village Pakhowal; (*iv*) that the story of abduction "has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence" and (*v*) that no corroboration of the statement of the prosecutrix was available on the record and that the story that the accused had left her near the school next morning was not believable because the accused could have no 'sympathy' for her.

7. The trial court also disbelieved the version of the prosecutrix regarding rape. It found that the testimony of the prosecutrix did not inspire confidence for the reasons (*i*) that there had been delay in lodging the FIR and as such the chances of false implication of the accused could not be ruled out. According to the trial court, Tirlok Singh PW 6 became certain on 1-4-1984 that there was no outcome of the meeting between the panchayats of Nangal-Kalan and Pakhowal, therefore, there was no justification for him not to have lodged the report on 1-4-1984 itself and since Tirlok Singh had "entered into consultations with his wife as to whether to lodge the report or not, it rendered the matter doubtful"; (*ii*) that the medical evidence did not help the prosecution case. The trial court observed that in her cross-examination PW 1 lady doctor had admitted that whereas intercourse with the prosecutrix could be one of the reasons for the laceration of the hymen "there could be other reasons also for that laceration". The trial court noticed that the lady doctor had inserted a vaginal speculum for taking swabs from the posterior vaginal fornix of the prosecutrix for preparing slides and since the width of the speculum was about two fingers, the possibility that the prosecutrix was habituated to sexual intercourse could not be ruled out". The trial court observed that the prosecutrix was "flighting her imagination in order to rope in the accused persons" and that implicit reliance could not be

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placed on the testimony "of such a girl"; (*iii*) there was no independent corroboration of her testimony and (*iv*) that the accused had been implicated on account of enmity as alleged by the accused in their statements recorded under Section 313 CrPC.

8. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Tirlok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village Sarpanch and complained to him. The Sarpanch of the village also got in touch with the Sarpanch of Village Pakhowal, where in the tubewell kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that

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naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Tirlok Singh PW 6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Tirlok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination centre next morning at about 6 a.m. was "not believable" as "the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination centre so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.

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The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*[1] Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

> "A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her

1 (1990) 1 SCC 550 : 1990 SCC (Cri) 210

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evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

9. We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any 'corroboration'. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix.

10. The medical evidence has lent full corroboration to the testimony of the prosecutrix. According to PW 1 lady doctor Sukhwinder Kaur she had examined the prosecutrix on 2-4-1984 at about 7.45 p.m. at the Primary Health Centre, Pakhowal, and had found that "her hymen was lacerated with fine radiate tears, swollen and painful". The pubic hair were also matted. She opined that intercourse with the prosecutrix could be "one of the reasons for the laceration of the hymen" of the prosecutrix. She also opined that the "possibility cannot be ruled out that (prosecutrix) was not habitual to intercourse earlier to her examination by her on 2-4-1984". During her cross-examination, the lady doctor admitted that she had not inserted her fingers inside the vagina of the prosecutrix during the medico-legal examination but that she had put a vaginal speculum for taking the swabs from the posterior vaginal fornix for preparing the slides. She disclosed that the size of the speculum was about two fingers and agreed with the suggestion made to her during her cross-examination that "if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual intercourse cannot be ruled out". However, no direct and specific question was put by the defence to the lady doctor whether the prosecutrix in the present case could be said to be habituated to sexual intercourse and

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there was no challenge to her statement that the prosecutrix "may not have been subjected to sexual intercourse earlier". No enquiry was made from the lady doctor about the tear of the hymen being old. Yet, the trial court interpreted the statement of PW 1 Dr Sukhwinder Kaur to hold that the prosecutrix was habituated to sexual intercourse since the speculum could enter her vagina easily and as such she was "a girl of loose character". There was no warrant for such a finding and the finding if we may say so with respect, is a wholly irresponsible finding. In the face of the evidence of PW 1, the trial court wrongly concluded that the medical evidence had not supported the version of the prosecutrix.

11. The trial court totally ignored the report of the chemical examiner Ex. PM, according to which semen had been found on the slides which had been prepared by the lady doctor from the vaginal secretions from the posterior of the vaginal fornix of the prosecutrix. The presence of semen on the slides lent authentic corroboration to the testimony of the prosecutrix. This vital evidence was forsaken by the trial court and as a result wholly erroneous conclusions were arrived at. Thus, even though no corroboration is necessary to rely upon the testimony of the prosecutrix, yet sufficient corroboration from the medical evidence and the report of the chemical examiner is available on the record. Besides, her statement has been fully supported by the evidence of her father, Tirlok Singh, PW 6 and her mother Gurdev Kaur, PW 7, to whom she had narrated the occurrence soon after her arrival at her house. Moreover, the unchallenged fact that it was the prosecutrix who had led the investigating officer to the kotha of the tubewell of Ranjit Singh, where she had been raped, lent a built-in assurance that the charge levied by her was 'genuine' rather than 'fabricated' because it is no one's case that she knew Ranjit Singh earlier or had ever seen or visited the kotha at his tubewell. The trial court completely overlooked this aspect. The trial court did not disbelieve that the prosecutrix had been subjected to sexual intercourse but without any sound basis, observed that the prosecutrix might have spent the 'night' in the company of some 'persons' and concocted the story on being asked by her mother as to where she had spent the night after her maternal uncle, Darshan Singh, came to Nangal-Kalan to enquire about the prosecutrix. There is no basis for the finding that the prosecutrix had spent the night in the company of "*some persons*" and had indulged in sexual intercourse with *them* of her own free will. The observations were made on surmises and conjectures — the prosecutrix was condemned unheard.

12. The trial court was of the opinion that it was a 'false' case and that the accused had been implicated on account of enmity. In that connection it observed that since Tirlok Singh PW 6 had given a beating to Gurmit Singh on 1-4-1984 suspecting his hand in the abduction of his daughter and Gurmit Singh accused and his elder brother had abused Tirlok Singh and given a beating to Tirlok Singh PW 6 on 2-4-1984, "it was very easy on the part of Tirlok Singh to persuade his daughter to name Gurmit Singh so as to take revenge" The trial court also found that the relations between the family of

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Gurmit Singh and of the prosecutrix were strained on account of civil litigation pending between the parties for 7/8 years prior to the date of occurrence and that was also the 'reason' to falsely implicate Gurmit Singh. Indeed, Gurmit Singh accused in his statement under Section 313 CrPC did raise such a plea but that plea has remained unsubstantiated. Tirlok Singh PW 6 categorically denied that he had any litigation with the father of Gurmit Singh at all and went on to say that no litigation had ever taken place between him and Mukand Singh, father of Gurmit Singh, over a piece of land or otherwise. To the similar effect is the statement of Gurdev Kaur PW 7 who also categorically stated that there had been no litigation between her husband and Mukand Singh, father of Gurmit Singh. The trial court ignored this evidence and found support for the plea of the accused from the statement of the prosecutrix in which during the first sentence of her cross-examination she admitted that litigation was going on between Mukand Singh, father of Gurmit Singh, and her father for the last 8/9 years over a piece of land. In what context the statement was made is not clear. Moreover, the positive evidence of PW 6 and PW 7 that there was no litigation pending between PW 6 and the father of Gurmit Singh completely belied the plea of the accused. If there was any civil litigation pending between the parties as alleged by Gurmit Singh, he could have produced some documentary proof in support thereof but none was produced. Even Mukand Singh, father of Gurmit Singh, did not appear in the witness-box to support the plea taken by Gurmit Singh. The allegation regarding any beating given to Gurmit Singh by PW 6 and to PW 6 by Gurmit Singh and his brother was denied by PW 6 and no material was brought forth in support of that plea either and yet the trial court for undisclosed reasons assumed that the story regarding the beating was correct. Some stray sentences in the statement of the prosecutrix appear to have been unnecessarily blown out of all proportion to hold that 'admittedly' PW 6 had been given a beating by Gurmit Singh accused and that there was civil litigation pending between the father of the prosecutrix and the father of Gurmit Singh to show that the relations between the parties were inimical. There is no acceptable material on the record to hold that there was any such civil litigation pending between the parties. Even if it be assumed for the sake of argument that there was some such litigation, it could hardly be a ground for a father to put forth his daughter to make a wild allegation of rape against the son of the opposite party, with a view to take revenge. It defies human probabilities. No father could stoop so low as to bring forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending civil litigation. Again, if the accused could be falsely involved on account of that enmity, it was equally possible that the accused could have sexually assaulted the prosecutrix to take revenge from her father, for after all, enmity is a double-edged weapon, which may be used for false implication as well as to take revenge. In any case, there is no proof of the existence of such enmity between PW 6 and the father of Gurmit Singh which could have prompted PW 6 to put up his daughter to falsely implicate

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Gurmit Singh on a charge of rape. The trial court was in error to hold that Gurmit Singh had been implicated on account of enmity between the two families and for the beating given by Gurmit Singh and his brother to PW 6, in retaliation of the beating given by PW 6 to Gurmit Singh on 1-4-1984. Similarly, so far as Jagjit Singh respondent is concerned, the trial court opined that he could have been got implicated at the instance of the Sarpanch of Village Pakhowal who was hostile to Jagjit Singh. The ground of hostility as given by Jagjit Singh against the Sarpanch of Village Pakhowal stems out of the fact that the Sarpanch was annoyed with him for marrying a Canadian girl in the village gurdwara. There is no evidence whatsoever on the record to show that the Sarpanch of Village Pakhowal had any relationship or connection with the prosecutrix or her father or was in any way in a position to exert so much of influence on the prosecutrix or her family, that to settle his score Tirlok Singh PW 6 would put forward his daughter to make a false allegation of rape and thereby jeopardise her own honour and future prospects of her marriage etc. The plea of Jagjit Singh alias Bawa like that of Gurmit Singh did not merit acceptance and the trial court erroneously accepted the same without any basis. The plea of the accused was a plea of despair not worthy of any credence. Ranjit Singh, apart from stating that he had been falsely implicated in the case did not offer any reasons for his false implication. It was at his tubewell kotha that rape had been committed on the prosecutrix. She had pointed out that kotha to the police during investigation. No ostensible reason has been suggested as to why the prosecutrix would falsely involve Ranjit Singh in the commission of such a heinous crime and nominate his kotha as the place where she had been subjected to sexual molestation by the respondents. The trial court ignored that it is almost inconceivable that an unmarried girl and her parents would go to the extent of staking their reputation and future in order to falsely set up a case of rape to settle petty scores as alleged by Jagjit Singh and Gurmit Singh — respondents.

13. From the statement of the prosecutrix, it clearly emerges that she was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. In this fact situation the question of age of the prosecutrix would pale into insignificance. However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence. Their evidence is supported by the birth certificate Ex. PJ. Both Tirlok Singh PW 6 and Gurdev Kaur PW 7, the father and mother of the prosecutrix respectively, explained that initially they had named their daughter, the prosecutrix, as Mahinder Kaur but her name was changed to ... (name omitted), as according to The Holy Guru Granth Sahib her name was required to start with the word 'chhachha' and therefore in the school-leaving certificate her name was correctly given. There was nothing to disbelieve the explanation given by Tirlok Singh and Gurdev Kaur in that behalf. The trial court ignored the explanation given by

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the parents observing that "it could not be swallowed being a belated one". The trial court was in error. The first occasion for inquiring from Tirlok Singh PW 6 about the change of the name of the prosecutrix was only at the trial when he was asked about Ex. PJ and there had been no earlier occasion for him to have made any such statement. It was, therefore, not a belated explanation. That apart, even according to the lady doctor PW 1, the clinical examination of the prosecutrix established that she was less than 16 years of age on the date of the occurrence. The birth certificate Ex. PJ was not only supported by the oral testimony of Tirlok Singh PW 6 and Gurdev Kaur PW 7 but also by that of the school-leaving certificate marked 'B'. With a view to do complete justice, the trial court could have summoned the official concerned from the school to prove various entries in the school-leaving certificate. From the material on the record, we have come to an unhesitating conclusion that the prosecutrix was less than 16 years of age when she was made a victim of the lust of the respondents in the manner deposed to by her against her will and without her consent. The trial court did not return any positive finding as to whether or not the prosecutrix was below 16 years of age on 30-3-1984 and instead went on to observe that "even assuming for the sake of argument that the prosecutrix was less than 16 years of age on 30-3-1984, it could still not help the case as she was not a reliable witness and was attempting to shield her own conduct by indulging in falsehood to implicate the respondents". The entire approach of the trial court in appreciating the prosecution evidence and drawing inferences therefrom was erroneous.

14. The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterised her as "a girl of loose morals" or "such type of a girl".

15. What has shocked our judicial conscience all the more is the inference drawn by the court, based on no evidence and not even on a denied suggestion, to the effect:

> "The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for reasons best known to her, she did not do so and she preferred to give company to some persons."

16. We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Suchlike stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole — where the victim of crime is discouraged — the criminal encouraged and in turn crime gets rewarded! Even in cases, unlike the present case, where there is

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some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court.

17. As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial court fell in error in acquitting them of the charges levelled against them. The appreciation of evidence by the trial court is not only unreasonable but perverse. The conclusions arrived at by the trial court are untenable and in the established facts and circumstances of the case, the view expressed by it is not a possible view. We, accordingly, set aside the judgment of the trial court and convict all the three respondents for offences under Sections 363/366/368 and 376 IPC. So far as the sentence is concerned, the court has to strike a just balance. In this case the occurrence took place on 30-3-1984 (more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been involved in any other offence after they were acquitted by the trial court on 1-6-1985, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents. We accordingly sentence the respondents for the offence under Section 376 IPC to undergo five years' RI each and to pay a fine of Rs 5000 each and in default of payment of fine to 1 year's RI each. For the offence under Section 363 IPC we sentence them to undergo three years' RI each but impose no separate sentence for the offence under Sections 366/368 IPC. The substantive sentences of imprisonment shall, however, run concurrently.

18. This Court, in *Delhi Domestic Working Women's Forum* v. *Union of India*[2], had suggested, on the formulation of a scheme, that at the time of conviction of a person found guilty of having committed the offence of rape, the court shall award compensation.

19. In this case, we have, while convicting the respondents, imposed, for reasons already set out above, the sentence of 5 years' RI with fine of Rs 5000 and in default of payment of fine further RI for one year on each of the respondents for the offence under Section 376 IPC. Therefore, we do not, in the instant case, for those very reasons, consider it desirable to award any

2 (1995) 1 SCC 14: 1995 SCC (Cri) 7

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compensation, in addition to the fine already imposed, particularly as no scheme also appears to have been drawn up as yet.

20. Before parting with the case, there is one other aspect which we would like to advert to.

21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

22. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or

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confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.

23. The alarming frequency of crime against women led Parliament to enact Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) to make the law of rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114-A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was also amended by addition of sub-sections 2 and 3 after renumbering the old section as sub-section (1). Sub-sections 2 and 3 of Section 327 CrPC provide as follows:

"327. *Court to be open.*—

* * *

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted *in camera*:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court."

24. These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 CrPC is not only significant but very important. It casts a *duty* on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of public. The improved quality of her evidence would assist the courts in

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arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 CrPC and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open court as envisaged by Section 327(2) CrPC. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) CrPC. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases *in camera* should be the rule and an *open trial* in such cases an exception.

(1996) 2 Supreme Court Cases 405

(BEFORE A.M. AHMADI, C.J. AND N.P. SINGH AND K. VENKATASWAMI, JJ.)

Writ Petitions (C) No. 691 of 1995 with Nos. 716, 801 and 818 of 1995, 2 and 3 of 1996

DELHI SCIENCE FORUM AND OTHERS .. Petitioners;

Versus

UNION OF INDIA AND ANOTHER .. Respondents.

With

Transfer Cases Nos. 4-6 of 1996

NATIONAL TELECOM FEDERATION OF TELECOM EMPLOYEES AND OTHERS .. Petitioners;

Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions (C) No. 691 of 1995† with Nos. 716, 801 and 818 of 1995, 2 and 3 of 1996 and Transfer Cases Nos. 4-6 of 1996, decided on February 19, 1996

A. Telegraph Act, 1885 — S. 4(1) first proviso — Grant of licences by State Govt. to non-govt. companies, including foreign collaborated companies, for

† Under Article 32 of the Constitution of India

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ILR (2013) III DELHI 1861
CRL. L.P

STATE ....PETITIONER

VERSUS

RAHUL ....RESPONDENT

(GITA MITTAL & J.R. MIDHA, JJ.)

CRL. L.P. NO. : 250/2012 **DATE OF DECISION: 15.04.2013**

Code of Criminal Procedure, 1973—Section 378(1)—Indian Penal Code, 1860—Sections 376 and 377—Indian Evidence Act, 1872—Section 118—Statement of a child witness—Manner of conducting competency test—Insufficient attention paid; no real assessment of the capacity and capabilities children accorded special treatment—Extensive guidelines laid down by the Supreme Court and the Delhi High Court—Pronouncements bind all trial courts in Delhi—Knew no exceptions—Adherence is mandatory—Questions put should meet the requirements of law having special regard to age and circumstances of the person required to depose—Questions to be put to child witness ought to be sensitively framed—Education, socio economic background, age and capacity to be kept in mind—Directions issued.

Important Issue Involved: Section 118 of the Indian Evidence Act contains the expression 'competent to testify' as well as 'court considers'. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not

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prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to give evidence is concerned.

The competency inquiry means the witness ability and willingness to tell the truth and the capacity to perceive, to recollect and to communicate the evidence.

A common sense approach should be taken when dealing with the testimony of young children and same standards as expected from adults should not be expected from young children.

Children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim is only further aggravated.

The first and the foremost guideline on the subject of competenacy testing and mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim on the prime requirement is to ensuring the best interests of the child under all circumstances.

The questions that the trial judge would be required to put to the witness have to meet the requirements of law as well as the binding principles laid down in several judicial pronouncements and the authoritative texts having special regard to the age and circumstances of the person who is required to depose.

The judges and magistrates should always record their opinion that the child understands the duty of speaking truth.

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Not having taken oath only goes to the creditability and not the competency of the witness.

While evaluating the testimony of a child (who is a victim as well), the circumstances which would be considered would be the tender age of the child; its demeanor; possibility of tutoring, etc.

The Court appearances impact children more drastically than they do adults and may bring alive the trauma the child has seen (or may have experienced, if a victim). Which may reduce the child into a state of terrified silence. The judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court.

The guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is essential so as to get the best evidence from the child witness.

It is the fundamental responsibility of every court to ensure the welfare and best interest of the child which has to remain the paramount consideration under all circumstances.

The questions which put to the child witness ought to be sensitively framed keeping in mind the socio-economic background of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

The trial courts to carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatisation of a child witness by the courtroom experience.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Dayan Krishnan, Additional

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Standing Counsel with Ms. Manvi Priya, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Director of Public Prosecutions, Transwal* vs. *Minister of Justice and Constitutional Development* (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC).
2. *Virender* vs. *The State of NCT of Delhi* Crl.A.No.121/2008.
3. *Ratansinh Dalsukhbhai Nayak* vs. *State of Gujarat,* (2004) 1 SCC 64.
4. *Dattu Ramrao Sakhare* vs. *State of Maharashtra,* (1997) 5 SCC 341.
5. *Prem Shankar Sachhan* vs. *State* 20 (1981) DLT 55 (DB).
6. *Rameshwar* vs. *The State of Rajasthan* (1952) 1 SCR 377.

RESULT: Directions issued.

GITA MITTAL, J. (Oral)

1. By this order we are considering the issue of evaluation of the competency of a child to testify in court proceedings. The instant petition has been filed under Section 378(I) of the Cr.P.C. seeking leave to appeal against the judgment of acquittal dated 20th October, 2011 whereby the respondents herein was acquitted of the charges punishable under Sections 376 and 377 of the Indian Penal Code by the learned Additional Sessions Judge in the case arising out of FIR No.45/2010, registered by the police station Nabi Karim.

2. Upon consideration of the leave petition, we had directed issuance of notice for the service of the respondents on the 3rd of September, 2012. However, the notice was not served upon the respondents and, therefore, the notice was again directed to be issued.

3. Mr. Dayan Krishnan, learned Additional Standing counsel for the State has submitted that quite apart from the challenge on merits, there is a very important aspect of the criminal trials which requires to be

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immediately addressed, especially in the light of the proceedings in the present case. Mr. Dayan Krishnan, Additional Standing Counsel has placed a copy of the statement of the child victim, who was examined as prosecution witness no.6 in the trial on the 21st of April, 2011. He has drawn our attention to the manner in which the learned trial judge has conducted the competency test of the child witness. It is submitted that the matter of conducting the test for competency of a child witness to depose is a critical part of the child testimony and unfortunately insufficient attention is being paid to it. Mr. Dayan Krishnan, Additional Standing Counsel urges that most courts have a set pattern of questions which are put indiscriminately to every child witness. As a result there is no real assessment of the capacity and capabilities of the child, thereby impacting the quality of the child evidence. He impresses upon us that this aspect deserves immediate attention. It is pointed out that so far as consideration of this aspect of the child witness testimony is concerned, no issue arises and it is independent of and does not impact the consideration of the case on merits. The matter has been listed today for this purpose alone.

Statutory Prescription

4. Before proceeding to examine this issue, it is necessary to examine the statutory prescription with regard to competency of any person to give evidence in Court. In this regard Section 118 of the Indian Evidence Act provides as follows:

> **"118.** Who may testify.- All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

Competency Inquiry – nature of

5. Section 118 of the Indian Evidence Act contains the expression *'competent to testify'* as well as *'court considers'*. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not prevented from

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A understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to
B give evidence is concerned.

6. We may first consider the meaning of the expression *'competency to testify'* and the manner in which an examination is to be conducted and conclusion could be reached in this regard. This expression has
C arisen for consideration not only in this country but internationally. International jurisprudence on this aspect has been placed before us by Mr. Dayan Krishnan, the learned Additional Standing counsel for the State which we note hereafter.

D 7. Our attention has been drawn to the pronouncement of the Supreme Court of Canada reported at (1993) 4 SCR 2231, **R. vs. Marquard** wherein the court interpreted the "competency inquiry' to mean the witness ability and willingness to tell the truth, and the capacity
E to perceive, to recollect and to communicate the evidence.

8. In yet another pronouncement reported at (1990) 2 SCR 3, **R. vs. B.(G).**, the Supreme Court of Canada has observed that since children may see the world differently from adults, some details which may
F appear to be important to adults like time and place may be missing from their recollection. The court suggested that judiciary should take a common sense approach when dealing with the testimony of young children and not expect the same standards from young children as they expect from adults.

G

9. Valuable light is shed on the impact of a court appearance on a child and the duty of the court towards child witness by a pronouncement of the Constitutional Court of South Africa in the judgment reported at
H (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC) **Director of Public Prosecutions, Transwal v. Minister of Justice and Constitutional Development**. In South Africa, protection is to be given to the child complainants in giving evidence in criminal proceedings involving sexual offences to ensure the foundational constitutional values of human dignity,
I achievement of equality and advancement of human rights and freedoms under Section 28 (2) of the Constitution which requires that in all matters concerning a child's best interests must be of paramount importance. Further, the Criminal Law (Sexual Offences and Related Matters)

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Amendment Act [which effectuated the amendment to the Criminal Procedure Act (CPA)] was introduced so that protection is given to child complainants when their evidence is being recorded in criminal proceedings involving sexual offences. With regard to administration of justice, the Constitutional Court noted the following questions which arise in this regard:

> "5 .First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and trauma associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any – to investigate any failure to implement these provisions which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the Court's attention."

10. The Constitutional Court was concerned with two rape cases the first, involving change of rape of a 13 year old girl child by one Mr. Phaswane. In the second, charge of rape of an 11 year old girl by one Mr. Mokoena was levelled. In the Phaswane trial, before the witness testified she was questioned by the court in order to determine whether she understood the import of an oath, and if not, whether she understood what it meant to speak the truth. While the court was not satisfied that she understood the import of an oath, it nevertheless concluded that the child understood the difference between truth and falsehood. The child was accordingly admonished to speak the truth.

11. In the Mokoena trial the child complainant was allowed to give evidence with the aid of an intermediary. We find emphasis on consideration of the best interests of the child by Courts in the judgment authored by Nacobo, J placing reliance on the UN Guidelines when he wrote thus:

> "78. The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines). The main objective of these Guidelines is to 'set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles'. These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all

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matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal justice system. In particular, in the context of the best interests of the child, the Guidelines set forth the following principle:

> "(c) While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:
>
> (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;
>
> (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development..

79. It is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere.[77] This means that, where necessary, child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected.[78] Children must be treated with dignity and compassion.[79] In my view, these considerations

77. Para 30(d) and 31(b) of the Guidelines.

78. Para 11 of the Guidelines.

79. Para 10 of the Guidelines.

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should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in section 28(2) of the Constitution..

12. The Court noted that Section 170A(1) was introduced into the CPA to prevent a child from undergoing *'undue mental stress or suffering'* by permitting the child to testify through an intermediary; to give evidence shielded from the accused by testifying in another room, electronic devices via CCTV or sitting behind a screen that blocks the child's view of the accused but allows the child to be seen; creating an atmosphere conducive for a child to speak freely about the events relating to the offence. It was reiterated that the statutory provision must be construed to give effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence.

13. The observations of the Constitutional Court on the impact of a Court appearance on a child squarely apply to all children and read thus:

> "101. A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before – at least one assumes that the prosecutor would have interviewed the child in preparing for trial – the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown."

So far as conduct of the competency assessment of the child is concerned, it was held as follows:

> "102. The child would be questioned by the judicial officer in order to satisfy himself or herself that the child understands that he or she is under a duty to speak the truth or understands the

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import of the oath. Regrettably this questioning, although well-meaning, is often theoretical in nature and may increase the child's sense of confusion and terror. The child may wonder why he or she is being subjected to this questioning. That is not all."

14. This of course is not the end of the matter. There is the added agony of making the statement (i.e. giving evidence) in the presence of the accused. The Constitutional Court has elaborated on this aspect of the Court appearance and also extracted a portion of the child's examination which must be considered by every trial judge:

"103. The child is obliged to give evidence in the presence of the accused. This is what happened in the Phaswane matter. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. Perhaps the accused will have threatened the child with death or physical harm if he or she should tell anyone about what the accused had done to him or her. At this stage the child may wonder whether he or she will be punished for speaking the truth that the judicial officer had admonished him or her to speak. This may put the child to an unfortunate choice: either testify and risk the accused carrying out his or her threat, or say nothing. In these circumstances, it would not be surprising for the child to refuse to testify.

104. If the child decides to speak, then the prosecutor will take him or her through his or her evidence. The questioning of a child requires special skills, similar to those required to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the court room environment. If the questioning by the prosecutor is not skilled, the result is what happened in the Phaswane matter. The following exchange between the prosecutor and the interpreter illustrates the point:

"PROSECUTOR: What did you mean when you said that he had slept with you?

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– He had raped me. What do you mean with rape, we must know what you understand under rape? A

– Yes I personally do not know what rape is, I heard from people who say that there is a thing called rape.

Okay but we need to know what happened, you were tripped and then you fell on the ground and he took out a condom. We must know why do you say you have been raped, what did he do to you? B C

– Rape is sexual intercourse.

What is sexual intercourse?

– Sexual intercourse is when one person has sex with another person. D

But we do not know what that means, we need to know what you think what happened, not what you think. You must tells us why do you say that you have been raped and why did you say that the accused had sexual intercourse with you. What did he do, did he take his finger and scratch you on your ear or what did he do, why do you say it is sexual intercourse? E

INTERPRETER: I think with the permission of the court of course, I do understand what the state wants to elicit from the witness, it is just that the Prosecutor does not have proper words which can be cut down to the level of the understanding of this. All the question the words that come, I saw a pitch high. The state does not have proper words which are curtailed to the level of the understanding of this, and I do understand what she is saying but I am just afraid to say what she did not say, because I end up being testifying." F G H

15. The ordeal of the cross examination and its purpose was highlighted in para 105 which reads as follows:

"105. The child is then cross-examined with the sole purpose of discrediting the child. If the accused is not legally represented, the accused may conduct the cross-examination. The effect of this on the child can be terrifying especially where the accused is an adult relative of the child. The child may agree with questions I

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put by the accused for fear of punishment if he or she disagrees. If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through."

16. And the impact of having to repeat the same story to different persons takes its toll child as this noted in para 106 and 107:

"106. And moreover, the child has been telling the same story to several adults by now, most of whom are strangers: first, to a relative to whom the report was first made; then to a mother; then to a social worker, if she or he has been lucky to have been referred to one; then to a district surgeon or a medical practitioner – this time, the story-telling is accompanied by physical examination; then to a police officer at the charge office where the offence is reported; then to the investigating officer who will now be in charge of the case, where more details are now required; and then perhaps to the public prosecutor for a pre-trial interview, if the child is lucky to have one or if the public prosecutor has the time to conduct one. At times, the abuse may have been discovered by a caring teacher at a day-care centre or at school, and this adds to the list of people to whom the story is told. Then to the court, before an audience of strangers and in the atmosphere described above.

107. Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them."

17. The Constitutional Court has succinctly summed up the impact of the Court appearance on the child witness finally in the following terms:

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"108. A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive act was. Indeed, High Courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants .to further trauma possibly as severe as the trauma caused by the crime. It is precisely this secondary trauma that section 170A(1) seeks to prevent."

18. The Court then clearly pronounced that use of the measures which protects the child from secondary traumatisation has the following valuable impact on the testimony of the child:

"116. Following the approach outlined here not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all." (Emphasis supplied)

19. So far as the approach of court and exercise of judicial discretion is concerned, the Constitutional Court of South Africa ruled thus:

"123. What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion.[109] This means that the child must 'be treated in a caring and sensitive manner'.[110] This requires "taking into account

109. Paras 10-4 of the Guidelines.

110. Para 10 of the Guidelines.

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A [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity".[111] In short, "[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings".[112] Sensitivity requires the child's individual needs and views to be taken into account.[113] The exercise of judicial discretion in the appointment of an intermediary allows a judicial officer to assess "the individual needs, wishes and feelings" of each child. This, in my view, conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child."

(underlining by us)

20. It is trite that children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim as well is only further aggravated. This important subject has received attention of the United Nations as well which has framed the **"United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005.** which recognize that children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN Guidelines further state that girls are particularly vulnerable and may face discrimination at all stages of the justice system. The UN Guidelines stress the importance of ensuring dignity, including physical, mental and moral integrity of the child witness; the justice process should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socio-economic condition, as well as special needs of the child including health, ability and capacities.

21. The present case is concerned with the alleged commission of offence of rape. So far as examination of the testimony of witnesses, including child witnesses, in cases involving sexual offences are concerned,

111. Id.

112. Para 11 of the Guidelines.

113. Para 9(d) of the Guidelines.

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the same has been the subject matter for consideration before the Supreme Court of India as well as this court in several cases. Extensive guidelines have been laid down by the Supreme Court as well as the Delhi High Court in several judgments with regard to every stage of a criminal investigation as well as trials. These guidelines in cases regarding sexual offences laid down in judicial precedents as well as additional guidelines have been compiled in the decision dated 29th September, 2009 authored by one of us (Gita Mittal, J.) in Crl.A.No.121/2008, **Virender vs. The State of NCT of Delhi** (reported at 2009 (4) JCC 2721).

22. So far as the manner in which the statement of the child witness is to be examined is concerned, we may usefully reproduce hereunder para 83(iv) of the above judgment mentioned above wherein the guidelines relating to the cases involving sexual offences are set out. The same reads thus:

> "83. xxx
>
> I. xxx
>
> II. xxx
>
> III. xxx
>
> IV COURT
>
> (i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court On Its Own Motion vs. State & Anr)
>
> (ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.
>
> (iii) The trials into allegations of commission of rape must invariably be "in camera" . No request in this behalf is necessary. (Ref : **State of Punjab vs. Gurmit Singh)**
>
> (iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007 (4) JCC 2680 Court On Its Own Motion vs. State & Anr.)

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(v). The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : **Sakshi vs UOI**).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.

There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly

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and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi) A

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her. B C

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim. D

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure; E

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors). F

This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony. G

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing. H

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI). I

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(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : **Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.**)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) **State of Rajasthan vs. Ani alias Hanif & Ors.)**

(xxii) The court should ensure that the embarrassment and

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reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance 'gandi harkatein' or 'batamezein' have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record. (xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure

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protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child."

23. In addition, certain general guidelines have been mandated in this pronouncement which reads as follows:-

"V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.

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(iv) The child victim shall not be separated from his/her parents/ guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/ guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion vs. State of N.C.T. of Delhi). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted..

24. This pronouncement binds all trial courts in Delhi. It certainly bound the trial judge who was seized of the trial arising out of FIR 45/ 2010 in the instant case.

25. It is essential to note that all these concerns apply to all stages of a child witnesses court appearance including the competency examination of the child and evaluation of her/his response thereto. We cannot emphasise enough that the legislation, the statutory requirements as well as the jurisprudence on the subject have kept the best interest of the child as the complete focus of every action, especially Court proceedings and the decision. This aspect cannot be compromised in any manner. The matter assumes even greater importance in cases involving the sexual offences and abuse of the child as in the present case.

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26. In this regard, the protocol captioned as *"Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters"* is in vogue for the operationalization of the Child Victim Court Room in the District Courts in Delhi*. Currently, these guidelines are being applied in the Child Witnesses Court Room in the District Courts at Karkardooma. These Guidelines only reinforce the principles and the jurisprudence that has been referred to above.

27. In the United States Federal Court and the majority of state courts children are presumed competent to testify (US Code 18 USCS § 3509(c), 2004) unless a legal challenge is raised about the witness' competency. Compelling reasons other than age must exist for a Court to order a competency evaluation of the child witness (US Code 18 USCS § 3509(c), 2004). To raise the issue of competency of a child witness an understanding of abilities and skills needed to be competent to testify is essential. The enumeration by Sherrie Bourg Carter (Psychologist) in her Article "Child Witness Competency : when Should the Issue be Raised?"** of the standards which courts would apply is thus:-

- Adequate intelligence and memory to store information.
- The ability to observe, recall, and communicate information.
- An awareness of the difference between truth and a lie.
- An appreciation of the meaning of an oath to tell the truth.
- An understanding of the potential consequences of not telling the truth.

28. Ms. Carter further elaborates that when a challenge is formally raised, the burden falls upon the Court to make a determination as to whether the child is competent to testify. The courts in the USA usually adopt one or a combination of the following methods:

- Assessment by a court appointed expert in forensic child psychology or psychiatry.
- The child witness is brought to the courtroom and

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* http://delhihighcourt.nic.in/writerwaddata/upload/NotificationFile_LCWCD2x4.PDF.

** http://www.forensic-experts.net/general.php?category=Publications%2FNewsletters&headline=Articles of the Institute of Behavioural Science and the Law (IBSL) retrieved

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questioned by the attorneys and/or the judge about competency-related matters.

- The judge reviews the child's sworn statement and/or deposition.
- Testimony is taken from those who are familiar with the child's abilities or those who interviewed the child about the alleged incident.

After this the court may hold another hearing where both sides file motions, examine witnesses including expert witnesses, cite case law. The Court then makes a ruling as to whether the child is competent to testify.

29. Guidance on the nature of questions which could facilitate a fair evaluation of the child's competency is also found in this writing. Some questions which have been suggested by Sherrie Bourg Carter for enabling the judges to determine the competency of the child include the following:-

I. **For determining Intelligence and Memory –** For a young child, questions about family, school, counting, and knowledge of the alphabet and colors can provide sense of the child's intelligence and memory. With older children, more difficult intellectual skills determining their literacy level would provide information about their intelligence and memory.

II. **Ability to Observe, Recall and Communicate -** Examples of recent experiences about which child can be questioned should include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the child's birthday or memorable holiday or a field trip or a vacation. Further questioning could be about attended, and what gifts were received. (Of course, these questions are required to be put keeping in view the socio-economic background and literacy of the child, especially in our country). III. Understanding of Truth and Lie – To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked.

As this issue is of extreme importance in our context, the view of the author may be considered in extenso and reads thus:-

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"...it is important to recognize that some types of questions are more developmentally appropriate than others. For example, when assessing children's understanding of these dichotomies, interviewers routinely ask children if they know the *difference* between them. However, asking children to explain the difference between two concepts is a more developmentally difficult task than asking what each concept means. In other words, questions such as, *"What does it mean to tell the truth?"* and *"What does it mean to tell a lie?"* are more developmentally appropriate for young children than asking, *"What is the difference between the truth and a lie*?"

It also is important to recognize that very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. In one study, researchers found that none of the four-year-olds in their sample were able to define either truth or lie whereas 87.5% of the eight-year-olds were able to define both concepts (Michelle Aldridge & Joanne Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners,* 1998). This does not necessarily mean that four-year-olds do not understand the meaning of truth and lies. It also does not mean that the open-ended questions should not be asked. Some developmentally advanced children may be able to answer in a narrative form, but if not, there are acceptable alternative questions to help determine if and how much a child understands these concepts.

For example, young children usually have an easier time answering multiple-choice questions, such as *.If I said my hair is brown, is that the truth or a lie?"* In fact, it is quite common for interviewers or legal professionals to ask several of these basic questions. While there is nothing wrong with doing this, such questions really are not sufficient for several reasons. First, although most children can correctly answer these types of basic questions, they do not provide an answer to the real question of whether the child understands what it means to tell the truth and what it means to tell a lie. While they may be appropriate preliminary questions, the standard *"If I said my hair is brown* .... type of questions mostly establishes whether a child knows his or her colors and can provide a correct or incorrect answer.

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Secondly, such questions do not place children in scenarios similar to what judges are ultimately considering when determining witness competency. The pertinent question is whether a child who is placed in a particular situation (the courtroom) and asked questions about an event they either witnessed or experienced (the alleged incident) can distinguish what is the truth and what is a lie. Therefore, in addition to the relatively simple questions, more situationally relevant questions should be asked when assessing a child's competency to testify, such as:

- If I told your mom that you just yelled at me, would that be the truth or a lie?
- If you told your mom that I hit you, would that be the truth or a lie?
- If you told your teacher that something bad happened to you, but it really didn't happen – you were making it up - would you be telling the truth or a lie?

Competent children should be able to consistently provide correct answers to these multiple-choice questions".

IV. **Meaning of Taking an Oath** – Here also, the observations of the author shed valuable light and reads as follows:-

"Children usually are not familiar with the word, oath, but most recognize the word, promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and more productive to ask children if they know what it means to make a promise. Furthermore, substituting the word, promise, for the word, oath, when swearing in child witnesses has become increasingly more common and accepted throughout the legal system (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, The Child Witness in Legal Cases, 2002).

Still, as with other open-ended, definition-type questions, young children may not be able to readily answer the question, .What does it mean to make a promise?. If this is the case, follow-up questions also should be asked to better assess the child's appreciation, such as:

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- If you promise your mom that you are going to eat your lunch, what should you do? 'and' Why?. 'If you promise to tell the truth today, what should you do? 'and' Why?.

Children also should be asked what might happen, both to the child and the person being lied about, if they said something happened to them and it was not true. Examples of such questions are:

- When you get caught telling a lie, what usually happens to you?
- If you said that your classmate hit you and it was not true – you were making it up – what could happen to you for lying?
- If you said that your sister hit you and it really didn't happen, but your dad believed you, what could happen to your sister?

In cases where a child witness struggles with responding appropriately to questions about promising, the issue of competency may need to be raised."

30. The author further notes that while judges and attorneys believe that a child who can correctly answer questions such as, *"If I said my hair is green, is that the truth or a lie?"* understands the difference between the truth and a lie and is, therefore, competent to testify, a review of the legal standards for competency to testify throughout the majority of states shows that the standard is not that simple to meet. Legal standards for competency to testify generally require witnesses to not only understand the concepts of truth and lie, but also to appreciate the meaning of an oath to tell the truth and an understanding of the potential consequences of not telling the truth as well as abilities to observe, recall, and communicate information.

31. The importance of the evaluation is underlined by the author who states that as a pre-trial challenge to the competency of a child witness is crucial for the outcome of the case, the competency requirements must be well understood by attorneys and judges.

32. The Judge thus evaluates the child's intelligence and capacity as a competent witness or to ascertain whether she understands the

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meaning of oath. This is also the mandate of Section 118 of the Indian Evidence Act. A

What may the trial judge ask?

33. We are deeply concerned with the manner in which any child in the court system is treated. The issue of not only the manner in which children are treated in the court system, but the nature and propriety of questions which would be appropriate for them. Judges are not trained in child psychology and may also have had very little experience and interaction with children. Just as adults, it is impossible to fathom what goes through a child's mind or predict as to how a particular experience or question may impact them. Some insight into the manner a competence examination ought to be conducted by the Court is to be found in the paper **Child Witnesses: the Judicial Role (2007) 8 (2) The Judicial Review 281-294 by Dr. Judy Cashmore, Associate Professor, Sydney Law School (former Member, the Judicial Commission of New South Wales, Australia).** In view of the significance of the issue, the relevant extract of the paper on this aspect is extracted below: B C D E

> **"Competence testing**
>
> Children are presumed to be competent and can give unsworn evidence if the court is satisfied they understand the difference between the truth and a lie. This presumption is reasonable given the research findings on children's understanding of truth and lies, and promises. Children as young as four or five recognise deliberately false statements as lies but tend to be over-inclusive and more stringent than older children and adults because they tend to include incorrect guesses and exaggerations as lies. They also expect to be caught out and to be punished if they lie. F G
>
> Despite the presumption of competence, some children are still subjected to inappropriate questioning about their understanding of truth and lies. Several children and a parent/carer in the child sexual assault specialist jurisdiction evaluation study commented on the confusing nature of the questions about truth-telling. One 15-year-old with a learning difficulty said, for example: H I
>
> *"He made me confused. He asked me what the truth was, and I was thinking about it and he said =Did you listen to me, young*

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man?' and he just kept asking the same thing".

His foster mother also commented on his difficulty:

"His speech goes when he is really nervous, and he was struggling to talk. That was hard for him because the judge did not give him time to answer. He said =Are you listening, can you understand what I'm saying' and that just flustered him more and he could not get his answers out. And when that happens, he just clams up, and he just says 'yep', 'nup'."

It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between the truth and a lie. Attempts to ask more concrete questions may, however, raise other difficulties. For example:

- *Would it be the truth or a lie if* **I said** (if asked by a judge/magistrate)? There are two problems with this question. First, it asks the child to call the judge/magistrate a liar. Secondly, asking children whether a given statement matches reality (for example, colour of clothing) does not indicate whether they know the difference between a truth and a lie. A lie requires the intention to deceive or mislead.
- *If I said there were eight people in the room,* **and if** there were only ...? This question requires the child to keep in mind two conditional or hypothetical statements, in addition to the problem alluded to above.
- *Have you ever told a lie?* **No.** Children are likely to be very uncomfortable admitting that they have lied, especially in court to a judge or lawyer.
- *What would happen to you if you told a lie here today?* A child who answers by saying 'nothing' may be seen as not understanding the consequences of lying but some children do not accept the premise of the question - they have no intention of lying - so they may say "nothing".
- For example, one exchange between an adult and a child: *If you tell a lie, will you get into trouble? No.*

You won't get into trouble? **No ... But I am not going to tell a lie.**

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Since some children may not elaborate and give a reason for their answer, it would therefore be better to ask - .If your brother/sister/friend broke a plate and said you broke it to save getting into trouble, would that be the truth or a lie?"

34. We may note that we have hardly come across a case where the question as to whether the child witness understands the meaning of truth, lie and oath is not a standard.

35. The importance of judicial leadership in cases involving children is expressed by L. Sas in "The Interaction Between Children's Development Capabilities and the Courtroom Environment: The Impact on Testimonial Competency, Research Report (RR02-6e)"***, [November 2002, Department of Justice, Canada], when she stated thus:

"Children's feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as someone who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses..

Competency testing in the present case

36. Before coming to the actual statement, we may refer to some essential facts some of which were before the trial judge in the challan. In the present case, the alleged incident took place in public toilet in the Multani Danda, Pahar Ganj area. The child victim/ witness was one of the four sisters who did not appear to be having the care of their parents and was living with their aunt (described by the child as Bua). So far as the victim is concerned, she appeared to be under the guardianship of her maternal aunt.

*** http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter.pdf (retrieved on 24 January 2007).

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37. The child victim was examined by the trial judge on the 21st of April, 2011. The statement has been annexed with the paper book placed before us.

38. The first and foremost guideline mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim. The several judicial pronouncements and guidelines noted above are based on the prime requirement of ensuring the best interests of the child under all circumstances. We are constrained to note that the trial Court has completely ignored this guideline and has recorded the full particulars, including the name of the child, before recording the statement.

39. We may now extract the examination by the trial judge in the present case to ascertain this very aspect of the matter:

"Q. What is your age?

Ans. My aunt Baby knows it.

Q. For how many years you are going to school?

Ans. For the last one year.

Q. Do you know how to read Hindi or English?

Ans. I know to read Hindi only.

Q. Whether one should speak truth or false?

Ans. Truth.

Q. Why one should speak truth or false?

Ans. Silence, as she does not reply.

Q. Whether one should speak truth in the court or not?

Ans. Yes, one should speak truth.

Q. Do you watch T.V.?

Ans. No, we do not have T.V.

Q. Do you know who is prime minister of India?

Ans. No.

Q. Who are your family members?

Ans. We are four sisters living with our Bua as our mother had already expired and my father is missing for long time."

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40. After putting the above questions and a consideration of the witnesses answers noted above, the learned trial judge held that the witness did not understand the meaning of the oath and therefore her statement was recorded without oath.

41. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State points out that from the very case of the prosecution, the learned trial judge was conscious of the socio-economic status of the child and consequently most of the questions put to the child were completely unfair and unmerited.

42. We find from the questions put to the child that the learned trial judge was well aware of the fact that she was one of the four sisters who were being looked after by their Bua for the reason that their mother had expired and father was missing for the long time. The child was not going to school. The incident had taken place in public toilet and the child appeared to be coming from a household with little economic means.

43. In this background, the questions put to the child as to whether she watches television and her disclosing that she does not have television was certainly not circumstance appropriate. Given the level of her education as well as her background, the further question as to who was the Prime Minster of India was wholly unwarranted.

44. The questions that the trial judge would be required to put to the witness have necessarily to meet the requirements of law as well as the binding principles laid down in the several judicial pronouncements and the authoritative texts noted by us having special regard to the age and circumstances of the person who is required to depose.

Importance of Child testimony

45. So far as the parameters within which the inquiry by the court shall be conducted are concerned, in the judgment reported at (1952) 1 SCR 377 **Rameshwar vs. The State of Rajasthan** (at page 382), the Supreme Court held that *"it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking truth"* In this precedent the court had recorded that the child did not understand the nature of the oath, however continued to record the child's evidence which circumstance by itself was construed as the record of competence. It was also held that not having taken oath only

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goes to the credibility, and not the competency of the witness. The court relied upon the testimony of the prosecutrix who was eight years old and upheld the conviction of the accused for the offence of rape. The court had observed that while evaluating the testimony of such child, the circumstances which would be considered would be the tender years of the child; its demeanor; possibility of tutoring, etc.

46. In (2004) 1 SCC 64, **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat,** the Supreme Court upheld the conviction of the appellants under Section 302 IPC relying upon the evidence of a ten years old child. The court prescribed the requirements, which the court would meet before recording the evidence of a child witness in para 7 in the following terms:-

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices her manners, her apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as her understanding of the obligations of an oath."

47. On the weight to be attached to child testimony, in para 5 of the case reported at (1997) 5 SCC 341, **Dattu Ramrao Sakhare vs. State of Maharashtra,** the Supreme Court has made the following valuable observations:-

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the

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corroboration to such evidence from other dependable evidence on record." A

48. Such being the weight which may be attached to a child witness testimony, a fair trial would mandate that the best child testimony is ensured. B

Impact of a court appearance on the child

49. It needs no elaboration that Court appearances impact children more drastically than they do adults. The foreboding and austere Court rooms; people in black and white uniforms; the presence of the offender against whom the child has to testify may bring alive the trauma the child has seen (or may have experienced, if a victim). All of this may reduce the child into a state of terrified silence. This is where the judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court. C D

50. The following courtroom experiences of child witness recorded by **Dr. Judy Cashmore,** in **(Child Witnesses: The Judicial Role [(2007) 8(2) The Judicial Review 281-294)** as to why they could not give a full and proper account of their evidence shed valuable light on the present issue as well: E

> "There were several reasons children felt they could not give a full and proper account of their evidence. First, they were constrained by the questions and by the directions they were given about how they could answer. Several children were upset that they could not .tell the truth, the whole truth, and nothing but the truth., because they were told by either the judge or the lawyer, to "just answer the question that was asked". They also reported being cut off or interrupted by the lawyer. For example: F G
>
> "It was very hard because he [lawyer] would not let me speak. He would ask me a question and he would not let me respond to it. He'd just cut me off.. (15-year-old complainant) H
>
> "Like I'd go to tell him what happened and he'd just say, 'No, just answer the question'. Like, you want to tell them the whole story, and they say, 'No, you can't say that. If you don't say it this way, you can't say it at all'.. Who was saying that? The other guy, the defence guy. (11-year-old complainant) I

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Second, some felt constrained by admissibility issues and by having to carefully edit their 'stories' to suit. For example, Alice, a 16-year-old, was giving evidence in relation to a series of sexual assaults against her in one trial, and in relation to assaults against several other complainants in two other separate trials. She spoke of her difficulty in trying to answer questions 'out of context' - without referring to the other complainants - and her consequent discomfort at appearing hesitant and unreliable before the jury.

"No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, 'Am I going to look like I am lying because I am hesitating? - because I didn't know how to answer without mentioning them. I feel negative about the court experience now because there are just so many things you can't say which makes it very hard for the jury to understand a lot of other things you know are connected to them'. (15-year-old complainant)

Third, some children had difficulty in understanding the questions, consistent with the findings of numerous other studies on the difficulty of 'legal language' 8 For example:

"It was quite hard ... and a bit annoying. They were speaking mumbo jumbo. Words I could not understand. (15-year-old complainant)

Finally, some child witnesses were clearly frustrated by what they saw as unnecessary questioning about irrelevant details by the defence lawyer and dissatisfied that their attempts to give honest answers were used to make them appear to be an unreliable witness. For example: .There were so many questions that you cannot possibly remember the details over two years. He asked questions about things that were really irrelevant, like how long did Petra stay for, so he got me saying a number of times 'I don't really remember'. And it worked; so then he could say to the jury that she doesn't remember.. (16-year-old complainant.

51. We may point out even at the cost of repetition that the directions

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by the courts noted above, made with the best interests of the child at the center, take care of all these issues.

52. Our attention has been drawn to the Division Bench pronouncement reported at 20 (1981) DLT 55 (DB), **Prem Shankar Sachhan vs. State** wherein in para 22, the court observed that the testimony of a child witness can be *"spontaneous and unsparing, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with what was seen"*. It was thereafter held as follows:-

> "The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also while permitting full scope for cross-examination of such witnesses be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal court atmosphere and the public gaze..

53. The guidelines noticed above in para 83(iv), have factored in avoidance of interface with the accused; use of screens/video links; avoidance of multiple court appearances; sensitive questioning and cross examination of the child and ensuring minimization of secondary transaction of the child witness (who may be a victim).

Duty of the court

54. What needs emphasis, however, is that the guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is most essential so as to get the best evidence from the child witness, necessary for conviction of the guilty as well as for preventing the innocent from punishment. We repeat that these principles have to be followed at the stage of conducting the competency examination of the child witness as well.

55. Even more important is the fundamental responsibility of every court to ensure the welfare and best interests of the child which has to remain the paramount consideration under all circumstances. Unfortunately, this aspect during the trial is more often a casualty than not. Regrettably the trial court without realizing, are thereby violating with impunity binding judgments of the Supreme Court and this Court. Important statutory provisions are being ignored impacting not only the quality of important child witnesses but the result of the trial. The inevitable consequence is that best interest of the child suffer as well.

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Conclusions

56. We are presently considering the matter of a competency examination by a trial judge.

57. To say the least in the instant case, the trial judge has completely ignored the best interest of the child witness who testified before him. He has also ignored the mandate of law as well as the several judicial pronouncements which have been mentioned hereinbefore.

58. The questions which were put to the child witness ought to have been sensitively framed keeping in mind the socio-economic background of the child, education of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

59. It is not for us to frame a template with regard to the questions which may be appropriate in a particular case. Some examples suggested by experts have been noted herein. The discussion suggests propriety of some questions which could be put to the child. However, the questions which have been put in the instant case were certainly inappropriate, were insensitive and violated the basic human rights of the child witness.

60. The trial courts would be well advised to pay heed to the several cautions by the experts and carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatisation of a child witness by the courtroom experience.

61. We are concerned only with the violation of the guidelines noted in para 14 and the nature of questions framed and put by the learned trial judge for as the competency examination. Given the importance of the issue, this matter cannot be ignored by us. We make it clear that nothing above in this order is an expression of opinion on either the statement of the child or on the merits of the judgment against which the present leave petition has been filed by the State. The impugned judgment does not reflect any challenge by the defence to the competency of the child to give evidence in the present case. We have examined herein only the general principles which would govern a competency examination of the child witness before the court and the propriety of the questions framed by the learned trial judge.

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In view of the above discussion, we direct that a copy of this order be sent to the Principal, District and Sessions Judge who shall circulate this order to all judges in the District Courts who shall ensure compliance of the judicial precedents and guidelines laid therein.

List the petition on 27th May, 2013, the date already fixed.

ILR (2013) III DELHI 1897
W.P.(C)

PANCHAM SINGH ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 337/1998 **DATE OF DECISION: 17.04.2013**

Border Security Force Act, 1968—Section 11—Border Security Force Rules, 1969—Rule 22—Sector HQs Hospital, Amritsar referred petitioner to Base Hospital, Jalandhar for further treatment—Petitioner neither reported in that hospital nor informed respondents and went to his home town, Moradabad—As petitioner's period of absence exceeded 30 days, a Court of Inquiry was conducted—Show cause was also dispatched to petitioner informing that it was tentatively proposed to terminate his services by way of order of dismissal—Petitioner failed to respond to respondents and vide impugned orders, petitioner dismissed from service and appeal of petitioner also rejected—Orders challanged before HC—Plea taken, petitioner was unwell and was taking treatment for tuberculosis and for this reason has failed to report at place of duty—

***IN THE HIGH COURT OF DELHI**

+Crl.A.No. 121/2008

Judgment reserved on : 18th September, 2009
% Date of decision: 29th September, 2009

Virender ... Appellant
through: Mr. S.B. Dandapani, Advocate

VERSUS

The State of NCT of Delhi ....Respondent
through: Mr. Manoj Ohri, APP for the state

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. The present appeal lays a challenge to a judgment dated 17th August, 2007 passed by the learned Additional Sessions Judge returning a finding of guilt against the appellant for commission of an offence under the provisions of Section 376 of the IPC in the case arising out of FIR No. 234/04 registered by the police station Gokul Puri on 29th April 2005. The appellant also assails the order dated 21st August, 2007 sentencing him to undergo rigorous imprisonment for the period of seven years and imposing fine of Rs.1,000. In default of payment of the fine, he was sentenced to undergo simple imprisonment of 10 days. The court further directed benefit under section 428 of the CrPC to be

given to the appellant.

2. Briefly stated, the case of the prosecution against the appellant was that on 28th April, 2005 at 10.30 a.m., in a house in front of the house of one Bhule Ram Choudhary, Gali No. 2, Sadat Pur, Delhi, he had committed rape upon the prosecutrix by committing sexual intercourse with her without her consent. The appellant pleaded not guilty and had claimed trial. A total of 13 witnesses were examined by the prosecution in support of its case. The conviction rests primarily o the evidence of the prosecutrix who was examined as PW1; PW-7 her father Raju Austin; PW10 Dr. Manisha who proved her MLC and PW 11 Ms. Poonam Chaudhary, the Metropolitan Magistrate who recorded the statement under section 164 of the CrPC of the prosecutrix.

3. Mr. S.B. Dandapnai, learned counsel for the appellant has strongly contested the finding of guilt returned by the learned trial court contending that there are contradictions in all material particulars in the three statements given by the prosecutrix; the first being the statement recorded under section 161 of the CrPC; the second, being the statement recorded by the learned Metropolitan Magistrate under section 164 of the CrPC and the third, being her deposition in court. The first plank of challenge is based on the plea that even if the contradictions in matters of detail were ignored, however the prosecutrix has contradicted herself in her statements with regard to the very place of occurrence. Learned counsel has submitted at some length that

this is a major contradiction. The second major contradiction relied upon by learned counsel for the appellant relates to the manner in which she was allegedly saved from the clutches of the appellant. The submission is that in view thereof the prosecution has failed to establish the case laid against the appellant.

4. It is also contended on behalf of the appellant that the prosecution deserves to be disbelieved for its failure to produce a material witness named in the statement of the prosecutrix and that the same nails the falsity in the case set up against the appellant. The further submission is that PW 4 Neelam who was set up by the prosecution as being the person who arrived at the scene of occurrence and saved the prosecutrix, has turned completely hostile and has denied any such occurrence.

5. Mr. Dandapani has painstakingly urged that even if the allegations made by the prosecutrix are taken as true, still they are insufficient to bring home the charge of rape against the appellant. The submission is that the medical evidence led by the prosecution also does not support any finding or conclusion of rape. Learned counsel further urges that the learned trial court has erred in completely ignoring the explanation given by the accused in his statement recorded under section 313 of the CrPC as to the motive for his implication in the false case set up against him.

6. PW 9 Dr. Gopesh, the Radiologist who conducted the examination of the prosecutrix on 29th April, 2005 and proved his

report on record as Exh. PW9/A. According to PW 9, the prosecutrix was aged between 12-13 years. The MLC (Exh. PW 10/A) recorded on 28th April, 2005 mentions her age at 11 years.

7. So far as the occurrence is concerned, in the statement recorded by the police under section 161 of the CrPC on 28th April, 2005 which was proved on record as Ex PW1/A, the prosecutrix had stated that she was a student of class 3; that at about 10.30 a.m. on 28th April, 2005, she was standing outside her house; that the appellant who resides in front of her house had called her and handed over a twenty rupee note to purchase a bottle of a cold drink for him; that she went to the nearby shop and brought the cold drink. When she went with the cold drink and the balance money to his house, the appellant grabbed her and put her on the ground. The prosecutrix wanted to raise a hue and cry when the accused covered her mouth with his hand and forcibly removed her clothes. He removed his own clothes as well and thereafter did 'galat kaam' with her. He threatened the prosecutrix not to disclose the same to anybody and left her. The prosecutrix has stated that thereafter she returned to her house and when her father returned after few hours, she disclosed the entire incident to him. Her father brought her to the police who sent her to the GTB Hospital for the medical check up.

8. The prosecutrix was produced before the learned Metropolitan Magistrate on 3rd May, 2005 when her statement was recorded without an oath by the learned judge under Section

164 of the Criminal Procedure Code which has been exhibited on record as Ex PW1/B. In this deposition, the appellant stated that on 28th April, 2005, the appellant herein had come to her house and told her to get a cold drink for which he had given her the money. She had got the cold drink. The prosecutrix stated before the magistrate that at that time, other than the prosecutrix there was no one in her house and that Virender had forced her to lie on the bed; forcibly removed their clothes and then he did 'gandi harkatein'. She stated that hearing her screams, one of her aunts arrived whereupon Virender left her.

It is noteworthy that when questioned by the learned magistrate, the prosecutrix had stated that she does not understand the meaning of the oath.

9. In the deposition in court as PW 1, the prosecutrix stated that she knows the appellant very well for the reason that he was residing at the same place for 3-4 years. She made a statement similar to the one given by her under section 161 of the CrPC so far as the place of occurrence was concerned. In her statement, at one place she stated that the appellant had misbehaved with her and that he did 'galat kaam' with her. The witness explained galat kaam to mean as to what 'a husband does with his wife in the night'. Certain additions in this statement so far as what happened there after are pointed out. For the first time the prosecutrix states that when she had shouted for help, one aunty (who she now named as Neelam) asked another lady who was

passing by to ascertain as to where the cries were coming from on which that lady, whose name she did not know, opened the door on which the appellant left the house while she then put on her clothes and returned to her house. In the evening, when her father returned, she narrated the incident to him. She was taken by her father to the police station and her statement was recorded thereupon. She identified the underwear which had been seized by the police as the one worn by her at the time of incident. The statement given by her to the police and the one under section 164 of the CrPC before the Metropolitan Magistrate were proved on record as Exh PW 1/A and Exh PW 1/B respectively.

10. The prosecutrix had denied the suggestion put on behalf of the appellant to the effect that her father had taken a loan of Rs.4,000/- from the appellant three months prior to the registration of the case with the promise to return the amount within one month. It was further suggested to the prosecutrix that her father had only returned Rs.1,000/- in three months and that the appellant had come to her house at about 7 a.m. on 28th April, 2005 to seek the balance money from her father for the reason that he was leaving for his native village and needed the same. The prosecutrix also denied the suggestion that when the accused again demanded the money in the evening, her father refused to return the money and for this reason the prosecutrix had been tutored to make the statement against the accused

person and he has been falsely implicated.

These very suggestions were also put to Shri Raju Austin father of the prosecutrix, who testified as PW 7. He too denied the same.

11. The entire foundation to bring home the charge of rape on the appellant rests on the attribution of 'galat kaam' to him by the prosecutrix in Exh PW 1/A (statement under section 161 of the CrPC) as well as the statement made in court. The prosecutrix has referred to his acts as 'gandi harkatein' in Exh. PW1/B recorded by the learned magistrate.

12. It needs no elaboration that a conviction can be based on the uncorroborated evidence of a prosecutrix if the same inspires complete confidence.

13. It would be useful to refer to certain observations of the Apex Court in the pronouncement reported at ***2007 Crl.L.J. 4704 Radhu vs. State of Madhya Pradesh*** which succinctly laid down the applicable principles thus:-

> “5. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well

settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

15. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned Counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt."

14. Inasmuch as the present case is concerned with allegations

of rape, a sexual offence, the ingredients of the offence must be considered. In this behalf, reference deserves to be made to Medical Jurisprudence and Toxicology (Twenty First Edition) by Modi at page 369 which reads thus :

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.*"
>
> (Underlining supplied)

15. The necessary ingredients which are to be satisfied to bring home the charge under section 376 of the IPC have been stated in the pronouncement of the Apex Court in ***MANU/SC/844/2006 Santosh Kumar vs. State of U.P***. The court placed reliance in para 7 on the texts on medical jurisprudence by Modi (considered above). Parikh and the Encyclopadia of Crime & Justice which were cited in paras 38 to 39 of ***Madan Gopal Kakkad v. Naval Dubey MANU/SC/0509/1992 : [1992]2SCR921*** as follows :-

> "38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.
>
> 39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:
>
> ...even slight penetration is sufficient and emission is unnecessary.
>
> Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed."

16. The essentials of the offence have been described in ***2009 CriLJ 396 State of Punjab vs. Rakesh Kumar*** thus :-

> "Rape" or "Raptus" is what a man hath carnal knowledge of a woman by force and against her will (Co. Litt.123-b); or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of he organ alleged tohave been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p. 262). In 'Encyclopodia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation

> with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxiuos act of the highest order."

17. In a judgment reported as far back as in ***AIR 1923 Lah 536 Regina vs. Ferrol; Natha***, the court had ruled that to constitute an offence under section 375 IPC, there must be evidence of penetration, which may occur and the hymen may remain intact. Vulval penetration is sufficient to constitute rape in India without actual seminal emission.

This was reiterated in ***(1992) 3 SCC 204 Madan Gopal Kakkad vs. Naval Dubey*** wherein the Apex Court held that it is not essential that hymen should be ruptured, provided it is clear that there was penetration even if partial.

18. In this case, the Apex Court had expression concern that all sexual assaults on female children are not reported and do not come to light, there is an alarming and shocking increase of such cases. Children were ignorant of the act of rape and are not able to offer resistance and become easy pray by lusty brutes who display the unscrupulous, deceitful and insidiuos art of luring female children and young girls. Therefore, such offenders who are menace to the citilized society should be mercilessly and inexorably punished in the severest terms.

19. Thus in order for the offence of rape to be complete, it is essential to establish even slightest penetration. (Ref : ***MANU/SC/0080/1978 : 1978 CriLJ 1804 Dr. S.P. Kohli, Civil***

Surgeon, Ferozpur vs. High Court of Punjab & Haryana through Registrar.)

20. In ***MANU/SC/7825/2008 Moti Lal vs. State of M.P.***, the Apex Court had observed that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

The evidence of PW 1 is to be tested on these touchstones.

21. In the light of the applicable law, the testimony of a prosecutrix deserves to be recorded with utmost sensitivity and care. Regard must be had to the trauma which the victim is undergoing as well as the unwarranted feeling of shame the victims of such offence feel. At the same time, the trial courts must discharge the onerous task of ensuring that the complete truth is brought on record so as to facilitate adjudication and the basic question that is complicity of the accused in the

commission of the offence is correctly answered. The trial court must be satisfied that the prosecutrix has understood the essence of the acts which were committed by the accused which must be borne out from the recorded testimony. These must be sensitively brought out and recorded in the testimony of the victim.

22. It is to be noted that the embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.

23. It is, therefore, necessary and incumbent on the court to sensitively examine a prosecutrix in a trial relating to commission of an offence under section 376 of the IPC to ensure that the prosecutrix understands and brings out in her deposition as to what has transpired. This requires a matured and sensitive handling by the court.

24. The testimony of the prosecutrix as has been recorded brings the acts attributed to the appellant into sphere of conjecture and speculation. Therefore, it is essential to examine the medical evidence which was led by the prosecution.

25. The prosecutrix was medically examined at 10.50 a.m. on 28th April, 2009 by Dr. Anjali. This doctor was not produced in the witness box. The MLC which was recorded has been proved by her colleague Dr. Mamta who was examined as PW 10 who proved her writing and signatures thereon. The doctor had recorded that there were no marks of injury on the body of the prosecution. On the vaginal examination, the doctor has noted that a old healed tear was present in the hymen and that the vagina admitted tip of only one finger.

26. Her vaginal smear was sent for forensic testing. The report of the Forensic Science Laboratory dated 28th April, 2005 Exh. PW 13/F-1 states that no semen was detected on exhibit PW1/A, 1/B and 1/2 i.e. two microslides sent to the laboratory and one dirty underwear. It is noteworthy that the prosecution has made no effort to connect the two underwears which were sent to the Forensic Science Laboratory with the one worn by the prosecutrix and which one was worn by the appellant. It is to be kept in mind that the medical examination was conducted late in the night while the occurrence took place in the morning.

27. In the given facts, one essential fact also deserves to be noticed. The MLC (Exh PW 10/A) which was prepared on the medical examination of the prosecutrix has been proved on record. This document however fails to record any opinion on the examination which was conducted by the doctor. It fails to give any opinion as to whether the prosecutrix had been sexually

assaulted. The doctor who conducted the medical examination was not available to the prosecution and was not produced in the witness box.

28. Mr. Ohri, learned APP for the prosecution has drawn my attention to the Medical Jurisprudence and Toxicology (Law Practice & Procedure) authored by Dr. K.S. Narayan Reddy wherein at page 439 in the portion dealing with examination on the issue of 'Rape on Children', the author has observed thus:-

> "....As the age and size of the infant increases, the pattern of injury will become less marked but the circumferential tears of the vestibular mucoas are found up to the age of six years or more. Full penile penetration produces bruising of the vaginal walls and frequently tears of the anterior and posterior vaginal walls. Anterior tears can involve the blader and the posterior tears the anorectal canal. Vaginal vault may rupture, and there may be vaginal herniation of abdominal viscera. The hymen may be entirely destroyed or may show lacerations. Blood may be oozing from the injured parts, or clots of blood may be found in the vagina. There may be mucopurulent discharge from the vagina. In digital penetration of the infant vagina, there is frequently some scratching or bruising of the labia and vestibule, but the circumferential tears are absent. The hymen shows a linear tear in the posterior or posterolateral quadrant, which may extend into the posterior vaginal wall and on to the skin of the perineum and may involve the perineal body. Ano-rectal canal is rarely involved. Bruising in the margins of tear and of anterior vaginal wall are common, but vaginal vault injury is rare. Any attempt to separate the thighs for examination causes great pain, because of the local inflammation. The child walks with difficulty due to pain. The absence of marks of violence on the genitals of the child, when an early examination is made is strong evidence that rape has not been committed."

There is no opinion available of the doctor who conducted

the examination. The MLC when examined in the context of the medical jurisprudence, does not appear to assist the prosecution.

29. So far as reliance on medical jurisprudence is concerned, it was observed by Fazal Ali, J in ***MANU/SC/0120/1977 : 1977 CriLJ 817 Pratap Misra vs. State of Orissa*** that medical jurisprudence is not an exact science and it is difficult for any doctor to say with precision and exactitude as to when a particular injury was caused as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.

30. In ***R vs. Ahmed Ali 11 WR Cr. 25*** Nariman, J had made observations on medical evidence. It was stated by the learned Judge that the evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.

Even opinion with regard to rupture of a hymen has been held to be inclusive so far as commission of an offence of rape is concerned.

31. It is trite that medical evidence would at best be a matter of mere opinion. In the instant case certainly from the medical evidence brought on record, no conclusive finding with regard to the charge against the appellant can be returned.

32. As pointed out by learned counsel for the appellant, the

prosecutrix has also vacilated on the issue as to the place of occurrence. In the deposition given by her to the Magistrate, she has stated that the incident occurred in her house. Her explanation in court that there was a hearing error on the part of the Magistrate is controverted by the statement to the Magistrate itself as she further clarified that other than the prosecutrix, there was no one in her house at that time.

33. So far as the contradiction in the place of occurrence in the statement recorded by the learned Magistrate is concerned Mr. Manoj Ohri, learned APP has placed reliance on the explanation given by PW 1. In her deposition in court, the prosecutrix has stated that the incident had occurred at the house of the accused and sought to explain the contradictions in Ex PW 1/B as inadvertence in the hearing process on the part of the learned Magistrate.

It is to be noted that the learned Metropolitan Magistrate appeared in the witness box as PW 11. Exhibit PW 1/B contains a certificate by the learned Magistrate to the effect that the statement was a “true, full and correct” account of the statement of the prosecutrix recorded by her in her chamber. It also certified that the same had been read over to the prosecutrix and admitted by her to be correct. This statement was sent under sealed cover to the court concerned.

34. In the factual narration noted above, the statement of the prosecutrix with regard to the manner in which she escaped from

the clutches of the appellant also assumes importance. While nothing was said in her statement under section 161, she has drastically improved on the same in the statement made by her under section 164 of the CrPC. Her deposition in court improved even further on it and for the first time discloses the name of the aunty as Neelam. She further stated that Neelam had sent yet another lady into the premises.

35. It is noteworthy that Raju Austin appearing as PW7 had stated that Neelam was a neighbour and disclosed the name of the second lady as Kela. PW7 had deposed that he had informed the police about her identity.

No effort has been made to produce the lady who would have been a material witness in support of the prosecution.

36. Neelam was examined as PW 4 before the court who stated that she did not know anyting about the case as nothing had happened in her presence and she had not seen anything. She denied any acquaintance with the appellant and also stated that she did not know who was the prosecutrix. The witness was declared hostile and she had denied the contents of the statements attributed to her as recorded by the police. She also denied the specific suggestion that on 28th April, 2005, the prosecutrix had told her that the appellant had committed rape upon her.

37. Learned counsel for the appellant has painstakingly pointed out that there are contradictions even with regard to the time at

which and the contents of the information which was given by the prosecutrix to her father. In this behalf, the testimony of PW 7 father of the prosecutrix has been pointed out. According to the prosecutrix, she told her father about the occurrence between 1 and 1.15 p.m. whereas her father who was examined as PW 7 stated that she told him about the incident only after 5 p.m. The police is stated to have recorded FIR No. 434/05 at about 12.30 a.m. On 29th April, 2005. PW 7 has also denied having taken loan from the appellant and the rest of the suggestions.

38. At this stage, learned counsel for both parties have drawn my attention to the examination of the appellant under section 313 of the CrPC. The appellant had stated that he was residing in the house opposite to the prosecutrix who had denied any acquaintance with her. In the answer to the last question put by the court, the appellant had stated that the case against him was false and fabricated and that prosecutrix's father has implicated him for the reason that PW 7 owed an amount to appellant of Rs.4,000/- who was asking for return of his money.

The trial court has not touched upon this issue at all.

39. The principles which are required to and weigh with the courts in the administration of the criminal law and the justice delivery system have been laid down in ***AIR 2002 SC 3206 : MANU/SC/0757/202 Ashish Batham vs. State of Madhya Pradesh***, the Apex Court had observed thus :-

"Realities or truth apart, the fundamental and

> basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise……..”

40. The evaluation or assessment of evidence which is brought on record by the prosecution would be guided by well settled principles best stated in the words of Justice V.R. Krishna Iyer in ***(1978) 4 SCC 161 (page 162 para 2) : MANU/SC/0093/1978 Inder Singh & Anr. vs. The State (Delhi Administration)*** thus :-

> “2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true ? No, we must be realistic.”

41. An examination of the statement made by the prosecutrix would have to be examined in the context of the social milieu from which a victim may hail. A person who has grown up with the family surviving in a single room dwelling may carry different impressions and knowledge of intimacies. An understanding of a child as to what has been done to her would depend on her maturity, education and knowledge which could be sourced from several factors including education, exposure, environment; upbringing and media. In the Indian context, society and societal relationships still follow conservative patterns. There are large pockets even in Delhi, many communities and social groups where covering of heads and the purdah system in the presence of males is still prevalent. Physical display of affection between persons of opposite sexes in the form of even holding of hands is unacceptable, and a hug is absolutely taboo. By and large there is no physical display of affection, intimacy or closeness and gestures as hugging or kissing invite public censure even amongst the progressive and modern. The conventional Indian namaskar manifests the traditional reserve of the nation.

42. Commission of an offence under section 376 certainly requires some evidence with regard to the acts which were committed by an accused person to establish the ingredients of the offence. The statement which has been recorded in court does not at all enable any conclusion to be derived as to what was the comprehension of the prosecutrix as to what are the

relations between a husband and wife. In any traditional and conservative Indian family, any act from mere touch to the ultimate intimacy of sexual intercourse between persons not married to each other would, in common parlance, would be covered within the gamut of acts which could be labelled as “galat kaam” or “gandi harkatein”. This range would also cover the intimacies shared by a married couple. Such understanding of even the learned trial judge is manifested from the proceedings in that while putting the evidence to the appellant under section 313 of the CrPC, as question 4, it has been put to the appellant that he had “misbehaved” with the prosecutrix.

43. The prosecutrix has explained 'galat kaam' to mean 'something that the husband and wife do in the night'. No questions to ascertain the size of the house; background; whether the prosecutrix has any siblings or any other relatives who were cohabiting have been put. The record does not indicate as to what is the comprehension or understanding level of this child. The testimony of the prosecutrix does not reflect as to what is her understanding of the physical intimacy which a married couple shares.

44. In the present case, the evidence does not disclose as to the nature of the environment in which the prosecutrix was growing up. In the testimony of her father Raju Austin who appeared as PW7 and the prosecutrix as PW 1, her mother had left the house on account of quarrel with her father over his drinking habit

where was the occasion to witness intimacies between spouces. PW 1 has stated that her father earned about Rs.400-500 per week as a cleaner of private vehicles. The proseuctrix was a mere child and a student of class III years at the time of the incident.

45. In her statement before the learned magistrate on the 3rd of May, 2005, PW 1 used a less strong expression. She attributed “gandi harkatein” to the accused. The prosecutrix had stated that she did not understand the meaning of oath. Thus both statements leave the conclusion to be arrived at by the judge to be based on supposition and conjecture.

46. Having regard to the well settled principles laid down by the courts and in several judicial pronouncements of the Apex Court, the acts alleged by the prosecutrix would not by themsleves be sufficient to invite a finding of guilt for commission of an offence under section 376 of Indian Penal Code. This is not to say that such conduct is permissible or acceptable. However we are concerned with a finding of guilt for a serious charge of rape in the instant case.

47. Learned APP has placed a pronouncement of this court wherein a prosecutrix has used the same expression. In the judgment of this court reported at ***MANU/SC/2043/2009*** entitled ***Maruti vs. State***. The prosecutrix had used the same very expression to describe the offence of rape. In this case however the mother of the prosecutrix had reached the scene of

occurrence while the appellant was in the act and had corroborated the deposition of the prosecutrix.

It is noteworthy that the prosecutrix was a married lady and the report of the Forensic Science Laboratory had supported the deposition of the prosecutrix.

It is not so in the instant case.

In another judgment reported at ***MANU/SC/7825/2008 : JT 2008 8 SCC 271 Moti Lal vs. State of U.P.***, the Apex Court had reiterated the well settled principle that the victim of a sexual assault is not to be treated as an accomplice and as such her evidence does not require corroboration from any other evidence including the evidence of the doctor. It was further held that in a given case even if the doctor who examined the victim does not find any sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence.

It was further held that it is only if the court finds it difficult to place implicit reliance on her testimony which may lend assurance of her testimony, amount of corroboration require in the case of an accomplice.

48. It needs no elaboration and has been repeatedly held that whatever be the nature of evidence oral or documentary, direct or circumstantial, it is essential for the prosecution to prove the necessary ingredients of the offence. In view of the above discussion, it may not be proper to return a finding of guilt against the appellant for the commission of an offence under

section 376 based on the deposition of the prosecutrix, oral evidence or the medical evidence which has been led by the prosecution.

49. Before parting with this case, it is necessary to consider an important issue relating to the examination of a child witness as well as a one, who is the victim in the offence. There are examinations of a victim by the investigating agency; or in court (A doctor performs a medical examination). Several areas are covered by existing legislation and others by directions and guidelines in binding pronouncements of the Apex Court and this court. Jurisdiction and power conferred by the legislature is not exercised and directions in precedents not followed, having disastrous consequences upon the criminal justice dispensation system. Having regard to the importance of these issues, learned counsels appearing in the case have facilitated examination of the statutory provisions and the judicial precedents noticed hereafter.

50. The court rooms in the court building are normally crowded places. The occupants include hardened criminals as well. The court room environment is unfamiliar and would definitely be unfriendly to a child who is require to testify as a witness. The trauma if the child witness is a victim as well is only further aggravated. An already apprehensive child in an unfriendly atmosphere is in difficulty even in recounting his or her experience. Such nervous testimony is then exposed to be torn

to shards by a skillful defence lawyer.

51. The treatment of victims of sexual assault or child witnesses in such cases in court during their testimony has come up for repeated criticism. The defence strategy of repetitive questioning of the prosecutrix as to the details of the occurrence under the pretence of testing her statement for inconsistency in an attempt to secure varying interpretations of the occurrence given by her so as to make them appear inconsistent with her allegations has come up for criticism repeatedly. Faced with the frequency of crimes against women, the Parliament enacted the Criminal Law (Amendment Act) 1883 which was a statutory recognition of the need to make the law of rape more realistic. Sections 375 and 376 were amended and more penal provisions were incorporated for benefiting such custodians who molest a woman in custody and care. Section 114(a) was also added in the Evidence Act for drawing a presumption in certain prosecutions for rape involving such custodians.

52. Chapter 9 of the Indian Evidence Act, 1872 deals with 'witnesses'. As per Section 118, all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. An explanation has been incorporated by the legislature to clarify that a lunatic is not incompetent to testify, unless he is

prevented by his lunacy from understanding the questions put to him and giving rational answers. Thus so far as the competency to appear as a witness, the legislature has underlined the basic requirement of a person's understanding of the obligation to speak the truth and to give an accurate impression and possession of the mental capacity at the time of the occurrence concerning which he has to testify and to receive an accurate impression of it. This would be more so in case the witness is a child of tender years. An assessment by the court of the competency of a child who is to appear as the witness on these issues is essential. It is also necessary to ascertain as to whether the witness had a memory sufficient to retain an independent recollection of the occurrence; capacity to understanding simple questions about it and the capacity to express his/her memory of the occurrence. (Ref : ***State vs. Allen, 70 Wn,2d 690, 424 P.2d 1021 (1967***)

53. So far as the competency of a child to testify as a witness is concerned, the courts in India have relied on the proposition formulated by Justice Brewer in ***Wheeler vs. United States 159 US 523 (1895)*** who had opined that the evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convicted about the quality thereof and reliability can record conviction, based thereon.....

54. The reservation expressed with regard to evaluating the

testimony of a witness is based on apprehensions that children may be vulnerable and susceptible to be swayed by what others tell and the child witness is an easy pray to tutoring and therefore their evidence must be evaluated carefully and with greater circumspection. (Ref : ***Panchhi vs. State of U.P. MANU/SC/0530/1998 : 1998 CriLJ 4044.***)

55. It is equally well settled that if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required. The Supreme Court has repeatedly ruled that there is no rule of practice that the evidence of a child witness needs corroboration and stated that conviction can be based on it. It is only as a rule of caution and prudence that the court may require that it would be desirable to have corroboration from other dependable evidence. (Ref : ***Dattu Ramrao Sakhare & Ors. vs. State of Maharashtra MANU/SC/1185/1997 : (1997) 5 SCC 341; Suryanarayana vs. State of Karnataka MANU/SC/0001/2001 : 2001 CriLJ 705***)

56. The manner in which evidence is required to be assessed by the courts has been laid down in a catena of decisions from ***MANU/SC/0037/1952 : AIR 1952 SC 353 Hanumant vs. The State of Madhya Pradesh***.

57. In ***Rameshwar vs. State of Rajasthan AIR 1952 SC 54*** the Apex Court was concerned with the conviction of the accused

for the rape of a 18 year old girl. The Additional Sessions Judge concerned with the appeal has certified that she did not understanding the sanctity of the oath. The evidence of the witness in court was recorded without administering any oath to her. On appeal, the sessions court held that the evidence was sufficient enough to form the basis of a moral conviction but was legally insufficient. This was overruled by the High Court which granted leave to appeal to the Apex Court.

The Apex Court observed that the omission to administer an oath goes to the credibility of the witness and not his competency. Section 118 of the Indian Evidence Act makes it clear that there is always competency in effect unless the court considers otherwise and since there was nothing to suggest incompetence, therefore section 118 would prevail.

58. It was observed that despite the certification that the witness did not understanding the nature of the oath, the court continued to take her evidence which manifested satisfaction of the witness understanding the duty to speak the truth. The accused had also never raised any objection to the same.

In this case, the Apex Court had observed that it is desirable that the judge or magistrate should always record their opinion as to whether the child understands his duty to speak the truth and also to state that why they think that otherwise the credibility of the witness would be seriously effected, so much so that in some cases it may be necessary to reject the evidence

altogether.

59. So far as power of a judge to put questions to a witness is concerned, the same is statutorily founded in section 165 of the Indian Evidence Act, 1872 which enables the judge to do so 'in order to discover or to obtain proper or relevant facts'. The statutory provision reads thus:-

> "**165. Judge's power to put questions or order production –** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:
>
> Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:
>
> Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer, or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

60. The Delhi High Court Rules in Part E prescribe the "Practice in the Trial of Criminal Cases" and lay down therein the manner in which the record of evidence in criminal cases shall be made. Rule 1 mandates that only relevant evidence should be recorded.

Rule 2 sets out the duty of the court in the following terms :-

> "2. **Duty of Court to elucidate facts –** Magistrates should endeavour to elucidate the facts and record the evidence in a clear and intelligible manner. As pointed out in 23 P.R. 1917 a Judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The vide powers given to the Court by Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure should be judiciously utilised for this purpose when necessary."
>
> (Emphasis supplied)

These rules bind the conduct of trials by the courts in Delhi.

61. Certain provisions of the Code of Criminal Procedure which deal with the recording of evidence in inquiries and trials require to be considered. Section 273 to 277 in this behalf are noteworthy. Section 280 of the Code enables a court to record remarks regarding the demeanour of the witness.

62. From the above, it is evident that there is statutory recognition of the necessity for a judge to ask certain questions to discover or obtain proper proof of the relevant facts. This assumes significance in the context of examination of a child witness where the court is first require to satisfy itself about the competency of the child to testify and thereafter to ensure that the complete testimony is brought out on record.

63. The Supreme Court has the criticised silence of the trial judges who have permitted trials to develop into a contest

between the prosecution and the defence resulting in contradictions entered into the trial. In this behalf, the observations of Chinnappa Reddy, J in the case reported at ***1981 CriLJ 609 : MANU/SC/0206/1981 Ram Chander vs. State of Haryana*** reads thus :-

> "The adversary system of trial being what is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."
>
> (Emphasis supplied)

64. The Apex Court has emphasised the wide powers of the trial court under section 165 of the Evidence Act in the case reported at ***AIR 1997 SC 1023 : (1997) 6 SCC 162 State of Rajasthan vs. Ani alias Hanif & Ors***. which observations read thus :-

> "11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant " in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond

the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."

(Underlining supplied)

It is noteworthy that in this case the court had put questions to PW 3 with regard to certain contradictions in his cross examination. This was objected to by learned counsel for the respondent/accused.

65. The role of the court is best described in the words of the Supreme Court in the pronouncement reported at ***AIR 2004 SC 346 : (2004) 4 SCC 158 Zahira Habibulla H. Sheikh & Anr.***

vs. State of Gujarat & Ors. and there can be no better exposition of the principles than in the words of the Apex Court when it stated as follows :-

> “43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.
>
> 44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India (1991 Supp (1) SCC 271)* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out

that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth.

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46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case."

(Emphasis supplied)

In view of the above, the courts are bound to act in exercise

of powers under section 165 of the Evidence Act and undertake a participatory role in a trial. They are expected to act fairly especially in a trial involving possibility of a witness being bashful or embarrassed with regard to the occurrence about which she or he is require to depose, and it is the duty of the court to ensure that the complete truth is brought out is even more stringent.

66. In ***Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.*** the purpose of a trial has been stated by the court in paras 38, 39 and 40 thus :-

> "38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.
>
> 39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.
>
> 40. The fair trial for a criminal offence consists not only in technical observance of the frame and

> forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

67. So far as witnesses are concerned, in para 41 of the judgment, the Apex Court has quoted Bentham who described witnesses as the eyes and ears of justice. The Apex Court observed the importance and primacy of the quality of the trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their bench men and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and trifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed

would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression, and injustice resulting in complete breakdown and collapse of the efifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has definite role to play in protecting the witnesses to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense

of making the proceedings before Courts mere mock trials as are usually seen in movies.

68. Despite the several pronouncements of the Apex Court as well as the High Courts, it is to be noted that the trial courts have failed to comply with the same. The present case throws an imperative issue with regard to the duty of the court so far as recording of the statement of the child witness is concerned. The statement under section 164 of the CrPC was recorded by a magistrate during the course of investigation. It would appear that individual sensibilities clouded the proceedings resulting in a camouflage of the evidence so much so that complete truth has not been brought out. This in fact defeats the statutory mandate and would be a failure to comply with the binding directions noticed herein. This aspect has a direct and immediate impact on society. For decades, the Apex Court has expressed concerns on the rate at which sexual crime is increasing especially in the context of children.

69. It was on a consideration of the sensitivities of the child that courts acted on a complaint received by it and laid down guidelines with regard to the investigation, medical examination and recording of a statement by the magistrate as well as appearance before the trial court which have been reported at ***(2007) 4 JCC 2680 Court on Its own Motion vs. State & Anr***.

70. A very sensitive pronouncement on some of the issues noticed herein is found in the judgment reported at ***62 (1996)***

DLT 563 : 1998 CriLJ 2428 Sudesh Jhaku vs. K.C.J. & Ors. when the court observed that it was high time when a fresh look was taken and principles evolved which, while protecting the child, do no harm to the defence. This statement by itself emphasises the careful balance which is to be drawn by the court and the solemn duty cast on it to ensure that while emphasising the value of the childs feelings, it is necessary to ensure that the rights of the defence are not obscured. In this case, the main argument was made to expand the definition of rape to mean sexual penetration of any bodily orifice. Certain observations by the court in para 38 on the care which is required to be taken by the judge recording testimony of a child are relevant for the purposes of the issue being considered and read thus :-

> "38. I hope that while the child is in the witness box every effort will be made by the learned trial Judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings. There is need to keep a check on it. The defense counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. Chief sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution

establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the court room itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of trial Judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the court room. On that Mr. Jaitely had drawn my attention to the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada Reaching for Solutions, 1991. In fact that the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states :

"There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the Judge has ordered supportive persons to leave the court room, along with other members of "the public."

I am leaving the matter to the good sense of the learned trial Judge. However, one thing is certain. The proceedings have to be in camera."

(Underlining supplied)

71. The judgment of this court was assailed before the Apex Court and was heard alongwith a writ petition filed by Sakshi, an NGO. The pronouncement of the Apex Court is reported at ***AIR 2004 SC 3566 : (2004) 5 SCC 518 Sakshi vs. UOI & Ors***. On the issue being considered, the court has noticed a judgment of the Canadian Supreme Court in Her Majesty, The Queen, Appellant vs. D.O.L., Respondent and the Attorney General of Canada, etc. (1993) 4 SCR 419 wherein the Supreme Court took

note of some glaring features in cases of sexual abuse which included the innate power imbalance which exists between the abuser and the abused child; a failure to recognise that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age; and that the court cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions without the criminal justice system which holds stereotypical and biased views about the victimisation of women. It was observed that “system induced trauma: often ultimately serves to re-victimise the young complainant”. These observations were made in the context of Section 715.1 of the Criminal Code of Canada which permitted video taping made within a reasonable time after the alleged offence in which the complainant describes the act complained of, to be admissible in evidence, if the complainant, while testifying, adopts the contents of the video tape.

The Canadian Supreme Court observed that this provision acts to remove the pressure placed on the child victim of assault when the attainment of truth depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. It was also observed that rules of evidence have not been constitutionalised into unaltered principles of fundamental justice. Neither they should be

interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time.

72. In ***Sakshi vs. UOI*** (supra) the Supreme Court though did not accept the prayer for expanding the definition of rape, however made many valuable observations especially with regard to the proceedings in the trial court in which a child victim has to testify. These observations deserve to be considered in extenso and reads thus :-

> "31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B Desai MANU/SC/0268/2003 : 2003CriLJ2033 . There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.
>
> 32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in

> miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."
>
> (Emphasis supplied)

73. In ***Sakshi vs. UOI*** (supra), the Apex Court had observed that these legislature had failed to take note of the offences and had omitted to mention section 354 and 377 of the Indian Penal Code which are also embarrassing to recount in section 327 (2) and (3) of the Criminal Procedure Code.

74. In ***AIR 1996 SC 1383 : (1996) 2 SCC 384 State of Punjab vs. Gurmit Singh & Ors***., the Apex Court had observed that these two provisions are in the nature of exception to the general rule of an open trial. It was observed that the provisions are mandatory and cast a duty on the court to conduct the trial of rape cases etc invariably 'in camera'. The courts are obliged to act in furtherance of the functions expressed by the legislature and not to ignore its mandate and must invariably take recourse

of these provisions and hold trial of rape cases in camera. The Apex Court observed that this would would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be an open court, under gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood.

75. In the case of ***State of Punjab vs. Gurmit Singh & Ors.***(supra), the Apex Court had stated that wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the Courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. Some activists have suggested that in addition, as far as possible, the staff in a court room who is concerned with such cases, should as far as possible be of the same gender. This is not to denigrate or make any observation on the sensivity of male judges and staff but only a consideration

towards the embarrassment and the natural reticence which is faced by a victim of sexual assault to recall such a traumatic occurrence fuelled by the feeling of guilt and humiliation which is felt by the victim by what has happened to her in the presence of strangers and gender of the judge may put the victim at ease.

76. The present case illustrates the extent of divergence in the perceptions and approach of two learned judges, one being the magistrate who recorded the section 164 statement and the other being the judge who recorded the testimony of the child witness in court. While the magistrate has put a couple of questions in an attempt to ascertain the understanding level of the prosecutrix, the testimony in court does not say so. It is well settled that the trial court is required to be satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. She clearly stated in her statement under section 164 of the CrPC that she did not understand the oath. This is not to be found in her court deposition.

77. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to

express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court. There is no such material on the record. The order sheet does not indicate that the proceedings were in camera. The name of the prosecutrix is clearly mentioned on the record even, in the charge framed and the evidence recorded.

78. Children who are victims of sexual assaults and rape carry a huge burden of unwarranted guilt and violations for which they are not responsible. The humiliation, shame and embarrassment which cloud their emotions because of the worst kind of violation they have suffered which get aggravated when required to recount the same to strangers in formal surroundings. The trauma of a child victim is only multiplied as he or she is required to repeatedly recapitulate her ordeal to the investigating agencies, prosecutors and then in court.

79. In the instant case, the evidence recorded by the learned Metropolitan Magistrate under section 164 of the CrPC and by the court appears to suggest embarrassment of the court to put questions of any kind to the prosecutrix and witness so as to elucidate the complete truth from her resulting in, not contradictory but incoherent testimony of the child victim who has concealed the essential ingredients of the offence. Use of

appropriate language would enable the necessary decency to be maintained in the proceedings and the record.

A judge is require to be mindful that the edifice on which the entire structure of the evidence of the prosecution stands is the trustworthiness of the testimony of the witness. Therefore, the manner and the language in which the evidence is recorded is of extreme importance.

80. India is a country where several languages are spoken. The Constitution recognises several of these while the number of dialects which are prevalent and in use in different parts of the country run into hundreds. Delhi is home to people from every corner of the country and the world. In this background, a communication with the child witness has added dimensions so far as this city is concerned. The court has to ascertain not only the comprehension of the child witness but also the extent of the child's vocabulary before proceeding to record a deposition. This assumes even more importance inasmuch as the same word may have different connotations and meanings in different languages and regions. The child is also being called upon to make a deposition with regard to events which may be way beyond her/his knowledge and comprehension.

81. The above discussion in no uncertain terms reiterates a hard reality that the requisite care and caution which investigation, examination and trial into sexual offences involving

child victim and child witnesses may not receive the necessary attention from the trial courts and the other concerned agencies.

82. Certain guidelines were laid down by R.C. Chopra, J in a judgment reported at ***115 (2004) DLT 174 : MANU/DE/1088/2004 Sh. Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.*** with regard to investigation and trial of cases involving commission of offences of murder under section 302; culpable homicide not amounting to murder under section 304; death of a woman under suspicious circumstances within seven years of marriage under section 304B; rape under section 376 and decoity with murder punishable under section 396 IPC were laid down. The court observed that radical improvements are required with a view to nail the real culprits and save victimisation of innocents so that the faith of general public in the criminal investigation system is not eroded. In para 9 of the judgment, the learned Judge observed that criminal investigation and trial is a journey to discover the truth. The conviction of an innocent or acquittal of a guilty is an inexcusable shame to the system. These salutary guidelines deserves to be implemented and followed to the letter.

83. It therefore needs no further elaboration that the care which is required, whether the child is victim of the offence or is one who has witnessed the occurrence would remain the same. It is also evident that on different aspects of investigation, medical examination and trial relating to commission of offences

including sexual offences wherein either the victim is a child or a child is required to appear as a witness in support of the prosecution, directions have been made and guidelines have been laid down in different judgments which have not received the attention they deserve. It would be in the interests of justice to therefore compile the same to facilitate their implementation. Upon hearing learned counsel for the parties in the present case and on a consideration of the several judgments placed by Mr. Manoj Ohri, learned APP for the state, certain additional requirements have been also noticed and set out in the preceding paragraphs. For the sake of convenience, the directions and guidelines laid down by the Apex Court and this court so far as case involving a child victim or child witness which are required to be mandatorily and urgently implemented are culled out as follows:-

I. <u>POLICE</u>

(i). On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii). Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(iii). The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv). The statement of the victim shall be recorded verbatim.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). The officer recording the statement of the child victim should not be in police uniform.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii). The statement should be recorded promptly without any loss of time.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii). The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix). The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.(Ref: Court On Its Own Motion vs. State & Anr.)

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(xi). The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion vs. State &

Anr.)

(xii). In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiii). The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiv). The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion vs. State & Anr.)

(xv). The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvi). The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvii). The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion vs. State & Anr.)

(xviii). To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any

particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xix). Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xx). The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxi). The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxii). Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

II RECORDING OF STATEMENT BEFORE MAGISTRATE

(i). The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii). In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.(Ref: Court On Its Own Motion vs. State & Anr.)

(iii). To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv). The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion vs. State & Anr.)

III MEDICAL EXAMINATION

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(ii). While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii). In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.(Ref: Court On Its Own Motion vs.

State & Anr.)

(iv). In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii). The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii). Emergency medical treatment wherever necessary should be provided to the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix). The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion vs. State & Anr.)

(x). In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.(Ref: Court On Its Own Motion vs. State & Anr.)

IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child

victim can be recorded.(Ref : Court On Its Own Motion vs. State & Anr)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be “in camera” . No request in this behalf is necessary. (Ref : State of Punjab vs. Gurmit Singh)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007 (4) JCC 2680 Court On Its Own Motion vs. State & Anr.)

(v). The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : Sakshi vs UOI).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction

that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.

There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and

enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors).

This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI).

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to

harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan vs. Ani alias Hanif & Ors.)

(xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on

account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “gandi harkatein” or “batamezein” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced,

humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.

V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness.

This would create and inspire a feeling of confidence and trust in the child.

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.

84. The issue with regard to teaching of offences regarding sexual assault and rape itself has been a source of much discussion. I am informed that there are instances of even legal educators being bashful and embarrassed about teaching such subjects. Judges and counsels are products of the legal education. The multi-faceted problem and concerns noticed

above are not confined to ensuring gender justice in courts alone. In this background, it is absolutely imperative that these areas of law and the issues which have been raised herein are taken up with all seriousness. Perhaps the programme of continuing legal education needs to take a look on these questions.

85. As noted above, the directions laid down in the aforenoticed judgments do not appear to be strictly followed. Some of the trial courts are either not conscious of their powers and duties as conferred by the Code of Criminal Procedure and recognised by the Indian Evidence Act or hesitant to exercise them. These issues cannot be ignored any further.

86. The Delhi Legal Services Authority and the Delhi High Court Legal Services Committee are taking several initiatives so far as access to and dispensation of justice is concerned. The directions of the courts as culled out above are intended to ensure justice to both the victim and the accused.

87. For all the reasons set down above, the finding of guilt of the appellant for commission of the offence under section 376 of the Indian Penal Code is not sustainable. The appellant is stated to be in custody since 29th of April, 2005 and has spent a period of four years and five months in incarceration.

In view of the above discussion, the judgment dated 17th of August, 2007 is, therefore, set aside and quashed. As a result, the order of sentence dated 17th of August, 2007 also cannot stand and is also hereby set aside.

This appeal is allowed in the above terms.

Copy of the operative part i.e. the directions and guidelines be sent to the District Judge who may circulate the same and ensure that the same are complied with.

88. It is further directed that a copy of this judgment be sent to the Secretary, Delhi Legal Services Authority and Secretary, Delhi High Court Legal Services Committee for further action so as to ensure the implementation of the directions and guidelines laid down in para 83.

Copy of this judgment be also sent to the Director, Delhi Judicial Academy so that the several issues raised may be also addressed.

89. This court records its deep appreciation for the thorough research and able assistance rendered by Mr. S.B. Dandapani, Advocate for the appellant and Mr. Manoj Ohri, learned APP for the state in this case.

Needless to say in case of any difficulty in respect of any of the directions, it is open to any person or party concerned to make appropriate application for consideration.

This matter is disposed of in the above terms.

GITA MITTAL
(JUDGE)

September 29, 2009
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 1st August, 2014

\+ **DEATH SENTENCE REFERENCE No.5/2010**

STATE ..... Petitioner

Through Ms.Swati Goswami, Adv. for Mr.Dayan Krishnan, ASC with Inspector Rajveer Singh, PS S.P. Badli

Versus

JAGTAR & ORS. ..... Respondents

Through Mr. Sidharth Aggarwal, Adv. with Adit S. Pujari, Adv. & Mr.Rahul Kumar, Adv.

Crl.A. No.979/2008

AMAR BHADUR THAPAS S/O GYAN BHADUR THAPA .... Petitioner

Through Mr.Sumer K. Sethi, Adv.

Versus

STATE ..... Respondents

Through Ms.Ritu Gauba, APP
S.I. Amit Rathee, PS Model Town.

WITH

\+ **Crl.A. No.1087/2010**

RAVINDER ..... Petitioner
Through Mr.Sumer K. Sethi, Adv.

Versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through Ms.Ritu Gauba, APP

AND

\+ **Crl.A. No.1301/2010**

NOOR JAHAN ALIAS HASEENA & ORS. ..... Petitioner
Through Mr.Vivek Sood & Mr.Vishwanath Pratap Singh, Advs.

Versus

STATE (GOVT. OF NCT OF DELHI) ..... Respondent
Through Ms.Ritu Gauba, APP
Insp. Rajveer Singh, PS S.P. Badli

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE J.R. MIDHA

GITA MITTAL, J

1. A question stands raised before this court that is, if a plea of juvenility of the convict, raised for the first time at the appellate stage in the High Court, is accepted, what happens to his appeal against the conviction? Consequently,

another issue follows. Does the Appellate Court have the power to order the removal of the disqualification attaching to the conviction? In other words, what is the fate of the conviction and the order on the sentence which stands imposed upon such a person?

2. This plea was raised by one or more of the appellants in the above appeals. We have therefore heard learned counsels in the appeals on these two issues.

I. Statutory Framework

3. So far as the issues at hand are concerned, it would be useful to first and foremost set out, in extenso, the provisions of Section 2(k), 2l, 6, 7, 19, 20 of the Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter the 'JJ Act') as well as Rule 3(IX) and (XIV) of Chapter II of the Juvenile Justice (Care & Protection of Children) Rules of 2007 (hereinafter referred to as the 'Rules'). The same read as hereunder :-

> "2(k) "**juvenile**" or "child" means a person who has not completed eighteenth year of age;
>
> 2(l) "**juvenile in conflict with law**" means a juvenile who is alleged to have committed an offence;
>
> **6. Powers of Juvenile Justice Board.-** (1) Where a Board has been constituted for any district or a group of districts, such Board shall, notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to

deal exclusively with all proceedings under this Act relating to juvenile in conflict with law. (2) The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise.

7. Procedure to be followed by a Magistrate not empowered under the Act.- Procedure to be followed by a Magistrate not empowered under the Act.-(1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it.

7A. Procedure to be followed when claim of juvenility is raised before any court. – (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a **claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act**.

(2) If the court finds a person to be juvenile on the date of commission of the offence under sub-section (1), it shall forward the

juvenile to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect."

4. How the Juvenile Justice Board is to proceed against the juvenile and what are the possible orders which may be passed on finding him guilty of commission of offences is prescribed under Section 15 of the Statute which reads as follows:-

> **"15. Order that may be passed regarding juvenile.-** (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit,-
>
> (a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;
>
> (b) direct the juvenile to participate in group counselling and similar activities;
>
> (c) order the juvenile to perform community service;
>
> (d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;
>
> (e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> (f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;
>
> **(g) make an order directing the juvenile to be sent to a special home,- i. in the case of juvenile, over seventeen years but less than eighteen years**

of age for a period of not less than two years; ii. in case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

2. The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

3. Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition **make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein,** and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law :

Provided that **if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution** under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour **and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.**

4. The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer."

5. Conviction for a criminal offence has widespread ramifications. It immediately impacts employability in public positions. To erase such consequences upon a juvenile, in recognition of social responsibility for his actions/omissions, the legislature has mandated removal of any disqualification in Section 19 which is as follows:-

> **"19. Removal of disqualification attaching to conviction.-** (1)Notwithstanding anything contained in any other law, a **juvenile who has committed an offence and has been dealt with under the provisions of this Act shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.** (2) The Board shall make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be."

6. The legislation contains a special provision as to manner in which courts would proceed in cases pending on the date the statute came into force. Section 20 in this regard reads thus:-

> **"20. Special provision in respect of pending cases.-** Notwithstanding anything contained in this Act, **all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in** respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

7. It is also necessary to advert to some portions of Rule 3 of **the Juvenile Justice (Care and Protection of Children) Rules, 2007,** the relevant extract whereof reads as follows:

> **"Rule 3. Fundamental principles to be followed in administration of these rules.—**
>
> **xxx xxx xxx**
>
> **IX. Principle of non-waiver of rights:**
>
> (a) No waiver of rights of the child or juvenile in conflict with law, whether by himself or the competent authority or anyone acting or claiming to act on behalf of the juvenile or child, is either permissible or valid.
>
> (b) Non-exercise of a fundamental right does not amount to waiver.
>
> **xxx xxx xxx**
>
> **XI. Principle of right to privacy and confidentiality**
>
> The juvenile's or child's right to privacy and confidentiality shall be protected by all means and though all the stages of the proceedings and care and protection processes.
>
> **XIV. Principle of Fresh Start:**
>
> (a) The principle of fresh start promotes new beginning for the child or juvenile in conflict with law by ensuring erasure of his past records.
>
> (b) The State shall seek to promote measures for dealing with children alleged or recognized as having impinged the penal law, without resorting to judicial proceedings."

8. As per section 2(k) of the JJ Act, a juvenile is a person who has not completed the 18th year of age. Under Section 2l, 'a juvenile in conflict with law' is a person who has not completed the 18th year of age as on the date of commission of such offence and is alleged to have committed an offence.

9. A literal construction of section 2l suggests that a 'juvenile in conflict with law' includes persons who had not completed 18 years of age as on the date of commission of the offence but could be beyond such age on the date of consideration of the issues of conviction and sentencing.

10. As per section 6, the power of the Juvenile Justice Board 'JJB' or the Board, hereafter) is restricted to 'a juvenile in conflict with law'. Confinement in a special home under Section 15(1)(g) is also restricted to a juvenile who is over seventeen years of age and less than eighteen years of age.

11. The spirit, object and intendment of the JJ Act is obvious from a bare reading of the statutory provisions. Section 7(1) mandates that when any Magistrate (other than one empowered to exercise the power of the JJ Bord) is of the opinion that a person brought before him under any of the provisions of the JJ Act (other than as a witness), is a juvenile, he shall without any delay record such opinion and forward the juvenile and the record of the proceeding to the competent

authority having jurisdiction over the proceeding. Under Sub-Section (2) of Section 7, the competent authority to which the proceeding is forwarded is mandated to hold the inquiry as if the juvenile or the child had originally been brought before it.

12. Section 7A mandates that if the court finds a person to be a juvenile on the date of commission of the offence under sub-section 1, the juvenile shall be forwarded to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

13. Section 7A is concerned with a claim of juvenility raised before any court. Upon the court being of the opinion that an accused person may have been a juvenile on the date of commission of the offence, the court is mandated to conduct an inquiry so as to determine the age of such person and to record a finding whether a person is a juvenile or not, stating his age as nearely as may be.

14. The proviso to Section 7A of the JJ Act states that a claim of juvenility as on the date of the offence may be made by a person at any stage of a proceeding, before any court, even after the final disposal of the case. If such a claim is made, the court is required to determine if the individual was a juvenile on the date of commission of the offence. It does not matter if the individual has ceased to be a

juvenile before the JJ Act of 2000 came into force. Further, Section 7A(2) states that if a court finds a person to be a juvenile on the date of commission of the offence, it shall forward the juvenile to the Juvenile Justice Board for passing appropriate orders. If a sentence has been imposed by a court, such sentence shall be deemed to have no effect. Sub-section 2 of Section 7A thus confined its scope to a person being a juvenile on the date the court accepts such plea.

15. Section 7A does not deal with the case wherein a person claims to have been a juvenile on the date of commission of the offence, but has ceased to be a juvenile either on the date on which such plea is taken in the court or it is taken in the appellate or revisional jurisdiction. It also does not deal with a situation where a person is not a juvenile, on the date when such plea is accepted by the court. This is the situation with which we are faced in these cases. We are also unable to find any judicial precedent which has considered this question. This issue would require to be thus tested keeping in view the spirit, intendment and purpose of the statute.

16. Another important aspect of the statutory scheme is the provision enacted with regard to removal of disqualifications attaching to a conviction contained in Section 19 of the statute. Section 19(1) states that if a person has been convicted for committing an offence and has been dealt with under the provisions of the JJ

Act, such person shall not suffer the consequences that attach because of such of a conviction. Section 19(2) states that the Juvenile Justice Board shall order the records of the conviction to be removed after the period of appeal has expired.

17. Section 19(1) thus provides a general statutory right for removal of disqualification but only where the juvenile has been dealt with and convicted under the `Act'. This right therefore is limited to proceedings before the Juvenile Justice Board and not to a conviction by the Magistrate or a court. Section 19(2) provides the procedure to be followed by the Board, in implementing an order for removal of disqualification. Thus, when an order is made for the removal of disqualification, it is the Board which implements the order in actuality, by removing the records and thus, cleaning the slate so that the juvenile can commence life afresh.

18. In this context, also of relevance is Rule 3 of the Rules, 2007, which lists the fundamental principles to be followed in administration of the rules. Rule 3(IX) unequivocally and absolutely prohibits waiver of the rights of the juvenile. As per Rule 3 (XIV) (a), one of these fundamental principles is the "Principle of Fresh Start," which is sought to be achieved by ensuring removal of past records. The

Board, exercising its power to direct the removal of the records under Section 19(2) of the JJ Act, facilitates the implementation of the "*principle of fresh start*."

19. The statutory scheme would show that this enactment confers exclusivity on the Juvenile Justice Board for dealing with all proceedings, which relate to juveniles.

20. We may briefly notice the factual matrix in these cases before examining the questions in hand. The same are considered appeal wise hereafter.

II. Crl.(A) No.979/2008 Amar Bahadur Thappa v. State

21. This appeal arises out of an incident which allegedly took place in the night intervening 22nd/23rd December, 2000 and resulted in the registration of FIR No.762/2000 implicating the appellant – Amar Bahadur Thappa and co-accused Raju Chakravarthy on the 23rd December, 2000 by the police station Model Town for the commission of offences under Sections 302, 392 read with 34 IPC. They jointly stood trial in Sessions Case No.26/2011 and were convicted for commission of offence under Sections 302/392 read with Section 34 of the IPC by the judgment dated 24th September, 2004 of the learned Additional Sessions Judge. By the order dated 27th September, 2004, the learned trial judge sentenced both the appellants to imprisonment for life along with a fine of Rs.10,000/- each in default one year

rigorous imprisonment under Section 302 read with 34 of the IPC. Additionally, for the offence under Section 392 read with 34 of the IPC, both the accused were sentenced to rigorous imprisonment for ten years along with a fine of Rs.5,000/- each in default six months rigorous imprisonment. It was further ordered that both the sentences imposed on the accused persons shall run concurrently.

22. Crl.(A)No.152/2005 was separately filed by Raju Chakravarthy impugning the order dated 24th September, 2004. This appeal was allowed by an order dated 4th November, 2011 passed by the Division Bench of this Court.

23. On 28th February, 2012 a plea was orally taken by learned counsel for the appellant in his appeal (Crl.(A)No.979/2008) that Amar Bahadur Thappa was a juvenile on the date of commission of offence. No documentation of Amar Bahadur Thapa's date of birth was available. A detailed inquiry was conducted by this court which included directions to the Investigating Officer to place a report with regard to the details of marriage of the appellant's parents; date of birth and ages of the siblings of the appellant; constitution of a medical board for the medical examination of the appellant, first by the Safdarjung Hospital, and then by the All India Institute of Medical Sciences. After consideration of the material

placed before the court, the plea of the appellant was accepted that he was juvenile on the date of commission of the offence by the order dated 28th May, 2012.

24. It is noteworthy that on 28th February, 2012, as per the nominal roll received from the Central Jail, Tihar, the appellant Amar Bahadur Thappa had undergone 11 years, 2 months and four days in jail. The appellant Amar Bahadur Thapa thus had undergone imprisonment which is not permissible under Section 15(1)(g) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (the JJ Act hereafter). The incarceration for a long period of 11 years is also way beyond the maximum period of three years which could be ordered to be spent by a juvenile in a special home as prescribed under the JJ Act.

25. As a result, by the order dated 28th May, 2012, it was directed that the appellant be released from jail forthwith. As on 28th May, 2012, Amar Bahadur Thapa would be between 25 – 29 years of age.

III. Crl.(A) No.1087/2010 Ravinder v. State

26. This appeal arises out of an alleged incident on 15th November, 2004 which resulted in registration of the FIR No.1035/2004 implicating the present appellant – Ravinder and co-accused Monu Thappa; Raj Kumar and Arjun Singh Rawat by the police station Kalkaji for the commission of offences under Sections 302, 397

read with 34 IPC. They jointly stood trial in Sessions Case No.21/2005. The trial court convicted the accused Ravinder and Arjun Singh Rawat for commission of offences under Sections 392/394/302 read with Section 34 of the IPC by the judgment dated 4th March, 2010. However the other two accused, namely Raj Kumar and Monu Thappa @ Nepali were given the benefit of doubt for the reason that no incriminating article had been recovered from them or at their instance and hence no role could be attributed to these two accused persons. As such they were acquitted by the trial court.

27. By the order dated 6th March, 2010, the learned trial judge sentenced both Ravinder and Arjun Singh Rawat to imprisonment for life along with a fine of Rs.2,000/- each and in default of payment of fine, further one year rigorous imprisonment for commission of the offence under Section 302 read with 34 of the IPC. Additionally, for commission of the offence under Section 392 read with 34 of the IPC, both the accused were sentenced to rigorous imprisonment for ten years along with a fine of Rs.2,000/- each in default of payment of fine one year rigorous imprisonment and for commission of the offence under Section 392 of the IPC, both the accused were awarded a sentence of three years rigorous imprisonment and a fine of Rs.2,000/- and in default of payment of the fine imposed, they were liable to undergo six months rigorous imprisonment. It was further ordered that the

substantive sentences under Section 392 and 394 imposed on the accused persons shall run concurrently with his life imprisonment.

28. Ravinder impugned his conviction as well as the order dated 4th March, 2004 by way of Crl.(A)No.1087/2010. On 13th September, 2010, Crl.M.B.No.1297/2010 was filed in Crl.A.No.1087/2010 seeking a clarification as to whether the co accused Arjun Singh who has been convicted by the learned Sessions judge has filed any appeal or not.

29. On 23rd September, 2011 a written plea to file documents on the basis of which the claims to be juvenile plea was taken by learned counsel for the appellant in Crl.M.A.No.11306/2011 filed in Crl.A.No.1087/2010 that Ravinder was a juvenile on the date of commission of offence. Again no documentation to support this plea was forthcoming. A detailed inquiry was conducted by this court which included directions to the Investigating Officer to place a report with regard to the details of marriage of the appellant's parents; date of birth and ages of the siblings of the appellant; constitution of a medical board for the medical examination of the appellant, first by Safdarjung Hospital. Directions were issued to the Joint Registrar to conduct an inquiry and record evidence and submit a report with regard to the juvenility claimed by the appellant. After consideration of the

material placed before the court, the plea of the appellant that he was juvenile on the date of commission of the offence was accepted by the order dated 17th July, 2012.

30. It is noteworthy that on 21st September, 2010, as per the nominal roll received from the Central Jail, Tihar, the appellant Ravinder had undergone 5 years, 9 months and 21 days in jail. It would therefore, appear that the appellant Ravinder – a juvenile on the date of commission of the offence, had undergone imprisonment which is completely impermissible under the JJ Act. The incarceration for the long period of 5 years is also way beyond the maximum period of three years to be spent in a special home by juvenile which would be prescribed under the JJ Act.

31. As a result, by the order dated 17th July, 2012, it was directed that the appellant shall be set at liberty forthwith. As on 17th July, 2012, Ravinder would be around 26 years of age.

IV. <u>Crl.(A) No.1301/2010 Noor Jahan @ Haseena & Ors. v. State –</u>

32. This appeal was jointly filed by Noor Jahan @Haseena, Abdul Waheed and Imran Khan assailing their conviction by the judgment dated 22nd September 2010 and the sentence imposed by the order dated 29th September 2010. The appeal

arises out of an alleged incident which took place on 8th October, 2008 resulting in the registration of FIR No.280/2008 implicating the appellants by the police station Gokul Puri for the commission of offences under Sections 302 and 506 IPC. They jointly stood trial in Sessions Case No.24/2009.

33. By the judgment dated 22nd September, 2010 of the learned Additional Sessions Judge, the appellants were held guilty for commission of the offences under Section 302 read with Section 34 IPC and convicted thereunder. Accused Imran Khan was additionally held guilty for commission of offence under Section 506 of the IPC. The learned trial judge by the order dated 29th September, 2010, sentenced the three convicted persons to imprisonment for life along with a fine of Rs.5,000/- each for offence punishable under Section 302 read with Section 34 of the IPC. In default of payment of fine, they would further undergo rigorous imprisonment for one year each. Convict Imran was also further sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.3,000/- for commission of the offence under Section 506 IPC. In default of payment of fine, he would further undergo rigorous imprisonment for six months.

34. Crl.(M). (Bail) No.468/2012 was filed by Imran Khan seeking suspension of sentence. On 16th July 2012, a plea that Imran Khan was a juvenile on the date of

commission of offence was orally taken by learned counsel for the appellant. No documentation with regard to his date of birth was available. A detailed inquiry was conducted by this court which included directions to be produced before the Medical Superintendent of Lok Nayak Jai Prakash Hospital for conducting the dental and ossification examination of the appellant. A report dated 1st July, 2012 was received from the medical experts opining that the appellant was 18 years 2 months 2 days on 8th of October, 2008, the date of the incident. As per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2000, one year margin is given on the lower side of the age as opined on medical examination. The plea of juvenility as on the date of commission of the offence had to be accepted. As a result, by the order dated 16th August 2012, it was directed that the appellant be set at liberty by the jail authorities.

35. It is noteworthy that as per the nominal roll received from the Central Jail, Tihar on the 24th December, 2010, the appellant Imran Khan had undergone 2 years, 2 months and nine days in jail. By 16th August, 2012, Imran Khan would have undergone over 3 years 10 months of imprisonment, which is more than the permissible period for which a juvenile delinquent could be sent to a special home under the JJ Act. As on 16th August, 2012 Imran Khan could be over 27 years of age.

V. ***Death Reference 5/2010 - State v. Jagtar***

36. This reference under Section 366 Cr.P.C. is before this court for confirmation of the death sentence awarded to convicts namely, Jagtar, Sheela, Gian Chand and Ashok @ Ganja, arising out of an alleged incident which took place in the night intervening 6th/7th June, 2003 resulting in registration of FIR No.264/2003 dated 7th June, 2003 by the police station Samey Pur Badli. They jointly stood trial in Session Case No.123/2008. The accused Jagtar, Sheela, Gian Chand and Ashok @ Ganja have been convicted under Section 302 read with 34 IPC. The accused Jagtar further stands convicted under Section 25/27 of the Arms Act by the judgment dated 29th November, 2010 of the learned Additional Sessions Judge. By the order dated, 2nd December 2010, the appellants have been sentenced to death subject to confirmation of the sentence by the High Court of Delhi. Convict Jagtar was further sentenced to undergo rigorous imprisonment for a period of one year and fine of Rs.5,000/- in default of payment of which, he shall undergo simple imprisonment for a period of two months for committing offence under Section 25/27 of the Arms Act and in this regard, benefit under the provisions of Section 428 Cr.P.C. were also extended to the convict Jagtar.

37. In Death Reference 5/2010, Sheela and her brother Jagtar filed an application being Crl.App.No.14021/2011 contending that they were juvenile on the 7th of June, 2003 when the incident took place. On this application, the court called for a report to be filed by the State. On the 18th of August, 2011, it was observed that Sheela's claim with regard to date of birth had been verified and a report of the Sarpanch of the concerned village as well as office of the Additional District Registrar (Birth and Death) – cum District Health Officer, Panipat supported her claim. The court was of the view that a further inquiry under Section 7A of the JJ Act and Rule 12 and 98 of the JJ Rules 2007 be held by the trial court. Pending inquiry, on a prima facie view that she was juvenile on the date of the incident, she was granted interim suspension of sentence for a period of three months which was extended from time to time.

38. Jagtar and Sheela were subjected to medical examination and the inquiry with regard to their plea of juvenility was undertaken by the trial court in accordance with law. The report was considered by this court on 20th of April, 2012 when it was found that on the date of incident, i.e., 7th of June, 2003, Jagtar was approximately 16 years of age and that Sheela was older to him by one year only. As such Sheela would have been 17 years on the date of the incident. They were therefore, juveniles within the meaning of expression under the JJ Act, 2000.

39. In view thereof, both the Jagtar and Sheela were held to be juvenile on the date of the offence and by the order dated 21st September, 2011 directed to be released forthwith from custody.

40. As on 21st September, 2011, Jagtar would be over 24 years of age while Sheela would be above 25 years of age.

41. It is noteworthy that on 21st September, 2011, Sheela had undergone 8 years, 3 months and 14 days in jail as per the nominal roll received from Central Jail, Tihar which imprisonment is not permissible under JJ Act. The incarceration is also beyond the maximum period of three years which would be ordered to be spent in a special home by a juvenile delinquent as prescribed under JJ Act.

42. As on 21st April, 2012, Jagtar had undergone 8 years, 10 months and 9 days in jail as per the nominal roll received from Central Jail, Tihar. Jagtar has also undergone imprisonment which is not permissible under JJ Act. His incarceration of 8 years is also way beyond the maximum period of three years which could be ordered to be spent in a special home by a Juvenile delinquent as prescribed under JJ Act.

Ashok Kumar @ Ganja

43. Ashok @ Ganja was produced in this court on 13th of February, 2012. His physical appearance had suggested that he was still of young age and he was questioned briefly. The court was of the opinion that an inquiry with regard to his juvenility on the date of commission of offence was required to be made under Section 7(A) of the JJ Act, 2000. A direction was issued to the Inquiry Officer to submit a report with regard to full details of the family including the siblings of the respondent Ashok Kumar @ Ganja and file the same with documentary materials, details of marriage of the parents of the respondents, full details of the date of birth of the siblings as well as school and other records if any. The appellant was also directed to be produced in custody before the Medical Superintendent of the LNJP Hospital for a medical examination to obtain a report of his age. The Inquiry Officer was directed to ensure that a complete inquiry from the concerned authority and village as well was made and the consolidated report was directed to be placed before the trial court with a direction to conduct inquiry in terms of Section 7(A) of the JJ Act.

44. A report was received on 10th April, 2012 from the learned Additional Sessions Judge which records that the father of the convict Ashok Kumar @ Ganja

had not submitted any record regarding the birth of his son. The date of birth recorded in the admission register was based on an affidavit submitted by the father. As it was unsafe to place reliance on this record, the trial court relied on the report of the Medical Board according to which he is estimated to be 24 years as on 1st March, 2012. Computed on this basis, as on 7th June, 2003, Ashok Kumar would have been around 15 years of age and hence would fall under the definition of juvenile as on the date of the offence.

45. By the order dated 20th April, 2012, it was also directed that Ashok Kumar @ Ganja be released from custody.

46. It is noteworthy that on 21st April, 2012, Ashok Kumar @ Ganja had undergone 8 years, 10 months and 11 days in jail as per the nominal roll received from Central Jail, Tihar. Ashok Kumar @ Ganja also has thus undergone imprisonment which is not permissible under JJ Act. The incarceration is also beyond the maximum period of three years which a juvenile delinquent could be ordered to spend in a special home under JJ Act.

47. Other than in Crl.Appeal.No.979/2008, the offences in the above cases were post 1st April, 2000 when the Juvenile Justice (Care and Protection of Children) Act, 2000 had come into force.

48. So far as Crl.A.No.979/2008 is concerned, the same arises out of incident which took place in the night intervening 22nd/23rd December, 2000. Therefore Section 20 of the JJ Act would come apply.

VI. Issues arising for consideration

49. The legislature has anticipated the situation where a criminal case may be pending when the JJ Act came into force, against a person who was juvenile on the date of commission of the offence. A perusal of Section 20 of the JJ Act would shows that it postulates that the court would record findings and forward such juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the statutory provisions as if it had been satisfied on inquiry under the JJ Act that the juvenile has committed the offence. The question which has been raised in these appeals is regarding persons who after facing a full-fledged trial before courts, have been convicted and are found by an appellate court to be a juvenile on the date of commission of the offence. How is such person to be treated? The further question to be answered is as to how the person, a juvenile on the date of the crime, but has ceased to be so on the date of the finding of his juvenility, is to be treated.

50. What happens to the finding of guilt by the trial court as well as the sentence which has been awarded to the person? Can such a person who is an adult on the date of the adjudication of the juvenility plea, be forwarded to the Board for fresh trial or passing of orders on the sentence (as in section 20 of the JJ Act?) A further question which arises is as to whether the High Court (or the appellate/revisional court) itself can order removal of the disqualification attached to the conviction by the trial court, without referring the matter to the Board?

VII. Plea of juvenility on date of offence accepted at appellate stage – status of appeal against conviction

51. We are here concerned with the course of action to be adopted by the court when a plea of juvenility on the date of commission of the offence is taken before an appellate court after the appellant ceased to remain a juvenile or when the finding of juvenility came to be returned by the appellate court before which the plea was raised in proceedings pending on the date of the Juvenile Justice Act coming into force.

52. In the judgment reported at ***(2009) 13 SCC 211 Hari Ram v. State of Rajasthan & Anr.***, the court has extensively considered the provisions of the Juvenile Justice (Care & Protection of Children) Act, 2000 especially the provisions of Sections 2(k), 2(l), 7A (Explanation), and 49 (as amended by the Act

of 2006). The question which was raised before the Supreme Court was as to whether a person who was below 18 years of age on the date of commission of the offence, prior to the commencement of the 2000 Act, was entitled to the benefit under the Act of 2000. The court held that though such person was not a "juvenile" under a literal application of Section 2(h) of the Juvenile Justice Act, 1986 nor a "juvenile in conflict with law" under Section 2(l), however in all cases pending in any court on the date the Act came into force, the determination of juvenility shall be in terms of clause (l) of Section 2 by virtue of the explanation to Section 20 of the Act of 2000. Therefore, a claim of juvenility was tenable even after the accused had crossed the age of 18 years on or before the commencement of the JJ Act 2000 or was undergoing a sentence after conviction.

The permissibility of raising the plea for determination of juvenility for the first time at the appellate stage is, therefore, no more *res integra*.

53. Taking note of previous decisions on this point in ***(2011) 2 SCC 251 Lakhan Lal v. State of Bihar***, the Supreme Court has allowed such plea raised before the Court for the first time and has observed thus:

> "21. The fact remains that the issue as to whether the appellants were juvenile did not come up for consideration for whatever reason, before the courts below. The question is whether the same could be considered

by this Court at this stage of the proceedings. A somewhat similar situation had arisen in *Umesh Singh* v. *State of Bihar* [(2000) 6 SCC 89 : 2000 SCC (Cri) 1026] wherein this Court relying upon the earlier decisions in *Bhola Bhagat* v. *State of Bihar* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125], *Gopinath Ghosh* v. *State of W.B.* [1984 Supp SCC 228 : 1984 SCC (Cri) 478] and *Bhoop Ram* v. *State of U.P.* [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] while sustaining the conviction of the appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under (*Umesh Singh case* [(2000) 6 SCC 89 : 2000 SCC (Cri) 1026] , SCC pp. 93-94, para 6):

> "6. So far as Arvind Singh, appellant in Criminal Appeal No. 659 of 1999 is concerned, his case stands on a different footing. On the evidence on record, the learned counsel for the appellant was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the appellant is born on 1-1-1967 while the date of the incident is 14-12-1980 and on that date he was hardly 13 years old. We called for a report of experts being placed before the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as the matriculation certificate produced before this Court which indicate that his date of birth is 1-1-1967. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with the other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trial court or before the High Court. In such circumstances, ***this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720 : 1998***

> ***SCC (Cri) 125] following the earlier decisions in Gopinath Ghosh v. State of W.B. [1984 Supp SCC 228 : 1984 SCC (Cri) 478] and Bhoop Ram v. State of U.P. [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] and Pradeep Kumar v. State of U.P. [1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395] while sustaining the conviction of the appellant under all the charges, held that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] , we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case***. Conviction of the appellant Arvind Singh is confirmed but the sentence imposed upon him stands set aside. He is, therefore, set at liberty, if not required in any other case.'"

54. Relying on the above pronouncements in several appeals against convictions and sentences awarded by session's court pending in this court, the convicts, as appellants, have raised a plea of juvenility which if supported by the inquiry in this regard, has been accepted by the court.

55. The issue as to the procedure to be adopted by the court on such a plea, gets vexed when it comes to dealing with a case where the person stands convicted and sentenced by the trial court and has ceased to be juvenile on the date that a plea of juvenility of the offender as on the date of commission of the offence, is set up before an appellate court.

56. The investigating officer as well as the court before whom the challan was filed, remained oblivious of the juvenility of the accused on the date of commission of the offence. Such person as well as his counsel also failed to take such plea in the proceedings before the criminal court. The trial proceedings culminated in a conviction and a sentence of imprisonment stands imposed upon the accused person. The plea of juvenility was raised in the appellate proceedings long after the person ceased to be a juvenile. We attempt to examine the questions noted hereinabove by the present consideration.

57. We have been ably assisted in the present consideration by Mr. Dayan Krishnan, Additional Standing Counsel (Criminal), Mr. Siddharth Agarwal, Mr. Sumer Sethi, Mr. Vivek Sood, learned amicus on behalf of the appellants.

58. Appearing on behalf of the State, Mr. Dayan Krishnan has taken us carefully through the applicable statutory provisions and judicial precedents and drawn our attention to similar provisions in statutes regarding juveniles in different countries including Bangladesh, South Africa, Canada, Nepal, United Kingdom. Mr. Krishnan has also placed several international instruments including the United Nations Convention on the Rights of the Child which was adopted and opened for ratification and accession by the General Assembly Resolution No. 44/25 of 20th

November, 1989 and entered into force on 2nd September, 1990; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice dated 29th November, 1985 and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty dated 14th November, 1990.

Position in other jurisdictions

59. Mr. Dayan Krishnan, learned Additional Standing Counsel (Criminal) has submitted that some guidance on the issue can be taken from the position in other countries. Our attention has been drawn to the provisions of the Children Act, 1974 of the Republic of Bangladesh and the Children Rules, 1976 framed thereunder. As a matter of illustration of legislative prohibitions, Sections 6, 8, 70, 71 and 76 of this Act deserve to be considered in extenso and read as follows :-

> "6. No Joint trial of child and adult - (1) Notwithstanding anything contained in section 239 of the Code or any other law for the time being in force, no child shall be charged with, or tried for, any offence together with an adult.
>
> (2) If a child is accused of an offence for which under section 239 of the Code or any other law for the time being in force such child but for the provisions of sub-section (1) could have been tried together with an adult, the Court taking cognizance of the offence shall direct separate trials of the child and the adult.
>
> 8. Adult to be committed to sessions in a case to be committed to sessions-- (1) When a child is accused along with an adult of having committed an offence and it appears to the Court taking cognizance of the offence that the case is a fit one for committal to the Court of Session, such Court shall, after

separating the case in respect of the child from that in respect of the adult, direct that the adult alone be committed to the Court of Session for trial.

(2) The case in respect of the child shall then be transferred to a Juvenile Court if there is one or to a Court empowered under section 4, if there is no Juvenile Court for the local area, and the Court taking cognizance of the offence is not so empowered:

Provided that the case in respect of the child shall be transferred to the Court of Session under section 5 (3) if it is exclusively triable by the Court of Session in accordance with the Second Schedule of the Code.

xxx

70. **When a child is found to have committed any offence, the fact that he has been so found shall not have any effect under section 75 of the Penal Code (XLV of 1860), or section 565 of the Code or operate as a disqualification for any office, employment or election under any law.**

71. Save as provided in this Act, the words ‘conviction' and ‘sentenced' shall cease to be used in relation to children or youthful offenders dealt with under this Act, and any reference in any enactment to a person convicted, a conviction or a sentence shall, in the case of a child or youthful offender be construed as a reference to a person found guilty of an offence, a finding of guilty or an order made upon such a finding, as the case may be.

xxxx

76. (1) Notwithstanding anything contained in the Code, an appeal from an order made by a Court under the provisions of this Act shall lie-

(a) if the order passed by a Juvenile Court or a Magistrate empowered under section 4, to the Court of Session; and

(b) if, the order is passed by a Court of Session or Court of an Additional Sessions Judge or of an Assistant Sessions Judge, to the High Court Division.

(2) Nothing in this Act shall affect the powers of the High Court Division to revise any order passed by a Court under this Act.”

To try a child for commission of offences, in the ordinary course is, therefore, statutorily prohibited under the Children Act, 1974.

60. An issue similar to the one with which we are concerned herein had arisen before the Supreme Court of Bangladesh and High Court division in ***W.P.(C) No.1341/2000*** in the matter of ***Bangladesh Legal Aid and Services Trust and Anr. V. Bangladesh & Ors***. The judgment of the Division Bench was delivered on 6th November, 2001.

61. In this case, the petitioner no. 2 stood convicted and sentenced by a judgment dated 1st December, 1998 passed by Mr. Iktedar Ahmed, Bicharak (District and Sessions Judge), Nari-O-Shishu Nirjatan Daman Bishesh Adalat, Comilla, in Nari-O-Shishu Case No.4 of 1998. The petitioner no. 2 stood convicted for offences under Sections 5 (kha) and 5 (gha) of the Nari-O- Shishu Nirjatan (Bishesh Bidhan) Ain, 1995 and was sentenced to suffer imprisonment for life as well as the fine and in default to undergo other punishments of lesser duration on other counts. In this case, the Special Tribunal itself found that the petitioner no. 2 was 14-15 years of age at the time of occurrence. A challenge was laid to this conviction and sentence on the grounds that the same was violative of the aforenoticed statute as well as of the repeated directions of the High Court

Division; was unconstitutional; was without jurisdiction and of no legal effect. The Bangladesh court had referred to the pronouncement of the Supreme Court of India reported at *AIR 1986 SC 1777 Sheela Barse & Ors. vs. UOI & Ors*. while referring to the issue as to whether an accused, if found to be a child, could be lodged in prison. It was further observed that the Children Act, 1974 provided different processes and modes of arrest, detention and trial of the juvenile offenders being below 16 years of age. Consequently, the court found that the trial of the petitioner no. 2 held by the Special Tribunal was "without jurisdiction" and without lawful authority; and that as such the impugned judgment and order of conviction was void ab initio. The court referred to other precedents wherein also it had been so ruled as far as conviction of persons who were below the age of 16 years at the time of trial was concerned. The court also found that there was no evidence to support the order of conviction and sentence as the charge against the petitioner no. 4 had not been proved by even a single witness and that the order of conviction had been passed on the basis of his uncorroborated confessional statement which was made when the convict was a minor and hence, did not have the required competency to make it. The court found that the child had no maturity to understand the consequences of such statement and that he had, in a written statement, categorically stated that the statement was procured through coercion,

threat and false promises to release him on giving the statement, before the magistrate as tutored by the police.

62. The principle reiterated by the court was that the very trial of the person was in violation of the statute and therefore completely without jurisdiction. This case however, does not deal with a issue of plea of juvenility being taken post conviction in proceedings in the appellate court. It also does not envisage the conditions anticipated by the Indian legislature and the prescription in Section 20 of the JJ Act, 2000. The Indian legislature has empowered the court to complete the pending proceedings, record findings and thereafter to forward the juvenile and the proceedings to the JJB for passing the sentence.

63. In this regard, Mr. Dayan Krishnan, learned Additional Standing Counsel has also referred to us the consideration by the Supreme Court of the United States of America in the judgment reported at ***383 U.S. 541 : 16 L.Ed.2d 84*** in the case titled ***Morris A. Kent, Jr. v. United States***. In this case, the petitioner was prosecuted for house breaking, robbery and rape. The United States District Court for the District of Columbia entered a judgment of conviction on counts of housebreaking and robbery. The defendant appealed to the United States Courts of Law for the District of Columbia Circuit which affirmed the judgment of the trial

court and granted certiorari. The Supreme Court held that the District of Columbia Juvenile Court Act allowed the Juvenile Court to waive jurisdiction over the juvenile after full investigation. As a condition to a valid waiver order, the juvenile was entitled to a hearing including access by his counsel to the social records and probation or similar reports, which presumably were considered by the court. It was also observed that the same included a statement of reasons for the decision of the juvenile court. In this case, the juvenile court waived jurisdiction and the petitioner was indicted by a grand jury of the United States District Court for the District of Columbia on eight counts. The petitioner moved the District Court to dismiss the indictment on the ground that the waiver was invalid and also moved the District Court to constitute itself a Juvenile Court in accordance with law. The District Court denied the motion to dismiss the indictment and ruled that it would not 'go behind' the Juvenile Court judge's recital that his order was entered 'after full investigation'. The District Court held that the petitioner was guilty and sentenced to imprisonment. The challenge to the findings was laid before the Supreme Court inter alia on the ground that his detention and interrogation were unlawful and that the police failed to follow the procedure prescribed by the Juvenile Court and also that they failed to notify the parents of the juvenile. The petitioner attacked the waiver of jurisdiction on the ground that

no hearing was held; that no findings and no reasons were given by the Juvenile Court for the waiver and because counsel was denied access to the social service file.

64. The Supreme Court ruled that full investigation was required before waiver of jurisdiction and that the same could not be granted as a matter of routine. The procedural regularity required satisfaction of the basic requirements of due process and fairness as well as compliance of the statutory requirement of a 'full investigation'. Though the statute conferred substantial degree of discretion on the juvenile court, it did not confer upon it a license for arbitrary procedure and did not permit the juvenile court to determine in isolation and without the participation or any representation of the child, of the 'critically important' question whether a child would be deprived of the special protection and provisions of the Juvenile Court Act. The Supreme Court concluded that the petitioner was by statute entitled to certain procedures and benefit as a consequence of his statutory right to be tried by the exclusive jurisdiction of the juvenile court and as a condition to a valid waiver order, the petitioner was entitled to a hearing, including access by his counsel to the social records and probation and similar reports which were presumably considered by the court and to a statement of reasons.

65. This pronouncement was relied upon by the US Supreme Court in the later decision reported at ***387 U.S. 1 (1967) In Re Gault*** wherein observations of the court on the history underlying the development of the juvenile court movement shed valuable light on the ethos and background behind similar provisions in other jurisdictions which observations read as follows :-

> "3. In such proceedings the child and his parents must be advised of their right to be represented by counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child. Mrs. Gault's statement at the habeas corpus hearing that she had known she could employ counsel, is not "an `intentional relinquishment or abandonment' of a fully known right."
> 4. The constitutional privilege against self-incrimination is applicable in such proceedings: "an admission by the juvenile may [not] be used against him in the absence of clear and unequivocal evidence that the admission was made with knowledge that he was not obliged to speak and would not be penalized for remaining silent." "[T]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. . . . [J]uvenile proceedings to determine `delinquency,' which may lead to commitment to a state institution, must be regarded as `criminal' for purposes of the privilege against self-incrimination." Furthermore, experience has shown that "admissions and confessions by juveniles require special caution" as to their reliability and voluntariness, and "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." "[S]pecial problems may arise with respect to waiver of the privilege by or on behalf of children, and . . . there may well be some differences in technique but not in principle depending upon the age of the child and the presence and competence of parents. . . . If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary. . . ." Gerald's admissions did not [387 U.S. 1,

3] measure up to these standards, and could not properly be used as a basis for the judgment against him."

66. The jurisprudence from Bangladesh as well as judgments by the Supreme Court of the United States of America manifest the concern of the courts and authorities with the rights of the child, specially those in conflict with law. Strict compliance with the letter and spirit of legislation stipulating special procedures and courts for trials of juvenile offenders has been mandated in all jurisdictions. Failure to do so has rendered the trial court proceedings and judgments as violative of law and held to be without jurisdiction.

67. These very concerns are manifested in the statutory provisions in India as well as the jurisprudence which has developed here as would be evident from the following discussion. As is evident from Principle IX of Rule 3 of the JJ Rules reproduced above, there can be no waiver of the rights of the juvenile in India.

VIII. Judicial precedents

68. There is scanty jurisprudence with regard to the pleas of juvenility being raised in criminal appeals against conviction by the convicts before the High Courts, though several instances of such plea being pressed before the Supreme Court are available. It would be useful to examine such jurisprudence to answer

the question as to whether this court can order removal of the disqualification of conviction for criminal offences or is it essential for this Court to refer the matter to the Juvenile Justice Board upon arriving at a conclusion that the appellant/convict was a juvenile on the date of commission of the offence.

69. Prior to the JJ Act, 2000 coming into force, these issues were dealt under the Children's Act as applied and were in vogue in the different states.

70. The examination of the jurisprudence on the subject would show that the Supreme Court has followed three approaches in dealing with the issue of juvenility when it has been raised before it for the first time. We have available a set of cases whereby the Supreme Court upheld the conviction of the individual while quashing/suspending the sentence without making any reference to the removal of the disqualification which is attached to the conviction and/or the sentence.

71. In the second set of cases we find that the Supreme Court has referred the cases to the Juvenile Justice Board for appropriate action. It is obvious therefrom that, in such cases, the Juvenile Justice Board while passing the requisite order under Section 15 of the JJ Act, would also pass an order under Section 19(2) for removal of any disqualification attached to the conviction.

72. The third approach followed by the Supreme Court in some cases is to itself direct that any disqualification incurred shall be removed.

73. We would firstly discuss the approaches adopted by the Supreme Court before adverting to the few instances where the such issue has arisen before the High Courts.

Conviction sustained, sentence set aside.

74. The judgment of the Supreme court reported at ***(1981) 4 SCC 149 Jayendra & Anr. V. State of U.P.*** has been placed before us. In this case a question arose in the context of a plea of juvenility by the appellant Jayendra that he was about 15 years on the date of the offence and sought benefit under the Uttar Pradesh Children Act, 1951. Section 29 of this Act was similar to the provisions of Section 7A of the JJ Act. Section 29 provided that if the child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for a period of stay as will not exceed his attaining the age of 18 years. Jayendra was 23 years of age on the date of the report of his juvenility plea and therefore, in view of the provision of Section 29 of the Uttar Pradesh Children Act, 1951 could not be sent to an approved school. For this reason, the Supreme

Court upheld the conviction of the appellant of Jayendra and quashed the sentence imposed upon him and directed that he shall be released forthwith.

75. In ***(1989) 3 SCC 9 Bhoop Ram v. State of U.P.*** the appellant stood convicted with five others for commission of offences under Section 148, 302, 323, 324 read with Section 149 of the IPC and sentenced to life imprisonment besides concurrent sentences for lesser terms of imprisonment. Placing reliance on a school certificate showing his date of birth, the appellant had claimed that he should have been treated as a child within the meaning of Section 2(4) of the U.P. Children Act, 1951. The learned Sessions Judge did not go into the question as to whether the appellant was below 16 years of age on the date of offence and proceeded to award the lesser sentence of imprisonment of life instead of the extreme penalty of death sentence. In the face of this plea, at the stage of admission of the Special Leave Petition, the Supreme Court was of the view that the Sessions Judge, Bareilly be called upon to enquire into the age of the appellant and submit a report with the option to have the appellant examined by the Chief Medical Officer of the State. Liberty was given to the parties to adduce evidence on this aspect. In this case, the Chief Medical Officer, Bareilly gave a certificate that the appellant appeared to be 30 years of age as on 30th April, 1987. The appellant had placed only his school certificate before the Sessions Judge to prove

that he had not completed 16 years on 3rd October, 1975, the date of commission of the offence. This certificate was rejected by the learned Sessions Judge on the ground that it was not unusual that in schools, ages are understated by one or two years for future benefits.

76. The Supreme Court rejected the finding of the learned Sessions Judge and opined that the appellant could not have completed 16 years of age on 3rd October, 1975 and ought to have been treated as a child within the meaning of Section 2(4) of the U.P. Children Act and dealt with u/s 29 of the Act because of the following three factors :-

> "i) The first is that the appellant has produced a school certificate which carries the date 24-6-1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars."
>
> (ii) The second factor is that the Sessions Judge has failed to bear in mind that even the Trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on 12-9-1977 on the ground the appellant was a boy of 17 years of age. The observation of the trail judge would lend credence to the appellant's case that he was less than 10 years of age on 3-10-1975 when the offences were committed.
>
> (iii) The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on 30-4-1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief

> Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts."
>
> (Underlining by us)

77. It is noteworthy that in ***Bhoop Ram v. State of U.P***. (Supra), the Supreme Court followed the reasoning of ***Jayendra & Another v. State of U.P.*** (Supra). On the date of consideration of the appeal by the Supreme Court, the appellant Bhoop Ram was aged more than 28 years of age and there was no question of his being sent to an approved school in accordance with the provisions of U.P. Children Act, 1951 and for being detained there. The appellant had crossed the maximum age of detention at the time of consideration of the issue.

78. Therefore, so far as the manner in which the appellant ***Bhoop Ram*** was to be treated as he was more than 28 years of age at the time of consideration of the case by the Supreme Court is concerned, the court adopted the course followed in ***Jayendra v. State of U.P.****(*supra*)* and observed that the course which was to be followed is to *sustain the conviction but however, quash the sentence imposed on the accused*. The court accordingly sustained the conviction of the appellant under

all the charges framed against him but quashed the sentence awarded to him and directed his release forthwith. In this regard, the court had observed as follows:-

> "8. Since the appellant is now aged more than 28 years of age, there is no question of the appellant now being sent to an approved school under the U.P. Children Act for being detained there. In a somewhat similar situation, this Court held in *Jayendra v. State of U.P. (1981) 4 SCC 149 : 1982 Cri LJ 1000* that where an accused had been wrongly sentenced to imprisonment instead of being treated as a "child" under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith. The appeal is therefore partly allowed in so far as the sentence imposed upon the appellant are quashed."
>
> (Underlining by us)

79. At this stage, we may notice another pronouncement of the Supreme Court. An issue of juvenility was raised for the first time before the Supreme Court of India by the appellant in the judgment reported at ***(2005) 12 SCC 615 Gurpreet Singh vs. State of Punjab*** and the connected appeal. In this regard, the court laid down the procedure which was required to be followed under the following terms:-

> "18. ……It appears that this point was not raised either before the trial court or the High Court. But it is

> **well settled that in such an eventuality, this Court** should ***first consider the legality or otherwise of conviction of the accused and in case the conviction is upheld, a report should be called for from the trial court on the point as to whether the accused was juvenile on the date of occurrence*** *and upon receipt of the report, if it is* found that the accused was juvenile on such date and continues to be so, he shall be sent to juvenile home. But ***in case it finds that on the date of the occurrence, he was juvenile but on the date this Court is passing final order upon the report received from the trial court, he no longer continues to be juvenile, the sentence imposed against him would be liable to be set aside."***
>
> (Emphasis by us)

80. It is noteworthy that the dicta in ***Bhoop Ram*** (Surpa) is cited as an authority for suspension of sentence while upholding the conviction in cases involving the Juvenile Justice Act, 1986 as well.

81. The Supreme Court had observed that it is well settled that in such an eventuality, the court should first consider the legality, or otherwise, of the conviction of the accused. In case the conviction is upheld, a report should be called for from the trial court on the point as to whether the accused was juvenile on the date of occurrence and upon receipt of the report, if it is found that the accused was juvenile on such date and continues to be so, he shall be sent to juvenile home. In case the court finds that on the date of the occurrence, he was juvenile but on the date the Court is passing the final order upon the report

received from the trial court, he no longer continues to be juvenile, the sentence imposed against him would be liable to be set aside.

82. In ***(2010) 5 SCC 344 Dharambir v. State (NCT of Delhi) & Anr.***, the court reiterated the well settled principles that a claim of juvenility would be maintainable and can be raised before any court or forum and has to be recognised at any stage even after disposal of the case. In this case, by the impugned judgment, the High Court had upheld the conviction of the appellant for commission of the offences under Sections 302 and 307 read with Section 34 of the Indian Penal Code, 1860. The appellant had been sentenced to imprisonment for life under sections 302/34 IPC as well as fine. Additionally, for commission of offence under Section 307/34 IPC, he stood sentenced to undergo rigorous imprisonment for a term of seven years and fine. The Supreme Court noted that at the time of pronouncement, the appellant had undergone an actual period of sentence of 2 years, 4 months and 4 days and was now aged about 35 years. The court was of the view that keeping in mind the age of the appellant, it may not be conducive to the environment in the Special Home and to the interest of other juveniles housed in the Special Home, to refer him to the Board for passing orders for sending the appellant to Special Home or for keeping him at some other place of safety for the remaining period of less than eight months, the maximum period

for which he can now be kept in either of the two places in accordance with the provisions of the Juvenile Justice Act, 1986. For these reasons, while sustaining the conviction of the appellant for the aforestated offences, the sentence imposed upon him was quashed and he was directed to be released forthwith.

83. We find that this issue arose in yet another pronouncement reported at ***(2012) 8 SCC 800 Babla @ Dinesh v. State of Uttrakhand*** before the Supreme Court of India. The plea of juvenility had been raised by the appellant before the High Court which stood rejected by the High Court on the ground that it was not raised before the trial court and no evidence has been adduced in defence and no suggestion had been made to the witnesses. The High Court had also relied on the statement made by the appellant with regard to his age being 20 years at the time of recording of his statement under Section 313 of the Code of Criminal Procedure. The High Court had examined the appeal on merits in great detail. The appellant had challenged the rejection of the juvenility plea by the High Court. The Supreme Court directed an inquiry to be conducted with regard to the age of the appellant on the date of commission of offence and to submit a report as envisaged under Rule 12 of the JJ Act. The Supreme Court accepted the inquiry report dated 3rd December, 2011 wherein it was concluded that the appellant was aged between 10 to 15 years on the date of commission of offence and therefore, held that on the

date of the offence the appellant was juvenile. The court noted that the appellant had undergone actual period of sentence of more than three years out of the maximum period prescribed under Section 15 of the Juvenile Justice Act. In these circumstances, while sustaining the conviction of the appellant, the sentence awarded to him by the trial court (which stood confirmed by the High Court) was set aside.

84. Again in an judgment reported at ***(2012) 8 SCC 763 Vijay Singh v. State of Delhi*** the issue of juvenility was raised for the first time only before the Supreme Court. In this case as well, in para 7 of the pronouncement, the Supreme Court noted that there was overwhelming evidence led before the trial court which on being convinced of proof of guilt against the appellant, had convicted him for the offence under Section 307 of the IPC and had imposed a sentence of five years rigorous imprisonment with fine. The Supreme Court also noted that on a detailed analysis of the evidence available on record and the injuries sustained by the victim, supported by medical evidence, the High Court had dismissed the appeal. In these circumstances, the Supreme Court noted that it did not find any scope to interfere with the order of conviction imposed on the appellant. After returning this finding, the court proceeded to examine the impact of the plea of juvenility raised by the appellant for the first time before it.

In paras 14 and 15 of the pronouncement, the court considered the juvenility plea of the appellant and concluded that he was below 18 years on the date of commission of offence and therefore, the provisions of the JJ Act, 2000 would apply in full force in his case. Having so concluded in para 16, the court held the following: -

> "16. Having regard to the above conclusion, in the normal course we would have remitted the matter to the Juvenile Justice Court, Itawa for disposal in accordance with law. However, since the offence was alleged to have been committed more than 10 years ago and having regard to the course adopted by this Court in certain other cases reported in *Jayendra* v. *State of U.P.* [(1981) 4 SCC 149 : 1981 SCC (Cri) 809] , *Bhoop Ram* v.*State of U.P.* [(1989) 3 SCC 1 : 1989 SCC (Cri) 486] which were subsequently followed in *Bhola Bhagat* v.*State of Bihar* [(1997) 8 SCC 720 : 1998 SCC (Cri) 125] , *Pradeep Kumar* v. *State of U.P.* [1995 Supp (4) SCC 419 : 1995 SCC (Cri) 395] , *Upendra Kumar* v. *State of Bihar* [(2005) 3 SCC 592 : 2005 SCC (Cri) 778] and *Vaneet Kumar Gupta* v. *State of Punjab* [(2009) 17 SCC 587 : (2011) 1 SCC (Cri) 1092] , we are of the view that at this stage when the appellant would have now crossed the age of 30 years, there is no point in remitting the matter back to the Juvenile Justice Court. Instead, following the abovereferred decisions, appropriate orders can be passed by this Court itself."

85. The precedents noted in para 16 of ***Vijay Singh*** (supra) above were considered at length. In each of these cases, the evidence before the trial court and the conviction by court stood considered and upheld by the High Court. The conviction was therefore, sustained by the Supreme Court. However, the sentence awarded to them had been quashed. Consequently, in para 27 of [***Vijay Singh***

(Supra)] also while upholding the conviction of the appellant, the Supreme Court set aside the sentence imposed upon him and directed that he be released forthwith, if not required in other cases.

86. It is important to note that so far as the judgments of the Supreme Court in ***Jayendra; Vijay Singh; Bhoop Ram; Dharambir; Babla @ Dinesh*** as well as ***Gurpreet Singh*** (Supra) are concerned, the issue of juvenility was being considered by the Supreme Court. In all these judicial precedents, the convictions by the trial courts had been challenged before the High Courts in appeals. The evidence recorded before the trial courts stood tested and considered in the appeals by the High Courts. The findings of guilt of the appellants were found justified by the High Courts which had considered the evidence and rejected the appeals of these persons. It was in these circumstances, while confirming the conviction, the Supreme Court had set aside the sentence imposed upon the appellants.

Conviction set aside

87. We may now consider the second approach which has been followed in some cases by the Supreme Court. In some cases, the court not only accepted the plea of juvenility but also set aside the conviction. In this regard we may usefully

refer to the judgment reported at ***1984 (Supp.) SCC 228 Gopinath Ghosh v. State of West Bengal*** which arose in the context of the West Bengal Children Act.

In this case, the entire trial was conducted before the Additional Sessions Judge, Nadia who found that the appellant had caused the fatal injury to the deceased in furtherance of the common intention of the three accused and convicted all of them for commission of an offence under Section 302 read with Section 34 of the Indian Penal Code and sentenced each of them to suffer imprisonment for life. The High Court rejected the appeal filed by the appellant who thus moved the Supreme Court. At this stage, a plea was urged on his behalf that as on 19th August, 1974, the date of the offence, the appellant was aged below 18 years and was therefore a child entitled to the benefit of the benevolent provisions of the West Bengal Children Act, 1959.

88. The Supreme Court remitted the issue for decision on the age of the appellant after recording evidence to the Sessions Judge, Nadia. Section 24 of the West Bengal Act contained a non-obstante clause and took away the jurisdiction of the court to impose the sentence of death on a juvenile delinquent as well as the power to impose a sentence of imprisonment or commitment to prison in default of payment of fine or in default of furnishing security of a juvenile delinquent. As

per the proviso to sub-clause 2 of Section 24, the court was empowered to impose a sentence of imprisonment on the juvenile delinquent if the conditions prescribed therein are satisfied. An application to the court to report the case to the State Government and direct the juvenile delinquent to such custody as it may deem fit was made.

89. Section 4 conferred power on the State Government to establish juvenile courts by a notification in this behalf. It was held that, from a reading of the statute, that a juvenile delinquent ordinarily has to be released on bail irrespective of the nature of the offence alleged to have been committed, unless it is shown that there appears reasonable grounds for believing that the release was likely to bring him under the influence of any criminal or expose him to moral danger or defeat the ends of justice. Section 25 forbade any trial of a juvenile delinquent and only an inquiry could be held in accordance with the provisions of the Code of Criminal Procedure ('Cr.P.C.') for the trial of a summons case. The court called for a report of the Additional Sessions Judge, which, on unassailable evidence, established that, on the date of offence, the appellant was a juvenile delinquent. The Supreme Court held that the learned Magistrate therefore, could not have committed his case to the court of sessions in view of the statutory provisions and thus the entire trial of the appellant was without jurisdiction and vitiated. The Supreme Court

therefore set aside as unsustainable the conviction of the appellant for having committed an offence under Section 302 IPC and the consequential sentence for imprisonment for life imposed by the learned Additional Sessions Judge as well as confirmed by the High Court.

As to what should follow, in para 12 of the judgment, the court directed thus:-

> "12. The next question is what should be the sequel to our decision ? The appellant has been in prison for some years. But neither his antecedents nor the background of his family are before us. It is difficult for us to gauge how the juvenile court would have dealt with him. Therefore, we direct that the appellant be released on bail forthwith by the learned Additional Sessions Judge, Nadia. The case is remitted to the learned Magistrate for proceeding further in accordance with law keeping in view the provisions of the Act."
>
> (Underlining by us)

90. A similar view was taken in the pronouncement of the Karnataka High Court reported at ***ILR 2005 KAR 1572 State of Karnataka v. Harshad.*** The High Court reiterated the legislative mandate that Juvenile Justice Board having been constituted, it therefore alone would have the exclusive power of dealing with the issue of juvenility and to that extent the jurisdiction of any court including that of the Sessions Court or Fast Track Court is barred.

91. In ***(1981) 4 SCC 210 Raghbir v. State of Haryana,*** a question was raised as to whether a person under 16 years of age and accused of offence under Section 302 of the Penal Code can get the benefit of the Haryana Children Act, 1974. The High Court sustained the conviction and the sentence. The discussion by the Supreme Court in para 19 of the pronouncement sheds valuable light on the issue under consideration and reads as follows:-

> "19. Mr Bhagat in support of his contention has relied on a Full Bench decision of the Madhya Pradesh High Court in *Devi Singh* v. *State of M.P* [1978 Cri LJ 585] . The Full Bench of three judges considered the jurisdiction of the Madhya Pradesh Bal Adhiniyam, 1970 (15 of 1970) to try a juvenile offender for offences punishable with death or imprisonment for life. There was a difference of opinion.
>
> The view of the majority was that the juvenile courts constituted under the Madhya Pradesh Bal Adhiniymn have exclusive jurisdiction to try a delinquent child (a person under sixteen years of age) for all offences *except* those punishable with death or imprisonment for life even after the commencement of the Code of Criminal Procedure, 1973 (Act 2 of 1974), while the minority view of Verma, J. was to the contrary. With respect, the majority view is erroneous. Verma, J. has observed as follow:
>
> "...Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the new Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. It is in this light that the question has to be examined with a view to determine whether there is any such

irreconcilable conflict so as to attract Article 254 of the Constitution. This is the real question for decision."

He has held:

"Applying the tests indicated by the settled principles, I have no hesitation in holding that there is no real conflict between the provisions of the new Code, particularly Section 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the new Code clearly save any special or local law like the Bal Adhiniyam and Section 27 of the new Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in Section 5 of the new Code. There being thus no conflict or repugnancy, the question of Article 254 of the Constitution being attracted does not arise."

With respect, Verma, J. has expressed the correct opinion."

Matter referred to the Juvenile Justice Board

92. We may now examine the third approach, which is to refer the matter to the Juvenile Justice Board.

93. Section 7(A) of the Juvenile Justice (Care and Protection of Children) Act, 2006 permits the claim of juvenility to be made by a person at any stage of proceedings and before any court, even after the disposal of the case.

94. In the judgment reported at ***(2009) 17 SCC 574 Rambir Singh & Ors. v. State of Uttar Pradesh***, upon the plea of juvenility being raised before it, the court

sustained the conviction. Instead of suspending the sentence, the matter was referred to the Juvenile Justice Board for the purposes of sentencing. The case of the appellant no.4 who had taken the plea of juvenility was transmitted to the Juvenile Justice Board for passing appropriate orders in terms of Section 15 of the Act read with Rule 98 of the Juvenile Justice (Care and Protection of Children) and Rules framed thereunder.

95. Thus the Juvenile Justice Board had to take action under Section 15 of the Juvenile Justice Act read with Rule 98 of the Rules framed thereunder. This procedure requires to be followed upon plea of juvenility being raised before the court.

IX. <u>Procedure to be followed when the plea is raised in an appeal before the High Court and matter of removal of disqualification.</u>

96. The Supreme Court has also made observations on the manner in which the High Court would proceed where the plea of juvenility is raised for the first time before it in an appeal against the conviction and order of sentence by the trial court. In the case reported at ***(2012) 8 SCC 34 Kalu @ Amit v. State of Haryana***, the court noted that on 7th April, 1999 when the offence in question took place, Kalu @ Amit was a juvenile. He was convicted by the trial court on 7th September,

2000. The Juvenile Justice Act came into force on 1st April, 2001. The appeal of Kalu @ Amit was decided by the High Court on 11th July, 2006.

97. We have set out Section 20 of the JJ Act in extenso hereinabove, which provides the manner in which the trial in court of a person, who is juvenile on the date of which the Juvenile Act came into force, is to proceed. In ***Kalu @ Amit v. State of Haryana (Supra)***, the Supreme Court had considered the provisions of Section 20 thus:-

> "21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

22. As regards the Explanation to Section 20 of the Juvenile Act, it would be appropriate to quote observations of this Court in *Hari Ram v. State of Rajasthan [(2009) 13 SCC 211 : (2010) 1 SCC (Cri) 987]* . The observations read thus: (SCC p. 223, para 39)

> "39. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but ***even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1-4-2001,*** when the Juvenile Justice Act, 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, ***Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."***

23. It is clear, therefore, that the Juvenile Act is intended to protect the juvenile from the rigours of a trial by a criminal court. It prohibits sentencing of a juvenile and committing him to prison. As its Preamble suggests it seeks to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation."

(Emphasis supplied)

98. After noting the above principles, so far as the facts of ***Kalu @ Amit*** (Supra) are concerned**,** the Supreme Court observed as follows:-

"24. The instant offence took place on 7/4/1999. As we have already noted Kalu @ Amit was a juvenile on that date. He was convicted by the trial court on 7/9/2000. The Juvenile Act came into force on 1/4/2001. The appeal of Kalu @ Amit was decided by the High Court on 11/7/2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu @ Amit was a juvenile at the time of commission of offence had come to light the ***High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act (See Hari Ram)***.

25. As noted above, the Board could have sent Kalu alias Amit to a special home for a maximum period of three years and under Section 19, it would have made an order directing that the relevant record of conviction be removed. Since on the date of offence, Kalu alias Amit was about 17 years, 5 months and 23 days of age, he could have been directed to be kept in protective custody for 3 years under the proviso to Section 16 as the offence is serious and he was above 16 years of age when the offence was committed. But he certainly could not have been sent to jail. Since the plea of juvenility was not raised before the High Court, the High Court confirmed the sentence which it could not have done. None of the above courses can be adopted by us, at this stage, because Kalu alias Amit has already undergone more than 9 years of imprisonment. In the peculiar facts and circumstances of the case, therefore, we quash the order of the High Court to the extent it sentences accused Kalu alias Amit to suffer life imprisonment for the offences under Section 302 read with Section 34 IPC. After receipt of report from the Additional Sessions Judge, Rewari, vide order dated 14-12-2009, we had ordered that Kalu alias Amit be released on bail. If he has availed of the bail order, his bail bond shall stand discharged. If he has not availed of the bail order, the prison authorities are directed to release him forthwith, unless he is required in some other case. Accused Kalu alias Amit shall not incur any disqualification because of this order. Criminal Appeal No. 1467 of 2007 filed by the accused Kalu alias Amit is allowed to the above extent."

(Emphasis by us)

Even in ***Kalu @ Amit*** (Surpa), the Court did not quash the conviction. Kalu @ Amit had the benefit of consideration of his appeal against the conviction by the High Court.

99. Section 20 mandates the criminal court to continue with the trial as if the JJ Act "***had not been passed;*** if the criminal court finds that the juvenile has committed an offence, "***it shall record such finding;*** thereafter "***instead of passing any sentence in respect of the juvenile;*** forward the juvenile to the Juvenile Justice Board which shall pass an order in respect of that juvenile. So far as manner in which the Board would consider the matter is concerned, Section 20 mandates that the Juvenile Justice Board shall pass an order in respect of that juvenile in accordance with the provision of the JJ Act "***as if it had been satisfied on an inquiry"*** under the Act that a juvenile had committed an offence.

100. In ***Kalu @ Amit v. State of Haryana (supra),*** the Supreme Court had mandated that if the plea of juvenility is raised at the appellate stage before the High Court, it would have to record its findings on merits and decide on the guilt or innocence of the appellant. However, upon confirming the conviction, the sentence has to be set aside and the case has to be forwarded to the Juvenile Justice Board for passing an order permissible under Section 15 of the JJ Act.

X. Discussion in the present Case

101. From the above narration, it is evident that the prohibition upon the court trying a juvenile for commission of an offence is absolute. There is no option but to deal with the juvenile in accordance with the provisions of the Juvenile Justice Act. Failure to do so would be contrary to specific statutory provisions and result in violation of statutory provision and denial of legal protections to the juvenile.

102. In the instant case, the trial judges proceeded with the trial oblivious of the fact that juveniles were arraigned before them and that they were not authorized to conduct such trials. The JJ Act on the other hand had taken away the jurisdiction of the court to conduct the trials.

103. The right to appeal against the findings and sentence of the criminal court are provided by Section 374 of the Code of Criminal Procedure. No statutory provision has been pointed out whereby such a right has been taken away.

This court is seized of such statutory appeals filed by the appellants assailing their convictions by the criminal courts.

104. Given the judicial pronouncements and the statutory provisions, the appellants have been set at liberty. Three options are available - would it be proper

to hold that the appellants are to be denied their statutory right to challenge the judgments convicting them on merits or is the trial to be held to be without jurisdiction or can we test the appeal on merits?

105. In the cases before the Supreme Court wherein the conviction was sustained, challenges were laid to the judgments of the High Courts in appeals against convictions. Thus, orders of conviction by the trial court had been challenged before the High Court which convictions by the trial courts stood tested and sustained by the High Courts.

106. It is also necessary to bear in mind that under Rule 3(IX), the legislature has mandated that it is not open to a 'juvenile in conflict with law' by himself or by the competent authority, or anyone acting or claiming on his or her behalf to waive any of the rights conferred under the statute. At this stage, reference can usefully be made to some of the judicial pronouncements placed before us.

107. We may at this stage also refer to Section 20 of the JJ Act which has been set out hereinabove. This provision is restricted in its applicability to proceedings in respect of a juvenile pending in any court, in any area, on the date on which this Act comes into force in that area. The legislature has mandated that such proceedings would continue in that court as if the Act had not been passed and if

the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of the juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under the Act that *'a juvenile' has committed the offence'*. By virtue of Section 20, in cases against juveniles pending before criminal courts on the date the enactment came into force, the legislature itself permits completion of the juveniles' trial before the regular court. The principle as statutorily prescribed, say by the Bangladesh Statute noticed above, that in view of the JJ Act, the trial would be rendered as being without jurisdiction, is therefore not applicable in absolute terms.

108. Keeping in view the scheme of the statute, as well as the spirit, intendment and purpose of the legislation, the trial of the juvenile in these circumstance before the criminal court cannot be faulted.

109. From the above discussion, it is quite clear that once a plea of juvenility is raised in an appeal against conviction before the High Court, the course to be followed by the High Court is clear. The High Court is required to cause the inquiry in terms of Section 7(A) of the JJ Act to give a finding upon the correctness of the plea of juvenility to be conducted. The High Court also has to

examine the legality and validity of the conviction of the juvenile. In case the High Court concludes that the juvenile is innocent and accepts the appeal, the order on sentence is automatically quashed. However in case the High Court maintains the conviction, the sentence is required to be suspended and the matter sent to the Juvenile Justice Board for passing an order on sentence as well as the order under Section 19 of the JJ Act.

110. However, this might not be feasible in all cases. There is an important circumstance which needs bearing in mind. How is the High Court to proceed if at the stage when the plea is raised or when the appellate court is passing the order, the appellant has undergone sentence beyond the maximum prescribed under the Juvenile Justice Act, 2000? In such eventuality is it still necessary to send the matter to the Juvenile Justice Board for consideration of sentence and passing order under Section 15 of the Juvenile Justice Act?

111. In this regard it is also necessary to refer to Sub Section 2 of Section 6 which empowers the High Court and the Court of Session to exercise all powers conferred on the Juvenile Justice Board when examining an appeal revision of otherwise. The courts thus stand empowered to pass such orders qua the person asserting a plea of juvenility on the date of the offence, prescribed under Section

15 of the JJ Act, of course bearing in mind the age of the person and sentence already undergone by him.

112. Therefore if the conviction is maintained, then the Appellate Court would also examine the facts and circumstances of the case, and if deemed appropriate refer the juvenile appellant to the Juvenile Justice Board for consideration of the sentence. However, if the appellant has ceased to be a juvenile on the date of consideration of the sentence, that is, he has crossed 18 years - the maximum age for which he/she could be lodged in the special home or if the appellant has already undergone a sentence equal to or more than that prescribed under the Juvenile Justice Act, then the court while setting aside the sentence would be required to mould relief appropriately.

113. The first question framed for consideration by us in the opening part of this judgment is answered thus.

XI. Removal of disqualification attached to the conviction- power of appellate court?

114. We now turn to the consequential question arising from the above. The Juvenile Justice Act provides removal of disqualification attached to the conviction upon a juvenile as a statutory right under Section 19 of the JJ Act. The JJB is

mandatorily required to make an order directing that the relevant records of the conviction shall be removed after expiry of the period of appeal or such reasonable period as may be prescribed under the rules.

115. The above narration would also show that in ***Kalu @ Amit v. State of Haryana (supra)*** the Supreme Court was of the view that given the fact that Kalu @ Amit had already undergone more than 9 years of imprisonment, it would not be appropriate to send the matter back to the Juvenile Justice Board. The Supreme Court upheld the conviction (which had been sustained by the High Court) and quashed the order of the High Court to the extent it sentenced Kalu @ Amit to suffer life imprisonment. In these circumstances, the Supreme Court also directed that the juvenile shall not incur disqualification as a consequence of the conviction.

116. Our attention is also drawn on the two High Court cases of relevance in relation to removal of disqualification. In both these cases, the High Courts themselves passed order Section 19, instead of referring the matter to the relevant Juvenile Justice Board. In a case reported at ***(2012) Cri.L.J. 759 Ranjeet Kumar Jha v. State of Bihar,*** the Patna High Court found the appellant to be a juvenile. It upheld the conviction, and set aside the sentence. It also ordered that the juvenile

shall not suffer disqualification, if any, attached to the conviction. This was in accordance with Section 19 of the Juvenile Justice Act.

117. While considering this issue in Criminal Appeal No.365/2010, decided on 22nd November, 2012 ***H C Sharma d/o Chand Pasha v. State of Karnataka,*** the Karnataka High Court was faced with a situation where a prayer was made before it to erase the disqualification that would arise because of conviction. The appellant in that case had been convicted of offences under the Indian Penal Code, as well as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Court upheld the conviction, and suspended the sentence. The court took note of Section 19 of the Juvenile Justice Act and ruled that the conviction shall not result in any disqualification.

118. The statutory provision does not state that the responsibility to enforce this statutory right is only upon the Board. As per Section 19(2), the Board only ensures the implementation of the statutory right by ordering removal of records. The High Court is as much under an obligation to uphold the right, as is the Board. On contrary Section 6(2) specifically reiterates the jurisdiction of the High Courts as well as Sessions Courts to pass all orders which the JJB stands statutorily empowered to do so. The High Court therefore also empowered to pass orders for

removal of disqualification attaching as a result of the conviction as well as destruction of records which the JJB is statutorily mandated to do under Section 19 of the JJ Act.

119. We may note that this situation could arise not only in appeals against conviction by the criminal courts in serious offences which are placed before the Division Bench of the High Court as in the present case, but could very well arise in any appeal against the convictions as well as criminal revision before the learned Single Judge. Given the enunciation of law in ***Hari Ram v. State of Rajasthan & Anr.(Supra),*** the plea can be raised in revisions and appeals before the Sessions Courts as well . The dicta laid down by the Supreme Court and the statutory position crystallized by us hereinabove would apply to all appeals and revisions before the learned Single Judge of the High Court as well as in all proceedings before the Sessions Courts as well.

The second question, which was noticed by us in the opening part of this judgment, also stands answered thus.

XII. <u>Duty of the Trial Court</u>

120. We find in several of these cases that the plea of juvenility is raised in appeals before us after the person concerned may have undergone a long period of

incarceration which would have had an irreversible impact on his/her life as well as personality.

121. What is the primary duty of the trial court then? In this regard, the observations of the Supreme Court in para 13 of the judgment reported at ***1984 (Supp) SCC 226 Gopinath Ghosh v. State of West Bengal*** made as back as in the year 1984 deserve to be noticed in extenso and read thus :-

> "13. …….. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, the Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of a very socially progressive statute by taking shield behind the technicality of the contention being raised for the first time in this Court. A way has therefore, to be found from this situation not conducive to speedy disposal of cases and yet giving effect to the letter and the spirit of such socially beneficial legislation. We are of the opinion that ***whenever a case is brought before the Magistrate and the accused appears to be aged 21 years as below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special acts dealing with juvenile delinquent are in force. If necessary, the Magistrate may refer the accused to the Medical Board or the Civil Surgeon, as the case may be, for obtaining credit worthy evidence about age. The Magistrate may as well call upon accused also to lead evidence about his age. Thereafter, the learned Magistrate may proceed in accordance with law. This procedure, if properly followed, would avoid a journey upto the Apex Court and the; return journey to the grass-root court***. If necessary and found expedient, ***the High Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.***"
>
> (Emphasis by us)

122. In the judgment reported at ***1995 Supp.(4) SCC 419 Pradeep Kumar v. State of U.P.*** and connected appeals, the observations of the court in para 18 so far as the mandatory requirement of holding an inquiry especially by the High Courts and subordinate courts also deserve to be considered in extenso and read as follows :-

> "18. Before parting with this judgment, we would like to reemphasis that when a plea is raised on behalf of an accused that he was a "child" within the meaning of the definition of the expression under the Act, it becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, to hold an inquiry itself for determination of the question of age of the accused or cause an enquiry to be held and seek a report regarding the same, if necessary, by asking the parties to lead evidence in that regard. Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the court where such a plea is raised to examine that plea with care and it cannot fold its hands and without returning a positive finding regarding that plea, deny the benefit of the provisions of an accused. The court must hold an enquiry and return a finding regarding the age, one way or the other. We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the Legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated. ***The High Courts may issue administrative directions to the subordinate courts that whenever such a plea is raised before them and they entertain any reasonable doubt about the correctness of the plea, they must as a rule, conduct an inquiry by giving opportunity to the parties to establish their respective claims and return a finding regarding the age of the concerned accused and then deal with the case in the manner provided by law***. "

(Emphasis supplied)

Thus, the Supreme Court has held that if a plea of juvenility is raised before the court, it is the obligation of the court to mandatorily hold an inquiry and return a finding regarding the age in one way or the other. The court has also reiterated its earlier directions to the High Court issuing administrative directions to the subordinate courts with regard to such pleas.

123. It is, therefore, well settled that it is the duty of the Magistrate to conduct an inquiry about the age of an accused whenever a case is brought before the Magistrate. The Supreme Court has held that the trial court is not required to await an application taking the plea that the accused is juvenile from the accused or the State. On the contrary, the inquiry is required to be undertaken as soon as it appears to the court from the physical appearance of the accused when he is produced before it that he may be a juvenile.

This duty also enjoins the Sessions Courts conducting trials as well as appeals, revisions to conduct such inquiry when cases are brought before it.

124. We find that this directive of the Supreme Court is being unfortunately completely ignored. We have not come across a single case where the trial court has undertaken a *suo motu* inquiry. There are instances when convicts were produced before us even at the appellate stage, after several years in the court

system, their physical appearance still suggested that they were juveniles on the date of the offence. Our impression were confirmed upon the *suo motu* inquiry directed by us. By then the appellants, juveniles at the time of offence have undergone long year's incarceration. Irreversible damage may have resulted to the juveniles.

125. Ashok Kumar @ Ganja (one of the respondents in Death Reference No.5/2010) is one such person. Our doubt from his physical appearance that he may have been as juvenile on the date of the offence was confirmed in the medical examination.

126. The directions by the Supreme Court bind every court. The mandate of the law too requires strict compliance. This is more so in the context of social welfare legislation as the erstwhile Children Act of different states, and now, the Juvenile Justice Act. Apart from the resultant prejudice to the welfare of a juvenile who is subjected to a criminal trial in violation of the law, there is an unnecessary drain on scarce judicial resources. Valuable judicial time is expended on proceedings which are without jurisdiction at not only the trial court level but at the appellate stage as well. These apprehensions find articulation by the Supreme Court in the judgment rendered in ***Gopinath Ghosh*** (Supra).

127. We therefore, emphasize the duty of the trial courts to ensure that an inquiry in accordance with the provisions of the JJ Act, 2000 is undertaken at the earliest when an accused brought before it appears to be of 18 years or below.

128. In ***Hari Ram v. State of Rajasthan (supra)*** certain observations of the Supreme Court, with regard to questions which were fundamental to the understanding and implementation of the object with which the JJ Act, 2000 was enacted, deserve to be considered in extenso and reads thus:-

> "2. The said law which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different therefrom.
>
> 3. The very scheme of the aforesaid Act is rehabilitatory in nature and not adversarial which the courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mindset of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000."

129. The Statement of Object and reasons of the JJ Act, 2000 records the legislature's concerns with the much greater attention that is required to be given to children in conflict with law as well as those in need of care and protection. The justice system as available for adults is not considered suitable for being applied to

a juvenile or the child or any one on their behalf, including the police, voluntary organizations, social workers, or parents and guardians, throughout the country.

130. Article 40 of the United Nations "*Convention on the Rights of the Child*" enjoins on state parties to take certain actions with regard to children against whom there may be allegations of infringing penal laws. The relevant extract of Article 40 in this regard reads as follows:-

> "Article 40
>
> 1. States parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
>
> (a) No child shall be alleged as, be accused of, or recognised as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
>
> xxxx
>
> 3 States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

> (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law…;"

Children's legislations are the result of the State's concern about these issues.

131. The Constitution of India places the primary responsibility on the State of ensuring that all needs of the children are met with and their basic human rights are fully protected. As a result, the Juvenile Justice Act of 1986 was enacted to provide neglected or delinquent juveniles the due care, protection, treatment, development and rehabilitation for adjudication of certain matters relating to and disposition of delinquent juveniles. In order to confirm to the set of standards for securing the best interest of the child, the Government of India re-enacted the existing statutes to give effect to the aforenoticed international instruments and enacted the Juvenile Justice (Care & Protection of Children) Act of 2000.

132. The importance of a prompt determination of juvenility is not only in the interest of the juveniles but has a deep impact on society inasmuch as efforts of reform are made. Public employment require disclosure of implications in cases, arrest, conviction, sentence etc. at the time of recruitment. Section 19 refers to

removal of disqualification attaching to conviction of offence enabling juveniles who may have been in conflict with law, to thus seek public employment.

133. In this background, in failing to abide by the statutory mandate and the directions of the Supreme Court, the trial courts are failing to discharge constitutional duties as well as responsibility in public law of ensuring the best interest of a child in conflict with law. The District Judges concerned shall ensure that the directions of the Supreme Court as well as the observations made by us which are extracted by us (in para 118 to 131) are complied with.

XIII. Result

134. In the cases before us, such pleas have been taken in appeals against award of life sentences and even death sentences as detailed above. We *suo moto* caused inquiry in respect of two persons who stood sentenced to death. We have found them to be juveniles on the date of offences after conducting the inquiries in respect of their ages.

135. It is noteworthy that so far as Amar Bhadur Thapa, Ravinder, Sheela, Jagtar and Ashok@ Ganja are concerned, they have undergone imprisonment much beyond the maximum period of permissible detention of three years under the

Juvenile Justice (Care and Protection) Act, 2000. It would therefore, be impermissible to deprive such persons of their liberty, after having undergone confinement beyond the three years permitted by the J.J. Act. In any case, all the persons with whom we are concerned in these cases are over 18 years of age now and cannot be lodged in the special homes.

136. We find that Imran Khan has undergone imprisonment of only 2 years, 2 months and 9 days as on 24th December, 2010. The JJ Act prohibits sentence of imprisonment absolutely. The maximum that can be ordered under Section 15 of the JJ Act against a juvenile is a direction that the juvenile be sent to special home for completing the period of three years of detention. So far as Imran Khan is concerned, such a course may be available. However, as on 24th December, 2010, when his case of juvenility was considered , Imran Khan had completed 24 years of age. Therefore, it would not be permissible to send him to a special home where only juveniles are kept.

137. It is noteworthy that Sheela, Jagtar and Ashok @ Ganja (respondents in Death Sentence Reference No.5/2010) have not filed appeals assailing their conviction by the judgment dated 29th November, 2010 in Sessions Case

No.123/2008. This court has accepted the plea in the reference of their having been juveniles on the date of the occurrence.

138. In this background, keeping in view the above discussion and our answer to the questions under consideration, it is directed that the appeals of the appellants are required to be considered on merits. In case this court upholds the judgment of the trial court whereby the appellants have been found guilty of commission of offence, appropriate orders with regard to the sentence as well as removal of disqualification in accordance with Section 19 of the JJ Act would require to be passed.

139. In view of the above discussion, Sheela, Jagtar and Ashok @ Ganja (respondents in Death Sentence Reference No.5/2010) are entitled to an opportunity to file appeals against their conviction for which purpose they would require to be informed of the directions of this court.

140. We make it clear that by this judgment, we do not preclude any of the appellants from withdrawing the appeal or challenge to the judgment whereby they have been convicted by the trial court. A considered submission in this regard would be made by the appellants before the court hearing the appeal which would then pass appropriate orders permitting the withdrawal of the appeal.

141. Given the nature of the question considered and the anguish expressed by the Supreme Court on the failure of trial courts to suo moto take action with regard to determination of juvenility of accused persons, we direct the Registrar General to send copies of the judgment to all District and Sessions Judges for circulation to all judges for information and compliance. The trial courts shall ensure strict compliance with the observations and directions of the Supreme Court and this court noted by us from paras 118 to 131 above.

(GITA MITTAL)
JUDGE

(J.R. MIDHA)
JUDGE

AUGUST 1st, 2014
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