MADHYA PRADESH STATE JUDICIAL ACADEMY,
JABALPUR

READING MATERIAL
ON

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

2022

COMPILED AND EDITED
BY

OFFICERS OF THE ACADEMY

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PART-I

ARTICLES
&
GUIDELINES

STANDARD AND EXTENT OF BURDEN OF PROOF ON THE PROSECUTION *VIS-A-VIS* ACCUSED WITH REFERENCE TO PRESUMPTION U/S 29 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012[*]

– By Gajendra Singh,
President, District Consumer Forum,
Ujjain

Whenever the law places a burden of proof upon a party, a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. When there is ample evidence from both sides, the fate of the case is not determined by presumptions or burdens of proof, but by a careful identification of the true version based, no doubt, on preponderance of probabilities which have to be so compulsive or overwhelming in favour of a conviction as to remove all reasonable doubt. Burden of proof and presumption may become decisive in cases where evidence is equally balanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

The standard and extent of burden of proof on the prosecution vis-a-vis accused with reference to presumption in section 29 of the Protection of Children from Sexual Offences Act, 2012, is a questions which requires deliberation. Section 29 of the Act which envisages such presumption reads as hereunder:

> 29. **Presumption as to certain offences**. – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

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[*] Published in Part I, JOTI Journal December 2012

On plain reading of section 29, it seems that once a charge-sheet is filed against the concerned accused on the allegation of having committed an offence under Sections 3, 5, 7 or 9 of the Act, he shall be presumed to have committed such offence. The word 'prosecution' has been defined in Black's Law Dictionary, Fifth Edition, at page 1099, to mean, a criminal action, a proceeding instituted and carried on by due course of law, before a competent Tribunal for the purpose of determining the guilt or innocence of a person charged with crime. A Constitution Bench of the Supreme Court in the case of ***Thomas Dana Vs State of Punjab, AIR 1959 SC 375*** had an occasion to consider the term 'prosecuted' as employed by Article 20(2) of the Constitution of India, wherein it was observed that 'prosecution' means, a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial. Therefore, it becomes obvious that once an accused is charge-sheeted, he gets prosecuted before competent Criminal Court. Thus, if section 29 were to be given its literal meaning, after filing of charge-sheet, the Court shall proceed to frame a charge. Thereafter, the entire burden to prove innocence would rest upon the accused. In such a scenario, the prosecution may not lead any evidence at all and by virtue of the presumption under section 29, the accused shall straight away be required to establish his innocence by leading defence evidence.

Keeping in view the extra-ordinary nature of the presumption envisaged under section 29, the question to ponder over is whether such literal interpretation of the provision is permissible under the law? or would it be hit by articles 14, 20(3) and 21 of the Constitution of India.

It may be noted here that the presumption raised under section 29 is somewhat similar to the one raised under section 8-A of the Dowry Prohibition Act, 1961, in as much as both the provisions put burden of proving innocence upon the accused. Section 8-A is reproduced hereinbelow.

> 8A. **Burden of proof in certain cases** - Where any person is prosecuted for taking or abetting the taking of any dowry under section 3, or the demanding of any dowry under section 4, the burden of proving that he had not committed an offence under these sections shall be on him.

A casual comparison of two provisions reveals that the presumption envisaged under section 29 of the Act is considerably stronger

than the one raised under section 8-A of the Dowry Prohibition Act, yet, a Full Bench of Karnataka High Court in the case of ***Harikumar v. State of Karnatak, 1995 (1) Crimes 573*** while examining the vires of section 8-A had held that Section 8-A, in its operation, will have to be read down in the light of Sections 2, 3 and 4 of the Act. Once it is so read down, the challenge to the said Section on the anvil of Articles 14, Article 20(3) and Article 21 of the Constitution of India, would not survive.

There is another provision in the Act which militates against giving literal meaning to the section 29. Section 35 (1) of the Act, ordains that the evidence of the child shall be recorded within a period of 30 days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. If the defence were to begin evidence there would be practically no chance of evidence of the child being recorded within a month.

Further, according to section 135 of Evidence Act, 1872 the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and in the absence of any such law by the discretion of the court.

Under the Code of Criminal Procedure, 1973 there is no provision like Order 18 Rule 3 of code of civil procedure, 1908 which authorizes the party upon whom the burden of proving some issues lies to begin at is option. In a sessions trial we have to follow the procedure laid down in sections 225 to 237 chapter XVIII. According to the procedure prescribed in such trials the initial burden is on the prosecution to prove its case beyond reasonable doubt. If we take the ex-facie interpretation of Section 29 then the above- mentioned procedure is to be given a complete go by.

Moreover as held in cases of ***State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede, (2009) 15 SCC 200 (205); Noor Aga v. State of Punjab, (2008) 16 SCC 417*** and ***Jayendra Vishnu Thakur v. State of Maharashtra, (2009) 7 SCC 104*** that even in a case where the burden is on the accused, the prosecution must prove the foundation facts. So in spite of the

presumption of Section 29, initially the prosecution has to prove existence of ingredients constituting the offence beyond a reasonable doubt and thereafter burden of rebuttal shall shift upon the accused.

Thus, on a closer scrutiny, the first-hand impression about the Section 29 gets dispelled. It has to be kept in view that Sections deals with burden of proving innocence in given cases. Therefore the Section, in substance, create a Rule of Evidence and deals with casting of burden of proof in certain cases on the accused. A close reading of the Section shows that merely because the accused is charged with offences under Sections 3, 5, 7 or Section 9 of the Act, the initial burden which is always on the prosecution to prove basic ingredients of the Sections for bringing home the charges to the accused will not get displaced or dispensed with and the provision will have to be read down to that extent.

Now the question arises weather such reading down of section 29, would render it otiose. Section 29 provides that where a person is prosecuted for any of the offences under sections 3,5,7 & 9 of the Act, the Court shall presume that such person has committed the offence unless the contrary is proved. The Apex Court had occasion to consider the effect of phrase "unless the contrary is proved" in ***Dhanvantrai Desai v. State of Maharashtra, AIR 1964 SC 575*** in the context of section 4 of the Prevention of Corruption Act, 1947 (followed in the case of ***Ram Kishan Bedu Rane Vs State of Maharashtra, AIR 1973 SC 246***), and drew a distinction between the presumption under S. 114 of the Evidence Act and a statutory presumption mandatory upon the Court. Repelling the contention that under a statutory presumption the only thing necessary is an explanation or evidence which need be only reasonably true and not necessarily true and thereby throwing a doubt on the prosecution case, it was observed as follows:

> "12. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the

> contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted."

Thus, if the ingredients establishing the offence are proved by the prosecution beyond reasonable doubt, the stage of presumption arises and the accused has to rebut this presumption by 'proof' and not by a bare explanation which is merely plausible by directly establishing the facts which rebut the presumption against him.

The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the character of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. While the mere plausibility of an explanation given by the accused in his examination under Section 313, Cr. P. C. may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the facts presumed, improbable.

Conclusion:

(1) The burden of proving facts constituting offences under ss. 3,5,7 or 9 beyond reasonable doubt shall be upon the prosecution and section 29 of the Act shall have to be read down to that extent.

(2) Once prosecution discharges that burden, presumption envisaged under section 29 shall arise.

(3) Thereafter, the accused shall be required to rebut this presumption by 'proof' and not by a bare explanation which is merely plausible by directly establishing the facts.

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विषय प्रारंभ करने से पूर्व कुछ फिल्मी गानों की पंक्तियों पर आपका ध्यान आकर्षित करवाता हूँ जो इस प्रकार हैं :–

1. बच्चे में है भगवान, बच्चे में है रहमान,
   बच्चा जिसस की शान, गीता इसमें, बाईबल इसमें,
   इसमें है कुरान बोलों बच्चा है महान।
2. जगजीत सिंह की एक गजल के बोल :–
   ये दौलत भी ले लो, ये शोहरत भी ले लो,
   भले छीन लो मुझसे मेरी जवानी,
   मगर मुझको लौटा दो बचपन का सावन,
   वो कागज की कश्ती वो बारिश का पानी।
3. बच्चे मन के सच्चे सारी जग के आँखों के तारे
   ये वो नन्हे फूल हैं जो भगवान को लगते प्यारे।
4. बचपन हर गम से बेगाना होता है,
   जन्म का शुभ दिन हर दिन से सुहाना होता है।
5. जहाँ नारी की पूजा होती है वहाँ भगवान का वास होता है।

उक्त पक्तियों को देखें तो जहाँ एक ओर बच्चा जो कि किसी भी राष्ट्र का भविष्य होता है और वह हर तरह के लोभ कपट से दूर होता है इस कारण उसमें देवताओं का वास बतलाया जाता है। ऐसे ही बच्चों के भोलापन का या अपेक्षाकृत कम सशक्त स्थिति का लाभ लेकर इसी समाज के कुछ लोग उसे अपनी यौन पीपासा को शांत करने का हथियार बना लेते हैं। 6 माह से लेकर 6 साल की छोटी–छोटी बच्चियों के यौन शोषण की खबरें समाचार पत्रों की हेड लाइन के रूप में प्रायः देखने को मिलती है। यहाँ तक कि अब ये बालक घर की चार दीवारी में

भी सुरक्षित नहीं हैं और वहाँ भी वे शोषण का शिकार हो जाती हैं। पुलिस थाना, अस्पताल, स्कूल, कोचिंग क्लास, रेल, सिटी बस, कोई भी स्थान सुरक्षित नहीं बचा है। विगत दिसम्बर 2012 में दिल्ली में हुआ घटनाक्रम सभी को याद होगा।

इन बच्चों की सुरक्षा के लिये The Commissions For Protection Of Child Rights Act, 2005 लाया गया लेकिन इस अधिनियम में बच्चों के विरूद्ध होने वाले अपराध की कार्यवाही शुरू करने की प्रक्रिया एक कमीशन के माध्यम से थी जो प्रभावकारी साबित नहीं हुई। इन सब परिस्थितियों में राष्ट्र के भविष्य बालक को बचाने के लिये बाल दिवस अर्थात 14 नवम्बर 2012 के दिन एक अधिनियम और उसके बनाये गये नियम लागू किये गये जिसका नाम है – लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 और लैंगिक अपराधों से बालकों का संरक्षण नियम, 2012।

प्रायः अधिनियम बन जाते हैं लेकिन उनसे संबंधित नियम नहीं बनते इस कारण कार्यवाही नहीं हो पाती है। लेकिन यह अधिनियम और इसके तहत् बनाये गये नियम एक साथ वर्ष 2012 में लागू हुये जो विधायिका की बालकों के भविष्य के सुरक्षा के प्रति गंभीरता दर्शाता है। भारतीय संविधान के अनुच्छेद 15 (3) के अनुसार राज्य को स्त्रियों और बालकों के लिये विशेष उपबंध बनाने की बात कही गई है। यहां तक की भारतीय संविधान के अनुच्छेद 39 (एफ) के अनुसार प्रत्येक राज्य को अपनी नीति इस प्रकार संचालित करने के लिये कहा गया है जिससे बालकों को स्वतंत्र और गरिमामय वातावरण में स्वस्थ विकास के अवसर और सुविधाएँ दी जाएं और बालकों और अल्प व्यय व्यक्तियों की शोषण से और नैतिक और आर्थिक परित्याग से रक्षा की जाये। इस तरह भारतीय संविधान के मौलिक अधिकारों और राज्य के नीतिनिर्देशक तत्वों में भी बालकों को शोषण से बचाने के लिये उचित प्रावधान किये गये हैं। हमें अधिनियम का उद्देश्य और अधिनियम क्यों लाना पड़ता है यह बात इसलिये समझना आवश्यक है ताकि हम प्रावधानों का उद्देश्यों की प्राप्ति हो सके ऐसा अर्थ लगायें और इस अधिनियम का एक मात्र उद्देश्य लैंगिक अपराधों से 18 वर्ष से कम आयु के बालकों की रक्षा करना है। इस अधिनियम में धारा 2 में कुछ परिभाषायें दी गई हैं जिनमें धारा 2 (डी) में बालक शब्द को परिभाषित किया गया है जिसके अनुसार ''बालक'' या चाइल्ड

से ऐसा व्यक्ति अभिप्रेत है जिसकी आयु 18 वर्ष से कम है। इस प्रकार बालक किसे माना जाये इसको अधिनियम में स्पष्ट कर दिया गया है यहॉ हमें यह तथ्य भी ध्यान में रखना होगा कि 18 वर्ष की उम्र उस दिन देखना है जिस दिन उस बालक के साथ अपराध हुआ जैसा कि न्यायदृष्टांत *i;rki flag fo:) LVV vkQ >kj[k.M] ¼2005½ 3 ,l-lh-lh- 51* में 5 न्यायमूर्तिगण की पीठ ने प्रतिपादित किया है कि यह देखने के लिये की कोई व्यक्ति किशोर है या नहीं अपराध करने की तारीख तात्विक या सुसंगत होती है। उसे प्राधिकारी या न्यायालय के समक्ष पेश करने की तारीख सुसंगत नहीं होती है। जहाँ तक सतत् जारी रहने वाले अपराध का संबंध है जब प्रथम बार अपराध का पता लगा उस तारीख को अपराध की तारीख मान्य की जा सकती है। इस अधिनियम की धारा 2 में जो शेष परिभाषाएँ हैं उन्हें अधिनियम में आगे परिभाषित किया गया है। धारा 2 में केवल यह उल्लेख आया है कि उस शब्द का अर्थ वही है जो संबंधित धारा में है जिस पर आगे चर्चा करेंगे। इस अधिनियम में कुल 46 धाराएँ हैं और कुल 7 नियम बने हैं। अधिनियम कुल 6 अध्यायों में बांटा गया है जिसमें अध्याय 2 में बालकों के विरूद्ध लैंगिक अपराध का उल्लेख है जबकि अध्याय 3 में बालकों का अश्लील साहित्य के प्रयोजन के लिये उपयोग किया जाना दण्डनीय बताया गया है अध्याय 4 दुष्प्रेरण एवं प्रयत्न के बारे में है वहीं अध्याय 5 और 6 अनुसंधान की प्रक्रिया के बारे में। अध्याय 7 विशेष न्यायालय, विशेष लोक अभियोजक और उपधारणाओं के बारे में है जबकि अध्याय 8 में विशेष न्यायालय की प्रक्रिया बताई गई है। अध्याय 9 में विविध प्रावधान हैं। इन सभी प्रावधानों का उद्देश्य किसी भी बालक को विधि विरूद्ध लैंगिक क्रिया कलाप से उत्पीड़न, बालक के शोषण और अश्लील सामग्रियों में उसके शोषण रोकना है।

इस अधिनियम की धारा 3 में प्रवेशन लैंगिक हमला या पेनीट्रेटिव सेक्सुअल असाल्ट को परिभाषित किया गया है जो इस प्रकार है – कोई व्यक्ति ''प्रवेशन लैंगिक हमला'' करता है यदि वह :–

(क) अपना लिंग, किसी भी सीमा तक किसी बालक की योनि, मुंह, मूत्र मार्ग या गुदा में प्रवेश करता है या बालक से उसके साथ या किसी अन्य व्यक्ति के साथ ऐसा करवाता है; या

(ख) किसी वस्तु या शरीर के किसी ऐसे भाग को, जो लिंग नहीं है, किसी सीमा तक बालक की योनि, मूत्र मार्ग या गुदा में घुसेड़ता है या बालक से उसके साथ या किसी अन्य व्यक्ति के साथ ऐसा करवाता है; या

(ग) बालक के शरीर के किसी भाग के साथ ऐसा अभिचालन करता है जिससे कि वह बालक की योनि, मूत्र मार्ग या गुदा में या बालक के शरीर के किसी भाग में प्रवेश कर सके या बालक से उसके साथ या किसी अन्य व्यक्ति के साथ ऐसा करवाता है; या

(घ) बालक के लिंग, योनि, गुदा या मूत्र मार्ग पर मुंह लगाता है या ऐसे व्यक्ति या किसी अन्य व्यक्ति के साथ बालक से ऐसा करवाता है।

अधिनियम की धारा 4 में प्रवेशन लैंगिक हमले के लिये दण्ड निर्धारित किया गया है जिसके अनुसार किसी भी भांति का कारावास जिसकी अवधि 7 वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास तक की हो सकेगी और जो जुर्माने से भी दण्डनीय होगा। इस तरह धारा 4 में प्रवेशन लैंगिक हमले के लिये न्यूनतम 7 वर्ष का दण्ड निर्धारित किया गया है। यह सदैव ध्यान रखना चाहिये प्रायः कई बार इसमें चूक हो जाती है यहां यह भी ध्यान रखना होगा कि इस अधिनियम में विशेष कारण लिखते हुये न्यूनतम से कम दण्ड देने का कोई परन्तुक धारा 4 के साथ नहीं जोड़ा गया है। धारा 3 में जो प्रवेशन लैंगिक हमले की परिभाषा दी है वह धारा 375 भारतीय दण्ड संहिता में बलात्संग की परिभाषा के बिलकुल समान है, केवल भारतीय दण्ड संहिता में कुछ परिस्थितियाँ जोड़ी गई हैं जिसमें उस स्त्री के इच्छा के विरूद्ध उसके सहमति के बिना आदि परिस्थियाँ जोड़ी गई हैं। इसे भी ध्यान में रखना चाहिये।

अधिनियम की धारा 5 में ''गुरूतर प्रवेशन लैंगिक हमला या एग्रिवेटड पेनीट्रेटिव सेक्सुअल असाल्ट'' को परिभाषित किया गया है जिसके अनुसार यदि कोई पुलिस अधिकारी कोई सशस्त्र बल या सुरक्षा बल का सदस्य, लोक सेवक आदि व्यक्ति प्रवेशन लैंगिक हमला करते हैं या कुछ विशेष परिस्थियों में प्रवेशन लैंगिक हमला किया जाता है तो उसे गंभीर माना गया है और धारा 5 में ऐसी 21 विभिन्न परिस्थितियाँ बतलाई गई हैं जिसे गुरूतर प्रवेशन लैंगिक हमला माना गया है। कुल मिलाकर प्रवेशन लैंगिक हमला कब गंभीर होता है यह स्पष्ट किया गया

है। धारा 6 में गुरूतर प्रवेशन लैंगिक अपराध के लिये न्यूनतम 10 वर्ष का कठोर कारावास निर्धारित किया गया है जिसका विस्तार आजीवन कारावास तक हो सकता है और उसमें जुर्माना भी शामिल है। यहां हमें यह ध्यान रखना होगा की उस अपराध के लिये 10 वर्ष का कठोर कारावास निर्धारित है और न्यायालय को इससे कम दण्ड देना को कोई विवेकाधिकार नहीं दिया गया है। धारा 376 (2) भा. द.सं. पर यदि विचार करें तो वह धारा 5 अधिनियम 2012 के समान है और इसका दण्ड भी धारा 6 के समान है।

अधिनियम की धारा 7 में लैंगिक हमला या सेक्सुअल असाल्ट को परिभाषित किया गया है जिसके अनुसार जो कोई, लैंगिक आशय के साथ बालक की योनि, लिंग, गुदा या स्तनों को छूता है या बालक को ऐसे व्यक्ति या अन्य व्यक्ति की योनि, लिंग, गुदा या स्तन छूने के लिए तैयार करता है या लैंगिक आशय के साथ ऐसा कोई अन्य कार्य करता है जिसमें प्रवेशन किए बिना शारीरिक संपर्क अंतर्ग्रस्त होता है, उसके द्वारा लैंगिक हमला किया गया माना जाएगा। धारा 8 में लैंगिक हमले के लिये दोनों में से किसी भी भांति के कारावास से जिसकी अवधि 3 वर्ष से कम नहीं होगी किन्तु जो 5 वर्ष तक की हो सकेगी और जुर्माने देने का भी प्रावधान है। इस तरह धारा 7 के अपराध के लिये 3 वर्ष का कारावास निर्धारित किया गया है। धारा 9 में ऐसी 21 परिस्थितियाँ बतलाई गई हैं जिनमें लैंगिक हमला गुरूतर या एग्रिवेटेड हो जाता है और लैंगिक हमले के गंभीर हो जाने के कारण उसके लिये धारा 10 में न्यूनतम 5 वर्ष के कारावास जो 7 वर्ष तक हो सकेगा और जुर्माना के दण्ड का प्रावधान किया गया है।

अधिनियम की धारा 11 में लैंगिक उत्पीड़न को परिभाषित किया गया है जो इस प्रकार है :–

किसी व्यक्ति द्वारा किसी बालक पर लैंगिक उत्पीड़न किया गया है जब ऐसा व्यक्ति–

(एक) लैंगिक आशय से कोई शब्द कहता है या ध्वनि या अंग विक्षेप करता है या कोई वस्तु या शरीर का भाग इस आशय के साथ प्रदर्शित करता है कि बालक द्वारा ऐसा शब्द या ध्वनि सुनी

जाए या ऐसा अंग विक्षेपया वस्तु या शरीर का भाग देखा जाए; या

(दो) लैंगिक आशय से उस व्यक्ति द्वारा किसी अन्य व्यक्ति द्वारा किसी बालक को अपने शरीर या शरीर का कोई भाग प्रदर्शित करने के लिए कहता है;

(तीन) अश्लील साहित्य के प्रयोजनों के लिए किसी प्रारूप या मीडिया में किसी बालक को कोई वस्तु दिखाता है; या

(चार) बालक को या तो सीधे या इलेक्ट्रॉनिक, अंकीय या किसी अन्य साधनों के माध्यम से बार–बार या निरंतर पीछा करता है या देखता है या संपर्क बनाता है; या

(पांच) बालक के शरीर के किसी भाग या बालक को लैंगिक कृत्य में अंतर्वलित इलेक्ट्रॉनिक फिल्म या अंकीय या अन्य किसी रीति के माध्यम से वास्तविक या बनावटी तस्वीर खींचकर मीडिया का किसी भी रूप में उपयोग करने की धमकी देता है; या

(छः) अश्लील प्रयोजनों के लिए किसी बालक को प्रलोभन देता है या उसके लिए परितोषण देता है।

स्पष्टीकरण – ''लैंगिक आशय'' में अंतर्वलित कोई प्रश्न तथ्य का प्रश्न होगा।

धारा 12 में लैंगिक उत्पीड़न के लिये 3 वर्ष तक के कारावास और अर्थदण्ड का प्रावधान किया गया है। इस अपराध के लिये कोई न्यूनतम दण्ड निर्धारित नहीं किया गया है।

इस तरह अधिनियम का अध्याय 2 को 5 भागों में बाटा गया है और पाँचों भागों में अपराध की परिभाषा और उसके लिये दण्ड निर्धारित किया गया है। अधिनियम के अध्याय 3 में अश्लील साहित्य के लिये बालक का उपयोग करना या ऐसे अश्लील साहित्य का भंडारण करने को दण्डनीन बताया गया है। अधिनियम के अध्याय 3 में धारा 16 में अपराध के दुष्प्रेरण की परिभाषा और धारा 17 में दुष्प्रेरण के लिये दण्ड बताया गया है जबकि धारा 18 में अपराध के प्रयत्न को दण्डनीय बताया गया है। अधिनियम की धारा 33 के अनुसार विशेष न्यायालय अभियुक्त को विचारण के लिये सुपुर्द किये बिना किसी अपराध के लिये संज्ञान ले

सकता है और ऐसा संज्ञान परिवाद पर या पुलिस रिपोर्ट पर दोनों पर ले सकता है। इस तरह न्यायालय को सीधे प्रसंज्ञान लेने का अधिकार प्राप्त है। अभियुक्त को मजिस्ट्रेट द्वारा विशेष न्यायालय को सुपुर्द किया जाये या कमिट किया जाये ऐसा आवश्यक नहीं है। धारा 33 से यह बिलकुल स्पष्ट है। यह प्रावधान इसलिए जोड़ा गया है कि सुपुर्दगी की कार्यवाही में लगा समय बचाया जा सके।

अधिनियम की धारा 28 में इस अधिनियम के अधीन अपराधों का विचारण करने के लिये विशेष न्यायालय गठित करने के प्रावधान हैं और धारा 28 (1) के परंतुक के अनुसार यदि कोई सेशन न्यायालय बालक अधिकार संरक्षण आयोग अधिनियम, 2005 या किसी अन्य विधि के अनुसार पहले से अधिसूचित किया गया है तो उसे इस अधिनियम के लिये विशेष न्यायालय समझा जायेगा। राज्य सरकार ने अधिसूचना क्रमांक एफ नंबर 17 (ई) /38 /2010 /21–बी (1) दिनांक 7 जनवरी 2011 से ''कोर्ट ऑफ सेशन'' जो प्रत्येक सत्र खण्ड में है उसे बालकों का न्यायालय नोटिफाई किया है। अत्एव धारा 28 (1) के अनुसार प्रत्येक सेशन खण्ड में स्थित सत्र न्यायाधीश और प्रत्येक अतिरिक्त सत्र न्यायाधीश इस अधिनियम के अपराध की सुनवाई के लिये विशेष न्यायालय माने जायेंगे।

कभी–कभी ऐसी स्थिति भी बन सकती है कि किसी आरोपी पर इस अधिनियम के अधीन आरोप भी लगाये जाये और भारतीय दण्ड संहिता का भी आरोप लगाये जाये। ऐसी स्थिति में धारा 42 ऐसे वैकल्पिक आरोपों के बारे में दण्ड देते समय ध्यान में रखना चाहिये जिसमें यह कहा गया है यदि कोई कार्य या लोप इस अधिनियम के अधीन और भारतीय दण्ड संहिता के अधीन भी दण्डनीय हो वहां उस अभियुक्त को वह दण्ड दिया जायेगा जो मात्रा में गुरूतर या अधिकतम हो। दण्डादेश देते समय धारा 42 के इस प्रावधान को विशेष रूप से ध्यान में रखना चाहिये। पीड़ित व्यक्ति को विधि व्यवसायी की सहायता लेने का अधिकार भी धारा 40 अधिनियम में दिया गया है और ऐसा विधि व्यवसायी लोक अभियोजन के अधीन रहते हुये कार्य करता है मामले का संचालन लोक अभियोजक करते हैं और न्यायालय के अनुमति से अंतिम तर्क ऐसा विधि व्यवसायी कर सकता है। इसे ध्यान रखना चाहिये और धारा 40 में विधिक सेवा प्राधिकरण से विधि व्यवसायी उपलब्ध कराने का भी प्रावधान किया गया है।

धारा 39 में बालक को विशेषज्ञों की सहायता लेने के प्रावधान किये गये हैं। इसे भी ध्यान में रखना चाहिये। धारा 37 में बंद कमरे में विचारण का संचालन करने के प्रावधान किये गये हैं जिसमें बालक के माता–पिता या बालक के विश्वास का व्यक्ति रह सकता है। यहां तक की धारा 37 में कमीशन पर कथन की कार्यवाही के भी प्रावधान है जिनका उपयोग उचित मामलों में किया जाना चाहिए। धारा 38 में बालक का साक्ष्य अभिलिखित करते समय अनुवादक या द्विभाषायें की या विशेषज्ञ की सहायता लेने के भी प्रावधान है। यदि यह प्रश्न उठे की अपराध कारित करने वाला बालक ही अवयस्क है तब आयु का निर्धारण किशोर न्याय (बालकों की देखरेख व संरक्षण) अधिनियम 2000 (*अब किशोर न्याय (बालकों की देखरेख व संरक्षण) अधिनियम 2015*) के तहत् किया जाता है और यदि वह बालक किशोर पाया जाता है तब मामला किशोर न्याय बोर्ड को भेज दिया जाता है। आयु निर्धारण के समय नियम 12 ध्यान में रखना चाहिए। इस संबंध में नियम 12 किशोर न्याय (बालकों की देख–रेख और संरक्षण) नियम 2007 जिसे आगे केवल नियम कहा जायेगा, सबसे महत्वपूर्ण है जिसके तहत उक्त प्रश्न उत्पन्न होने पर एक जांच गठित की जाती है जिसमें निम्नलिखित साक्ष्य लिया जाता है :–

1. मैट्रिक परीक्षा या उसके समकक्ष परीक्षा का प्रमाण पत्र यदि उपलब्ध हो अेण उसके अनुपस्थिति में,
2. प्रथम बार के स्कूल जो कि प्ले स्कूल न हो का जन्म तिथि संबंधी प्रमाण पत्र,उसकी अनुपथिति में,
3. जन्म प्रमाण पत्र जो निगम या नगर पालिका प्राधिकारी या पंचायत द्वारा दियागया हो।
4. और उक्त तीनों साक्ष्य के न होने पर एक सम्यक रूप से गठित मेडिकलबोर्ड की राय।

* *vc vkyd dh vk;q fu/kkj.k dq fy, fd'kksj U;k; ¼ckydksa dh nq[knk[k o lajf{k.k½ vf/kfu;e] 2015 dh /kkjk 94 dk vuqikyu vifjgk;Z gSA*

नियम 12 का सार यहां दिया गया है और इसमें केवल चार प्रकार के साक्ष्य उम्र के बारे में निर्धारक मानी गई है और उनका क्रम भी निर्धारित है जिसे ध्यान में

रखते हुए किसी भी मजिस्ट्रेट को जिसके समक्ष किशोर अवस्था का दावा किया जाता है एक जांच करना होती है और यह निष्कर्ष देना होता है की संबंधित व्यक्ति किशोर है या नहीं। यदि वह किशोर पाया जाता है तो मामला किशोर न्याय बोर्ड को भेजा जायेगा अन्य दशा में कार्यवाही निरंतर जारी रखी जायेगी।

इस संबंध में नवीनतम वैधानिक स्थिति इस प्रकार है :–

1. न्याय दृष्टांत *y[ku yky fo:) LVVV vkQ fcgkj] ¼2011½ 2 ,l-lh-lh- 151* में यह प्रतिपादित किया गया है कि कोई अभियुक्त चाहे वह 18 वर्ष की उम्र पूर्ण कर चुका हो इस अधिनियम के उद्देश्य से ज्वेनाइल माना जायेगा यदि अपराध करने की तारीख पर वह 18 वर्ष से कम का रहा हो। यदि वह सजा भी भुगत रहा हो तो धारा 15 अधिनियम, 2000 के प्रकाश में उसे 3 वर्ष तक ही संप्रेक्षण गृह में रखा जावेगा। इस मामले में निम्नलिखितन्याय दृष्टांतों पर भी विचार किया गया है :–

2. न्याय दृष्टांत *iwrki flag fo:) LVVV vkQ >kj[k.M ¼2005½ 3 ,l-lh-lh- 551* में पांच न्यायमूर्तिगण की पीठ ने यह प्रतिपादित किया है कि यह देखने के लिए की कोई व्यक्ति किशोर या ज्वेनाइल है या नहीं अपराध करने की तारीख या डेट ऑफ ऑफेन्स तात्विक या सुसंगत तारीख होती है उसे प्राधिकारी या न्यायालय के समक्ष पेशकरने की तारीख सुसंगत नहीं होती है।

3. न्याय दृष्टांत */ke/ohj fo:) LVVV ,u-lh-Vh- nYgh ¼2010½ 5 ,l-lh-lh- 344* में यह प्रतिपादित किया गया है कि सभी लंबित मामले चाहे विचारण, अपील या पुनरीक्षण किसी भी स्टेज पर हो उनमें अपराध की तारीख पर उम्र देखी जावेगी धारा 20 का स्पष्टीकरण बिलकुल साफ है।

4. न्याय दृष्टांत *gfjjke fo:) LVVV vkQ jkt LFkku] ¼2009½ 13 ,l-lh-lh- 211* में यह प्रतिपादित किया गया है कि धारा 2 (के), धारा 2 (आई), 7ए, 20, 49 व नियम 12 व 98 को एक साथ पढ़ने से यह स्पष्ट है कि यदि अपराध की तारीख पर कोई व्यक्ति 18 वर्ष से कम का रहा है तब 1 अप्रैल 2001 को इस अधिनियम के लागू होते ही वह ज्वेनाइल ट्रिट किया जायेगा चाहे उम्र का अभिवाक उसके 18 वर्ष का हो जाने के बाद उठाया गया हो।

5. न्याय दृष्टांत *fodkl pkS/kjh fo:) LVV] ,u-1h-Vh- nYgh ¼2010½ 8 ,l-1h-1h- 508* में यह प्रतिपादित किया गया है कि सतत् जारी रहने वाले अपराधों के मामले में जब प्रथम बार अपराध का पता लगा उस तारीख को अपराध की तारीख मानकर उम्र देखी जावेगी यह फिरौती का मामला था अंतिम बार जब फिरौती मांगी गई वह अपराध की तारीख मान्य की गई।

6. न्याय दृष्टांत *ekgu eaxyh fo:) LVV vkQ ,e-ih-] ,-vkb-vkj- 2010 ,l-1h- 1790* में धारा 302, 304, 324/34 भा.दं.सं. में सजा भुगत रहे आरोपी ने ज्वेनाइल होने का दावा किया जो बाद जांच सही पाया गया। आरोपी धारा 15 अधिनियम, 2000 के तहत अधिकतम 3 वर्ष की अवधि के लिए संप्रेक्षण गृह में रखा जा सकता था। आरोपी 3 वर्ष से अधिक से जेल में था उसे रिहा किया गया। इस संबंध में न्याय दृष्टांत *fct;Un; f1g fo:) LVV vkQ gfj;k.kk] ¼2005½ 3 ,l-1h-1h- 685* अवलोकनीय है।

7. न्याय दृष्टांत *ccy; ik1h fo:) LVV vkQ >kj[k.M] ,-vkb-vkj- 2009 ,l-1h- 314* में मेडिकल बोर्ड की राय पर कैसे विचार किया जाये इस संबंध में प्रकाश डाला है, यह निश्चायक नहीं होती है वातावरण, खानपान आदि का प्रभाव रहता है मेडिकल बोर्ड केवल ओपिनियन देता है।

8. न्याय दृष्टांत *tCcj f1g fo:) fnu'k ¼2010½ 3 ,l-1h-1h- 757* में यह प्रतिपादित किया गया है कि उम्र के निर्धारण नियम 12 के पालना की जायेगी और स्कूल रिकार्ड का इंद्राज कैसे प्रमाणित किया जाये यह बतलाया गया है।

9. न्याय दृष्टांत *jke lqj'k f1g fo:) iHkkr f1g] ¼2009½ 6 ,l-1h1h- 681* में यह प्रतिपादित किया गया है कि नियम 12 में उम्र निर्धारण की जो प्रक्रिया दी है उसे पालन किया जाना है जब स्कूल का प्रमाण पत्र न होया संदेहास्पद हो तब मेडिकल बोर्ड की राय लेते हैं। स्कूल रजिस्टर की प्रविष्टि लोक दस्तावेज नहीं है उसे भी सामान्य दस्तावेज की तरह प्रमाणित करना होगा इस संबंध में *chjn ey f1g fo:) vkun ¼1988½ 1Iyhe;V ,l-1h-1h- 604* अवलोकनीय हैं।

10. न्याय दृष्टांत *,jkrh y{e.k fo:) LVV vkQ ,-ih-] ¼2009½ 3 ,l lh- lh- 337* में किसी व्यक्ति की उम्र की गणना करने की विधि, माह, वर्षऔर दिन पर प्रकाश डाला गया है।

11. न्याय दृष्टांत *dfiy n;xokuh fo:) LVV vkQ ,e-ih-] vkb-,y-vkj-2010 ,e-ih- 2003* में यह प्रतिपादित किया गया है कि धारा 12 अधिनियम, 2000 और धारा 18 एस.सी., एस.टी. एक्ट दोनों के स्कोप अलग–अलग है धारा 12 अधिनियम, 2000 धारा 18 एस.सी., एस.टी. एक्ट पर ओवर राइडिंग इफेक्ट नहीं रखती है।

12. न्याय दृष्टांत *xMM mQ foukn fo:) LVV vkQ ,e-ih-] 2006 ¼1½,e-ih-t-vkj- ,l-,u- 35* में यह प्रतिपादित किया गया है कि ज्वेनाइल के जमानत में गुणदोष नहीं देखना है केवल धारा 12 अधिनियम 2000 की परिधि में विचार करना होता है।

13. न्याय दृष्टांत *gljkt fo:) LVV vkQ ,e-ih-] 2005 ¼2½ ,-,u-t-¼,e-ih½ 407* में यह प्रतिपादित किया गया है कि ज्वेनाइल की जमानत मेनडेटरी है जब तब कि धारा 12 अधिनियम, 2000 में बतलाई परिस्थितियाँ न हो जमानत दी जायेगी। उक्त वैधानिक स्थिति को ध्यान में रखते हुये यदि अपराध की तारीख पर कोई व्यक्ति नियम 12 के तहत की गई जांच और उसमें वर्णित साक्ष्य को लेने के बाद ज्वेनाइल पाया जाता है तो उसका मामला किशोर न्याय बोर्ड को भेजा जायेगा अन्य दशा में कार्यवाही निरंतर रहेगी। धारा 35 में अपराध के संज्ञान से 30 दिन के भीतर बालक का कथन अभिलिखित करना और 1 वर्ष के भीतर विचारण पूरा करने के भी प्रावधान है। धारा 36 में पूर्व में न्यायदृष्टांत *lk{kh fo:) ;fu;u vkQ bfM;k* में दिये निर्देशों को शामिल किया गया है जिसके अनुसार बालक का साक्ष्य जब अभिलिखितकिया जाता है अभियुक्त बालक को देख न सके और उसका कथन भी सुन सके ऐसी व्यवस्था करने के प्रावधान हैं। बालक के कथन लेखबद्ध करने की विशेष प्रक्रिया भी धारा 33 में बताई गई है जो अधिनियम की एक और विशेषता है।

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अधिनियम के मुख्य उल्लेखनीय बिन्दु :–

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1. धारा 19 अधिनियम 2012 के अनुसार यदि इस अधिनियम में उल्लेखित कोई अपराध किया गया है या किये जाने की आशंका हो तब कोई भी व्यक्ति जिसने पीड़ित बालक भी शामिल है घटना की रिपोर्ट निम्नलिखित में से किसी का भी कर सकता है :–
2. विशेष किशोर पुलिस यूनिट या स्पेशल ज्वेनाइल पुलिस यूनिट (SJPU)
3. स्थानीय पुलिस
4. धारा 19 (2) के अनुसार ऐसी रिपोर्ट को एक नंबर दिये जाने और उसे लेखबद्ध करने के प्रावधान है सूचना देने वाले को पढ़कर सुनाई जाती है। धारा 19 (3) के अनुसार यदि रिपोर्ट बालक ने की है तो उसको सरल भाषा में लिखने और धारा 19 (4) के अनुसार रिपोर्ट यदि ऐसी भाषा में है जो बालक नहीं समझ सकता है तो इसके लिए अनुवादक या द्विभाषी या उपलब्ध कराने के भी प्रावधान है।
5. धारा 19 (5) के अनुसार यदि संबंधित बालक की देखरेख और संरक्षण की आवश्यकता पुलिस को प्रतीत होती है तो वह कारण लेखबद्ध करने के पश्चात् 24 घंटे के भीतर अर्थात् रिपोर्ट के 24 घंटे के भीतर बालक को देखरेख और संरक्षण उपलब्ध करवाएगा।
6. धारा 19 (6) के अनुसार 24 घंटे के भीतर मामले की सूचना बालक कल्याण समिति और विशेष न्यायालय को देने के प्रावधान है।

धारा 19 के उक्त प्रावधानों से यह स्पष्ट होता है कि घटना के बाद या घटना की संभावना पर यदि कोई रिपोर्ट होती है तो उसे लिखने, किशोर को देखरेख और संरक्षण उपलब्ध कराने के प्रावधान किये गये हैं। साथ ही

बालक यदि रिपोर्ट की भाषा नहीं समझता है तो उसे अनुवादक उपलब्ध कराने के भी प्रावधान हैं जो इस अधिनियम की एक अलग ही विशेषता है।

इस प्रकार रिपोर्ट या घटना की सूचना के समय से ही बालक को संरक्षण उपलब्ध कराने के प्रावधान हैं और उसके हितों की रक्षा के प्रावधान किये गये हैं। माननीय सर्वोच्च न्यायालय ने यह अनुभव किया कि शोषित बालकों की रिपोर्ट पुलिस या विशेष किशोर पुलिस यूनिट तक नहीं पहुंच पा रही है इसलिए उन्होंने कुछ निर्देश या डायरेक्शन भी जारी किये हैं जो न्यायदृष्टांत *'kdj fd 'kkj jko [kkM fo:) LVV vkQ egkjk"V 2013 ,-vkb-vkj- ,l-1h-MCY;-2668* में दिये गये हैं जो इस प्रकार है :–

Considering fact that many of child abuse cases go unreported and preventive action is seldom given importance and taken care of, the Court issued following directions :-

(1) The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping utmost secrecy to the nearest Special Juvenile Police Unit (S.J.P.U.) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family

members.

(2) Media personnels, persons in charge of hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of S. 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with S. 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring it to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

(6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, S.C.P.C.R., Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organisations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

(8) The Central Government and the State Governments are directed to constitute SJPUs in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J.J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

(9) The Central Government and every State Government should take all measures as provided under S. 43 of the Act 32 of 2012 to give vide publicity of the provisions of the Act through media including television, radio and print media, at @page-SCW2671 regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

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यह अधिनियम की एक अन्य विशेषता है जिसमें मीडिया या होटल या लॉज या अस्पताल या क्लब या स्टूडियो या फोटोग्राफिक संबंधित सुविधा आदि पर यह बाध्यता डाली गयी है कि यदि किसी सामग्री या वस्तु का उपयोग बालक के यौन शोषण के संबंध में है जिसमें अश्लील साहित्य बालक या बालिका का अश्लील प्रदर्शन भी शामिल है इसकी जानकारी SJPU या स्थानीय पुलिस को उपलब्ध करायेगा।

इस तरह यदि किसी बालक या बालिका के यौन शोषण संबंधी कोई भी जानकारी उक्त में से किसी को भी हो तो वह तत्काल पुलिस या SJPU को जानकारी देने के लिए बाध्य किये गये हैं इस तरह अधिनियम में यह ऐसी विशेषता है जिसमें संबंधित साक्षी पर ही यह बाध्यता डाली गयी है कि वह जानकारी पुलिस को उपलब्ध करायेगा। यहाँ तक की जानकारी उपलब्ध न कराने पर धारा 21 में 6 माह तक के कारावास या जुर्माना के भी प्रावधान किये गये हैं।

धारा 21 के अनुसार अगर धारा 19 (1) के तहत अपराध की रिपोर्ट जानकारी होने के बाद भी यदि कोई व्यक्ति नहीं करता है तो उसे भी दण्डित करने का प्रावधान है।

धारा 21 (2) के अनुसार यदि कोई कम्पनी या संस्था का भारसाधक उसके अधीनस्थ के संबंध में धारा 19 (1) की रिपोर्ट नहीं करता है तो उसके लिए भी दण्ड के प्रावधान किये गये हैं।

धारा 21 (3) के अनुसार किसी बालक पर यह प्रावधान लागू नहीं है। इस तरह आम मामलों में पुलिस साक्ष्य खोजती है जबकि इस अधिनियम में साक्षी पर यह भार डाला गया है कि वह पुलिस को जानकारी दे कि उसके पास बालक के यौन शोषण की साक्ष्य है।

मिथ्या सूचना के लिए दण्ड यह अधिनियम की एक अन्य विशेषता है कई बार अधिनियम के प्रावधानों का दुरूपयोग भी होता है जैसे की 498 ए भारतीय दण्ड संहिता के मामले में देखा जाता है इसी को ध्यान रखते हुए अधिनियम में विधायिका ने धारा 22 में यह प्रावधान किया गया है यदि मिथ्या परिवाद या मिथ्या सूचना किसी व्यक्ति को अपमानित करने, बदनाम करने या धमकाने के लिए की जाती है तो उसमें भी दण्ड के प्रावधान है। इस तरह अधिनियम का दुरूपयोग रोकने के बारे में भी व्यवस्था की गयी है।

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धारा 23 अधिनियम 2012 में मीडिया पर भी रिपोर्ट प्रकाशित करने के बारे में प्रक्रिया निर्धारित की गयी है। जिसके अनुसार किसी बालक के संबंध में कोई भी रिपोर्ट या टीका–टिप्पणी पूर्ण और अधिप्रमाणित सूचना के बिना नहीं की जा सकती है।

बालक की पहचान प्रकट नहीं की जा सकती है। जब तक की न्यायालय अनुमति न दें। जिसमें बालक का नाम, पता, परिवार का विवरण विद्यालय या पड़ोसी का नाम भी शामिल है जिससे बालक की पहचान हो सकती है। यह अधिनियम की एक अन्य विशेषता है जो ऐसे बालक का सम्मान की रक्षा के लिए बनाया गया है इसके उल्लंघन पर धारा 23 (4) में दण्ड का प्रावधान भी किया गया है।

धारा 23 (3) अधिनियम में यह भी प्रावधान है कि प्रकाशक या स्वामी अपने कर्मचारी के कार्य या लोप के लिए संयुक्त रूप से दायी होते हैं बहुत सी बार प्रकाशक या स्वामी छोटे कर्मचारियों पर दायित्व डालकर अलग हो जाते हैं। इसे अधिनियम में ध्यान रखा गया है।

अधिनियम के अध्याय 6 में बालक का कथन अभिलिखित करने की प्रक्रिया बतलायी गयी है। धारा 24 (1) के अनुसार अनुसंधान के दौरान बालक का कथन उसके निवास पर या ऐसे स्थान पर जिस पर वह साधारणतः निवास करता है या उसके पसन्द के स्थान पर लेने के प्रावधान है और यह कथन भी जहाँ तक संभव हो सके महिला पुलिस अधिकारी जो उपनिरीक्षक पंक्ति की हो उसी के द्वारा लेने के प्रावधान है।

धारा 24 (2) के अनुसार बालक का कथन अभिलिखित किये जाते समय संबंधित पुलिस अधिकारी वर्दी में नहीं रहेगा। यह प्रावधान इसलिए किया गया है कि सामान्यतः बच्चों में पुलिस को लेकर भय होता है और यह भय नहीं न रहें शायद इसलिए यह प्रावधान किया गया है।

धारा 24 (3) के अनुसार पुलिस अधिकारी पर यह दायित्व डाला गया है कि बालक का कथन लेते समय वह अभियुक्त के सम्पर्क में नहीं आने पाये यह प्रावधान बालक की सुरक्षा के लिए किया गया है ताकि उस पर किसी प्रकार का भय न रहे।

धारा 24 (4) के अनुसार किसी भी बालक को किसी भी कारण से रात्रि में पुलिस स्टेशन में निरूद्ध नहीं किया जायेगा।

धारा 24 (5) में पुलिस अधिकारी पर यह दायित्व भी डाला गया है कि पब्लिक मीडिया में बालक की पहचान न होने पायें जब तक की विशेष न्यायालय अन्यथा निर्दे ा न दें।

इस तरह पीड़ित बालक का संरक्षण अनुसंधान के दौरान करने का विशेष प्रावधान किया गया है जो इस अधिनियम की एक अलग ही विशेषता है।

धारा 164 एवं 207 दण्ड प्रक्रिया संहिता के बारे में धारा 25 (1) के अनुसार मजिस्ट्रेट पर यह दायित्व डाला गया है जैसा बालक ने बोला है उसी प्रकार से उसका कथन अभिलिखित करे और ऐसे कथन लेखबद्ध करते समय अभियुक्त के अधिवक्ता उपस्थित नहीं रह सकते हैं।

धारा 25 (2) के अनुसार बालक और उसके अभिभावक या प्रतिनिधियों को अंतिम प्रतिवेदन प्रस्तुत हो जाने पर धारा 207 के तहत प्रतिलिपि दिलवाने का प्रावधान किया गया है यह अधिनियम की एक अन्य विशेषता है। अब तक दण्ड प्रक्रिया संहिता में केवल अभियुक्त की धारा 207 दण्ड प्रक्रिया संहिता के

तहत अभियोग पत्र और अन्य दस्तावेजों की निःशुल्क प्रतियां दिलाने के प्रावधान थे।

लेकिन अधिनियम में पीड़ित बालक को भी ऐसी प्रतिलिपियां दिलवाने का विशेष

प्रावधान किया गया है। एक प्रश्न यह उत्पन्न हो सकता है यह प्रतिलिपियाँ पीड़ित बालक तक कैसे भिजवायी जायें क्योंकि अभियोग पत्र प्रस्तुत होते समय पीड़ित बालक मजिस्ट्रेट के सामने नहीं होता है। चूंकि अधिनियम की धारा 35 (1) के अनुसार विशेष न्यायालय द्वारा अपराध का संज्ञान लेने के 30 दिन के भीतर बालक का कथन अभिलिखित करने का प्रावधान है, अतः उस समय जब बालक कथन देने उपस्थित होता है तब यह प्रतिलिपियां दिलवायी जा सकती हैं या अनुसंधान अधिकारी के माध्यम से या डाक द्वारा भेजी जा सकती है।

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धारा 26 में संबंधित पुलिस अधिकारी और मजिस्ट्रेट पर यह कर्त्तव्य भी डाला गया है कि बालक का कथन लेखबद्ध करते समय ऐसा व्यक्ति उपस्थित रहे जिस पर बालक भरोसा करता है जैसे बालक के माता–पिता या कोई अन्य व्यक्ति। यह प्रावधान इसलिए किया गया है कि बालक बिना किसी भय के या अपने परिचितों की उपस्थिति में खुलकर घटना के बारे में बतला सके।

धारा 26 (2) में अनुवादक या द्विभाषाये की सहायता कथन के समय लेने के प्रावधान है यहां तक की धारा 26 (3) के अनुसार यदि बालक शारीरिक या मानसिक रूप से निशक्त है तब विशेष शिक्षक या बालक के हावभाव से परिचित व्यक्ति की सेवायें लेने के भी प्रावधान है। यह प्रावधान आवश्यकता के नियम के आधार पर बनायें गये हैं ताकि घटना के बारे में बालक का पूर्ण और स्पष्ट कथन अभिलेख पर आ सके यहां तक की धारा 26 (4) में यदि संभव हो तो कथन आडियो–वीडियो, इलेक्ट्रानिक माध्यम से लिया जाये यह प्रावधान इसलिए किया गया है ताकि वास्तव में बालक में किस प्रकार कथन दिये हैं इसका रिकार्ड रहे।

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धारा 27 में बालक की चिकित्सा परीक्षण धारा 164 ए सी.आर.पी.सी. के अनुसार करने के प्रावधान है चाहे प्रथम सूचना पंजीबद्ध हुई हो या नहीं।

धारा 27 (2) में यह प्रावधान भी है यदि पीड़ित कोई बालिका है तो महिला डॉक्टर द्वारा उसका परीक्षण करवाया जाएगा।

धारा 27 (3) बालक का परीक्षण माता–पिता या बालक के विश्वास के व्यक्ति की उपस्थिति में करने के प्रावधान है।

धारा 27 (4) में यह प्रावधान भी है कि यदि बालक के माता–पिता या कोई उसके विश्वास का व्यक्ति उपलब्ध नहीं है तब किसी महिला की उपस्थिति में बालक का परीक्षण किया जाएगा जिसका नाम उसी चिकित्सा संस्था के प्रमुख द्वारा सुझाया जाएगा।

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इस अधिनियम की यह एक और विशेषता है जिसके तहत अधिनियम में उपधारणाएं जोड़ी गयी हैं पहली धारा 29 के तहत है जिसके अनुसार धारा 3, 5, 7 और 9 के अपराध या उनके दुष्प्रेरण या उनके प्रयत्न के मामले में विशेष न्यायालय यह उपधारणा करेगा की ऐसे व्यक्ति ने अपराध किया है जब तक की इसके विरूद्ध साबित नहीं किया जाता।

धारा 29 की उपधारणा को लागू करते समय संबंधित न्यायालय को यह ध्यान रखना चाहिए की प्रथम दृष्टया अपराध के तत्वों को प्रमाणित करके भार अभियोजन पर होता है। यदि अभियोजन अपराध के घटक युक्तियुक्त संदेह से प्रमाणित कर देता है तब अभियुक्त पर यह प्रमाण भार चला जाता है कि वह इसके विपरीत साबित करे और यह प्रमाणभार धारा 30 (2) की अपेक्षा के अनुरूप उस स्तर के समकक्ष होना चाहिए जो स्तर अधिसंभावनाओं की प्रबलता से उच्च स्तर का प्रमाण भार होता है।

धारा 30 में आपराधिक मनःस्थिति की उपधारणा का प्रावधान है जिसके अनुसार यह उपधारित किया जाएगा कि अभियुक्त ने पीड़ित मन स्थिति से कार्य किया है जिसमें आशय ज्ञान हेतु विश्वास शामिल है।

धारा 30 (2) के तहत अभियुक्त यह प्रतिरक्षा ले सकेगा कि उसने आपराधिक मनस्थिति के बिना कार्य किया है लेकिन उसे युक्तियुक्त संदेह से परे इस तथ्य को प्रमाणित करना पड़ेगा।

इस तरह धारा 29 और 30 अधिनियम की अन्य विशेषताएं हैं जो आज्ञापक उपधारणा के बारे में है।

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धारा 31 अधिनियम के अनुसार विशेष न्यायालय के समक्ष कार्यवाहियों में दण्ड प्रक्रिया संहिता लागू होगी और यदि अधिनियम में अन्य उपबन्ध है तो वह लागू होंगे और अभियोजन का संचालन करने वाले व्यक्ति लोक अभियोजक समझा जाएगा।

विशेष लोक अभियोजक धारा 32 अधिनियम में राज्य सरकार पर विशेष अभियोजन नियुक्त करने का दायित्व डाला गया है। जो ऐसे अधिवक्ता हो सकते हैं जैसे विधि व्यवसाय का 7 वर्ष से अधिक अनुभव रखते हैं।

यदि विशेष लोक अभियोजक नियुक्त नहीं भी किया गया हो तब भी धारा 31 के प्रकाश में जो भी लोक अभियोजक उपस्थित होती है उसी के माध्यम से त्वरित कार्यवाही आगे बढ़ाना चाहिए।

धारा 33 में विशेष न्यायालय की प्रक्रिया बतलायी गयी है जिसे ध्यान में रखना

चाहिए और अपने इस कर्त्तव्य का विशेष न्यायालय को दृढ़ता से पालन करना चाहिए।

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नियम 7 में विशेष न्यायालय को पीड़ित बालक को अंतरिम प्रतिकर देने की शक्तियां भी दी गयी हैं। मामले के अंतिम निराकरण पर तो प्रतिकर दिलवाना ही चाहिए यहां तक की नियम 7 (2) के अनुसार यदि अभियुक्त दोषमुक्त हो चुका हो या Discharge किया हो या फरार हो गया हो तब भी विशेष न्यायालय प्रतिकर दिलवा सकता है।

नियम 7 (3) में वे 13 घटक बतलाये गये हैं। जिन पर प्रतिकर के निर्धारण के समय विशेष न्यायालय को ध्यान रखना चाहिए।

उक्त सभी प्रावधानों से यह स्पष्ट है कि विशेष न्यायालय को पीड़ित बालक के संरक्षण के लिए कई शक्ति दी गयी है बालक को भी कई अधिकार दिये गये हैं।

यदि माननीय विशेष न्यायालय इन सब शक्तियों का प्रयोग अधिनियम को उद्देश्य प्राप्त करने के लिए करे तो निश्चित रूप से वह पीड़ित बालक का संरक्षण कर सकते हैं और उसे न्याय दिलवा सकते हैं जो आज समय की मांग है।

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STATUTORY PRESUMPTION AND REVERSE BURDEN – AN ANALYSIS OF PRESENT SCENARIO*

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PRESUMPTION

The term "presumption" in a comprehensive sense, may be defined, where in absence of actual certainty of the truth or falsehood of a fact or proposition, an inference affirmative or disaffirmative of that truth or falsehood is drawn by a process of probable reasoning from something which is taken to be granted. Presumption literally means taking as true without examination or proof. In other words, presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence.

Under the Evidence Act, all presumptions must come under one or other class of the three classes mentioned in the Act, namely, (i) may presume (rebuttable), (ii) shall presume (rebuttable) and (iii) conclusive presumptions (irrebuttable).

The presumptions falling under category of an expression "may presume" are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling under expression "shall presume" are known as "legal presumptions" or "compulsory presumptions". Presumption of law or artificial presumptions are inferences and the proposition established by law.

PRESUMPTION OF INNOCENCE

The English Common Law case, ***Woolmington v. D.P.P.*** is the ***locus classicus*** on presumption of innocence, in which Lord Chancellor Viscount Sankey entrenched the principle in the following words:

> "One golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made

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> out the case and the prisoner is entitled to an acquittal.....
>
> No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained".

It is recognised as human right and fundamental principle to be applied in criminal trial in India by catena of judgments of the Apex Court. In case of ***Kailash Gour v. State of Assam, AIR 2012 SC 786,*** it was observed:

"It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused 'may have committed the offence' and 'must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away."

Also See: ***Narendra Singh and anr. v. State of M.P., (2004) 10 SCC 699, Ranjitsingh Brahmajeetsingh Sharma v. State of Maharashtra and ors., (2005) 5 SCC 294, State of U.P. v. Naresh and ors., 2011 AIR SCW 187*** and ***Ganesan v. Rama Raghuraman and ors., (2011) 2 SCC 83***.

In ***Noor Aga v. State of Punjab, AIR 2009 SC (Supp) 852,*** it was held that:

> "The presumption of innocence is a human right. Article 6(2) of the European Convention on Human Rights provides : "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". ..... . In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence."

Recently in ***Rajiv Singh v. State of Bihar, Criminal Appeal No. 1708 of 2015*** decided on ***16th December, 2015,*** the Supreme Court reiterated importance of "presumption of innocence" as the fundamental notion of criminal jurisprudence and fundamental human

right encompassing the assurance of liberty, dignity and privacy of the individual.

PRESUMPTION OF INNOCENCE – WHETHER INDISPENSIBLE

In case of ***State of West Bengal v. Mir Mohammad Omar and others, (2000) 8 SCC 382,*** it was observed that:

> "The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty".

In ***K.Veeraswamy v. Union of India, (1991) 3 SCC 655*** the Constitution Bench held that:

> ".....a statute placing burden on the accused cannot be regarded as unreasonable, unjust or unfair. Nor it can be regarded as contrary to Art.21 of the Constitution as contended for the appellant. It may be noted that the principle reaffirmed in ***Woolmington case,*** is not a universal rule to be followed in every case. The principle is applied only ***in the absence of statutory provision to the contrary***".

REVERSE BURDEN

Since presumption of innocence is the fundamental element of a trial, the legal or ultimate burden of proof is always on the prosecution to prove the guilt of the accused. The prosecution must, therefore, prove a concurrence between ***mens rea*** and ***actus reus*** beyond reasonable doubt in order to discharge its burden.

The accused may rebut the Court's presumption that a particular exculpating circumstance was absent by raising either a defence or an exception. Commonly referred to as the ***"reverse evidential burden",***

merely requires proof from the accused, which satisfies the standard of 'prudent man' or at least creates reasonable doubt regarding one or more necessary ingredients of the offence. If the accused succeeds in creating reasonable doubt, he will be acquitted because the prosecution has been unable to prove his guilt beyond reasonable doubt. Thus, the legal burden of proving all necessary ingredients of an offence remains on the prosecution from the commencement to the termination of a trial.

"Reverse onus clauses or reverse burdens", constitute an exception to the fundamental rule, replacing the 'golden thread' of criminal law with a presumption of guilt. They tend to replace 'innocent until proven guilty' with 'guilty until proven innocent', making the accused a presumptive offender who is required to prove his innocence.

Reverse burdens dilute the prosecution's legal obligation to the extent that the prosecutor is required to prove only formal requisites, also referred to as the basic or foundational facts. Based on the proof of such foundational facts, the culpability of the accused is presumed and the burden to establish absence of inculpatory facts is then shifted to the accused. The burden upon the accused in such cases, also known as the ***"reverse persuasive burden,"*** is ultimate or final because failure to discharge it will result in the conviction of the accused. Therefore, unlike in a reverse evidential burden, where the accused only has to raise reasonable doubt as to his guilt while the legal burden continues to persist on the prosecution, in a reverse persuasive burden, the role of the prosecution ends once the burden shifts to the accused. Further, reverse persuasive burdens compel the accused to testify as opposed to the reverse evidential burden, which gives the accused the opportunity to displace it by prosecution's evidence or raise any exculpatory defence. Reverse persuasive burdens, however, leave the accused with no choice but to testify to his innocence.

The recommendations of the 47th Report of the Law Commission, 1972 suggest that since offences relating to narcotics, corruption and food adulteration threaten the 'health or material welfare of the community as a whole', special efforts are necessary for their enforcement. The Commission further emphasised that the

injury to society, in general, was greater in certain offences against public welfare in comparison to crimes having identifiable victim, such as murder, robbery etc. It was felt, therefore, that to effectively address and redress such crimes, the prosecution should be relieved of proving all the elements beyond doubt. Thereafter, the reverse burden clauses were incorporated in various statutes.

Some statutory provisions employing reverse onus clauses in India are – S.114-A of the Evidence Act, 1872, (Presumption as to rape) and S.113-B (Presumption as to dowry death) (introduced on the recommendations of the 84th and 91st Law Commission Reports, respectively); S.10(7-B) of the Food Adulteration Act, 1954; S.10-C of the Essential Commodities Act, 1955; Ss.123, 138A and 139 of the Customs Act, 1962; S.39 of the Foreign Exchange Management Act, 1999; Ss. 35, 54 and 66 of the Narcotic Drugs and Psychotropic Substances Act, 1985; S.35-O of the Wealth Tax Act, 1957; S.4(1) of the Prevention of Corruption Act, 1947 and S.20 of the Prevention of Corruption Act, 1988; S.43 and S.44 of M.P. Excise Act, 1915; S.13-A of M.P. Govansh Vadh Pratishedh Adhiniyam, 2004.

CONFLICT BETWEEN "THE PRESUMPTION OF INNOCENCE" AND "REVERSE BURDENS"

In ***Noor Aga v. State of Punjab*** (supra) following statements were quoted with approval:

> "In a recent Article ***"The Presumption of Innocence and Reverse Burdens : A Balancing Duty"*** published in [2007] CLJ (March Part) 142, it has been stated :
>
> > "In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice - where the offence is not too serious or the reverse burden only concerns a matter

> incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment."

In Glanville Williams, Textbook of Criminal Law (2nd Edn.) page 56, it is stated:

> "Harking back to Woolmington, it will be remembered that Viscount Sankey said that "it is the duty of the prosecution to prove the prisoner's guilt, subject to the defence of insanity and subject also to any statutory exception". ... Many statutes shift the persuasive burden. It has become a matter of routine for Parliament, in respect of the most trivial offences as well as some serious ones, to enact that the onus of proving a particular fact shall rest on the defendant, so that he can be convicted "unless he proves" it."

Further in case of ***Hiten P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897,*** it was held :

> "Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact."

In case of ***Babu v. State of Kerala, (2010) 9 SCC 189,*** it was observed that:

> "Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any

> injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact."

Again in ***Noor Aga v. State of Punjab*** (supra), it was observed that:

> "Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself.
>
> Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind."

DOCTRINE OF *RES IPSA LOQUITUR* – REVERSE BURDEN TO EXPLAIN CIRCUMSTANCES

We may find many instances wherein the doctrine of *res-ipsa-loquitur* has been applied in criminal trial to place reverse burden on accused to explain the inculpatory circumstances, failing which he will be presumed guilty.

See – ***Alimuddin v. King Emperor, 1945 Nagpur Law Journal 300; Raghubir Singh v. State of Punjab, (1974) 4 SCC 560; State of A.P v. R. Jeevaratnam, AIR 2005 S C 4095; State of A.P. v. C. Uma Maheswara Rao and anr., 2004 (4) SCC 399*** and ***B. Nagabhushanam v. State of Karnataka, (2008) 7 SCALE 716***.

Similarly, Sec. 106 of Evidence Act is often pressed into service to place reverse evidential burden on accused to explain the facts specifically in his knowledge.

In ***State of West Bengal v. Mir Mohammad Omar and ors., AIR 2000 SC 2988,*** it was held that if the fact is specifically in the knowledge of any person, then the burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.

In case of ***Rajinder Singh v. State of Haryana, AIR 2013 SC 2529,*** the accused failed to explain as to why he was in a hurry to cremate the deceased in the early morning of 24th January, 1993 while she died in the mid night of 23rd/24th January, 1993 i.e. within few hours. The village of deceased's parents was just 17-18 kms far from the village of the accused but the reason as to why they were not informed about the incident on the same day and why the accused had not waited for them to come is not explained. The accused also failed to explain as to why according to the F.S.L. Report, an Organo Phosphorus Pesticide was found in the vomiting of the deceased. The Supreme Court, placing the burden on accused as per Section 106 of Evidence Act to explain above circumstances held that the Trial

Court rightly drew an inference that the accused-appellants were guilty of the offence for which they were charged.

In ***State of W.B. v. Mir Mohammad Omar and others, (2000) 8 SCC 382, Sucha Singh v. State of Punjab, (2001) 4 SCC 375*** and ***Paramsivam*** and ***ors. v. State, AIR 2014 SC 2936,*** placing the burden on the accused to explain the circumstances, it was held that when it is proved to the satisfaction of the Court that deceased was abducted by the accused, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to abductee at least until he was in their custody.

Recently, in case of ***Suresh and Anr. v. State of Haryana, AIR 2015 SC 518,*** recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It was held that the recovery casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused.

PRESUMPTION OF INNOCENCE, RULE AGAINST SELF-INCRIMINATION AND RIGHT TO REMAIN SILENT *VIS-A-VIS* REVERSE BURDEN

In case of ***Manu Sao v. State of Bihar, 2012 AIR SCW 6138,*** the Supreme Court explained the right of the accused to remain silent with reference to inculpatory facts appearing in evidence as under-

> "… The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences

> and pass consequential orders, as may be called for, in accordance with law. .....
>
> The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

In ***Phula Singh v. State of Himachal Pradesh, AIR 2014 SC 1256,*** balancing the right to remain silent and duty to explain, it was observed that-

> "The accused has a duty to furnish an explanation in his statement under Section 313, Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313, Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law."

In ***Ramnaresh and ors. v. State of Chhattisgarh, AIR 2012 SC 1357,*** the Apex Court held as under:

> "One of the main objects of recording of a statement under Section 313 CrPC is to give an opportunity to the accused to explain the circumstances appearing against him as well as to put forward his defence, if the accused so desires. But once he does not avail this opportunity, then consequences in law must follow. Where the accused takes benefit of this opportunity, then his statement made under Section 313 CrPC, insofar as it supports the case of the prosecution, can be used against him for rendering conviction. Even under the latter, he faces the consequences in law." (Also see – ***Munna Kumar Upadhyaya v. State of Andhra Pradesh, AIR 2012 SC 2470***)

In ***State of Karnataka v. Suvarnamma, (2015) 1 SCC 323*** (at page 330), it was observed that:

> "Once the prosecution ***probabilises*** the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused."

However in ***Raj Kumar Singh v. State of Rajasthan, AIR 2013 SC 3150***, the Supreme Court cautioned that:

> "An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become witness against himself."

In this connection, reference may also be made to the judgments of the Supreme Court in ***Devender Kumar Singla v. Baldev Krishan Singla, 2005 SCC (CRI.) 1185*** and ***Bishnu Prasad Sinha v. State of Assam, (2008) 1 SCC (CRI.) 766*** that the statement of the accused under Section 313 CrPC for the admission of his guilt

or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

The present scenario of law, in this regard, may be summarized as under:

1. Admission of guilt or confession in the statement u/s 313 Cr.P.C. cannot be made sole basis for finding the accused guilty but the same can be taken as a piece of evidence as landing credence to the evidence lead by the prosecution.
2. The accused has a right to remain silent or even remain in complete denial but he is under a duty to furnish an explanation as a statement u/s 313 Cr.P.C. regarding incriminating material.
3. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain the inculpatory facts and circumstances appearing in evidence. If the explanation is false, then the court is entitled to draw adverse inference and pass consequential order against the accused in accordance with the law.
4. An adverse inference may be drawn against accused only and only if the incriminating material should establish the guilt and the accused is not able to furnish any explanation for the same.
5. The Court may rely on the portion of statement of accused and find his guilt in consideration of other evidence lead by prosecution. However, such statement should not be considered in isolation.
6. False plea taken against the accused in statement can be taken as vital additional circumstance against him.

We may, now, examine some of the statutory presumptions and interpretation of the Supreme Court on particular reverse burden clause.

SECTION 29 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

> "***Sec. 29. Presumption as to certain offence:-*** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court ***shall presume, that such person has committed*** or abetted or attempted to commit ***the offence,*** as the case may be, ***unless the contrary is proved.***"

Readers are requested to go through the Article – "Standard and extent of burden of proof on the prosecution *vis-a-vis* accused with reference to presumption under Section 29 of the Protection of Children from Sexual Offences Act, 2012" published in JOTI JOURNAL 2012 in Part I of December 2012 issue, authored by Shri Gajendra Singh, Faculty Member.

SECTION 8 (C) OF THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 AS INSERTED BY THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT ACT, 2015

> "Sec. 8. Presumption as to offences:- In a prosecution for an offence under this Chapter, if it is proved that –
>
> (a) xxxxx
>
> (b) xxxx
>
> (c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved."

SECTION 8-A OF THE DOWRY PROHIBITION ACT, 1961

> "Sec. 8-A. Burden of proof in certain cases:-Where any person is prosecuted for taking or abetting the taking of any dowry under Sec. 4, or the demanding of dowry under Sec. 4, the burden of proving that he

> has not committed an offence under those sections shall be on him." These provisions are similar in substance with Section 29 of the Protection of Children from Sexual Offences Act, 2012. Therefore, aforementioned Article would provide guidance for application of presumption and effect therof.

SECTIONS 118(A), 138 AND 139 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881

The Supreme Court in ***M.S. Narayana Menon alias Mani v. State of Kerala and anr., (2006) 6 SCC 39*** dealt with legal presumption in favour of holder of cheque and held :

> "Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. Presumption drawn under a statute has only an evidentiary value."

Section 138 of Negotiable Instruments Act contains the words "shall be deemed to have committed an offence". It is well settled that offence u/s 138 is created by a legal fiction. (See ***R. Kalyani v. Janak C. Mehta & ors., 2009 (1) SCC 516*** and ***DCM Financial Services Ltd. v. J.N. Sareen, 2008 (8) SCC 1***).

Explaining the legal fiction in ***Hiten P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897,*** it was held :

> "Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, it is

> obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (...). Such a presumption is a presumption of law, as distinguished from a presumption of fact. ….."
>
> The rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

A three Judge Bench of the Supreme Court in ***Rangappa v. Sri Mohan, AIR 2010 SC 1898*** examined the degree of proof required for an accused to discharge his burden in a prosecution under Sec. 138 of Negotiable Instrument Act and held as follows;

> "S.139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments…… . It is a settled position that when an accused has to rebut the presumption under S.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail."

Thus, Sections 118-A, 138 and 139 of the Negotiable Instruments Act, 1881 make it obligatory on the Court to raise statutory presumption in every case where the factual basis of raising presumption has been established but the accused may rebut the presumption by making his defence reasonably probable.

SECTION 4 (1) OF THE PREVENTION OF CORRUPTION ACT, 1947

In case of ***V. D. Jhingan v. State of Uttar Pradesh, AIR 1966 SC 1762,*** the presumption and scope of reverse burden was explained as under:

> "It is well established that where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him under S. 4 (1) of the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge its original onus that never shifts, i.e., that of establishing on the whole case the guilt of the accused beyond a reasonable doubt. ..... . That does not mean that if the statute places the burden of proof on an accused person, he is not required to establish his plea; but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case.
>
> In other words, the onus on an accused person may well be compared to the onus on a party in civil proceedings, and just as in civil proceedings, the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a

> preponderance of probability is established by the evidence led by him."

A three judges bench of the Supreme Court while dealing with this statutory presumptions in ***Trilok Chand Jain v. State of Delhi, AIR 1977 SC 666*** observed as under:

> "The presumption however, is not absolute. It is rebuttable. The accused can prove the contrary. The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the shape of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. But the degree and the character of the burden of proof which s.4(1) casts on an accused person to rebut the presumption raised thereunder, cannot be equated with the degree and character of proof which under s.101, Evidence Act rests on the prosecution. While the mere plausibility of an explanation given by the accused in his examination under s.342, Cr.P.C. may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the fact presumed, improbable. In other words, the accused may rebut the presumption by showing a mere preponderance of probability in his favour; it is not necessary for him to establish his case beyond a reasonable doubt."

SECTION 20 OF THE PREVENTION OF CORRUPTION ACT, 1988

M. Narsinga Rao v. State of Andhra Pradesh, AIR 2001 SC 318 provides the guideline to appreciate the evidence with reference to

presumption under section 20 of the Act that when the section deals with legal presumption it is to be understood as in terrorum i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied.

In case of ***T. Shankar Prasad v. State of Andhra Pradesh, AIR 2004 SC 1242,*** it was observed that unless the presumption is disproved or dispelled or rebutted the Court can treat the presumption as tantamounting to proof. Thus, presumption under S.20 is a presumption of law and cast an obligation on Court to operate it in every case brought in. The presumption is a rebuttable presumption and it is rebutted by proof and not by explanation which may seem to be plausible.

However, in case of ***State of Punjab v. Madan Mohan Lal Verma, AIR 2013 S C 3368,*** it was observed that:

> "The burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. (Vide: ***Ram Prakash Arora v. The State of Punjab, AIR 1973 SC 498; State of Kerala and anr. v. C.P. Rao, (2011) 6 SCC 450*** and ***Mukut Bihari and anr. v. State of Rajasthan, (2012) 11 SCC 642***)"

Thus, the presumption provided u/Sec. 4(1) of the Prevention Act, 1947 or u/Section 20 of the Prevention of Corruption Act, 1988 would apply only on proof of foundational facts beyond all reasonable doubts and the accused may displace these statutory presumptions by bringing on record, direct or circumstantial evidence, to establish his defence by mere preponderance of probabilities.

SECTIONS 35 AND 54 OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

Section 35 of NDPS Act, 1985 provides for "presumption of culpable mental state" as under:

> (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state *but it shall be a* ***defence for*** *the accused to* ***prove*** *the fact that he had no such mental state with respect to the act charged as an offence in that prosecution*.
>
> (2) For the purpose of this section, a fact is said to be ***proved*** only when the court believes it to exist ***beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability***.

Section 54 of the N.D.P.S. Act, 1985 provides for presumption for possession of illicit articles as under:

> "In trials under this Act, it may be presumed, unless and ***until the contrary is proved***, that the accused has committed an offence under this Act in respect of –
>
> (a) Any narcotic drug or psychotropic substance or controlled substance;
>
> (b) .....,,"

Explaining the scope and effect of these legal presumption provisions in case of ***Gyan Chand and ors. v. State of Haryana, 2013 CRI. L. J. 4058 (SC),*** it was laid down that:

> "From the conjoint reading of the provisions of Sections 35 and 54 of the Act, it becomes clear that if the accused is found to be in possession of the

> contraband article, he is presumed to have committed the offence under the relevant provisions of the Act until the contrary is proved. According to Section 35 of the Act, the court shall presume the existence of mental state for the commission of an offence and it is for the accused to prove otherwise.
>
> Thus, in view of the above, it is a settled legal proposition that once possession of the contraband articles is established, the burden shifts on the accused to establish that he had no knowledge of the same.
>
> Additionally, it can also be held that once the possession of the contraband material with the accused is established, the accused has to establish how he came to be in possession of the same as it is within his special knowledge and therefore, the case falls within the ambit of the provisions of Section 106 of the Evidence Act, 1872."

Explaining the nature and extent of burden cast on the accused under section 35(2) of the Act, in case of ***Abdul Rashid v. State of Gujarat, AIR 2000 SC 821,*** three Judge Bench held as under-

> "The burden of proof cast on the accused under S.35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under S.35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

Thus, even in a case where the statute (S.35 NDPS Act) requires the accused to prove his defence beyond reasonable doubt, the three Judge Bench of the Apex Court had read it down to place "reverse evidential burden" on the accused to be discharged in abovementioned manner.

Later in case of ***Noor Aga v. State of Punjab*** (supra), the notion stands affirmed in following words:

> "Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established.
>
> With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt."

The present position of law may be summarized as follows:

1. Initial burden to prove the foundational facts beyond all reasonable doubt lies on the prosecution.
2. Sections 35 and 54 of the Act raise presumption with regard to culpable mental state of the accused only in the event circumstances mentioned in the provision are fully satisfied by the prosecution.
3. Once possession of contraband articles is established by the prosecution beyond all reasonable doubt, the burden shifts on the accused that he had no knowledge of the same and the Court shall presume that the accused has committed the offence until contrary is proved by the accused.
4. The burden casts on the accused can be discharged through direct or circumstantial evidence appearing in prosecution case itself or in the defence evidence.
5. The standard of proof required to dispel the burden by the accused is preponderance of probability.

SECTION 13-A OF THE M.P. GOVANSH VADH PRATISHEDH ADHINIYAM, 2014

> "***Burden of proof on accused –*** Where any person is prosecuted for an offence under the provisions of this Act, the burden of proof that he had not committed the offence under the provisions of this Act, shall be on him, if the prosecution is in a position to produce the prima facie evidence against him at the first instance."

This provision clearly places reverse persuasive burden on the accused on production of ***prima facie*** evidence by the prosecution. The prosecution is not required to prove the ingredients of alleged offence under the Act beyond all reasonable doubts to shift the burden to prove innocence on the accused.

Kindly go through the position of law hereinafter analysed.

SECTION 304-B OF IPC AND SECTION 113-B OF THE EVIDENCE ACT:

Section 304B of IPC was introduced w.e.f. 19.11.1986 as per Act 43 of 1986. The Law Commission, in its 91st Report dated 10th August, 1983,

recommended reform of the law to deal with the situation which led to incorporation of Sections 304 B in IPC, making 'dowry death' an offence and Section 113B in the Evidence Act which provides for raising a presumption as to dowry death in case of an unnatural death within seven years of marriage when it is shown that a woman was subjected to harassment for dowry soon before her death.

Presumption under S.113B of Indian Evidence Act is a presumption of law. On proof of the essential ingredients mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essential ingredients:

(1) The question before the court must be whether the accused has committed the ***dowry death*** of a woman. This means that the presumption can be raised only if the accused is being tried for the offence under S.304B, IPC.
(2) The woman was subjected to cruelty or harassment by her husband or his relatives.
(3) Such cruelty or harassment was for, or in connection with any demand for dowry.
(4) Such cruelty or harassment was soon before her death.

Whether the prosecution is required to prove the ingredients of Sec. 304-B IPC beyond all reasonable doubts or may prove them even by preponderance of probabilities ? And

How this statutory reverse burden may be displaced by the accused?

There is a catena of precedents which held that in order to establish the offence of dowry death under Section 304-B, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death.

In ***Vipin Jaiswal v. State of A.P., AIR 2013 SC 1567*** the requirement of proof of ingredients laid down as follows-

> "In any case, to hold an accused guilty of both the offences under Sections 304B and 498A, IPC, the prosecution is required to prove beyond reasonable doubt that the deceased was subjected to cruelty or harassment by the accused. Similarly, for the Court to draw the presumption under S.113B of the Evidence Act that the appellant had caused dowry death as defined in S.304B, IPC, the prosecution has to prove besides the demand of dowry, harassment or cruelty caused by the accused to the deceased soon before her death. Since the prosecution has not been able to prove beyond reasonable doubt this ingredient of harassment or cruelty, neither of the offences under S.498A and S.304B, IPC has been made out by the prosecution. [Also see – ***Madivallappa V. Marabad v. State of Karnataka, 2013(2) SCALE 665; Devinder v. State of Haryana, (2012) 10 SCC 763; Narayanamurthy v. State of Karnataka, AIR 2008 SC 2377; Raj v. State of Punjab and others, (2000) 5 SCC 207; Sanjiv Kumar v. State of Punjab, (2009) 16 SCC 487*** and ***Bakshish Ram v. State of Punjab, (2013) 4 SCC 131***]

Recently in ***Karan Singh v. State of Haryana, (2014) 5 SCC 73,*** it was held:

> "It has been held times without number that, to establish the offence of dowry death under Section 304-B IPC, the prosecution has to prove beyond reasonable doubt that the husband or his relative has susbjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death."

In ***Rajeev Kumar v. State of Haryana, AIR 2014 SC 227,*** it is observed that:

> "One of the essential ingredients of the offence of dowry death under S.304B, IPC is that the accused

> must have subjected a woman to cruelty in connection with demand of dowry soon before her death and this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death under S.113B of the Indian Evidence Act."

In abovementioned judgments the legal effect of the 'deeming' legal fiction provided in section 304-B of IPC read with the statutory presumption mandated by section 113-B of the Evidence Act and use of word 'shown' in section 304-B IPC was not considered at length.

In ***Devinder v. State of Haryana, (2012) 10 SCC 763,*** it is held that the word "deemed" in Section 304B, IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused dowry death.

However, the following observation in case of ***Kashmir Kaur v. State of Punjab, AIR 2013 SC 1039*** clarifies the notion of reverse burden placed on accused by deeming fiction of Sec. 304-B IPC-

> "Section 304-B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304-B.
>
> Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304-B were not satisfied."

Kind attention of readers is invited to ***Sher Singh @ Partapa v. State of Haryana AIR 2015 SC 980,*** wherein a two Judge Bench of the Supreme Court, while dealing with S.304-B IPC and S.113-B Evidence Act, ***interalia***, held as follows:

> "The Prosecution can discharge the initial burden to prove the ingredients of S.304B even by preponderance of probabilities. Once the presence

> of the concomitants are ***established or shown or proved*** by the prosecution, ***even by preponderance of possibility,*** the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence ***dislodging his guilt, beyond reasonable doubt.*** Keeping in perspective that Parliament has employed the amorphous pronoun/noun "it" (which we think should be construed as an allusion to the prosecution), followed by the word "shown" in Section 304B, the proper manner of interpreting the Section is that "shown" has to be read up to mean "prove" and the word "deemed" has to be read down to mean "presumed". Regarding the third proposition, there is no scope for doubt since the Courts in India have been interpreting the word "shown" to mean "prove" and the word "deemed" has to mean "presumed" though not expressly declared as 'reading down' and 'reading up'."
>
> It seems to us that what Parliament intended by using the word 'deemed' was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt.
>
> The other facet is that the husband has indeed a heavy burden cast on his shoulders in that his deemed culpability would have to be displaced and overturned beyond reasonable doubt.
>
> In our opinion, it would not be appropriate to lessen the husband's onus to that of preponderance of probability as that would annihilate the deemed guilt expressed in Section 304B, and such a curial interpretation would defeat and neutralise the intentions and purposes of Parliament."

Thereafter, another two Judge Bench of the Apex Court in ***Ramakant Mishra @ Lalu etc. v. State of U.P., 2015 (3) SCALE 186,*** reaffirmed the view as under:

> "Very recently, this Court had the opportunity of interpreting Section 304B of the IPC in Criminal

> Appeal No.1592 of 2011, titled ***Sher Singh v. State of Haryana, [reported in (2015) 1 SCR 29]*** which was authored by one of us (Vikramajit Sen,J.). Succinctly stated, it had been held therein that the use of word 'shown' instead of 'proved' in Section 304B indicates that the onus cast on the prosecution would stand satisfied on the anvil of a mere preponderance of probability. In other words, 'shown' will have to be read up to mean 'proved' but only to the extent of preponderance of probability. Thereafter, the word 'deemed' used in that Section is to be read down to require an accused to prove his innocence, but beyond reasonable doubt. The 'deemed' culpability of the accused leaving no room for the accused to prove innocence was, accordingly, read down to a strong 'presumption' of his culpability. However, the accused is required to dislodge this presumption by proving his innocence beyond reasonable doubt as distinct from preponderance of possibility."

It is further observed that:

> "The defence has failed to comply with Section 113-B of the Evidence Act. The accused being charged of the commission of a dowry death ought to have entered the witness box themselves."

Another two Judges Bench of the Supreme Court in case of ***Maya Devi and anr. v. State of Haryana, AIR 2016 SC 125*** reiterated the reverse onus notion as under:

> "The key words under Section 113B of the Evidence Act, 1872 are "shall presume" leaving no option with a court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. In the case on hand, accused persons failed to ***prove beyond reasonable doubt*** that the deceased died a natural death."

A three Judges Bench of the Supreme Court in case of ***V.K. Mishra & anr. v. State of Uttarakhand, AIR 2015 SC 3043*** relied the dictum of law laid down in case of ***Sher Singh*** (supra).

The present scenario of law may, thus, be summarised as follows:

(1) The composite effect of deeming provision in section 304-B of IPC and legal presumption provided in section 113-B of the Evidence Act is to place "reverse persuasive burden" on the accused.

(2) The deeming legal fiction created by section 304-B of IPC read with the statutory presumption mandated by section 113-B of the Evidence Act and use of word 'shown' in section 304-B IPC have following legal effect:

(i) The prosecution can discharge the initial burden to prove the ingredients of section 304-B of IPC by preponderance of possibilities.

(ii) If the prosecution succeeds in establishing the essential ingredients of the offence by evidence, the presumption of innocence of the accused is replaced by assumption of guilt of accused.

(iii) Once the prosecution succeeds in proving essential ingredients of the offence by preponderance of probabilities, the Court is left with no option but to presume the accused guilty of offence of dowry death unless the presumption is rebutted by proof of innocence beyond reasonable doubt.

(iv) The accused would be required to produce evidence to prove his innocence beyond reasonable doubt as distinct from mere preponderance of probabilities.

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ftyk ,oa l= U;k;k/kh'k] /kkj

दांडिक विधिशास्त्र का मूलभूत सिद्धांत यह है कि अभियोजन को उसका मामला युक्ति–युक्त संदेह से परे प्रमाणित करना होता है। कभी–कभी अपराध ऐसी परिस्थितियों में किया जाता है और ऐसे पीड़ित के साथ किया जाता है कि अभियोजन के लिए प्रमाण लाना लगभग असंभव हो जाता है। विधायिका ने इसी कठिनाई को ध्यान में रखते हुए उपधारणाओं के बारे में व्यवस्था की है। ये उपधारणाएं तब लागू होती हैं जब अभियोजन कुछ मूलभूत तथ्य स्थापित कर देता है। उसके बाद खंडन का भार अभियुक्त पर अंतरित हो जाता है। धारा 29 एवं धारा 30 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 (एतस्मिन् पश्चात् 'अधिनियम, 2012') में उपधारणा विषयक प्रावधान किये गये हैं।

अधिनियम, 2012 की धारा 29 एवं धारा 30 इस प्रकार हैं–

> */kkjk 29- dfri; vijk/kksa ds ckjs esa mi/kkj.kk* – जहां किसी व्यक्ति को इस अधिनियम की धारा 3, धारा 5, धारा 7, धारा 9 के अधीन किसी अपराध को करने या दुष्प्रेरण करने या उसको करने का प्रयत्न करने के लिए अभियोजित किया गया है वहां विशेष न्यायालय तब तक यह उपधारणा करेगा कि ऐसे व्यक्ति ने, यथास्थिति, वह अपराध किया है, दुष्प्रेरण किया है या उसको करने का प्रयत्न किया है जब तक कि इसके विरूद्ध साबित नहीं कर दिया जाता है।
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> */kkjk 30- vkijkf/kd ekufld n'kk dh mi/kkj.kk* – (1) इस अधिनियम के अधीन किसी अपराध के लिए अभियोजन में, जो अभियुक्त की ओर से आपराधिक मानसिक स्थिति की अपेक्षा करता है, विशेष न्यायालय ऐसी मानसिक दशा की विद्यमानता की उपधारणा करेगा, किन्तु अभियुक्त के लिए यह तथ्य साबित करने के लिए

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प्रतिरक्षा होगी कि उस अभियोजन में किसी अपराध के रूप में आरोपित कृत्य के संबंध में उसकी ऐसी मानसिक दशा नहीं थी।

(2) इस धारा के प्रयोजनों के लिए किसी तथ्य का साबित किया जाना केवल तभी कहा जाएगा जब विशेष न्यायालय उसके युक्तियुक्त संदेह से परे विद्यमान होने पर विश्वास करता है और केवल तब नहीं जब इसकी विद्यमानता संभाव्यता की प्रबलता द्वारा स्थापित होती है।

Li"Vhdj.k – इस धारा में आपराधिक मानसिक दशा के अंतर्गत आशय, हेतुक, किसी तथ्य का ज्ञान और किसी तथ्य में विश्वास किए जाने का कारण भी है।

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जो उपधारणाएं न्यायालय के विवेकाधिकार का विषय होती हैं वे तथ्य की उपधारणाएं हैं जैसे धारा 114 भारतीय साक्ष्य अधिनियम, 1872 के अधीन उपधारणा। लेकिन जो उपधारणाएं आज्ञापक होती हैं उन्हें विधि की उपधारणा कहा जाता है जैसे धारा 139 परक्राम्य लिखत अधिनियम, 1881 के अधीन उपधारणा। अधिनियम, 2012 की धारा 29 एवं 30 के अधीन उपधारणाएं आज्ञापक स्वरूप की है अर्थात् यह विधि की उपधाराणाएं हैं। अभियोजन द्वारा प्राथमिक तथ्य सिद्ध किये जाने पर न्यायालय उपधाराणा करने के लिये बाध्य हैं। उपधारणाओं की आज्ञापक प्रकृति को न्यायालय को ध्यान में रखना चाहिए।

/kkjk 29 ,o /kkjk 30 fdu vijk/kkd ij ykx gkrh g

धारा 29 से ही यह स्पष्ट है कि इसके अधीन उपधारणा अधिनियम, 2012 की धारा 3, 5, 7 और 9 में परिभाषित अपराध क्रमशः प्रवेशन लैंगिक हमला, गुरुत्तर प्रवेशन लैंगिक हमला, लैंगिक हमला एवं गुरुत्तर लैंगिक हमला के अपराधों एवं उनके दुष्प्रेरण और प्रयत्न के बारे में लागू होती है जो क्रमशः अधिनियम की धारा 4, 6, 8, 10, 17 एवं 18 में दंडनीय हैं। शेष अपराधों के बारे में धारा 29 की उपधारणा लागू नहीं होती है।

धारा 3 और धारा 5 में परिभाषित 'प्रवेशन लैंगिक हमला' और 'गुरुत्तर प्रवेशन लैंगिक हमला' के अपराधों में अधिनियम की धारा 30 की उपधारणा लागू नहीं होगी क्योंकि अधिनियम की धारा 30 'आपराधिक मानसिक दशा' की उपस्थिति

का प्रावधान करती है और धारा 30 के स्पष्टीकरण में आपराधिक मानसिक दशा के अंतर्गत आशय, हेतुक, किसी तथ्य का ज्ञान और किसी तथ्य में विश्वास या विश्वास किए जाने का कारण होने का प्रावधान है जबकि धारा 3 और 5 में परिभाषित 'प्रवेशन लैंगिक हमला' और 'गुरुत्तर प्रवेशन लैंगिक हमला' के लिए किसी भी प्रकार की आपराधिक मानसिक दशा अर्थात् आशय या ज्ञान या हेतुक या विश्वास करने के कारण होना आवश्यक नहीं हैं।

इस प्रकार जहां धारा 29 की उपधारणा केवल धारा 3, 5, 7 और 9 में परिभाषित अपराधों पर लागू होती है, शेष अपराधों पर धारा 29 लागू नहीं होती है, वहीं धारा 30 की उपधारणा अधिनियम की धारा 3 और 5 में परिभाषित अपराधों पर लागू नहीं होती है, शेष अपराधों पर लागू होती है।

/kkjk 29 ,oa /kkjk 30 dh ykxw gksus dh 'krsZ

धारा 29 को पढ़ने से प्राथमिक रूप से ऐसा प्रतीत होता है कि अभियुक्त को अभियोजित करते ही यह उपधारणा लागू हो जाती है लेकिन स्थिति ऐसी नहीं है। अभियोजन को प्राथमिक तथ्य स्थापित करने होते हैं, तभी धारा 29 की उपधारणा लागू होती है। धारा 30 केवल आपराधिक मानसिक स्थिति की अपेक्षा करती है और इसके लिए भी प्राथमिक तथ्य अभियोजन को स्थापित करने होते हैं। उदाहरण के लिए, धारा 8क दहेज प्रतिषेध अधिनियम, 1961 में भी इसी प्रकार की उपधारणा का प्रावधान है जो इस प्रकार हैरू–

> *8d- dfrN ekeyksa esa lcwr dk Hkkj &*
>
> जहां कोई व्यक्ति धारा 3 के अधीन कोई दहेज लेने या दहेज का लेना दुष्प्रेरित करने के लिए या धारा 4 के अधीन दहेज मांगने के लिए अभियोजित किया जाता है वहां यह साबित करने का भार उसी पर होगा कि उसने उन धाराओं के अधीन कोई अपराध नहीं किया है।

इस प्रावधान में भी अभियुक्त को अभियोजित करने के बाद उपधारणा लेने के प्रावधान हैं लेकिन माननीय कर्नाटक उच्च न्यायालय की पूर्ण पीठ ने न्यायदृष्टांत *gfj dqekj fo:) LVVA ¼1994½ Mh,e lh ¼dukVd½ ¼i.kihB½* में प्रतिपादित किया है कि धारा 8क को ध्यानपूर्वक पढ़ने से यह दर्शित होता है कि अभियुक्त को

धारा 3 एवं 4 अधिनियम, 1961 के अपराधों में आरोपित किया गया है, मात्र इस कारण प्रारंभिक भार, जो अपराध के घटक साबित करने का अभियोजन पर रहता है, वह समाप्त नहीं होता है। धारा 8क को धारा 2 में वर्णित दहेज की परिभाषा के साथ पढ़ना चाहिए।

इस प्रकार धारा 8क दहेज प्रतिषेध अधिनियम, 1961 में दी गई उक्त उपधारणा पर विचार करें जो धारा 29 अधिनियम, 2012 के समान है, तब भी उक्त न्यायदृष्टांत हरि कुमार के अनुसार अभियोजन पर प्रारंभिक तथ्यों को प्रमाणित करने का भार होता है जो धारा 8क की उपधारणा के कारण समाप्त नहीं होता है। इस विधिक स्थिति से मार्गदर्शन लेने पर भी यह कहा जा सकता है कि प्राथमिक तथ्यों का प्रमाण भार सदैव अभियोजन पर रहता है।

न्यायदृष्टांत *uohu Mh- ckfj;/ fo:) LVV v,Q egkjk"V] 2018 lhvkj,y t/ 3393]* मंढ़ बाम्बे उच्च न्यायालय ने यह प्रतिपादित किया है कि धारा 29 अधिनियम, 2012 की अभियुक्त के विरूद्ध उपधारणा निरपेक्ष नहीं है बल्कि खंडनयोग्य है। यह उपधारणा तब लागू होती है जब अभियोजन प्रथमतः प्राथमिक तथ्य स्थापित करने में समर्थ हो जाता है। इस संबंध में निर्णय का चरण क्रमांक 17 अवलोकनीय है।

प्रारंभिक तथ्यों में सर्वप्रथम इस संबंध में निष्कर्ष देना चाहिए कि क्या पीड़ित घटना के समय 'बालक' था या थी? या घटना के समय पीड़ित की आयु क्या 18 वर्ष या इससे कम थी?

न्यायदृष्टांत *fel b/jk }kjk M,- e/t/yrk fo:) LVV] ,u lhVh ngyh] ,vkb/vkj 2017 ,l lh 3457]* के अनुसार धारा 02 (1)(डी), अधिनियम, 2012 के अनुसार 'बालक' से तात्पर्य उसकी भौतिक आयु से है न कि मानसिक आयु से है। 18 वर्ष तक की आयु का व्यक्ति बालक की परिभाषा में आता है। आयु के निष्कर्ष के बाद अपराध को प्रमाणित करने के लिए दी गई साक्ष्य पर विचार करना चाहिए।

इस प्रकार न्यायालय के लिए यह आवश्यक है कि इन उपधारणाओं को लेते समय पहले अभियोजन की साक्ष्य पर विचार करें और यह देखें कि क्या अभियोजन

ने प्राथमिक तथ्य स्थापित कर दिए हैं, उसके बाद निर्णय में उपधारणा का उल्लेख करते हुए उसे लेने के बारे में उल्लेख करें।

[kMu d Hkkj dk Lrj

धारा 30 (2) से यह स्पष्ट है कि अभियुक्त को युक्तियुक्त संदेह से परे यह प्रमाणित करना होता है कि अपराध कारित करने में उसकी आपराधिक मानसिक स्थिति नहीं थी। अतः धारा 30, अधिनियम, 2012 की उपधारणा को खंडित करने का भार युक्तियुक्त संदेह से परे स्तर का होता है। प्रश्न यह उत्पन्न होता है कि क्या धारा 29 की उपधारणा के खंडन का भार भी इसी स्तर का होना चाहिए जबकि धारा 29 में धारा 30 (2), के समान कोई प्रावधान नहीं है?

धारा 30 की उपधारणा अधिनियम की धाराएं 7, 9, 11, 13, 15, 16, एवं 18 में वर्णित अपराधों पर लागू होती हैं, धारा 3 और 5 में परिभाषित अपराधों पर लागू नहीं होती हैं।

धारा 3 में परिभाषित 'प्रवेशन लैंगिक हमला' का दंड धारा 4 में है, जो प्रावधान इस प्रकार हैः–

> */kkjk 4- ços'ku y|fxd geyk d fy, nM* – जो कोई प्रवेशन लैंगिक हमला करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दस वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास तक की हो सकेगी, दंडित किया जाएगा और जुर्माने से भी दंडनीय होगा।

धारा 5 में परिभाषित 'गुरुत्तर प्रवेशन लैंगिक हमले' का दंड धारा 6 में है, जो प्रावधान इस प्रकार हैरू–

> */kkjk 6- x#rj ços'ku y|fxd gey d fy, nM* – जो कोई, गुरुतर प्रवेशन लैंगिक हमला करेगा वह कठोर कारावास से जिसकी अवधि बीस वर्ष से कम की नहीं होगी किन्तु जो आजीवन कारावास, जिसका अभिप्राय उस व्यक्ति के शेष प्राकृत जीवनकाल के लिए कारावास होगा, तक की हो सकेगी, दंडित किया जाएगा और जुर्माने का भी दायी होगा या मृत्यु से दंडित किया जाएगा।

इस प्रकार धारा 3 और 5 में वर्णित अपराधों का दंड और धारा 7 और 9 में वर्णित अपराधों का भी दंड अधिनियम के शेष अपराधों से अधिक है जिन पर धारा 30 लागू होती है जिसमें खंडन का भार युक्तियुक्त संदेह से परे स्तर का है। ऐसे में अधिक गंभीर अपराध की उपधारणा के प्रावधान धारा 29 में प्रमाण भार का स्तर, एक सामान्य प्रज्ञावान व्यक्ति की तरह विचार करें तो, युक्तियुक्त संदेह से परे स्तर का ही होना चाहिए, चाहे धारा 29 के साथ धारा 30 (2) की तरह कोई प्रावधान न भी जोड़ा गया हो। अतः, धारा 29 की उपधारणा में प्राथमिक तथ्य स्थापित हो जाने के बाद अभियुक्त पर जो खंडन का भार होता है, वह अधिसंभावनाओं की प्रबलता के स्तर का न होकर युक्तियुक्त संदेह से परे के स्तर का होना चाहिए।

इसके अतिरिक्त न्यायदृष्टांत *txj flag fo:) LVV v,Q fgekpy çn'k] 2015 ¼2½ vkj lhvkj ¼fØfeuy½ 320 ¼,pih½]* में यह प्रतिपादित किया गया है कि यह स्थापित विधि है कि न्यायालय अवयस्क का संरक्षक होता है और यह भी स्थापित विधि है कि जहां दो अर्थान्वयन संभव हों वहां न्यायालय को न्यायहित में वह मत मानना चाहिए जो अवयस्क के हित का हो।

D;k tekur d Lrj ij Hkh ;s mi/kkj.kk,a ykxw gksrh g

न्यायदृष्टांत *LVV v,Q fcgkj fo:) jktcYyo çlkn mQZ jktcYYo çlkn ;kno] 2017 ¼1½ ,,ut ¼,llh½ ¼lIyheUV½ 10* ,vkbvkj *2017 ,llh 630]* में माननीय उच्च न्यायालय ने अभियुक्त को जमानत प्रदान की थी, जिसे माननीय सर्वोच्च न्यायालय ने निरस्त कर दिया और इस मामले में माननीय सर्वोच्च न्यायालय ने यह अभिलिखित किया कि उच्च न्यायालय ने विधि का एक साधारण कथन कि अभियुक्त को निर्दोष समझा जाता है जब तक कि अपराध प्रमाणित न हो जाए, करते समय धारा 29 अधिनियम, 2012 के प्रावधानों को विचार में नहीं लिया।

इस प्रकार माननीय सर्वोच्च न्यायालय के उक्त कथन पर विचार करें तो इन मामलों में जमानत के स्तर पर भी धारा 29 की उपधारणा विचार में लेना चाहिए और इस न्यायदृष्टांत से मार्गदर्शन लेते हुए धारा 30 की उपधारणा भी विचार में ली जानी चाहिए।

इस मामले में माननीय सर्वोच्च न्यायालय ने जमानत को निरस्त किया, जो अपवाद स्वरूप परिस्थितियों में ही किया जाता है और उस जमानत निरस्ती के साथ धारा 29 की उपधारणा को विचार में न लेने को उचित नहीं माना। इन तथ्यों के प्रकाश में यह सुरक्षित रूप से कहा जा सकता है कि जमानत के स्तर पर भी धारा 29 और धारा 30 की उपधारणाएं ध्यान में रखना चाहिए।

fofo/k

1. न्यायदृष्टांत *fNr| f1g xkM fo:) LV/V v,Q ,e-ih-] vkb,y vkj ¼2015½ ,eih 1343 ¼Mh-ch-½]* के मामले में अभियुक्त 5 से 6 वर्ष की अभियोक्त्री को उसके घर के अंदर ले गया। अभियुक्त ने उसका पायजामा और उसकी पैंटी उतार दी थी और उसे पलंग पर उठा रखा था। इन तथ्यों के प्रकाश में धारा 30 अधिनियम, 2012 के तहत यह उपधारणा ली गई कि किया गया हमला लैंगिक आशय से था और अभियुक्त को धारा 8 के तहत दोषसिद्ध किया गया। प्रवेशन लैंगिक हमला प्रमाणित नहीं माना गया था। इस मामले में अभियोक्त्री के धारा 164 दं.प्र.सं. के कथन भी लेखबद्ध नहीं किए गए थे। चूंकि अनुसंधान अधिकारी के अनुसार अभियोक्त्री बोलने में असमर्थ थी, ऐसे में उसके कथन लेखबद्ध न करने का कोई प्रतिकूल प्रभाव नहीं माना गया।
2. कभी–कभी अभियुक्त प्रारंभिक स्तर पर ही आपराधिक मनःस्थिति का अभाव का पक्ष रखते हुए उन्मोचन की मांग करता है लेकिन ये तथ्य प्रारंभिक स्तर पर निर्णीत नहीं किए जा सकते हैं। ये तथ्य दोनों पक्षों को उनके पक्ष समर्थन में साक्ष्य का अवसर देने के बाद गुण–दोष पर ही निराकृत किए जा सकते हैं। इस संबंध में न्यायदृष्टांत जगर सिंह विरूद्ध स्टेट ऑफ हिमाचल प्रदेश, (पूर्वोक्त) अवलोकनीय है।
3. धारा 30 के तहत अभियुक्त पर ये भार होता है कि वह यह प्रमाणित करे कि उसकी आपराधिक मनःस्थिति नहीं थी। इस संबंध में उक्त न्यायदृष्टांत जगर सिंह अवलोकनीय है।
4. न्यायदृष्टांत *lkxj nhukukFk tk/ko fo:) LV/V v,Q egkjk"V] 2018 lhvkj,y t| 4271] ckEc| mPp U;k;ky;]* में ये प्रतिपादित किया गया है

कि पक्षों के मध्य घटना के एक दिन पहले विवाद हुआ था जिस तथ्य की पुष्टि बचाव साक्षी ने की। घटना के समय अभियुक्त उसके परिवार के सदस्यों के साथ सत्संग में उपस्थित था, ये तथ्य अन्य बचाव साक्षी ने स्थापित किया था। मेडिकल साक्ष्य से 'लैंगिक हमला' दर्शित नहीं होता था। आहत के कपड़ों पर रक्त या वीर्य के कोई निशान नहीं पाये गये थे, ऐसे में धारा 29 की उपधारणा खंडित होना माना गया।

5. न्यायदृष्टांत *l|c|eU;e fo:) LVV] 2017 lhvkj,y t| 946 ¼Mh-ch-½] eækl mPp U;k;ky;* के मामले में 'प्रवेशन लैंगिक हमला' का आरोप था। अभियुक्त के विरूद्ध धारा 29 की उपधारणा ली गई थी जिसे अभियुक्त ने प्रत्यक्ष या परिस्थिजन्य साक्ष्य से खंडित नहीं किया था। अखंडित उपधारणा से दोषसिद्धि का समर्थन होना पाया गया। निर्णय चरण 27 अवलोकनीय है।

6. न्यायदृष्टांत *bæ dekj çkku fo:) LVV v,Q flfDde] 2017 lhvkj,y t| 4066 flfDde mPp U;k;ky;]* के मामले में 5 वर्षीय अवयस्क के साथ अभियुक्त ने 'गुरुतर लैंगिक हमला' दुकान के अंदर कारित किया था। बाल संरक्षण अधिकारी के समक्ष आहत ने पूरी घटना बताई थी और दो पूर्व की घटनाएं भी बताई थीं। छोटे विरोधाभास महत्वपूर्ण नहीं माने गये थे। अभियुक्त के विरूद्ध 'गुरुतर लैंगिक हमले' की उपधारणा धारा 29, अधिनियम, 2012 के तहत ली गई। प्रथम सूचना प्रतिवेदन में 17 दिन का विलंब घातक नहीं माना गया। निर्णय चरण 10 अवलोकनीय है।

7. न्यायदृष्टांत परेश मोंदल विरूद्ध स्टेट ऑफ वेस्ट बंगाल, 2016 सीआरएलजे 5091, कलकत्ता उच्च न्यायालय, के मामले में अभियुक्त पर साक्ष्य के आधार पर आहत के कपड़ों के उपर से निजी अंग छूना स्थापित हुआ था। धारा 29 अधिनियम, 2012 की उपधारणा ली गई। निर्णय चरण 11 अवलोकनीय है।

8. न्यायदृष्टांत *n'kjFk fo:) LVV] 2018 lhvkj,y t| 4226 Mhch] eækl mPp U;k;y;]* के मामले में 7 वर्षीय लड़की के साथ अभियुक्त पर लैंगिक हमला कारित करने और उसकी हत्या के अभियोग थे। अभियुक्त के मोबाईल फोन में अश्लील वीडियो और अश्लील सामग्री की हिस्ट्री थी अभियुक्त अश्लील सामग्री देखने का अभ्यस्थ पाया गया था और उसने

अभियुक्त परीक्षण में भी अश्लील सामग्री देखने के तथ्य स्वीकार किए थे। हेतुक स्थापित हुआ था। अभियुक्त की आपराधिक मानसिक अवस्था की उपधारणा ली गई थी जिसे खंडित करने में अभियुक्त असफल रहा था। निर्णय चरण 102, 104 एवं 105 अवलोकनीय हैं।

9. न्यायदृष्टांत *uhe r'kfjx ylpk fo:) LVV v,Q flfDde] 2017 lhvkj,y t 3168] flfDde mPp U;k;ky;]* में यह प्रतिपादित किया गया है कि अभियुक्त के विरूद्ध अवयस्क आहत को 'सदोष अवरोध' करने और 'प्रवेशन लैंगिक हमला' कारित करने का अभियोग था। आहत के पालक और दो अन्य गवाह आहत को ढूंढने निकले। आहत मिली। उसने अभियुक्त के विरूद्ध घटना का वर्णन किया। कपड़ों पर रक्त पाया गया जिसका आहत के ब्लड ग्रूप से मिलान हुआ। आहत 7 वर्षीय अवयस्क थी। धारा 29 की उपधारणा ली गई व अभियुक्त की दोषसिद्धि उचित मानी गई।

10. न्यायदृष्टांत *vPpr rjh mQ ckckr fo:) LVV v,Q v1e] 2019 lhvkj,y t 1235] xkgkVh mPp U;k;ky;]* के मामले में 11 वर्षीय आहत के साथ उसके पिता द्वारा 'लैंगिक हमला' करने का अभियोग था। आहत और उसकी माता ने साक्ष्य दी। झूठा फंसाने का कोई हेतुक नहीं था। धारा 29 और 30 अधिनियम की उपधारणाएं ली गई। दोषसिद्धि उचित मानी गई।

11. न्यायदृष्टांत *fnu'k pn fo:) ,u1hVh fnYyh] 2019 ,11h1h v,uykbu fnYyh 7802]* के मामले में अभियुक्त के विरूद्ध धारा 29 की उपधारणा ली गई। 'प्रवेशन लैंगिक हमला' प्रमाणित पाया गया।

12. न्यायदृष्टांत *y[kik nkjth rex fo:) LVV v,Q flfDde] nkfMd vihy 33@17 fujk–r fnukd 21-02-2019] flfDde mPp U;k;ky;]* के मामले में अभियुक्त के विरूद्ध, अवयस्क आहत को जो स्कूल के बाद आ रही थी जंगल में ले जाने और उस पर लैंगिक हमला कारित करने के अभियोग था आहत ने विस्तार से घटना बताई और अभियुक्त के द्वारा पूर्व में भी 4 अवसरों पर लैंगिक हमला कारित करना बतलाया। आहत के मित्रगण, जो उसकी तलाश में आये थे, उन्होंने भी घटना की पुष्टि

की। केवल दृश्यमान चोटें आहत के शरीर पर न होना आरोप को असत्य प्रमाणित नहीं करतीं। आहत के कपड़ों पर शुक्राणू पाये गये। अभियुक्त धारा 29 और 30 की उपधारणाएं खंडित करने में असफल रहा। दोषसिद्धि उचित पाई गई।

13. न्यायदृष्टांत *LVV v,Q ,e-ih- fo:) xxkjke vfgjokj] 2016 y, lV ¼,eih½ 1248]* के मामले में विशेष न्यायाधीश के समक्ष धारा 302, 511, 450 एवं 354 भा.दं.सं. एवं धारा 18 अधिनियम, 2012 का अभियोग पत्र पेश किया गया। विशेष न्यायाधीश ने अनुसंधानकर्ता को अभियोगपत्र सक्षम न्यायालय में पेश करने के लिए लौटा दिया उनके अनुसार अधिनियम, 2012 का कोई अपराध नहीं बनता था। यह प्रतिपादित किया गया कि उभयपक्ष को सुनकर आरोप विरचित करते समय यह देखा जा सकता था कि अधिनियम, 2012 का कोई अपराध आकर्षित होता है या नहीं। अभियोग पत्र लौटाने में न्यायालय ने त्रुटि की है, ऐसा माना गया।

इस न्यायदृष्टांत से यह मार्गदर्शन लिया जा सकता है कि विशेष न्यायाधीश को अभियोग पत्र पेश होने के बाद उभयपक्ष को सुनकर यह अभिमत देना चाहिए कि अधिनियम का अपराध बनता है या नहीं बनता है।

14. न्यायदृष्टांत *lfpu fo:) LVV v,Q ,p-ih-] 2015 lh-vkj-,y-t- ¼,uvklh½ 157 ¼,pih½,* के मामले में दो अभियोक्त्रियों के धारा 164 दं.प्र. सं. के कथनों में घटनास्थल के बारे में विरोधाभास थे। यह प्रतिपादित किया गया कि इन कथनों का उपयोग विचारण के समय पुष्टि या खंडन के उद्देश्य से किया जा सकता है। जमानत के स्तर पर इन कथनों का उपयोग उचित नहीं माना गया।

इस प्रकार न्यायालय के समक्ष जमानत के समय यदि धारा 164 दं.प्र.सं. के कथनों को आधार बनाकर तर्क किए जाते हैं, तब इस विधिक स्थिति को ध्यान में रखना चाहिए कि इन पूर्ववर्ती कथनों का प्रयोग अभियोक्त्री के कथन की पुष्टि या खंडन के लिए किया जा सकता है।

mi lgkj

धारा 29 एवं 30 अधिनियम, 2012 की उपधारणाएं आज्ञापक हैं। यदि अभियोजन प्रारंभिक तथ्य स्थापित कर देता है तो ये उपधारणाएं लेना अनिवार्य होता है। धारा 29 की उपधारणा, धारा 3, 5, 7 एवं 9 अधिनियम, 2012 में वर्णित अपराधों एवं उनके दुष्प्रेरण एवं प्रयत्न के अपराधों के बारे में लागू होती हैं, अधिनियम के शेष अपराधों पर लागू नहीं होती हैं, वहीं धारा 30 की उपधारणा धारा 3 एवं 5 में वर्णित अपराधों और उनके प्रयत्न एवं दुष्प्रेरण के अपराधों के अलावा अधिनियम में दंडनीय शेष अपराधों पर लागू होती हैं। इन उपधारणाओं के खंडन का भार युक्तियुक्त संदेह के परे स्तर का होता है। जमानत के स्तर पर भी ये उपधारणाएं ध्यान में रखनी होती हैं।

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DIRECTIVES ISSUED BY SUPREME COURT FOR EFFECTIVE IMPLEMENTATION OF WITNESS PROTECTION SCHEME, 2018*

Witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The witnesses 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 making process. It is for this reason that Bentham stated more than 150 years ago that **"witnesses are eyes and ears of justice".**

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. 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 to testify in Courts. These witnesses neither have any legal remedy nor do they are 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.

It hardly needs to be emphasised that one of the main reasons for witnesses turning 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'.

Hon'ble Supreme Court had on several occations expressed its anguish over the pathetic state of witnesses turning hostile resulting in low rate of convictions in ***Sakshi v. Union of India, (2004) 5 SCC 518, K. Anbazhagan v. Supt. of Police, (2004) 3 SCC 767*** and ***State v. Sanjeev Nanda, (2012) 8 SCC 450.*** Recently, in ***Ramesh Kumar and others v. State of Haryana, (2017) 1 SCC 529,*** the Supreme Court had noted some of the reasons which make witnesses turn hostile and observed that:-

> "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

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* Published in Part II-A, JOTI Journal June 2019

> in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible 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."

In ***Ramesh Kumar*** (supra), on the analysis of various cases, the following reasons were 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.

The Law Commission of India in its 198th Report titled **"Witness Identity Protection And Witness Protection Programmes"** has also suggested to bring a legislation on witness protection. However, no concrete action was taken.

These issues were again raised in a petition filed under Article 32 of the Constitution of India before Supreme Court in ***Mahender Chawla and Others v. Union of India and Others, AIR ONLINE 2018 SC 829,*** by the petitioners who were vulnerable witnesses in various cases instituted against godman Asharam and his son Narayan Sai. Hon'ble Supreme Court considered the seriousness of the matter and has stepped into the shoes of legislature invoking Article 141 and 142 of the Constitution of India and has implemented the ***Witness Protection Scheme, 2018*** prepared by the Central Government.

Considering various directions issued previously, it has been held by Supreme Court 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 considerations influenced the Court to issue directions implementing Witness Protection Scheme which should be considered as law under Article 141 of the Constitution till a suitable law is framed.

The directions are as follows :

(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.

WITNESS PROTECTION SCHEME, 2018

PREFACE

Aims and 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 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".In ***Zahira Habibulla H. Shiekh and another v. State of Gujarat, 2004 (4) SCC 158 SC,*** the Apex Court 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 not 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 CriminalIntimidation of Witnesses a criminal offence punishable with seven years of imprisonment. Likewise, statutes namely Juvenile Justice (Care and Protection of Children) Act, 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Sexual offences Act, 2012 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 also provide for safeguarding witnesses against 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. Hence 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 includes 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 person or persons making the threat have the intent, motive and resources to implement the threats.

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

includingname/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 Application
under Witness Protection Scheme, 2018

(To be filed in duplicate)

Before,
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 membersof the witness who are receiving orperceiving 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) Criminal Case No. (in case of private complaint)	
	Particulars of the Accused (if available/known):	
	1) Name 2) Address 3) Phone No. 4) Email id	
	Name & other particulars of the person giving/suspected of giving threats	
	Nature of threat perception. Please give brief details of threat received in the matter with specific date, place, mode and words used	
	Type of witness protection measures prayed by/for the witness	

• 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:.....

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cykRlx ,oa ;kSfxd vijk/kksa ls cPpksa dk lajf{k.k vf/kfu;e d vrxZr vijk/k d ekeyksa ls lacf/kr fn'kk&funsZ'k*

महिलाओं के विरुद्ध बलात्कार एवं अन्य लैंगिक अपराध तथा पॉक्सो अधिनियम के अधीन दण्डनीय अपराध के पीड़ितों की निजता एवं अन्य अधिकारों का संरक्षण करने के उद्देश्य से माननीय सर्वोच्च न्यायालय द्वारा *fuiqu lDlukuk o vU; fo- Hkkjr lajk o vU;] ¼2019½ 2 ,llhlh 703* में प्रतिपादित दिशानिर्देश निम्नानुसार हैं:—

1. कोई भी व्यक्ति प्रिंट, इलेक्ट्रॉनिक, सोशल मीडिया आदि में, पीड़िता का नाम प्रकाशित नहीं कर सकता है। यहां तक कि किसी दूरस्थ तरीके से भी किन्हीं ऐसे तथ्यों का खुलासा नहीं कर सकता है जिससे पीड़िता की पहचान की जा सके अथवा जिससे उसकी पहचान आम जनता को ज्ञात हो सके।
2. ऐसे मामलों में जहां पीड़िता की मृत्यु हो चुकी है अथवा वह विकृत चित्त है वहां उसके नाम अथवा उसकी पहचान का खुलासा उसके परिजनों के प्राधिकार के अधीन भी नहीं किया जाना चाहिए, जब तक कि उसकी पहचान का खुलासा करने की औचित्यपूर्ण परिस्थितियां विद्यमान हों। ऐसा निष्कर्ष सक्षम अधिकारी द्वारा तय किया जाएगा, जो वर्तमान में सत्र न्यायाधीश हैं।
3. भारतीय दण्ड संहिता की धारा 376, 376ए, 376एबी, 376बी, 376सी, 376डी, 376डीए, 376डीबी अथवा 376ई एवं पॉक्सो अधिनियम के अधीन दण्डनीय अपराधों से संबंधित प्रथम सूचना रिपोर्ट सार्वजनिक पटल पर उपलब्ध नहीं कराई जाएगी।
4. यदि कोई पीड़ित धारा 372 दण्ड प्रक्रिया संहिता के अंतर्गत अपील संस्थित करता है, तो पीड़ित के लिए यह आवश्यक नहीं होगा कि वह अपनी पहचान का खुलासा करे और ऐसी अपील की विधिनुसार सुनवाई की जाएगी।

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5. पुलिस अधिकारियों को यथासंभव, ऐसे समस्त दस्तावेजों को जिनमें पीड़ित के नाम का खुलासा किया गया हो और जिनकी सार्वजनिक पटल पर जांच होना संभाव्य हो, एक सीलबंद कवर में रखना चाहिए और इन दस्तावेजों को उनके समान दस्तावेजों द्वारा प्रतिस्थापित करना चाहिए जिनमें पीड़ित का नाम सभी अभिलेखों से हटा दिया गया हो।

6. ऐसे सभी प्राधिकारी, जिन्हें अनुसंधान एजेंसी अथवा न्यायालय द्वारा पीड़ित का नाम प्रकट किया गया हो, वे भी पीड़ित के नाम और पहचान को गुप्त रखने के लिए कर्तव्यबद्ध हैं तथा अपनी रिपोर्ट जो कि अनुसंधान एजेंसी अथवा न्यायालय को एक सीलबंद कवर में प्रेषित की जाएगी, के अतिरिक्त किसी भी तरीके से खुलासा नहीं करें।

7. भारतीय दण्ड संहिता की धारा 228ए(2)(सी) के अंतर्गत किसी मृत अथवा विकृत चित्त पीड़ित के निकट संबंधी द्वारा उसकी पहचान के प्रकटीकरण को अधिकृत करने के लिए आवेदन मात्र सत्र न्यायाधीश के समक्ष प्रस्तुत किया जाएगा तब तक कि संबंधित सरकार भारतीय दण्ड संहिता की धारा 228ए(1)(सी) के अधीन हमारे निर्देशों के अनुसार ऐसे सामाजिक कल्याण संस्थानों या संगठनों की पहचान एक मापदंड निर्धारित न कर दे।

8. पॉक्सो अधिनियम के अधीन अवयस्क पीड़ितों के मामले में, उनकी पहचान का खुलासा मात्र विशेष न्यायालय द्वारा ही किया जा सकता है, यदि ऐसा खुलासा बालक के हित में हो।

9. सभी राज्यों एवं केंद्रशासित प्रदेशों से अनुरोध है कि वे आज से एक वर्ष के भीतर प्रत्येक जिले में कम से कम एक ''वन स्टॉप सेंटर'' स्थापित करें।

कलकत्ता उच्च न्यायालय द्वारा *fct,,; fo- if'pe cxky jkT;] 2017 lhvkj,y t/ 3893* में प्रतिपादित दिशानिर्देश निम्नानुसार हैंः–

1. अधिनियम के अधीन अपराध के घटित होने या घटित होने की संभावना की शिकायत प्राप्त करने वाले पुलिस अधिकारी या विशेष किशोर पुलिस इकाई तत्काल उसे अधिनियम की धारा 19 के संदर्भ में पंजीबद्ध करे और बालक अथवा उसके मातादृपिता को निःशुल्क एक प्रति उपलब्ध कराएगा। साथ ही बालक या उसके मातादृपिता या किसी भी व्यक्ति को, जिसमें बालक को

भरोसा और विश्वास है, विधिक सहायता और प्रतिनिधित्व के अपने अधिकार की जानकारी देगा। यदि बालक अपने विधिक प्रतिनिधित्व के लिए व्यवस्था करने में असमर्थ है, तो अधिनियम की धारा 40 के अधीन आवश्यक विधिक सहायता या प्रतिनिधित्व के लिए जिला विधिक सेवा प्राधिकरण को बालक को रेफर करेगा। पॉक्सो अधिनियम की धारा 4, 6, 7, 10 और 12 के अंतर्गत दण्डनीय अपराधों के संबंध में प्रथम सूचना रिपोर्ट पंजीबद्ध करने में विफलता भारतीय दण्ड संहिता की धारा 166दृबी के अधीन आपराधिक दायित्व को आकर्षित करेगी क्योंकि उपरोक्त अपराध उक्त धारा में उल्लेखित दण्ड संहिता के अपराधों के ही समान हैं।

2. एफ.आई.आर. दर्ज करने पर पुलिस अधिकारी तत्काल आपातकालीन चिकित्सा सहायता के लिए, जब भी आवश्यक हो, बालक को प्रेषित करेंगे, एवंध्या अधिनियम की धारा 27 के अधीन चिकित्सा जांच के लिए और अधिनियम की धारा 25 के अधीन मजिस्ट्रेट के समक्ष पीड़ित के बयान लेखबद्ध कराना सुनिश्चित करेंगे। यदि पुलिस अधिकारी या विशेष किशोर पुलिस इकाई की राय है कि बालक किशोर न्याय (बालकों की देखभाल और संरक्षण) अधिनियम, 2000 की धारा 2(घ) जैसा कि किशोर न्याय (बालकों की देखभाल और संरक्षण) अधिनियम, 2015 द्वारा उपयुक्त रूप से संशोधित किया गया है, में परिभाषित ''देखरेख एवं संरक्षण की आवश्यकता वाले बच्चे'' की परिधि में आता है, तो उक्त पुलिस अधिकारी या विशेष किशोर पुलिस इकाई बालक को क्षेत्रीय अधिकारिता वाली बाल कल्याण समिति को विधिनुसार बालक की देखभाल, सुरक्षा, उपचार और पुनर्वास प्रदान करने के लिए अग्रेषित करेगी।

3. जब भी विशेष न्यायालय को एफआईआर के पंजीबद्ध होने की सूचना दी जाती है, तो विशेष न्यायालय उपरोक्त बिन्दु (1) और (2) में बताई गई विधि की पूर्वोक्त आवश्यकताओं का अनुपालन सुनिश्चित करने के लिए अनुसंधान एजेंसी से उचित पूछताछ करेगी एवं यदि आवश्यक समझे, तो विधिनुसार उनका अनुपालन सुनिश्चित कराने के लिए आवश्यक आदेश पारित करेगी।

4. थाने के प्रभारी अधिकारी और विशेष किशोर पुलिस इकाई सहित मामले के अनुसंधान अधिकारी यह सुनिश्चित करेंगे कि पीड़ित की पहचान का खुलासा अनुसंधान के दौरान नहीं किया गया है। विशेषकर अधिनियम की धारा 24 के तहत पीड़ित बयान लेखबद्ध करते समय (जो जहाँ तक व्यवहारिक हो, पीड़ित या उसके मातादृपिता या संरक्षक के निवास स्थान पर या जैसा कि मामला हो, उनकी इच्छा का स्थान हो सकता है) अधिनियम की धारा 25 के तहत मजिस्ट्रेट के समक्ष उसकी परीक्षा के समय, धारा 19(5) के तहत आपातकालीन चिकित्सा सहायता के लिए बालक को अग्रेषित करते समय औरध्या अधिनियम की धारा 27 के तहत चिकित्सीय परीक्षण के समय।

5. अनुसंधान एजेंसी किसी भी मीडिया में पीड़ित की पहचान का खुलासा नहीं करेगी और यह सुनिश्चित करेगी कि न्याय के हित में विशेष न्यायालय की प्रत्यक्ष अनुमति के अतिरिक्त किसी भी तरह से ऐसी पहचान का खुलासा नहीं किया जाएगा। विधि की पूर्वोक्त आवश्यकता का उल्लंघन करने वाले पुलिस अधिकारी सहित कोई भी व्यक्ति उक्त अधिनियम की धारा 23(4) के अनुसार अभियोजित किया जाएगा।

6. मामले का विचारण अधिनियम की धारा 37 के संदर्भ में बंद कमरे में किया जाएगा और पीड़ित की साक्ष्य को अनावश्यक विलम्ब के बिना लेख किया जाएगा एवं इस हेतु अभियुक्त से पीड़ित का सामना कराए बिना धारा 36 में विहित प्रक्रिया का पालन किया जाएगा। मातादृपिता, अभिभावक या किसी अन्य व्यक्ति, जिसमें बालक का भरोसा और विश्वास है, की उपस्थिति में न्यायालय द्वारा बालक के अनुकूल माहौल में पीड़ित की साक्ष्य लेखबद्ध की जाएगी। इस दौरान बालक को बारदृबार विराम दिया जाएगा। विशेष न्यायालय द्वारा किसी भी दोहराव, आक्रामक या उत्पीड़नकारी पूछताछ की अनुमति नहीं दी जाएगी, विशेष रूप से बालक के चरित्र हनन के लिए या इस तरह की परीक्षा के दौरान बालक की गरिमा को क्षीण कर सकती है। उपयुक्त मामलों में, विशेष न्यायालय बचाव पक्ष को न्यायालय में लिखित रूप से प्रतिपरीक्षण के दौरान घटना से संबंधित अपने प्रश्न प्रस्तुत करने के लिए आदेशित कर सकती है और बाद में न्यायालय द्वारा पीड़ित से ऐसे प्रश्न

उसे समझ में आने वाली भाषा में सौम्य और गैरदृआक्रामक तरीके से पूछे जाएंगे।

7. ऐसी स्थिति में, जहां पीड़ित विदेश में है अथवा दूरस्थ स्थान पर निवासरत है अथवा उपस्थित परिस्थितियों के कारण न्यायालय में व्यक्तिगत रूप से साक्ष्य देने के लिए उपस्थित होने में असमर्थ है, उसकी साक्ष्य वीडियो कॉन्फ्रेंस के माध्यम से लेखबद्ध की जा सकेगी।

8. पीड़िता की पहचान विशेष रूप से उसका नाम, मातादृपिता, पता या कोई अन्य विवरण जो इस तरह की पहचान को प्रकट कर सकता है, विशेष न्यायालय द्वारा दिए गए निर्णय में प्रकट नहीं किया जाएगा, जब तक कि पहचान का ऐसा खुलासा बालक के हित में न हो।

9. विशेष न्यायालय एफआईआर के पंजीबद्ध होने पर अधिनियम के अधीन किसी भी अपराध के घटित होने की सूचना प्राप्त होने स्वयमेव अथवा पीड़ित के आवेदन पर राहत या पुनर्वास के लिए बालक की तात्कालिक आवश्यकताओं की जांच करती है और राज्य व अन्य प्रभावित पक्षों, जिसमें पीड़ित भी सम्मिलित है, को सुनवाई का एक अवसर देकर बालक के अंतरिम प्रतिकर औरध्या पुनर्वास के लिए उचित आदेश पारित करेगी। कार्यवाही के समापन पर, चाहे अभियुक्त को दोषी ठहराया गया है या नहीं, या ऐसे मामलों में जहां अभियुक्त का पता नहीं चला है या वह फरार हो गया था, विशेष न्यायालय की संतुष्टि है कि अपराध के कारण पीड़ित को नुकसान या क्षति कारित हुई है, पीड़ित के पक्ष में उचित प्रतिकर का आदेश देगा। प्रतिकर की मात्रा को पीड़ित को कारित नुकसान या क्षति और अन्य संबंधित कारकों को, जैसा कि पॉक्सो नियम, 2012 के नियम 7 (3) में निर्धारित किया गया है, ध्यान में रखते हुए तय किया जाएगा। इसे पीड़ित प्रतिकर निधि में निर्धारित न्यूनतम राशि तक प्रतिबंधित नहीं किया जाएगा। अंतरिम या अंतिम प्रतिकर का भुगतान या तो पीड़ित प्रतिकर कोष या दण्ड प्रक्रिया संहिता, 1973 की धारा 357ए या किसी अन्य विधि के अधीन स्थापित किसी अन्य विशेष योजना या निधि से किया जाएगा जो राज्य विधिक सेवा प्राधिकरण या जिला विधिक सेवा प्राधिकरण के माध्यम से,

जिनके पास निधि हो, भुगतान किया जाएगा। यदि न्यायालय किसी मामले में अंतरिम या अंतिम प्रतिकर का आदेश नहीं करती है तो ऐसा न करने के अपने कारणों को लेखबद्ध करेगी। यदि ऐसे अंतरिम प्रतिकर का भुगतान होता है तो इसे अधिनियम की धारा 33(8) के संदर्भ में मामले के निराकरण से समय, अंतिम क्षतिपूर्ति, यदि कोई हो, से समायोजित किया जाएगा।

10. विशेष न्यायालय यह सुनिश्चित करेगी कि पॉक्सो अधिनियम के अधीन मामलों का विचारण अनावश्यक विलंबित न हो और अधिनियम की धारा 35 (2) के संदर्भ में अनुचित स्थगन स्वीकार किए बिना अपराध का संज्ञान लेने से एक वर्ष के भीतर विचारण को पूर्ण करने के लिए समस्त उपाय किया जाना सुनिश्चित करेगी।

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What precautions are required to be taken while recording evidence in cases of child sexual abuse and rape?

न्याय दृष्टांत *lk{kh fo:) Hkkjr lj?k ,o vU;] ,-vkb-vkj 2004 l-dk- 3566* में बच्चों के यौन उत्पीड़न या बलात्संग के मामलों के संबंध में यह मत व्यक्त किया गया है कि ऐसे प्रकरणों में अभियुक्त की दृष्टि मात्र ही पीड़ित या साक्षी के मन में अत्यधिक भय उत्पन्न कर सकती है और ऐसी दशा में यह संभव है कि पीड़ित या साक्षी घटना का पूर्ण विवरण न दे सके और उस दशा में न्याय का हनन हो सकता है। अतः ऐसे प्रकरणों के विचारण के लिये सर्वोच्च न्यायालय द्वारा निम्न निर्देश दिये गये हैं:–

(1) पीड़ित और साक्षी तथा आरोपी के मध्य पर्दा या अन्य कोई ऐसा साधन प्रयुक्त किया जाए ताकि पीड़ित और साक्षी आरोपी का शरीर या चेहरा न देख पाए।

(2) प्रतिपरीक्षण में घटना से प्रत्यक्षतः संबंधित प्रश्न लिखकर न्यायालय के पीठासीन अधिकारी को दिये जाने चाहिए जो न्यायालय द्वारा पीड़ित या साक्षी के समक्ष स्पष्ट भाषा में और इस प्रकार रखें जाएंगे जिससे उन्हें शर्मिंदगी न हो।

(3) ऐसे साक्षियों को आवश्यकतानुसार कथन के मध्य विश्राम भी दिया जाना चाहिए।

सर्वोच्च न्यायालय द्वारा उक्त न्याय दृष्टांत में यह भी व्यक्त किया गया कि उक्त वर्णित निर्देश उन निर्देशों के अतिरिक्त हैं जो उच्चतम न्यायालय द्वारा *i tkc jkT; fo:) xjehr f1g] ,-vkb-vkj- 1996 l-dk- 1393* के प्रकरण में दिये गये हैं।

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D;k fd'kkj U;k; ¼ckyd dh n[kj[k ,o lj{k.k½ vf/kfu;e] 2015 d fd'kkj dh vk; fu/kkj.k lc/kh i'ko/kku y fxd vijk/kk l ckyd dk lj{k.k vf/kfu;e] 2012 d vrxr vfHk;kD=h dh vk; fu/kkj.k e Hkh ykx gkr g\ vkj D;k vk; fu/kkj.k d fy, vfLFk l;k tu ijh{k.k d fu"d"k fu.k;kRed gkx

आयु निर्धारण के संबंध में दण्ड प्रक्रिया संहिता, 1973, लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 या लैंगिक अपराधों से बालकों का संरक्षण नियम, 2020 में कोई प्रावधान नहीं हैं। किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2000 के अधीन किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2007 बनाए गए थे। इसके नियम 12 के संदर्भ में जरनेल सिंह विरूद्ध हरयाणा राज्य, 2013 (7) एस.सी.सी. 263 में यह प्रतिपादित किया गया कि "Even though Rule 12 [Juvenile Justice (Care and Protection) of Children Rules, 2007] is strictly applicable only to determine the age of child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime."

किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2000 निरसित हो चुका है और उसके स्थान पर किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2015 लागू किया गया है। इस नए अधिनियम, 2015 के अधीन किशोर न्याय (बालकों की देखरेख एवं संरक्षण) नियम, 2016 बनाए गए हैं जिसके नियम 54(18)(iv) में यह उपबंध है कि ''बालक के साथ अपराधों के संबंध में पीड़ित की आयु के निर्धारण हेतु, अधिनियम के अधीन, इस अधिनियम की धारा 94 के अधीन बोर्ड तथा समिति हेतु अधिदेशित इन प्रक्रियाओं का पालन किया जाएगा।''

यद्यपि नियम 54(18)(iv) में अधिनियम, 2015 के अधीन बालकों के विरुद्ध अपराध के संदर्भ में ही आयु निर्धारण हेतु प्रक्रिया का उल्लेख किया है किन्तु यह नियम जरनेल सिंह (उपरोक्त) में प्रतिपादित विधि के विपरीत नहीं है। वस्तुतः पुराने नियम 12 का ही प्रावधान नए अधिनियम 2015 की धारा 94 में अधिनियमित है। इसके अलावा न्यायदृष्टांत महादेव विरूद्ध महाराष्ट्र राज्य, (2013) 4 एस.सी.सी. तथा मध्यप्रदेश राज्य विरूद्ध अनूप सिंह, 2015 (7) एस.सी.सी. 773 में अभिनिर्धारित विधि भी अवलोकनीय है।

अर्थात् किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2015 के किशोर की आयु निर्धारण संबंधी प्रावधान लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 के अंतर्गत अभियोक्त्री की आयु निर्धारण में भी लागू होते हैं। अभियोक्त्री की आयु का निर्धारण के संदर्भ में यह ध्यान रखे जाने योग्य है कि अधिनियम, 2012 के अधीन अपराधों में अभियोक्त्री की आयु अपराध का आवश्यक घटक है। इसलिए आयु विषयक प्रमाण का स्तर भी अपराध के घटकों के प्रमाण के स्तर का होगा।

जहां तक अस्थि संयोजन परीक्षण (ossification test) के निष्कर्ष का प्रश्न है अस्थि संयोजन परीक्षण आयु निर्धारण के लिए निर्णयात्मक नहीं होता है। जैसे कि रामसुरेश सिंह विरूद्ध प्रभात सिंह (2009) 6 एस.सी.सी. 681 एवं मुकर्रब व अन्य विरूद्ध उत्तर प्रदेश राज्य, (2017) 2 एस.सी.सी. 210 व अन्य मामलों में यह प्रतिपादित किया गया है कि अस्थि संयोजन परीक्षण के मामलों में छः वर्ष से दो वर्ष की त्रुटि की संभावना होती है। प्रश्न यह है कि ऐसी त्रुटि का लाभ किस पक्ष अर्थात् अभियोजन को या अभियुक्त को प्रदान किया जा सकता है?

यह सुस्थापित है कि आपराधिक मामलों में संदेह का लाभ अभियुक्त को प्रदान किया जाता है। न्यायदृष्टांत त्रिवेणीबेन विरूद्ध गुजरात राज्य, (1989) 1 एस.सी.सी. 678 तथा मारू राम विरूद्ध भारत संघ, (1981) 1 एस.सी.सी. 107, श्वेता गुलाटी विरूद्ध दिल्ली एन.सी.आर. की राज्य सरकार, 2018 एस.सी.सी. ऑनलाईन दिल्ली 10448 और रज्जाक मोहम्मद विरूद्ध हिमाचल प्रदेश राज्य, (2018) 9 एस.सी.सी. 248 आदि में ऐसा ही मत प्रतिपादित किया गया है। न्यायदृष्टांत महेश्वर तिग्गा विरूद्ध झारखण्ड राज्य, (2020) 10 एस.सी.सी. 108 में यह अभिनिर्धारित किया है "In absence of any positive evidence with regard to the age of prosecutrix on the date of occurance, benefit of doubt has to be given to accused."

लेकिन आयु के संबंध में त्रुटि की गुंजाइश (margin of error) को सदैव ''युक्तियुक्त संदेह'' नहीं माना जा सकता है। जहां आयु के विषय में अभिलेख पर उपलब्ध समग्र साक्ष्य और इंगित परिस्थितियां एक आयु को दर्शाती हैं वहां त्रुटि की गुंजाइश (margin of error) का लाभ ''युक्तियुक्त संदेह'' के रूप में अभियुक्त को दिए जाने की अनिवार्यता नहीं होगी। तथापि यह एक तथ्य का प्रश्न है।

दीपक प्रजापति विरूद्ध मध्यप्रदेश राज्य, 2021 क्रि.ला.ज. 4229 (म.प्र.) में मध्यप्रदेश उच्च न्यायालय द्वारा यह प्रतिपादित किया गया है कि –"There is no straight jacket formula to the effect that in every case the margin of error of two years has to be taken in favour of the accused irrespective of the

surrounding circumstances. If the surrounding circumstances indicate the margin of error in favour of the prosecution then there is no bar under the law in considering the same against the accused." अर्थात् जहां उपस्थित परिस्थितियां अभियोक्त्री का निम्न आयु सीमा का होना इंगित करती है, ऐसी स्थिति में त्रुटि की गुंजाइश का लाभ अभियोजन को भी दिया जा सकता है। अतः ऐसी किसी परिस्थिति की उपलब्धता की स्थिति में त्रुटि की गुंजाइश का लाभ अभियोक्त्री को दिया जा सकेगा।

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PART-II

NOTES ON JUDICIAL PRONOUNCEMENTS

*1. POINT INVOLVED

Sections 4, 8 & 30 of the Protection of Children from Sexual Offences Act, 2012 –

- Appreciation of evidence – Penetration of any part of accused's body in the private part of the prosecutrix neither mentioned in the FIR nor in police statement as statement of prosecutrix's mother on this point found unreliable by Hon'ble the High Court but the prosecution has proved that the accused took the prosecutrix, aged 5 or 6 years, inside his house – He removed her slacks and panty, lifted her on to the cot – By virtue of presumption under section 30 of the POSCO Act, it may be presumed that the assault was made with sexual intent – Accused convicted under section 8 of the Act of 2012.
- When non-recording of statement of prosecutrix under section 161 or 164 of Cr.P.C. is not fatal for prosecution? According to I.O., she was unable to speak at the time of recording her statement – The entire prosecution case was based upon the statement of prosecutrix's mother and grand-mother – Non-recording of statement of prosecutrix, held, not fatal for prosecution.

Parties – ***Chaitu Singh Gond v. State of M.P.***

Reported in – **ILR (2015) MP 1343 (DB)**

2. POINT INVOLVED

Section 6 of the Protection of Children from Sexual Offences Act, 2012
Offence under sections 376-A, 302 and 304 Part II of IPC and section 6 of the POCSO Act, consideration and ingredients of – Law explained.

Facts of the case:

The accused person who was close relative of deceased prosecutrix, aged 10 years, took her from her house to the field of one of the villagers 'V' which was witnessed by one of the villagers 'Dr. R' – Afterwards the accused person was seen by two other witnesses 'D' and 'B' coming out of the field of 'R' in a suspicious manner who was trying to hide himself – He confessed his guilt before the witnesses – Next day the dead body of the deceased prosecuterix was found lying in the field of 'R' – During post mortem, doctors found that blood was oozing out from the vagina of the deceased prosecutrix and froth was coming out from her nostril – Her hymen was torn and laceration relating to hymen was 3 cm inside the vaginal opening and upto 1 cm deep – In DNA test, male profile of the accused was found on the clothes of the deceased prosectrix and her vaginal swab – During investigation when the accused person learnt that police would bring dog for smelling purpose, he ran away from the spot – After completion of investigation, charge sheet was filed before the concerned committal Court who committed the case to the Court of Sessions

– The Sessions Court after considering the prosecution evidence, convicted the accused person under sections 201, 302, 363 and 376-A of IPC and section 6 of POCSO Act and death sentence was awarded for offence under sections 376-A and 302 of IPC whereas 5 years rigorous imprisonment with fine of Rs. 1,000 was inflicted for each count for the remaining offence under Penal Code – However, no separate sentence was awarded under section 6 of the POCSO Act – Held, it is apparent that no external injury was caused to the deceased prosecutrix other than the injury caused in her private part – Injury caused in the private part was a part of crime under section 376 IPC and it cannot be taken separately as injury caused by the accused to the prosecutrix for offence under section 302 of the IPC – As no doctor has stated that injury caused on private part was fatal in nature, it was opined that possibility cannot be ruled out that the accused kept his hand on the mouth of the prosecutrix so that she could not cry – But in doing so he suffocated the prosecutrix and she died of asphyxia – Under such circumstances it cannot be held that the accused intended to actually kill the deceased – Relying on the judgments by the Apex Court in the case of ***Ajit Singh v. State of Punjab, (2011) 9 SCC 462, Yomeshbhai Pranshankar Bhatt v. State of Gujarat, (2011) 6 SCC 312*** and ***Manjit Singh v. State of Himachal Pradesh, (2014) 5 SCC 697***, it was further held that the crime committed by the accused in the absence of an intention or causing fatal injury falls

within the purview of section 304 Part II of IPC.

As regards offence committed under section 376-A, it was held that it is no where mentioned in the section that the accused would have cause death of the prosecutrix.

. Intention – If someone harms illegally to body, mind etc. then injury would be caused and therefore, when the accused kept his hand on mouth of prosecutrix so that she should not shout and in that process if she died due to suffocation, the accused caused the injury to the prosecutrix which caused death to the accused and therefore, the offence of the accused squarely falls within the purview of section 376-A of IPC – In appeal conviction under section 376-A of IPC and section 6 of the POCSO Act was maintained and conviction under section 302 IPC was set aside and the accused was convicted for offence under section304 Part I of IPC – It was further held that the case does not falls within the rarest of rare case and therefore, reference for confirmation of death sentence was rejected.

Parties – ***In ref. received from Sessions Judge, Narsinghpur (M.P.) v. Arvind alias Chhotu Thakur***

Reported in – 2014 (3) MPHT 212 (DB)

The learned counsel for the appellant has also placed his reliance upon the judgment passed by Hon'ble the Apex Court in the case of Manjeet Singh v. State of Himachal Pradesh, (2014) 5 SCC 697 in which it is held that if the evidence on record does not establish that the injuries caused on the body of the deceased must in all probability cause his death or likely to cause his death and the incident took place at the spur of the moment, during the heat of exchange of words, the accused caused injuries on the body of the deceased which caused his death then the ingredients of murder as defined under Section 300 of I.P.C shall not be attracted. In such a case, offence of culpable homicide not amounting to murder under section 304 of I.P.C shall constitute. In the light of aforesaid judgments passed by Hon'ble the Apex Court, if the facts of the present case are considered then it would be apparent that no external injury was caused by the appellant to the deceased prosecutrix other than injury caused in her private part. Injury caused in the private part was a part of crime under Section 376 of I.P.C and it cannot be taken separately as injury caused by the appellant to the prosecutrix for offence under Section 302 of I.P.C because no doctor has stated that injury caused on private part of the deceased was fatal in nature. Possibility cannot be ruled out that the appellant kept his hand on the mouth of the prosecutrix, so that she would not cry but, in doing so he suffocated the prosecutrix and she died of asphyxia. Under such circumstances, it cannot be said that the appellant intended to kill the deceased. Hence in the light of aforesaid judgments passed by the Apex Court the crime committed by the appellant in the absence of any intention or causing fatal injury, falls within the purview of

Section 304 (Part II) of I.P.C. Hence the learned Sessions Judge has committed an error in convicting the appellant for offence under Section 302 of I.P.C.

The appellant is convicted for offence under Section 376-A of I.P.C. This provision has been recently introduced to punish severely offences of rape where injury is caused resulting into death of victim. It may be read as under :

> "376-A. Punishment for causing death or resulting in persistent vegetative state of victim- Whoever, commits an offence punishable under sub-section (l) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death."

The learned counsel for the appellant has submitted that no visible injury was found to the prosecutrix, except the injury caused in her private part and therefore, it cannot be said that the appellant inflicted an injury which caused death of the woman. However, the contention advanced by the learned counsel for the appellant cannot be accepted, because in this provision it is no where mentioned that the accused would have caused death of the prosecutrix with intention. Word "injury" is mentioned in that provision is defined in Section 44 of the I.P.C. Provision of Section 44 of I.P.C is reproduced as under:-

> "44. "Injury" – The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

According to that provision if someone harms illegally to any person in body, mind etc. then injury would be caused and therefore, when the appellant kept his hand on mouth of the prosecutrix, so that she should not shout and in that process if she died due to suffocation, then certainly the appellant caused an injury to the prosecutrix which caused the death of the prosecutrix and therefore, the offence of the appellant squarely falls within the purview of Section 376-A of I.P.C and therefore, the learned Sessions Judge has rightly convicted the appellant under Section 376-A of I.P.C. According to the witnesses the appellant was found going towards the field of one Raj kumar along with the prosecutrix. It is duly proved that the age of the prosecutrix was 10 years. It was not in the knowledge of the parents of the prosecutrix that she was taken by the appellant and therefore, a missing report Ex.P/1 was lodged by the mother of the deceased prosecutrix. Under such circumstances, it is duly established that the appellant kidnapped the deceased prosecutrix from her mother's guardianship without taking any permission from her guardians. Hence he committed an offence under Section 363 of I.P.C. The learned Sessions Judge has rightly convicted the appellant for offence under Section 363 of I.P.C.

As discussed above, the appellant is found guilty of offence under Section 376-A of I.P.C and since the deceased prosecutrix was aged 10 years then his offence is also covered with Section 6 of 'POSCO Act' and therefore, the learned Sessions Judge has rightly convicted the appellant for that offence also.

So far as the sentence is concerned the learned

counsel for the appellant has placed his reliance upon the judgments passed by Hon'ble the Apex Court in the cases of Rajkumar v. State of M.P, (2014) 5 SCC 353, Dharam Deo Yadav v. State of U.P, (2014) 5 SCC 509 and Ashok Debbarma @ AchakDebbarma v. State of Tripura, (2014) 4 SCC 74, to show that in similar cases the Apex Court converted the death sentence into sentence of life imprisonment. However, basically it is laid in all such cases that death sentence be given in rare of rarest case. On the other hand the learned Deputy Advocate General has submitted with a bunch of so many cases decided by the Hon'ble Apex Court since the year 1980 to 2013. However, in all of such cases it is held by the Apex Court that death sentence be given in rare of rarest case. The learned Deputy Advocate General has placed his reliance especially on the judgment passed by the Apex Court in the case of Rajendra PralhadraoWasnik v. State of Maharashtra, (2012) 4 SCC 37 in which the death sentence directed to a culprit who, was guilty of rape upon a small child and killed her thereafter, was confirmed. In the present case, it would be apparent that it was not the intention of the appellant to kill the deceased prosecutrix. He is not found guilty of offence under Section 302 of I.P.C. Similarly if the appellant would have been found guilty of offence under Sections 376(1) or (2) of I.P.C. then, he would have been awarded a sentence of life imprisonment but, the offence is committed after introduction of provision of Section 376-A of I.P.C which provides a sentence of life imprisonment up to the natural life or with death. In the present case, when the crime committed by the appellant falls within the purview of Section 376-A of I.P.C, then it is necessary that a severe sentence as

directed in the provision of Section 376-A of I.P.C which is severe than the sentence of offence under Section 376(1) or (2) of I.P.C should be awarded. However, according to the factual position, the appellant did not kill the deceased intentionally but, while he stopped the prosecutrix from crying or shouting, suffocation was caused and the deceased prosecutrix died. However, rape with a girl of tender age is brutal on its own but, no death sentence is provided for offence under Section 376(1) or (2) of I.P.C therefore, due to that brutality, no death sentence can be directed. Under such circumstances, it cannot be said that it is a rare of rarest case and therefore, it would be proper not to award the death sentence to the appellant for offence under Section 376-A of I.P.C. It would be proper that he be sentenced for rigorous imprisonment for life which shall mean imprisonment for the remainder of that person's natural life. Similarly, he can be sentenced with 10 years rigorous imprisonment for offence under Section 304(Part II) of I.P.C. Since the offence committed by the appellant under Section 6 of the 'POSCO Act' is parallel to the offence committed under Section 376-A of I.P.C therefore, in the light of the provision under Section 42 of the 'POSCO Act' it would not be necessary to pass a separate sentence for offence under Section 6 of the 'POSCO Act' The trial Court has rightly inflicted a sentence of five years rigorous imprisonment with fine of Rs.1000/- for offence under Section 363 of I.P.C and therefore, there is no need to interfere in the sentence passed by the trial Court for that offence.

On the basis of aforesaid discussion, the appeal filed by the appellant is hereby partly allowed. His conviction and

sentence under Section 201 and 302 of I.P.C are hereby set aside whereas, conviction under Section 363 and 376-A of I.P.C is confirmed. He is acquitted of the charge of offence under Section 302 and 201 of I.P.C but, he is convicted for offence under Section 304 (Part II) of I.P.C under the head of charge under Section 302 of I.P.C. The appellant shall undergo 10 years rigorous imprisonment for offence under Section 304 (Part II) of I.P.C. Though the conviction for offence under Sections 376-A and 363 of I.P.C is maintained and also the sentence for offence under Section 363 of I.P.C is maintained but, death sentence awarded by the trial Court for offence under Section 376-A of I.P.C is hereby set aside and the appellant is sentenced for life imprisonment which shall mean imprisonment for the remainder of that person's natural life for that offence. Since death sentence is not confirmed against the appellant for any offence therefore, reference sent by the learned Sessions Judge, Narsinghpur is not accepted and death sentence directed against the appellant is not confirmed. The reference is hereby disposed off with the aforesaid direction and the appeal filed by the appellant 46.
is also hereby disposed of with the aforesaid modification in conviction and sentence.

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*3. POINT INVOLVED

Sections 6 & 17 of the Protection of Children from Sexual Offences Act, 2012 – Statements of two prosecutrix recorded under section 164 Cr.P.C. for bail, use of – There are contradictions in the statements of both the

prosecutrix regarding the place of occurrence – It can be used only for corroboration or contradiction purpose during trial – Application under section 439 Cr.P.C. rejected. .

Parties – ***Sachin v. State of H.P.***

Reported in – 2015 Cri.L.J. (NOC) 157 (H.P.)

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4. POINT INVOLVED

Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 and Section 376, 420/34, 366-A, 370, 370-A, 212 and 120-B of I.P.C,1860 and Section 439 Cr.P.C,1973.

(i) Bail, cancellation of – If cancellation of bail is sought on the ground that the accused mis-conducted himself after the grant of bail or new facts have emerged which warrant cancellation of bail, then conduct or events based grant of bail are to be examined and considered – On the other hand, when order of grant of bail is challenged on the ground that grant of bail itself is given contrary to principles of law, while undertaking the judicial review of such an order, it needs to be examined as to whether there was arbitrary or wrong exercise of jurisdiction by the Court granting bail – If that be so, higher Court has power to correct the same.

(ii) While cancelling bail under section 439 (2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice – The High Court or the Sessions Court may cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice – If the Court granting bail ignores relevant materials indicating *prima facie* involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bailsto the accused, the High Court or the Sessions Court would be justified in cancelling the bail – The High Court or the Sessions Court is bound to cancel such orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society.

(iii) The accused allegedly involved in commission of offence of rape upon the minor girl, the trial Court initiated proceedings under sections 82 and 83 of the CrPC as the accused had avoided his arrest, there were several complaints of intimidation of witness

made on behalf of the prosecutrix and her family members as well as the presumption of offence under section 29 of POCSO Act – Held – The High Court erred in granting bail.

Parties – ***State of Bihar v. Rajballav Prasad @ Rajballav Pd. Yadav @ Rajballabh Yadav***

Reported in – 2017 (1) ANJ (SC) (Suppl.) 10

It is a matter of record that when FIR was registered against the respondent and on the basis of investigation he was sought to be arrested, the respondent had avoided the said arrest. So much so, the prosecution was compelled to file an application under Section 82 of Cr.P.C. before the trial court and the trial court even initiated the process under Section 83 of Cr.P.C. At that stage only that the respondent surrendered before the trial court and was arrested.

The respondent's application was dismissed by the Additional Sessions Judge vide orders dated 30.05.2016. While passing this order of rejection, the trial court was persuaded by the submission of the Prosecutor that direct and specific allegations had been levelled against the respondent of committing rape upon the victim minor girl and he was identified by the victim during the course of investigation while he was walking in the P.O. House. It was also noted that prayer for bail of co-accused Sandeep Suman @ Pushpanjay had already been rejected and the case of the respondent was on graver footing and also that the respondent had a long criminal diary, as would be evident from the Case Diary produced before the Court.

It has also come on record that the prosecutrix had her family members made representations claiming that the respondent is threatening the family members of the prosecutrix. So much so, having regard to several complaints of intimidation of witnesses made on behalf of the prosecutrix and her family members, the State administration has deputed a force of 1+4 for the safety and security of the prosecutrix and her family.

In spite of the aforesaid material on record, the High Court has made casual and cryptic remarks that there is no material

showing that the accused had interfered with the trial by tampering evidence. On the other hand, it has discussed the merits of the case/evidence which was not called for at this stage. No doubt, in a particular case if it appears to the court that the case foisted against the accused is totally false, that may become a relevant factor while considering the bail application. However, it can be said at this stage that the present case falls in this category.

That would be a matter of trial. Therefore, the paramount consideration should have been as is pointed out above, whether there are any chances of the accused person fleeing from justice or reasonable apprehension that the accused person would tamper with the evidence/trial if released on bail. These aspects are not dealt with by the High Court appropriately and with the seriousness they deserved. This constitutes a sufficient reason for interfering with the exercise of discretion by the High Court.

The High Court also ignored another vital aspect, namely, while rejecting the bail application of co-accused, the High Court had ordered expeditious, nay, day-to-day trial to ensure that the trial comes to an end most expeditiously. When order had already been passed to fast-track the trial, and the application for bail by co-accused Sandeep Suman @ Pushpanjay was also rejected, the High Court, while considering the bail application of the respondent, was supposed to take into consideration this material fact as well. Further, while making a general statement of law that the accused is innocent, till proved guilty, the provisions of Section 29 of POCSO Act have not been taken into consideration.

Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf. We would like to reproduce following discussion from the judgment in the case of ***Kanwar Singh Meena v. State of Rajasthan & anr., (2012) 12 SCC 180***.

> "...While cancelling bail under Section 439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order

> granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc. would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.
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> xxx
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> Taking an overall view of the matter, we are of the opinion that in the interest of justice, the impugned order granting bail to the accused deserves to be quashed and a direction needs to be given to the police to take the accused in custody..."

As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail. This importance of fair trial was emphasised in ***Panchanan Mishra v. Digambar Mishra & ors., (2005) 3 SCC 143*** while setting aside the order of the High Court granting bail in the following terms:

> "We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

Such sentiments were expressed much earlier as well by the Court in ***Talab Haji Hussain v. Madhukar Purshottam Mondkar & ors., 1958 SCR 1226*** in the following manner:

> "There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself

> and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked..."

We are conscious of the fact that the respondent is only an under–trial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trail of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. 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 this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses etc., that would happen because of wrongdoing of the accused himself, and the consequences thereof, he has to suffer. This is so beautifully captured by this Court in ***Masroor v. State of Uttar Pradesh & anr., (2009) 14 SCC 286*** in the following words:

> "There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in ***Shahzad Hasan Khan v. Ishtiaq Hasan Khan, (1987) 2 SCC 684*** are quite apposite:

> "… Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.""

This very aspect of balancing of two interests has again been discussed lucidly in ***Neeru Yadav v. State of Uttar Pradesh & anr., (2014) 16 SCC 598*** in the following words:

> "The issue that is presented before us is whether this Court can annul the order passed by the High Court and curtail the liberty of the second respondent? We are not oblivious of the fact that liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on the human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to the rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. Society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can

> make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law.
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> Coming to the case at hand, it is found that when a stand was taken that the second respondent was a history-sheeter, it was imperative on the part of the High Court to scrutinise every aspect and not capriciously record that the second respondent is entitled to be admitted to bail on the ground of parity. It can be stated with absolute certitude that it was not a case of parity and, therefore, the impugned order [Mitthan Yadav v. State of U.P., Criminal Misc. Bail Application No. 31078 of 2014, decided on 22–9–2014 (All)] clearly exposes the non–application of mind. That apart, as a matter of fact it has been brought on record that the second respondent has been charge–sheeted in respect of number of other heinous offences. The High Court has failed to take note of the same. Therefore, the order has to pave the path of extinction, for its approval by this Court would tantamount to travesty of justice, and accordingly we set it aside."

No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.

For the foregoing reasons, we allow this appeal thereby setting aside the order of the High Court. In case the respondent is already released, he shall surrender and/or taken into custody forthwith. In case he is still in jail, he will continue to remain in jail as a consequence of this judgment.

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5. POINT INVOLVED

Sections 35 of Protection of Children from Sexual Offences Act, 2012.

Speedy trial – Many cases pending at evidence stage beyond one year – Section 35 (2) and intent of the legislature mandates completion of trial "as far as possible" within one year – Directions issued.

Parties – ***Alakh Alok Shrivastava v. Union of India and ors***

Reported in – AIR 2018 SC 2440

Keeping in view the protection of the children and the statutory scheme conceived under the POCSO Act, it is necessary to issue certain directions so that the legislative intent and the purpose are actually fructified at the ground level and it becomes possible to bridge the gap between the legislation remaining a mere parchment or blueprint of social change and its practice or implementation in true essence and spirit is achieved.

Mr. Srivastava has provided us a chart relating to the cases pending under the POCSO Act in all States except Andhra Pradesh, Telangana, Rajasthan and Jammu and Kashmir in respect of which the data is not available. We may take the example of two States, namely, Madhya Pradesh and Uttar Pradesh. The pendency of such cases in the State of Uttar Pradesh is approximately 30884 and in the State of Madhya Pradesh, approximately 10117.

It is submitted by Mr. Srivastava that in both the States, the cases are pending at the evidence stage beyond one year. We are absolutely conscious that Section 35 (2) of the Act says "as far as possible". Be that as it may, regard being had to the spirit of the Act, we think it appropriate to issue the following directions:-

(i) The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said Courts are sensitized in the matters of child protection and psychological response.

(ii) The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.

(iii) The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time frame under the Act.

(iv) The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.

(v) The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial Courts.

(vi) Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.

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6. POINT INVOLVED

Sections 8, 10 & 33 of Protection of Children from Sexual Offences Act, 2012, Sections 3 & 118 of the Evidence Act.

(i) Evidence of prosecutrix – Child witness of 12 years of age – Truthfulness and verasity – Prosecutrix explained the reprobate conduct of accused (her father) about rubbing his genitals against her anus – This statement remained constant and unwavering during trial – No allegation of penetrative assault, hence, absence of injury is irrelevant – Nature of the act itself excludes the possibility of other witnesses – Prosecutrix had no reason to falsely implicate accused – Non-cordial relation between mother of prosecutrix and accused cannot lead to presumption of tutoring – Statement of prosecutrix found to be trustworthy.

(ii) Identity of victim – POCSO cases – It is the duty of Special Court to ensure that identity of child is not disclosed during the course of investigation or trial – Objectives of the provision, explained – Duties of different stakeholders also explained.

Parties – Subash Chandra Rai v. State of Sikkim

Reported in – 2018 CriLJ 3146 (Sikkim)

What emanates from the evidence on record is that apart from the victim, P.W.3 there is no other witness to the sexual assault committed on her. The witness has categorically deposed that when she, her mother and the Appellant were living in

Tumin, East Sikkim, the Appellant used to come to her bed, disrobe her and rub his genital on her anus. On his repeating the act several times, she informed her mother, P.W.4 of it, who asked the victim to sleep with her in the Kitchen. The Appellant however was prone to enter the Kitchen during the night and commit the same offence, besides he also showed her videos of naked boys and girls which were stored in his mobile. After they shifted to Mangan, North Sikkim, he continued with the offence, but her mother remained helpless despite knowledge of the perverse acts as she herself used to be physically assaulted by the Appellant. A careful perusal of the cross-examination which the victim was subjected to would reveal that no questions were put to the victim to contradict her evidence pertaining to the act of sexual assault on her. Thus, her evidence regarding the sexual act committed on her by the Appellant remained uncontroverted.

I am not inclined to accept nor appreciate the argument of Learned Counsel for the Appellant that the child was susceptible to tutoring from her mother. The evidence of P.Ws 1, 5 and 6 reveal that besides the child disclosing the incidents of sexual assault to them in the absence of P.W.4, she was resolute in her stand that the Appellant had sexually assaulted her and described the reprobate acts perpetrated on her by him. Merely because P.W.4 was presumably not in a cordial relationship with her husband did not mean that she would have made the victim a bait to bail out of the marriage by accusing him of depraved and degenerate acts. Such accusations could not have assured her of an escape from her marriage without recourse to legal procedure.

The victim herein has no reason to implicate the Appellant and it is but trite to mention that the nature of the act itself would ensure exclusion of other witnesses.

x x x

In the instant matter, I have to note that the Learned Trial Court has been largely circumspect with regard to the identity of the victim during the trial. However, it would be worthwhile to indicate here that Section 33(7) of the POCSO Act enjoins upon the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The Explanation to the Section elucidates that the identity of the child includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. There are a few slip-ups in this regard in the Order of the Learned Trial Court dated

30.08.2016 and the impugned Judgment. Besides ensuring that the Court does not disclose the child's identity, the Learned Special Court is also vested with the responsibility of ensuring that this does not occur during the investigation. In this context, it is for the Learned Special Court to devise methods for such steps. One would find on perusal of the Charge-sheet that the name of the victim, her address and detail of school has been revealed therein flagrantly by the Investigating Agency throwing caution and the mandate of the Statute to the winds. The provisions in law which seek to protect the identity of the child are for the purpose of sheltering her from curiosity and prying eyes which could further traumatize her psychologically creating insecurity and apprehension in the victim's mind. It is also an effort, *inter alia*, to protect her future, to prevent her from being tracked, identified and for warding off unwanted attention and to prevent repetition of such offences on her on the assumption that she is easy prey. The Investigating Agency for their part should ensure that the identity of the victim is protected and not disclosed during investigation or in the Charge-Sheet. A separate File may perhaps be maintained in utmost confidence, for reference, if so required. Statutes have been enacted to protect children of crimes of which the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "Juvenile Justice Act") and POCSO Act are of special relevance. These Acts impose an obligation not only on the Court and the Police, but also the Media and Society at large to protect children from the exponentially increasing sexual offences against children and to the best of their ability to take steps for prevention of such sexual exploitation of children.

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*7. POINT INVOLVED

Sections 3 & 4 of Protection of Children from Sexual Offences Act, 2012, Sections 3 of the Evidence Act and Section 302 of IPC.

(i) Appreciation of circumstantial evidence – Last seen circumstance of victim aged 8 years going with the accused – Later body of the victim recovered with

fatal injuries on various parts of the body – No explanation of the accused as to when they parted company – Such silence leads to adverse inference – Conviction under Section 302 upheld.

(ii) Appreciation of evidence – Charge of penetrative sexual assault – No direct evidence – Post-mortem report revealed injury on body parts but not on the genital organs – Genital organs found to be normal – No sign of sperm ejaculation near genital organs – Absence of evidence of penetration – Conviction under the POCSO Act set-aside.

(iii) Death penalty – Motive of the crime, not on record – Accused was young at the time of offence – Absence of extreme brutality – State failed to show that there is no possibility of reform or rehabilitation – Capital punishment commuted to life imprisonment.

Parties – Prahlad v. State of Rajasthan

Reported in – 2018 (4) Crimes 372 (SC)

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8. POINT INVOLVED

Sections 2, (1) (d) & 27 of Protection of Children from Sexual Offences Act, 2012.

(i) Child – Whether Section 2 (1)(d) of the POCSO Act that defines "child" to mean any person below the age of 18 years, engulfs and embraces, in its connotative expanse, "mental age" of a person

irrespective of his or her biological age? Held, No – Purpose of POCSO Act is to treat minors as a class by itself and treat them separately so that no sexual offence is committed against them – This Act categorically makes a distinction between a child and an adult – To include mental competence of a victim or mental retardation as a factor willtantamount to incorporating certain words to definition – This is not within the sphere of Courts.

(ii) Medical examination of child – Held, is mandatory whether POCSO Act is mentioned in FIR or not.

(iii) Interpretation of statutes – Purposive interpretation – POCSO Act is a benevolent beneficial legislation – Provisions must be construed to help in carrying out the beneficient purpose of the Act and should not unduly expand the scope of a provision.

Parties – ***Ms. Eera Through Dr. Manjula Krippendorf***

v.

State (Govt. of NCT of Delhi) and another

Reported in – 2018 (2) Crimes 99 (SC)

On that basis, an argument has been structured to treat the mental age of an adult within the ambit and sweep of the term "age" that pertains to age under the POCSO Act. In this regard, I am obligated to say what has been provided in the IPC is on a different base and foundation. Such a provision does treat the child differently and carves out the nature of offence in respect of an insane person or person of unsound mind. There is a prescription by the statute. Learned counsel would impress upon us that I can adopt the said prescription and apply it to dictionary clause of POCSO Act so that mental age is considered within the definition of the term "age". I am not inclined to accept the said submission.

In this regard, it is worthy to note that the legislature despite having the intent in its Statement of Objects and Reasons and the long Preamble to the POCSO Act, has thought it wise to define the term "age" which does not only mention a child but adds the words "below the age of 18 years". Had the word "child" alone been mentioned in the Act, the scope of interpretation by the Courts could have been in a different realm and the Court might have deliberated on a larger canvass. It is not so.

The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying "age" would cover "mental age" has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature. To elaborate, an addition of the word "mental" by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned.

X X X

Section 27 stipulates that medical examination of a child in respect of whom any offence has been committed under the Act is to be conducted in accordance with Section 164A of the CrPC. It is also significant to note that the said examination has to be done notwithstanding an FIR or complaint has not been registered for the offences under the POCSO Act. I shall refer to Section 164A CrPC at a later stage. Section 28 of the POCSO Act deals with Special Courts. Section 31 provides that the CrPC shall apply to the proceedings before a Special Court. Section 32 requires the State Government to appoint a Special Public Prosecutor for every Special Court for conducting the cases under the provisions of the POCSO Act. Chapter VIII deals with the procedure and powers of the Special Courts and recording of evidence. Section 35 provides for a period for recording of evidence of child and disposal of case. Section 36 stipulates that

child should not see the accused at the time of testifying. The said provision protects the child and casts an obligation on the Special Court to see that the child, in no way, is exposed to the accused at the time of recording of evidence. Recording of the statement of a child is through video conferencing or by utilizing single visibility mirrors or curtains or any other device is permissible. This provision has its own sanctity. Section 37 deals with trials to be conducted in camera and Section 38 provides assistance of an interpreter or expert while recording evidence of a child. Section 42A lays the postulate that POCSO Act is not in derogation of the provisions of any other law.

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***9. POINT INVOLVED**

Sections 7 & 8 of Protection of Children from Sexual Offences Act, 2012 & Section 354 & 354A of IPC,

Accused had caught hold of victim girl's hand in public place, saying her that he loves her and wants to marry – Neither amounts to sexual harassment as required under Section 354A nor sexual assault as required under Section 7 of POCSO Act – Only constitutes outraging the modesty of the victim girl, punishable under Section 354 of IPC, simpliciter.

Parties – Vasudev @ Kallu v. State of M.P.
Reported in – 2018 (1) ANJ (MP) 54

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***10. POINT INVOLVED**

Sections 3, 5, 7, 9, 18 and 29 of Protection of Children from Sexual Offences Act, 2012 and Section 302, 354, 376, 450 and 511 of IPC, Section 161, 173(2) and 193 of Criminal Procedure Code, 1973

Cognizance of offence under POCSO Act by Special Judge – Charge Sheet filed before the Special Judge under Section 173 (2) of the Cr.P.C. against the accused/respondent for the offence punishable under Sections 302, 511, 450 and 354 of IPC and Section 18 of the Protection of Children from Sexual Offences Act, 2012 – The Special Judge returned the charge sheet to the Investigating Officer for being presented to the competent Court on the premise that there are no grounds for presuming that the accused/respondent has committed any offence punishable under the Act of 2012 as no admissible material on record was available to prima facie indicate that a sexual assault or any attempt to commit a sexual offence was made upon the deceased before her death – On consideration of facts held, the Special Judge erred in returning the final report to the SHO for being presented before the Magistrate – Further held, all the aforesaid factors could have been considered at the stage of framing of charge after giving the prosecution and the accused an opportunity of being heard – Impugned order set aside.

Parties **–** ***State of Madhya Pradesh v. Gangaram Ahirwar***

Reported in – 2016 Law Suit (MP) 1248

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11. POINT INVOLVED

Section 376(2) of IPC, Sections 5 & 6 of Protection of Children from Sexual Offences Act, 2012 and Section 354 of Criminal Procedure Code, 1973.

(i) Death sentence – Mitigating circumstances – No previous criminal antecedent, tender age (19 years) at commission of crime, good jail conduct are mitigating circumstances which should be considered while awarding death sentence.

(ii) Death sentence – Accused convicted under Section 376 (2) IPC read with Section 5 read with Section 6 POCSO Act and Section 302 IPC for committing rape and murder of 7½ year old girl – He was awarded death sentence by trial Court which was affirmed by the High Court – Considering the above mitigating circumstances, his death sentence was commuted to life imprisonment.

Parties – Vijay Raikwar v. State of M.P.

Reported in – 2019 (2) Crimes 36 (SC)

Now, so far as the request and the prayer made on behalf of the accused to commute the death sentence to life imprisonment is concerned, having heard the learned counsel appearing on behalf of the accused on the question of death sentence imposed by the learned Sessions Court, confirmed by the High Court and considering the totality and circumstances of the case and the decisions of this Court in ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684*** and ***Shyam Singh v. State of M.P., (2017) 11 SCC 265,*** we are of the opinion that the present case does not fall within the category of "rarest of rare case" warranting death penalty. We have considered each of the circumstance and the crime as well as the facts leading to the commission of the crime by the accused. Though, we acknowledge the gravity of the

offence, we are unable to satisfy ourselves that this case would fall in the category of "rarest of rare cases" warranting the death sentence. The offence committed, undoubtedly, can be said to be brutal, but does not warrant death sentence. It is required to be noted that the accused was not a previous convict or a professional killer. At the time of commission of offence, he was 19 years of age. His jail conduct also reported to be good. Considering the aforesaid mitigating circumstances and considering the aforesaid decisions of this Court, we think that it will be in the interest of justice to commute the death sentence to life imprisonment.

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12. POINT INVOLVED

Section 376(A), 302 and 201 of IPC, Sections 5(i) and (m) r/w/s 6 of Protection of Children from Sexual Offences Act, 2012 and Section 354 of Criminal Procedure Code, 1973.

Rape and murder – Life imprisonment is a rule – Death penalty is an exception – Death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime.

Parties – ***Sachin Kumar Singhraha v. State of Madhya Pradesh***

Reported in – 2019 (1) Crimes 278 (SC) (Three Judge Bench)

In our considered opinion, the Courts may not have been justified in imposing the death sentence on the accused/appellant.

As has been well settled, life imprisonment is the rule to which the death penalty is the exception. The death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and

circumstances of the crime. As held by this Court in the case of ***Santosh Kumar Singh v. State through C.B.I., (2010) 9 SCC 747,*** sentencing is a difficult task and often vexes the mind of the Court, but where the option is between life imprisonment and a death sentence, if the Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser punishment be awarded.

We have considered the aggravating and mitigating circumstances for the imposition of the death sentence on the accused/appellant. He has committed a heinous offence in a premeditated manner, as is indicated by the false pretext given to PW4 to gain custody of the victim. He not only abused the faith reposed in him by PW4, but also exploited the innocence and helplessness of a child as young as five years of age. At the same time, we are not convinced that the probability of reform of the accused/appellant is low, in the absence of prior offending history and keeping in mind his overall conduct.

Therefore, with regard to the totality of the facts and circumstances of the case, we are of the opinion that the crime in question may not fall under the category of cases where the death sentence is necessarily to be imposed. However, keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment simpliciter would be grossly inadequate in the instant case. In this respect, we would like to refer to our observations in the recent decision dated 19.02.2019 in ***Parsuram v. State of M.P. (Criminal Appeal Nos. 314-315 of 2013)*** on the aspect of non-permissible sentencing:

> "As laid down by this Court in ***Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767,*** and subsequently affirmed by the Constitution Bench of this Court in ***Union of India v. V. Sriharan, (2016) 7 SCC1,*** this Court may validly substitute the death penalty by imprisonment for a term exceeding 14 years, and put such sentence beyond remission. Such sentences have been awarded by this Court on several occasions, and we

> may fruitfully refer to some of these decisions by way of illustrations. In ***Sebastian alias Chevithiyan v. State of Kerala, (2010) 1 SCC 58,*** a case concerning the rape and murder of a 2 year-old girl, this Court modified the sentence of death to imprisonment for the rest of the appellant's life. In ***Raj Kumar v. State of Madhya Pradesh, (2014) 5 SCC 353,*** a case concerning the rape and murder of a 14 year-old girl, this Court directed the appellant therein to serve a minimum of 35 years in jail without remission. In ***Selvam v. State, (2014) 12 SCC 274,*** this Court imposed a sentence of 30 years in jail without remission, in a case concerning the rape of a 9-year-old girl. In ***Tattu Lodhi v. State of Madhya Pradesh, (2016) 9 SCC 675,*** where the accused was found guilty of committing the murder of a minor girl aged 7 years, the Court imposed the sentence of imprisonment for life with a direction not to release the accused from prison till he completed the period of 25 years of imprisonment."

In the matter on hand as well, we deem it proper to impose a sentence of life imprisonment with a minimum of 25 years' imprisonment (without remission). The imprisonment of about four years as already undergone by the accused/appellant shall be set off. We have arrived at this conclusion after giving due consideration to the age of the accused/appellant, which is currently around 38 to 40 years.

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13. POINT INVOLVED

Sections 5 (J) (ii) and 6 of Protection of Children from Sexual Offences Act, 2012

*Age of prosecutrix; determination of – Date of birth in certificate issued after 15 months of birth – Same age was recorded in School Admission Register which was

proved by Head Master – Age described therein held to be reliable.

*Birth certificate – Proof – Challenged on the basis of absence of examination of Registrar – Public document – Admitted without formal proof – Absence of objection at the time of admissibility – Precluded from objecting about the probative value later.

*Delay in FIR – Delay of six months – Prosecutrix did not tell about pregnancy – Mortification, apprehension of informing and fear of reprisal – Sufficient explanation of delay – Not fatal.

* Presumption of culpable mental state – Must be rebutted beyond reasonable doubt

Parties – Lakhi Ram Takbi v. State of Sikkim

Reported in – 2019 CriLJ 2667

Now to address the first doubt raised by learned Counsel for the Appellant, that Exhibit 2, the Birth Certificate prepared by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim was prepared *ante litem motam* and was therefore suspicious. On perusing Exhibit 2 it is revealed that it is the original Birth Certificate issued in the name of the victim by the Registrar, Births and Deaths, Health and Family Welfare Department, Government of Sikkim where the victim's date of birth is entered as 21.12.1996. The date of registration has been recorded as 24.03.1998. It is undoubtedly prepared almost fifteen months after the birth of the victim. Would this fact by itself make the document unreliable? According to the Black's Law Dictionary, *"ante litem motam"* means "before the law suit started''. The principle would imply the meaning "before an action has been raised" or "before a legal dispute arose," at a time when the declarant had no motive to lie. The principle on which this restriction is based is succinctly stated in Halsbury's Laws of England, 3rd Edition and Volume 15 at page 308 in these words;

"To obviate bias the declarations are required to have been made *ante litem motam* which means not merely before the commencement of legal proceedings but before even the existence of any actual controversy concerning the subject-matter of the declarations."

While discussing this principle, the Hon'ble Supreme Court in ***Murugan alias Settu v. State of Tamil Nadu, AIR 1988 SC 1796*** held as follows;

"23. In ***Mohd. Ikram Hussain v. State of U.P., AIR 1964 SC 1625*** this Court had an occasion to examine a similar issue and held as under:

> "16. In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on 20-06-1960 she was under 17 years of age. There [was] also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Evidence Act and the entries in the school registers were made *ante litem motam*. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the doctor who examined Kaniz Fatima, …. The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."

24. The documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. (Vide ***Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202 and State of Bihar v. Radha Krishna Singh, AIR 1983 SC 684***)

25. This Court in ***Madan Mohan Singh v. Rajni Kant, AIR 2010 SC 2933*** considered a large number of judgments including ***Brij Mohan Singh v. Priya Brat Narain Sinha and others, AIR 1965 SC 282, Birad Mal Singhvi v. Anand Purohit, 1988 AIR 1796, Updesh Kumar v. Prithvi Singh, AIR 2001 SC 703, State of Punjab v. Mohinder Singh, AIR 2005 SC 1868, Vishnu v. State of Maharashtra, AIR 2006 SC 508 and Satpal Singh v. State of Haryana,***

(2010) 8 SCC 714 and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases.

The *ratio* (supra) establishes two points (i) that documents made *ante litem motam* can be safely relied upon when such documents are admissible under Section 35 of the Indian Evidence Act, 1872 (for short "Evidence Act"), and (ii) that the Court has the right to examine the probative value of a document admissible even under Section 35 of the same Act if it so requires. Exhibit 2 was prepared in 1998 while the FIR came to be lodged in 2014, thus it cannot be said that Exhibit 2 was prepared with a prior motive to distort the truth, consideration being taken of the age of the document and the date when the FIR was filed.

The next contention flagged by learned Counsel for the Appellant was that the contents and signature on Exhibit 2 the Birth Certificate remained unproved in the absence of examination of witnesses by the prosecution. While addressing this issue it would be pertinent to recapitulate the provisions of Sections 35 and Section 74 of the Evidence Act which are furnished here in below for easy reference;

"*35. Relevancy of entry in public [record or an electronic record] made in performance of duty.* - An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

"*74. Public documents.*-The following documents are public documents:-

(1) Documents forming the acts, or records of the acts –

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;

(2) Public records kept [in any State] of private documents."

The seizure of the Birth Certificate Exhibit 2 has been established by P.W.2. Exhibit 2 fulfils the requirements of both Section 35 and Section 74 of the Evidence Act. No doubts were raised about the authenticity of Exhibit 2 by way of cross-examination of witnesses before the learned trial Court. Therefore, can this question be brought up before the Appellate Court. In ***Murugan alias Settu*** (supra) the Hon'ble Supreme Court further held as follows:

> "26. In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3-1984; registration was made on 5-4-1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable."

In the present appeal, as already pointed out, no objection was raised when the original Birth Certificate Exhibit 2 was admitted in evidence nor any issue raised on its probative value and objection to

the document is being heard in the Appellate Court for the first time. Exhibit 2 for its part, a public document is admissible in evidence and in the absence of objection it is assumed that the Appellant has accepted its probative value.

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Besides, Section 30 of the POCSO Act, 2012 provides for presumption of culpable mental state and reads as follows:

> "*30. Presumption of culpable mental state.-*
>
> (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."
>
> It is evident from the provision delineated that the absence of culpable mental state has to be established beyond a reasonable doubt. It is also relevant to point out that in the reverse burden of proof as postulated in Section 30 (supra), it is not preponderance of probability but "beyond reasonable doubt," thereby distinguishing it from rebuttable presumption such as required under Section 304B of the IPC, 1860, which is to the extent of existence of a preponderance of probability. In ***Hiten Dalal P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897*** the Hon'ble Supreme Court while dealing with an appeal under Section 138 of the Negotiable Instruments Act, 1881 (for short "N.I. Act, 1881) and considering the words "shall presume" as appears in Sections 138 and 139 of the N.I. Act, 1881 held as follows:
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> > "22. Because both Sections 138 and 139 require that the Court "shall presume" the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in ***State of Madras v. A. VaidvanathaIyer, 1958 CriLJ 232,*** it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. "It introduces an exception to

> the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused"
>
> (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs.
>
> Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. .....

24. .... In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption

created by the provision cannot be said to be rebutted. ..."

The ratio clears the air on the burden resting on the accused and clarifies that where the statute so demands no discretion rests with the Court, save to draw the statutory conclusion, while at the same time allowing the accused to rebut the presumption, which under the POCSO Act, 2012 demands it to be beyond a reasonable doubt.

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*14. POINT INVOLVED

Section 376(2)(1) of IPC & Sections 4 of Protection of Children from Sexual Offences Act, 2012

Rape – Appreciation of evidence – Accused allegedly committed rape on prosecutrix aged 8 years – Prosecutrix deposing that on pretext of giving money, accused raped her – Mother of prosecutrix and other witness saw accused running away from spot – Testimony of prosecutrix corroborated by medical evidence as well as FSL report – FSL report establishing presence of human sperms on vaginal slide and vaginal swab of prosecutrix – Injuries, rupture of hymen and presence of human sperms, clearly establishing that prosecutrix was subjected to rape – Guilt of accused established beyond reasonable doubt – Conviction, proper.

Parties – Vimal v. State of Madhya Pradesh

Reported in – 2019 CriLJ 4785

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15. POINT INVOLVED

Sections 5(M) & 6 (i) Rape and murder – Subsequent conduct – Accused father allegedly committed rape upon minor daughter, murdered her and then hanged her from ceiling for extracting revenge from her mother – Accused did not want autopsy of deceased to be conducted – During investigation accused demolished structure of room where incident took place – Investigating Officer found debris of demolished room – No reason given by accused to demolish room in a hurry – Room demolished with intent to destroy cogent evidence – Actions of accused are relevant to connect him with crime – Conviction was held to be proper.

(ii) Rape and murder – Cause of death – Doctor who conducted post-mortem clearly opined that deceased died due to asphyxia as result of hanging – Deceased had more than ten abrasions, both large and small, on several parts of her body, showing that just before her death she was assaulted – Injuries also found over private parts of deceased including swellings, which established that just before her death, rape was committed with deceased – Deceased was only six years old and such type of injuries cannot be caused to her accidentally – Deceased being of tender

age could not have committed suicide due to shame – Death of deceased proved to be homicidal.

(iii) Rape and murder – Expert evidence – DNA report – In FSL report of vaginal slide and swab, anal slide and swab along with clothes of deceased, human semen and sperm were found – FSL report duly corroborated by doctor who prepared it – DNA samples of accused and victim taken properly and kept in safe custody – When all samples reached Laboratory, seals were found to be intact – Genuineness of samples cannot be doubted – DNA report connecting accused with crime, reliable – Conviction, proper.

(iv) Rape and murder – Plea of alibi – Accused claimed that he was in his shop and not at his house at the relevant time – Testimony of elder daughter of accused, not reliable to prove his alibi as she admitted that at the time of incident, she was doing household chores, hence not aware if someone climbed up her house – Another defence witness admitted that he was not present with accused and could not tell as to when he left his shop – Such type of evidence not sufficient to establish plea of alibi – Defence evidence not sufficient to discard proof against accused – Conviction, proper.

(v) Rape and murder of minor – Sentence – Accused committed rape upon his minor daughter and murdered her for extracting

revenge from her mother – Aggravating circumstances included extremely brutal, diabolic and cruel act of accused, age of deceased being six years, no provocation by deceased due to dominating position of accused and grievous injuries with respect to sexual assault – Mitigating circumstances included lack of evidence that accused had propensity of committing further crimes causing continuous threat to society, possibility of reformation and rehabilitation of accused, accused not being professional killer or having criminal antecedent – Mitigating circumstances outweigh aggravating circumstances – Instead of death penalty, accused sentenced to undergo life imprisonment for a period of 30 years.

Parties – ***Afjal Khan v. State of Madhya Pradesh***

Reported in – 2019 CrLJ 5003 (DB)

It is a relevant issue, that what was the reason for the appellant to demolish the room in such a hurry, where the incident took place. It is a matter of investigation. Police may have got some clues about the possibility whether the deceased herself committed suicide or not, what was the height of the ceiling, whether it was possible for the deceased to climb on the heap of clothes chabutra to reach the ceiling and hang herself. Therefore, it is indicative of the fact that the room was demolished with intent to disappear the cogent evidence. We cannot ignore such material circumstance helpful in establishing the intention of the appellant to the place where offence was committed with the deceased.

The testimony of Dr. Geeta Rani Gupta (PW-2) clearly indicates that deceased died due to asphyxia as a result of hanging. The deceased had more

than ten abrasions, of which some were large and some were small on several parts of her body, which shows that just before her death she was assaulted due to which she sustained those injuries. In addition to the aforesaid external injuries, there were injuries over her private parts. Swelling and the injuries were fresh which establish that just before her death, rape was committed with her. Her postmortem report (Ex. P/2) duly establish the commission of unnatural intercourse. Her anal part was badly affected. She was only six years old. Such type of injuries cannot be caused to her accidentally nor it can be imagined that she herself caused such type of injuries. We are not inclined to accept the contentions of learned counsel for the appellant that a minor girl of this age committed suicide due to shame. Her bodily injuries are sufficient to disagree with the contention of learned counsel.

In FSL report (Ex. P/22) of the vaginal slide, vaginal swab, anal slide and anal swab, clothes of the deceased (Article A) to (Article F) semen and human sperm were found. On the dupatta and bed sheet (Article G) and (Article H) particles of saliva were found, On the skirt (Article F), dupatta (Article G) and bed sheet (Article H) human blood was found. On the bed sheet (Article H) human blood of group-B was found. This FSL report is duly corroborated by the testimony of Dr. Geeta Rani Gupta (PW-2). DNA Report Ex.-P/25 established that the genetic marker Y chromosomes STR DNA taken from the source of the deceased (Ex.F) matched with the Y chromosomes STR DNA profile of of the appellant. Whereas, the DNA profile of other suspects Devendra Yadav, Sunil Gavli and Rajat Rajput did not tally with the DNA taken from the frock of the deceased.

We find that the DNA sample has been duly/properly and procedurally taken and kept in safe custody. The procedures were rightly followed as mentioned in (Ex. P/23), (P/24), (P/25). Learned counsel strongly contended to create suspicion about the procedure for obtaining DNA sampling. It is pertinent to note that during cross-examination of Investigating Officer Anil Bajpai (PW-16) and expert Dr. Anil Kumar Singh (PW-18) and other concerned police personnel, no question has been asked by the counsel for the

appellant about the safe custody of the samples and the procedure adopted by them. Such defence cannot be taken for the first time at this stage by the learned Senior counsel for the appellant without showing any cogent evidence to support the contention to create amaze. It was established by the prosecution that when all the sample reached FSL Sagar and RFSL, Bhopal for DNA profile test, they found that the seals were intact. No suggestion was made during cross-examination of Experts from FSL and Police Officials that seals of the package/containers were tampered with. Hence, in our view the genuineness of samples could not be doubted. It cannot be ignored that scientists are eminent persons and that the laboratory is an esteemed institution in the country. Hence, the trial Court has rightly accepted the DNA report. In case of ***Santosh Kumar Singh v. State, (2010) 9 SCC 747***, the Hon'ble Apex Court has held as under:

> "It is significant that not a single question was put to PW
> Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das & anr. v. State of Rajasthan, AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert."

Learned Senior Counsel for the appellant further contented that the trial Court wrongly ignored the defence evidence which proves that without any cogent evidence the appellant has wrongly convicted by the trial Court. The defence witness Anay Khan (DW-1) daughter of the appellant, deposed that at the time of the incident, the appellant was not present at their house. In the last

line of the cross-examination, she admitted that now she was residing with her grand-mother and not with her parents. From the memorandum of the appellant, it shows that the appellant hated his wife because he suspect on her character and due to this reason he committed crime with his own daughter-prosecutrix. He also suspected that the prosecutrix was not his daughter. Looking to the aforesaid circumstances it seems that Anay Khan (DW-1) has given false evidence to save her father. Her testimony is not reliable. She also admitted that at the time she was doing household chores, therefore, she would not be aware if someone climbed up her house. Similarly, other defence witnesses Emran (PW-2) admitted that he was not present with the appellant 24 hours. Neither he was aware as to when did the appellant left the shop, went anywhere and when did he returned back to his shop. Such type of evidence is not sufficient to establish the plea of alibi taken by the appellant. In our opinion, the defence evidence is not sufficient to discard or disbelieve the DNA report Exhibit-P/25 which is against the appellant. The learned Trial Court rightly convicted the appellant under Sections 302, 201, 377, 376(2)(f), 376(2)(i) and 376(2)(n) of the IPC.

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16. POINT INVOLVED

Section 42 -A of Protection of Children from Sexual Offences Act, 2012

(i) Non-obstante clauses – Interpretation – Where two enactments contain conflicting non-obstante clauses, provision of latter enactment will prevail over the former.

(ii) Offences involving SC and ST (Prevention of Atrocities) Act, 1989 as well as POCSO Act, 2012 –

Special Court constitued under which Act is competent to try such offences? Held, Special Court constituted under POCSO Act, 2012 shall conduct trial of such offences.

Parties – Pramod Yadav v. The State of Madhya Pradesh & ors.

Reported in – Criminal Appeal No. 5189 of 2020 (unreported) (DB)

In case of conflict between two enactments having non-obstante clause, apart from object and purpose for which the Act has been enacted, the latter enactment shall prevail over the provisions of the former Act.

The trial of a case instituted under the provisions of two special Acts viz. Atrocities Act and POCSO Act, shall be conducted by the Special Courts constitued under the POCSO Act.

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17. POINT INVOLVED

Section 6 of Protection of Children from Sexual Offences Act, 2012

(i) Sexual offences – Age of prosecutrix – Assessment of – Prosecutrix stated her age to be 16 and corrected it to 13 in deposition – She further stated that four years ago her modesty was outraged by accused when she was on her way to school – No name of school was stated by any witness nor any documentary evidence such as school register was produced to prove her age – Medical

expert assessed her age to be 25 years – Her cousin, aged 30 deposed that she was 6 years younger to him – Held, in absence of any positive evidence with regard to the age of prosecutrix on the date of occurance, benefit of doubt has to be given to accused.

(ii) Examination of accused – Failure to put circumstances against accused in his examination u/s 313 CrPC – Effect of – Held, such circumstances must be excluded from consideration by courts.

(iii) Delay in lodging FIR – Effect of – Sexual offences – Prosecutrix and accused belonged to different religions – Both were known to each other – Letters exchanged between them show that their love for each other grew and matured over time – Their physical relations were not sporadic but, regular over the years – FIR was lodged at an opportune time of seven days prior to accused's marriage with another girl – All these facts raise serious doubt about truthfulness of allegations.
(iv) Consent to physical relationship – Whether given under misconception of

fact or fraudulent promise of marriage – Determination of – Held, misconception of fact u/s 90 IPC must be in proximity of time of occurance – Prosecutrix and accused were in love with each other, their engagement ceremony was also performed, accused wanted to marry in temple but family of prosecutrix insisted for marriage in church – Marriage could not be soleminized because of societal reasons – Held, consent of prosecutrix was a conscious and informed choice coupled with positive action not to protest and there is no fraudulent promise of marriage.

Parties – Maheshwar Tigga v. State of Jharkhand

Reported in – (2020) 10 SCC 108 (Three Judge Bench)

The prosecutrix in her deposition dithered with regard to her age by first stating she was sixteen years on the date of occurrence and then corrected herself to state she was thirteen. Though she alleged that the appellant outraged her modesty at the point of a knife while she was on way to school, no name of the school has been disclosed either by the prosecutrix or her parents PWs 5 and 6. If the prosecutrix was studying in a school there is no explanation why proof of age was not furnished on basis of documentary evidence such as school register, etc. PW 10, in cross-examination assessed the age of the prosecutrix to be approximately twenty-five years. PW 2, the cousin (brother) of the prosecutrix aged

about 30 years deposed that she was six years younger to him. There is thus wide variation in the evidence with regard to the age of the prosecutrix. The Additional Judicial Commissioner held the prosecutrix to be fourteen years of age applying the rule of the thumb on basis of the age disclosed by her in deposition on 18-8-2001 as 20 years. In absence of positive evidence being led by the prosecution with regard to the age of the prosecutrix on the date of occurrence, the possibility of her being above the age of eighteen years on the date cannot be ruled out. The benefit of doubt, therefore, has to be given to the appellant.

x x x

It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.

x x x

The appellant belonged to the Scheduled Tribe while the prosecutrix belonged to the Christian community. They professed different religious beliefs in a traditional society. They both resided in the same Village Basjadi and were known to each other. The nature and manner of allegations, coupled with the letters exchanged between them, marked as exhibits during the trial, make it apparent that their love for each other grew and matured over a sufficient period of time. They were both smitten by each other and passions of youth ruled over their minds and emotions. The physical relations that followed was not isolated or

sporadic in nature, but regular over the years. The prosecutrix had even gone and resided in the house of the appellant. In our opinion, the delay of four years in lodgement of the FIR, at an opportune time of seven days prior to the appellant solemnising his marriage with another girl, on the pretext of a promise to the prosecutrix raises serious doubts about the truth and veracity of the allegations levelled by the prosecutrix. The entire genesis of the case is in serious doubt in view of the admission of the prosecutrix in cross-examination that no incident had occurred on 9-4-1999.

The parents of the prosecutrix, PWs 5 and 6 both acknowledged awareness of the relationship between appellant and the prosecutrix and that they were informed after the first occurrence itself but offer no explanation why they did not report the matter to the police immediately. On the contrary, PW 5 acknowledges that the appellant insisted on marrying in the Temple to which they were not agreeable and wanted the marriage to be solemnised in the Church. They further acknowledged that the appellant and the prosecutrix were in love with each other. Contrary to the claim of the prosecutrix, PW 6 stated that the prosecutrix was sexually assaulted in her own house.

The prosecutrix acknowledged that an engagement ceremony had also been performed. She further deposed that the marriage between them could not be solemnised because they belonged to different religions. She was therefore conscious of this obstacle all along, even while she continued to establish physical relations with the appellant. If the appellant had married her, she would not have lodged the case. She denied having written any letters to the appellant, contrary to the evidence placed on record by the defence. The amorous language used by both in the letters exchanged reflect that the appellant was serious about the relationship desiring to culminate the same into marriage. But

unfortunately for societal reasons, the marriage could not materialise as they belonged to different communities.

The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section 90 IPC a consent given under fear of injury is not a consent in the eye of the law. In the facts of the present case, we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family members with regard to the relationship, and beatings given to her.

The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also

held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.

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18. POINT INVOLVED

Sections 7 & 8 of Protection of Children from Sexual Offences Act, 2012 – Sexual offences – Sole testimony – Conviction can be based on the sole testimony of the victim, if it is found to be reliable and trustworthy.

Parties – Ganesan v. State Represented by its Inspector of Police

Reported in – AIR 2020 SC 5019 (Three Judge Bench)

Relevant extracts from the judgment:

In the present case, the appellant accused has been convicted by the learned trial Court for the offence under Section 7, punishable under Section 8 of the POCSO Act. We have gone through the entire judgment passed by the learned trial Court as well as the relevant evidence on record, more particularly the deposition of PW1-father of the victim, PW2-mother of the victim and PW3-victim herself. It is true that PW2-mother of the victim has turned hostile. However, PW3-victim has fully supported the case of the prosecution. She has narrated in detail how the incident has taken place. She has been thoroughly

and fully cross-examined. We do not see any good reason not to rely upon the deposition of PW3-victim. PW3 aged 15 years at the time of deposition is a matured one. She is trustworthy and reliable. As per the settled proposition of law, even there can be a conviction based on the sole testimony of the victim, however, she must be found to be reliable and trustworthy.

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19. POINT INVOLVED

Sections 300 Fourthly, 376 (2) and 376-A of Indian Penal Code, 1860, Article 20 (1) of Constitution of Indian and Section 6 of Protection of Children from Sexual Offences Act, 2012 –

(i) Rape and murder – Applicability of Section 300 Fourthly in cases of rape which involves death of victim – Held, intention to cause death is not necessary to attract section 300 Fourthly – Its applicability depends upon the knowledge that can be attributed to the accused – If the callousness towards the result and the risk taken is such that the knowledge is attributable to accused that the act is likely to cause death or such bodily injury as is likely to cause death, Section 300 Fourthly will get attracted.

(ii) Rape and murder – Victim being child aged 2½ years – Considering the age of victim, accused must have known the consequence that his sexual assault will cause her death or such bodily injury as was likely to cause her death – Held, section 300 Fourthly is attracted.

(iii) Applicability of section 376 (2) and 376-A IPC as amended by 2013 Amendment Ordinance (from 03.03.2013 to 01.04.2013) and 2013 Amendment Act which received Presidential assent on 02.04.2013 but came into force retrospectively on 03.02.2013 – Held, Section 376-A being identical in both Ordinance and Act of 2013, it is applicable from 03.02.2013 – However, section 376 (2) was amended by 2013 Amendment Act to include "imprisonment for the remainder of that person's natural life" in "life imprisonment", which was not there till 02.04.2013 – Therefore, section 376(2) as amendment by 2013 Amendment Act is not applicable to offence committed between 03.02.2013 and 01.04.2013 being violative of Article 20(1).

(iv) Death sentence – Imposition in cases based on circumstantial evidence – Held, not impermissible – The question of sentence is not to be determined on the basis of volume or character of evidence, but with reference to any extenuating circumstances which can be said to mitigate the enormity of the crime – Where death sentence is to be imposed on the basis of circumstantial evidence, the same must be of unimpeachable character and leads to an exceptional case.

(v) Theory of 'residual doubt' – Applicability in India – Held, such theory

does not have any place in cases based on circumstantial evidence.

Parties – Shatrughna Baban Meshram v. State of Maharashtra

Reported in – (2021) 1 SCC 596 (Three Judge Bench)

The guiding principles were summed up in **State of M.P. v. Ram Prasad, (1968) 2 SCR 522** to the effect that even if there be no intention to cause death, "if there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death" clause Fourthly of Section 300 IPC will get attracted and that the offender must be taken to have known that he was running the risk of causing the death or such bodily injury as was likely to cause the death of the victim.

Considering the age of the victim in the present case, the accused must have known the consequence that his sexual assault on a child of 2½ years would cause death or such bodily injury as was likely to cause her death. The instant matter thus comes within the parameters of clause Fourthly to Section 300 IPC.

x x x

If the abovementioned provisions of IPC are considered in three compartments, that is to say,

(A) The situation obtaining before 3-2-2013;

(B) The situation in existence during 3-2-2013 to 2-4-2013; and,

(C) The situation obtaining after 2-4-2013;

following features emerge:

(1) The offence under Section 375, as is clear from the definition of relevant provision in compartment (A), could be committed

against a woman. The situation was sought to be changed and made gender neutral in compartment (B). However, the earlier position now stands restored as a result of provisions in compartment (C).

(2) As a result of the Ordinance, the sentences for offences under Sections 376 (1) and 376 (2) were retained in the same fashion. However, a new provision in the form of Section 376-A was incorporated under which, if while committing an offence punishable under sub-section (1) or sub-section (2) of Section 376, a person "inflicts an injury which causes the death" of the victim, the accused could be punished with rigorous imprisonment for a term "which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life or with death". Thus, for the first time, death sentence could be imposed if a fatal injury was caused during the commission of offence under sub-section (1) or (2) of Section 376.

(3) Though the provisions of the Amendment Act restored the original non gender-neutral position vis-à-vis the victim, it made certain changes in sub-section (2) of Section 376. Now, the punishment for the offence could be rigorous imprisonment for not less than ten years which could extend to imprisonment for life, "which shall mean imprisonment for the remainder of that person's natural life". It was, thus, statutorily made clear that the imprisonment for life would mean till the last breath of that person's natural life.

(4) Similarly, by virtue of the Amendment Act, for the offence under Section 376-A, the punishment could not be less than 20 years which may extend to imprisonment for life which shall

mean imprisonment for the remainder of that person's natural life, or with death.

In the instant case, the offence was committed on 11-2-2013 when the provisions of the Ordinance were in force. However, the Amendment Act having been given retrospective effect from 3-2-2013, the question arises whether imposition of life sentence for the offence under Section 376 (2) could "mean imprisonment for the remainder of that person's natural life".

In the present case, since the victim was about two-and-a-half years of age at the time of incident and since it was the Ordinance which was holding the field, going by the provisions of the Ordinance, clauses (f), (h) and (l) of Section 376 (2) would get attracted. The comparable provisions of Section 376 (2) as amended by the Amendment Act would be, clauses (f), (i) and (m) respectively. As the substantive penal provisions under clauses (f), (h) and (l) as inserted by the Ordinance and clauses (f), (i) and (m) as inserted by the Amendment Act are identical, no difficulty on that count is presented. But the sentence prescribed by Section 376 (2) as amended by the Amendment Act, has now, for the first time provided that the imprisonment for life "shall mean imprisonment for the remainder of that person's natural life". This provision comes with retrospective effect and in a situation where such prescription was not available on the statute when the offence was committed, the question arises whether such ex-post facto prescription would be consistent with the provisions of clause (1) of Article 20 of the Constitution.

An imposition of life sentence simpliciter does not put any restraints on the power of the executive to grant remission and commutation in exercise of its statutory power, subject of course to Section 433-A of the Code. But, a statutory prescription that it "shall mean the remainder of that person's life" will certainly restrain the

executive from exercising any such statutory power and to that extent the provision concerned definitely prescribes a higher punishment ex-post facto. In the process, the protection afforded by Article 20(1) of the Constitution would stand negated. We must, therefore, declare that the punishment under Section 376 (2) IPC in the present case cannot come with stipulation that the life imprisonment "shall mean the remainder of that person's life". Similar prescription in Section 6 of the POCSO Act, which came by way of amendment in 2019, would not be applicable and the governing provision for punishment for the offence under the POCSO Act must be taken to be the pre-amendment position as noted hereinabove.

x x x

The question of sentence must be determined not with reference to the volume or character of the evidence on record but with reference to the circumstances which mitigate the enormity of the crime and that the nature of proof can have bearing upon the question of sentence and not with the question of punishment.

It can therefore be summed up:

(1) It is not as if imposition of death penalty is impermissible to be awarded in circumstantial evidence cases.

(2) If the circumstantial evidence is of an unimpeachable character in establishing the guilt of the accused and leads to an exceptional case or the evidence sufficiently convinces the judicial mind that the option of a sentence lesser than death penalty is foreclosed, the death penalty can be imposed.

x x x

When it comes to cases based on circumstantial evidence in our jurisprudence, the standard that is adopted in terms of law laid down by

this Court as noticed in ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116*** and subsequent decisions is that the circumstances must not only be individually proved or established, but they must form a consistent chain, so conclusive as to rule out the possibility of any other hypothesis except the guilt of the accused. On the strength of these principles, the burden in such cases is already of a greater magnitude. Once that burden is discharged, it is implicit that any other hypothesis or the innocence of the accused, already stands ruled out when the matter is taken up at the stage of sentence after returning the finding of guilt. So, theoretically the concept or theory of "residual doubt" does not have any place in a case based on circumstantial evidence. As a matter of fact, the theory of residual doubt was never accepted by the US Supreme Court as discussed earlier.

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20. POINT INVOLVED

Sections 4 & 42 of Protection of Children from Sexual Offences Act, 2012 – (i) Determination of age – Where the birth certificate from the school is available then, the ossification test report cannot be looked into.

(ii) Margin of error –There is no straight jacket formula to the effect that in every case the margin of error of two years has to be taken in favour of the accused irrespective of the surrounding circumstances – If the surrounding circumstances indicate the margin of error in favour of the prosecution then there is no bar under the law in considering the same against the accused.

(iii) Consent of minor – The prosecutrix was minor on the date of the incident, therefore, under such circumstances, her consent is immaterial.

(iv) Procuration of minor girl – If a minor girl leaves her house on the enticement by the accused then it cannot be said that the prosecutrix has left her house on her own volition – Held, that the appellant is guilty of kidnapping the prosecutrix as well as guilty of procuration of minor girl u/s 366A of IPC.

(v) Sentence – For an offence committed prior to POCSO Amendment Act, 2019, if the appellant has been held guilty for the offence p/u/s 376(1) of the IPC as well as for the offence u/s 4 of POCSO Act, 2012, them it was not necessary for the Trial Court to award a separate sentence for offence u/s 4 of POCSO Act, 2012 in view of Section 42 of POCSO Act, 2012.

Parties – ***Deepak Prajapati v. State of Madhya Pradesh***

Reported in – 2021 CriLJ 4229

In the present case, the incident took place in the year 2014 whereas the Juvenile Justice (Care and Protection of Children) Rules, 2007 were framed under Section 68(1) of Juvenile Justice (Care and Protection of Children) Act, 2000 were in force. From bare perusal of Rule 12 of the Rules of 2007, it is clear that if the matriculation certificates are available and in the absence whereof, the date of birth certificate from the school first attended is available and in absence whereof, the birth certificate given by a Corporation or Municipal Authority or a Panchayat is available and in only in absence of

the above mentioned documents, the medical opinion would be sought from a duly constituted Medical Board, which will declare the age of the Juvenile or Child. Thus, where the birth certificate from the school is available then, the ossification test report cannot be looked into.

Under these circumstances, this Court is of the considered opinion that the Ossification Test Report (Exhibit-P/11) is not material piece of evidence for proper determination of the age of the prosecutrix. Even otherwise, according to the Ossification Test Report (Exhibit-P/11), the age of the prosecutrix was between 16 to 18 years but there is no straight jacket formula to the effect that in every case the margin of error of two years has to be taken in favour of the accused irrespective of the surrounding circumstances. If the surrounding circumstances indicate the margin of error in favour of the prosecution then there is no bar under the law in considering the same against the accused. In that view of the matter, this Court is of the considered opinion that the Trial Court did not commit any mistake by holding that the prosecutrix was minor on the date of the incident.

As this Court has already come to a conclusion that the prosecutrix was minor on the date of the incident, therefore, under such circumstances, her consent is immaterial. The prosecutrix has specifically stated in her evidence that she was raped by the appellant. Even in the FSL report, human sperms were found. Even otherwise it is well established principle of law that if the evidence of the prosecutrix is reliable & trustworthy then looking for corroborative evidence is nothing but adding a pinch of salt to her injury.

Under these circumstances, this Court is of the considered opinion that if a minor girl leaves her house on the enticement by the accused then it cannot be said that the prosecutrix has left her house on her own volition. Thus, it is held that the appellant is also guilty of kidnapping the prosecutrix as well as guilty of procuration of minor girl under Section 366A of the Indian Penal Code.

In the year 2014, the maximum sentence for the offence under Section 4 of the POCSO Act was seven years whereas the maximum sentence for the offence

under Section 376 of the Indian Penal Code was ten years. However, this anomaly was also rectified by the legislation by amending the POCSO Act, 2012 by Amendment Act No. 25/2019 and the minimum sentence for the offence under Section 4 of POCSO Act 2012 has been enhanced to rigorous imprisonment for ten years. Since the appellant has been held guilty for the offence under Section 376(1) of the Indian Penal Code as well as for the offence under Section 4 of POCSO Act, 2012 and at the relevant point of time, the sentence provided for offence under Section 376(1) of the Indian Penal Code was greater in degree, therefore, this Court is of the considered opinion that it was not necessary for the Trial Court to award a separate sentence for offence under Section 4 of POCSO Act, 2012. The sentences awarded for offence under Sections 363, 366-A and 376(1) of I.P.C. are hereby affirmed. No separate sentence is awarded for offence under Section 4 of POCSO

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PART-III

ACTS, RULES & AMENDMENTS

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

(No. 32 of 2012*)

[*19th June, 2012*]

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:-

CHAPTER I

Preliminary

1. **Short title, extent and commencement**. – (1) This Act may be called the Protection of Children from Sexual Offences Act, 2012.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. **Definitions**. – (1) In this Act, unless the context otherwise requires, -

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in Section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in Section 9;

(c) "armed forces or security forces" means armed forces of the Union or security forces or police forces, as specified in the Schedule;

(d) "child" means any person below the age of eighteen years;

(e) "domestic relationship" shall have the same meaning as assigned to it in clause (f) of Section 2 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005);

(f) "penetrative sexual assault" has the same meaning as assigned to it in Section 3;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "religious institution" shall have the same meaning as assigned to it in the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988);

(i) "sexual assault" has the same meaning as assigned to it in Section 7;

(j) "sexual harassment" has the same meaning as assigned to it in Section 11;

(k) "shared household" means a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child;

(l) "Special Court" means a court designated as such under Section 28;

(m) "Special Public Prosecutor" means a Public Prosecutor appointed under Section 32;

(2) The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973 (2 of 1974), the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and the Information Technology Act, 2000 (21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts.

CHAPTER II

Sexual offences against children

A. Penetrative sexual assault and punishment therefor

3. **Penetrative sexual assault**. – A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. **Punishment for penetrative sexual assault**. – Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

B. Aggravated penetrative sexual assault and punishment therefor

5. **Aggravated penetrative sexual assault**. – (a) whoever, being a police officer, commits penetrative sexual assault on a child-

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child –

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law of the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation. – When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which –

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

6. **Punishment for aggravated penetrative sexual assault**.– Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment of life and shall also be liable to fine.

C. – Sexual assault and punishment therefor

7. **Sexual Assault**. – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. **Punishment for sexual assault**. – Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

D. Aggravated sexual assault and punishment therefor

9. **Aggravated Sexual Assault**. –

(a) whoever, being a police officer, commits sexual assault on a child –

(i) within the limits of the police station or premises where he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child –

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the security or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known or identified as a member of the security or armed forces; or

(c) Whoever being a public servant commits sexual assault on a child; or

(d) whoever being on the management or on other staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or

remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(g) whoever commits gang sexual assault on a child.

Explanation. – When a child is subjected sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits sexual assault on a child, which –

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child: or

(s) whoever commits sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force: or

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

10. **Punishment for aggravated sexual assault**. – Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

E. – Sexual harassment and punishment therefor

11. **Sexual harassment**. – A person is said to commit sexual harassment upon a child when such person with sexual intent, –

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefore.

Explanation. – Any question which involves "sexual intent" shall be a question of fact.

12. **Punishment for sexual harassment**. – Whoever commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

CHAPTER III

Using child for pornographic purposes and punishment therefor

13. **Use of child for pornographic purposes**. – Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes –

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

Explanation. – For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

14. **Punishment for using child for pornographic purposes**. – (1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

(2) If the person using the child for pornographic purposes commits an offence referred to in Section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(3) If the person using the child for pornographic purposes commits an offence referred to in Section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.

(4) If the person using the child for pornographic purposes commits an offence referred to in Section 7, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and shall also be liable to fine.

(5) If the person using the child for pornographic purposes commits an offence referred to in Section 9, by directly participating in pornographic

acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and shall also be liable to fine.

15. **Punishment for storage of pornographic material involving child.** – Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

CHAPTER IV

Abetment of and attempt to commit an offence

16. **Abetment of an offence**. – A person abets an offence, who –

Firstly. – Instigates any person to do that offence; or

Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly. – Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I. – A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II. – Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III. – Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for

the purpose of any offence under this Act, is said to aid the doing of that act.

17. **Punishment for abetment**. – Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Explanation. – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.

18. **Punishment for attempt to commit an offence.** – Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

CHAPTER V

Procedure for reporting of cases

19. **Reporting of offences**. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, –

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be –

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

20. **Obligation of media, studio and photographic facilities to report cases**. – Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

21. **Punishment for failure to report or record a case**. – (1) Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.

22. **Punishment for false complaint or false information**. – (1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

23. **Procedure for media**. – (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

CHAPTER VI

Procedures for recording statement of the child

24. **Recording of statement of a child**. – (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

25. **Recording of statement of a child by Magistrate**. – (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

26. Additional provisions regarding statement to be recorded. – (1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

27. **Medical examination of a child**. – (1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

CHAPTER VII

Special Courts

28. **Designation of Special Courts**. – (1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under Section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

29. **Presumption as to certain offences**. – (1) Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed the offence as the case may be, unless the contrary is proved.

30. **Presumption of culpable mental state**. – (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the

accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.— In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

31. **Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court**. – Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

32. **Special Public Prosecutors**.– (1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

(2) A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (1) only if he had been in practice for not less than seven years as an advocate.

(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 and provision of that Code shall have effect accordingly.

CHAPTER VIII

Procedure and Powers of Special Courts and Recording of Evidence

33. **Procedure and powers of Special Court**. – (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and

as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 for trial before a Court of Session.

34. **Procedure in case of commission of offence by child and determination of age by Special Court**.– (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

35. **Period for Recording of evidence of child and disposal of case**. –(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

36.**Child not to see accused at the time of testifying**. – (1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

37. **Trials to be conducted in camera**. – (1) -The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973.

38. **Assistance of an interpreter or expert while recording evidence of child**. – (1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

CHAPTER IX

Miscellaneous

39. **Guidelines for child to take assistance of experts, etc**. – Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

40. **Right of child to take assistance of legal practitioner**. – Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

41. **Provisions of Sections 3 to 13 not to apply in certain cases**. – (1) The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.

42. **Alternative punishment**. – (1) Where an act or omission constitute an offence punishable under this Act and also under any other law for the time

being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree.

43. **Public awareness about Act**. – The Central Government and every State Government, shall take all measures to ensure that—

(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;

(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act.

44. **Monitoring of implementation of Act**. – (1) The National Commission for Protection of Child Rights constituted under Section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under Section 17, of the Commissions for Protection of Child Rights Act, 2005, shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.

(2) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005.

(3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005.

45. **Power to make rules**. –– (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

(a) the qualifications and experience of, and the fees payable to, a translator or an interpreter, a special educator or any person familiar with the manner of communication of the child or an expert in that field, under sub-section (4) of Section 19; sub-sections (2) and (3) of Section 26 and Section 38;

(b) care and protection and emergency medical treatment of the child under sub-section (5) of Section 19;

(c) the payment of compensation under sub-section (8) of section 33;

(d) the manner of periodic monitoring of the provisions of the Act under sub-section (1) of Section 42B

(3) Every rule made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

46. **Power to remove difficulties**.— (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty:

Provided that no order shall be made under this section after the expiry of the period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

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NOTIFICATION DATED 9th NOVEMBER, 2012 OF MINISTRY OF WOMEN AND CHILD DEVELOPMENT REGARDING THE DATE OF ENFORCEMENT OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

[*Published in Gazette of India (Extraordinary) Part II Section 3(ii) dated 9-11-2012 Page 1*]

S. O. 2705(E). – In exercise of the powers conferred by sub-section (3) of Section 1 of the Protection of Children from Sexual Offences Act, 2012 (No.32 of 2012), the Central Government hereby appoints the 14th November, 2012, as the date on which the provisions of the said Act shall come into force.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2012

New Delhi, the 14th November, 2012

[Ministry of Women and Child Development Notification No. G.S.R. 823(E) dated the 14th November, 2012. Published in Gazette of India (Extraordinary) Part II Section 3(i) dated 14-11-2012 pages 13-22]

[Note : The Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012), which is an Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences, came into force on 14.11.2012. Under this Act, the power to make rules rests with the Central Government.]

In exercise of the powers conferred by sub-section(1), read with clauses (a) to (d) of sub-section (2), of Section 45 of the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), the Central Government hereby makes the following rules, namely, –

1. **Short title and commencement** — (1) These rules may be called the **Protection of Children from Sexual Offences Rules, 2012**.

(2) These rules shall come into force on the date of their publication in the Official Gazette.

2. **Definitions**. – (1) In these rules, unless the context otherwise requires,–

(a) "Act" means the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

(b) "District Child Protection Unit" (DCPU) means the District Child Protection Unit established by the State Government under Section 62A of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006;

(c) "Expert" means a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability;

(d) "Special educator" means a person trained in communication with children with special needs in a way that addresses the child's individual differences and needs, which include challenges with learning and communication, emotional and behavioural disorders, physical disabilities, and developmental disorders;

(e) "Person familiar with the manner of communication of the child" means a parent or family member of a child or a member of his shared household or any person in whom the child reposes trust and confidence, who is familiar with that child's unique manner of communication, and whose presence may be required for or be conducive to more effective communication with the child;

(f) "Support person" means a person assigned by a Child Welfare Committee, in accordance with sub–rule (8) of Rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act.

(2) Words and expressions used and not defined in these rules but defined in the Act shall have the meaning respectively assigned to them under the Act.

3. **Interpreters, translators and Special educators**. – (1) In each district, the DCPU shall maintain a register with names, addresses and other contact details of interpreters, translators and special educators for the purposes of the Act, and this register shall be made available to the Special Juvenile Police Unit (hereafter referred to as "SJPU"), local police, Magistrate or Special Court, as and when required.

(2) The qualifications and experience of the interpreters, translators, Special educators, and experts engaged for the purposes of sub-section (4) of Section 19, sub-sections (3) and (4) of Section 26 and Section 38 of the Act, shall be as indicated in these rules.

(3) Where an interpreter, translator, or Special educator is engaged, otherwise than from the list maintained by the DCPU under sub-rule (1), the

requirements prescribed under sub-rules (4) and (5) of this rule may be relaxed on evidence of relevant experience or formal education or training or demonstrated proof of fluency in the relevant language by the interpreter, translator, or special educator, subject to the satisfaction of the DCPU, Special Court or other authority concerned.

(4) Interpreters and translators engaged under sub-rule (1) should have functional familiarity with language spoken by the child as well as the official language of the state, either by virtue of such language being his mother tongue or medium of instruction at school at least up to primary school level, or by the interpreter or translator having acquired knowledge of such language through his vocation, profession, or residence in the area where that language is spoken.

(5) Sign language interpreters, Special educators and experts entered in the register under sub–rule (1) should have relevant qualifications in sign language or special education, or in the case of an expert, in the relevant discipline, from a recognized University or an institution recognized by the Rehabilitation Council of India.

(6) Payment for the services of an interpreter, translator, Special educator or expert whose name is enrolled in the register maintained under sub-rule (1) or otherwise, shall by made by the State Government from the Fund maintained under Section 61 of the Juvenile Justice Act, 2000, or from other funds placed at the disposal of the DCPU, at the rates determined by them, and on receipt of the requisition in such format as the State Government may prescribe in this behalf.

(7) Any preference expressed by the child at any stage after information is received under sub-section (1) of Section 19 of the Act, as to the gender of the interpreter, translator, Special educator, or expert may be taken into consideration, and where necessary, more than one such person may be engaged in order to facilitate communication with the child.

(8) The interpreter, translator, Special educator, expert, or person familiar with the manner of communication of the child engaged to provide services for the purposes of the Act shall be unbiased and impartial and shall

disclose any real or perceived conflict of interest. He shall render a complete and accurate interpretation or translation without any additions or omissions, in accordance with Section 282 of the Code of Criminal Procedure, 1973.

(9) In proceedings under section 38, the Special Court shall ascertain whether the child speaks the language of the court adequately, and that the engagement of any interpreter, translator, Special educator, expert or other person familiar with the manner of communication of the child, who has been engaged to facilitate communication with the child, does not involve any conflict of interest.

(10) Any interpreter, translator, Special educator or expert appointed under the provisions of the Act or its rules shall be bound by the rules of confidentiality, as described under Section 127 read with Section 126 of the Indian Evidence Act, 1872.

4. **Care and Protection**. – (1) Where an SJPU or the local police receives any information under sub-section (1) of Section 19 of the Act from any person including the child, the SJPU or local police receiving report of such information shall forthwith disclose to the person making the report, the following details: –

(i) his name and designation;

(ii) the address and telephone number;

(iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

(2) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-section (1) of Section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, –

(a) proceed to record and register a First Information Report as per the provisions of Section 154 of the Code of Criminal Procedure, 1973, and furnish a copy thereof free of cost to the person making such report, as per sub–section (2) of Section 154 of the Code;

(b) where the child needs emergency medical care as described under sub–section (5) of Section 19 of the Act or under these rules, arrange for the child to access such care, in accordance with Rule 5;

(c) take the child to the hospital for the medical examination in accordance with Section 27 of the Act;

(d) ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory at the earliest;

(e) inform the child and his parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief;

(f) inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with Section 40 of the Act.

(3) Where the SJPU or the local police receives information under sub–section 10 of Section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter referred to as "CWC") within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of Section 19 of the Act, and with a request for a detailed assessment by the CWC.

(4) Upon receipt of a report under sub–rule (3), the concerned CWC, must proceed, in accordance with its powers under sub–section (1) of Section 31 of the Juvenile Justice Act, 2000, to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the

child needs to be taken out of the custody of his family or shared household and placed in a children's home or a shelter home.

(5) In making determination under sub–rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations :

(i) the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counselling;

(ii) the need for the child to remain in the care of his parent, family and extended family and to maintain a connection with them;

(iii) the child's age and level of maturity, gender, and social and economic background;

(iv) disability of the child, if any;

(v) any chronic illness from which a child may suffer;

(vi) any history of family violence involving the child or a family member of the child; and,

(vii) any other relevant factors that may have a bearing on the best interests of the child:

Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

(6) The child and his parent or guardian or any other person in whom the child has trust and confidence and with whom the child has been living who is affected by such determination, shall be informed that the determination is being considered.

(7) The CWC, on receiving a report under sub-section (6) of Section 19 of the Act or on the basis of its assessment under sub–rule (5), and with the consent of the child and his parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child through the process of investigation and trial. Such

support person may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the DCPU :

Provided that nothing in these rules shall prevent the child and his parents or guardian or other person in whom the child has trust and confidence from seeking the assistance of any person or organisation for proceedings under the Act.

(8) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he has access. He shall keep the child and his parent or guardian or other person in whom the child has trust and confidence, informed as to the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. He shall also inform the child of the role he may play in the judicial process and ensure that any concerns that the child may have, regarding his safety in relation to the accused and the manner in which he would like to provide his testimony, are conveyed to the relevant authorities.

(9) Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of making such assignment, inform the Special Court in writing.

(10) The services of the support person may be terminated by the CWC upon request by the child and his parent or guardian or person in whom the child has trust and confidence and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

(11) It shall be the responsibility of the SJPU, or the local police to keep the child and his parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

(12) The information to be provided by the SJPU, local police, or support person, to the child and his parents or guardian or other person in

whom the child has trust and confidence, includes but is not limited to the following : –

(i) the availability of public and private emergency and crisis services;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victims' compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

5. **Emergency medical care** . – (1) where an officer of the SJPU, or the local police receives information under Section 19 of the Act that an offence under the Act has been committed and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, he shall, as soon as possible, but not later than 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care:

Provided that where an offence has been committed under Sections 3,5,7, or 9 of the Act, the victim shall be referred to emergency medical care.

(2) Emergency medical care shall be rendered in such a manner as to protect the privacy of the child, and in the presence of the parent or guardian or any other person in whom the child has trust and confidence.

(3) No medical practitioner, hospital or other medical facility centre rendering emergency medical care to a child shall demand any legal or

magisterial requisition or other documentation as a pre-requisite to rendering such care.

(4) The registered medical practitioner rendering emergency medical care shall attend to the needs to the child, including-

(i) treatment for cuts, bruises, and other injuries including genital injuries, if any;

(ii) treatment for exposure to sexually transmitted diseases(STDs) including prophylaxis for identified STDs;

(iii) treatment for exposure to Human Immunodeficiency Virus (HIV) including prophylaxis for HIV after necessary consultation with infectious disease experts;

(iv) possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and;

(v) wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made.

(5) Any forensic evidence collected in the course of rendering emergency medical care must be collected in accordance with Section 27 of the Act.

6. **Monitoring of implementation of the Act**. – (1) The National Commission for the protection of Child Rights (hereafter referred to as "NCPCR") or the State Commission for the Protection of Child Right (hereafter referred to as "SCPCR"), as the case may be, shall in addition to the functions assigned to them under the commission for Protection of Child Right Act, 2005, perform the following functions for implementation of the provisions of the Act:-

(a) to monitor the designation of Special Courts by State Governments;

(b) to monitor the appointment of public Prosecutors by State Governments;

(c) to monitor the formulation of the guidelines described in Section 39 of the Act by the State Governments, for the use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health,

mental health and child development to be associated with the pre-trial and trial stage to assist the child, and to monitor the application of these guidelines;

(d) to monitor the designing and implementation of modules for training police personnel and other concerned persons, including officers of the Central and State Governments, for the effective discharge of their functions under the Act;

(e) to monitor and support the Central Government and State Governments for the dissemination of information relating to the provisions of the Act through media including the television, radio and print media at regular intervals, so as to make the general public, children as well as their parents and guardians aware of the provisions of the Act.

(2) The NCPCR or the SCPCR, as the case may be, may call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC.

(3) The NCPCR or the SCPCR, as the case may be, may collect information and data on its own or from the relevant agencies regarding reported cases of sexual abuse and their disposal under the processes established under the Act, including information on the following:-

(i) number and details of offences reported under the Act;

(ii) whether the procedures prescribed under the Act and rules were followed, including those regarding time frames;

(iii) details of arrangement for care and protection of victims of offences under this Act. Including arrangements for emergency medical care and, medical examination; and

(iv) details regarding assessment of the need for care and protection of a child by the concerned CWC in any specific case.

(4) The NCPCR or the SCPCR, as the case may be, may use the information so collected to assess the implementation of the provisions of the Act. The Report on monitoring of the Act shall be included in a separate chapter in the Annual Report of the NCPCR or the SCPCR.

7. **Compensation**. – (1) The Special Court may, in appropriate cases, on its or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-section (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim. Including the following :-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted Human Immunodeficiency Virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the Sate Governments from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules of scheme of the central Government or State Government.

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PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2020

(Notification dated 09.03.2020 of Ministry of Women And Child Development)

G.S.R. 165(E). – In exercise of the powers conferred by section 45 of the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), the Central Government hereby makes the following rules, namely:––

1. (1) **Short title and commencement. –** These rules may be called the Protection of Children from Sexual Offences Rules, 2020.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions. – (1) In these rules, unless the context otherwise requires,–

(a) **"Act"** means the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

(b) **"District Child Protection Unit"** (DCPU) means the District Child Protection Unit established by the State Government under section 106 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016);

(c) **"Expert"** means a person trained in mental health, medicine, child development or other relevant discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability;

(d) **"Special educator"** means a person trained in communication with children with disabilities in a way that addresses the child's individual abilities and needs, which include challenges with learning and communication, emotional and behavioral issues, physical disabilities, and developmental issues.

Explanation.– For the purposes of this clause, the expression "disabilities", shall carry the same meaning as defined in clause (s) of section 2 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016);

(e) **"Person familiar with the manner of communication of the child"** means a parent or family member of a child or a member of child's shared household or any person in whom the child reposes trust and confidence, who is familiar with that child's unique manner of communication, and whose presence may be required for or be conducive to more effective communication with the child;

(f) **"Support person"** means a person assigned by the Child Welfare Committee, in accordance with sub-rule (7) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act;

(2) Words and expressions used and not defined in these rules but defined in the Act shall have the meanings respectively assigned to them under the Act.

3. Awareness generation and capacity building. – (1) The Central Government, or as the case may be, the State Government shall prepare age-appropriate educational material and curriculum for children, informing them about various aspects of personal safety, including––

(i) measures to protect their physical, and virtual identity; and to safeguard their emotional and mental well-being;

(ii) prevention and protection from sexual offences;

(iii) reporting mechanisms, including Child helpline-1098 services;

(iv) inculcating gender sensitivity, gender equality and gender equity for effective prevention of offences under the Act.

(2) Suitable material and information may be disseminated by the respective Governments in all public places such as panchayat bhavans, community centers, schools and colleges, bus terminals, railway stations, places of congregation, airports, taxi stands, cinema halls and such other prominent places and also be disseminated in suitable form in virtual spaces such as internet and social media.

(3) The Central Government and every State Government shall take all suitable measures to spread awareness about possible risks and vulnerabilities, signs of abuse, information about rights of children under the Act along with access to support and services available for children.

(4) Any institution housing children or coming in regular contact with children including schools, creches, sports academies or any other facility for children must ensure a police verification and background check on periodic basis, of every staff, teaching or non-teaching, regular or contractual, or any other person being an employee of such Institution coming in contact with the child. Such Institution shall also ensure that periodic training is organised for sensitising them on child safety and protection.

(5) The respective Governments shall formulate a child protection policy based on the principle of zero-tolerance to violence against children, which shall be adopted by all institutions, organizations, or any other agency working with, or coming in contact with children.

(6) The Central Government and every State Government shall provide periodic trainings including orientation programmes, sensitization workshops and refresher courses to all persons, whether regular or contractual, coming in contact with the children, to sensitize them about child safety and protection and educate them regarding their responsibility under the Act. Orientation programme and intensive courses may also be organized for police personnel and forensic experts for building their capacities in their respective roles on a regular basis.

4. Procedure regarding care and protection of child. – (1) Where any Special Juvenile Police Unit (hereafter referred to as "SJPU") or the local police receives any information under sub-section (1) of section 19 of the Act from any person including the child, the SJPU or local police receiving the report of such information shall forthwith disclose to the person making the report, the following details:-

(i) his or her name and designation;

(ii) the address and telephone number;

(iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

(2) If any such information regarding the commission of an offence under the provisions of the Act is received by the child helpline – 1098, the child helpline shall immediately report such information to SJPU or Local Police.

(3) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-section (1) of section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, ––

(a) proceed to record and register a First Information Report as per the provisions of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), and furnish a copy thereof free of cost to the person making such report, as per sub-section (2) of section 154 of that Code;

(b) where the child needs emergency medical care as described under sub-section (5) of section 19 of the Act

or under these rules, arrange for the child to access such care, in accordance with rule 6;

(c) take the child to the hospital for the medical examination in accordance with section 27 of the Act;

(d) ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory immediately;

(e) inform the child and child's parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief;

(f) inform the child and child's parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with section 40 of the Act.

(4) Where the SJPU or the local police receives information under sub-section (1) of section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter referred to as "CWC") within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act, and with a request for a detailed assessment by the CWC.

(5) Upon receipt of a report under sub-rule (3), the concerned CWC must proceed, in accordance with its powers under sub-section (1) of section 31 of the Juvenile Justice Act, 2015 (2 of 2016), to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the child needs to be taken out of the custody of child's family or shared household and placed in a children's home or a shelter home.

(6) In making determination under sub-rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations, namely: –

(i) the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counseling;

(ii) the need for the child to remain in the care of parent's, family and extended family and to maintain a connection with them;

(iii) the child's age and level of maturity, gender, and social and economic background;

(iv) disability of the child, if any;

(v) any chronic illness from which a child may suffer;

(vi) any history of family violence involving the child or a family member of the child; and,

(vii) any other relevant factors that may have a bearing on the best interests of the child:

Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

(7) The child and child's parent or guardian or any other person in whom the child has trust and confidence and with whom the child has been living, who is affected by such determination, shall be informed that such determination is being considered.

(8) The CWC, on receiving a report under sub-section (6) of section 19 of the Act or on the basis of its assessment made under sub-rule (5), and with the consent of the child and child's parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child in all possible manner throughout the process of investigation and trial, and shall immediately inform the SJPU or Local Police about providing a support person to the child.

(9) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he or she has access and shall keep the child and child's parent or guardian or other person in whom the child has trust and confidence, informed regarding the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. The Support person shall also inform the child of the role the Support person may play in the judicial process and ensure that any concerns that the child may have, regarding child's safety in relation to the accused and the manner in which the Support person

would like to provide child's testimony, are conveyed to the relevant authorities.

(10) Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of making such assignment, inform the Special Court in writing.

(11) The services of the support person may be terminated by the CWC upon request by the child and child's parent or guardian or person in whom the child has trust and confidence, and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

(12) The CWC shall also seek monthly reports from support person till the completion of trial, with respect to condition and care of child, including the family situation focusing on the physical, emotional and mental well-being, and progress towards healing from trauma; engage with medical care facilities, in coordination with the support person, to ensure need-based continued medical support to the child, including psychological care and counseling; and shall ensure resumption of education of the child, or continued education of the child, or shifting of the child to a new school, if required.

(13) It shall be the responsibility of the SJPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

(14) SJPU or the local police shall also inform the child and child's parents or guardian or other person in whom the child has trust and confidence about their entitlements and services available to them under the Act or any other law for the time being applicable as per **Form-A**. It shall also complete the Preliminary Assessment Report in **Form-B** within 24 hours of the registration of the First Information Report and submit it to the CWC.

(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

(i) the availability of public and private emergency and crisis services;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

5. Interpreters, translators, special educators, experts and support persons. – (1) In each district, the DCPU shall maintain a register with names, addresses and other contact details of interpreters, translators, experts, special educators and support persons for the purposes of the Act, and this register shall be made available to the SJPU, local police, magistrate or Special Court, as and when required.

(2) The qualifications and experience of the interpreters, translators, special educators, experts and support persons engaged for the purposes of sub-section (4) of section 19, sub-sections (3) and (4) of section 26 and section 38 of the Act, and Rule 4 respectively shall be as indicated in these rules.

(3) Where an interpreter, translator, or special educator is engaged, otherwise than from the list maintained by the DCPU under sub-rule (1), the requirements prescribed under sub-rules (4) and (5) of this rule may be relaxed on evidence of relevant experience or formal education or training or demonstrated proof of fluency in the relevant languages by the interpreter, translator, or special educator, subject to the satisfaction of the DCPU, Special Court or other authority concerned.

(4) Interpreters and translators engaged under sub-rule (1) should have functional familiarity with language spoken by the child as well as the official language of the state, either by virtue of such language being child's mother tongue or medium of instruction at school at least up to primary school level, or by the interpreter or translator having acquired knowledge of such language through child's vocation, profession, or residence in the area where that language is spoken.

(5) Sign language interpreters, special educators and experts entered in the register under sub-rule(1) should have relevant qualifications in sign language or special education, or in the

case of an expert, in the relevant discipline, from a recognised University or an institution recognised by the Rehabilitation Council of India.

(6) Support person may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the DCPU:

Provided that nothing in these rules shall prevent the child and child's parents or guardian or other person in whom the child has trust and confidence from seeking the assistance of any person or organisation for proceedings under the Act.

(7) Payment for the services of an interpreter, translator, special educator, expert or support person whose name is enrolled in the register maintained under sub-rule (1) or otherwise, shall be made by the State Government from the Fund maintained under section 105 of the Juvenile Justice Act, 2015 (2 of 2016), or from other funds placed at the disposal of the DCPU.

(8) Any interpreter, translator, special educator, expert or support person engaged for the purpose of assisting a child under this Act, shall be paid a fee which shall be prescribed by the State Government, but which, shall not be less than the amount prescribed for a skilled worker under the Minimum Wages Act, 1948 (11 of 1948).

(9) Any preference expressed by the child at any stage after information is received under sub-section(1) of section 19 of the Act, as to the gender of the interpreter, translator, special educator, expert or support person, may be taken into consideration, and where necessary, more than one such person may be engaged in order to facilitate communication with the child.

(10) The interpreter, translator, special educator, expert, support person or person familiar with the manner of communication of the child engaged to provide services for the purposes of the Act shall be unbiased and impartial and shall disclose any real or perceived conflict of interest and shall render a complete and accurate interpretation or translation without any additions or omissions, in accordance with section 282 of the Code of Criminal Procedure, 1973 (2 of 1974).

(11) In proceedings under section 38, the Special Court shall ascertain whether the child speaks the language of the court adequately, and that the engagement of any interpreter, translator, special educator, expert, support person or other person familiar with the manner of communication of the

child, who has been engaged to facilitate communication with the child, does not involve any conflict of interest.

(12) Any interpreter, translator, special educator, expert or support person appointed under the Act shall be bound by the rules of confidentiality, as described under section 127 read with section 126 of the Indian Evidence Act, 1872 (1 of 1872).

6. Medical aid and care. – (1) Where an officer of the SJPU, or the local police receives information under section 19 of the Act that an offence under the Act has been committed, and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, such officer, or as the case may be, the local police shall, within 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility center for emergency medical care:

Provided that where an offence has been committed under sections 3, 5, 7 or 9 of the Act, the victim shall be referred to emergency medical care.

(2) Emergency medical care shall be rendered in such a manner as to protect the privacy of the child, and in the presence of the parent or guardian or any other person in whom the child has trust and confidence.

(3) No medical practitioner, hospital or other medical facility center rendering emergency medical care to a child shall demand any legal or magisterial requisition or other documentation as a pre-requisite to rendering such care.

(4) The registered medical practitioner rendering medical care shall attend to the needs of the child, including:

(a) treatment for cuts, bruises, and other injuries including genital injuries, if any;

(b) treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis for identified STDs;

(c) treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts;

(d) possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and,

(e) wherever necessary, a referral or consultation for mental or psychological health needs, or other counseling, or drug de-addiction services and programmes should be made.

(5) The registered medical practitioner shall submit the report on the condition of the child within 24 hrs to the SJPU or Local Police.

(6) Any forensic evidence collected in the course of rendering emergency medical care must be collected in accordance with section 27 of the Act.

(7) If the child is found to be pregnant, then the registered medical practitioner shall counsel the child, and her parents or guardians, or support person, regarding the various lawful options available to the child as per the Medical Termination of Pregnancy Act, 1971 and the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(8) If the child is found to have been administered any drugs or other intoxicating substances, access to drug de- addiction programme shall be ensured.

(9) If the child is a divyang (person with disability), suitable measure and care shall be taken as per the provisions of The Rights of Persons with Disabilities Act, 2016 (49 of 2016).

7. Legal aid and assistance. – (1) The CWC shall make a recommendation to District Legal Services Authority (hereafter referred to as "DLSA") for legal aid and assistance.

(2) The legal aid and assistance shall be provided to the child in accordance with the provisions of the Legal Services Authorities Act, 1987 (39 of 1987).

8. Special relief. – (1) For special relief, if any, to be provided for contingencies such as food, clothes, transport and other essential needs, CWC may recommend immediate payment of such amount as it may assess to be required at that stage, to any of the following:-

(i) the DLSA under Section 357A; or;

(ii) the DCPU out of such funds placed at their disposal by state or;

(iii) funds maintained under section 105 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016);

(2) Such immediate payment shall be made within a week of receipt of recommendation from the CWC.

9. Compensation. – (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

10. Procedure for imposition of fine and payment thereof. – (1) The CWC shall coordinate with the DLSA to ensure that any amount of fine imposed by the Special Court under the Act which is to be paid to the victim, is in fact paid to the child.

(2) The CWC will also facilitate any procedure for opening a bank account, arranging for identity proofs, etc., with the assistance of DCPU and support person.

11. Reporting of pornographic material involving a child. – (1) Any person who has received any pornographic material involving a child or any information regarding such pornographic material being stored, possessed, distributed, circulated, transmitted, facilitated, propagated or displayed, or is likely to be distributed, facilitated or transmitted in any manner shall report the contents to the SJPU or local police, or as the case may be, cyber-crime portal (cybercrime.gov.in) and upon such receipt of the report, the SJPU or local police or the cyber-crime portal take necessary action as per the directions of the Government issued from time to time.

(2) In case the "person" as mentioned in sub-rule (1) is an "intermediary" as defined in clause (w) of sub-section (1) of section 2 of the Information Technology Act, 2000, such person shall in addition to reporting, as provided under sub-rule (1), also hand over the necessary material including the source from which such material may have originated to the SJPU or local police, or as the case may be, cyber-crime portal (cybercrime.gov.in) and upon such receipt of the said material, the SJPU or local police or the cyber-crime portal take necessary action as per the directions of the Government issued from time to time.

(3) The report shall include the details of the device in which such pornographic content was noticed and the suspected

device from which such content was received including the platform on which the content was displayed.

(4) The Central Government and every State Government shall make all endeavors to create widespread awareness about the procedures of making such reports from time to time.

12. Monitoring of implementation of the Act. – (1) The National Commission for the Protection of Child Rights (hereafter referred to as "NCPCR") or the State Commission for the Protection of Child Rights (hereafter referred to as "SCPCR"), as the case may be, shall in addition to the functions assigned to them under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), perform the following functions for implementation of the provisions of the Act–

(a) monitor the designation of Special Courts by State Governments;

(b) monitor the appointment of the Special Public Prosecutors by the State Governments;

(c) monitor the formulation of the guidelines described in section 39 of the Act by the State Governments, for the use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child, and to monitor the application of these guidelines;

(d) monitor the designing and implementation of modules for training police personnel and other concerned persons, including officers of the Centre and State Governments, for the effective discharge of their functions under the Act;

(e) monitor and support the Central Government and State Governments for the dissemination of information relating to the provisions of the Act through media including the television, radio and print media at regular intervals, so as to make the general public, children as well as their parents and guardians aware of the provisions of the Act.

(f) call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC.

(g) collect information and data on its own or from the relevant agencies regarding reported cases of sexual abuse and their disposal under the processes provided under the Act, including information on the following:-

(i) number and details of offences reported under the Act;

(ii) whether the procedures prescribed under the Act and rules were followed, including those regarding time-frames;

(iii) details of arrangements for care and protection of victims of offences under this Act, including arrangements for emergency medical care and medical examination; and,

(iv) details regarding assessment of the need for care and protection of a child by the concerned CWC in any specific case;

(h) use the information so collected to assess the implementation of the provisions of the Act. The report on monitoring of the Act shall be included in a separate chapter in the annual report of the NCPCR or the SCPCR.

(2) The concerned authorities mandated to collect data, under the Act, shall share such data with the Central Government and every State Government, NCPCR and SCPCRs.

13. Repeal. – The Protection of Children from Sexual Offences Rules, 2012 are hereby repealed, except as respects things done or omitted to be done before such repeal.

FORM-A

Entitlement of children who have suffered sexual abuse to receive information and services

1. To receive a copy of the FIR.
2. To receive adequate security and protection by Police.
3. To receive immediate and free medical examination by civil hospital/PHC etc.
4. To receive counseling and consultation for mental and psychological well being.
5. For recording of statement of child by woman police officer at child's home or any other place convenient to child.
6. To be moved to a Child Care Institution where offence was at home or in a shared household, to the custody of a person whom child reposes faith.
7. For immediate aid and assistance on the recommendation of CWC.
8. For being kept away from accused at all times, during trial and otherwise.
9. To have an interpreter or translator, where needed.
10. To have special educator for the child or other specialized person where child is disabled.
11. For Free Legal Aid.
12. For Support Person to be appointed by Child Welfare Committee.
13. To continue with education.
14. To privacy and confidentiality.
15. For list of Important Contact No.'s including that of the District Magistrate and the Superintendent of Police.

Date: **Duty Officer**

I have received a copy of 'Form-A' **(Name & Designation to**

(Signature of Victim/Parent/Guardian) **be mentioned)**

(Note : The form may be converted in local and simple child friendly language)

FORM-B

PRELIMINARY ASSESSMENT REPORT

	PARAMETERS	COMMENT
1	Age of the victim	
2	Relationship of child to the offender	
3	Type of abuse and gravity of the offence	
4	Available details and severity of mental and physical harm/injury suffered by the child	
5	Whether the child is disabled (physical, mental or intellectual)	
6	Details regarding economic status of victim's parents, total number of child's family members, occupation of child's parents and monthly family income.	
7	Whether the victim has undergone or is undergoing any medical treatment due to incident of the present case or needs medical treatment on account of offence.	
8	Whether there has been loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial or other reason?	
9	Whether the abuse was a single isolated incident or whether the abuse took place over a period of time?	
10	Whether the parents of victim are undergoing any treatment or have any health issues?	
11	Aadhar No. of the child, if available.	

Date: **Station House Officer**

THE CRIMINAL LAW (AMENDMENT) ACT, 2018
No. 22 of 2018

(relevant extract)

CHAPTER V
AMENDMENT TO THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

25. Amendment of section 42 of Act No.32 of 2012. – In section 42 of the Protection of Children from Sexual Offences Act, 2012, for the figures and letters "376A, 376C, 376D", the figures and letters "376A, 376AB, 376B, 376C, 376D, 376DA, 376DB" shall be substituted.

26. Repeal and savings. – (1) The Criminal Law (Amendment) Ordinance, 2018 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Indian Penal Code, the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of those Acts, as amended by this Act.

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THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (AMENDMENT) ACT, 2019

(No. 25 of 2019)

[5th August, 2019]

An Act further to amend the Protection of Children from Sexual Offences Act, 2012.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

1. Short title and commencement. – (1) This Act may be called the Protection of Children from Sexual Offences (Amendment) Act, 2019.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. – In the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the principal Act), in section 2,—

(a) in sub-section (1), after clause (d), the following clause shall be inserted, namely:—

'(da) "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child;'

(b) in sub-section (2), for the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2000", the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2015" shall be substituted.

3. Amendment of section 4.– In the principal Act, section 4 shall be renumbered as section 4(1) thereof and—

(a) in sub-section (1) as so renumbered, for the words "seven years", the words "ten years" shall be substituted;

(b) after sub-section (1), the following sub-sections shall be inserted, namely:—

"(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

4. Amendment of section 4. – In section 5 of the principal Act,—

(I) in clause (j),—

(A) in sub-clause (i), the word "or" occurring at the end shall be omitted;

(B) in sub-clause (iii), the word "or" occurring at the end shall be omitted;

(C) after sub-clause (iii), the following sub-clause shall be inserted, namely:—

"(iv) causes death of the child; or";

(II) in clause (s), for the words "communal or sectarian violence", the words "communal or sectarian violence or during any natural calamity or in similar situations" shall be substituted.

5. Substitution of new section for section 6. – For section 6 of the principal Act, the following section shall be substituted, namely:—

"6. Punishment for aggravated penetrative sexual assault. – (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous

imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.".

6. Amendment of section 9. – In section 9 of the principal Act,—

(i) in clause (s), for the words "communal or sectarian violance", the words "communal or sectarian violence or during any natural calamity or in any similar situations" shall be substituted;

(ii) after clause (u), the following clause shall be inserted, namely:—

"(v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity;".

7. Substitution of new section for section 14. – For section 14 of the principal Act, the following section shall be substituted, namely:—

"**14. Punishment for using child for pornographic purposes. –** (1) Whoever uses a child or children for pornographic purposes shall be punished with imprisonment for a term which shall not be less than five years and shall also be liable to fine, and in the event of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.

(2) Whoever using a child or children for pornographic purposes under sub-section (1), commits an

offence referred to in section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic acts, shall be punished for the said offences also under section 4, section 6, section 8 and section 10, respectively, in addition to the punishment provided in sub-section (1)."

8. Substitution of new section for section 15. – For section 15 of the principal Act, the following section shall be substituted, namely:—

"15. Punishment for storage of pornographic material involving child. – (1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees, and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both, and in the event of second or subsequent conviction, with imprisonment of

either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

9. Amendment of section 34. – In section 34 of the principal Act, for the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2000", the words, brackets and figures "the Juvenile Justice (Care and Protection of Children) Act, 2015" shall be substituted.

10. Amendment of section 42. – In section 42 of the principal Act, for the figures, letter and words "376E or section 509 of the Indian Penal Code", the figures, letters and words "376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000" shall be substituted.

11. Amendment of section 45. – In section 45 of the principal Act, in sub-section (2), clause (a) shall be re-lettered as clause (ab) thereof and before clause (ab) as so re-lettered, the following clauses shall be inserted, namely:—

"(a) the manner of deleting or destroying or reporting about pornographic material in any form involving a child to the designated authority under sub-section (1) of section 15;

(aa) the manner of reporting about pornographic material in any form involving a child under sub-section (2) of section 15;"

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