

Role of Courts During Judicial Proceedings Involving Sexual Offences

(Bail, Trial & Other Proceedings)

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Sexual Offences are a special class of offences in themselves. Courts cannot adopt the same approach in conducting the judicial proceedings of the cases involving sexual offences which they generally adopt in the cases involving offences of general category like those under the Indian Penal Code or the other special Acts. Various provisions in the Code of Criminal Procedure, Evidence Act and the judicial pronouncements of the Supreme Court require the trial and appellate courts to deal with the cases involving sexual offences differently. There are enough safeguards provided in various laws to prevent the unnecessary harassment of the victim of the sexual offences and the witnesses during the course of investigation, enquiry and trial of cases. Certain salient provisions of laws and the leading judicial pronouncements of the Supreme Court requiring the trial courts to have different approach in dealing with the cases involving sexual offences are being discussed hereunder:

1.1 Laws relating to sexual offences against women: Various laws relating to sexual offences against women are as under:

- (1) Section 53-A CrPC: Medical examination of the person accused of rape and sampling for DNA profiling

- (2) Section 164 CrPC: Recording of confessions and statements by Magistrates
- (3) Section 164-A CrPC: Medical examination of the victim of rape
- (4) Section 97 CrPC: Search for persons wrongfully confined
- (5) Section 98 CrPC: Power to compel restoration of abducted females
- (6) Section 46 CrPC: Normally only female police officer to touch the person of a female at the time of her arrest
- (7) Section 54 CrPC: Medical examination of a female accused only by female medical officer
- (8) Section 195-A CrPC: Complaint for threatening witness
- (9) Section 195-A IPC: Penalty for threatening witness
- (10) Section 437(1) CrPC, First Proviso: Bail by Magistrate to female accused for offence punishable with death or imprisonment for life
- (11) Indian Penal Code, 1860
- (12) Section 357-A CrPC: Victim Compensation Scheme
- (13) Victim Compensation Scheme, 2011
- (14) Section 357 CrPC: Uttar Pradesh Amendment: Compensation to victim of offence under the SC/ST (Prevention of Atrocities) Act, 2015
- (15) Section 228-A IPC: Penalty for disclosure of identity of victim of rape
- (16) Immoral Traffic (Prevention) Act, 1956
- (17) Protection of Women from Domestic Violence Act, 2005
- (18) Dowry Prohibition Act, 1961

- (19) Protection of Children from Sexual Offences Act, 2012
- (20) Indecent Representation of Women (Prohibition) Act, 1986
- (21) Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
- (22) Juvenile Justice (Care and Protection of Children) Act, 2015
- (23) Section 146, Evidence Act: No question to be put to a female witness on her immoral character etc during cross-examination
- (24) Section 113-A, Evidence Act: Presumption as to abetment of suicide by a married women
- (25) Section 113-B, Evidence Act: Presumption as to dowry death
- (26) Section 114-A, Evidence Act: Presumption as to absence of consent in certain prosecution of rape
- (27) Judicial Pronouncements

1.2 Role of law enforcement agencies and courts in relation to cases involving sexual offences: The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. See: *AparnaBhatVs State of MP*, AIR 2021 SC 1492 (para 31).

2. Arrest of female accused (Section 46(4) CrPCw.e.f. 23.06.2006): Respecting the human rights of the female accused, a new Section 46(4) CrPC has been added since 23.06.2006 which provides that save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose

jurisdiction the offence is committed or the arrest is to be made. However, in the case of State of Maharashtra v. Christian Community Welfare Council of India, (2003) 8 SCC 546, the Supreme Court while interpreting the provisions contained U/s 41 and 46 CrPC for the arrest of a female accused, has clarified that it is not necessary that a lady constable must be present at the time of her arrest and in case a lady constable is not present to effect the arrest of the female accused then the arrest can be made by the male police officer also provided there would be undue delay in the arrest of the female accused and that would impede the investigation. See State of Maharashtra v. Christian Community Welfare Council of India, (2003) 8 SCC 546

BAIL

3.1 Special provision u/s 439 CrPC w.e.f. 21.4.2018 for bail for offences u/s 376, 376-AB, 376DA, 376DB IPC: Section 439 CrPC as amended w.e.f. 21.4.2018 reads as under:

“**Provided** further that the High Court or the court of sessions shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of Section 376, 376AB, 376DA or 376DB of the IPC, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.”

(1A): The presence of the informant or any person authorized by him shall be obligatory at the time of hearing of the application for bail under sub-section(3) of Section 376, 376AB, 376DA or 376DB of the IPC.”

3.2 No interim bail for offence of rape: No interim bail can be granted for the offence of rape. See: Pradeep Tyagi Vs. State of UP & Others, 2009 (65) ACC 443 (All)(DB)(Para 12).

3.3 No anticipatory bail for certain sexual offences: Sec. 438(4) CrPCw.e.f.

21.04.2018: Nothing in this Section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the IPC.

3.4 Presumption of accused being innocent not to be applied in bail for offences under the POCSO Act, 2012:

Where the offences committed by the accused involve statutory presumption of guilt, the general presumption of innocence of the accused is not applicable to the cases where there is contrary statutory presumption of guilt such as when the accused is prosecuted for offences u/s 3, 5, 7 and 9 of the Protection of Children from Sexual Offences Act, 2012. **State of Bihar Vs. Rajballav Prasad, (2017) 2 SCC 178.**

3.5 Relevant considerations for grant or refusal of bail:

Interpreting the provisions of bail contained u/s 437 and 439 CrPC, the Supreme Court has laid down following considerations for grant or refusal of bail to an accused in a non-bailable offence :

- (1) Prima facie satisfaction of the court in support of the accusations
- (2) Nature of accusation
- (3) Evidence in support of accusations
- (4) Gravity of the offence
- (5) Punishment provided for the offence
- (6) Danger of the accused absconding or fleeing if released on bail
- (7) Character/criminal history of the accused
- (8) Behavior of the accused
- (9) Means, position and standing of the accused in the Society

- (10) Likelihood of the offence being repeated
- (11) Reasonable apprehension of the witnesses or evidence being tampered with
- (12) Danger, of course, of justice being thwarted by grant of bail
- (13) Balance between the rights of the accused and the larger interest of the Society/State
- (14) Any other factor relevant and peculiar to the accused. See :
 - (i) ArnabManoranjanGoswamiVs State of Maharashtra, AIR 2021 SC 1 (Paras 57,58,59)
 - (ii) MayakalaDharamaraja Vs. State of Telangana, (2020) 2 SCC 743
 - (iii) LachhmanDass Vs. Resham Chand Kaler, AIR 2018 SC 599
 - (iv) Virupakshappa Gouda Vs. State of Karnataka, AIR 2017 SC 1685(para 16)
 - (v) State of Bihar Vs. Rajballav Prasad, (2017) 2 SCC 178
 - (vi) SanghianPandianRajkumar Vs. CBI, 2014 (86) ACC 671 (SC) (Three-Judge Bench)
 - (vii) Nimmagadda Prasad Vs. CBI, (2013) 7 SCC 466 (para 24)
 - (viii) Y.S. Jagan Mohan Reddy Vs. Central Bureau of Investigation, AIR 2013 SC 1933
 - (ix) Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446
 - (x) DipakShubhashchandra Mehta Vs. CBI, AIR 2012 SC 949
 - (xi) Prakash Kadam Vs. RamprasadVishwanath Gupta, (2011) 6 SCC 189
 - (xii) GokulBhagajiPatil Vs. State of Maharashtra, (2007) 2 SCC 475
 - (xiii) Anil Kumar TulsiyaniVs. State of U.P., 2006 (55) ACC 1014 (SC)
 - (vix) State of U.P. through CBI Vs. AmarmaniTripathi,(2005) 8 SCC 21
 - (xv) Surinder Singh Vs. State of Punjab, (2005) 7 SCC 387
 - (xvi) PanchananMisra Vs. DigambarMisra, 2005 (1) SCJ 578
 - (xvii) Chamanlal Vs. State of U.P., 2004(50) ACC 213 (SC)

(xviii) State of Gujarat Vs. Salimbhai Abdul Gaffar, (2003) 8 SCC 50

(ixx) Mansab Ali Vs. Irsan, (2003) 1 SCC 632.

3.6 Heinous offences: What are?: Only those offences which prescribe minimum sentence of seven years or more can be regarded as heinous offences. Offences not providing minimum sentence of seven years cannot be treated as heinous offences. See: Shilpa Mittal Vs. State NCT of Delhi, (2020) 2 SCC 787

3.7 Bail granted by Sessions Judge, Badaun u/s 67 of the I.T. Act, 2000 for sending lewd messages to woman cancelled by High Court : In the case noted below, the accused was working as Manager of the Urban Co-operative Bank, Badaun, and had fraudulently got signed some blank papers from the informant Smt. VeenaVerma in respect of certain home loan advanced to her and thereafter started harassing her and her husband by threatening to commit their murder and had also sent some obscene SMS to her from his mobile with obscene comments on her and started blackmailing her by threatening to make public the obscene recorded of her on his phone. The accused had also demanded a sum of Rs. 8 lacs from her failing which he had threatened to commit her murder and of her husband and to make public the SMS on his phone. During investigation it was found that the accused had committed rape also on her. The Sessions Judge, Badaun had granted bail to the accused for the offences u/s 386, 511, 506, 509 IPC and u/s 67 of the Information Technology Act, 2000. But the said Bail was subsequently cancelled by the Hon'ble Allahabad High Court. See : Smt. VeenaVerma Vs. State of UP, 2010 (71) ACC 510 (All).

3.8 Conditions of bail in sexual offences: In the case noted below, the Madhya Pradesh High Court granted pre-arrest/anticipatory bail to the accused u/s 438 CrPC for offences u/s 452,354-A, 323,506 IPC and imposed a condition that the accused will request the complainant to tie him 'rakhi'. The Supreme Court set aside the said condition and held that by directing the accused to request the complainant to tie him rakhi as condition for bail transformed a molester into brother by the judicial order.. The Supreme Court has issued following directions regarding grant of bail by courts in the cases involving sexual offences:

- (a). Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused.
- (b). Where circumstances exist for the court to believe that there might be a potential threat or harassment of the victim, or upon apprehension expressed, after calling for report from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim,
- (c). In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days,
- (d). Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the CrPC. In other

words, discussion about the dress, behavior, or past conduct or morals of the prosecutrix, should not enter the verdict granting bail,

- (e). The courts while adjudicating case involving gender related crimes should not suggest or entertain notions or encourage any steps towards compromise between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction,
- (f). Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and,
- (g). Judges especially should not use any words, spoken or written. that would undermine or shake confidence of the survivor in the fairness or impartiality of the court. See: *AparnaBhatVs State of MP*, AIR 2021 SC 1492 (para 44).

TRIAL

4.1 Different manner of trial for offences u/s 376, 377, 354 IPC suggested by the Supreme Court: In a trial of an offence u/s 376 IPC, different procedure for the trial has been suggested by the Hon'ble Supreme Court in the cases *The same procedure has also been suggested to be applied in relation to the trial of offences u/s 377 & 354 IPC. The procedure suggested by Hon'ble Supreme Court in the aforesaid cases is as under----*

- (a) A screen or such arrangements may be made where the victim or witness do not see the face or the body of the accused.
- (b) The question put in cross-examination on behalf of the accused should be given in writing to the presiding officer of the court who

may put them to the victim or witnesses in a language which is clear and is not embarrassing.

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

As regards the appreciation of evidence in a trial of offence u/s 376 IPC, following important aspects are being discussed with the help of leading judicial pronouncements. See:

- (i) Sakshi Vs. Union of India, (2004) 5 SCC 518
- (ii) State of Punjab Vs. Gurmeet Singh, (1996) 2 SCC 384.

4.2 Judges are expected not to sit as 'mute structures of clay' in the Hall known as 'court room' but to be sensitive to the nature of matters under their consideration: The right which advances the public morality or public interest would alone be enforced through the process of Courts for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hall, known as Court Room, but have to be sensitive in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day. See: 'X' Vs. Hospital 'Z', AIR 1999 SC 495 (para 43)

4.3 Presiding Judge must play pro-active role to ensure fair trial (Sec. 165, Evidence Act): Duty of presiding judge is to play pro-active role to ensure fair trial. Court cannot be a silent spectator or mute observer when it presides over trial. It is the duty of the court to see that neither prosecution nor accused plays truancy with criminal trial or corrode sanctity of the proceedings. Presiding Judge can invoke his powers u/s 165 of the Evidence

Act and can put questions to the witness to elicit the truth. See : **Bablu Kumar Vs. State of Bihar, (2015) 8 SCC 787.**

4.4 Direction of the Supreme Court as to when should cross-examination of witness be deferred : Norm in any criminal trial is for the examination-in-chief of witnesses to be carried out first, followed by cross-examination, and re-examination if required, in accordance with Section 138 of the Indian Evidence Act, 1872. Section 231(2) of the Cr.P.C., however, confers a discretion on the Judge to defer the cross-examination of any witness until any other witness or witnesses have been examined, or recall any witness for further cross-examination, in appropriate cases. Judicial discretion has to be exercised in consonance with the statutory framework and context while being aware of reasonably foreseeable consequences. The party seeking deferral under Section 231(2) of the CrPC must give sufficient reasons to invoke the exercise of discretion by the Judge, and deferral cannot be asserted as matter of right. There cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) of the CrPC can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a Judge under Section 231 CrPC is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed. While deciding an application under Section 231(2) of the CrPC, a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. See: **State of Kerala Vs. Rasheed, AIR 2019 SC 721.**

4.5 Calling witness for cross-examination after long gap deprecated by Supreme Court : It is not justified for any conscientious trial Judge to

ignore the statutory command, not recognize "the felt necessities of time: and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilised and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of. In the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics. In fact, it is not at all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. See :

- (i) **Sadhu Saran Singh Vs. State of UP, (2016) 4 SCC 357**
- (ii) **Vinod Kumar Vs. State of Punjab, (2015) 3 SCC 220.**

4.6 No direction fixing time limit for disposal of criminal trials can be issued by courts: A Constitution Bench of the Hon'ble Supreme Court has ruled that although speedy trial is a fundamental right of an under trial under

Article 21 of the Constitution but courts cannot prescribe any specific time limit for the conclusion of a criminal trial. See: **P. Ramachandra Rao Vs. State of Karnataka, (2002) 4 SCC 578 (Seven-Judge Bench).**

4.7 If witness resiles from his previous statement recorded u/s 164 CrPC, conviction cannot be based upon his such previous statement: When a witness resiles from his earlier statement recorded by a Judicial Magistrate u/s 164 CrPC, then his previous statement u/s 164 CrPC may not be of any relevance nor it can be considered as substantive evidence to base conviction solely thereupon. See :

(i). Somasundaram Vs. State, (2020) 7 SCC 722

(ii). State of Karnataka Vs. P. Ravikumar, (2018) 9 SCC 614.

5.1 Section 376 IPC and Delayed FIR : Normal rule that prosecution has to explain delay and lack of prejudice does not apply per se to rape cases. See :

(i) State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711 (Three-Judge Bench)

(ii) Santosh Moolya Vs. State of Karnataka, (2010) 5 SCC 445

5.2 Seven months' delayed FIR for offences u/s 376 IPC disbelieved by the Supreme Court: Accused had allegedly committed rape on the prosecutrix on point of knife. FIR was lodged with the police after a delay of seven months which affected the possibility of medical examination in which signs of resistance or injuries could have been revealed. Testimony of the prosecutrix was not corroborated by the other witnesses. The labourers supposed to haunt the common path had not heard hue and cry of the

prosecutrix though the incident had taken place on the common path. The medico-legal report had opined that the prosecutrix was habitual of sexual intercourse. The Supreme Court held that the evidence of the prosecution fell short of the test of reliability and acceptability. Conviction of the accused based on the testimony of the prosecutrix was set aside by the Supreme Court. **See: Prakash Chandra Vs. State of Himachal Pradesh, AIR 2019 SC 1037 (Three-Judge Bench).**

6.1 No corroboration of testimony of victim of rape/prosecutrix required: In a case of rape, **testimony of prosecutrix stands at par with that of an injured witness.** It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. An accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Woman or girl raped is not an accomplice and to insist for corroboration of the testimony amounts to insult to womanhood. On principle the evidence of victim of sexual assault stands on par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from rules devised by the courts in the

western world. If the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune. See :

- (1) Santosh Prasad Vs. State of Bihar, (2020) 3 SCC 443
- (2) Raja Vs. State of Karnataka, (2016) 10 SCC 506
- (3) State of U.P. Vs. Choteylal, AIR 2011 SC 697.
- (4) Santosh Moolya Vs. State of Karnataka, (2010) 5 SCC 445
- (5) Moti Lal Vs. State of M.P., 2009 (67) ACC 570 (SC)
- (6) Wahid Khan Vs. State of M.P., 2009 (7) Supreme 584
- (7) Rajinder Vs. State of H.P., AIR 2009 SC 3022
- (8) Om Prakash Vs. State of U.P., 2006 (55) ACC 556 (SC)
- (9) State of Rajasthan Vs. Biramal, 2005 (53) ACC 246 (SC)
- (10) State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153
- (11) Aman Kumar Vs. State of Haryana, 2004(50) ACC 35 (SC)
- (12) Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P., (2003) 3 SCC 175
- (13) Visveswaran Vs. State, (2003) 6 SCC 73
- (14) Bhupinder Sharma Vs. State of H.P., (2003) 8 SCC 551
- (15) State of H.P. Vs. Gian Chand, (2001) 2 JIC 305 (SC)
- (16) State of Rajasthan Vs. N.K., (2000) 5 SCC 30

- (17) State of H.P. Vs. Lekhraj, (2000)1 SCC 247
- (18) State of Punjab Vs. Gurmit Singh, 1996 JIC 611 (SC)
- (19) MadanGopalKakkadVs. Naval Dubey, (1992) 3 SCC 204
- (20) GaganBihariSamalVs. State of Orissa, (1991) 3 SCC 562
- (21) State of Maharashtra Vs. Chandra Prakash, 1990 (1) JIC 301 (SC)

6.2 Rustic lady witness and illiterate villager witness : It is impossible for an illiterate villager or rustic lady to state with precision the chain of events as such witnesses do not have sense of accuracy of time etc. Expecting hyper technical calculation regarding dates and time of events from illiterate/rustic/villager witnesses is an insult to justice-oriented judicial system and detached from the realities of life. In the case of rustic lady eye witnesses, court should keep in mind her rural background and the scenario in which the incident had happened and should not appreciate her evidence from rational angle and discredit her otherwise truthful version on technical grounds. See:

- (1) State of U.P. Vs. Chhoteylal, AIR 2011 SC 697
- (2) Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239
- (3) State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408
- (4) State of H.P. Vs. ShreekantShekari, (2004) 8 SCC 153
- (5) State of Rajasthan Vs. Kheraj Ram, (2003) 8 SCC 224
- (6) State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408

6.3 Appreciation of evidence of rustic witness subjected to gruelling cross examination : Where a rustic eye witness of murder/honour killing (child of tender age) was subjected to cross examination for days together to

confuse him and there were certain contradiction etc. in his evidence, it has been held that such rustic witness cannot be expected to state precisely the exact distance, direction from which he had witnessed the incident and the description of whole incident happened in few minutes and his evidence cannot be rejected. See : State of U.P Vs. Krishna Master, 2010 (5) ALJ 423(SC).

6.4 Inconsistencies occurring in testimony of rustic witness not to be given undue importance: : Where a rustic witness was subjected to grueling cross examination for many days, inconsistencies are bound to occur in his evidence and they should not be blown out of proportion. See : **State of U.P Vs. Krishna Master, AIR 2010 SC 3071.**

6.5 'DNA' report and directions dated 28.8.2014 therefor by Division Bench of Allahabad High in cases of child rape and murder: Following directions in the case of Akhtar Vs. State of UP have been issued by the Hon'ble High Court ::

- (1) That in cases of rape and murder of minor girls, which are based on circumstantial evidence, as far as possible, material which is collected from the deceased or the accused for example hair or blood of the victim or the accused, which is found on the persons or clothes of the victim or the accused or or at the spot, seminal stains of the accused on the clothes or body of the victim, Seminal swabs which may be collected from the vaginal or other orifices of the victim and the blood and other materials extracted from the accused which constitutes the control sample should be sent for D.N.A. Analysis, for ensuring that forensic

evidence for establishing the participation of the accused in the crime, is available.

- (2) We also direct the Director General Medical Health U.P., Principal Secretary Health, U.P., and D.G.P., U.P. to mandate sending the accused for medical examination in each case for ascertaining whether he has any injuries caused by the resisting victim, or when he attempts to cause harm to her as is provided under section 53 A of the Code of Criminal Procedure Code, which was introduced by Act 25 of 2005, (w.e.f. 23.6.2006). In particular if the rape suspect is apprehended at an early date after the crime, it should be made compulsory to take both dry and wet swabs from the penis, urinary tract, skin of scrotum or other hidden or visible regions, after thorough examination for ascertaining the presence of vaginal epithelia or other female discharges which are also a good source for isolating the victim's DNA and necessary specialized trainings be imparted to the examining forensic medical practitioners for this purpose.
- (3) We direct the Principal Secretary (Health), U.P., Director General (Health and Medical Services) U.P. to prohibit conducting the finger insertion test on rape survivors, and to employ modern gadget based or other techniques for ascertaining whether the victim has been subjected to forcible or normal intercourse. These finger insertion tests in female orifices without the victim's consent have been held to be degrading, violative of her mental and physical integrity and dignity and right to privacy and are re-traumatizing for the rape victim. Relying on the International Covenant on Economic, Social, and Cultural Rights, 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 it was further held in Lillu

v. State of Haryana, (2013) 14 SCC 643 that no presumption of consent could be drawn ipso facto on the strength of an affirmative report based on the unwarranted two fingers test.

- (4) We find that there is absence of an adequately equipped D.N.A. Laboratory in U.P. which has advanced mitochondrial DNA analysis facilities, comparable to the CDFD, Hyderabad, (from where we were able to obtain positive results in this case, after unsuccessful DNA matching in an earlier case [Criminal Capital Appeal (Jail) No. 2531 of 2010], Bhairo vs. State of U.P.(decided on 6.9.11) where this Court had sent the sample of vaginal smear slides and swabs and appellant's underwear to the U.P. DNA laboratory, viz. Forensic Science Laboratory, Agra), and we direct that such a DNA centre comparable to the CDFD be established in the State of U.P. at the earliest so that Courts and investigating agencies are not compelled to send DNA samples at high costs to the specialized facility of the CDFD at Hyderabad.
- (5) The Director General of Prosecution, U.P., the Director General of Police U.P. and Director General Medical Health should ensure that blind cases of rape and murder of minor girls or other complicated cases are thoroughly investigated by efficient Investigating Officers. Effective steps should be taken for forensic investigations by collecting and promptly sending for DNA analysis all possible incriminating material collected from the deceased, victim, accused, and at the scene of the crime etc. which may give information about the identity of the accused and his involvement in the crime, after taking precautions for preventing the contamination of the material. This is necessary to prevent Courts being rendered helpless because the prosecution and investigating

agency are lax in producing witnesses or because witnesses have been won over or are reluctant to depose in Court. Steps should also be taken for preventing witnesses from turning hostile, by prosecuting such witnesses, and even by cancelling bails of accused where they have secured bails where it is apparent that efforts are being made to win over witnesses and by providing witnesses with protection where ever necessary so that they can give evidence in Court without fear or pressure. In case there is reason to think that the Investigating Officers or medical officers or others have colluded with the accused, strict action be initiated against the colluding officials as was recommended in the case of DayalSingh vs. State of Uttaranchal (supra). It is necessary that policies and protocols be developed by the DGP, U.P., Principal Secretary Health, Director Medical Health U.P., Director of Prosecutions, U.P., for the aforesaid purposes.

Note : (1) Registry of the High Court was directed to forthwith forward the copies of the above judgment/directions to all the respondents to submit compliance report of the directions of the Hon'ble High Court within 4 weeks.

(2) Registry was also directed to circulate copies of the above judgment/directions to all the District Judges for ensuring compliance of the above directions. See: Judgment dated 28.08.2014 of Allahabad High Court passed in Capital Case No. 574/2013 Akhtar Vs. State of UP.

7.1 Presumption of absence of consent of victim of rape: Section 114-A, Evidence Act (as amended w.e.f. 03.02.2013):In a prosecution for offence

of rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of sub-section (2) of Section 376 IPC where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

7.2 Questions on consent of prosecutrix not permissible to be put to her for offences u/s 376 IPC etc (Proviso to Section 146, Evidence Act as amended w.e.f. 03.02.2013) : "Provided that in a prosecution for an offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, or such victim with any person for proving such consent or the quality of consent."

7.3 Evidence of character or consent of rape victim when not relevant ? (Section 53-A, Evidence Act w.e.f. 03.02.2013) : In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376-A, section 376-B, section 376-C, section 376-D or section 376-E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

7.4 Consent of prosecutrix u/s 114-A of Evidence Act for having sexual relationship upon false promise of marriage, fear or misconception not to absolve accused of liability of rape u/s 376 IPC : Consent of prosecutrix obtained by the accused u/s 114-A of the evidence Act for having sexual relationship with her upon false promise of marriage, fear of injury or misconception is no consent in the eye of law and does not absolve the accused of his liability of rape u/s 376 IPC. See:

(i). MaheshwarTiggaVs State of Jharkhand, (2020) 10 SCC 108 (Three-Judge Bench)

(ii). AnuragSoniVs. State of Chattisgarh, AIR 2019 SC 1857.

7.5 Only voluntary consent of prosecutrix material : Unless there is voluntary participation by women to a sexual act after fully exercising choice in favour of assent, court cannot hold that women gave consent to sexual intercourse. See :Roop Singh Vs. State of MP, (2013) 7 SCC 89

7.6 Consent means voluntary consent: Consent means voluntary consent and voluntary participation with the accused. Submission of body under the fear of terror cannot be construed as consented sexual act. See : State of H.P. Vs. Mango Ram, 2000 (41) 559 Supreme Court (Three-Judge Bench)

7.7 Consent for intercourse and consequential pregnancy on promise of marriage not to amount to rape: where A 19 year old girl fell in love with a 21 year old man and got pregnant and the man had earlier assured her to marry her but refused later when the pregnancy became visible, conviction recorded by trial court was upheld by High Court. But on appeal

Supreme Court held, “Judicial opinion in favour of the view that consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her later, cannot be said to be given under a misconception of fact. Accused acquitted by Supreme Court. See :Uday Vs. State of Karnataka, (2003) 4 SCC 46)

7.8 Having sex on a false promise to marry amounts to rape: A betrayal in love would attract s. 376 IPC. Having sex on false promise of break in career would also attract s. 376 IPC. See : Dileep Singh Vs. State of Bihar, (2004) SCC)

7.9 Consent given by girl below 16 years of age for sexual relation immaterial: Where in a criminal trial u/s 366, 376 IPC, the prosecutrix was below 16 years of age on the date of commission of the offence, her consent was treated as immaterial. The best evidence to prove the date of birth of rape victim is the evidence of the father and mother and their evidence would prevail over expert opinion. Expert opinion is only to assist the court and of an advisory character only and would not be binding on the witness of fact. See : Vishnu Vs. State of Maharashtra, 2006(54) ACC 554 (SC)

7.10 No presumption of consent: In a prosecution for offence of rape, consent of prosecutrix cannot be presumed on mere fact that she was more than 16 years of age. See : State of U.P. Vs. Manoj Kumar Pandey, AIR 2009 SC 711

8. Dowry death and trial for offence u/s 304-B IPC: When the facts are clear and the links in the chain of circumstances are not broken, proof

of motive is immaterial : When the facts are clear, it is immaterial whether motive was proved. Absence of motive does not break the link in the chain of circumstances connecting the accused with the crime. Proof of motive or ill-will is unnecessary to sustain conviction where there is clear evidence. It was a case u/s 304-B IPC r/w Section 113-A and 113-B of the Evidence Act. See:

- (i) Mustak Vs. State of Gujarat, (2020) 7 SCC 237.
- (ii) Saddik Vs. State of Gujara, (2016) 10 SCC 663
- (iii) Bhimsingh Vs. State, (2015) 4 SCC 281 (*para 21*)
- (iv) DasinBai Vs. State of Chhatisgarh, 2015 (89) ACC 337 (SC)
- (v) Mulakh Raj Vs. Satish Kumar, AIR 1992 SC 1175

9.1 Award of compensation by trial/appellate court to victim u/s 357 CrPC mandatory: It is mandatory duty of Criminal Court to apply its mind to question of awarding compensation u/s 357 CrPC in every case. This power is not ancillary to other sentences but in addition there to. Use of the word “may” in section 357 CrPC does not mean that court need not consider applicability of Section 357 CrPC in every criminal case. Section 357 CrPC confers power coupled with duty on court to mandatorily apply its mind to question of awarding compensation in every criminal case. Court must also disclose that it has applied its mind to such question by recording reasons for awarding/refusing grant of compensation. Power given to courts u/s 357 CrPC is intended to re-assure victim that he/she is not forgotten in criminal justice system. Very object of Section 357 CrPC would be defeated if courts choose to ignore Section 357 CrPC and do not apply their mind to question of compensation. Courts are directed to remain careful in future as to their mandatory duty u/s 357 CrPC. *Copy of order directed to be forwarded to*

Registrars General of all High Court for its circulation amongst judges handling criminal trials and hearing criminal appeals. See : AnkushShivajiGaikwad Vs. State of Maharashtra, (2013) 6 SCC 770.

9.2 Awarding compensation u/s 357 CrPC to the victim of offence by keeping in view his financial capacity mandatory : Awarding compensation u/s 357 CrPC to the victim of offence by keeping in view his financial capacity mandatory. See :

(i) Manohar Singh Vs. State of Rajasthan, 2015 (89) ACC 266.

(ii) AnkushShivajiGaikwad Vs. State of Maharashtra, 2013 (82) ACC 312 (SC).

9.3 Victim Compensation Scheme 2011: Relying on the directions of the Supreme Court issued in Laxmi Vs. Union of India, (2014) 4 SCC 427 and State of HP Vs. Rampal, (2015) 11 SCC 584, the Supreme Court, in the case noted below, while referring to the amended provisions of Section 357-A CrPCw.e.f. 31.12.2009 and the victim compensation scheme 2011, awarded Rs. 1,50,000/- as compensation to be paid by the convict to the injured victim of acid attack after his conviction for the offences u/s 326/34 IPC. See: **State of Himachal Pradesh Vs. Vijay Kumar, AIR 2019 SC 1543.**

9.4 Reasons must be recorded for not granting compensation : Trial court must record reasons why it is not possible to release the convict on probation. Similarly, grant of compensation to the victim is equally a part of just sentencing. Reason should be recorded for not granting compensation. A Trial Judge must be alive to alternate methods of mutually satisfactory

disposition of a case. See : **State Vs. SanjivBhalla, 2014 (86) ACC 938 (SC)**.

9.5 Direction for imparting training to Judicial Officers at NJA, Bhopal regarding award of interim or final compensation u/s 357, 357-A CrPC to the victim of the offence at any stage of the criminal proceedings

: Apart from the sentence and fine/compensation to be paid by the accused, the Court has to award compensation by the State under Section 357-A when the accused is not in a position to pay fair compensation as laid down by the Supreme Court in its (unreported) judgment dated 28.11.2014 delivered in Criminal Appeal No. 420 of 2012, Suresh Vs. State of Haryana. The Supreme Court in the case of Suresh had held thus : "We are of the view that it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the Court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factor as may be found relevant in the facts and circumstances of an individual case. We are also of the view that there is need to consider

upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from receipt of a copy of this order. We also direct that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make the provision operative and meaningful." See : **State of MP Vs. Mehtab, 2015 (89) ACC 306 (SC)** (Para 8).

9.6 Rape victim's illegitimate child entitled to compensation u/s 357A CrPC: Word 'victim' occurring in Section 357-A CrPC and UP Victim Compensation Scheme, 2014 should include a child also born out of illegal act of sexual abuse with minor and such child of the rape victim is also entitled to compensation. See: **"A" through her father "F" Vs. State of UP, AIR 2016 (NOC) 396 (All)(DB)(LB)**.

10. POCSO Court to try both the cases where accused charged under SC/ST Act also: A perusal of Section 20 of the SC/ST (Prevention of Atrocities) Act, 1989 and Section 42-A of the Protection of Children from Sexual Offences Act, 2012 reveals that there is a direct conflict between the two non obstante clauses contained in these two different enactments. If Section 20 of the SC/ST Act is to be invoked in a case involving offences under both the Acts, the same would be triable by a Special Court constituted under Section 14 of the SC/ST Act and if provisions of Section 42-A of the POCSO Act are to be applied, such a case shall be tried by a Special Court constituted under Section 28 of the POCSO Act. Dealing with

an issue identical to the case on hand, the Apex Court in Sarwan Singh Vs. KasturiLal, AIR 1977 SC 265 held thus : "When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non-obstante clauses in the earlier. In **KSL & Industries Limited Vs. ArihantThreads Limited & Others**, AIR 2015 SC 498, the Apex Court held thus :In view of the non obstante clause contained in both the Acts, one of the important tests is the purpose of the two enactments. It is important to recognize and ensure that the purpose of both enactments is as far as possible fulfilled. A perusal of both the enactments would show that POCSO Act is a self contained legislation which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure. The legislature introduced the non obstante clause in Section 42-A of the POCSO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POCSO Act though the legislature was aware about the existence of non obstante clause in Section 20 of the SC/ST Act. Applying the test of

chronology, the POCSO Act, 2012 came into force with effect from 20.06.2012 whereas SC/ST Act was in force from 30.01.1990. The POCSO Act being beneficial to all and later in point of time, it is to be held that the provisions of POCSO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments." See:

- (i) State of A.P. Vs. MangaliYadgiri, 2016 CrLJ 1415 (Hyderabad High Court)(AP) (*paras 14, 15, 16, 17, 19 & 20*).
- (ii) KSL & Industries Limited Vs. Arihant Threads Limited & Others, AIR 2015 SC 498,

11.1 Name of victim of rape whether major or child not to be disclosed in judgment or order : Section 228-A IPC reads thus : “Sections 376, 376-A, 376-B, 376-C, 376-D and POCSO Act,2012 and 228-A IPC:Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence u/s 376, Sec. 376-A, Sec. 376-B. Sec. 376-C, or Sec. 376-D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.” Identity of the minor/child victim of sexual offences under the POCSO Act, 2012 can also not be disclosed and Section 228-A IPC applies to the POCSO Act, 2012 also. See:

- (1) A Vs State of UP, (2020) 10 SCC 505 (Three-Judge Bench)
- (2) NipunSaxenaVs Union of India, (2019) 2 SCC 703
- (3) Premiya Vs. State of Rajasthan, 2008 (63) ACC 94 (SC)
- (4) Om Prakash Vs. State of U.P., 2006 (55) ACC 556 (SC)
- (5) State of Karnataka Vs. Puttaraja, (2004) 1 SCC 475

(6) State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153

(7) Bhupinder Sharma VS. State of H.P., (2003) 8 SCC 551

11.2 Section 228-A IPC applies to dead victim also: Section 228-A IPC applies to dead victim also. See: **NipunSaxenaVs Union of India, (2019) 2 SCC 703.**

11.3 Non-observance of section 228-A IPC amounts to judicial indiscipline : It has been held by the Supreme Court that disclosure of the name of the woman/victim of a sexual offence by not observing the restrictions u/s 228-A IPC and the repeated judicial pronouncements thereon amounts to judicial indiscipline. See: **State of Orissa VS. Sukru Gouda, AIR 2009 SC 1019**

12.1 Child in the lap of female accused and the duty of courts: Directions issued by the Supreme Court in writ petition (C) No. 559/1994, R.D. Upadhyay vs. State of A.P. & others, AIR 2006 SC 1946 and circulated by Allahabad High Court amongst the Judicial Officers of the State of U.P. vide **C.L. No. 34/2006 dated 7.8.2006** mandates that female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years. In such cases the courts must issue directions to the jail authorities for proper feeding, medication and over all well-being of the infants/children in jail. These directions from the Apex Court are aimed at protecting the valuable human rights of the infants/children who are in jails with their prisoner mothers. See: **R.D. Upadhyay vs. State of A.P. & others, AIR 2006 SC 1946.**

12.2 Pregnancy and birth of child in jail and protection of human rights : In the matter of a prisoner women being pregnant & birth of child in jail, several guidelines have been issued by the SC to the jail authorities & the courts. See: **R.D Upadhyay Vs. State of A.P,(2007) 15 SCC 337 (Three-Judge Bench).**

13. Threatening a witness made offence u/s 195A IPC w.e.f.

16.04.2006: Threatening a witness has been made offence u/s 195A IPC w.e.f. 16.04.2006. Section 195A CrPC inserted w.e.f. 31.12.2009 provides that a witness or any other person may file a complaint in relation to an offence u/s 195A of the IPC.

14.1 Constitutional freedom of inter-caste and inter- faith marriages:

“Educated younger boys and girls are choosing their life partners which in turn is a departure from the earlier norms of the society where caste and community played a major role. Possibly, this is a way forward where caste and community tensions will reduce by such inter-marriages. But in the meantime, these youngsters face threats from the elders and the courts have been coming to the aid of these youngsters. Consent of the family or the community or the clan is not necessary once the two adult individuals agree to inter into a wedlock and their consent has to be piously given primacy. Choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. Such a right of choice is not expected to succumb to the concept of “class honour” or “group thinking”. Indian society is emerging through a crucial transformational period. Intimacies of marriage lie within a core zone of privacy, which is inviolable and even matters of faith would have the least effect on them. The

right to marry a person of choice is integral to Article 21 of the Constitution of India. Autonomy of an individual in relation to family and marriage is integral to the dignity of the individual. Under the garb of caste and community, to alienate the child and the son-in-law will hardly be a desirable social exercise “. See:

- (1) Laxmibai Chandaragi B. Versus State of Karnataka, (2021) 3 SCC 360
- (2) Shakti Vahini Versus Union of India, (2018) 7 SCC 192
- (3) Asha Ranjan Versus State of Bihar, (2017) 4 SCC 397
- (4) Shafin Jahan Versus Asokan K.M., (2018) 16 SCC 408
- (5) Lata Singh Versus State of Uttar Pradesh, (2006) 5 SCC 475
- (6) K.S. Puttaswamy Versus Union OF India, (2017) 10 SCC 1 (Nine-Judge Bench).

14.2 Dr. B.R.Ambedkar’s views on inter-caste marriages: ” I am convinced that the real remedy is inter-caste marriage. Fusion of blood can alone create the feeling of being kith and kin, and unless this feeling of kinship, of being kindred, becomes paramount, the separatist feeling- the feeling of being aliens-created by Caste will not vanish. Where society is already well-knit by other ties, marriage is an ordinary incident of life. But where society is cut as under, marriage as a binding force, becomes a matter of urgent necessity. The real remedy for breaking Caste is inter-marriage. Nothing else will serve as the solvent of the Caste.” (Excerpts from Dr. Ambedkar’s Book ‘**Annihilation of Caste**’ as referred to by the Supreme Court of India in the case of Laxmibai Chandaragi B. Versus State of Karnataka, (2021) 3 SCC 360).

14.3 Police protection to be given to major boys and girls undergoing inter-caste or inter-religious marriage: Explaining the concept of right to life guaranteed under Article 21 of the Constitution, the Supreme Court has directed the police and administration to protect from harassment, threats or act of violence such major boys or girls who have undergone inter-caste or inter-religious marriages. It has further been directed that stern action should be taken against persons who give threats or harass or commit violence against major boys or girls undergoing inter-caste or inter-religious marriages. See: **Lata Singh Versus State of Uttar Pradesh, (2006) 5 SCC 475.**
