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NOTIFICATION

In pursuance to the Judgment dated 18.03.2021 passed by the Hon'ble Supreme Court of India in Criminal Appeal No.329 of 2021 (Special Leave Petition (Crl.) 2531 of 2021 (arising out of SLP (Crl.) Diary No. 20318 of 2020)) Aparna Bhat & Ors., Appellants v. State of Madhya Pradesh & Anr., Respondents, the Hon'ble High Court of Sikkim hereby frames this module on Judicial Sensitivity to Sexual Offences to be tested in Judicial Services Examination.

By Order,

REGISTRAR

S.G.P.G. - 516/ Com. 2/Gazette /13 Nos./ Dt:- 04.01.2024

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MODULE ON JUDICIAL SENSITIVITY TO SEXUAL OFFENCES

INTRODUCTION

The Hon'ble Supreme Court in its judgment dated 18.03.2021 passed in Aparna Bhat & Ors., Appellants v. State of Madhya Pradesh & Anr., Respondents Criminal Appeal No.329 of 2021 (Special Leave Petition (Crl.) 2531 of 2021 (arising out of SLP (Crl.) Diary No. 20318 of 2020)) has been pleased to direct the High Courts to formulate a module on judicial sensitivity to sexual offences which is also to be tested in Judicial Services Examination.

The need for judicial sensitivity to sexual offences has often been emphasized by the Hon'ble Supreme Court. Justice Krishna Iyer in Krishan Lal v. State of Haryana (1980) 3 SCC 159; AIR 1980 SC 1252 was pleased to observe as follows in this regard:-

"a socially sensitized judge is a better statutory armour against the gender-outrage than long clauses of complex section with all protection writ into it."

Again, in State of Punjab v. Gurmit Singh & Ors. (1996) 2 SCC 384 the Hon'ble Supreme Court was pleased to emphasize on the judges to deal with such cases with utmost sensitivity and realistic approach. Recently, in Nipun Saxena & Anr. v. Union of India & Ors. (2019) 2 SCC 703 the Hon'ble Supreme Court was at pains to observe that, "unfortunately, in our society, the victim of sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime."

The above decisions would reflect judicial sensitivity at the highest level towards victims of sexual offences.

Now, therefore this module has been prepared in due compliance to the directions of the Hon'ble Supreme Court in Aparna Bhat's case (supra) as well as keeping in view the various other decisions of the Hon'ble Apex Court on the subject. This module shall be supplemental to the provisions contained in the Protection of the Children from Sexual Offences Act, 2012(In short, "the POCSO Act, 2012"), rules thereunder, the Code of Criminal Procedure, 1973 (In short, "the Cr.P.C,1973") and various directions issued from time to time by the Hon'ble Supreme Court on the matter.

CHAPTER I

I. Overcoming harmful gender stereotypes & myths

Judges handling offences of sexual assaults have to be aware of the fact that they are prone to harmful gender stereotypes & myths which:-

(a) serve to deny and/or trivialize sexual offences perpetrated by men against women and girl-child;

(b) shift the blame from the perpetrator to the victim for the sexual assault;

(c) express a disbelief in claims of sexual violence;

(d) exonerate the perpetrator;

(e) allude that only certain types of women and girls are "real" victims;

(f) contribute to the oppression and social control of women and girls.

Being conscious of the above harmful gender stereotypes & myths judges should be able to overcome and debunk it. They being one of the most important criminal justice functionaries and well-placed should play a major role in dispelling the above myths and harmful gender stereotypes. However, the judges handling offences of sexual assault should equally be sensitive to all the genders and ensure that all parameters reflected above are adhered to.

II. Realising that victim safety is paramount and adopting victim-centred approach

(a) Right since the inception of a case judges should be conscious of the fact that victim safety is paramount and accordingly adopt a victim-centred approach.

(b) Once victims are identified, judges have a duty to ensure that there are appropriate measures to protect them. Victims themselves may not be aware of the availability of such protective measures, so the onus is on the judges to raise this issue.

(c) Wherever possible judges should ask the victim(s) directly about their fears and the basis for that fear.

(d) Judges should realize that victims of sexual offences may not be able to express the level of risk to them, due to extreme levels of fear, cultural barriers to disclosure, language barriers and so on.

(e) Protection measures should restore a victim's sense of security and self-worth since victims commonly share a sense of helplessness, shame and guilt after the violence. This means that a crucial principle of any protection measure is the need to respect victim's rights, dignity and privacy.

(f) Protection should, however, not be offered in a paternalistic manner, but should be afforded in a manner so that the victims are also able to develop their own strengths and self-esteem.

III. Considerations while deciding bail applications of accused

(a) Judges need to have as much information as possible regarding the situation and the individuals involved when deciding whether to grant bail to the accused.

(b) They need to understand and carefully assess the well-known risk factors and also verify if the police or prosecutor has conducted a risk assessment in the case. If they have, it should be ensured that this information is before the judge. If not, the judges may direct the police or prosecutor to conduct a risk assessment. If this is not possible, the judges should ensure that they seek such information during the hearing that allows them to make a risk assessment themselves.

(c) Judges should be aware that accused charged with minor offences are as likely to be as dangerous as those charged with more serious offences, especially in cases involving victims who are close relatives and in stalking cases.

(d) Victims should be notified of the application for bail, which may impact their safety. They should have the chance to provide their views during the hearing, whether through the prosecutor, or through their own lawyer.

(e) Where bail is granted the bail conditions should not mandate, require or permit contract between the accused and the victim. Instead, the conditions should seek to protect the complainant/victim from any further harassment by the accused.

(f) In all cases where bail is granted without information to the complainant or victim they should immediately be informed that the accused has been granted bail and copy of the bail order should be made over to them within two days.

(g) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society. In particular, discussions about the dress, behaviour or past conduct or morals of the victim should not enter the verdict granting bail.

(h) The courts while adjudicating cases of sexual violence should not suggest or entertain any notions(or encourage any steps) towards compromises between the victim and the accused or suggest or mandate mediation between them.

(i) Judges should not use any words, spoken or written, that would undermine or shake the confidence of the victim in the fairness or impartiality of the court.

CHAPTER II

I. Protection issues during court proceedings

(a) Judges should realise that they have the responsibility to protect victims of sexual offence during the criminal proceedings.

(b) Safety at court in criminal proceedings is again critical. If the victim does not feel safe, it is likely they will become unwilling to continue their participation. Feeling unsafe also negatively impacts their ability to recount facts and their experience. It is thus crucial to identify victims who are vulnerable to secondary and repeat victimization by the criminal justice system itself, to intimidation, and to retaliation during the court procedures, whether this is during the pre-trial or post-trial hearing.

(c) The exact nature of safety measures should be determined through individual assessment, taking into account the wishes of the victim, as well as the availability of measures in the jurisdiction.

(d) Judges should ensure that they are able to minimise victim's levels of fear during the hearing.

(e) As also mandated by the POCSO Act, 2012 there should be complete protection from disclosure of a victim's identity. Judges have to ensure that the names and/or other details of the victims are redacted while supplying the case papers to the accused and also when uploading the case details online.

II. Preventing secondary victimization in the criminal justice system

(a) The courtroom can be a frightening place for many victims of sexual offences. Criminal courts, procedures and trials can be formal and traditional. Judges have a better chance of reducing the anxiety of the victims if they understand how this institutionalized setting and its practices contribute to the inhospitable conditions faced by victims and expose them to secondary victimization.

(b) While interacting with the victims the judges have to take into account that they are not only victims of sexual offences but frequently also of secondary victimization, which is the victimization that occurs not as a direct result of the criminal act but through the inadequate response of criminal justice actors and institutions. Most victims of sexual violence suffer devastating trauma caused by the violence itself, including feelings of shame, humiliation and powerlessness. Unfortunately, many victims also experience their participation in criminal proceedings as a "second assault", leading to re-traumatization.

(c) Judges should endeavour to ensure that they promote the victim's right to be heard. Victims of sexual violence who have been silenced by the impacts of trauma may find that the opportunity to articulate their own experiences help them to move beyond the violence to which they have been subjected. Giving victims a voice and the feeling of being believed can be a transformative experience for them. The notion of testimony is associated with the possibility of granting a voice to those who have been harmed and denied their rights.

(d) Cases involving specially-abled victims warrant a higher degree of caution and sensitivity at every stage including at the time of trial.

CHAPTER III

I. Sensitive and cautionary approach at evidence stage

(a) Judges should realise that aggressive and improper questioning of victims of sexual violence and their parents are aberrations in our criminal justice system.

(b) Judges should also realise that questioning techniques, such as aggressive questioning, extensive repetition, frequent interruptions, closed questions and demanding precise recollection of peripheral details, are common defence tactics in sexual assault cases. These are the only crimes in which "the victim becomes the accused and, in reality, it is the victim who is made to prove their good reputation, mental soundness and impeccable propriety".

(c) Judges have to disallow any unfair, unnecessary, repetitive, aggressive and discriminatory questioning. An understanding of unethical defence tactics is therefore crucial. A key tactic is "whacking" the complainant/victim through humiliating or prolonged questioning that seeks to put them on trial rather than the accused. Specious applications are also used to obtain the victim's personal records. Harmful gender stereotypes about women and consent are often invoked and exploited, including assumptions about communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure.

(d) Following additional special measures can facilitate the testimony of the girl child:-

(i) allowing the child to answer questions and describe what happened to her in a manner of her choice. This includes, for example, answers by writing, drawing or illustrating with models, such as anatomical dolls;

(ii) making use of a child psychologist or social worker to enable the court to better understand the circumstances of the child and her reactions;

(iii) allowing the child to testify via an intermediary wherever required. Judges should ensure that the intermediaries are qualified and understand that their role is to ensure that the victim understands the questions being asked and for the judge, prosecutor and defence lawyer to understand victim's responses. For example, the intermediary can ask defence counsel to rephrase overly complicated questions.

(e) The statement of the victim should be recorded verbatim.

(f) As far as practicable the cross-examination of the victim should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the victim.

II. Understanding common defence tactics

(a) Judges should realise that a common defence tactic is the attempt to undermine the victim's allegations by reference to a delay in reporting the crime. This involves suggesting that even the slightest deviation over a period of years, on any detail, relevant or not, between any of her statements, indicates unreliability if not dishonesty.

(b) Judges often reportedly fail to intervene when victims are subjected to improper questioning based on myths and harmful gender stereotypes. Further, they fail to realise that a victim will often be subjected to an assumption of rational behaviour,

not only by defence counsel to try to discredit her, but also by the prosecution to support their argument that the victim is credible. It should be ensured that injustice is not perpetuated by any of the actors in the courtroom, including prosecutors, defence counsel and the judge.

(c) Judges should be able to properly intervene to avoid harassing and improper questioning of victims. Such questioning could fall under rules regarding irrelevant or repetitive evidence. When codes of conduct for lawyers are breached, judges should not permit the continuation of such aggressive lines of questioning. They need to remind lawyers of applicable ethical standards, which include a duty not to badger the witness or mislead the court. For example, defence lawyers who use harassing and improper questioning to put forward a defence grounded in stereotypes may be considered to be misleading the court. Lawyers should be reminded of their ethical obligation to cross-examine in good faith.

(d) Judges should query the relevancy of the aggressive line of questioning during the trial and use applicable rules of criminal and evidential procedures to stop prejudicial defence questioning. If a certain line of questioning has been allowed, then judges need to assess whether the evidence is relevant or material. In doing so they should consider the prejudicial nature of such evidence. Even if the evidence has probative value, it may be substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the trier of fact, or wasting time.

CHAPTER IV

I. Assessment and sifting of evidence

(a) In making their assessment, judges could consider the following guidelines:-

(i) understand that several factors can have consequences on the coherence and comprehensiveness of the different statements. Such factors include the timing of the incident, being interviewed by a trained individual, whether the victim feels safe and supported at the time the statement is being given. Additional factors include the architecture, dress and formality of the court and the fact that testimony is often given in the presence of the perpetrator although screened, which make many courts an "inhospitable" and intimidating environment for victims;

(ii) understand that, between the incident and the time the victim is before a judge, it is not uncommon for victims to attempt to manage their lives by choosing not to revisit a traumatic event over and over again in their minds. Many victims make efforts to forget or not to think about the violence as a coping strategy;

(iii) recognize that inconsistencies are to be expected. It is difficult to imagine that anyone could maintain consistency with respect to insignificant details when retelling an incident that occurred months or more likely even years prior. It is sensible to assume that inconsistencies on minor details actually increase credibility. However, experience reveals that such inconsistencies are often cited as a factor in raising concerns about the victim's credibility;

(iv) most importantly, it has to be realised that victims of sexual violence often experience betrayal and fear apart from bearing additional trauma. A sensitive approach aimed at confidence building of the victim is thus warranted.

(b) Judges should realise that in cases involving sexual offences there is often insufficient meaningful case building at the investigation stage. Due to the nature of the crime, there are often no other witnesses or little physical evidence, which can result in over-reliance on the victim's statement. At the same time, given that evidentiary practices have developed out of traditional beliefs about women and girls, many judges may view the victim's testimony with – at best – caution and – at worst – suspicion. Such an approach should be avoided.

(c) Judges should also be conscious of the following:-

- that there is no need for corroborating evidence when objectively determining credibility issues;
- understand that medical evidence is not always required to corroborate a victim's account. A medical report that may show that penetration occurred but does not prove or disprove rape;
- do not dismiss victims' testimony as not credible unless the contrary is clearly indicated;
- avoid the use of myths and harmful gender stereotyping in assessing the lack of physical evidence;
- stop analysing whether the victim could have fought back.

(d) In fine, fact determination and judicial reasoning in sexual assault cases should be a sensitive approach. Such an approach contributes to protecting victims from the operation of myths and harmful gender stereotypes and assists in achieving substantive equality for them in their access to justice. Judges can and should play a leading role in moving judicial reasoning towards a more egalitarian approach to fact determination.

CHAPTER V

I. Sentencing guidelines

(a) In determining the appropriate sentencing in cases of sexual violence, it is important for judges to determine the appropriate offence category, consider aggravating and mitigating factors, as well as to assess the dangerousness of the offender and the need for any additional orders. Formulating clear reasons is another crucial aspect of appropriate sentencing.

(b) Wherever possible, the victim should also be heard on sentencing.

(c) An important aspect of sentencing that is often not fully utilized is ensuring reparations, compensation, restitution and rehabilitation of the victims. Judges should be creative in this regard. Wherever appropriate the victims should be granted interim compensation at the earliest.

(d) Judges should set apart time for reflection on sentencing. They also need to be consistent in this regard.

(e) Judges should realize that appropriate punishment and sentencing have two dimensions:-

- as a deserved response to culpable wrongdoing; and
- as an institutional necessity to deter wrongdoing.

IMPORTANT CASE LAWS & SUGGESTED READINGS

1 Nipun Saxena & Anr. v. Union of India & Ors. (2020) 18 SCC 499

2 Aparna Bhat & Ors., Appellants v. State of Madhya Pradesh & Anr., Respondents Criminal Appeal No. 329 of 2021 (Special Leave Petition (Crl,) 2531 of 2021 (arising out of SLP(Crl.) Diary No.20318 of 2020)

3 Nipun Saxena & Anr. v. Union of India & Ors. (2019) 2 SCC 703

4 Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi) & Anr. (2017) 15 SCC 133

5 Rabin Burman v. State of Sikkim Criminal Appeal No.18 of 2016 (date of decision - 28.08.2017) (Sikkim High Court)

6 Mohd. Hussain alias Zulfikar Ali v. State (Government of NCT of Delhi) (2012) 2 SCC 584

7 Court on its Motion v. State & Anr. 2008 (1) Crimes 301 (Del)

8 State of Punjab v. Ramdev Singh (2004) 1 SCC 421

9 Sakshi v. Union of India (2004) 5 SCC 518

10 Sudesh Jhaku v. K.C. Jhaku 1998 Cri.L.J 2428 (Del): MANU/DE/0153/1996

11 State of Punjab v. Gurmit Singh & Ors. (1996) 2 SCC 384

12 Bhardwada Bhoginbai Hirjibhai v. State of Gujarat (1983) 3 SCC 1073

13 Krishan Lal v. State of Haryana (1980) 3 SCC 159; AIR 1980 SC 1252

14 Decoding Child Sexual Abuse, A Socio-Legal Analysis of Protection of Children from Sexual Offences Act, 2012, by Dr. Justice Shalini Phansalkar Joshi, OakBridge Publishing Pvt. Ltd., 2022

15 Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls, United Nations Office on Drugs and Crime (UNODC), Vienna, 2019

16 Crime and Sentencing, by Siddhant Luthra and Supriya Juneja (Indian Journal of Constitutional & International Law)

17 The Sentencing Process - Problems and Perspectives, by G. Kameswari and V. Nageswara Rao (The Indian Law Institute Journal)

18 Need for Sentencing Policy in India - Critical Study on "Discipline of Justice", by Karan Gehlot and Prem Dhurvey (International Journal of Law and Legal Jurisprudence Studies, Vol.2, Issue-2)

19 Determination of Appropriate Punishment and Need for Sentencing Guidelines, by V.Priya Krithilka Devi (Indian Law Journal on Crime and Criminology, Vol.1, Issue-1)

20 Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012 issued by the Ministry of Women and Child Development, September 2013

21 The Bangalore Principles of Judicial Conduct, 2002

22 Bitter Chocolate, Child Sexual Abuse in India, by Pinki Virani, Penguin Books, 2000