Protection to Women under Various Laws in Criminal Matters

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Part : I

1. **'DNA' profiling report of a person accused of rape to be prepared by registered Medical Practitioner examining him :** Section 53A(2)(iv) CrPC as inserted w.e.f. 23.06.2006 casts a duty on the Registered Medical Practitioner examining an accused of offence of rape to prepare a report of his DNA profiling without delay.

2. **'DNA' profiling report of a victim of rape to be prepared by registered Medical Practitioner examining the person of the victim of rape :** Section 164A(2)(iii) CrPC as inserted w.e.f. 23.06.2006 casts a duty on the Registered Medical Practitioner examining the person of a victim of rape to prepare a report of her DNA profiling without delay.

3. **'DNA' Test to decide paternity when can be ordered by court? :** As regards the scientific test of blood or DNA Test for determining the paternity or legitimacy of a child, the Supreme Court has laid down following guidelines for the purpose :

   (1) That courts in India cannot order blood test as a matter of course;

   (2) Wherever applications are made with such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

   (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising u/s 112 of the Evidence Act.

   (4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis. See :

(i) Goutam Kundu vs. State of W.B., (1993) 3 SCC 418

(ii). Bhabani Prasad Jena Vs. Orissa State Commission for women, (2010) 8 SCC 633.

4. <u>'DNA' & 'RNA' Tests whether conclusive for determination of paternity etc.?</u> : Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements like **Deoxyribo Nucleic Acid (DNA)** as well as **Ribo Nucleic Acid (RNA)** tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Sec. 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated herein. It is for the parties to place evidence in support of their respective claims (regarding paternity) and establish their stands. The view that the documents produced by the party regarding succession certificate (paternity) are not sufficient or relevant for the purpose of adjudication of paternity and **DNA Test is conclusive, is erroneous**. See :

(i) Banarsi Dass vs. Teeku Dutta (Mrs.), (2005) 4 SCC 449

(ii) Kamti Devi vs. Poshi Ram, (2001) 5 SCC 311

5. <u>'DNA' Test Report denying biological paternity to repel presumption u/s 112, Evidence Act</u> : In the case noted below, the DNA Test Report stated that the husband was not the biological father of the child. The husband's plea that he had no access to his wife when the child was begotten stood proved by the DNA Test Report. The child was born during the continuance of a valid

marriage between the husband and the wife. Section 112 of the Evidence Act was enacted at a time when modern scientific advancement and DNA tests were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein, but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a "conclusive proof" envisaged under law based on a presumption and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. See : **Nandlal Wasudeo Badwaik Vs. Lata Nandlal Badwaik & Another, (2014) 2 SCC 576** *(para 17)*

6. **'DNA' test can be ordered by Court to repel or establish infidelity and presumption u/s 112 of the Evidence Act :** The Supreme Court in Nandlal Wasudeo Badwaik, (2014) 2 SCC 576, clearly opined that proof based on a DNA test would be sufficient to dislodge a presumption under Section 112 of the Evidence Act. Further, it is borne from the decisions rendered by the Supreme Court in Bhabni Prasad Jena, (2010) 8 SCC 633 and Nandlal Wasudeo Badwik case, that depending on the facts and circumstances of the case, it would be permissible for a court to direct the holding a DNA examination to determine the veracity of the allegation(s) which constitute one of the grounds, on which the party concerned would either succeed or lose. However, it is not disputed that if the direction to hold such a test can be avoided, it should be so avoided. The reason is that the legitimacy of a child should not be put to peril. .... In the instant case, the respondent husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the

extent of naming the person who was the father of the male child born to the appellant wife. It is in the process of substantiating his allegation of infidelity that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not he had fathered the male child born to the appellant wife. The respondent rightly feels that it is only possible for him to substantiate the allegations leveled by him (of the appellant wife's infidelity) through a DNA test. In the opinion of the Supreme Court, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in his pleadings. Hence, the direction issued by the High Court allowing the respondent's prayer for conducting a DNA test, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant wife is right, she shall be proved to be so. See : **Dipanwita Roy Vs. Ronobroto Roy, (2015) 1 SCC 365** *(paras 16 & 17)*

7. **<u>'DNA' report & directions therefor by Division Bench of the Hon'ble Allahabad High Court issued in its judgment & order dated 28.08.2014 passed in Capital Case No. 574/2013 Akhtar Vs. State of UP(Directing that 'DNA' report in the cases of rape & murder of minor girls must be obtained from the hair & clothes etc. of the victim of rape & accused)</u>** : 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 Dayal Singh 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.

8. **Bail granted by SJ, Badaun u/s 67 of the I.T. Act, 2000, cancelled by the 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. Veena Verma 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. Veena Verma Vs. State of UP, 2010 (71) ACC 510 (All).**

Part : II

(Protection to Females under the JJ Act, 2000)

1. **Female escort for female juvenile : Rule 17(6)** of the Juvenile Justice (Care & Protection of Children) Rules, 2007 provides that If the parent or guardian, as the case may be, fails to come and take charge of the juvenile on the

appointed date, the juvenile shall be taken by the escort of the institution; and in case of a girl, she shall be escorted by a female escort.

2. **Child or infant in mother's care in jail— Law & C.L. thereon :** Directions issued by the Supreme Court in **R.D. Upadhyay vs. State of A.P. & others, AIR 2006 SC 1946,** 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.

Part : III

1. **Name Of the Victim Of Sexual Offences u/s 376, 376-A, 376-B, 376-C, 376-D & 228-A IPC Not To Be Disclosed In Judgments etc. (Section 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." Cases on Section 228-A IPC are as under :

(i) State of Orissa Vs. Sukru Gouda, AIR 2009 SC 1019
(ii) Premiya Vs. State of Rajasthan, 2008 (63) ACC 94 (SC)
(iii) Om Prakash Vs. State of U.P., 2006 (55) ACC 556 (SC)
(iv) State of Karnataka Vs. Puttaraja, (2004)) 1 SCC 475
(v) State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153
(vi) Bhupinder Sharma Vs. State of H.P., (2003) 8 SCC 551

2. **No Corroboration of the testimony of a 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(a). Ganga Singh Vs. State of MP, AIR 2013 SC 3008.
1. State of U.P. Vs. Choteylal, AIR 2011 SC 697.
2. Santosh Moolya Vs. State of Karnataka, (2010) 5 SCC 445
3. Moti Lal Vs. State of M.P., 2009 (67) ACC 570 (SC)
4. Wahid Khan Vs. State of M.P., 2009 (7) Supreme 584
5. Rajinder Vs. State of H.P., AIR 2009 SC 3022
6. Om Prakash Vs. State of U.P., 2006 (55) ACC 556 (SC)
7. State of Rajasthan Vs. Biramal, 2005 (53) ACC 246 (SC)
8. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153

9. Aman Kumar Vs. State of Haryana, 2004(50) ACC 35 (SC)
10. Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P., (2003) 3 SCC 175
11. Visveswaran Vs. State, (2003) 6 SCC 73
12. Bhupinder Sharma Vs. State of H.P., (2003) 8 SCC 551
13. State of H.P. Vs. Gian Chand, (2001) 2 JIC 305 (SC)
14. State of Rajasthan Vs. N.K., (2000) 5 SCC 30
15. State of H.P. Vs. Lekhraj, (2000)1 SCC 247
16. State of Punjab Vs. Gurmit Singh, 1996 JIC 611 (SC)
17. Madan Gopal Kakkad Vs. Naval Dubey, (1992) 3 SCC 204
18. Gagan Bihari Samal Vs. State of Orissa, (1991) 3 SCC 562
19. State of Maharashtra Vs. Chandra Prakash, 1990 (1) JIC 301 (SC)

3. **Special Procedure for trial of offences u/s 376, 377, 354 IPC :** In a trial of an offence u/s 376 IPC etc., special procedure has been suggested by the Hon'ble Supreme Court in the cases of **Sakshi Vs. Union of India, (2004) 5 SCC 518** and **State of Punjab Vs. Gurmeet Singh, (1996) 2 SCC 384**. 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.

4. **Presumption of absence of consent :** S. 114-A, Evidence Act (as amended w.e.f. 03.02.2013) : In a prosecution for 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 of the Indian Penal Code (45 of 1860), 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.

5. **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."

6. **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. **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

8. **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** : 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).**

9. **Consent for sex in love affair not deception :** 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).**

10. **Having sex on a false promise to marry amounts to rape** : 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).**

Part : IV

1. **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 vs. State of U.P., 2006 ALJ 357 (SC).**

2. **Marital obligation of a woman & her human rights regarding pregnancy & child birth** : The woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively insistence on use of contraceptive methods. Furthermore, women are also free to choose birth

control methods such as undergoing sterilization procedures. Taken to their logical conclusions, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling State interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices. See **: Suchita Srivastava vs. Chandigarh Administration, AIR 2010 SC 235.**

3. **Child in the lap of female accused & 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.

4. **Pregnancy & birth of child in jail & 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).**

5. **Arrest of female accused :** Respecting the human rights of the female accused a new **sub-section (4)** to **Sec. 46 CrPC** has been added since June, 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 Cr.P.C. 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.

6. **Special procedure for recovery of abducted/kidnapped female (Sec. 97 to 103 CrPC)** : Section 97 to 103 CrPC provides for special procedure for recovery of abducted/kidnapped female.

Part V

(CUSTODY OF MINOR FEMALE IN CRIMINAL MATTERS)

1. **"Age of majority"--- what is?**--- Section 3 of the Indian Majority Act, 1875 reads thus :"Age of majority of persons domiciled in India (as amended w.e.f. 16.12.1999) : **(1)** Every person domiciled in India shall attain the age of majority on his completing the age of **eighteen years** and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

2.01. **Custody of minor children a sensitive issue**--- Custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully.

See--- **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**

2.02. **Welfare of minor to be paramount consideration for deciding minor's custody**--- In the matter of dispute of custody of a 1½ year old child in between the husband and wife, explaining Sec. 17 of the Guardians And Wards Act, 1890, it has been held by the Supreme Court that in deciding the custody of minor children, main consideration of the court must be welfare of the minor and not the legal rights of a particular party. See---

1. **Dr. V. Ravichandran vs. Union of India, 2009 Supreme 362 (Three-Judge Bench)**
2. **Lekha vs. P. Anil Kumar, 2007 (66) ALR 150 (SC)**
3. **R.V. Srinath Prasad vs. Nandamuri Jayakrishna, (2001) 4 SCC 71**
4. **Dr. (Mrs.) Veena Kapoor vs. Shri Varinder Kumar Kapoor, (1981) 3 SCC 92 (Three-Judge Bench)**

3.01. **Major girl is free to stay in any place even against the wishes of her parents or husband**--- Interpreting Article 21 of the Constitution, it has been held by the Supreme Court that a woman who has attained majority is free to stay in any place she likes without constraint by her parents or alleged husband. See--- **Gian Devi vs. Superintendent, Nari Niketan, Delhi, (1976) 3 SCC 234 (Three-Judge Bench)**

3.02. **Major girl's custody to father held proper in the event of offences u/s. 363, 366 IPC**--- Where the girl was recovered from clutches of person accused of offences u/s. 363, 366 IPC, giving of custody u/s. 98 CrPC to her father has been held not to be against her welfare as her custody with her father would provide her a healthy, fair and moral atmosphere to live in whereas such atmosphere cannot be expected if she is kept in Nari Niketan or where she is left free to go to any place of her choice. See--- **Niki Gupta vs. State of U.P., 2008 CrLJ (NOC) 1045 (All).**

3.03. **Major girl willing to live with her husband to be released from Nari Niketan**--- Where an FIR against the accused to whom a major girl had married, was lodged for offences u/s. 363, 366, 452, 504, 506 IPC and u/s. 7 Criminal Law Amendment Act and the girl was lodged in Nari Niketan under order of ACJM, Lakhimpur Kheri and meanwhile the accused/husband was released from jail and girl aged 20 years was willing to live with her husband/accused, her detention at Nari Niketan was declared illegal and she was set free to go with her husband/accused. See--- **Smt. Suneeta vs. State of U.P., 2003 (47) ACC 1046 (All—D.B.)**

3.04. **Major girl has right to go with her husband/accused of offences u/s. 363, 366 IPC**--- Where an FIR for offences u/s. 363, 366 IPC was lodged against the accused/husband to whom a major girl had married, explaining Sec. 98 CrPC, it has been held that once the girl becomes major she has her own right to stay as per her will and as the girl wanted to go with her husband, the investigating officer was directed not to arrest the husband/accused till the submission of charge sheet or final report. See---

1. **Sayed Sadab Hasan vs. State of U.P., 2006 (55) ACC 424 (All—D.B.)**
2. **Nitin Agnihotri vs. State of U.P., 2006 (54) ACC 235 (All—D.B.)**

3.05. **Major girl and boy willing to marry each other ordered to be accommodated in hostel till solemnization of their marriage in accordance with Islamic rites:-** Where an unmarried girl of 18 years of age was kidnapped and detained illegally against her wishes and she was not willing to stay with her brother and the accused and the girl were willing to marry each other, the High Court ordered the girl to be accommodated in hostel till solemnization of their marriage in accordance with Islamic rites. See: **Mohammad Jabir Vs Shijas, 2013 CrLJ (NOC) 64(Kerala)(DB).**

3.06. **<u>Major girl not to be detained in Nari Niketan</u>**--- Where a major Muslim girl who had done M.A. and had married a major Hindu boy and was detained in Nari NIketan at Kanpur Nagar under orders of SDM and she had stated about illtreatment by her mother and brother and was not willing to go with them to her house and preferred to go with her husband, it has been held that the major girl should be allowed to go where she pleases instead of her confinement at Nari Niketan. In such matters Sec. 97 or Sec. 171 CrPC cannot be pressed into service for detaining the major girl in Nari Niketan. When a person had crossed the age of majority i.e. 18 years, no fetters can be placed upon her choice of the person with whom she wants to stay and that the court or the relations of such person cannot substitute their own opinion or preference for that of her in such a matter. The fact that such female person has been cited as witness in a case is no valid ground for her detention in Nari Niketan against her wishes. When she has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be held to be in accordance with law. See---

1. **Km. Ajra Khan vs. State of U.P., 2009 (66) ACC 802 (All—D.B.)**
2. **Idrish Mohd. vs. Memam, (2000) 10 SCC 333**
3. **Smt. Shakeela Begum vs. SSP, Moradabad, 1999(39) ACC 422 (All—D.B.)**
4. **Smt. Parvati Devi vs. State of U.P., 1982 (19) ACC 32 (All—D.B.)**
5. **Gian Devi vs. Superintendent, Nari Niketan, Delhi, (1976) 3 SCC 234 (Three-Judge Bench).**

3.07. **<u>Major girl aged about 18 or above 18 years not to be detained in Nari Niketan</u> :** In the case of Smt. Kavita Vs. State of UP & Others, 2012 (79) ACC 602 (Allahabad…D.B.) a Division Bench of the Hon'ble Allahabad High Court has held thus : "However, we are conscious of the fact that there might be some dispute regarding the petitioner being aged below 18 years or more than that age, on the date

of occurrence, but we have considered the age recorded in her school records which was 15.04.1994. We do not have any hesitation in recording that the lady, Smt. Kavita, is aged about 18 years of age. The medical assessment of age may also not be conclusive. The determination of age is always in the realm of being the estimated age on account of scientific exercise. This is the reason that the Supreme Court in the case of Jaya Mala V. Home Secretary, Government of Jammu and Kashmir, had observed that if the age has been determined by the doctor medically then three years have to be added to such assessed age. That judgment has consistently been followed in the cases of the present nature to give weightage to assess the age of the victim so as to appreciating the evidence of minority/majority of the victim in favour of the accused. In addition to that, it is trite that if the girl who is at the verge of majority, walks out of her parent's house to go with any man, then it could not be a case of kidnapping as the same could not be said to be an act of taking away or enticing away a woman below 18 years of age. It could be a mere case of elopement. This proposition was laid dow by the Supreme Court in the case of S. Varadarajan Vs. State of Madras. We are not concerned with that aspect of the matter. We are mainly concerned as to whether a lady who is 18 or more years of age, could be directed to be confined. Even assuming that the lady was below 18 years of age, we have to keep in our mind that Smt. Kavita was not an accused, she has not committed any offence. Legally, her custody could not be authorized by any Court in connection with any offence which is alleged having been committed on account of taking or enticing her away from her lawful guardianship. It would have been in the fitness of thins that the learned Chief Judicial Magistrate should have appreciated that position of law and should not have directed the confinement of the lady in Nari Niketan, as he did. He

could have directed her to be set at liberty at any rate. We have just recorded that the lady is aged 18 years or more than that and is thus, major and her liberty could never be confined by an order which might be having the tinge of judicial sanctity. Usually judicial sanctity is attached to resisting such order so as to resisting the release of such confined persons. But the balance of reasonableness, which is the hallmark of judging such orders, convince us that any judicial order, which failed the scrutiny on reasonableness could not be upheld. The lady, Smt. Kavita, was more than 18 years of age and as such, the order of the Chief Judicial Magistrate and that passed by the learned Sessions Judge in the form of Annexures 5 and 6 respectively, could not be upheld. **We are clearly of the view that the lady was wrongfully confined in exercise of an illegal judicial jurisdiction. We, as such, direct that the lady, Smt. Kavita, be set at liberty immediately so that she could go to the place or to a person, she likes or chooses to.** With the above directions, we dispose of the present petition. **Smt. Kavita Vs. State of Uttar Pradesh & Others, 2012 (79) ACC 602** *(paras 4, 5 & 6).*

3.08. **Major girl and boy undergoing inter-caste or inter-religious marriage entitled to police protection**--- Explaining the concept of right to life and personal liberty guaranteed by 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 vs. State of U.P., 2006 ALJ 357 (SC).**

3.09 <u>A major girl not to be detained in Nari Niketan against her wishes</u> : Where in the FIR registered u/s 363, 366 of the IPC, a girl aged about 18 years was alleged to have been kidnapped and in her statement u/s 164 CrPC, she had expressed her willingness to remain with Manish, her husband/ accused, and was not willing to go to Nari niketan but was still sent by the CJM, Gorakhpur to Nari Niketan, the Hon'ble Allahabad High Court, directing her immediate release from the Nari Niketan the same very day by the end of next hour, had observed that the CJM was simply ignorant of the constitutional provisions of procedure being reasonable and liberty being the most fundamental right of a person. It was further observed by the Hon'ble High Court that the confinement of the lady in Nari Niketan, which could never be proper place for custody of young lady, was not only illegal but wrongful confinement also. The Hon'ble Court further directed the State of UP to pay compensation of Rs. 50,000/- to her for her wrongful confinement. See….**Smt. Saroj Vs. State of UP & Others, 2012 (77) ACC 882 (All…DB).**

3.10. <u>Conflict between radiological opinion & school certificate</u> : Age determination--Conflict between radiological opinion and school certificate--Age of girl estimated by doctor to be about 19 years while High School Certificate mentioning her birth date as 25.05.1996. Margin of flexibility or margin o error cannot be lowered any further below 18 years--Where doctor observed that girl is above 18 years of age, it obviously means that girl is not less than 18 years of age--Such an obs Juvenile Justice-- Age determination--conflict between radiological opinion and school certificate --age of girl estimated by doctor to be about 19 years while High School certificate mentioning her birth date as 25.05.1996--Margin of flexibility or margin of error cannot be lowered any further below 18 years--Where doctor observed that girl is above 18 years of age, it obviously means that girl is not less

than 18 years of age--Such an observation indicates lower most outer limit of flexibility bracket--Such kind of observation is made by doctors on basis of fusion of certain bones of body which cannot be completed before a person attains a particular age--Individual age variations of particular fusion are not and cannot be stretched beyond certain limits--categorical opinion of doctor regarding age of girl completely and belies contradictory age shown in High School certificate--In view of statement of girl given before J.M. refuting all allegation of coercion exercised by petitioner No. 1--Showing her complete willingness and approval to her marital status with him--Giving due weight to irreconcilable conflict of age continuation of girl's detention in Nari Niketan not justified--Court directed to set at liberty with immediate effect--Impugned orders of lower Court quashed--Revision allowed. See : **Vivek Chandra Bhaskar Vs. State of UP, 2013 (82) ACC 707(All)**

4.01. **<u>Immoral Traffic (Prevention) Act, 1956 & detention in Nari Niketan</u>**- No person can be kept in a protective home unless she is required to be kept there either in pursuance of the Immoral Traffic (Prevention) Act, 1956 or under some other law permitting her detention in such a home. See---

1. Km. Ajra Khan vs. State of U.P., 2009 (66) ACC 802 (All—D.B.)

2. Smt. Kalyani Chowdhary vs. State of U.P., 1978 CrLJ 1003 (All—D.B.)

4.02. **<u>No detention in Nari Niketan even under ITPA, 1956 without permission of court</u>**--- In the matter of detention of women and girls in the Nari Niketan without prior permission of the court under Suppression of Immoral Traffic in Women and Girls Act, 1956 & U.P. Suppression of Immoral Traffic in Women and Girls Rules, 1961, it has been held that even under the abovenoted Act the women and girls cannot be detained in Nari Niketan without the permission of the court. The Supreme Court directed the State Government for constituting

Board of Visitors, improving living conditions of the inmates of such protective homes and for formulating programmes of rehabilitation of the inmates. See--- **Dr. Upendra Baxi vs. State of U.P., AIR 1987 SC 191 (Three-Judge Bench)**

Note: The Hon'ble Allahabad High Court, vide CL No. 5777 dated 15.5.1993 has directed the Judicial Officers of the State of U.P. to implement the directions issued by Hon'ble Supreme Court in the case of Dr. Upendra Baxi vs. State of U.P., AIR 1987 SC 191 (Three-Judge Bench).

5.01 **Minor girl's detention in Nari Niketan held valid :** In the case noted below, an FIR for kidnapping of a minor girl was lodged for offences u/s 363 & 366 IPC. The girl was recovered by the IO and her statement was recorded by the Magistrate u/s 164 CrPC. The IO moved an application before the Magistrate for order for her custody. The girl born in 1994 had passed 8th class examination but had failed in 9th class. She had performed her marriage in a temple of Nagina, Bijnaur with the accused and wanted to go with her husband/accused and did not want to live in Nari Niketan (Moradabad). She had refused to go with her father who was also present in the court and was seeking custody of the corpus but the corpus was having apprehension of danger to her life from her father. According to school certificate, the date of birth of the corpus was 10.05.1996 and she was about 16 years of age on the date of alleged incident on 20.06.2012. In medical examination report, she was found of nearly 19 years of age. The Judicial Magistrate, Najibabad, Bijnore recorded a finding that from her physical appearance she appeared to be minor and was declared minor. In such age, she was driven by a emotions and not capable to foresee the future prospects of her life. Corpus refused to go in company of her father. In such circumstances, Judicial Magistrate sent corpus to Nari Niketan. The Division Bench held that the order of the Magistrate did not suffer from any illegality or

irregularity and her detention in Nari Niketan was not illegal." See : **Smt. Himani Vs. State of UP, 2013 (82) ACC 865 (All)(DB)**

5.02. **<u>A minor girl given in custody of her father & brother against her wishes</u> :** *In the present case the corpus was the victim of case crime No. 168 of 2012 under Section 363 and 366 IPC. According to the FIR she was kidnapped by Sumit, she remained in her company, she has been recovered. According to the High School mark-sheet she is minor and she has refused to go to her parents' house, she had stated that she would like to live in Nari Niketan. In such circumstance, the learned Judicial Magistrate, the Deoband has not committed any error in passing the impugned order dated 15.09.2012 by which she has been sent to nari Niketan. The present petitioner is devoid of merit, the same may be dismissed. Considering the facts, circumstances of the case, submission made by learned Counsel for the petitioner, learned A.G.A. and considering the statement of the corpus and her school certificate it appears that according to the High School marksheet her date of birth is 08.06.1996, she is minor, she has been allegedly kidnapped, thereafter she remained in the company of accused Sumit, she is not full major girl to take the proper decision for her future life. She herself stated in the Court that she had not performed the marriage with Sumit but she wanted to go with the accused Sumit. In such circumstances she may not be permitted to go with Sumit who is accused in case crime No. 168 of 2012 under section 363 and 366 IPC and the girl was not married with him. The corpus has stated that she was preferring to life in Nari Niketan than to life at her parents' house. This petition has been moved by her father who is natural guardian of the corpus. The corpus may not be kept in Nari Niketan for indefinite period. The corpus has not disclosed any reason for not living at her parents' house. The brother and father of the corpus are ready to take her custody. In such*

circumstances, we feel it proper that corpus may be released from Nari Niketan and she may be given in the custody of her father and brother. Therefore, we direct that corpus be released from Nari Niketan, Meerut forthwith in the presence of Officer Incharge of P.S. Nagal, District Shaharanpur who shall take the corpus to her parents house and she shall be given in custody of her father and brother on undertaking that she shall be properly maintained. In any manner she shall not be harassed. The officer incharge of P.S. Nagal shall ensure that the corupus be properly nourished and maintained at her parents' house and in any manner she shall not be harassed by any of the family members of her parents." **See : Km. Munni Vs. State of UP, 2013 (82) ACC 820 (All)(DB)*(paras 6 & 7)***

5.03. **<u>Even a minor female not to be detained in Government Protective Home or Nari Niketan against her wishes</u>**--- Where in a case of alleged abduction of minor girl, search warrant u/s 97 CrPC was issued by Executive Magistrate and an FIR by the mother of the girl against her alleged husband was lodged u/s. 363, 366 IPC and on recovery of the girl, she was directed to be detained at Nari Niketan and on medical examination, she was found to be not less than 17 years of age and she was not willing to go with her mother and rather was willing to go and live with her husband/accused, it has been held that her detention in Nari Niketan against her wishes was illegal as even a minor cannot be detained in Protective Home against her wishes. The minor girl, who was not less than 17 years old as per the medical report, was directed to be set at liberty to go with any one and any where. See---

1. **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**
2. **Smt. Parvati Devi vs. State of U.P., 1982 (19) ACC 32 (All—D.B.)**
3. **Smt. Shahana @ Shanti vs. State of U.P., 2003 (46) ACC 600 (All—D.B.)**
4. **Tara Chand Seth vs. Supdt., District Jail, Rampur, 1983 (2) ACC 168 (All—D.B.)**
5. **Pushpa Devi @ Rajwanti Devi vs. State of U.P., 1995 (1) JIC 189**

6. Mrs. Kalyani Chowdhary vs. State of U.P., 1997 ALJ 975 (All—D.B.)

5.04. **Magistrate not to act as natural guardian or duly appointed guardian of minors**--- A Magistrate is not a natural guardian or duly appointed guardian of the minors unless so appointed. See--- **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**

5.05. **Executive magistrate has no jurisdiction to decide custody of kidnapped child u/s 97 CrPC:-** Where the father of a child had alleged that his minor son was kidnapped by his mother and the SDM after issuing search warrant u/s 97 CrPC recovered the boy from mother's custody and handed over his custody to his father, it has been held by the Rajasthan High Court that the executive Magistrate had no power under Section 97 CrPC to wrest the custody of a child from its natural guardian. Section 97 CrPC is restricted in its application for issuance of direction for search of a person wrongfully confined. Admittedly when the child was in the custody of his mother, there was no reason to believe that he was under wrongful confinement and as such the issuance of search warrant was itself uncalled for. That apart, the learned Magistrate virtually acted as if he was having jurisdiction to decide the custody of a minor under the Hindu Guardianship and Wards Act by directing the custody of the child to be given to his father. **See: Jaishree Tiwari Vs State of Rajasthan, 2013 CrLJ 1610(Rajasthan)**.

5.06. **A victim of offences u/s. 363, 366, 376 IPC not being accused but only witness not to be detained in Nari Niketan**--- A victim of the offences u/s. 363, 366 IPC is not an accused but only a victim of such offences. A victim may at best be a witness and there is no law whereunder the Magistrate may direct detention of a witness in Nari Niketan simply because she does not like to go to any particular place. In such circumstances the direction of the Magistrate that she shall be

detained at Nari Niketan is absolutely without jurisdiction and illegal. See---

1. **Smt. Raj Kumari vs. Supdt., Women Protection House, Meerut, 1997 ALJ 2194 (All—D.B.)**
2. **Mrs. Kalyani Chowdhary vs. State of U.P., 1997 ALJ 975 (All—D.B.)**
3. **Smt. Shahana @ Shanti vs. State of U.P., 2003 (46) ACC 600 (All—D.B.)**

5.07. **A married minor girl should be sent into the guardianship of her husband and not to Nari Niketan :** Where a married minor girl was sent to Nari Niketan by the in-charge CJM, Balrampur, setting aside the order of the Magistrate, the Lucknow Bench of the Hon'ble Allahabad High Court has held that "marriage of a minor would be voidable u/s 3 & 12 of the Prohibition of Child Marriage Act, 2006 at the instance of the child spouse. As per section 6(1) of the Hindu Minority & Guardianship Act, 1956, natural guardian of a Hindu married minor girl is her husband. Under Section 21 of the Guardians and Wards Act, 1890 a minor can act as a guardian of his own wife or child. Under the Hindu Minority & Guardianship Act, 1956, clause 'C' of Section 6 in the case of a married girl, the husband would be the guardian. The marriage of the married minor girl would be voidable u/s 3/12 of the Prohibition of Child Marriage Act, 2006 only when the married minor wife files a petition for that purpose. If the married minor girl wants to live with her husband in matrimonial house, then there is no legal impediment in releasing her under guardianship of her husband who would be her natural guardian. It is not in the welfare of a female to keep her in Nari Niketan for prolonged period particularly when she wants to join the company or remain in the custody of her husband who would be the natural guardian in the context of law. See : **Sonu Paswan Vs. State of UP, 2013 (83) ACC 1 (All)(LB).**

5.08. **A minor female accused under 18 years of age to be detained in remand home or recognized social institution (Proviso to Explanation II to sub-section (2) of Section 167 CrPC :** Proviso to Explanation II to sub-section (2) of Section 167 CrPC as amended w.e.f. 31.12.2009 reads thus : "Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution."

6.01. **Scope of Sec. 97 CrPC**--- Sine qua non of Sec. 97 CrPC is that there has to be prima-facie finding that person has been in wrongful confinement and that wrongful confinement must amount to an offence. Where a nine years old child is in the custody of his father, it cannot be said that father has wrongfully confined son which would amount to offence. In such situation, issuance of search warrant u/s. 97 CrPC by Magistrate on application made by mother is not proper. See--- **Smt. Lily Manna vs. State of W.B., 2008 CrLJ 625 (Calcutta)**

6.02. **Scope of Sec. 98 CrPC**--- Section 98 CrPC is a special procedure. It is not available for all persons. It is available only for the rescue and restoration of persons belonging to the female species. Such person must be shown to be abducted or unlawfully detained. Such detention must be proved to be for unlawful purposes. What is crucial is that, this provision is not available for all children or all persons unlawfully detained for unlawful purposes. It has unmistakably a very special purpose to serve and that is the protection of the person belonging to the female species against unlawful detention for unlawful purpose. See--- **Zeenath K.V. vs. Kadeeja, 2007 CrLJ 600 (Kerala)**

6.03. **Ascertaining age of girl before ordering custody must u/s. 98 CrPC**--- Where an allegedly kidnapped girl was ordered to be given in the custody of her mother without ascertaining her age and without giving

her opportunity to speak out her mind and the version of the girl was that she was major and she had volunteered to quit her home and got married with the accused/person of her choice, it has been held that the Magistrate did not have jurisdiction to pass such custody order u/s. 98 CrPC and the Magistrate had acted in biased manner and his order for restoration of the girl to her mother's custody was set aside. See--- **N. Balaji vs. Smt. Savithiri, 2004 CrLJ 2818 (Madras).**

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